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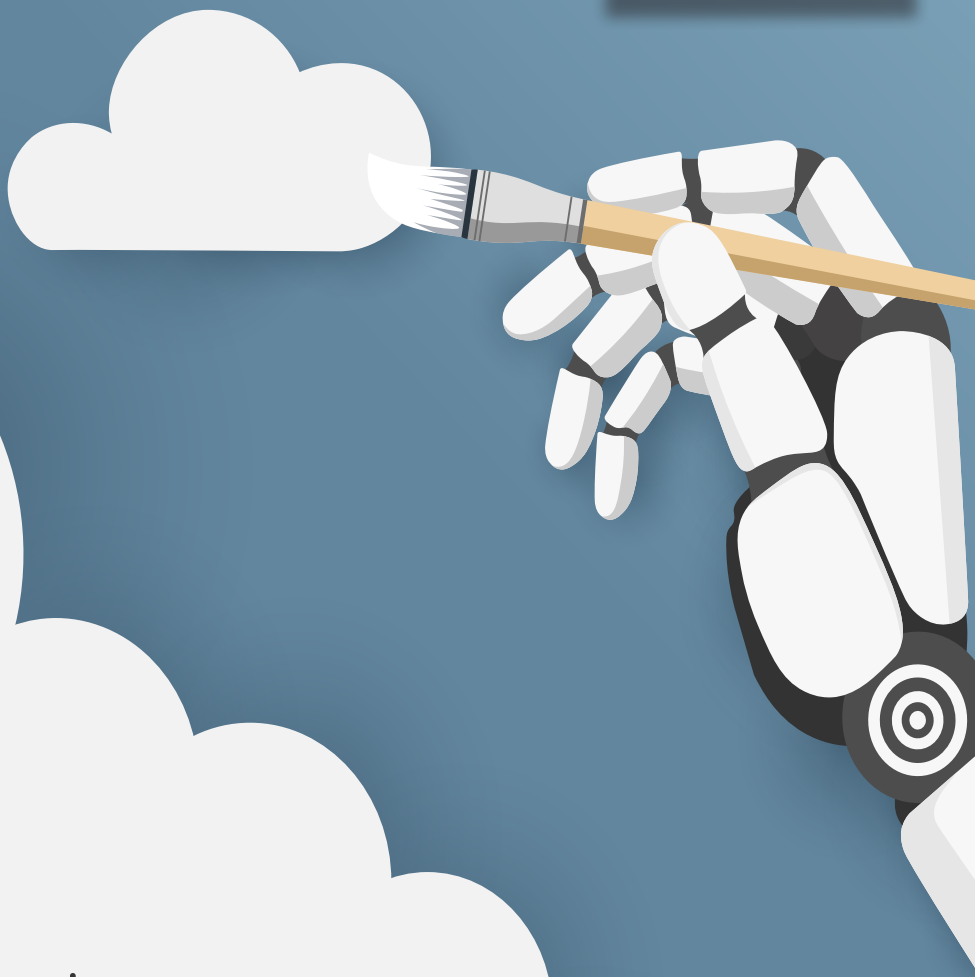
WINTER 2024



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By Michael K. Callahan

Invest in Your Future in 2024

Michael K. Callahan is assistant general counsel-litigation at Eversource Energy in Boston, Massachusetts. He is the Second Vice Chair of the DRI Corporate Counsel Committee.

When it comes to New Year's resolutions, most of us have great intentions. But somewhere along the way … well … we get lost. To be successful in executing your resolutions, you must be committed to creating sensible ones and keep them in the forefront of your daily activities.

Before I explore some sensible and achievable resolutions, a few words about process. First, think about the last 12 months. Were there any things you would like to improve on? Were there any things you wanted to do but could never quite find the time for? Second, develop realistic resolutions. If you're like me and haven't exercised in decades, then resolving to run the Boston Marathon is probably not a realistic resolution. Finally, write them down and track your progress—but be flexible and don't be too hard on yourself.

What are some reasonable and achievable resolutions?

Get Organized

If your office is like mine, you have piles of papers and files strewn about. All those papers and files are "yelling" for attention each day causing stress and anxiety. However, it doesn't take long to go through those files and organize them or get rid of them. In the week between Christmas and New Years, I spent two hours one morning going through every pile on my desk and credenza and putting the miscellaneous papers in their proper place or tossing them. When I returned to the office after New Year's, I was pleasantly surprised at how nice it looked. Not only that, but I felt energized to begin the new year feeling better organized and hopeful.

Stop Procrastinating

Hand in hand with getting organized is the need to stop procrastinating. I have been a chronic procrastinator. Like many lawyers I've talked to, I convinced myself that my best work is done under pressure. It's not.

Now, I create lists, sort them by priority, and check them periodically to track my progress or get me back on track when I feel adrift. Microsoft Office has a great tool called OneNote where I can create "To Do" lists. I check them periodically to stay on track, but I'm not wedded to them. Be flexible.

Take a Business-Centered Approach to Work

A former CEO used to complain that if the lawyers were in charge, no deals would ever get done. In some respects, he was right. There are few lawyers who can meld the business and legal worlds successfully. However, clear communication and thoughtful understanding of the client's business objectives will create greater appreciation of the in-house lawyer's role within the company.

As in-house counsel, you are in the unique position to develop strong relationships with senior executives, internal stakeholders, and decision makers, which is critical when you're advising them about matters. It also allows you to better understand the business, its culture, and its business goals. Take the time to integrate those goals into your legal advice, if possible.

Invest in Your Future

Set aside time to become more involved in your company's initiatives, including business resource groups, onboarding new employees, or diversity and inclusion events. Identify any industry organizations that will support your practice area and give you the opportunity to gain knowledge and experience.

To the extent possible given budgetary limitations, attend at least one industry event a year. Be a speaker at an industry event or webinar/seminar, and don't be afraid to let people know about it. ***Check out DRI's upcoming seminars*** for opportunities to expand your knowledge and network. Or, ***peruse available webinars*** if you prefer to learn from home. In 2024, DRI members receive FREE access to nine valuable webinars on trending topics that will impact your practice.

Increase Utilization of Technology and Data

Look for opportunities to automate processes to eliminate some of the lesser value work. Are there any key metrics you can leverage? Metrics are useful tools to support key strategic decisions with respect to the in-house legal department. However, they are only useful if they can be used and understood. You will want to identify metrics that look at past performance, identify highlights and trends, and aid in future decision making.

