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Strategic Perspectives

We're lawyers, not luddites: GenAI in law practice and the courts

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Highlights

- The promise and risks of GenAI in law practice
- Recent disciplinary cases
- Comments on the Fifth Circuit's proposed GenAI local rule
- Legal ethics rules and GenAI

Inside

Last year, the U.S. Court of Appeals for the Fifth Circuit proposed a new local rule that would require persons making filings with the court to certify on a related form that they did or did not "use" generative artificial intelligence (GenAI) in "drafting" their filings. On January 29, 2024, the Fifth Circuit published the public comments on the proposed local rule. The comments run overwhelmingly against the proposal as currently drafted, often because the proposed rule would be redundant of existing court rules and legal ethics requirements, but also because the proposed rule, as drafted, would be unworkable due to ambiguities that could result in interpretations of the rule that may impinge on attorneys' ability to advise their clients.

Yet this tiny, but insightful, trove of information contained in the public comments to the proposal suggests not only what commenters think of the Fifth Circuit's proposal but also yields more generalized evidence of the many ways in which attorneys in private practice and in other settings think about and use (or avoid using) GenAI in their professional legal work. Commenters' broader themes appear to present a tension between local court rules that risk chilling the legitimate use of GenAI and preserving space in the age of GenAI for the, at present likely still unique, legal insights that human attorneys can bring to bear in shaping the presentation of clients' legal matters.

This paper will first offer some background on why courts may consider adopting rules regarding GenAI. Then the paper will address two critical issues raised by commenters on the Fifth Circuit's proposed local GenAI rule concerning the "use" of GenAI in the "drafting" of court filings as well as the proposed language for certifying that a "human" reviewed and approved a court filing that was produced to any extent using GenAI. The paper also will address how the Fifth Circuit's proposed rule may undermine the attorney work product doctrine. The last section will address the question implicit in all of the public comments on the Fifth Circuit's proposed local rule for GenAI-infused court filings: are attorney ethics rules specific to GenAI redundant of existing, more generalized legal ethics rules?

I. GenAI's potential and the risk of bad legal research

The work of attorneys has always been in a state of ongoing tension with technological developments, although over time attorneys usually adapt to new technologies—personal computers and word processing programs, online research platforms, electronic case filing, e-discovery, cloud computing, and now, perhaps GenAI.

To be sure, some of the resistance to GenAI arises from a desire to protect what is unique about human-crafted legal advice, while some resistance arises from the lack of funds to acquire new technologies. With

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respect to newer technologies, mid-size and smaller firms historically have been somewhat disadvantaged compared to larger, and better financed, firms, but as technological tools overall have become cheaper to acquire that is not always the case today. Still, the largest law firms are likely to be the first adopters—this was true in the early 2000s when many of the biggest firms tried to combine third-party online research libraries and firm-generated documents into bespoke firm research tools.

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U.S Supreme Court Chief Justice John Roberts devoted his entire 2023 Year-End Report on the Federal Judiciary to the topic of GenAI. He focused largely on the judiciary in noting the potential benefits and risks of GenAI, including "due process, reliability, and potential bias," especially in the criminal law setting. A few key quotes from the chief Justice suggest the range of his thinking on GenAI and the courts:

- "The legal profession is, in general, notoriously averse to change" (p. 3).
- "AI obviously has great potential to dramatically increase access to key information for lawyers and non-lawyers alike. But just as obviously it risks invading privacy interests and dehumanizing the law" (p. 5).
- "At least at present, studies show a persistent public perception of a 'human-AI fairness gap,' reflecting the view that human adjudications, for all of their flaws, are fairer than whatever the machine spits out" (p. 6)
- "I predict that human judges will be around for a while. But with equal confidence I predict that judicial work—particularly at the trial level—will be significantly affected by AI" (p. 6).

Although the Chief Justice's report did not explicitly address the issue of fake case citations, that has been one of the first issues lower courts have encountered regarding attorneys' use of GenAI.

A. The problem of fake case citations

The immediate impetus for the Fifth Circuit's proposed GenAI certification rule is likely the small, but growing number of instances in which attorneys submitted fake case citations to courts. Several cases noted below resulted in the attorneys being disciplined. In one federal case that produced an opinion and order of sanctions, the judge described the potential dangers that can arise when attorneys rely on GenAI for case citations:

> "Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity" (footnote omitted) (See, *Mata v. Avianca, Inc.* (S.D.N.Y. 2023).

The following are a selection of matters in which attorneys' and others' use of GenAI in the drafting of court filings played a significant role in courts and other disciplinary authorities mulling the prospect of sanctions against the attorneys and unrepresented parties involved. Common themes included: (1) attorneys engaging in work outside their area of concentration and/or or in courts in which they did not normally practice; (2) attorneys failing to check case citations to ensure that the cases retrieved from GenAI systems in fact exist; and (3) attorneys attempting to conceal from tribunals the errors that arose from their use of GenAI and, thus, compounding the alleged ethical lapses:

