The PRACTICAL GUIDANCE Journal

The PRACTICAL GUIDANCE Journal

GENERATIVE ARTIFICIAL INTELLIGENCE, DATA MINIMIZATION, AND TODAY'S GOLD RUSH

Generative AI in Discovery Best Practices

Private Market Data Insights

Artificial Intelligence Investment

WINTER 2023-24

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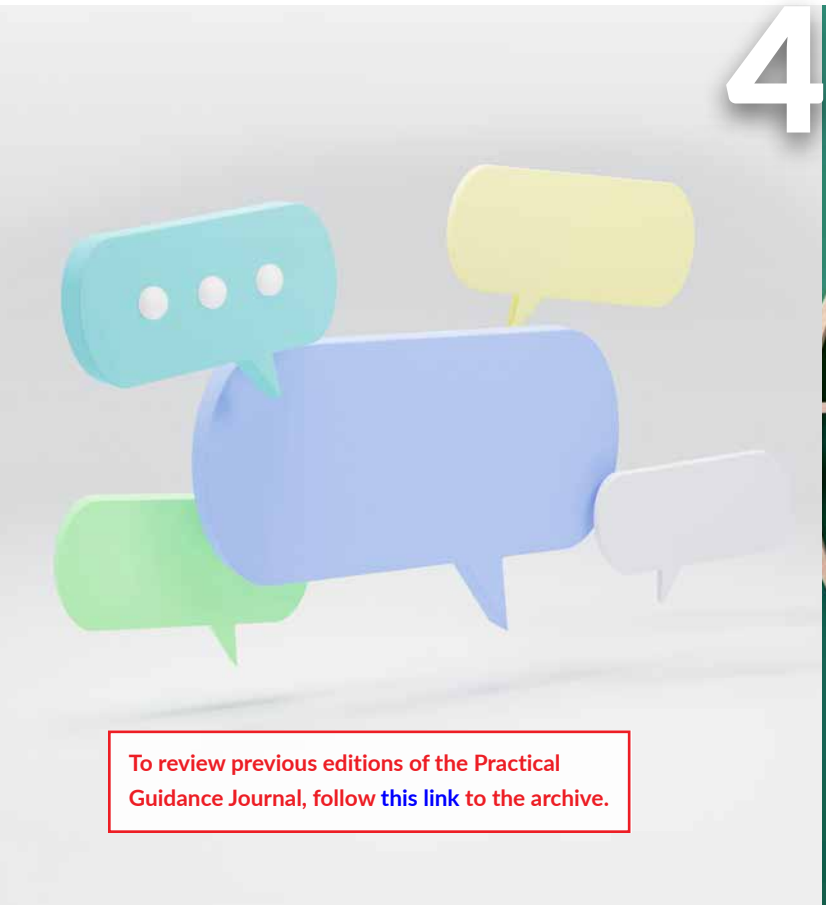

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The
PRACTICAL GUIDANCE
Journal

WINTER 2023-24

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Introduction

SPECIALIZED USES OF GENERATIVE artificial intelligence (GenAI) are exploding throughout the practice of law. This exponential growth is reaching into many unexpected facets of the law. This edition of the Lexis Practical Guidance Journal looks into impacts in the areas of discovery, investment, mergers and acquisitions, data privacy, and intellectual property.

Generative AI's role in discovery is discussed in the article, Generative AI in Discovery: GPT Prompt Preservation and Production Best Practices. It covers best practices and strategic insights litigators should consider in a federal court litigation when dealing with discovery produced by generative artificial intelligence tools.

Data security, privacy, and minimalization requirements are rapidly evolving as GenAI technology expands. An explosion of commercial applications of GenAI technology and tools complicated by their requirements to train on very large data sets, present challenges with applying data minimalization principles. Explore strategies for ensuring that your Gen AI tech and tools can withstand regulatory scrutiny in the article, Generative Artificial Intelligence, Data Minimization, and Today's Gold Rush.

Investors looking to capitalize on the exponential growth of artificial intelligence over the past decade continue to seek opportunities related to this transformative technology. The article, Artificial Intelligence Investment: Risks, Due Diligence, and Mitigation Strategies, explores the AI investment landscape, including trends in AI funding, the benefits and risks associated with AI investments, and key players in the market. It also reviews the legal and regulatory framework surrounding AI, the importance of due diligence when investing in AI, and the role of data in AI systems.

