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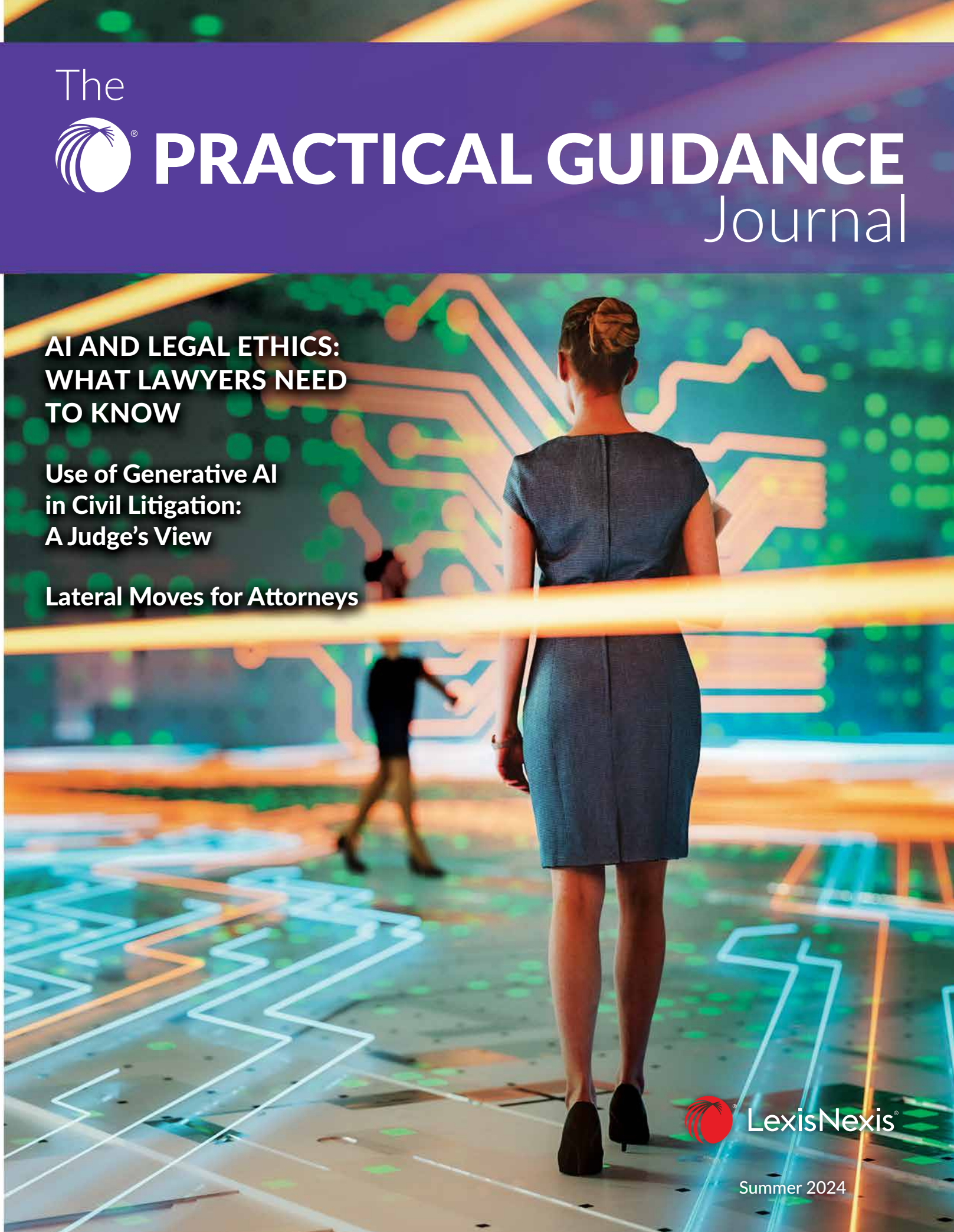

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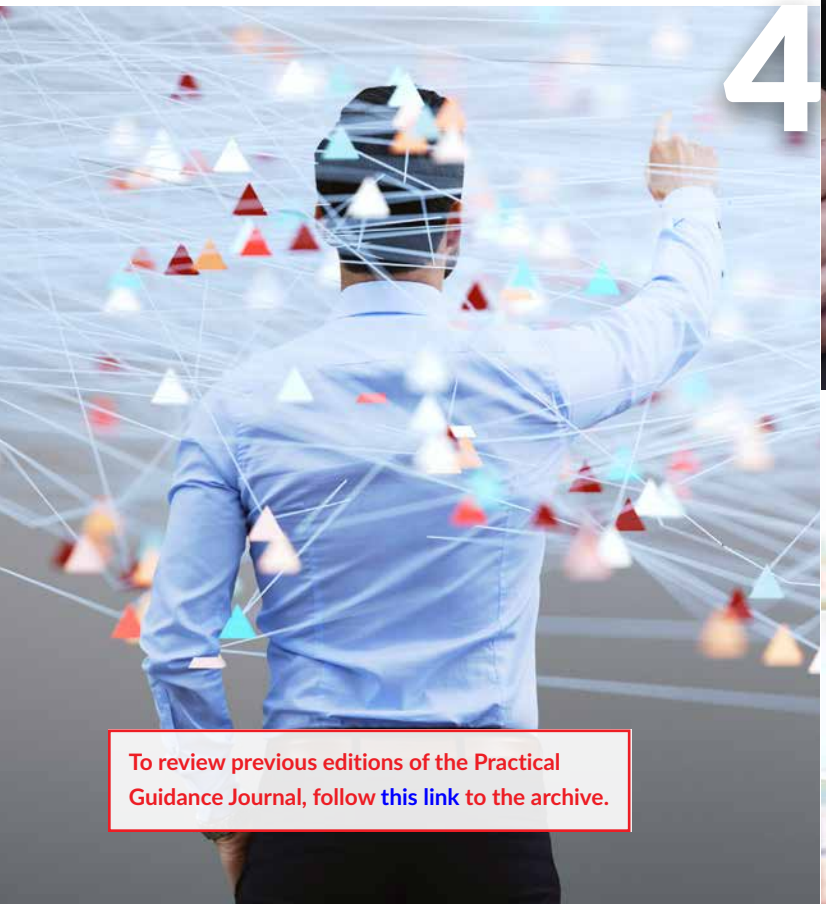

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The
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SUMMER 2024

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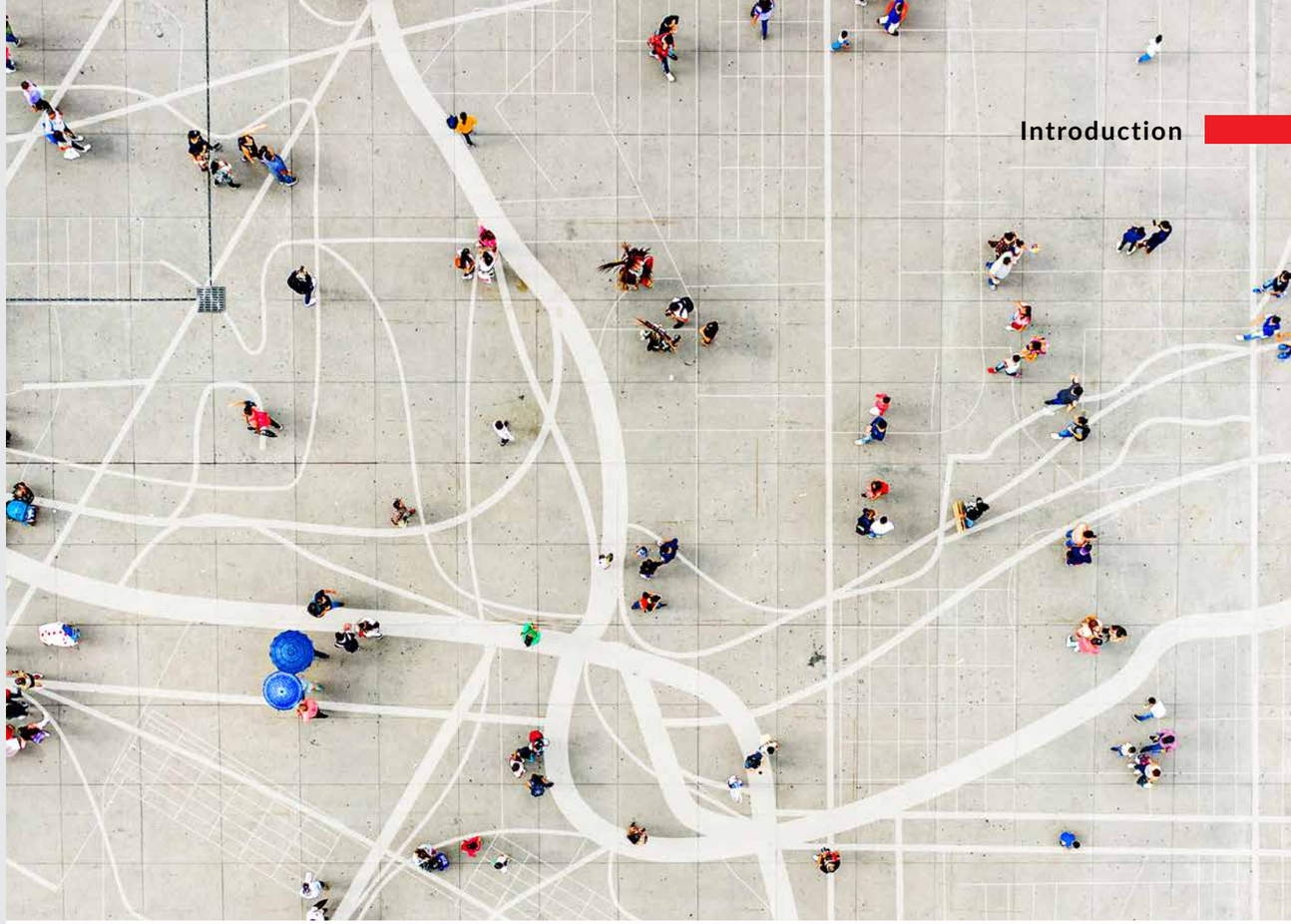

Introduction

AS ATTORNEYS LOOK FOR COST-SAVINGS AND EFFICIENCIES, ARTIFICIAL INTELLIGENCE (AI) OPENS THE DOOR TO countless ways for lawyers to streamline their work. This edition of the Practical Guidance Journal provides an overview of the ethical issues litigators must consider when using generative AI technology, including the specific professional ethics rules that apply.

Attorneys are already delving into uses for AI in tasks such as contract review, document drafting, and legal research. Explore insights from a judge into the use of GenAI in civil litigation, including discovery issues, the applicability of rules, use cases, and other key takeaways.

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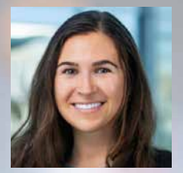


Hilary Gerzhoy, Julienne Pasichow and Grace Wynn HWG LLP

AI and Legal Ethics: What Lawyers Need to Know

This article discusses ethical issues litigators must be aware of when considering using generative artificial intelligence (AI) technology in their practice and covers topics such as the many ways litigators may use AI and the specific professional ethics rules that apply.

AI REPRESENTS AN EXCITING OPPORTUNITY FOR LAWYERS to streamline their practices, save their clients money, and provide better quality representation. It is also fraught with ethical risks. For this reason, lawyers should exercise caution in entrusting tasks to AI and, if and when they do, scrutinize the work it produces. The rules of professional responsibility do not require that lawyers shun AI technology—in fact, the rules encourage its use in some circumstances. But it is the role of a lawyer to ensure that AI work is checked and verified, and to exercise their own independent judgment on complex legal matters.

Opportunities Offered by AI

AI programs currently marketed to lawyers claim to be able to perform or assist with nearly every aspect of legal work. One of the most popular uses for AI in the legal profession is for document review. AI can streamline the document review process using programs like Technology-Assisted Review (TAR). TAR analyzes documents that human reviewers have marked responsive or nonresponsive and feeds the reviewers documents of the same type.[1] This allows lawyers to accelerate their review. After the AI has been trained to a certain level, lawyers can choose to have TAR finish the job—making its own determinations as to which documents are responsive and unresponsive.