- *Mata v. Avianca, Inc.* (S.D.N.Y.)—Counsel for the plaintiff in a case that involved application of the Montreal Convention allegedly submitted nonexistent case citations that were obtained from ChatGPT in a filing made with the U.S. District Court for the Southern District of New York and then initially stood by the authenticity of

those case citations despite the existence of the citations having been questioned by opposing counsel and by court orders. The plaintiff's nonexistent case citations purported to show that the two-year limitations period in the Montreal Convention, which has been interpreted as a condition precedent rather than a statute of limitations, could be equitably tolled under the Bankruptcy Code or that New York's statute of limitations applied to allow the plaintiff's late filed complaint to proceed. The plaintiff was allegedly injured by a metal serving cart during an international flight that terminated at New York's John F. Kennedy Airport. The court imposed sanctions under Federal Rule of Civil Procedure (FRCP) 11 and, alternatively, based on the court's inherent powers, on two attorneys for the plaintiff and the individual attorneys' law firm was held jointly responsible for the violation. The court found that the individual attorneys acted with subjective bad faith ("acts of conscious avoidance and false and misleading statements to the Court") and that no exceptional circumstances existed under which the law firm could avoid joint responsibility (*Mata v. Avianca, Inc.*, June 22, 2023, Castel, P. (opinion regarding sanctions); See also Opinion Regarding Limitations Period and Court Transcript).

- *U.S. v. Cohen* (S.D.N.Y.)—Although filings in the case by the principals assert differing views of how nonexistent case citations appeared in a court filing, the overarching allegation is that an attorney representing Michael Cohen, a one-time fixer for former President Donald Trump, in a proceeding seeking early termination of Cohen's supervised release, failed to check three case citations obtained by Cohen from Google's Bard GenAI system (Google recently replaced Bard with Gemini). Each fictitious case purported to state that the U.S. Court of Appeals for the Second Circuit had issued opinions in other cases that tended to support Cohen's bid for ending his supervised release. The matter remains pending[1] (Documents Nos. 88, 88-3, 96, 102, 103, 104, 105, 106, 107).

- *People v. Crabill* (Colo)—An attorney who, for the first time ever, was drafting a motion to set aside judgment, used ChatGPT to locate relevant cases. As it turned out, the cases found in this manner were fictitious. Nevertheless, the attorney included them in court filings, failed to notify the court of the error once the error was discovered, and when confronted by the judge in the matter about the authenticity of the cases cited, the attorney blamed a "legal intern" for the error. The attorney was sanctioned for violating Colorado attorney ethics rules related to competent representation of clients, acting with reasonable diligence and promptness, knowingly making material false statements of fact or law to a tribunal, and engaging in conduct that involves dishonesty, fraud, deceit, or misrepresentation. The attorney was suspended for one year and a day, although all but 90 days of the suspension was stayed pending the attorney's completion of two years of probation (*People v. Zachariah C. Crabill*, 23PDJ067, November 22, 2023).

- *Park v. Kim (2d Cir.)*—The case involved a plaintiff who failed to comply with the trial court's discovery orders. During the appellate phase of the case, plaintiff's counsel was late filing a reply brief and, once the reply brief was filed, it contained what the court determined was a non-existent case citation. Plaintiff's counsel explained that the citation was obtained from ChatGPT. The court cited FRCP 11 and referred plaintiff's counsel to the court's Grievance Panel while also ordering counsel to provide a copy of the court's ruling to her client, translated into Korean if necessary for the client to understand the ruling. In discussing the use of GenAI, however, the court briefly addressed the necessity for special rules for GenAI, such as the one proposed by the Fifth Circuit: "But such a rule is not *necessary* to inform a licensed attorney, who is a member of the bar of this Court, that she must ensure that her submissions to the Court are accurate" (*Park v. Kim*, January 30, 2024, *per curiam*) (emphasis in original).

- *J.G. v. New York City Department of Education (S.D.N.Y.)*—The case involved a motion for attorney's fees by the Cuddy Law Firm, counsel for J.G. and her child G.G., who prevailed in two administrative hearings and requested attorneys' fees and costs of $113,484.62 under the Individuals with Disabilities Education Act (IDEA). The court applied the lodestar method and a 12-factor test to arrive at a reduced award of $53,050.13. However, the court rejected evidence of local rates in IDEA cases that were based on the Cuddy Law Firm's use of ChatGPT-4, which the court said was used by the firm to bolster otherwise shaky sources of rate information. Said the court: "As such, the Court need not dwell at length on this point. It suffices to say that the Cuddy Law Firm's invocation of ChatGPT as support for its aggressive fee bid is utterly and unusually unpersuasive. As the firm should have appreciated, treating ChatGPT' s conclusions as a useful gauge of the reasonable billing rate for the work of a lawyer with a particular background carrying out a bespoke assignment for a client in a niche practice area was misbegotten at the jump.*** Barring a paradigm shift in the

1 The docket in *U.S. v. Cohen,* S.D.N.Y., No. 1:18-cr-00602, was last visited February 22, 2024.

reliability of this tool, the Cuddy Law Firm is well advised to excise references to ChatGPT from future fee applications" (*J.G. v. New York City Department of Education*, February 22, 2024, Engelmayer, P.).

B. Court rules emerge

This paper surveyed all federal district court and federal appellate court websites for local rules and standing orders of the courts and individual Article III judges regarding GenAI.[2] As of publication, at least 17 Article III courts and/or judges had issued standing orders or otherwise expressed preferences about the use of GenAI in court filings. Even if a court or judge has not issued a standing order explicitly addressing GenAI, counsel should check the standing orders of any court or judge before whom they are appearing for related rules that might apply to GenAI. This survey focused on civil cases, but judges also may express similar preferences regarding GenAI in orders relating to criminal cases.