For a high-level overview of intellectual property implications associated with AI, review the article, Patent Protection for Artificial Intelligence and Machine Learning. This guidance offers tips when drafting patent applications related to artificial intelligence and machine learning, and discusses trends and strategies for handling prosecution of such inventions.

Finally, we provide the results of our Private Market Data Real Estate and Labor & Employment surveys. The results reveal insightful trends related to recent changes in commercial real estate lending, sustainability-linked funding, and employment discrimination settlement agreements.

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The Practical Guidance Journal is designed to help attorneys start on point. This supplement to our online practical guidance resource, Practical Guidance, brings you a sophisticated collection of practice insights, trends, and forward-thinking articles. Grounded in the real-world experience of our 2000+ seasoned attorney authors, The Practical Guidance Journal offers fresh, contemporary perspectives and compelling insights on matters impacting your practice.

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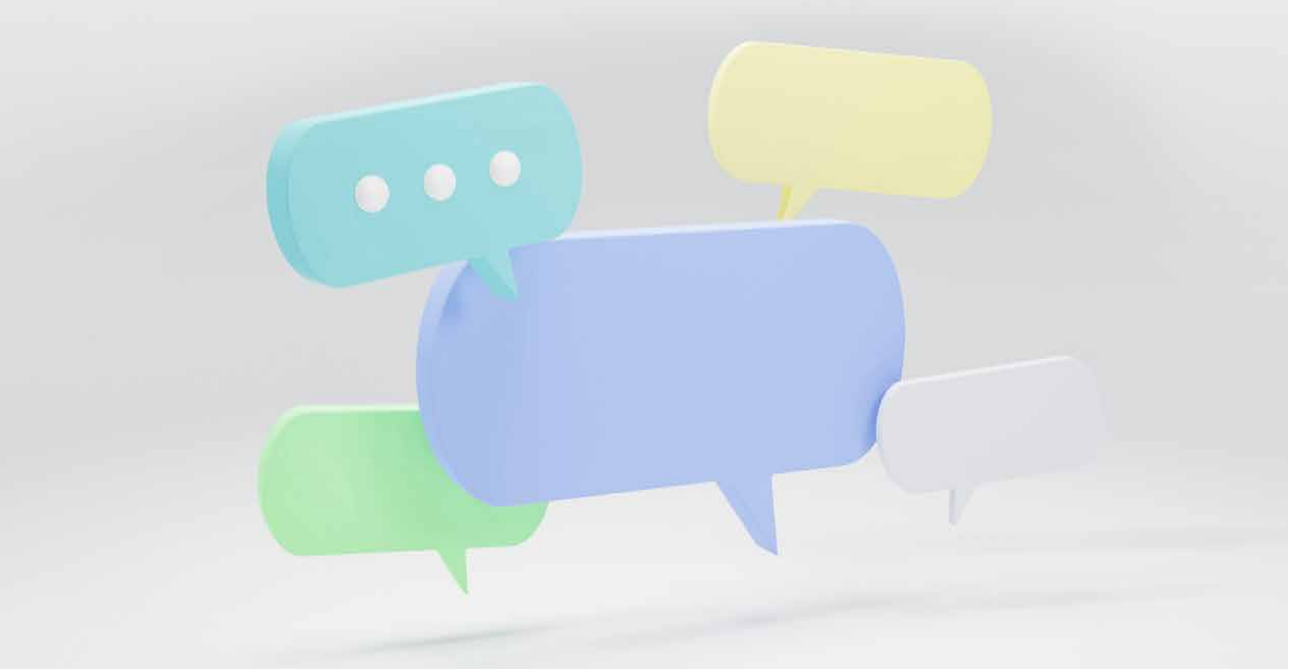
Generative AI in Discovery: GPT Prompt Preservation and Production Best Practices



This article discusses best practices and strategic insights litigators should consider in a federal court litigation when dealing with discovery produced by generative artificial intelligence (GAI) tools.

SINCE THE LAUNCH OF OpenAI'S ChatGPT 3.5 IN NOVEMBER 2022, discussions about the use of GAI tools like ChatGPT have dominated the news, publications, conference panels, and social media. The use of generated pre-trained transformers (GPT) is a topic that spans all industries and verticals, with the practice of law being no exception.

While the legal profession grapples with heady topics like appropriate use cases, potential bias, privilege and confidentiality considerations, and the application of legal ethics when using GPT and other GAI tools, it is important to look ahead to contemplate how the use of these tools will be addressed in litigation. This article focuses specifically on preservation and production obligations in federal civil litigation and how those obligations may apply to the emerging GPT tools businesses and individuals increasingly are using.