Use Your Vacation Time

With some exceptions, most in-house departments don't have the pressure of "billable hours," but there is a growing demand upon the in-house attorney to be "available" when needed. The workload among in-house counsel has grown substantially in recent years as the desire to shift more work inside increases. As I've said before, being a lawyer is inherently stressful; however, your mental and physical health is paramount. ***The DRI Foundation*** offers numerous opportunities and resources for you to improve your overall well-being in 2024.

To continue to perform at a high level, you need to take a break every once in a while and reset. It's not easy, and I frequently find myself checking my phone for emails while on vacation. But it's a worthwhile goal to put on your list this year.

Take Advantage of DRI Resources

In addition to taking advantage of the opportunities offered through in-person seminars, virtual webinars, and other resources on the DRI Learning Center, you can also become a member of the ***Corporate Counsel Committee (C3)***. C3 is comprised exclusively of in-house counsel members of DRI, and we work together to meet the challenges unique to in-house practice. Join C3's ***steering committee*** to help drive the exchange of ideas and best practices to improve our collective in-house experience. ***Simply click "Join Committee" on our committee page*** to take the next step for your career today.

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RETAIL AND HOSPITALITY

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By Nick Polavin, Ph.D., and David Metz

The Broken Promises of Third-Party Litigation Funding

Forget cryptocurrency—there is another kind of investment making the news in recent years, and it is one creating some major headaches for corporate defendants: litigation funding.

Third-party litigation funding (TPLF) sees investment firms providing money, generally to plaintiffs, to cover their litigation costs. In return, investors get a portion of damages in the event of a plaintiff verdict. How big has it become exactly? As of 2022, litigation funders had more than $13 billion under management in the United States (*What You Need to Know About Litigation Funding*; U.S. Chamber Institute for Legal Reform, 2023). It has objectively influenced the number of lawsuits filed and the number of settlements and verdicts reached. But does that mean it is advancing justice?

Some have touted funding as a way to provide potential plaintiffs the opportunity to pursue their claims against wealthier company defendants. Its supporters, including funding firm heads like Burford CEO Christopher Bogart, argue that it is a way to "make the playing field level" by reducing financial barriers to justice (Stahl; *Litigation Funding: More Investors Fund Lawsuits, as Rules and Transparency Lag Behind*; 60 Minutes, 2022). Others, however, argue that it injects outside, under-regulated interests into the lawsuits' outcomes, increases the number of frivolous claims, can drag out litigation, and can even take advantage of the plaintiffs themselves.

While study of the topic is limited, the published research does point to some troubling effects, both on the judicial system itself and its ability to deliver a just outcome.

Effects on the Judicial System

More Lawsuits

One study found that litigation funding increases the number of lawsuits and causes greater backlogs in courts (Abrams & Chen; *A Market for Justice: A First Empirical Look at Third Party Litigation Funding;* University of Pennsylvania Journal of Business Law, 2022). The obvious reason for this effect is that litigation funding is designed to help people bring lawsuits; it is not surprising that a greater volume of cases can inundate courts, especially

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as the system continues to work through its pandemic surfeit. But, as explained below, litigation funding can also prolong the litigation process by disincentivizing settlements—leaving even more cases clogging the system as new ones flood in.

Slower Resolutions and More Trials

Because the funder's interest is strictly financial—it wants to maximize return on investment—one main risk-reduction strategy is for it to diversify, investing in a "portfolio of cases" in the hopes that a few of them will return a large payout (Beisner et al.; *Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding a Decade Later;* U.S. Chamber Institute for Legal Reform, 2020). For this investment model, it is not about the result of one case in particular; it is about getting a few big wins across that portfolio. To encourage larger returns, plaintiff attorneys make larger demands and agree to settlements less often, resulting in a longer process and more cases going to trial.

An empirical study offers evidence to that effect. By examining statistics on medical malpractice litigation duration and awards and comparing data on where litigation funding is and is not allowed, the study demonstrated that funding had a considerable influence. It was associated with a 60.5% increase in claim payment, a 140% increase in resolution duration, and a 35.7% decrease in the probability of settlement (Xiao; *Consumer Litigation Funding and Medical Malpractice Litigation;* Journal of Empirical Legal Studies, 2017). These numbers are strong evidence that adding a third-party interest to case outcomes disrupts the litigation process and inflates damages requests; after all, an additional party is seeking payment.

Is Justice Being Served?

Who Gets Litigation Funding?

Litigation funding purports to help the everyman gain access to justice by overcoming the financial barriers to entry. But has this happened? One research paper found that it does not, in fact, remove the cost barrier for everyone. Rather, it tends only to help those who have claims with a high "profitability rate"—a decent shot at a high-damages verdict (Deffains & Desrieux; To Litigate or Not to Litigate? The Impacts of Third-Party Financing on Litigation; International Review of Law and Economics, 2015).

Granted, this preference is not unique to litigation funding firms; many law firms prioritize such cases as well. Yet this noble "marketing point" of litigation funding falls short if people with meritorious claims, but little chance for a large award, do not receive funding due to funders' profit-based concerns.

Frivolous Lawsuits

The same paper reported another problem: litigation funding provides unharmed plaintiffs with larger incentives to make a claim, which can increase the number of frivolous lawsuits (ibid.). From the perspective of the funding company, the more claims that are made, the more profitability a litigation investment can have. Some settlements here and a large verdict there are enough to justify the endeavor. Defendants in the crosshairs, meanwhile, find themselves scraping their defense reserves to counter fresh waves of lawsuits.

Effects on Jurors

More frequent and well-financed lawsuits can also have indirect effects on jurors. Litigation that assembles a plethora of individual suits (for example, hundreds of suits across the nation over the same product) is sure to attract media attention. Potential jurors are then more likely to see news about it and its prior verdicts. And since one of the first things jurors often wonder is whether anyone else has been harmed by the same product/company, pretrial publicity outlining serious, widespread plaintiff claims against a corporation—but offering little in the way of defense responses—can bias them against the defendant and suggest those claims have merit (Steblay et al.; *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review;* Law and Human Behavior, 1999).