The growing list of court orders regarding the use of GenAI in drafting documents to be filed with federal courts take multiple approaches to the problem of unreliable materials seeping into court filings. Most of the federal courts that have issued orders about GenAI require a certification that either GenAI was not used or that, if GenAI was used, the results were checked for accuracy.

With respect to how the results of GenAI are to be checked for accuracy, some courts specify that a "human being" or "person" must do the checking. Three courts, Judge S. Kato Crews (D. Colo.), Judge Brantley Starr (N.D. Tex.), and Judge Rolando Olvera (S.D. Tex.), explicitly mandate that the checking be done using "print reporters or traditional legal databases." As will be seen below regarding the public comments on the Fifth Circuit's proposed GenAI certification rule, even "traditional legal databases" can be problematic now that these databases potentially will be infused with GenAI features, which may or may not be readily apparent to the user. Another issue that may arise is the overall drive by legal publishers to reduce or eliminate "print reporters," although most of these reporters have been digitized for online legal research; print reporters that have been preserved in a digital format also could conceivably be infused with GenAI features in the future.

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Two judges from the federal courts in Ohio, Judge Christopher A. Boyko (N.D. Ohio) and Judge Michael J. Newman (S.D. Ohio), impose outright bans on the use of GenAI "in the preparation of any filing submitted to the Court." However, both judges do not apply the ban to "legal search engines" or "Internet search engines." Both judges also impose an ongoing requirement that all parties and their counsel "immediately inform" the court if they discover GenAI has been used in any document filed in their case. Judge Boyko cited as authority for his local rule, the court's inherent powers and FRCP 11.

An order on the use of GenAI issued by Judge Stephen Alexander Vaden of the U.S. Court of International Trade takes a unique approach as compared to other courts. Judge Vaden requires disclosure that GenAI was used in drafting court filings, including the GenAI system employed and the portions of text drafted with assistance from GenAI. But Judge Vaden goes further to require "certification that the use of such program has not resulted in the disclosure of any confidential or business proprietary information to any unauthorized party." Judge Vaden said that GenAI presents "novel risks" regarding confidential information. The judge further explained:

> Users having "conversations" with these programs may include confidential information in their prompts, which in turn may result in the corporate owner of the program retaining access to the confidential information. Although the owners of generative artificial intelligence programs may make representations that they do not retain information supplied by users, their programs "learn" from every user conversation and cannot distinguish which conversations may contain confidential information.

Two courts' standing orders lack a certification requirement, but they do come with hefty cautions about

2 Although the survey focused on Article III judges, it is worth noting that non-Article III federal bankruptcy judges and federal magistrate judges may also issue orders regarding GenAI. For example, Magistrate Judge Jeffrey Cole of the U.S. District Court for the Northern District of Illinois has issued such a case procedure. Likewise, several bankruptcy courts have adopted rules on GenAI, including the U.S. Bankruptcy Court for the Northern District of Texas (General Order 2023-03) and the U.S. Bankruptcy Court for the Western District of Oklahoma (General Order 23-01).

the use of GenAI in court filings. Judge Arun Subramanian of the U.S. District Court for the Southern District of New York states that counsel, especially lead trial counsel, must "personally confirm for themselves the accuracy of any research conducted" and remain responsible for any filings that employ GenAI. The local rules for the U.S. District Court for the Eastern District of Texas state that "the lawyer is cautioned that certain technologies [GenAI] may produce factually or legally inaccurate content and should never replace the lawyer's most important asset – the exercise of independent legal judgment." The Eastern District of Texas's local rules also remind attorneys that FRCP 11, other local rules of court, and standards of practice apply to the use of GenAI in court filings.

Court	Judge	Standing Order or Preference
N.D. Cal.	Judge Rita F. Lin	Civil Standing Order*
N.D. Cal.	Judge Araceli Martínez-Olguín	Civil Standing Order
D. Colo.	Judge S. Kato Crews	Standing Order for Civil Cases*
Ct. Int'l. Trade	Judge Stephen Alexander Vaden	Order on Artificial Intelligence
D. Haw.	Judge Leslie E. Kobayashi	Disclosure and Certification Requirements - Generative Artificial Intelligence
N.D. Ill.	Judge Iain D. Johnston	Artificial Intelligence (AI)
D.N.J.	Judge Evelyn Padin	General Pretrial and Trial Procedures
S.D.N.Y.	Judge Arun Subramanian	Individual Practices in Civil Cases
N.D. Ohio	Judge Christopher A. Boyko	Court's Standing Order On The Use Of Generative AI
S.D. Ohio	Judge Michael J. Newman	Standing Order Governing Civil Cases, Notice to counsel: New AI Provision
W.D. Okla.	Judge Scott L. Palk	Disclosure and Certification Requirements-Generative Artificial Intelligence
E.D. Pa.	Judge Michael M. Baylson	Standing Order Re: Artificial Intelligence ("AI") In Cases Assigned to Judge Baylson
E.D. Pa.	Judge Gene E.K. Pratter	Standing Order Regarding Use of Generative Artificial Intelligence ("AI") In Cases Assigned to Judge Pratter
E.D. Tex.	N/A	United States District Court For The Eastern District Of Texas Local Rules as of [December 1, 2023]
N.D. Tex.	Judge Matthew J. Kacsmaryk	Mandatory Certification Regarding Generative Artificial Intelligence
N.D. Tex.	Judge Brantley Starr	Mandatory Certification Regarding Generative Artificial Intelligence Certificate Regarding Judge-Specific Requirements
S.D. Tex.	Judge Rolando Olvera	Civil Procedures/Local Rules

Source: Federal court websites last visited on February 21, 2024 (N.D. Ill. and N.D. Tex. websites last visited on February 26, 2024).