Similar technology can be used to identify key documents, make privilege determinations, and group documents by category. In addition, AI can be used for the following:

- Searching discovery documents for relevant evidence
- Reviewing case documents to draft deposition questions
- Reviewing legal bills
- Assisting in contract drafting and brief writing[2]

ChatGPT, a popular AI chatbot, can perform a variety of legal tasks, including analyzing a legal scenario and providing the available causes of action. In fact, GPT-4, the most recent version of ChatGPT, has such a thorough understanding of legal concepts that it was able to pass the July 2022 bar exam, outperforming 90% of new lawyers taking the exam.[3]

Attorney Skepticism

The majority of lawyers remain unconvinced as to the benefits of AI. A recent LexisNexis survey found that only 10% of lawyers believe that generative AI tools, like ChatGPT, will have a transformative impact on law practice, and 60% of lawyers have no plans to use the technology at this time.[4]

The reticence is not born of ignorance: the survey found that 88% of lawyers and law students are aware of the technology, compared to 57% of consumers. Not only are they aware of the technology, but they would also like to use it for:

- Research (59%)
- Drafting documents (53%)
- Streamlining work (46%)
- Document analysis (40%)

The gulf between those who want to use AI in their practice but do not have immediate plans to do so can potentially be explained by the cloud of ethical uncertainty surrounding the use of AI.

Lawyer's Obligation to Be Competent

Rule 1.1 of the Model Rules of Professional Conduct requires that all lawyers provide competent representation to a client.[5] One aspect of providing competent representation is possessing the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6]

To date, more than 30 states have adopted a comment to the Model Rules of Professional Conduct that states that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[7]

AI is perhaps the single most relevant technology of our time. It, and related technologies, can help lawyers identify common mistakes like:

- Citing overturned statutes
- Misquoting legal authority
- Using terms inconsistently in a contract

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1. *See* Cat Casey, *How to Use Human-Centered AI in Legal Document Review*, Reveal, (Feb. 2, 2023). **2.** *See* Steve Lohr, *A.I. Is Coming for Lawyers, Again.* N. Y. Times, 10 Apr. 2023. **3.** Debra Cassens Weiss, *Latest version of ChatGPT aces bar exam with score nearing 90th percentile.* ABA J., Mar. 15, 2023. **4.** Rachel E., *Shock survey reveals most lawyers shunning game-changing AI technology.* JD J., Mar. 27, 2023. **5.** MODEL RULES OF PROF'L CONDUCT, R. 1.1 (2023). **6.** *Id.* **7.**MODEL R. 1.1 cmt. 8.

> As AI continues to refine and develop legal services each day, it is crucial to exercise diligence when using it.

As these issues and others can be spotted with the click of a button, lawyers may increasingly find themselves having to defend their refusal to use AI. And as a practical matter, a lawyer who insists on doing all aspects of their work manually may lose out on work in favor of lawyers who can use AI assistance to do the same tasks at a fraction of the cost. Lawyers may therefore find themselves in an increasingly fraught situation, where the ethical rules encourage use of AI, but also impose discipline for the various ways it can be misused.

Lawyers Must Oversee Any Work Done by AI

Without proper oversight, relying on AI can be problematic at best and catastrophic at worst. As AI continues to refine and develop legal services each day, it is crucial to exercise diligence when using it.

As noted above, lawyers must be competent in their practice of law under Rule 1.1 of the Model Rules of Professional Conduct (and the corresponding rule in each jurisdiction). Inherent in that responsibility is the obligation to ensure that work product generated by AI is coherent, defensible, and consistent, reflecting sound legal knowledge. Relying upon AI-produced or informed work product that does not meet this standard is likely to be deemed a violation of Rule 1.1.

To ensure that they are only utilizing AI systems that meet this standard, lawyers need to understand how AI operates and, where training the system is required, play an active role in the training. It is incumbent on a lawyer to proactively inquire with the vendor offering the AI system about how the technology operates, common pitfalls, and tips for optimal and accurate outcomes.

One challenge is that AI often operates in a so-called black box, where users are left in the dark as to why AI reached a conclusion or drafted an answer.[8] ChatGPT, for example, can analyze a factual scenario and provide causes of action to pursue based on those facts, but it cannot, as of today, tell you why it reached that answer. Without understanding why the question was answered in a particular way, a lawyer cannot assess the accuracy of the answer. At a minimum, competent representation means that you can tell a client how you reached an answer—the inputs, the weight of the factors, the countervailing arguments. Relying on black box AI fails to meet that requirement.

Because AI systems may misinterpret context or confuse words with multiple meanings, it is important that a lawyer ensure that any information fed to the system for training or AI learning purposes is accurate and unlikely to result in misinterpretation. This means that based on a task's complexity, potential for misinterpretation, or materiality, a lawyer may properly conclude that the project is better suited for a human lawyer than an AI system.

In the same way that lawyers in a supervisory role are required to "make reasonable efforts to ensure that the [lawyers that they supervise] conform[] to the Rules of Professional Conduct," lawyers are responsible for the quality of the results generated by AI systems.[9] Simply blaming mistakes, inconsistencies, or conclusions informed by improper context on an AI system will not cut it. The same is true if a lawyer attempts to evade responsibility by claiming to lack knowledge about how the AI system generally operates or how its conclusions are reached.

Work product and conclusions reached by AI cannot replace human judgment and must be reviewed by lawyers for completeness and correctness. In conjunction with a lawyer's Rule 5.1 supervisory obligations, a lawyer who supervises other lawyers needs to know whether those other lawyers are using AI to perform legal tasks.[10] It behooves a lawyer to conduct a thorough review to validate results reached by an AI system and ensure that they are consistent and replicable. For example, if AI is used for document coding and review at the discovery stage, a lawyer should consider reviewing a sample set of documents to validate the results generated by AI. Similarly, if AI is used to generate a legal document, a lawyer should closely review the language and the law implicated to ensure that both the relevant facts and law were considered.

Confidentiality Concerns

Protection of client confidences is perhaps the most fundamental duty in the legal profession. After all, the authority to practice law "is the true privilege, not the right, to be entrusted with a client's confidences, aspirations, freedom, life itself, property, and the very means of livelihood . . . "[11] Lawyers owe a duty of confidentiality to their clients, which means that they

> shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted [under certain circumstances, including "when appropriate in carrying out the representation"].[12]

This rule naturally applies when a lawyer is using AI in the course of representing a client.

In order to use AI to code documents, formulate legal conclusions, generate legal documents, or for a multitude of other pursuits, a lawyer must necessarily provide client information to the AI system. The client information provided to the AI system is generally viewable to the system vendors and/or developers. By way of example, ChatGPT stores personal user and conversation data, which can be viewed by developers and used to improve the system.[13]

Similarly, all documents uploaded to a document review platform—which could easily comprise millions of documents in a large-scale litigation—are subject to whatever security measures, strong or weak, the platform has in place. When using an AI program to generate legal documents, such as wills, incorporation documents, real estate documents, loan agreements, promissory notes, contracts, or a plethora of other documents, the application collects and stores highly sensitive personal or business information in order to construct the finished product.

All lawyers should take precautionary measures to understand the AI system's operative security policies, including the extent to which documents are retained, the time frame for which they are preserved, any encryption technology, what departments or parties employed by the AI vendor can view the information, and plans in the event of a data breach. You should also request and retain copies of the system's data privacy policies—if a client's information is ever compromised as a result of a data breach, you will be glad that you have it. Any information that you learn from vendors about the system's security features should be memorialized in writing for the same purpose.

8. Margaret Rouse, *What Does Black Box AI Mean?*, Techopedia, Mar. 10, 2023. **9.** MODEL RULES OF PROF'L CONDUCT, R. 5.1(b) (2019). **10.** *See* MODEL R. 5.1(b).

11. Baird v. State Bar of Ariz., 401 U.S. 1, 20 (1971) (Blackmun, Harlan, & White, JJ., dissenting). **12.** MODEL RULES OF PROF'L CONDUCT, R. 1.6(a), cmt.5 (2023). **13.** *See* Open AI, What is ChatGPT.

To comply with the Model Rule governing confidentiality, a lawyer must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[14] By proactively educating yourself about an AI system's privacy policies and response to a data breach, you will be better equipped to demonstrate your compliance with the rule if you ever find yourself in a less-than-ideal situation involving AI technology.

Duty to Communicate

The Model Rules contemplate that, as a general matter, the client chooses the objectives of the representation and the lawyer chooses the strategy to achieve those objectives. But lawyers are required to consult with the client about the means they choose in pursuit of their client's goals.[15] That means that if AI is writing legal documents, a client must be told, and given the opportunity to object. It follows that when a lawyer plans to use AI, including document review or generation technology, or other analysis tools, the client should be kept apprised of such plans so that the client can "make informed decisions regarding the representation."[16]

In many situations, the costs related to use of an AI system will be passed along to the client, and the lawyer may license or otherwise sign an agreement to use the AI technology on the client's behalf. It is crucial that a lawyer include their client in those conversations. Some clients, including those with cost sensitivities or heightened privacy concerns, may prefer not to pay for additional technology or assume additional privacy risks inherent in using AI products.

In consulting with the client, the lawyer should explain:

- The objective that AI involvement would achieve
- The anticipated costs
- Any benefits or drawbacks to using AI over lawyer (or support staff) labor[17]

14. MODEL R. 1.6(c). **15.** MODEL RULES OF PROF'L CONDUCT, R. 1.4(a)(2) (2023). **16.** Model Rule 1.4(b). **17.** *See* MODEL R, 1.4(a)(2) (providing that lawyer should "reasonably consult with the client about the means by which the client's objectives are to be accomplished").

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The potential benefits include increased accuracy, speed, cost savings, and replicability. Of course, if a client has more specific inquiries about how their data will be secured by the AI vendor or the protections that would be offered in the event of a privacy breach, the lawyer should consult with the vendor to adequately address such questions. Also keep in mind that work produced by AI as part of a case must be preserved as part of the client file.[18]

Conclusion

AI is a tool with the potential to transform the legal industry by making lawyering more productive and efficient. It also has potential for misuse. By understanding the ethical limitations on the use of AI, lawyers can feel more confident incorporating it into their practices. If a lawyer has questions about their obligations under the rules of professional conduct related to the use of AI or otherwise, they can and should get confidential legal advice to ensure compliance with the rules.[19]

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

18. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.15 (2023). **19.** *See* MODEL R. 1.6 cmt. 9 ("In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.").

Ronald J. Hedges, Esq. (FORMER U.S. MAGISTRATE JUDGE (D.N.J.)), RONALD J. HEDGES LLC

Use of Generative AI in Civil Litigation: A Judge's View

This article provides a judge's insights into the use of generative artificial intelligence (GAI) in civil litigation and covers topics such as potential uses of GAI, ethical concerns, how specific rules apply to GAI, discovery issues, and key takeaways.

Artificial Intelligence (AI) Overview

AI is the term used to describe how computers can perform tasks normally viewed as requiring human intelligence, such as recognizing speech and objects and making decisions based on data.

Machine learning is an application of AI in which computers use algorithms (rules) to learn from data. Machine learning adapts with experience. In other words, the algorithm can change as more data is fed into it.

Attorneys and their clients already use AI and machine learning for various purposes. Here are some uses of AI available to attorneys:

- **Contract review.** AI can review proposed text, flag potential issues, and suggest changes in text.
- **Document drafting.** AI can fit data into a template and prepare a document.
- **Predictive analytics.** AI can analyze data and predict results prior to commencement of a civil action.
- **Legal research.** AI can search and review large volumes of data and provide insight for arguments.
- **Risk management.** AI can identify legal risks, such as those related to data privacy and intellectual property.

In other words, AI can assist attorneys in the practice of law.

