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Litigating in the Age of AI: Tips for Defending Against and Using AI to Your Advantage in Civil Litigation

Artificial intelligence is here, accessible, and used by litigants of every stripe. For litigators, the rise of AI presents a new set of challenges that do not fit neatly within existing procedural and ethical frameworks. For example, opposing counsel might quietly use AI-assisted drafting tools without disclosure. A pro se adversary might generate high-volume discovery requests untethered from the actual claims. Worse still, litigants might upload confidential client materials into third-party AI platforms without understanding how that data might be reused. This article offers practical tips for litigating in the age of AI and aims to foster disciplined advocacy and strategic adaptation, while protecting core litigation values in an era of rapidly evolving technology.

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Judicial Backdrop: New York Courts Are Already Policing AI Use

New York courts have been grappling with AI and issuing rulings that shape how AI intersects with evidentiary reliability, privilege, and professional responsibility. A prime example is Mata v. Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023), in which the Southern District of New York sanctioned counsel for submitting briefing by a generative AI tool that fabricated cases.

Judge Castel emphasized that while there is "nothing inherently improper" about using AI in litigation, lawyers retain a nondelegable duty to independently verify accuracy and exercise independent judgment. The court found that reliance on AI did not excuse failure to conduct a reasonable inquiry or otherwise excuse counsel's duties.

Mata has become a lodestar decision cited by New York courts and ethics bodies alike when addressing AI-assisted filings. For litigators, it provides both a cautionary tale and a strategic lever. When facing an AI-assisted opponent, particularly one submitting dubious authority, Mata provides clear support for demanding verification and, where appropriate, seeking sanctions.

1. Protecting Confidential Information From Unintended AI Disclosure

Perhaps the most underappreciated AI litigation risk is the potential disclosure of confidential or privileged material. Many generative AI platforms reserve rights to retain user inputs for training or analytics, meaning uploads of client documents can create exposure beyond a party's control. As courts confront the implications for discovery and privilege, two analytical approaches have emerged.

In United States v Heppner, 2026 U.S. Dist. LEXIS 32697 (S.D.N.Y. Feb. 17, 2026), the court held that a criminal defendant's communications with a publicly available generative AI platform were not protected by attorney-client privilege or the work-product doctrine. The court emphasized the absence of a reasonable expectation of confidentiality, given clear terms of service permitting retention and sharing of user inputs, including for training.

Some courts outside New York have taken a different approach in civil cases. In Morgan v. V2X, Inc., 2026 U.S. Dist. LEXIS 67939 (D. Colo. Mar. 30, 2026) and Warner v. Gilbarco Inc., 2026 U.S. Dist. LEXIS 27355 (E.D. Mich. Feb. 10, 2026), courts held that work-product protection may extend to AI inputs and results when the inputs are performed by an attorney or pro se litigant.

As Morgan notes, based on the design and configuration of an AI tool, "it is entirely reasonable for a person to expect some privacy and confidentiality when interacting with [it]." Morgan, 2026 U.S. Dist. LEXIS 67939, at *13. Moreover, as Warner explains, AI tool interactions are not conversations with

another party: “ChatGPT (and other generative AI programs) are tools, not persons, even if they may have administrators somewhere in the background.” Warner, 2026 U.S. Dist. LEXIS 27355, at *12.

Nevertheless, New York litigants must be mindful of Heppner, as it provides a roadmap for how courts in the Southern District might analyze privilege claims involving materials shared with generative AI systems, particularly those offered on a public, non-bespoke basis. Heppner also suggests a potential discovery hook in that litigants might attempt to pursue targeted discovery into whether an opponent uploaded sensitive or privileged materials into third-party AI tools, especially where the opposing party’s documents appear paraphrased, summarized, or otherwise altered in ways that suggest AI involvement.

Setting up procedural safeguards at the start of the case is key. Traditional confidentiality provisions often assume human review and controlled electronic storage, and they rarely contemplate third-party AI ingestion. One practical solution is to amend protective orders to expressly prohibit uploading protected material into generative AI systems that are not contractually bound to preserve confidentiality and data isolation. Such provisions should define AI tools broadly and require reasonable technological safeguards.