* The direct links to Judge Lin's and Judge Crews's Civil Standing Orders are non-functional, but the relevant orders can be accessed by directly accessing Judge Lin's and Judge Crews's official court webpages and scrolling to the relevant orders.

C. Preview of Fifth Circuit comments

As mentioned in the opening paragraphs, the public comments on the Fifth Circuit's proposed AI certification rule evidence a tension between the desire to use what is eventually likely to be a life-changing technology and enabling human attorneys to continue doing what they do best—sifting, sorting, theorizing, and shaping their representation of clients. As a preliminary matter, the comments also suggest some other lesser concerns, while a few of them made a big reveal.

- ***Don't chill GenAI/maintain technology-neutrality—***Technology neutrality is a common theme for government regulators when confronted with emerging technologies. The goal is to craft regulations that don't choose winners and losers among competing technologies, which could chill innovation and competition. With respect to the Fifth Circuit's proposed GenAI certification rule, Carolyn Elefant, Law Offices of Carolyn Elefant, suggested that court rules on the accuracy of court filings should apply equally to flings that do and do not use GenAI. Xavier Rodriguez, United States District Judge for the Western District of Texas, in a brief comment, suggested an academic article that he said is "technology neutral in tone." Shelby L. Shanks of Porter Hedges, observed: "This rule unfairly singles out generative AI as a tool in need of special regulation, ignoring the widespread use of other, arguably more impactful technologies in legal practice. It risks creating a precedent for discriminatory regulation against future technological advancements."

Andrew R. Lee of Jones Walker said: "By singling out generative AI, the rule suggests that its use is somehow less trustworthy than other technological or traditional means of legal research and document preparation. The resulting stigma simultaneously undermines the credibility of practitioners who leverage AI to enhance their work and discourages innovation and the adoption of new technologies in the legal field." A comment by the Institute For Justice said: "[i]n short, IJ's primary concern with the proposed rule is that it treats all uses of generative AI as equivalent and equivalently worthy of disclosure." The group then posited that an attorney who uses GenAI to draft a dispositive motion should be treated differently than an attorney who uses GenAI to refine a portion of the same type of motion that has already been written. "Most judges would agree that the first practitioner—who has outsourced research, reasoning, and drafting to a computer program—is playing with fire," said the Institute For Justice. "But most judges would probably also agree that the second practitioner hasn't done anything nearly as dangerous."

- ***Guard against judicial skepticism of AI-infused filings—***Several commenters worried that courts may look askance at filings if attorneys check the box on the proposed form indicating that GenAI was used in drafting the filing. Andrew Gould of Arnold & Itkin commented: "That leads me to my concern about the proposed amendment's unintended, undesirable decisional effects. Say the answer to my above question is 'yes.' Would my brief be viewed more skeptically by members of the Court? I would certainly hope not, but I nonetheless would have concern that a member of the Court might view my brief with more skepticism because I used generative AI, even if I did so in a responsible and ethical manner." The Institute For Justice posited a hypothetical question about responsible and irresponsible users of AI in drafting court filings but also noted as part of this hypothetical that a court may lump all users of GenAI together and, thus, "may approach his [a responsible GenAI user's] filing with more skepticism than it otherwise might." Andrew R. Lee of Jones Walker, as part of a discussion about the potential for chilling of GenAI use by attorneys, also cited an article by a group of authors that included retired judges that suggested court rules on the use of GenAI could result in judicial skepticism that may persist "even when it has attained reliability equivalent to that of human drafters" (citation omitted).

- ***GenAI in the public comments—***Two commenters said they used GenAI systems in drafting their comments on the Fifth Circuit's proposal. In a postscript to his comment, Joshua Cottle, Fridge & Resendez PC, said: "The following version of the preceding argument came from my prompts to ChatGPT 3.5. I edited the resulting output to remove text I did not think advanced the general argument I made above. I imagine, as such tools become part of daily life, that no capable user will submit generated materials without some revisions." Carolyn Elefant, Law Offices of Carolyn Elefant, noted that she prepared her comment using both traditional legal search methods to locate cited cases and GenAI. The commenter said she could not tell for sure if the version of the product used to find cases employed GenAI, as did a related version of the product, which the commenter said produced disappointing results. Elefant said of her explicit use of GenAI: "For these comments, I used both Anthropic's Claude and Chat GPT to refine my outline and wordsmith a handful of sentences."

"Perhaps the most frequent public comment was that the Fifth Circuit's proposed rule's language about using GenAI in drafting a document could result in the proposed rule applying to many uses of technology that fall short of drafting a document that will be filed with the court."

With this larger background in mind, the paper now turns to a more detailed analysis of the public comments on the Fifth Circuit's proposed GenAI certification rule.

II. The Fifth Circuit's "Used in drafting the document" language

Perhaps the most frequent public comment was that the Fifth Circuit's proposed rule's language about using GenAI in drafting a document could result in the proposed rule applying to many uses of technology that fall short of drafting a document that will be filed with the court. The issue, thus, is one of what level of "use" could trigger disclosure on the proposed form?