Reports of adjacent cases with loosely similar defendants can also lead jurors toward biased viewpoints. They create the impression that multiple companies in an industry have been bad actors and are now facing justice. In voir dires and mock jury deliberations, we often hear jurors reference Agent Orange, Johnson's baby powder, or Roundup in cases that involve completely different corporations. Clearly, these news stories help cement the belief that large corporations are apt to put profits over safety.

Going beyond the free publicity that standard media outlets offer to substantial, eye-catching claims, litigation funding can boost the signal by supporting paid plaintiff advertisements. In fact, money spent on plaintiff advertising has tripled in the last decade (Fogarty; *Exposing the Litigation Financing, Advertising, and Gaming Techniques That Are Threatening American Health Care;* AdvaMed Responsible Advertising for Patient Safety, 2021).

Far from an accident, blanketing the airwaves is another way that third-party funders can invest money to make their portfolios more profitable. In touting the largest plaintiff wins, often in the tens or hundreds of millions of dollars, advertisements can anchor jurors to higher numbers at trial by providing a point of reference. As jury consultants, we commonly hear jurors in mock trials or post-verdict interviews make mention of other verdicts as a factor in their deliberations—e.g., "What's the going rate of lawsuits these days? $50 million for cancer?" or "That one woman got $80 million from Johnson & Johnson, so this is probably worth somewhere around that."

Jury selection hopes to identify and exclude those who may have been influenced by media reports and plaintiff advertising, but with the prevalence of both, a few fortunate cause challenges and a handful of peremptory strikes often fall short. Consequently, litigation funding has been cited as one reason for the rise in massive "nuclear verdicts" (*Annual Results 2019: Swiss Re Investor and Analyst Presentation;* Swiss Re, 2020).

Effects on Plaintiffs

Ironically, funding terms can prey on plaintiffs themselves, a concern that has been expressed by some scholars and lawmakers alike. There is good cause to

question whether the injured party ends up with a fair share of their own settlement or verdict. As one New York Assemblyman, William Magnarelli, observed, "Some of the fees being charged by the [funding] companies were so high that whatever the verdict was, the victims ended up getting very little or close to nothing" (Sams; *Litigation Funding Bills Crop Up in State Houses Across the Country;* Claims Journal, 2020).

Data instead suggests that litigation funding serves on a broad scale to redistribute money from those seeking justice into the pockets of wealthy funders. Models created by Swiss Re analysts, for example, indicate that cases involving third-party funding see a notable decrease in plaintiffs' ultimate compensation. The analysts estimated that "plaintiff compensation decreases by 21% relative to the same award in a case without TPLF" (*U.S. Litigation Funding and Social Inflation: The Rising Costs of Legal Liability;* Swiss Re, 2021).

Ironically, funding terms can prey on plaintiffs themselves, a concern that has been expressed by some scholars and lawmakers alike.

Some have also argued that, while lawyers have ethical responsibilities to their clients, funding firms share no such requirements. Plaintiffs thus may be influenced by the pressures of those paying for their suit (Stahl, 2022). With funders incentivized to hold out for a few large verdicts across a portfolio of cases, it stands to reason that some plaintiffs may be encouraged to pass up terms of resolution that would have been more favorable than the actual outcome.

Acknowledging such concerns, a handful of states have already enacted laws prohibiting or regulating the industry, whether its usage must be disclosed, and more. Other states and the federal government are in the process of drafting relevant legislation as well.

Corporate Defendants Must Act

With corporate defendants facing yet another litigation hurdle, corporations and the defense bar must coordinate both a long- and short-term response strategy:

Push for Regulation

The cryptocurrency collapse presents merely our most recent example that legislative response to new markets tends to lag—often to ruinous effect. In this case, lawmakers have only sporadically sought to regulate litigation funders and their practices; the gates remain wide open to profiteering at the expense of our civil justice system. Rather than trying to battle the problem in the courtroom, when it is mostly too late, defendants' best strategy will be to preempt the unhindered growth of litigation funding altogether. American businesses must urge legislatures nationwide to impose rules and transparency on litigation funding firms. Among other things, regulations should establish:

- Settlement decision-making control remains vested with plaintiff(s)
- Funding agreements are conspicuous, in writing, and signed by plaintiff(s)
- Financing amounts are capped
- Fees, charges, and interest rates are capped
- An exchange of funding documents in discovery
- The relevance of funding to the litigation and its potential admissibility into evidence

Counter the "David v. Goliath" PR Narrative

If there were ever a public relations battle to be waged, this is it. Juries have been reaching nuclear verdicts with increasing size and frequency, hoping to send a message to the wealthy. But if jurors know that awarding millions or even billions of dollars will serve to increase the return on investment for those with enough money to invest in (i.e., bet on) lawsuits, they may seek only to make the plaintiff whole rather than to enact change within a corporation or even an entire industry.

While the plaintiff bar continues to create ads with the semblance of news articles and pay for billboards and TV spots to anchor jurors to sky-high dollar figures, the defense bar could work to lift the veil on the influence of litigation funding. A documentary on a streaming service, an episode on a docuseries such as "Dirty Money," or a TikTok series via legal or journalism influencers could help inform future jurors about the vast potential resources behind plaintiffs going to trial—and those who stand to benefit most from a big verdict. By countering the perception of "David v. Goliath" in civil lawsuits, jurors may enter the courtroom with a healthier skepticism toward plaintiffs and their well-paid experts.

Precondition Jurors in Voir Dire

We often hear jurors lament the deep pockets of corporate defendants and the battle between "unequal" parties. In the short term, to get jurors thinking realistically, defense lawyers can ask the venire, "Does anyone have any idea how many resources the plaintiff's law firm has?" And, as long as there is no motion in limine on the issue, follow up with, "Has anyone here heard of third-party litigation funding?" Even if there is an objection, these questions hint to jurors that there may be plaintiff resources of which they were unaware.

Final Thoughts

Third-party funding has already had a significant impact on U.S. litigation. Although it is all too true that high litigation costs are a detriment to one of the founding principles of our civil justice system—that plaintiffs should receive their day in court—the introduction of third-party interests appears, thus far, to be more curse than cure. Litigation funding may help some plaintiffs pursue the justice they are seeking, but it comes at a cost. What may be a lucrative pursuit for the investors and funding firms stands to be a nuisance to the system, to defendants, and even to the very plaintiffs it purports to help.