GAI is a type of AI that uses machine learning algorithms to create new and original content such as images, videos, text, and sound. GAI hit the news in late 2022, when ChatGPT became available from OpenAI, an AI research and deployment company with a stated mission to "ensure that artificial general intelligence benefits all of humanity."[1] ChatGPT uses data to generate text. Other GAI, such as DALL.E2, another product of OpenAI, can create images and art from a description in natural language.

GAI might be used by attorneys in litigation to, among other things, draft pleadings and engage in discovery. Attorneys should understand that reliance on the output of GAI in a specific instance might be problematic.

Ethical Implications

Before we delve into the uses and potential abuses of GAI, it would be worthwhile to think about the ethical duties of attorneys that might come into play. In August 2019, the House of Delegates of the American Bar Association adopted the following resolution:

> [T]he American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ('AI') in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.[2]

At the least, the resolution implicates several Model Rules of Professional Conduct (Model Rules). First, there is the attorney's duty of competence under Model Rule 1.1. More than 30 states have adopted a comment to the rule providing that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[3]

Second is the duty to maintain client confidentiality under Model Rule 1.6.[4]

These duties go together. An attorney must:

- Understand the technology that they or the client use
- Take reasonable steps to protect information "given" to the technology

1. Planning for AGI and Beyond, OpenAI (Feb. 24, 2023). 2. Resolution 112 (ABA August 2019). 3. MODEL RULES OF PROF'L CONDUCT, R. 1.1 cmt. 8 (2023). 4. MODEL RULES OF PROF'L CONDUCT, R. 1.6 (2023).

Moreover, assuming you are working with a vendor or vendors, you might have supervisory duties under Model Rule 5.3[5] which, in turn, relates back to understanding the relevant technology.

Substitute GAI for the word technology to drive your ethical duties home.

How the Federal Rules Apply to AI

Rule 11(b) addresses representations by attorneys, specifically stating:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.[6]

In addition, Rule 11(c)(1) addresses sanctions for a violation of Rule 11(b), providing:

> If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.[7]

Second, consider Rule 26(g), which focuses on discovery-related signatures by attorneys:

> Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, email address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:
>
> (A) with respect to a disclosure, it is complete and correct as of the time it is made; and
>
> (B) with respect to a discovery request, response, or objection, it is:
>
> (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
>
> (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
>
> (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.[8]

5. MODEL RULES OF PROF'L CONDUCT, R. 5.3 (2023). 6. Fed. R. Civ. P. 11(b). 7. Fed. R. Civ. P. 11(c). 8. Fed. R. Civ. P. 26(g).

> The use of GAI might spawn various lawsuits, including claims for breach of contract…misrepresentation…libel or slander…trademark or copyright… breach of privacy…(and) employment discrimination.

Note the reference in these rules to the need to undertake a "reasonable inquiry." How does an attorney do that if they are relying on the output of GAI to draft a pleading or conduct a search of large volumes of data? That is a question that a judge must confront should there be a dispute about, among other things, a pleading or a document production that incorporated GAI output and has been challenged.

The rules require an attorney to "stop and think" before affixing their signature to a court document. As the Comment to the 1983 amendments of Rule 26 states:

> [a]lthough the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.[9]

The duty to make a reasonable inquiry "is satisfied if the [attorney's investigation] and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard . . . In making the inquiry, the attorney may rely on assertions by the client . . . as long as the reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances."[10]

I will leave to the reader what reasonable inquiry they might make, for example, before presenting the court with information that originated from a client's or vendor's GAI output. Suffice it to say that whatever the attorney does, they should document their inquiry.

Possible Causes of Action

The use of GAI might spawn various lawsuits, including claims for:

- Breach of contract ("the GAI output was not what was contracted and paid for")
- Misrepresentation ("the GAI output was not what the provider said it would be")
- Libel or slander ("the GAI output included words or images that injured a person in some way")
- Trademark or copyright or other intellectual property infringement ("the GAI output incorporated words or images that were protected by law")
- Breach of privacy ("the GAI reviewed and gave output based on personal data in violation of a data privacy law")
- Employment discrimination ("the GAI output resulted in unlawful age, gender, or racial discrimination")

All of the above raise some threshold issues that judges (and attorneys) should expect to have to deal with. These include:

- Whether to execute a protective order under Rule 26(c)(1),[11] assuming there is a showing of good cause to limit disclosure of certain information
- How to resolve disputes about requests for, or responses to, discovery requests, prepared or responded to with the assistance of GAI
- Whether discovery will be allowed of GAI used for discovery and, if so, how that discovery might be conducted
- Whether opinion testimony relating to GAI will be necessary under Federal Rule of Evidence 702,[12] and, if so, whether that opinion satisfies the standard for admissibility under *Daubert*[13]
- Whether evidence of GAI output is admissible at trial

GAI-Created Court Documents

Let's take all the above and craft the following hypothetical. An attorney submits a brief in opposition to a summary judgment motion. On its face, the judge has no reason to believe that the brief was created by GAI and simply signed by the attorney. On these facts, absent some knowledge on the part of the judge and adversary counsel, what should the judge do?

9. Fed. R. Civ. P. 26 Advisory Comm. Notes to the 1983 Amen. 10. *Id.* 11. Fed. R. Civ. P. 26(c)(1). 12. Fed. R. Evid. 702. 13. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)

On the facts of the hypothetical, I believe the answer is nothing unless there is a local rule or chambers' practice that requires the attorney to certify that the brief is the product of the attorney (and their human partners or associates), and that GAI did not contribute to the brief.

We can vary the hypothetical. Assume that, somehow, the judge becomes aware the brief was the product of GAI or that GAI contributed to the brief. So what? Attorneys have been known to submit papers drafted by associates and signed by the attorney. Should it matter to the judge what the GAI wrote if the attorney signed the brief and complied with Rule 11(b)[14] or 26(g)?[15]

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For information on legislative developments on AI issues, see

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Now, for a variation on the theme, imagine GAI is being used to draft complaints that might be filed. Assume that the complaints are filed in large numbers, perhaps in response to a mass casualty. Again, there is the effect of the attorney's signature under Rule 11(b)[16] to consider. We also must remember here that particular attorneys might already have templates they use for a particular cause of action, and that the templates have blanks to be filled for, among other things, a plaintiff's name, address, and injuries.

I have no definitive answers to these hypotheticals. However, they raise questions that I would not be surprised to see play out in the real world, sooner rather than later.

Key Takeaways

This article suggests several takeaways or best practices related to GAI:

- GAI is here to stay and you and your firm and your clients should expect to see it and, perhaps, use it.
- Recall your duty of competence under Model Rule 1.1.[17] Understand the benefits and risks in GAI and discuss those with your client.
- Recall your duty of confidentiality under Model Rule 1.6.[18] Appreciate the need to take reasonable steps to protect confidential communications. This need reinforces your duty under Model Rule 1.1.[19] You can't take those reasonable steps unless you understand the technology and what it can and cannot do.
- If you or your firm or your client decide to use GAI, understand the nature of the data that GAI will input, where the data comes from, and whether there are restrictions on access or use of the data.
- Consider the legal consequences that might arise from GAI output and engage in a reasonable inquiry about that output before sharing or relying on that output.
- Be prepared to address discovery and admissibility of GAI output with a judge. L

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

14. Fed. R. Civ. P. 11(b). **15.** Fed. R. Civ. P. 26(g). **16.** Fed. R. Civ. P. 11(b). **17.** MODEL RULES OF PROF'L CONDUCT, R. 1.1 (2023). **18.** MODEL RULES OF PROF'L CONDUCT, R. 1.6 (2023). **19.** MODEL RULES OF PROF'L CONDUCT, R. 1.1 (2023).

Michael J. Lehet OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

10 Ways You Should Be Using Your Firm's **Knowledge Management Department**

This article discusses how law firm attorneys can get the most out of their knowledge management (KM) department, and it covers topics such as KM tools for attorneys, artificial intelligence (AI), and using KM to create client-facing solutions.

KM IS THE PROCESS OF LEVERAGING INNOVATION TO identify, organize, and share information, typically within an organization but also outside of it. This knowledge includes data, documents, expertise, and research, among others. As discussed in Professional Development: Life as a Knowledge Management Attorney, KM plays an increasingly critical role in delivering quality representation and client solutions. To make the most of KM, however, attorneys must know what KM resources are available and why, when, and how to incorporate them into their workflows.

Whether an attorney is a recent law school graduate or a shareholder with an extensive book of business, KM provides ever-evolving opportunities to boost efficiency and advance client services. The following are 10 recommendations for utilizing this important resource.

1 Boost Your Efficiency and Productivity with Direct-Access KM Tools

KM departments offer attorneys numerous direct-access (i.e., self-service) tools to help them work smarter, faster, and more in sync. Although these tools vary from firm to firm, they commonly include:

- Enterprise search engines that allow attorneys to mine a firm's document management system, client-matter records, time entries, and other resources in a few keystrokes and mouse clicks

- Resource centers containing turnkey checklists, model documents, and practice notes curated by KM attorneys and firm subject-matter experts
- Surveys, maps, and other multi-jurisdictional content that attorneys can use to compare and contrast legal requirements across countries, states, counties, and municipalities

These items are generally accessible via intranets, which are themselves powerful tools for attorneys to quickly identify everything from firm news to practice group content.

Before sending a firm-wide email, conducting external research, or drafting from scratch, you can and should use these KM tools to identify existing information or documents. Doing so saves significant time while ensuring attorneys appropriately use their firm's collective experience and work product.

2 Improve Drafting Accuracy and Speed with Document Automation

As the name suggests, document automation is the process of automating the creation of documents at scale. With document automation, attorneys specify the document of interest, answer a questionnaire to verify certain information (parties, jurisdiction, etc.), and generate the desired output. The process allows users to generate high quality documents in significantly less time.

KM departments can assist attorneys in determining whether to automate documents and, if so, the specific documents to automate. Depending on firm and client demand, automated content can range from administrative paperwork to transactional documents to litigation materials. Once a firm identifies target documents, KM departments can assist with building and deploying the underlying automation technology, whether the firm develops the automation in-house or in partnership with third parties. KM can also work with the appropriate teams to launch and market the technology inside and outside the firm.

3 Glean Critical Insights and Trends with Data Analytics and Practice Intelligence

Law firms are a rich source of data, including client-matter details, timekeeping entries, and billing records. Firms also have access to third-party data, ranging from publicly available court filings to information captured by external research services. Clients likewise hold their own data, some of which they routinely share with law firms during the course of representation. This data—when effectively captured, analyzed, and distilled—provides critical insights to both law firms and their clients.

KM can be valuable in identifying these data sources, collecting and culling the data, and delivering key information to internal stakeholders and clients in easily understandable form. Examples include dashboards and other visualizations on agency investigations, case resolutions, settlements, and attorney hours and fees. End users can filter and analyze such data across seemingly endless criteria, including industry,

company, firm, attorney, state, forum, and time frame. These analyses can help attorneys and clients identify big-picture insights and trends that might not otherwise be apparent, providing firms with an advantage over the opposition and clients with greater value.

4 Look to KM for Guidance on AI Developments

AI is the topic *du jour* in many circles, including at law firms and the entities they represent. AI promises efficiencies and other benefits—and in some instances, arguable drawbacks—that change everything from how employers screen candidates to the practice of law.

Attorneys can rely on KM for myriad AI-related needs. For example, KM teams can take the lead on keeping current on the latest AI innovations, including liaising with vendors to identify available offerings and expenses. As appropriate, and in partnership with other firm personnel, KM can internally develop AI tools, supplementing or even replacing innovations provided by third parties. KM can also train attorneys on AI-related developments and AI's potential impact on marketing, client relations, and practice. In short, attorneys can look to KM to deal with the noise of the current AI trend, while making sure they understand the lay of the land and can competently use these tools on their own.

5 Partner with KM to Design and Deploy Client-Facing Solutions

Clients have long expected attorneys to deliver efficient, high quality legal services. These services now also include 24-7 access to a firm's subject-matter expertise, work product, and data sources, such as template document packages, automation technology, topical resource kits, customizable extranet pages, data dashboards and visualizations, and client portals that provide a single point of access to these and other content. Depending on the firm, the offerings might be complementary or paid either *a la carte* or on a subscription basis.