Commenters suggested that many of the problems they have identified regarding the proposed rule arise because attorneys frequently use third-party products and services in the document drafting process and those tools and

related writing applications may contain GenAI features that the users of those tools may or may not be aware of. As a result, the word "use" could trigger disclosure even if GenAI was not employed to produce text that appears in a document filed with the court.

David S. Coale of Lynn Pinker Hurst & Schwegman, LLP, for example, commented that the word "drafting" is similarly problematic because it may go beyond "false case citations and quotes" to reach "text that inaccurately analyzes citations that are otherwise accurate."

Despite most public comments running against the Fifth Circuit adopting the proposed GenAI certification rule as drafted, a number of commenters suggested revisions that they said could improve the proposed rule. The proposed revisions are collected in the following chart:

Source of rule text	Proposed rule and commenters' revisions
U.S. Court of Appeals for the Fifth Circuit	Additionally, counsel and unrepresented filers must further certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human. A material misrepresentation in the certificate of compliance may result in striking the document and sanctions against the person signing the document.
Peter J. Winders (Carlton Fields)*	Additionally, counsel and unrepresented filers must further certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by counsel of record signing the document~~human~~. A material misrepresentation in the certificate of compliance may result in striking the document and sanctions against the person signing the document
Alan K. Goldstein (Law Office of Alan K. Goldstein)	Additionally, counsel and unrepresented filers must further certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a an attorney admitted to practice before this court and/or someone working under their direct supervision~~human~~. A material misrepresentation in the certificate of compliance may result in striking the document and sanctions against the person signing the document.
Andrew Gould (Arnold & Itkin)	Additionally, counsel and unrepresented filers must further certify that to the extent any~~no~~ generative artificial intelligence program was used in drafting the document presented for filing, ~~or to the extent such a program was used,~~ all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human. A material misrepresentation in the certificate of compliance may result in striking the document and sanctions against the person signing the document.
Thomas C. Wright (Wright Close & Barger, LLP)	Additionally, counsel and unrepresented filers must further certify that all text, whether generated by human or artificial intelligence~~no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text~~, including all citations and legal analysis, has been reviewed for accuracy and approved by a human. A material misrepresentation in the certificate of compliance may result in striking the document and sanctions against the person signing the document.
Christopher M. Campbell	Additionally, counsel and unrepresented filers must further certify that no generative artificial intelligence program ~~was used in drafting~~drafted the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a person making the submission.~~human~~. A material misrepresentation in the certificate of compliance may result in striking the document and sanctions against the person signing the document.

Source: The chart is derived from public comments on the Fifth Circuit's proposed GenAI certification rule contained in "Comments on Proposed Rule Change to Fifth Circuit Rule 32.2 and Form 6" (January 29, 2024). In most instances, commenters offered track changes-style revisions in their comments. In those instances where the proposed changes were discussed in text only without being styled in track changes format, the author has transformed the text comments into track changes format.

***** The several email comments submitted by Winders included a preferred edit that would strike the Fifth Circuit's proposed language about human review and approval.

III. GenAI can't think, so humans are still essential?

Another problem commenters identified is the Fifth Circuit's proposed requirement that a court filing "has been reviewed for accuracy and approved by a ***human***" (emphasis added). While this issue crops up regarding the proposed rule text in general, it would be especially pronounced for the proposed certification on the Fifth Circuit's Form 6.

Perhaps the strongest comment on this point came from several posts by Peter J. Winders of Carlton Fields, who cited his colleague Gary L. Sasso's internal email remarks on the proposed rule, the upshot of which was that Sasso opined that "generative AI *cannot think*" (emphasis in original).[3] According to Sasso, generative AI is nothing more than an autocorrect-like feature that can search the Internet and predict what a human might write but, as impressive as that might be, it is not the equivalent of human legal research and writing. If generative AI cannot think, the post went on, then human attorneys must still be relevant. Sasso explained the need for human-driven nuance in court filings thus:

> But what's missing is *human research, knowing what authorities are out there, identifying and understanding different lines of legal analysis, identifying and understanding all authorities and doctrines that appear to be adverse, identifying and understanding all authorities and legal doctrines that are favorable but that may suggest different theories or approaches superior to what's in the brief, reconciling apparently conflicting authorities to determine what courts are actually doing, assessing such issues as preemption and choice of law, considering and applying various canons of construction when a matter may be governed by statute, even knowing whether any statutes or regulations are relevant, researching and understanding legislative history and common usage and considering extrinsic evidence, as appropriate in interpreting contracts or statutes, analyzing legal and factual arguments being made by the other side and responding to them or anticipating them, identifying and understanding emerging trends in the law, and balancing legal issues, policy issues, and factual nuances to come up with the best possible brief* (emphasis in original).

Another commenter emphasized the need for an attorney, not just a "human," to certify that a filing has been reviewed for accuracy and approved. Alan K. Goldstein, Law Office of Alan K. Goldstein, for example, noted the difference between a non-attorney conducting the accuracy review and an attorney making the certification. "But as a general matter, in all cases in which filers are represented by counsel, an attorney, not just any human, should be responsible for the content of the filing," said Goldstein. "I suppose the attorney's certification offers some protection against abuse even if 'a human' rather than an attorney performs the review and approval, but that nevertheless seems like a half-measure since the actual review and approval of the AI material would not have been performed by an attorney or someone acting under their direct supervision in the proposed rule change."