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DRI ANNUAL MEETING

SEATTLE, WASHINGTON | OCTOBER 16TH - 18TH

By James A. Lowery

Effectively Preparing and Presenting the Corporate Representative Witness

The most famous quote attributed to arguably the greatest military leader of all time, Napoleon Buonaparte, was "(N)ever interrupt your enemy when he is making a mistake." Napoleon had many faults, but his ability to see the entire battlefield and to take the plans and tactics of his enemies and use those against them was unmatched in human history.

Everyone expert in the space knows that asbestos litigation is nothing short of total warfare. Dozens of companies have gone bankrupt since the early 1980's. Billions spent in judgments, settlements and defense costs. Courts clogged for decades by the "elephantine mass" of hundreds of thousands of claims.

It's not an overstatement to say that the lynchpin of the defense in asbestos litigation is the preparation and presentation of the corporate representative witness. Corporations cannot take the witness stand. Thus, the corporate witness, or Person Most Knowledgeable (PMK), not only speaks for the corporation and binds the corporation by his or her answers, the PMK is the corporation in the eyes of the jury. Properly preparing and presenting the PMK is critical, but too often defense counsel miss opportunities to use their PMK to tell their client's story, to establish key facts and to put a human face on their corporate client. This article seeks to present a game plan for working with PMKs in order to achieve these goals.

What is Required of a Corporate Witness

Federal Rule of Civil Procedure §30(b)(6), followed by most jurisdictions, requires the organization to designate witnesses who will testify not only to the information known to the organization, but also information that is reasonably available to the organization. The organization also has an obligation to conduct a thorough investigation for information relevant to the subject matters denoted in the deposition notice. Further, the organization has an obligation to work with the 30(b)(6) witness to educate that witness to competently respond to questions posed by the party noticing the deposition.

Yet, these requirements have limits and counsel must work to limit the scope of PMK depositions. That begins the moment the areas of inquiry are identified, continuing when the deposition notice is received and through the preparation and conduct of the deposition.

The 30(b)(6) Deposition Notice

Discussions to limit the scope of the PMK deposition should begin before the plaintiffs serve the deposition notice. Defense counsel should confer with plaintiffs on this issue as soon as the request for a PMK deposition is raised and plaintiffs identify the proposed areas of inquiry. These discussions should include offers to use prior PMK transcripts if that testimony reasonably addresses the topics at issue and counsel feels the prior testimony does not harm the defense of the case.

Once defense counsel receives the PMK deposition notice, they must carefully review the notice and prepare objections, both to the scope and specific topics listed in the notice. This should also include a meet and confer session with plaintiff's counsel to see if agreement can be reached to limit the deposition. Absent any agreement, a motion for protective order should be filed in order to make every effort to reign in plaintiff's counsel and protect the corporate witness and defendant.

Identifying the Right PMK

Perhaps the most important decision client and defense counsel can make in the presentation of the PMK is deciding who the right person is to serve in that role. Several factors must be considered in making this choice. These include knowledge of the topics at issue in the deposition, ability to commit the time and attention to properly prepare, and the ability to communicate effectively to a jury. It is exceedingly rare that a corporate witness will naturally excel in all three of these areas; however, with a solid defense and preparation plan, PMKs can quickly improve.

Preparing the PMK for Deposition

Thorough and focused preparation of the PMK for deposition is critical. This should be done in an environment that is free from the daily distractions of business. The witness must be fully committed to the preparation process, and the corporate defendant must provide the time and support

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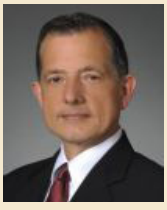
The author recognizes and thanks colleague and friend Ed Ullola for his contributions and thoughts regarding the PMK/expert discussion.



necessary for the witness to properly prepare.

Preparation should begin with a complete education of the history of the corporation, its business operations, products and services. The PMK does not need to know every word of every one of the thousands of potentially responsive documents. Rather the goal should be a mastery of key documents and defense themes and the ability to communicate those themes in response to plaintiff's questions.

Merely going through the topics at issue in the deposition notice and reviewing key documents is not enough. The corporate witness must go through a series of mock depositions conducted by seasoned trial counsel. These mock examinations should be conducted in an atmosphere approximating an actual 30(b)(6) deposition, with a 'plaintiff' counsel conducting the deposition and a counsel defending with appropriate objections. This will teach the witness the proper pacing and cadence of questions and answers, leaving time for defense counsel to lodge objections.

These training sessions and mock examinations should utilize a broad assortment of plaintiff 30(b)(6) techniques. There should be a healthy dose of 'reptile' questions, e.g., "[Y]ou wouldn't let a member of your family use a product you know could harm or kill them, right ma'am?" Counsel should also incorporate the use of classic plaintiff documents, such as key mileposts in the development of knowledge of asbestos hazards and documents generated by industry and trade groups related to dust hazards or compensation claims. The person playing the role of plaintiff's counsel should liberally repeat themes and specific questions to put pressure on the witness to change his or her answer.

It is critical to take the time after these mock sessions to provide feedback on the witness's answers and overall presentation. This includes an assessment of the witness's manner of communication, e.g., voice inflection, eye contact with jury, avoiding evasive answers, etc. Counsel must also listen to what the witness tells them about their performance, their concerns and areas in which the witness feels additional preparation is needed.

Part of proper preparation includes a debriefing session after the deposition concludes. Each PMK should review and sign the deposition transcript and then counsel should set up a time to do a thorough review of the testimony with the witness regardless of whether the case proceeds to trial.

The Lack of Personal Knowledge Conundrum

Every so often a key decision comes from an appellate court that changes the landscape of an entire segment of toxic tort litigation. The California Court of Appeal's decision in *Ramirez v. Avon Products*, 87 Cal.App.5th 939 (2023) certainly fits that bill.

The *Ramirez* case was a talc personal injury case brought against several defendants, including Avon. Avon filed a motion for summary judgment, relying on a declaration from Lisa Gallo ("Gallo Declaration"), an employee who did not begin to work at Avon until 1994, about halfway through the alleged exposure period of the 1970's to 2007. The Gallo Declaration stated it was made on the declarant's personal knowledge, but all but two of the Avon documents attached to the Gallo Declaration were from the 1970's, well before Ms. Gallo's time with the company. The trial court overruled the Ramirez' objections and granted summary judgment in favor of Avon.