Finally, this article also contemplates the development of corporate GAI policies that will address a wide variety of issues related to the use of GPT tools. For example, these policies could include requirements for employees to acknowledge the use of GPT tools as a step in their process, which will ultimately be validated, refined, and finalized by the employee to accurately reflect the intended message or information.

GPT Prompt Engineering

Users engage with GPT-based tools like ChatGPT through a chat box mechanism. Unlike a search bar, where one enters text to get search results, and then scrolls through to find the result that best matches what they were hoping to find, a GPT chat box is an iterative engagement, where the user:

- Enters a text (or a prompt) for the system to create content –and–
- Provides supplemental instructions for the chat box to refine those results

If the chat box does not provide the results that the user expects, the user can relay additional information during the chat until they achieve the desired results. Those chats exist as distinct communications (or conversations) with the GPT chat box and are displayed like chat messages on a mobile device or messaging application. Typically, users can scroll back through and review the back–and–forth interplay between them and the GPT tool. However, different GPT tools each have unique retention policies and some prompts may not be available indefinitely. Additionally, if the user deletes the prompts, depending on the tool, that information may be permanently lost. This process of engaging with the chat using prompts for a specific desired output is commonly referred to as prompt engineering.

OpenAI recommends six prompt engineering tactics for improved results:

1. Write clear instructions
2. Provide reference text
3. Break up complex tasks into simple subtasks
4. Instruct the GPT model to give itself time to think about complex tasks
5. Use external tools –and–
6. Test changes systematically

GPT systems are powerful tools, but OpenAI's guidance highlights the iterative nature of using its ChatGPT to maximize results. For some legal disputes or investigations, this iterative interplay with GPT systems may be key to a relevant issue, and therefore could be subject to discovery.