Lance L. Stevens, Stevens Law Group, agreed that the proposed "by a human" standard would be insufficient. "I do not believe that the minimum standard of care for a competent, reasonably prudent lawyer would allow any 'human' to confirm his or her cites and the propositions espoused in a brief []," said Stevens. He also suggested that standards focused on a "reasonably competent human," or a "capable professional human," would likewise be insufficient.

According to Carolyn Elefant, Law Offices of Carolyn Elefant, who offered some perspective on human drafters and the "hallucinations" that GenAI systems often produce, the problem of bad citations in court filings has a long history. "Although widely publicized incidents involving lawyers misusing generative AI highlight the longstanding problem of inaccurate case citations, the dirty little secret is that these infractions have always existed and gone undetected," said Elefant. "The advent of generative AI exposed, but did not cause[,] the problem of inaccurate citations in cou[r]t filings long known to experienced practitioners. To the extent that pervasive miscitation remains a concern, the proposed rule should require lawyers to certify that a human verified the accuracy of all research and arguments contained in filings, and not just those generated by AI."

IV. Work product privilege

The attorney work product privilege protects from discovery materials prepared by an attorney and others in anticipation of litigation, subject to some exceptions for certain information for which there

3 Winders later emailed the Fifth Circuit to explain why the firm's internal email was included in his comment on the proposed rule. Said Winders: "Perhaps I should have eliminated the parts intended to remain internal. In our firm, we have adopted a policy that GenAI not be used at all in production of legal product, and we have viewed with dismay the pronouncements of some lawyers that GenAI is reformative rather than potentially destructive to quality lawyering. I did not remove the internal parts because I thought they gave some flavor of the depth we have gone in addressing the problems that can be caused by GenAI, both in what it produces and what it can cause lawyers to overlook. I hope that decision was not seen as a lack of respect."

is a substantial need and that cannot be otherwise obtained without undue hardship. The work product privilege was recognized by the U.S. Supreme Court in *Hickman v, Taylor* (1947), in which the justices described the lawyer's case preparation process thus:

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

The Federal Rules of Civil Procedure (FRCP) (as amended December 26, 2023) codify the work product privilege for purposes of federal courts (state courts typically recognize versions of the work product privilege). In federal courts, under FRCP 26(b)(3), documents and tangible things generally would not be discoverable, but may become discoverable if the requisite showing of need has been made. However, even when such materials are discoverable, a court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."

Returning now to public comments on the Fifth Circuit's proposal, Thomas C. Wright, Wright Close & Barger, LLP, commented that Form 6 is an "odd place" for a GenAI certification because that form historically has been used for disclosure about compliance with type face and word limits rather than the "substantive content" of court filings. Wright also said the proposed certification could require an attorney to tip opposing counsel to trial or appellate strategy and that that type of disclosure could undermine the work product privilege. "For example, if after drafting a brief an attorney asks an artificial-intelligence program to write the opposing brief so that the attorney can make sure he or she is addressing all of the key issues, the attorney will have to disclose that process—and the opposing party gains an advantage by that knowledge," said Wright.

Carolyn Elefant of the Law Offices of Carolyn Elefant agreed that the proposed rule is a "slippery-slope" that may weaken the work product privilege. According to Elefant, "If courts can require disclosure of use of AI tools, will compelled disclosure of prompts and search strategy – activities which indisputably fall within work product privilege – soon follow?"

Legal research has always been a competitive landscape. As anyone who has used traditional legal research tools knows, those who are more skilled at selecting libraries of content to be searched and then drafting focused queries are likely to obtain faster and better results. In the GenAI space, there may be an even greater premium on what is called prompt engineering. Attorneys who are skilled at drafting prompts are likely to obtain better results. Attorneys who can effectively "chat" with a GenAI system to refine the results obtained from an initial prompt are likely to obtain still better results. One could even imagine a cottage industry developing to aid attorneys with prompt engineering, which is similar to, but very different, than drafting queries for traditional legal research. Unlike traditional legal research, which often uses either natural language or Boolean search terms, GenAI prompts lean toward natural language but may incorporate any combination of the following: (1) a natural language prompt (typically accompanied by the text to be summarized); (2) a system message that tells the GenAI system something about how to formulate the result (e.g. a description of the target audience); and (3) "few shots" that provide further examples of how the GenAI system should structure the results.

"In the GenAI space, there may be an even greater premium on what is called prompt engineering. Attorneys who are skilled at drafting prompts are likely to obtain better results."

V. Are court ethics rules on AI redundant?

A key question raised by comments on the Fifth Circuit's proposed GenAI certification rule was whether the court's rule would be redundant of existing ethics rules, be they court rules, such as rules of civil or criminal procedure, or state legal ethics rules. Eight of the 17 public comments mentioned the FRCP or related state legal ethics rules. For example, a comment submitted to the Fifth Circuit by Layne E. Kruse and Warren S. Huang, both of Norton Rose Fulbright, referring to FRCP 11 and Federal Rules of Appellate Procedure (as amended December 26, 2023) (FRAP) 32, observed: "As we understand them, these existing rules require the certifying attorney *not* to blindly

rely upon any sources, and in particular, any computer related sources such as a web search engine or a generative Al program" (emphasis in original). FRAP 32 has a signing requirement similar to FRCP 11 such that every paper filed with the court must be signed by the party or, if represented, by the party's attorney. The main difference between the FRCP and the FRAP is that FRAP 32(d) specifies papers "filed with the court" while FRCP 11(b) speaks of "presenting" papers to the court.