Whether starting from square one or expanding an existing offering, attorneys can work with KM to help conceive, design, develop, and maintain these resources. As part of the process, KM departments combine their in-depth institutional knowledge, legal experience, and tech savviness to help brainstorm and road map potential solutions. KM also works with other departments that are either potential stakeholders in the project or necessary to its execution, including client services and information technology. If third-party involvement is necessary, KM can assist with vendor and other service provider retention and oversight.

6 Complement Internal KM Resources with Research Services

Research (i.e., library) services are often part of KM. While other KM teams focus on internal or client-facing resources, research services teams help attorneys with externally sourced information and content. In addition to conducting business and legal research, these teams assist with vetting and onboarding research tools, managing firm-wide research subscription portfolios, and training attorneys on available research resources. Research services teams also help guide attorneys looking to jump-start their own research. For example, these teams can assist attorneys with primary or secondary law research and tap analytics tools and other platforms to collect intel on prospective clients, competitors, adverse parties, and neutrals. Attorneys can also work with these teams to identify the news—and sources of news—that matters most to them. Research services, in turn, can develop customized alerts or feeds that timely deliver the latest, most on-point updates. Lastly, these teams participate in business development efforts through monitoring new case filings and tracking case activity.

To review previous editions of the Practical Guidance Journal, follow this link to the archive.

7 Better Budgeting and Plan Your Case with Legal Project Management

Attorneys can benefit from legal project management (LPM) resources offered by law firms. LPM helps attorneys more accurately plan and budget matters, track matter progress, and report key milestones to clients, among other things. Depending on the firm, LPM might be a KM team, its own department, or part of the organization's finance or pricing group.

LPM services can include personal assistance from dedicated LPM professionals that spans the full length of a matter:

- Scoping the matter and setting objectives based on client expectations and other considerations
- Planning the matter by identifying specific phases and tasks to be budgeted, staffed, and managed
- Creating and actively monitoring the matter budget, including identifying potential developments that might impact the budget and plans to deal with them as necessary
- Tracking and reporting on budget and matter progress, including to clients and insurance carriers
- Conducting post-matter assessments to identify lessons learned and ways to improve efficiency

For more independent-minded attorneys, LPM teams offer self-service resources, including matter scoping checklists, budget templates, and matter maps and planning guidance.

8 Give Your Practice and Industry Groups a Competitive Edge with KM

Law firm practice and industry groups should also take advantage of KM. Whether new or well established, these groups have knowledge gaps, pain points, and other needs that KM can help address. As part of this process, KM attorneys can coordinate with group leadership to identify these opportunities and then liaise with KM and other teams to develop and implement appropriate solutions. In addition, or alternatively, some KM departments publish a menu of services so groups can more easily identify and select services that work best for them. Although the solutions are as diverse as the groups themselves, they often include collaboration hubs, data visualizations, topical newsfeeds, resource roadmaps, and robotic process automations. At some firms, KM attorneys also coauthor group publications and moderate group podcasts and webinars. KM teams can ensure these materials are captured and readily available internally and externally, the latter typically in partnership with the firm's client services and communications teams.

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PROFESSIONAL DEVELOPMENT: LIFE AS A KNOWLEDGE MANAGEMENT ATTORNEY

9 Market KM Offerings during the Request for Proposal (RFP) and Pitch Process

Integrated across numerous aspects of law firm practice, KM presents an opportunity to improve efficiency, increase profitability, and expand business. Although every KM tool or service arguably helps firms develop business, either directly or indirectly, there are three ways attorneys can meaningfully market KM offerings. First, attorneys should incorporate information about their firm's KM tools and services into written RFP responses. Second, attorneys should demo their firm's KM resources as part of the pitch process. Third, attorneys should regularly apprise existing clients of the firm's KM tools and services, particularly client-facing solutions.

KM teams can assist attorneys with these business development opportunities, including preparing or approving language on KM offerings for written RFP responses or other marketing materials. KM colleagues can also present live demos or on-demand webinars on available KM tools and services. In addition, KM teams can draft cheat sheets, talking points, and other guidance for attorneys who prefer to market these resources themselves.

10 Regularly Educate Yourself on Available KM Tools and Services

Although law firms offer a variety of KM tools and services, busy attorneys sometimes overlook them. As a result, the attorney—and the attorney's firm and clients—do not realize the full value of KM. Attorneys can avoid these missed opportunities by taking advantage of available KM training resources.

At many firms, KM training begins with new-attorney orientation and continues throughout that attorney's career. These trainings typically include live or on-demand webinars introducing new hires to the firm's various KM tools and services. KM departments supplement this training with educational sessions at attorney retreats, practice and industry group meetings, and local office lunch-and-learn presentations. In addition to attending these programs, attorneys can enlist KM for one-on-one training on the tools and services most important to their practice. Attorneys should also consult other available KM training resources, including guidebooks, quick reference cards, and firm updates on KM-related developments. By learning about a firm's KM resources at the outset and remaining current, attorneys will better position themselves to take advantage of KM in all aspects of their practice. For practicing attorneys interested in a career in KM, meaningfully learning and using their firm's KM resources is also important. L

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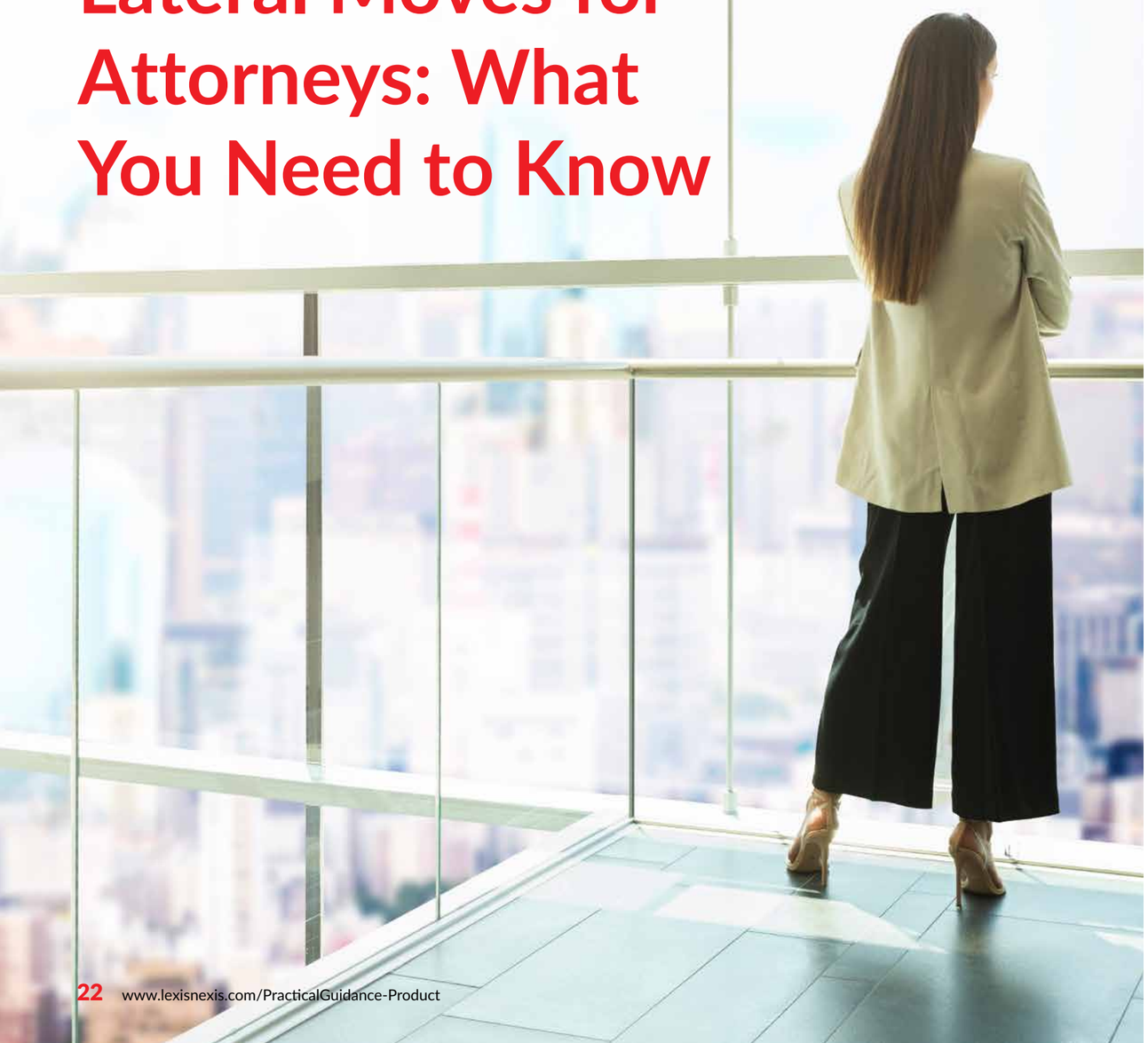
RESEARCH PATH: ***Civil Litigation > General Litigation > Practice Notes***



Hilary Gerzhoy, Amy Richardson, HWG LLP, **and Lauren Snyder** SAS

Lateral Moves for Attorneys: What You Need to Know



This article provides guidance for an attorney relocating to another firm, and covers topics such as what to consider when considering a lateral move; how to navigate your ethical responsibilities; and practical tips for associates, counsel, and partners.

THE DAYS OF STAYING AT THE SAME FIRM FOR THE duration of one's career are mostly a thing of the past. From junior associates to senior partners, lateral moves are commonplace. There are, however, a number of obstacles to a successful move. While this article provides high-level guidance, anyone considering making a lateral transfer should consider consulting counsel to understand any unique requirements, jurisdictional, or otherwise.

What to Consider in Making a Lateral Transfer

If you are considering making a lateral move, you should consider the following four topics:

- The new firm's structure
- The new firm's benefits and your proposed role
- The new firm's compensation structure
- If applicable, the new firm's partnership agreement and engagement agreement

You should also consider whether the founders of the firm are still present. If they are, that means the firm has yet to undergo the generational transition to new leadership and, if you join, you may become part of that transition, which can be difficult.

Beyond looking at the website to determine basic information about the firm's structure, you should inquire about the financial health of the firm. For example, ask how much debt the firm has, and try to learn how much turnover occurs at the firm by asking how long various attorneys have been there.

Regarding benefits, beyond asking about basic benefits like health insurance and 401(k) matching, you should ask if there is a defined benefit pension plan that is unfunded and closed to new entrants. If the plan is not closed, ask if you will have enough years of service to qualify at a reasonable age if you stay.

If you are planning to bring others with you, particularly if they are essential to your practice, you should discuss how the firm will pay and promote those people. Also consider whether you will need the help of other lawyers already at the firm to support your practice. If so, figure out who will be able to assist you. If you are instead supplementing an existing practice at the firm, consider carefully how you will fit in.

In terms of compensation, you should ask how it is determined and who makes that determination. For the first year or two, the firm may guarantee a certain level of compensation and, if you are a partner, consider how much business you need to bring in to be paid

that amount, both in those first couple of years and going forward. Also ask about the capital contribution and the ways to pay it. You may be expected to pay it immediately or, as is often the case, you may be able to borrow a portion of it and repay it over time. Also be sure to negotiate your billable rate at your new firm to help make the transition easier for existing clients.

Finally, review a partnership agreement carefully. Look at the section regarding withdrawing partners, in particular, to see how the firm handles withdrawal and other issues that may arise when a partner withdraws. You should also ask to review the firm's standard engagement letter and compare it to your existing agreements with clients to see if there are significant differences that might impact your relationship with your clients. Broad advance waivers, for example, could create tension with existing clients.

Practical Tips for Associates and Counsel

There are certain core considerations that associates and counsel should make before making a lateral transfer. You should start by looking at the firm's website to assess the firm's structure. Determine the ratio of partners to associates and whether there are different types of partners (i.e., equity and non-equity partners). If you are a junior lawyer, be aware that firms with few partners or two-tiered partnerships may offer fewer advancement opportunities.