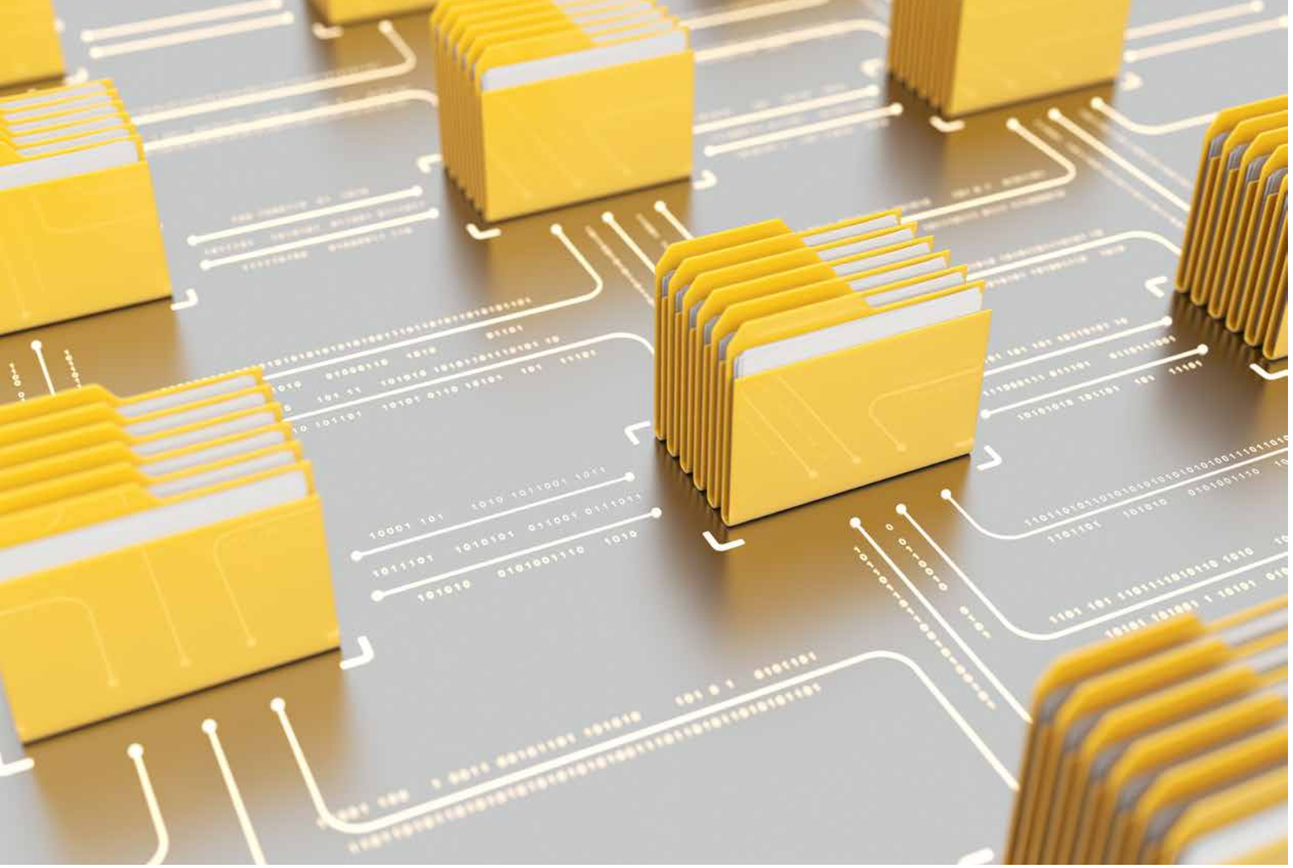
Preservation Obligations

In federal civil litigation, preservation obligations refer to the legal duty imposed on parties to ensure the protection and retention of electronically stored information (ESI) that may be relevant to a pending or anticipated litigation. This duty arises from the recognition that ESI plays a significant role in modern legal proceedings. Preservation obligations are crucial to maintain the integrity of the legal process and prevent the spoliation (i.e., destruction or alteration) of evidence.

Preservation obligations are triggered when a party reasonably anticipates litigation. This trigger includes situations where a party receives notice of potential legal action or becomes aware of facts that suggest litigation is imminent. Once the duty is triggered, the obligation to preserve relevant ESI attaches. Parties must preserve all relevant ESI, including:

- Documents
- Emails
- Text messages
- Social media content –and–
- Other digital records

The scope of preservation is broad and extends to information that may be directly or indirectly related to the litigation. The Federal Rules of Civil Procedure (FRCP) set forth a party's obligation to



preserve and produce data in federal civil litigation. Rule 34(a)(1)(A) of the FRCP broadly defines the data sources subject to preservation and production:

> Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes
>
> **a)** In General. A party may serve on any other party a request within the scope of Rule 26(b):
>
> **1.** to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's **possession, custody, or control**:
>
> **A)** **any designated documents or electronically stored information**—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form. (*emphasis added*.)[1]

The Committee Notes to the 2006 Amendment to Rule 34(a)(1) make clear that this definition is to be broadly interpreted:

> Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a) (1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers—either as documents or as electronically stored information—information "stored in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.[2]

1. *See* Fed. R. Civ. P. 34(a)(1)(A). **2.** *See* Fed. R. Civ. P. 34(a)(1), Cmte. Notes to 2006 Amendment.

> Whether GPT-based tools are within a company's possession, custody, or control, and this subject to a preservation obligation, is not yet a developed area of the law. However, courts generally apply one of three tests in a possession, custody, or control assessment.

Over the past few years, litigators have increasingly seen issues around obligations and discoverability of other varied and more modern data sources—such as mobile data, hyperlinks, and collaboration tools—become an area of focus in discovery disputes. Court orders around possession, custody, control, relevancy, and proportionality have been issued with regularity as the judiciary addresses how these obligations should apply to emerging technologies.

Preserving GPT prompts presents its own challenges:

- **Dynamic responses.** One of the unique challenges GPT tools present is the dynamic nature of the responses. GPT models generate text responses based on the input prompts. However, these responses are not static and can vary depending on the model's parameters, context, and even the same prompt entered at separate times. This dynamic nature makes it challenging to capture and preserve a specific response tied to a particular prompt.
- **No tracking functionality.** GPT service providers typically do not offer native prompt logging or archiving. This lack of built-in logging capabilities means users must rely on their own recordkeeping methods.
- **Ephemeral interactions.** GPTs often use real-time or ephemeral online interactions. Preserving such interactions can be logistically complex and may require immediate preservation.