Brian King, echoing comments cited above made by Carolyn Elefant about the "dirty little secret" of bad case citations, commented: "'AI' may get media attention, but as pertains to its use in a brief – ie, something that a lazy lawyer may copy and paste into a brief without thinking about it – it is nothing new, and there is no need for a special rule for it." A comment submitted by Joshua Cottle of Fridge & Resendez PC was even more direct: "In short, [FRCP] Rule 11(b) does the heavy lifting the proposed rule seeks to additionally regulate." Christopher M. Campbell, Esq.'s comment offered an explanation as to why FRCP 11 already may cover the use of GenAI: "Through the use of the word 'Every', there is no doubt that persons making submissions to the court are already held to the standard that the proposed rule amendment would create." Here, "every" refers to FRCP 11's requirement that every paper must be signed by an attorney of record or, in the case of an unrepresented party, by the party.

With respect to the FRAP, The Institute for Justice observed in its comment that "the proposed rule is largely redundant of tools already at this Court's disposal for regulating unethical or irresponsible practice." Specifically, the Institute for Justice cited FRAP 38 and 46(c), the former authorizing a court to "award just damages and single or double costs to the appellee" in the case of a frivolous appeal, and the authority to discipline an attorney "for conduct unbecoming a member of the bar or for failure to comply with any court rule," respectively. Andrew R. Lee of Jones Walker submitted a comment that clarified that FRAP 46 also contains a provision allowing a court to suspend or disbar members of the court's bar and that 28 U.S.C. §1912 allows the imposition of "just damages..., and single or double costs" for frivolous appeals.

An obvious starting point for a broader discussion of this issue is a selected review of legal ethics rules produced by the American Bar Association and by the federal courts that may apply to attorneys and others who use GenAI in their court filings.

A. ABA model ethics rules

The American Bar Association's Model Rules of Professional Conduct offer a baseline for which attorneys might approach any client representation in which GenAI may be involved, although attorneys should also become familiar with any legal ethics rules that apply in the specific jurisdiction(s) in which they practice. Most U.S. states have adopted versions of the ABA's Model Rules of Professional Conduct. Below is a list of selected ABA ethics rules that may apply to professional legal services in the age of GenAI:

- Rule 1.1—Competence: The rule states that an attorney should have the "knowledge" and "skill" to handle a representation. A comment to the rule indicates that an attorney should, among other things, be aware of the "benefits and risks associated with relevant technology." Moreover, an attorney can acquire knowledge of a "novel field" via further study. Attorneys should check whether individual states in which they are licensed to practice have adopted the technology competence language.
- Rule 1.6—Confidentiality: The rule provides that an attorney generally must not reveal information about a representation unless the client consents or the revelation falls into one of the exceptions set forth in the rule. Several comments to the rule may apply to evolving technologies. First, as discussed, in part, above, Comment 3 notes that the concept of confidentially includes the work product doctrine plus the attorney-client privilege and the rules for protecting client confidences. Second, under Comment 18, an attorney must take steps to safeguard from unauthorized third-party access information about a representation, although this requirement is subject to a number of factors related to the reasonableness of an attorney's actions. However, a client can demand greater security or may elect to drop certain security measures. Third, Comment 19 states that an attorney "must take reasonable precautions" regarding the transmission of communications to "unintended recipients." Comments 18 and 19 both note that the topic of the potential application of federal and state data privacy laws to communications in a representation is beyond the scope of the ABA's Model Rules of Professional Conduct. Although not mentioned in Rule 1.6, GenAI raises concerns about the use of proprietary or attorney-client privileged information in prompts and/or searches conducted via GenAI for information related to a representation because it may be possible for GenAI to train on such information.
- Rule 5.1—Supervisory attorneys: A supervising attorney must reasonably ensure that an attorney under his or her direct supervision complies with legal ethics rules. Attorneys managing law firms have similar duties. A supervising attorney can be responsible for another attorney's ethical violation under certain

circumstances. Comment 3 suggests that the size of a firm and the complexity of a legal matter are potentially significant, with less formal oversight being sufficient for a smaller, "experienced" firm and with more significant oversight required at larger firms or firms handling matters that are likely to raise ethical questions. The comment also suggests that tone from the top or the "ethical atmosphere" of a firm is an important benchmark for ethical compliance, even if it cannot be assumed that all firm attorneys will at all times meet legal ethics standards.

- Rule 5.2—Subordinate attorneys: A supervised attorney is responsible for complying with ethical rules, although a supervised attorney typically would not violate ethical rules for adhering to the supervising attorney's "reasonable resolution of an arguable question of professional duty." Comment 1 to the rule posits a scenario in which a supervising attorney directs the supervised attorney to file "a frivolous pleading" and concludes that the supervised attorney would not violate the rules unless they knew the filing was frivolous. The rule does not explicitly speak to GenAI but one could imagine scenarios involving GenAI in which "frivolous" might include "fictitious" or "nonexistent" to describe either the filing itself or portions of the filing's contents.

- Rule 5.3—Non-attorney assistants: Law firm managers and attorneys who directly supervise non-attorneys must reasonably ensure that non-attorney assistants act in a manner that is "compatible" with the ethical requirements for attorneys. A supervising attorney can be responsible for a non-attorney's ethical violation under certain circumstances. The comments to the rule reiterate that the rule applies to non-attorney assistants both within and outside the law firm. With respect to non-attorney assistance outside of a law firm, Comment 3 suggests the types of services often provided, including investigative services, document management services, and "using an Internet-based service to store client information."