Counsel should also consider affirmative measures, such as producing materials in formats that are not easy to feed into external tools, to reduce downstream disputes over privilege waiver and confidentiality.

2. Do Not Underestimate AI

Many attorneys mistakenly assume they can easily spot AI-generated work and that it poses little strategic risk. Time is proving this assumption wrong.

Though early generative AI outputs might have been recognizable by their generic tone and over formalized citations, newer tools produce pleadings that track jurisdiction-specific standards, cite real cases, and mimic the stylistic conventions of local practice. A pro se litigant using AI can now file a complaint that survives an initial motion to dismiss even if the litigant does not understand the substantive law underlying the claims.

From a defense perspective, this means that form-based attacks may be less effective. A complaint that appears superficially competent may still rely on hallucinated facts, misapplied precedent, or legally irrelevant authority. Counsel should resist the urge to treat polished drafting as evidence of legal merit and continue to scrutinize pleadings.

This requires a return to fundamentals. Counsel must read AI-assisted filings with an eye for substance, not style. Verify every cited authority. Confirm that quoted language exists and appears in the asserted context. Courts have already sanctioned parties for submitting briefs citing nonexistent cases generated by AI tools. While that risk falls most heavily on the user of AI, it also creates an opportunity for the opposing party to challenge credibility when errors surface.

3. Use Discovery To Identify AI Issues

Discovery presents risks and opportunities with respect to AI. On the one hand, some litigants may use AI to generate sweeping discovery demands at minimal cost, thereby increasing the burden on the opposing party. On the other, AI use itself may implicate discoverable issues relating to document handling, privilege, and spoliation.

Though courts have not yet articulated a clear rule governing when and how AI use must be disclosed, targeted discovery can be appropriate where AI use affects the integrity of the litigation process. For example, if an opponent appears to have generated pleadings or discovery requests using AI, counsel may consider focused discovery asking whether generative AI tools were used to draft specific submissions, whether client documents were uploaded into any third-party platforms, and what safeguards were employed to protect confidentiality.

Targeted discovery can help litigants identify concrete risks. If an opponent fed confidential business records into a publicly accessible AI system, that could bear on protective order compliance or the need for remedial measures.

4. Anticipate and Contain AI-Driven Discovery Abuse

Given that AI can allow users to propound dozens if not hundreds of document requests easily, parties should consider reaching an agreement at the start of a case regarding how AI will be used. Alternately, it might be prudent to try to reach an agreement on limiting the number of discovery requests each party can propound.

In responding to AI-generated discovery, precision matters. Boilerplate objections might not suffice. Instead, targeted objections tied to relevance, burden, and temporal scope help courts see the disconnect between the requests and the case. Providing exemplars of reasonable discovery can further strengthen the argument.
Counsel should be proactive in seeking discovery conferences and articulating clear proportionality arguments. Judges are generally receptive to concerns about overbroad discovery, particularly when requests appear formulaic or divorced from the facts pleaded.

5. Educate the Court Without Appearing Alarmist

Finally, effective advocacy in this area requires judicial education. Many judges are keenly aware of AI developments, but few have encountered the full range of litigation-specific risks. The challenge is to raise those issues credibly and clearly.

When addressing AI use, focus on concrete impacts. Counsel might want to explain how AI affects pleading reliability, discovery burden, confidentiality, or evidentiary integrity in the specific case. They might also want to avoid abstract debates about whether AI is good or bad for the legal profession.

Courts care about case management, fairness, and adjudicative efficiency. As a result, they should not hesitate to enforce rules uniformly. AI use does not excuse factual inaccuracy, legal misrepresentation, or abusive discovery. Framing the issue this way encourages courts to integrate AI into existing doctrines, rather than treating it as a category-breaking problem.

Conclusion

Litigating against an opponent who is using AI is no longer a niche scenario. The challenge for advocates is to adapt without abandoning core litigation principles.

The lawyers who succeed in this environment will be those who neither ignore AI nor fear it. Instead, they will treat it as another tool that shapes incentives, alters behavior, and occasionally introduces risk. As with every other technological shift in litigation, disciplined advocacy remains the most effective response.

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