Accordingly, once the duty to preserve is triggered and you determine that GPT prompts are within scope, you should observe preservation best practices for GPT tools such as:

- **Evidence authentication.** Consider how you will authenticate and verify GPT prompts. Develop procedures to ensure content's integrity, which may include documenting timestamps and any potential edits.
- **Comprehensive record retention.** Maintain comprehensive records of your use of GPT tools, including the specific prompts you fed into the tool and the responses generated. This documentation can aid in identifying relevant content.
- **Backup procedures.** Implement regular backup procedures for GPT prompts to help ensure their preservation, especially in dynamic, collaborative environments.
- **GPT metadata.** Capture and preserve metadata associated with GPT prompts, which can provide valuable context and authenticity.
- **Litigation holds.** Issue legal hold notices to relevant personnel, including those using GPT tools, to communicate the duty to preserve and prevent inadvertent deletions. Be sure to provide sufficient explanation addressing the complexity of GPT tools, especially where self-preservation of prompts is the only option. This preservation and legal hold notice process should align with any existing corporate GAI policies.
- **Prompt relevancy.** Address GPT tools in custodial interviews to assess the relevancy of GPT prompts, if any, and evaluate whether circumstances require enterprise-level preservation monitoring or collection-to-preserve.
- **Expert consultation.** Given the rapidly evolving and technical nature of GPT tools, consulting with experts in the field may be necessary to develop effective preservation strategies.

Possession, Custody, and Control

Whether GPT-based tools are within a company's possession, custody, or control, and thus subject to a preservation obligation, is not yet a developed area of the law. However, courts generally apply one of three tests in a possession, custody, or control assessment:

- **Legal right standard.** This standard takes the most restrictive view of possession, custody, or control. Documents or data are within a party's possession, custody, or control only if the party "has the legal right to obtain the documents [or data] on demand."[3]
- **Legal right plus notification.** Some jurisdictions apply the legal right standard but additionally require the party to notify any opposing parties about potentially relevant documents and data in the possession, custody, or control of third parties.[4]

3. In re Bankers Trust Co., 61 F.3d 465, 469 (6th Cir. 1995). **4.** *See, e.g.*, Silvestri v. GMC, 271 F.3d 583, 591 (4th Cir. 2001).

- **Practical ability standard.** This standard encompasses the broadest amount of information. Documents or data are within a party's possession, custody, or control if the party has the practical ability to obtain the documents or data from a third party, even if the party does not have legal ownership of those documents or data.[5]

GPT presents unique challenges related to possession, custody, or control of the GPT prompts on GPT service sites. The following essential considerations and tips can help you deal with this emerging technology:

- **Understand the nature of GPT service sites.** Familiarize yourself with the GPT service sites you are dealing with. Know how these platforms function and the terms of services that apply.
- **Review the terms of service.** GPT sites' terms of service can help you determine data ownership and usage rights. These terms can vary, and they impact your ability to access or control the content generated.
- **Seek expert advice.** Consider seeking advice from AI and data management experts to navigate the complexities of GPT-generated content. Their insights can be invaluable in building a strong strategy.

Production Obligations

In the context of federal civil litigation, production obligations pertain to the process by which parties must provide ESI in response to discovery requests. These obligations are integral to ensuring transparency and fairness in legal proceedings, as they dictate how parties exchange relevant evidence. As GPT tools become more prevalent in business and personal use, it is essential to understand how production obligations apply to the content generated by these systems. Parties should be prepared to address the unique challenges associated with GPT prompts, including relevance, proportionality, privilege, and confidentiality, while employing best practices to fulfill their production obligations.

Relevance

Information subject to production obligations must be relevant to the claims and defenses in the litigation. Rule 26(b)(1) of the FRCP defines discoverable information as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.[6]

GPT prompts, like any other ESI, must meet this relevance standard. Given the complexities surrounding GAI technologies, there may be many instances where a given matter does not meet this standard. Parties may dispute the relevance of GPT prompts, particularly if their connection to the case is not immediately apparent.

Also consider the impact of any corporate GAI policies in place and the requirements such policies may impose on employees to ensure they refine and validate GPT outputs, and confirm the outputs reflect the information and/or message the employee intends to relay.

Related Content

For a comprehensive guide to current practical guidance on generative artificial intelligence (GAI), ChatGPT, and similar tools, see

GENERATIVE ARTIFICIAL INTELLIGENCE (AI) RESOURCE KIT

For a discussion of ethical issues faced by attorneys when considering using GAI technology in their practices, see

AI AND LEGAL ETHICS: WHAT LAWYERS NEED TO KNOW

For insight into a judge's view of the use of GAI, see

ARTIFICIAL INTELLIGENCE: A JUDGE'S VIEW OF GENERATIVE AI

For an overview of the primary issues relating to the use of ChatGPT in the practice of law, see

LAWYERS AND CHATGPT: BEST PRACTICES

For an introduction to predictive coding in the context of discovery in federal court litigation, see

PREDICTIVE CODING FUNDAMENTALS (FEDERAL)

5. Gordon Partners, et. al. v. Blumenthal (In re NTL, Inc. Sec. Litig.), 244 F.R.D. 179, 195 (S.D.N.Y. 2007). 6. *See* Fed. R. Civ. P. 26(b)(1).