The Court of Appeal overruled the trial court's decision, finding that there are only two types of witness: lay and expert. The court found there was no special category of corporate witness that allows them to offer opinions or speculate on matters for which they have no personal knowledge. In this case, Ms. Gallo was simply a fact witness and could testify only on matters to which she had personal knowledge. Any such testimony, and the documents cited in the declaration, were beyond the witness's personal knowledge and would be considered inadmissible hearsay.

Counsel should closely evaluate their affirmative defenses and what evidence will need to be presented to support those defenses.

The impact of the *Ramirez* decision was immediate and stretched beyond the borders of California. Trial courts in other jurisdictions have ruled similarly. Corporate witnesses and their lead defense counsel scrambled on how to respond. Plaintiff's counsel rejoiced, taking the position they could still seek the information they want from PMKs, even if that is also not based on personal knowledge, and have that testimony admitted as an admission. The issue is made even more challenging because the very nature of toxic tort litigation involves companies, products and components discontinued decades ago. This means that often there are is no current or former employees of the corporate defendant in existence that would have any personal knowledge of the matters at issue in the lawsuit.

The Defense Response to *Ramirez*

While the Ramirez decision certainly sent a shock wave through the toxic tort world, defense counsel and their PMK witnesses have the ability to respond. First, PMK witnesses should be retrained not to speculate on answers seeking admissions that are not based on their personal knowledge. When shown a document, a PMK should not offer opinion or speculate on the meaning of the document beyond what the document actually states.

Second, defense counsel will need to be more creative when seeking to prove affirmative points necessary for the defense of their client. Many documents are self-authenticating, such as ancient documents or government records. Records custodians or similar witnesses can authenticate other documents, such as business records. These documents can form the foundation for key defenses or defense themes, even if the PMK witness can't speak to the document based on personal knowledge.

Third, counsel should strongly consider also designating their corporate designee as an expert witness. Experts are not limited to personal knowledge and can evaluate other information, including hearsay and hearsay documents, to form their opinions. This approach is not without risk, as the plaintiffs could challenge the qualifications of the expert and seek to limit or exclude their testimony. The plaintiffs could also ask the PMK/expert to assume certain facts and ask the witness hypothetical questions. Counsel must narrowly tailor the expert designation of the PMK to meet the goals of the defense. For instance, the witness could be designated as an expert in the history of the corporate defendant and the development, manufacture and sale of a particular product line. Jurisdictions like California require taking a hard look at this new and innovative approach.

The Counter Offensive: Using the PMK to Support the Defense Case

Many defense counsel have long believed that the best one can hope to do in presenting a corporate witness at deposition or trial is to simply avoid disaster. We have assumed for years that the PMK witness was purely defensive, parrying away the evidentiary thrusts of plaintiff's counsel in hopes of holding their position in the case. Yet, is that truly all we can expect of the PMK witness; the voice of the corporation in a case seeking millions of dollars against our clients?

Use of Direct Examinations in PMK Depositions

Defense counsel rarely conduct a direct examination of his or her own corporate witness in a PMK deposition. They choose not to ask any questions, or merely ask a handful of questions necessary to clear up certain points made by plaintiff's counsel. However, in jurisdictions where allowed, plaintiffs' counsel love to use the prior testimony of PMK witnesses by designation to defeat motions or for affirmative evidence at trial. A direct examination conducted by defense counsel in the PMK deposition can give counsel in other cases and jurisdictions the option of reading in favorable PMK testimony to establish points favorable for the defense.

Support for Affirmative Defenses

Counsel should closely evaluate their affirmative defenses and what evidence will need to be presented to support those defenses. Here, corporate witnesses can be extremely effective. For example, they can be critical in providing testimony of the corporation's position in support of the government contractor defense and in demonstrating the corporation's reliance on specific government regulations. They can similarly authenticate key documents showing when warnings were applied to products. In talc litigation involving retailers, PMK's familiar with purchase agreements and business relationships can show that the retailers did not make or alter a talc containing product and instead relied on the expertise of the manufacturers. This type of testimony also supports the innocent retailer statutes available in Texas and many other jurisdictions.

Using the Corporate Witness to Support Defense Themes

One of the greatest challenges we have as defense trial lawyers in toxic tort litigation is to humanize the corporate client. All of the great work we do in jury selection to try to identify anti- corporate jurors and separate the selected jurors from emotion and sympathy might be for naught, if we cannot make the jury understand that our clients are more than a legal fiction. Our clients need to be treated fairly at trial, and

that begins with the face of the client, the corporate witness.

Witnesses testifying on behalf of the corporation in deposition and at trial must consistently set the tone of positive corporate culture. A corporation that always, today and in the past, strives to do the right thing. An entity that follows the law and treats employees, customers and others in the chain of commerce fairly and with respect. The PMK shouldn't hesitate to show pride in their company and what they and the people they work with have built. Juries demand the truth, but they expect the corporate defendant to defend themselves, particularly through a voice in the courtroom; the PMK witness.

The PMK can also be used to support what is arguably the most important defense to them in mass tort cases: alternative exposure. Defense counsel must still put on evidence of asbestos content, exposure, no warnings and substantial factor causation in order to get other entities on the verdict form and assign them the bulk of fault in the case. However, the corporate witness should be prepared to provide valuable testimony regarding suppliers of asbestos or talc containing products or, components used in the client's product or services and highlight the lack of information and warnings provided to the corporate defendant. This will give defense counsel a powerful argument to make in closing argument on why the jury should assign the vast majority of fault on entities not in the courtroom.

Perhaps the most important thing the PMK witness can provide is the basis to blunt plaintiff's attempts to obtain punitive damages against the corporate defendant. In most jurisdictions, the standard for punitive damages against a corporate defendant is very high. The plaintiffs must typically show evidence of willful and wanton conduct, with a specific disregard for the safety of the plaintiff. Perhaps in the days of Johns Manville and Owens Corning evidence of such conduct existed. The defendants today are companies that may have used asbestos or talc in products long ago, with no evidence of the kind of conduct that would support punitive damages. Counsel should carefully prepare the corporate witness to address the elements of plaintiff's punitive damage claim so they can be attacked through summary adjudication before trial or through directed verdict during the trial itself.