- Rule 5.5—Unauthorized practice of law: An attorney must not practice law in a jurisdiction in which he or she is not authorized to practice, although some exceptions exist for specified activities and limited representations on a *pro hac vice* basis. Under Comment 2, as noted in the discussion of Rule 5.3, paraprofessionals can do work for an attorney if the attorney "supervises" and "retains responsibility for" any work done by a paraprofessional. The rule does not explicitly mention technology: one concern is that GenAI systems could be used to obtain legal advice; another concern, as seen in the several cases discussed above in which courts have addressed the use of GenAI, involves supervising attorneys' lack of supervision of subordinate attorneys and others. These real life cases involving GenAI demonstrate that multiple legal ethics rules may be in play simultaneously.

B. Federal civil procedure rules

In the federal courts, FRCP 11 is the workhorse provision governing the legal ethics of court filings. Most states have civil procedure rules similar in scope to FRCP 11. Additional federal procedural rules that may apply to attorneys and others navigating GenAI in court filings are discussed in the main text below and in a footnote to this section.

Although FRCP 11 does not apply to discovery issues,[4] it does apply broadly to "pleading[s], written motion[s], and other paper[s]" that are presented to a federal court. These filings must be signed by at least one attorney of record or, if a party is unrepresented, by that party.[5] According to FRCP 11, when a person "present[s]" such filings to a federal court by "signing, filing, submitting, or later advocating it" they are certifying that, to the person's best knowledge following reasonable inquiry, that: (1) the document was not presented for any "improper purpose"; (2) "legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"; (3) factual contentions have, or will have, evidentiary support; and (4) "denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information."

A federal court may sanction an attorney, law firm, or party for violations of FRCP 11. A law firm must be held jointly responsible for its attorney's or employee's violations unless exceptional circumstances exist. Sanctions may arise from a motion for sanctions (subject to limits when a document presented to a court has been withdrawn or corrected) or on the court's own motion via an order to show cause. The scope and amount of any sanction imposed under FRCP 11 must be limited to what is sufficient to "to deter repetition

4 FRCP 26(g) applies to discovery matters.

5 The Federal Rules of Criminal Procedure (as amended December 26, 2023) also contain similar signing requirements. Rule 7(c)(1) requires that an indictment or information be signed by an attorney for the government. Rule 49(b)(4) requires that written motions and other papers be signed by at least one attorney of record or, in the instance of an unrepresented person, by the person filing the paper. A Committee Note to the 2018 amendments to Rule 49(b)(4) states: "This new language requiring a signature and additional information was drawn from Civil Rule 11(a)."

of the conduct or comparable conduct by others similarly situated."

Public comments on the Fifth Circuit's proposed AI certification requirement also cited some equivalent state rules, but they also tended to cite multiple provisions in the Federal Rules of Appellate Procedure (FRAP), including:

- FRAP 32—The rule requires that the party, or if the party is represented, an attorney for the party, sign "[e]very brief, motion, or other paper filed with the court."
- FRAP 38—The rule provides for the award of "just damages and single or double costs to the appellee" for a frivolous appeal.
- FRAP 46—The rule provides for suspension or disbarment in certain circumstances. The rule also provides for discipline "for conduct unbecoming a member of the bar or for failure to comply with any court rule."

In addition to FRCP 11 and its federal appellate and state counterparts, some other federal laws may apply in the GenAI setting, especially regarding fake images. For example, 18 U.S.C. §505 makes it a crime to forge a federal judge's signature or a federal court's seal. Similarly, 18 U.S.C. §506 imposes criminal liability for forging the seal of a federal agency or department. Under 28 U.S.C. §1927, courts may impose civil liability for vexatious litigation. In the *Mata v. Avianca* case, discussed above, the judge considered but did not impose sanctions based on 18 U.S.C. §505 ("fake opinions" did not include "signature or seal") or 28 U.S.C. §1927 ("harms" did not involve "dilatory tactics and delay" targeted by the statute), and instead imposed sanctions in reliance on FCRP 11 and based on the court's inherent powers. The judge in *Mata v. Avianca*, however, did note that the conduct of Mata's counsel had similarities to *U.S. v. Reich* (2d Cir. 2007), in which a fake magistrate judge's order caused opposing counsel to withdraw a pending application.

"In addition to FRCP 11 and its federal appellate and state counterparts, some other federal laws may apply in the GenAI setting, especially regarding fake images."

VI. What's next?

Whether or not the Fifth Circuit's proposed local GenAI certification rule for court filings becomes a formal requirement in that court, the proposed rule and the public comments submitted in response to the proposal shed light on how a small sample of practicing attorneys currently think about and use GenAI in their professional work. Clearly there is some tension between the desire of attorneys to use GenAI for purposes of creating workflow efficiencies on the one hand and ensuring that results obtained from GenAI systems are accurate and then potentially having to make disclosures about their use of GenAI in preparing court filings on the other hand.

In the current setting, in which attorneys and courts are becoming familiar with GenAI for the first time, it will remain important for attorneys and unrepresented parties to review the local rules of the courts in which they are appearing because individual judges and perhaps some courts will continue to issue standing orders about the use of GenAI in court filings. Moreover, attorneys must continue to adhere to more generally applicable legal ethics rules, some versions of which may require attorneys to be current in their understanding of emerging technologies used in the practice of law.