> Often partnership agreements mandate how much advance notice of a departure that an existing partner is required to provide. Typical provisions call for 30-60 days. Note that in 2019, the ABA held in ABA Opinion 489 that a firm's fixed notice period can be unenforceable.

Note that it can be tempting to make a lateral transfer when you are having a difficult stretch at work. But be careful not to let this temptation cloud your judgment. Recruiters are paid to induce lawyers to move between firms. Pressure test the promises, such as:

- Is it really a firm that cares about work/life balance?
- What is the billable hour requirement and what counts towards it?
- Are you encouraged (or required) to do business development and will you get credit for the time you spend doing it?
- How much autonomy will you have in developing your practice?

Many firms place associates and counsel into designated practice groups. Find out if your potential practice group will have enough work to ensure that you will be able to meet your billable targets. If not, will you be allowed to get work from other practice groups?

You should also seek answers to the following questions:

- What percentage of associates and counsel were bonus-eligible in years past?
- In a multi-office firm, can you work with partners in different offices?
- What does the path to partnership look like?

If you're moving as counsel, you'll want to know:

- What targets do you need to meet to be considered for partnership?
- How many counsel make partner in a typical year?
- If associates are given a pay bump or mid-year bonus, will counsel be given an equivalent bonus?

It's important to know the answers to these questions before making a move. Once you secure an offer, ask to speak to senior associates and counsel in the office to ask these questions.

Practical Tips for Partners

If you are a partner making a lateral transfer, the first step to a successful move is to review your current firm's partnership agreement. Your partnership agreement is a contract. That means that for its terms to be binding, there must be adequate consideration.[1]

Importantly, if any term within the agreement conflicts with the ethics rules, the term is likely unenforceable as against public policy.[2]

You'll want to pay particular attention to what your partnership agreement says about:

- Notice of departure
- Notice to clients
- Capital repayment (e.g., what is the period over which capital will be repaid? Does the period vary according to the circumstances of the withdrawal?)

You'll also want to consider the timing of your departure. The less money the firm owes you, the less leverage the firm will have in negotiations about your departure. Firms can and do hold back money they owe you. This usually falls into two buckets:

- Your capital account
- Undistributed profits

As such, many partners wait to get to paid out for the previous year before announcing a departure.

Providing Notice to Your Existing Firm

Often partnership agreements mandate how much advance notice of a departure that an existing partner is required to provide. Typical provisions call for 30–60 days. Note that in 2019, the ABA held in ABA Opinion 489 that a firm's fixed notice period can be unenforceable. ABA Opinion 489 states, "A lawyer who wishes to depart may not be held to a pre-established notice period particularly where, for example, the files are updated, client elections have been received, and the departing lawyer has agreed to cooperate post-departure in final billing."[3] Where a fixed notice period serves to "restrict or interfere with a client's choice of counsel" or to "hinder or unreasonably delay the diligent representation of a client," it is unenforceable.[4]

For example, if a firm imposes a 30-day notice period, as most do, but the lawyer's client files are up to date and the lawyer promises to help in the transition going forward—even if that transition is not complete—the firm cannot hold the lawyer for 30 days or dock the lawyer financially.

Don't Solicit Any Associates or Staff at Your Current Firm

Do not solicit associates or staff members while you are still a partner at your current firm. Separate from their ethical obligations, "members of a partnership owe each other a duty of loyalty and good faith, and 'as a fiduciary, a partner must consider his or her partners' welfare, and refrain from acting for purely private gain.'"[5] Once you have left your firm, you can feel free to contact former colleagues about transitioning to your new firm.

Note that you are free to tell your other partners about your move, but you risk someone spreading the news before you are ready. Also be aware that you are prohibited from providing billing statistics about associates or partners you want to bring with you to a new firm because it is viewed as proprietary information. For example, you cannot say to the new firm, "I want to take Bob with me. Bob bills 2,200 hours a year and collects 90% of it."

Organize Your Client Files

Once you have decided to move, you should begin the process of getting your client files in order. To do this, save all documents and emails in designated client folders. Do not download any files or email any documents to yourself. Any manipulation of a client's file—downloading documents onto a USB, emailing correspondence to a personal email account, etc.—will leave a record. Your current firm could be alerted to the manipulation and could misconstrue it as an effort to remove client files without firm or client authorization.

Remember that the client file is the client's property—it does not belong to you or your firm.[6]

While some jurisdictions only require attorneys to include the end product of their services in the client file, the majority of jurisdictions follow the entire file approach, meaning attorneys must provide all papers and property related to the representation absent a specific exception.[7]

1. *See* 3 Richard A. Lord, WILLISTON ON CONTRACTS § 7:8 (4th ed. 2019); 59A Am. Jur. 2d Partnership § 94. 2. *See* Cohen v. Lord, Day & Lord, 550 N.E.2d 410 (N.Y. 1989) (holding that a partnership agreement "which conditions payment of earned but uncollected partnership revenues" upon adherence to a non-compete provision in violation of the New York Code of Professional Responsibility is "unenforceable . . . as against public policy"). 3. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 489 at 5 (2019).

4. *Id.* at 7. 5. Gibbs v. Breed, Abbott & Morgan, 710 N.Y.S2d 578, 581 (App. Div. 2000). 6. *See* D.C. Bar Legal Ethics Comm., Op. 333 (2005) (requiring attorney to surrender to client entire file upon termination of representation); In re Cupples, 952 S.W.2d 226, 234 (Mo. 1997) ("The client's files belong to the client, not to the attorney representing the client. The client may direct an attorney or firm to transmit the file to newly retained counsel."); Atty. Griev. Comm'n of Maryland v. Potter, 844 A.2d 367, 382 (Md. 2004) (finding attorney's removal of client files without authorization of the law firm or clients violated Md. Rule 19-308.4). 7. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 471 (2015) (considering ethical obligations of a lawyer to surrender papers and property to a former client).

The firm acts as the custodian of the client file if and until the client requests their file. Accordingly, your current firm is obligated to maintain the client's file until instructed in writing to provide the file elsewhere.

If your client intends to follow you to your new firm, have them request their file upon your departure. The firm will be required to give the file to the client or their agent (i.e., you, if you will continue to represent them).

Inform Your Current Clients

As a general matter, a lawyer cannot contact clients in advance of informing their current firm of the departure.[8]

After you've informed your current firm that you are leaving, you are obligated to notify your current clients of your departure.[9]

A firm cannot separate a departing lawyer from their clients while the lawyer remains at the firm without the client's consent. That is so because, "[c]lients are not property . . . [s]ubject to conflicts of interest considerations, clients decide who will represent them going forward when a lawyer changes firm affiliation."[10] A firm cannot, as many historically have, re-staff a case to remove a departing lawyer without client consent. In particular, a firm cannot, "absent client direction or exigent circumstances aris[ing] from a lawyer's departure," simply "assign new lawyers to a client's matter, pre-departure, displacing the departing lawyer."[11] So, too, is a firm prohibited from denying a departing lawyer access to their client files, email, voicemail, firm resources—including the ability to work with other firm lawyers—or requiring a departing lawyer to work from home.[12]

Virginia is the only jurisdiction that prohibits the firm or the departing lawyer from unilaterally notifying clients absent a failed attempt to agree on a joint communication.[13]

When informing your clients of your move, take care not to disparage your current firm. While you might consider telling your clients about your new firm's capabilities, note that the law is unsettled about the consequences of going beyond that to solicit the client to come with you.

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8. D.C. Bar Legal Ethics Comm., Op. 273 (1997); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Joint Formal Op. 300 (2007); Conn. Bar Ass'n Prof'l Ethics Comm., Op. 25 (2000); MODEL RULES OF PROF'L CONDUCT, R. 7.3 (018) (prohibitions on solicitation). **9.** MODEL RULES OF PROF'L CONDUCT, R. 1.4 (2018) (Communication); *see also* D.C. Bar Legal Ethics Comm., Op. 273. While they may try, your current firm cannot forbid you from contacting your current clients. MODEL RULES OF PROF'L CONDUCT, R. 1.1, 1.3–1.4 (2018). **10.** ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 489 at 3 (2019). **11.** *Id.* at 3–4. **12.** *Id.* at 6–7. **13.** *See* Va. Sup. Ct. R. pt. 6, sec. II, 5.8.

Some jurisdictions offer guidance or impose requirements regarding the content of your departure notice to clients. For example, comments 1 and 2 to Virginia Rule 5.8[14] provide that notice shall contain:

- Contact information for the departing lawyer
- The ability and willingness of the lawyer and/or firm to continue the representation, subject to Rule 1.16[15]
- Whether continued representation by the lawyer/firm is not possible and the remaining options for continued representation, including the right to choose other lawyers/firms

D.C. Ethics Op. 273[16] provides that notice should include:

- The fact and date of the change in affiliation
- Whether the lawyer wishes to continue the representation
- Information about the new firm (such as fees and staffing) sufficient to enable the client to make an informed decision concerning continued representation by the lawyer at the new firm
- Any conflicts of interest affecting its representation at the new firm

Note that the ABA's test for which client should get notice is whether the client would identify you as one of the lawyers who works on their case. Should a client choose to follow you, make sure their decision is in writing. The ABA and other authorities encourage joint written communication offering the client the choice to stay at the existing firm or go with the departing lawyer.[17]

Check for Conflicts of Interest

Pursuant to ABA Model Rule 1.7,[18] among others, a lawyer has an ethical duty to check if conflicts exist at the new firm before making the move. To do that, you'll need to provide the new firm with a list of all your clients, and all clients about whom you learned information even if you did not perform work for them.[19]

But note that pursuant to ABA Model Rule 1.6, you cannot provide that information until "substantive discussions regarding the new relationship" have begun.[20] ABA Model Rule 1.6(b)(7) allows for a lawyer to disclose non-privileged information about their clients and the nature of their representation provided disclosure does not prejudice the client.[21]

Once you've sent your list of clients to your new firm, you and your new firm must determine whether:

- You will be adverse to a current client (ABA Model Rule 1.7(a)(1))[22]
- The new firm's effectiveness on behalf of an existing client will be compromised (ABA Model Rule 1.7(a)(2) (material limitation conflicts))[23]
- Either you or your new firm will be adverse to a former client on a substantially related matter[24]

Should a conflict arise, one option is to be screened from the matter giving rise to the conflict. Many states permit screens in lateral moves, but they must be done correctly, in a timely manner, and in compliance with notice and certification requirements.[25]

Once you move to your new firm, keep in mind that your conflicts follow you.[26]

Once You're Settled at Your New Firm

Inform adversaries, courts in which you have pending matters, and all bars to which you belong that you now have a new employer. Many local rules require a lawyer to also notify adversaries of a change in employer as soon as possible.[27] If your move involves changing the state in which you practice, check attorney licensure requirements. Note that many states require that lawyers obtain and display a privilege license, a professional license that allows you to practice.[28] L

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

14. *Id.* **15.** Va. Sup. Ct. R. pt. 6, sec. II, 1.16. **16.** D.C. Bar Legal Ethics Comm., Op. 273. **17.** *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 414 (1999); Va. Sup. Ct. R. pt. 6, sec. II, 5.8. **18.** MODEL RULES OF PROF'L CONDUCT, R. 1.7 (2018). **19.** MODEL RULES OF PROF'L CONDUCT, R. 1.9 (2018); *see also* Cardinale v. Golinello, 372 N.E.2d 26 (N.Y. 1977) (law firm disqualified after hiring associate who did not previously represent, but who was deemed to know facts about, the firm's client's adversary). **20.** MODEL RULES OF PROF'L CONDUCT, R. 1.6 cmt.13 (2018). **21.** MODEL RULES OF PROF'L CONDUCT, R. 1.6(b)(7) (2018). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 455 (2009) (Disclosure of Conflicts Information When Lawyers Move Between Law Firms). **22.** MODEL RULES OF PROF'L CONDUCT, R. 1.7(a)(1) (2018). **23.** MODEL RULES OF PROF'L CONDUCT, R. 1.7(a)(2) (2018). **24.** MODEL RULES OF PROF'L CONDUCT, R. 1.9(a) and (b) (2018). **25.** MODEL RULES OF PROF'L CONDUCT, R. 1.10(a)(2) (2018); *see also* State Adoption of Lateral Screening Rules, Am. Bar Ass'n (2015). **26.** *See* MODEL RULES OF PROF'L CONDUCT, R. 1.10 (2018) (holding that a migrating lawyer's conflicts are imputed to the new firm). **27.** D.D.C. LCvR 83.15(c). **28.** *See* N.C. Gen. Stat. § 105-41 (North Carolina rule requiring attorneys to pay $50 annually to obtain "a statewide license for the privilege of practicing the profession").

