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AI Got It Wrong, Doesn't Mean We Are Right: Practical Considerations for the Use of Generative AI for Commercial Litigators

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Picture this: You've just been retained by a new client who has been named as a defendant in a complex commercial litigation. While the client has solid grounds to be dismissed from the case at an early stage via a dispositive motion, the client is also facing cost constraints. This forces you to get creative when crafting a budget for your client's defense. You remember the shiny new toy that is generative Artificial Intelligence ("AI"). You plan to use AI to help save costs on the initial research, and even potentially assist with brief writing. It seems you've found a practical solution to resolve all your client's problems. Not so fast.

Seemingly overnight, the use of AI platforms has become the hottest thing going, including (potentially) for commercial litigators. However, like most rapidly rising technological trends, the associated pitfalls don't fully bubble to the surface until after the public has an opportunity (or several) to put the technology to the test. Indeed, the use of AI platforms to streamline legal research and writing has already begun to show its warts. Of course, just last year, prime examples of the danger of relying too heavily on AI were exposed in highly publicized cases venued in the Southern District of New York. *See e.g.* Benajmin Weiser, Michael D. Cohen's Lawyer Cited Cases That May Not Exist, Judge Says, NY Times (December 12, 2023); Sara Merken, New York Lawyers Sanctioned For Using Fake Chat GPT Case In Legal Brief, Reuters (June 26, 2023).

In order to ensure litigators are striking the appropriate balance between using technological assistance in producing legal work product, while continuing to adhere to the ethical duties and professional responsibility mandated by the legal profession, below are some immediate considerations any complex commercial litigator should abide by when venturing into the world of AI.

Confidentiality

As any experienced litigator will know, involving a third-party in the process of crafting of a client's strategy and case theory—whether it be an expert, accountant, or investigator—inevitably raises the issue of protecting the client's privileged, proprietary and confidential information. The same principle applies to the use of an AI platform. Indeed, when stripped of its bells and whistles, an AI platform could potentially be viewed as another consultant employed to provide work product that will assist in the overall representation of your client. Given this reality, it is imperative that any litigator who plans to use AI, also have a complete grasp of the security of that AI system to ensure the safety of their client's privileged, proprietary and confidential information. A failure to do so may not only result in your client's sensitive information being exposed to an unsecure, and potentially harmful, online network, but it can also result in a violation of the duty to make reasonable efforts to prevent the disclosure of or unauthorized access to your client's sensitive information. Such a duty is routinely set forth in the applicable rules of professional conduct across the country.

Oversight

It goes without saying that a lawyer has a responsibility to ensure that he or she adheres to the duty of candor when making representations to the Court. As mentioned, violations of that duty have arisen based on statements that were included in legal briefs produced using AI platforms. While many lawyers would immediately rebuff the notion that they would fail to double-check the accuracy of a brief's contents—even if generated using AI—before submitting it to the Court, this concept gets trickier when working on larger litigation teams. As a result, it is not only incumbent on those preparing the briefs to ensure that any information included in a submission that was created with the assistance of an AI platform is accurate, but also that the lawyers responsible for oversight of a litigation team are diligent in understanding when and to what extent AI is being used to aid the work of that lawyer's subordinates. Similar to confidentiality considerations, many courts' rules of professional conduct include rules related to senior lawyer responsibilities and oversight of subordinate lawyers. To appropriately abide by those rules, litigation team leaders should make it a point to discuss with their teams the appropriate use of AI at the outset of any matter, as well as to put in place any law firm, court, or client-specific safeguards or guidelines to avoid potential missteps.

Judicial Preferences

Finally, as the old saying goes: a good lawyer knows the law; a great lawyer knows the judge. Any savvy litigator knows that the first thing one should understand prior to litigating a case is whether the Court and the presiding Judge have put in place any standing orders or judicial preferences that may impact litigation strategy. As a result of the rise of use of AI in litigation, many Courts across the country have responded in turn by developing either standing orders, local rules, or related guidelines concerning the appropriate use of AI. *See e.g.,* Standing Order Re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson (June 6, 2023 E.D.P.A.), Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers (January 25, 2024, N.J. Supreme Court). Litigators should follow suit and ensure they understand the full scope of how their Court, and more importantly, their assigned Judge, treat the issue of using AI to assist litigation strategy and development of work product.

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