Proportionality

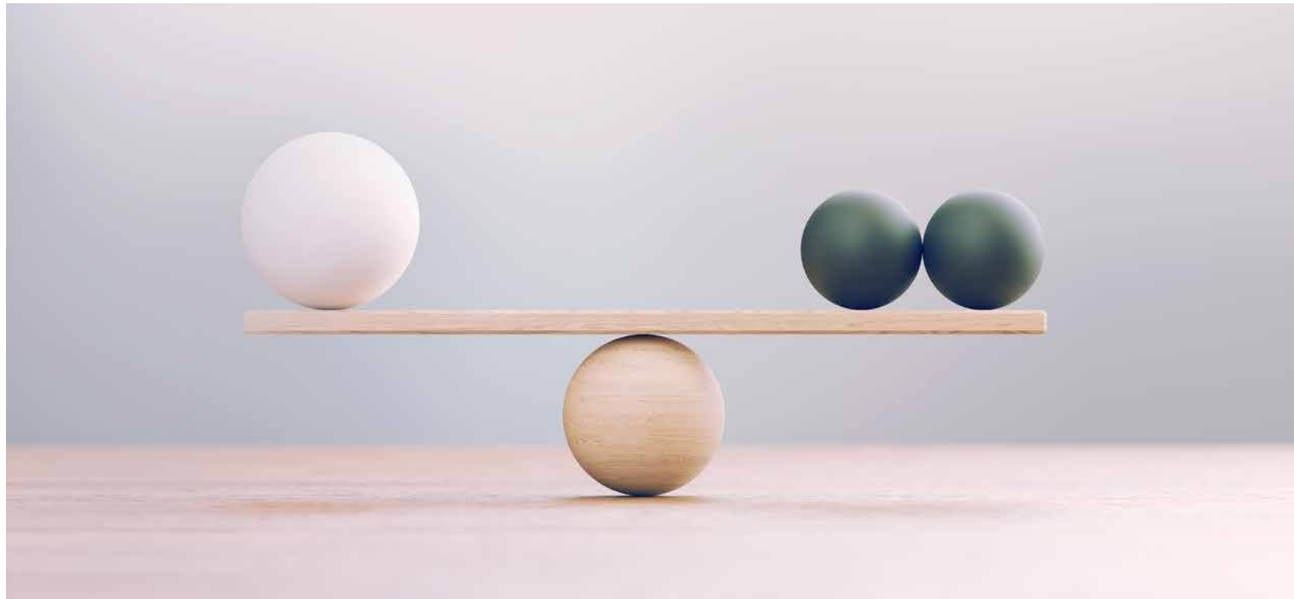
As lawyers navigate the production of GPT prompt data in litigation, it is crucial to apply the principle of proportionality. Balancing the relevance and importance of this data with the costs and burden of production is essential. This means that you must balance the cost, burden, and potential disruption caused by the production against the likely benefit you will receive using this data in your case. Courts should consider the volume and significance of GPT prompt data in proportionality assessments. Rule 26(b)(1) of the FRCP limits discovery to matters that are:

- Relevant to any party's claim or defense –and–
- Proportional to the needs of the case[7]

Consider taking the following steps to effectively assess proportionality in your litigation:

- Clearly define the scope of GPT prompts to be produced by identifying:
  - What types of content are relevant to the case
  - How the content relates to the claims or defenses
- Determine who the key custodians of GPT prompts are and which data sources are most likely to contain relevant information.
- Carefully assess the relevance of GPT prompts to the litigation by determining if the content is:
  - Directly related to the issues in the case –or–
  - Peripheral
- Weigh the significance of GPT prompts and how important they are to proving or defending against claims (high-impact data is more likely to be proportional for production).
- Examine the volume of GPT prompts as large volumes may require more stringent proportionality considerations than data limited in scope.
- Calculate the potential costs and burden associated with producing GPT prompts, considering factors such as:
  - Data collection
  - Review
  - Necessary technical expertise
- Factor in data privacy and confidentiality concerns, as some GPT prompts may contain sensitive or privileged information.
- Engage in open and constructive communication with opposing parties about:
  - The scope and proportionality of GPT prompt production –and–
  - Potential agreements and limitations
- Keep records of your proportionality assessment, documenting:
  - The criteria considered
  - The basis for your decisions –and–
  - Any negotiations with opposing parties
- Proportionality is not static so be sure to reevaluate your assessment as the case evolves and more information becomes available.