Hilary Gerzhoy, Amy Richardson, HWG LLP, **and Lauren Snyder** SAS

What Associates Need to Know About Changing Law Firms Checklist

This checklist provides guidance for associates considering relocating to another firm and covers topics such as how to evaluate a potential new law firm, questions to ask at your interview, ethical responsibilities, and practical tips.

How to Evaluate a Potential New Law Firm

If you are considering making a lateral move, you should consider the following four topics:

- The new firm's structure
- The new firm's benefits and your proposed role
- The new firm's compensation structure
- If applicable, the new firm's partnership agreement and engagement agreement

You should also consider whether the founders of the firm are still present. If they are, that means:

- The firm has yet to undergo the generational transition to new leadership.
- If you join, you may become part of that transition, which can be difficult.
- The new generation of leadership may:
  - ✓ Have visions for the firm that do not align with your objectives
  - ✓ Not prioritize your practice area
  - ✓ Make policy or compensation changes that could impact your practice and your chances of elevation

There is also the question of whether the firm will be viable once the founding partners leave. If the founding partners were rainmakers, and the next generation of attorneys mainly serviced those rainmakers' clients, clients may choose to go elsewhere once the founding partners leave.

Weighing the Factors

Like stated above, there are certain core considerations you should contemplate before making a lateral transfer, including:

- **Firm's structure.** You should start by looking at the potential firm's website to assess the firm's structure. Determine the ratio of partners to associates and whether there are different types of partners (i.e., equity and non-equity partners). Be aware that firms with few partners or two-tiered partnerships may offer fewer advancement opportunities. In two-tiered partnerships, getting elevated from non-equity partner to equity partner is often dependent solely on a sizable book of business or sponsorship by a particular practice group or firm leader, which might be difficult for non-equity partners to achieve. That means that most of the partnership could remain stagnant as non-equity partners.
- **Your motivation to move.** It can be tempting to make a lateral transfer when you are having a difficult stretch at work. Be careful not to let this temptation cloud your judgment.
- **Recruiter representations.** Recruiters are paid to induce lawyers to move between firms. Pressure test their promises, such as:
  - ✓ Is it really a firm that cares about work/life balance?
  - ✓ What is the billable hour requirement and what counts towards it?
  - ✓ Are you encouraged (or required) to do business development and will you get credit for the time you spend doing it?
  - ✓ How much autonomy will you have in developing your practice?
- **Practice groups.** Many firms place associates and counsel into designated practice groups. Find out if your potential practice group will have enough work to ensure that you will be able to meet your billable targets. If not, ask if you will be allowed to get work from other practice groups.

Check for Conflicts of Interest

A lawyer has an ethical duty to check if conflicts exist at the new firm before making the move. To do that, you'll need to provide the new firm with a list of:

- All your clients
- All clients about whom you learned information even if you did not perform work for them[1]

Once you've sent your list of clients to your new firm, you and your new firm must determine whether:

- You will be adverse to a current client[2]
- The new firm's effectiveness on behalf of an existing client will be compromised[3]
- Either you or your new firm will be adverse to a former client on a substantially related matter[4]

If there is a conflict, the common option is to see if you can be screened from the matter giving rise to the conflict.

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1. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.9(b)(2) (2018). **2.** MODEL RULES OF PROF'L CONDUCT, R. 1.7(a)(1) (2018). **3.** MODEL R. 1.7(a)(2) (material limitation conflicts). **4.** MODEL R. 1.9(a), (b).

Potential Interview Questions

Beyond looking at the potential new firm's website to determine basic information about the firm's structure, consider asking the following:

- How much debt does the firm have?
- How much turnover occurs at the firm (consider asking how long various attorneys have been there)?
- How is compensation determined and who makes that determination (for the first year or two, the firm may guarantee a certain level of compensation)?
- What are the basic benefits like health insurance and 401k matching?

You should also ask if there is a defined benefit pension plan that is unfunded. Unfunded pensions, also known as pay as you go plans, have the following features:

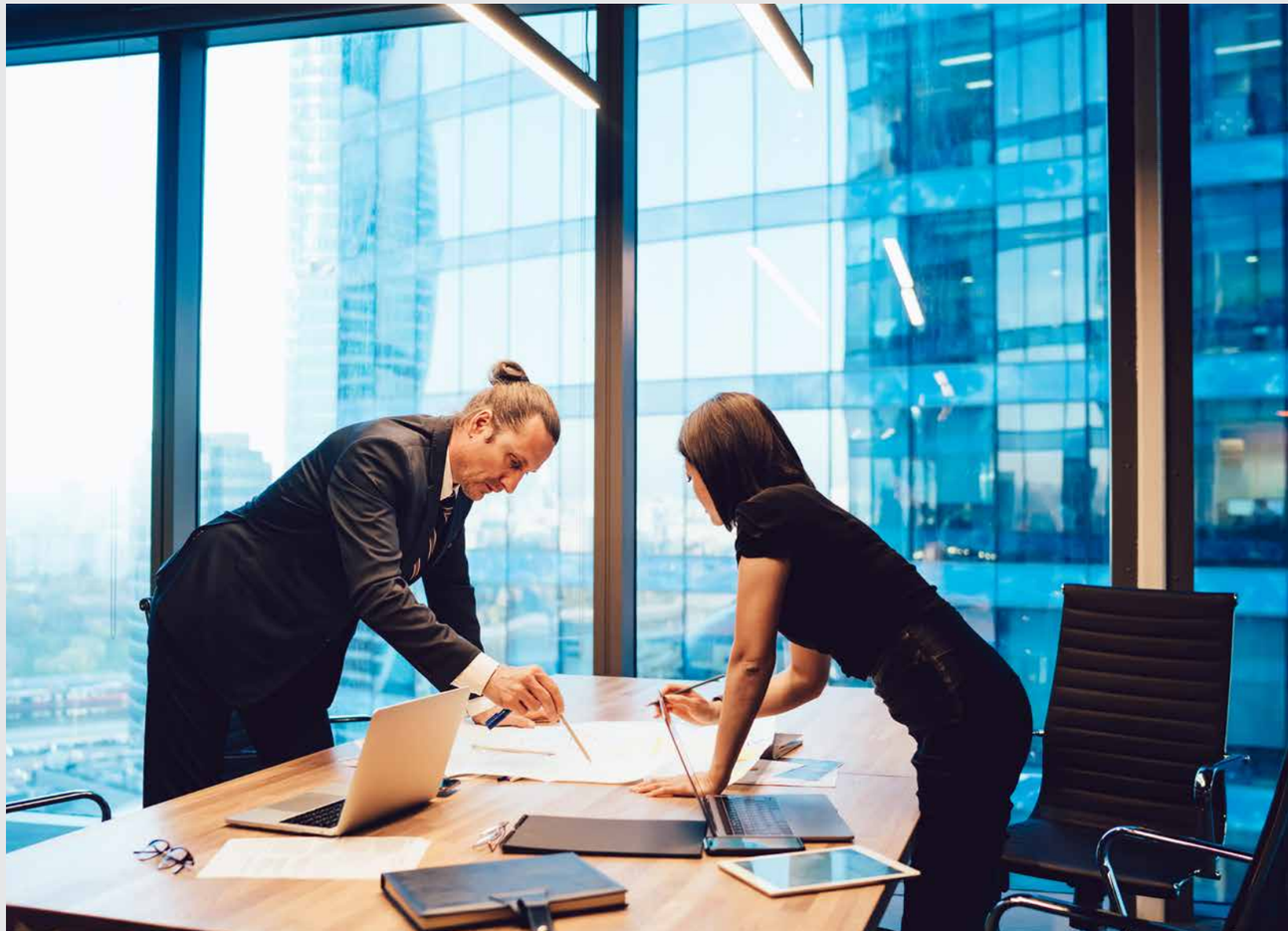
- They do not have assets set aside and instead use the employer's current income to fund payments to beneficiaries.
- The ability to pay in the future may depend on the financial health of the firm.
- The plan could also have requirements for entry, and you may not be eligible for the plan if the plan is closed.

If the plan is not closed, ask if you will have enough years of service to qualify at a reasonable age if you stay.

You should also seek answers to the following questions:

- What percent of associates and counsel were bonus-eligible in past years?
- In a multi-office firm, can you work with partners in different offices?
- What does the path to partnership look like?

It's important to know the answers to these questions before making a move. Once you secure an offer, ask to speak to senior associates and counsel in the office to ask these questions.



Organize Your Client Files

If you decide to move, start organizing your client files. To do this:

- Save all documents and emails in designated client folders
- Do not download any files or email any documents to yourself

Final Steps Once You're Settled at Your New Firm

Make sure that courts in which you have pending matters and all bars to which you belong are informed that you now have a new employer. In addition:

- If your lateral transfer means you are changing the state in which you practice, check attorney licensure requirements.
- Note that many states require that lawyers obtain and display a privilege license, a professional license that allows you to practice.[5] L

RESEARCH PATH: ***Civil Litigation > General Litigation > Checklists***

5. *See* N.C. Gen. Stat. § 105-41 (North Carolina rule requiring attorneys to pay $50 annually to obtain "a statewide license for the privilege of practicing the profession.").

Ronald J. Levine HERRICK, FEINSTEIN LLP

Business Development **for Litigators**

This article provides guidance for litigators on developing new business and covers topics such as building your presence as a thought leader, marketing, and networking.

THREE OF THE MOST IMPORTANT WORDS IN A LITIGATOR'S lexicon are book of business. Most lawyers are not exposed to those words until after they graduate from law school and start working in a law firm. While new graduates may be well-versed in the skills required for legal research and oral advocacy, they may know little or nothing about the techniques required to bring in new business.

This is unfortunate. New litigators who join a law firm will soon discover that the size of a lawyer's book of business is equivalent to a professional baseball player's batting average. Lawyers with a large client base are highly prized by law firms and can be well-compensated. If a lawyer considers moving to another firm, one of the first questions a potential new firm will ask is: "What is your book of business?"

There are many other good reasons to develop a client base. One of the great pleasures in practicing law is to have clients who look to you as their lawyer. It is much more enjoyable to serve as the lead lawyer on a matter, as opposed to working as the service attorney for a partner who has the direct relationship with the client.

How Litigators Obtain Clients

Transactional lawyers will find themselves involved in deals in which the client may be earning a nice profit. Hopefully, the client will be more than happy to engage the transactional lawyer in order to get the deal done. More legal work may come as the client does additional deals.

For some companies, especially those in highly regulated industries and those involved in protecting intellectual

property, litigation is a cost of doing business. They understand litigation and anticipate that they will need to retain excellent litigators. Clients who are experienced in litigation will be a good source of current and future engagements.

With that said, litigation, for many potential clients, is not viewed as a profitable enterprise. Litigators are often retained when the client is facing an unanticipated legal crisis. Indeed, litigators are not unlike oncologists—they may be highly respected for their skills, but most people hope they will never have to use them.

In addition, if a litigator gets retained for a trial, it may well be a one-off engagement. There may not be more work for that client when the trial concludes.

Accordingly, litigators often cannot anticipate repeat business from their clients, and must be vigilant in pursuing new clients and matters. New litigation matters will come up unexpectedly, and the client may not have a great deal of time to select counsel. Litigators must have the skills, credentials, and reputation to be in a position to be considered for the new engagement.