Conclusion

Like many other aspects of a successful defense to a toxic tort lawsuit, the key to identifying, preparing and presenting a corporate witness is to have a well-developed plan. National counsel and lead trial counsel must work as partners with decision makers in the corporate law department to develop the strategic PMK development plan. However, the plan should not be limited to the defensive posture. With the right witness and the right counsel, a PMK witness can be a valuable asset to the defense in the total war that is toxic tort litigation.

By Thorne Maginnis

The Generative AI Revolution in the Retail & Hospitality Industries

Artificial intelligence (AI) is already transforming the way we live and work. Within two months of its initial release to the public, ChatGPT reached 100 million monthly active users, making it the fastest-growing consumer application in history. Other popular generative AI tools such as GitHub Copilot, DALLE, HarmonAI, and Runway offer powerful tools that can generate computer code, images, songs, and videos, respectively, with limited human involvement.

Almost immediately, business executives across industries began asking how generative AI could be leveraged to make their companies *better, faster, stronger*—by automating tasks, removing inefficiencies, and generating new ideas for products and services. Accenture's Technology Vision 2023 research found that 96% of retail executives polled were "very" or "extremely" inspired by the business potential of generative AI. The potential applications in the hospitality space are just as intriguing.

At the same time, the revolutionary implications of generative AI gives many pause—and justifiably so. AI has the potential to radically transform the way we do business, the size and makeup of the global workforce, and how humans communicate and live their daily lives. It has even sparked concerns about human extinction. Calls for comprehensive federal legislation and new federal agencies to regulate AI are gathering steam, while some prominent voices have called for a total halt on AI development.

This article considers (i) how generative AI is likely to affect the retail and hospitality industries, (ii) how law firms advising companies in those industries can adopt generative AI to offer better service, and (iii) some key legal issues that may shape the future of generative AI tools.

AI's Potential to Reshape Retail

Generative AI is already transforming the way we live and work. Retail companies that fail to embrace AI likely risk losing their current market share or, worse, going out of business altogether. This paradigm shift is existential, and businesses that recognize and leverage AI are likely to gain a significant competitive advantage.

Product Design

For retailers that manufacture and sell their own products, generative AI is set to revolutionize the product design landscape. AI enables the generation of innovative designs by drawing inspiration from a designer's existing works and incorporating the designer's unique style into new creations. For instance, in March 2023, G-Star Raw created its first denim couture piece designed by AI. ArentFox Schiff worked with a client who utilized an AI tool to analyze its footwear designs from the previous two years and generate new designs for 2024. Remarkably, the AI tool produced 50 designs in just four minutes, with half of them being accepted by the company. Typically, this process would have required numerous designers and taken months to complete. While it is unlikely that AI tools will entirely replace human designers, the cost savings and efficiency gained from using such technology are undeniable and should not be overlooked.

Advertising

Generative AI has the potential to revolutionize retail advertising because it can impact every stage of a campaign. It can be used to create entire advertising campaigns from scratch—from idea generation to crafting print copy, email blasts, blog posts, and social media content.

Companies traditionally invest substantial time and resources in these efforts, but AI can generate such content in mere moments. While human involvement remains essential, AI allows businesses to reduce the manpower required.

Moreover, AI's predictive capabilities enable businesses to anticipate trends across various demographics in real time, driving customer engagement. By processing and analyzing vast amounts of consumer data and preferences, brands can create hyper-personalized and bespoke content, enhancing customer acquisition, engagement, and retention. Furthermore, AI facilitates mass content creation at an impressively low cost, making it an invaluable tool in today's competitive market.

Virtual Models and Virtual Mirrors

This year marked the world's first AI Fashion Week and the launch of AI-generated campaigns, such as Valentino's Maison Valentino Essentials collection, which combined AI-generated models with actual product photography. Retail companies, particularly those in the fashion space, allocate a significant portion

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of their budget to model selection and hiring, necessitating entire departments and grappling with legal concerns such as royalties, SAG, moral issues, and child labor. By leveraging AI tools to create lifelike virtual models, these companies can eliminate the associated challenges and expenses, as AI models are not subject to labor laws—including child entertainment regulations—or collective bargaining agreements.

Further, AI is transforming not only how consumers see products modeled in advertising, but also how they shop and try them on. AI smart mirrors can enhance in-store experiences for shoppers by enabling them to virtually try on outfits in various sizes and colors. Furthermore, customers can now enjoy the virtual try-on experience from the comfort of their homes, as demonstrated by Amazon's "Virtual Try-On for Shoes," which allows users to visualize how selected shoes will appear on their feet using their smartphone cameras.

Product Distribution, Logistics & ESG

Historically, retail companies have relied on their C-level executives to make informed predictions about product quantities, potential sales in specific markets or stores, and the styles that will perform best in each market. Increasingly, however, AI models can be employed to forecast a business' future sales by analyzing historical inventory and sales data. This ability to anticipate supply chain requirements can lead to increased profits. From an environmental, social, and corporate governance (ESG) standpoint, this use of AI-powered technology can eliminate the need for retail companies to produce and carry excess inventory, thereby supporting the industry's initiatives to reduce waste.

AI's Potential Impact on the Hospitality Industry

The hospitality industry is in its initial phase of adopting generative AI, and it is already clear that AI has the potential to revolutionize many aspects of hotel operations. The industry is now focusing on how to use AI to improve customer experience, automate repetitive tasks, and create operational efficiencies. Many of the generative AI advantages discussed above with respect to the retail industry are applicable to hospitality companies as well, particularly use of AI for advertising and logistics. Below we have addressed some advantages of AI that are particular to the hospitality industry.

Guest Services

There are many ways Generative AI could affect guest services. For example, an AI chatbot could take a guest's room service order or serve as a virtual receptionist that could not only fully automate check-in and check-out, but also use a "semantic search" function to answer guest questions, such as, "Where is the best place for coffee near here?" The chatbot could answer this question by querying a database of options and using the AI technology to find the most similar answer.

While this introduces tantalizing efficiencies, a valid question is whether consumers enjoy the experience of interacting with AI. At the recent New York University Hospitality Conference, Tim Hentschel, HotelPlanner CEO, provided examples of both positive and negative customer experiences with AI chatbots being used to change reservations. The key difference was that the customer had a more positive experience when a human employee assisted the customer using AI to reduce the wait time versus AI being the sole interface.