7. *See* Fed. R. Civ. P. 26(b)(1).



By following these practice tips and strategies, lawyers can make informed decisions regarding the proportionality of GPT prompts in litigation, ensuring that they maintain a balance between relevance and burden while complying with legal obligations and ethical considerations.

Privilege and Work Product Protections

Privileged and work product-protected documents are generally exempt from production. It is crucial to assess whether GPT prompts fall under these protections. If, for example, a lawyer uses a GPT tool to draft legal advice, the prompts may be subject to attorney-client privilege.

Form of Production

The form in which you can produce ESI can vary. Courts may specify the format, such as native files, PDFs, or structured data. With GPT prompts, choose a format that ensures its usability and understandability by all parties involved. Like short-form messages, there is no standardized format for production, so the parties should negotiate in good faith toward a result that is equitable under the FRCP.

Producing GPT prompts can be challenging. For example, parties must take measures to ensure that all relevant GPT prompts are produced. Additionally, GPT prompts may contain sensitive or confidential information. Balancing the obligation to produce with data privacy and confidentiality concerns is essential.

Here are some production best practices for GPT tools:

- Implement quality control measures to ensure that parties produce GPT prompts accurately and completely.
- If necessary, redact sensitive information from GPT prompts to protect confidentiality.
- Ensure the authenticity and integrity of GPT prompts through proper documentation and verification.

Practical Considerations for Business and Individuals

By following these practical considerations, businesses and individuals also can develop effective data management protocols, implement legal and technological strategies to meet their obligations, and ensure that employees using GPT tools are aware of their responsibilities in maintaining compliance with data-related regulations. Be prepared to effectively guide these efforts through your legal advice and consultation.

As with other ESI sources, consider developing data management protocols. These protocols may include the following:

- **Customized data policies.** Work with your organization to create data management protocols tailored to your specific needs and risks. Ensure they address the unique challenges posed by GPT-generated content and prompts. Additionally, organizations should consider the development of GAI policies to address evolving regulatory and compliance requirements.
- **Data classification.** Categorize data by sensitivity and importance. Define which data you must preserve, the retention periods, and the level of protection required for distinct categories.
- **Data collection and preservation practices.** Establish clear procedures for collecting, preserving, and securing GPT-generated content and prompts. This includes defining responsible custodians and methods for data retention.
- **Compliance with legal obligations.** Ensure that data management protocols align with legal preservation and production obligations, including rules governing ESI. Regularly update these protocols to reflect changes in laws and regulations.
- **Data mapping and inventory.** Create a comprehensive data inventory to track the location and nature of GPT-generated content and prompts. Maintain a record of where data resides, such as third-party GPT service sites.

To comply with any preservation and production obligations, consider the following legal and technology strategies:

- **GAI policies and training.** Implement corporate GAI policies to address the use of GPT tools, including approved tools, uses, and requirements. Provide training not only regarding proper use of these new tools but also regarding corporate and regulatory requirements.
- **Expert consultation.** Engage with experts in e-discovery and GAI technologies. Seek their guidance in understanding the legal implications and technological solutions for GPT-generated content and prompts.
- **Legal hold notices.** Develop clear procedures for issuing legal hold notices when you anticipate litigation. Ensure that employees using GPT tools understand their responsibilities under legal holds.
- **Technology adoption.** Leverage e-discovery and GAI tools to streamline the identification, collection, and review of GPT-generated data and prompts. These technologies can reduce the cost and complexity of compliance.
- **Regular audits and testing.** Conduct regular audits of data management protocols and e-discovery processes. Assess the effectiveness of data preservation and retrieval systems to ensure they function as expected.