Rainmaking Can Be Mastered

Contrary to a common belief, there is no set personality type for a rainmaker. While some rainmakers are consummate extroverted networkers, a more introverted litigator who has developed a valuable expertise and reputation in a field can build a large book of business. Ultimately, each litigator must develop an approach and style that feels comfortable. Some litigators can make contacts on the golf course. Others become a presence at the lectern and work the CLE circuit. And, of course, there are the classic trial lawyers who gain fame and prestige from representing public figures and become known as the go to lawyers for tough cases.

As discussed below, there are common well-proven steps which can be followed, no matter the litigator's personality.

Building one's client base is not a hobby to pursue during down time. You must dedicate yourself to business development each and every day. Any encounter, whether professional or social, is a new business opportunity. Even if the person you meet is not a potential client, that person may refer someone else to you.

Build Your Brand

You should focus on narrower areas of expertise. Rather than randomly selecting this area, choose a specialty that excites you. Consider the subjects you studied in college, your hobbies, and the subjects that interest you when you read news articles. Importantly, it helps if you have had some experience handling matters in the area.

When you undertake work in your chosen area your work must be top notch. All of the promotional literature you generate will not be worth very much unless you are viewed by your clients and your peers as a superb litigator.

You should study the articles that are being written about the area and review the agendas for related conferences. Try to develop a unique spin that could help you stand out. Audiences will be more interested in hearing your predictions about

trends and future developments, rather than a rehash of last year's judicial opinions.

You should author articles and blog posts presenting your unique take on your area and participate in legal podcasts. These endeavors will not necessarily prompt new clients to contact you. They will help you position yourself as a thought leader as you pursue new business.

Pay special attention to your firm website to make sure that your online presence reflects your thought leadership. In addition to writing on the subject, it is important to be quoted in the press when articles are published. Try to cultivate relationships with reporters on the subject. If you help them as a background resource, they may reward you by quoting you.

If, for example, you were looking to find a niche in food litigation, you should review the websites of some of the leading law firms that have food-law practice groups. You will be able to see the topics they are addressing in their articles and blog posts and the conferences where their attorneys are speaking. You might also know some of the lawyers who are leaders in the field and can reach out to them for guidance.

If you decide to author articles in that field, consider submitting them to publications whose readership includes both legal and industry audiences. You will cast a wider net by approaching Law360 as well as trade publications that cover food manufacturing and food processing. Try to get in contact with the reporters who are covering your area of interest. You could assist food-law reporters by tipping them off to key court opinions, or by helping to explain complicated legal concepts.

Similarly, you should attend and hopefully present at conferences sponsored by bar associations as well as food industry groups. Your target will be the deciders, who are often general counsels and assistant general counsels of food companies. They will generally be at both legal and lay meetings.

Marketing Costs

There will be travel and entertainment expenses, so you will need to determine how much you are prepared to invest in marketing. Also, some organizations will only provide speaking slots to attorneys who are willing to sponsor the event. Sponsorships can cost thousands of dollars. There may not be an immediate return on your investment, but you must be prepared to spend up front to get your business development plan off the ground. Note that spending will have a cumulative impact. It will be nearly impossible to connect any single article, event, or speech with landing a new client.

Colleagues and Satisfied Clients Can Be Your Best Source

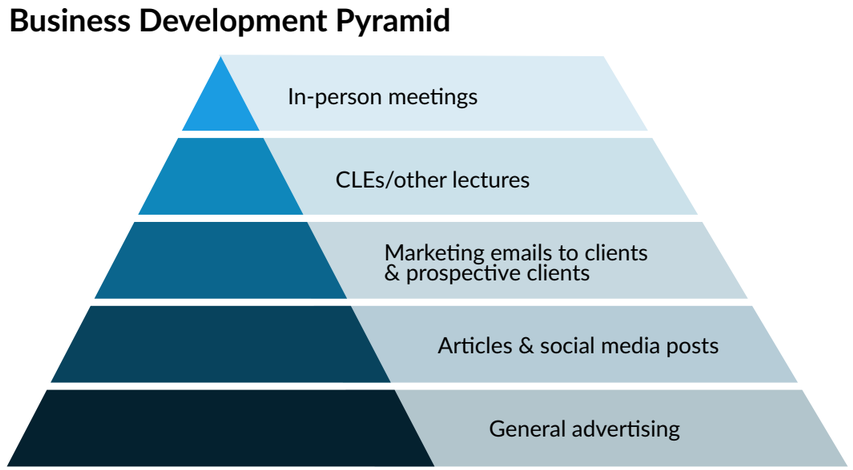
Litigators often need other litigators. It is important to cultivate all of the litigators you know—friends, relatives, law school classmates, fellow members of bar committees, and current and former partners and associates. They may be in a position to refer litigations to you if they need local counsel or have conflicts. In addition, they may have a multiparty litigation and some of the parties may need separate counsel. Remain in touch with all of these potential sources of business to let them know that you are available to assist in any way you can. Of course, tell them about your unique area of interest and share your written pieces.

In building your base, utilize both direct contacts through emailing, as well as indirect tools such as LinkedIn and X (formerly known as Twitter). You should take maximum advantage of platforms such as LinkedIn, including providing details in your profile about your legal skills and the thought leadership you can offer. Keep in mind that your audience will be interested in valuable content—practical guidance that will be helpful in navigating difficult legal problems. Avoid sending out self-congratulatory posts that merely announce some obscure award. Put yourself in the shoes of your clients. You want them to be interested in reading your posts and not view them as ego blasts.

Satisfied clients can be a great source of new business. An in-house litigation counsel is often asked by other in-house counsel for recommendations.

Satisfied clients can be a great source of new business. An in-house litigation counsel is often asked by other in-house counsel for recommendations. A satisfied client can be the strongest possible endorsement. When trying to cultivate new business at a social event or a sporting event, consider inviting an existing client to join you. Words of praise from your existing client will go much farther than singing your own praise.

It is helpful to subscribe to alert services so you know when new actions are filed that you can pursue. There are many legal search and court docket alerts that can advise you that a target has been sued. All existing clients should always be monitored. You can limit the search to courts in which you practice—where you have a chance of getting retained. You may find that you will be sending a copy of a new complaint before the client even knows about it.



Work Your Network

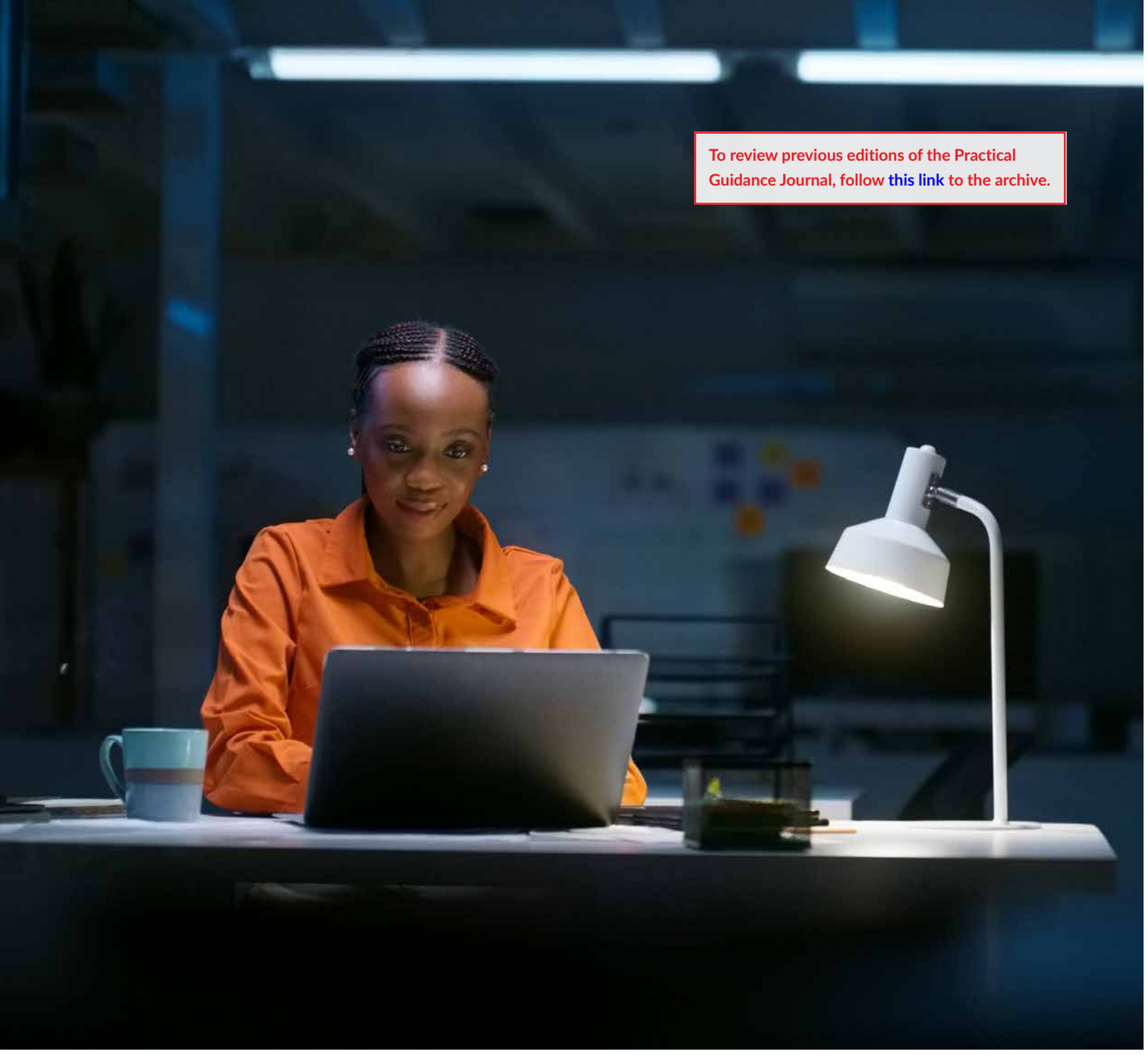
Participating in seminars, conferences, and other events can help build your referral network. Seek out both legal and industry events. If you are going to attend a conference, try to secure a speaker's spot. A speaker's badge can provide credibility when making contacts.

When networking, it is always better to ask how you can help the other person. Doing another person a favor can put you at a distinct advantage. For example, if you practice exclusively in New York, you might offer to introduce a California attorney to one of your clients. You could also offer to engage the California attorney as a local counsel if you have litigation there. Always keep a list of everyone you meet and/or assist, and follow up afterwards with future lunch invitations and notes.

Give thought to a short, but memorable, elevator speech that you will have in your back pocket whenever you network, and are asked who you are, or what you do. The pitch should set you apart as unique. Simply responding that you are a litigator at Blank and Blank Law Firm will not leave a lasting impression. Rather, the following response has a greater likelihood of provoking further discussion and interest: "I am a product liability litigator and am currently focusing on assisting auto manufacturers in working through the risks posed by self-driving cars." If you then pose a follow-up open ended question such as "Has artificial intelligence touched your practice?", the conversation might prompt an interesting and memorable dialogue with the other person.

Obtaining a speaker's slot can be a coup, but it is far better to have a one-on-one conversation with a prospect. Speaking to a wide audience will not leave as strong an impression as 10 minutes in a face-to-face conversation. A personal relationship is far superior to a brochure, an article, or even a lecture when trying to build business. The odds of getting engaged for new business will increase dramatically if you have personal contact with a prospective client.

Business development should be viewed geometrically as a pyramid, with your prospects for success increasing as you move to the top of the pyramid. The top is a one-on-one discussion with a prospect. The middle would be CLEs and other lectures to an audience. You will have personal exposure, but unless you arrange for personal meetings, members of the audience may not contact you. Lower on the pyramid are marketing emails, and then articles and other posts you may send out to a wide audience. Finally, at the bottom, is general advertising about your practice. While advertising may bring your expertise to the attention of a wide audience, the odds of a recipient reaching out to you to engage you for a new matter are slim.