The AI-human hybrid model is much more reliable in the short term. As discussed below, the risk of "hallucinations" from generative AI (*i.e.*, when the model creates its own "facts") are significant for all industries, including hospitality. The most likely practical short-term application for generative AI will be to increase the response time for customer support, an analysis which a human employee can then use to provide faster and informed service to hotel customers.

Customer Feedback

AI could also be helpful in assisting hotel owners in analyzing guest feedback, reviews, and social media posts and providing suggested responses that can be reviewed and edited by hotel staff. AI can also track and analyze guests' booking behaviors, which could assist hotels in creating personalized marketing campaigns targeted at certain customers.

Revenue Management & Hotel Operations

Industry leaders have also discussed using AI to enhance hotel revenue management. By using dynamic pricing models that share information across various assets, hotel managers can optimize prices and bookings to maximize revenue using AI that assesses a variety of factors in real time, such as demand, peak usage, and occupancy rates. Additionally, AI has the potential to personalize pricing to individual guests based upon their past behavior and demographics and identify opportunities for upselling and cross-selling.

Intercontinental Hotel Group recently partnered with Winnow Solutions, with the goal of using AI to reduce the chain's food waste by up to 30%. By connecting waste bins and inventory systems to AI, hotels should be able to more efficiently and accurately record how quickly and frequently certain items are discarded. Hotel kitchens can use this information to adjust future buying decisions, menus, and food preparation techniques. Additionally, AI could be a tool to create efficiencies in inventory management, housekeeping room assignments, and maintenance through the use of smart building systems.

Legal and Ethical Risks Associated with AI

Accuracy and Reliability

For all their well-deserved accolades and hype, generative AI tools remain a work in progress. Users, especially commercial enterprises, should never assume that AI-created works are accurate, non-infringing, or fit for commercial use. There are countless examples of AI making up facts and citing phantom sources. AI has also created works that arguably infringe the copyrights of others. Further, works created by generative AI may incorporate or display third-party trademarks or celebrity likenesses, which generally cannot be used for commercial purposes without appropriate rights or permissions.

The likelihood that a generative AI tool will produce infringing output depends on a variety of factors, such as the data set used to train the AI tool and the manner in which the program was developed, including whether safeguards were integrated to prevent it from copying content from the training data wholesale. In the coming months and years, it will likely become more obvious which platforms present more or less infringement risk. AI developers may also find ways to properly license the data used to train their programs, which could remove concerns over intellectual property rights infringement. Indeed, some companies are already experimenting with this model. Adobe is advertising its Firefly product, a generative AI art tool, as "ethical AI" because it is trained exclusively on Adobe's library of licensed images. For the time being, however, businesses should carefully vet any content produced by generative AI before using it for commercial purposes.

Intellectual Property Rights and Enforcement

From an intellectual property perspective, there are two distinct types of business risk presented by the use of generative AI tools. In addition to the infringement risks just discussed, there is also the problem of intellectual property ownership.

There is general agreement that content produced without significant *human* control and involvement is not protectable by U.S. copyright or patent laws. Presented with an application for a graphic novel with illustrations generated by AI, the Copyright Office refused registration, finding that the Copyright Act contains an inherent requirement of human authorship and that the images in the novel, which were produced using the generative AI tool Midjourney, did not warrant protection. The Copyright Office did, however, issue a limited registration covering the novel's text and the selection, coordination, and arrangement of the work's written and visual elements, which were created without the use of AI. Courts have thus far agreed with this approach. *See Thaler v. Perlmutter*, 2023 WL 5333236, at *1 (D.D.C. Aug. 18, 2023) (affirming Copyright Office's decision to deny registration for AI-generated work); *Thaler v. Vidal*, 43 F.4th 1207, 1209 (Fed. Cir. 2022), cert. denied, 143 S. Ct. 1783 (2023) (affirming U.S. Patent & Trademark Office's decision to reject patent application consisting of AI-created invention).

The result is a new orphan class of works with no human author and potentially no usage restrictions. This is something that businesses must bear in mind when using AI to generate content. While generative AI tools offer staggering efficiencies, the notion that anyone might be able to use and repurpose the resulting content—be it product designs, advertising materials, or computer code—will make many businesses think twice about when and how they use AI.

Still, a key principle can go a long way to mitigating risk: generative AI tools should aid human creation, not replace it. Provided that generative AI tools are used merely to help with drafting or brainstorming early in the creative process, then it is more likely that the resulting work product will be protectable under copyright or patent laws. In contrast, asking generative AI tools to create a finished work product will likely deprive the final product of protection. Currently, the precise modicum of human involvement and contribution required to render work products protectable is

unclear, but this is likely to be the subject of litigation in the coming months and years.

Data Security & Confidentiality

Before utilizing generative AI tools, companies should consider whether those tools adhere to internal data security and confidentiality standards. Like any third-party software, the security and data processing practices for these tools vary. Some tools may store and use prompts and other information submitted by users. Other tools offer assurances that prompts and other information will be deleted or anonymized. Enterprise AI solutions, such as Azure's OpenAI Service, can help reduce privacy and data security risks by offering access to popular generative AI tools within the data security and confidentiality parameters required by the business customer.

Before authorizing the use of generative AI tools, organizations and their legal counsel should carefully review the applicable terms of use, inquire about access to tools or features that may offer enhanced privacy, security, or confidentiality, and consider whether to limit or restrict access on company networks to any tools that do not satisfy company data security or confidentiality requirements. Further, as business adoption of generative AI becomes more common, many companies are opting for a more holistic approach by adopting acceptable AI use policies. Such policies can identify specific AI tools that are allowed and disallowed, while also setting standards for employee compliance pertaining to infringement risk mitigation, transparency and accountability, and ethical use of AI.

Software Development and Open-Source Software

One of the most popular use cases for generative AI has been computer coding and software development. But the proliferation of AI tools like GitHub Copilot, as well as a pending lawsuit against its developers, has raised a number of questions for legal counsel about whether the use of such tools could expose companies to legal claims or license obligations.

These concerns stem, in part, from the use of open-source code libraries in the data sets for Copilot and similar tools. While open-source code is generally freely available for use, that does not mean that it may be used without condition or limitation. In fact, open-source code licenses typically impose a variety of obligations on individuals and entities that incorporate open-source code into their works. This may include requiring an attribution notice in the derivative work, providing access to source code, and/or requiring that the derivative work be made available on the same terms as the open-source code.