Related Content

For recommendations on best practices to be used by litigators when working with e-discovery in federal court litigation, see

E-DISCOVERY BEST PRACTICES (FEDERAL)

To explore the role of the metadata of electronically stored information in e-discovery in federal court litigation, see

METADATA IN E-DISCOVERY (FEDERAL)

For an analysis of technology-assisted review of electronically stored information, see

TECHNOLOGY-ASSISTED REVIEW: OVERVIEW (FEDERAL)

For a sample certificate regarding the use of GAI in federal court, see

GENERATIVE ARTIFICIAL INTELLIGENCE (AI) USE AND COMPLIANCE CERTIFICATION (FEDERAL)

For a comparison of the most common electronically stored information production formats found in federal court civil litigation and the advantages and limitations of each format, see

ESI PRODUCTION FORMATS CHART (FEDERAL)

For an explanation on how email threading works, the technological benefits of using threading, and strategic considerations for it in document review and production in federal court litigation, see

EMAIL THREADING IN E-DISCOVERY CHECKLIST (FEDERAL)

For a review of issues relating to e-discovery search terms and search parameters in federal court litigation, see

E-DISCOVERY SEARCH TERMS CHECKLIST (FEDERAL)

- **Encryption and data security.** Implement encryption and robust data security measures to protect sensitive GPT-generated content and prompts. Safeguard against data breaches and unauthorized access.
- **Evolving technologies.** Stay current with the evolving landscape of GPT tools and GAI advancements. Continuously adapt your legal and technological strategies to address emerging challenges.

Most importantly, ensure that employees have training and awareness of their responsibilities as it relates to the proper use of GPT tools. Here are some examples:

- **Training programs.** Develop comprehensive training programs for employees using GPT tools. Ensure they understand their responsibilities in data management and compliance.
- **Data ethics, privacy, and privilege.** Educate employees on data ethics, privacy regulations, privilege, and best practices for handling sensitive information when using GPT tools. Privilege training should, at a minimum, address attorney-client privilege and the work product doctrine, but depending on the industry, may also need to address other kinds of privilege (e.g., bank examiner's privilege).
- **Clear communication channels.** Establish clear channels for employees to seek guidance or report issues related to GPT-generated data and prompts. Encourage transparency in data management practices.
- **Internal guidelines and policies.** Create internal guidelines and policies that address the appropriate use of GPT tools, data handling procedures, and legal compliance.
- **Regular updates and refreshers.** Periodically refresh training materials and conduct refresher courses to keep employees informed about changes in data management protocols and legal requirements.

Preparing for Our GAI Future in Litigation

In the context of federal civil litigation, addressing preservation and production obligations regarding GPT and prompts is essential for maintaining the integrity of legal proceedings. The evolving landscape of GAI, particularly GPT tools, introduces unique challenges that legal professionals, businesses, and individuals must navigate.

Preservation obligations encompass the duty to protect and retain relevant ESI in anticipation of or during litigation. GPT-generated content and prompts, being a form of ESI, require special attention due to its characteristics, such as identification challenges and data integrity concerns.

Production obligations come into play when parties need to produce ESI as part of discovery requests. GPT-generated data and prompts may be subject to these obligations, necessitating careful consideration of relevance, proportionality, and production format.

In conclusion, the integration of GPT tools into litigation practices requires a nuanced understanding of preservation and production obligations. It calls for the development of best practices and the incorporation of expert consultation. Legal professionals, businesses, and individuals must adapt to the unique challenges presented by GPT-generated content and prompts while upholding the principles of fairness, transparency, and compliance with legal obligations in federal civil litigation. L

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RESEARCH PATH: ***Civil Litigation > General Litigation > Practice Notes***

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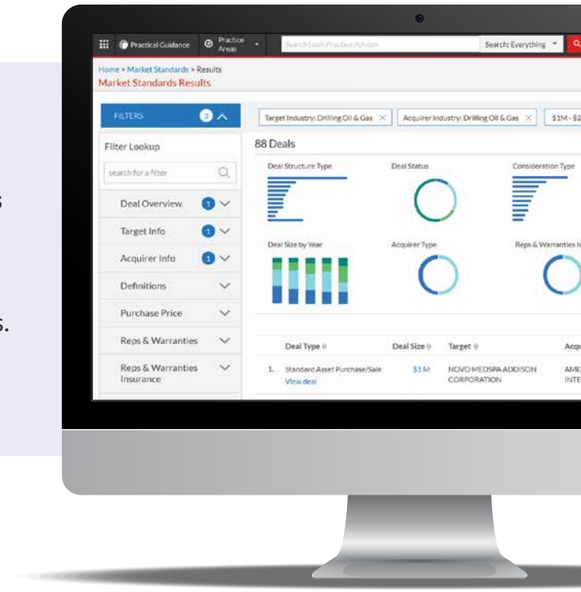

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