Before utilizing generative AI tools, companies should consider whether those tools adhere to internal data security and confidentiality standards.

Many companies, particularly those that develop valuable software products, cannot risk having open-source code inadvertently included in their proprietary products or inadvertently disclosing proprietary code through insecure generative AI coding tools. That said, some AI developers are now providing tools that allow coders to exclude AI-generated code that matches code in large public repositories (in other words, making sure the AI tool is not directly copying other public code), which would reduce the likelihood of an infringement claim or inclusion of open-source code. As with other AI-generated content, users should proceed cautiously, while carefully reviewing and testing AI-contributed code.

Labor & Employment

When the Writers Guild of America recently went on strike, one issue, in particular, generated headlines: a demand by the union to regulate the use of AI on union projects, including prohibiting AI from writing or re-writing literary material; prohibiting its use as source material; and prohibiting the use of union content to train large AI language models.

These demands are likely to presage future battles to maintain the primacy of human labor over cheaper or more efficient AI alternatives. For instance, some have suggested that human artists should be compensated when generative AI tools create works that are clearly inspired by copyrighted works and/or that artists should be compensated anytime that their works are included in the training sets that make generative AI possible. The retail and hospitality industries are likely to be part of these discussions: as discussed above, AI tools have the potential to reduce the need for human labor in the areas of product design, modeling, customer service, and elsewhere. Meanwhile, the Equal Employment Opportunity Commission (EEOC) is warning companies about the potential adverse impacts of using AI in employment decisions. To the extent that limitations on AI use are imposed by future regulations or contractually by collective bargaining agreements, this will introduce new legal requirements for businesses to navigate.

Future Regulations

Earlier this year, Italy became the first Western country to ban ChatGPT, but it may not be the last. In the U.S., legislators and prominent industry voices have called for proactive federal regulation, including the creation of a new federal agency that would be responsible for evaluating and licensing new AI technology. Others have suggested creating a federal private right of action that would make it easier for consumers to sue AI developers for harm they create. U.S. legislators and regulators overcoming partisan divisions and enacting a comprehensive framework seems unlikely. Still, the possibility of future regulation is something for companies to closely monitor as they begin investing in AI and integrating it into their business models.

How Law Firms Are Using AI for Client Service

AI is changing the way we do business, and the legal industry is no exception. As companies consider the implementation of AI to improve their businesses, they have started asking how their outside counsel

can likewise adopt AI to offer better, more efficient, and more affordable service.

How Law Firms Can Use AI to Provide Better Service

There are a number of ways law firms can and have adopted generative AI tools to enhance the speed and quality of their client deliverables. Below are a few applications of generative AI tools in the law firm context:

Non-legal text generation

Generative AI can be tasked with basic non-legal writing tasks. For instance, a lawyer could instruct an AI tool to "Write an email to [client] about [topic]" or "Draft a LinkedIn post about [topic]." These are simple tasks, but they can add up to hours over the course of the day. AI has the potential to reduce them to mere minutes.

Edit or summarize text

AI can also be used to aid legal research. As an example, a lawyer might ask an AI tool to "explain in plain language how internal revenue code section 2701 works." AI should never be relied upon entirely when conducting legal research or advising clients, but it can be a provide a useful introductory primer or background information that can speed up the research process.

Short/common legal document first drafts

While the critical and creative thinking required to prepare compelling legal documents, such as motions, briefs, and memorandums, remains squarely in the domain of lawyers, AI can be used for first drafts of certain documents, such as short or simple letters. Of course, the lawyer must carefully review the work product produced by the AI and adapt it as needed, but AI is often capable of producing a serviceable first draft.

Specific clause re-write suggestions

During the course of contract negotiations, it is often necessary to take an existing provision and revise it in order to add or subtract some aspect. Generative AI can be leveraged for this purpose. For example, a lawyer might ask a generative AI tool to "Revise the following [XYZ] provision from an [XYZ] contract to make it more favorable to [party]." As always, the output should be carefully reviewed, but AI can provide a good starting point.

Support services

Lawyers have also begun using AI tools to automate and improve their support services, including litigation support, technology services, accounting, and secretarial services.

Special Risks for Lawyers

Generative AI presents special concerns for lawyers, who are governed by rules of professional conduct. The intersection of generative AI and professional responsibility obligations could be the subject of an entire article. While this is not our primary focus here, it is important for businesses to have at least an introductory understanding of these issues if and when they ask their outside counsel to use generative AI.

Professional conduct rules vary to some degree by jurisdiction. For our purposes, we will consider the American Bar Association's Model Rules of Professional Conduct (the "Model Rules"). Below we briefly discuss two key professional responsibility considerations that lawyers must take into account with respect to the use of generative AI:

Duty of Confidentiality

Under Model Rule 1.6, lawyers "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized," or the disclosure is justified by one of a few narrow exceptions. In addition, lawyers are bound to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

As discussed above, generative AI tools differ in their treatment of user data, including the prompts that are input by the user. Lawyers must exercise extreme caution when using generative AI tools to assist with research or drafting for client work. Including client information in prompts submitted to generative AI tools risks violating the confidentiality obligation of the Model Rules and could even waive attorney-client privilege with respect to certain information. Before using generative AI, lawyers should be confident that the relevant AI tool has sufficient privacy and confidentiality safeguards and/or that any prompts have been anonymized.

Duty to Supervise

Model Rule 5.3 states, *inter alia*, that "a lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." The Model Rules explain that this requirement applies whether the non-lawyer is human or non-human. As such, when using generative AI tools, lawyers are responsible for ensuring that this process complies with all aspects of the Model Rules, including not only the duty of confidentiality discussed above, but also the duty of competence imposed by Model Rule 1.1, which requires lawyers to exercise "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." With this in mind, to the extent that lawyers utilize generative AI, it is essential that they never do so entirely and that any use of generative AI output is thoroughly checked for accuracy and supplemented by the lawyer to the extent necessary to discharge the duty to provide skillful, reasoned advice.

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Before asking their outside counsel to use generative AI to provide better and more efficient legal services, businesses should always ask what the law firm is doing to ensure that its AI adoption protects client confidentiality and otherwise complies with professional conduct obligations.