To review previous editions of the Practical Guidance Journal, follow this link to the archive.

Persistence Will Conquer All Things

A book of business will not be built in a day. It will require a long-term plan, with constant focus and daily effort. Keep in mind Benjamin Franklin's sage advice: "Energy and persistence conquer all things."

You will hopefully be very busy managing your litigation caseload and may not have a great deal of time to devote to writing, speaking, and building relationships with the media. But, for example, writing one article every 10 years is not sufficient. Try to generate at least one or two articles or blog posts each year. Potential clients will be most interested in your recent publications. Also, you do not have to write a 20-page law review article. You will find that publications are interested in much shorter articles with practical bullet-point suggestions and ideas.

Drafting an article without a follow-up plan will probably result in a dead end. Any activity, whether it is an article or an alert, should be shared with your network with personal notes to each recipient. The best note would include an invitation for the one-on-one lunch or dinner. Take advantage of any opportunity to reach out to your network since you never know when that new business opportunity may arise.

Related Content

For a review of counsel's management of the various litigation tasks and responsibilities in federal court, see

CIVIL LITIGATION FUNDAMENTALS RESOURCE KIT (FEDERAL)

For an overview of managing a litigation client's expectations, including the initial meeting with the client, early case assessment, engagement agreements, budget and billing, communicating with the client during the litigation, and post-litigation reviews, see

MANAGING CLIENT EXPECTATIONS IN LITIGATION

For information on the expectations of the junior litigation associate, such as the specific tasks that will be assigned, how to stay organized, technology issues, pro bono work, and strategies for success, see

PROFESSIONAL DEVELOPMENT: LIFE AS A JUNIOR LITIGATION ASSOCIATE

For a discussion on the expectations and opportunities for the senior litigation associate, including how to lead case teams, interacting with clients, and developing a practice niche, see

PROFESSIONAL DEVELOPMENT: LIFE AS A SENIOR LITIGATION ASSOCIATE

For guidance for an attorney relocating to another firm, including what to consider when considering a lateral move and how to navigate your ethical responsibilities, see

LATERAL MOVES FOR ATTORNEYS: WHAT YOU NEED TO KNOW

Review resources focused on professional development, practice management strategies, and helpful career-related soft skills, see

PROFESSIONAL DEVELOPMENT, PRACTICE MANAGEMENT AND SOFT SKILLS RESOURCE KIT

It is never too early to begin planning your business development strategy. For new litigators, the assistant in-house litigation counsel they may meet at a CLE conference may get promoted to a position of authority and have the ability to select outside counsel. Importantly, the in-house counsel's name and contact information should populate your networking lists and should hear from you after the conference. Hopefully, the relationship will continue for years to come and may become one of your most important clients.

In sum, what should be on your checklist for your business development plan?

- Determine the focus for your area(s) of practice
- Develop your elevator pitch which differentiates you
- Identify your potential clients
- Generate topics for articles and other posts and begin drafting
- Reach out to media contacts, including reporters
- Review your website and other promotional literature
- Select organizations and associations you should join
- Cultivate opportunities to present to relevant audiences
- Track your network and referral sources
- Arrange in-person meetings

Your plan will not be built in a day. But with persistence and attention, it should pay off, making your litigation career much more enjoyable and profitable. L

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

Ronald J. Levine HERRICK, FEINSTEIN LLP

Litigation Business Pitches: Five Tips

This article discusses how to make pitches for new litigation business and covers topics such as preparing the presentation, effective communication techniques, and following up after the pitch.

TOO MANY LITIGATORS FOLLOW THE SAME GAME PLAN when offered an opportunity to meet with a potential client to pitch for business. They will assemble a few available partners, and possibly a senior associate, and load the firm's generic slides on a laptop. The slides will inevitably list the firm's practice areas, major matters, and a few statistics about the firm. If they can find a few minutes during the ride to the meeting, the pitch team may decide who is going to take the lead. They might even kick around a few ideas on how the firm might handle the matter.

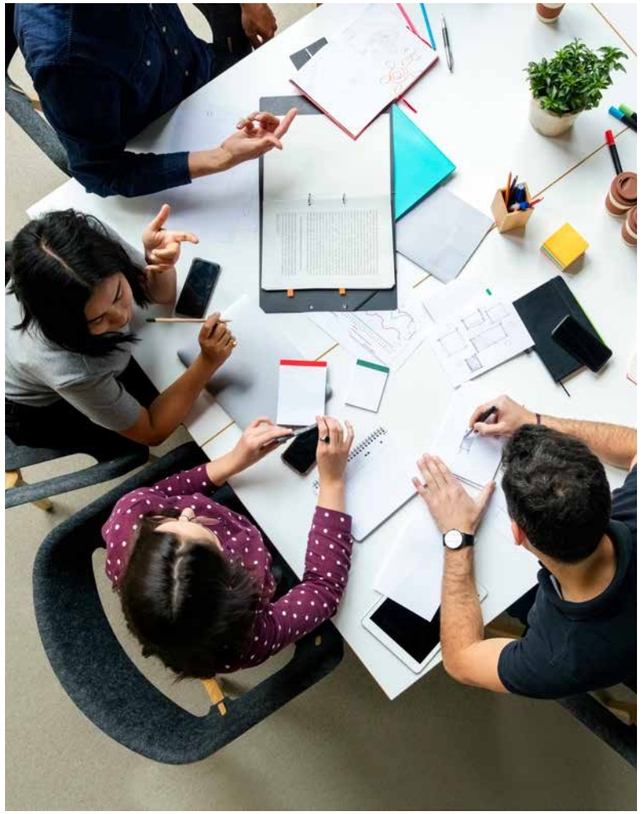
Extra advance time and effort spent appropriately, though, can dramatically improve your chance of landing the potential litigation.

Five Steps

In order to have an effective pitch, there are five essential steps to follow:

- Gather intelligence
- Research the client, the attendees, and the potential matter
- Tailor the presentation
- Listen and offer a solution
- Follow up

By following these steps, you can significantly increase your chances of getting retained for the matter. Even if you do not get hired, you may well be invited back in the future to be considered for other opportunities.



Gather Advance Intelligence

Whenever you are invited to pitch for a new matter, you should try to find out from your contact (usually the in-house counsel) the following information:

- The basic facts concerning the matter you are being asked to handle
- The status of the matter, and whether the client has been dealing with similar matters
- What the client's goals are for the meeting
- The manner in which the client handles outside counsel (e.g., does the in-house counsel stay deeply involved?)
- How the potential client believes the matter should be staffed
- The other parties involved in the matter (so you can run a conflict check in advance, among other things)
- The identity of the adversary counsel, if any
- The names and titles of the individuals who will be attending the meeting on behalf of the client
- Whether the client's decision maker will be attending the meeting
- How much time is being allocated to the meeting
- Whether the room will support a PowerPoint (if you plan to bring one)
- If at all possible, the other law firms which will be pitching for the business

Gathering as much of this advance intelligence as possible will pay off when preparing for the meeting. Your goal will be to know the client and your audience, understand the assignment, and deliver the information the client is seeking. You will want to connect with the client, let the client know what you plan to do for the client, and convey how your firm's "special sauce" differentiates your firm from the competitors who have also been invited to pitch.

Take a Deep Dive into the Client, the Potential Matter, the Audience, and the Competition

Preparation for the pitch is going to take time. If you are pitching to a current client of the firm and you are not familiar with the client, you should speak with the partners who have the preexisting relationship to learn as much as possible about the client.

If it is a new client to the firm, you will want to learn as much as you reasonably can about its business, industry, competitors, and the challenges it faces. At the very least, you will want to read the company's website and recent securities

filings, if there are any. You should run docket and case history searches to find out the types of legal matters it has been addressing. You will also want to find out the names of the law firms it has been engaging.

Hopefully, you will also find out something about the potential matter. You will want to review the pleadings that have been filed, if any. Pay special attention to the assigned judge and find out your firm's experience with that judge. Also, conduct a search for opinions which the judge has written for similar matters. Importantly, research the judge's track record—is the judge inclined to grant early dismissal of similar matters? In addition, you should be familiar with the prominent court cases and decisions in the area, and how other cases have panned out.

You will also want to survey your colleagues to find out as much as possible about the adversary counsel. Is it a firm which will be interested in an early settlement, or does it like to do battle? In addition, you will want to know as much as possible about your firm's experience with similar claims involving other clients.

Services like Context Analytics will enable you to efficiently research the judge and other attorneys. For more information about Context and to sign up for a free trial, click here.

You are going to want to build a rapport with the people who will be in the room. Hopefully, your contact will provide you with the attendees' names so you can do as much advance research as possible. Fortunately, there are many resources that can provide the attendees' backgrounds, education, and activities. Once you find out about their personal histories, you may be able to locate friends, neighbors, or classmates at your firm. In addition, try to find out as much as possible about the corporate culture. If the potential client is informal, then you may want to dress more casually.

> ...what do you want to accomplish in the pitch? Hopefully, your research on the matter and the potential client has uncovered a unique solution to meet the client's goals, to the extent you know them.

Your contact may be reluctant to provide the names of the other law firms that are pitching for the business. If you are able to find out, you may be able to subtly differentiate your firm. For example, if the other firms are all very large firms, and your firm is a mid-sized firm, you may want to emphasize the value of a mid-sized firm in terms of staffing and cost. It is not advisable, however, to demean your competition. In addition to being bad form, you may be denigrating attorneys who have a close relationship with the potential client.

Tailor Your Presentation Accordingly

When planning for your pitch, consider three Ps—purpose, people, and PowerPoint (if any)—in that order.

First, what do you want to accomplish in the pitch? Hopefully, your research on the matter and the potential client has uncovered a unique solution to meet the client's goals, to the extent you know them. You will want to be able to communicate, in a very compressed period of time, how you and your team can accomplish those goals.

Secondly, you need to decide who will be on the pitch team. You will hopefully find out in advance the client's views on staffing. It will not help to bring eight attorneys to a meeting when the client is only expecting one partner and one associate.

Everyone on the team should be essential to the mission. The client will want to meet the lawyers who will be handling their matter, including the associates. The team should hopefully mirror the client's representatives, to the extent possible.

Do not bring anyone whose only purpose is to serve as window dressing. The client will not be pleased to find out that the star of the meeting does not plan on having anything to do with the matter after the meeting has ended. With that said, you may want to bring an attorney who has a prior relationship with the client, even though that attorney will not be working on the matter. If the relationship attorney does attend, it should be made clear up front that the attorney is present merely to facilitate introductions.

The entire team should be prepared to participate in the pitch. Clients are often eager to hear from the associates since they know that the associates will be doing the majority of the work.

Finally, spend time revising your PowerPoint or other pitch materials so they supplement your pitch. You can assume that the in-house counsel has looked at your firm's website. The fact that your firm has been invited to pitch is a sure sign that your firm is in the ballpark. Accordingly, it will not be necessary to devote the slides to regurgitating your firm's history and awards. You may have already been asked to submit a response to a request for proposal (RFP). If so, you may have already provided a great deal of information about your practice. The PowerPoint should never be the entire show. Rather, it should provide the headlines for each portion of your pitch.

Do a dry run in advance of the meeting. Anticipate the questions and discuss the possible answers. Consider which team members will field the questions and who will handle anticipated topics.

If you have not already provided your firm's billing proposal in response to the RFP, you must be prepared to discuss how your firm plans on billing for the matter. Answers to questions about billing rates, discounts, and alternative billing arrangements must all be prepared in advance. If it is a new client, you may not know the potential client's expectations concerning pricing. It is helpful to signal that your firm is flexible and open to further discussion on the topic.

Start Strong, Then Mostly Listen and Finally, Put It All on the Line

Once the big day arrives, you will want to be as enthusiastic as possible when you begin the meeting. You should decide who is going to speak first and make the introductions.

Impress on your team that it is critical that they appear to work well together and not have internal divisions. The potential client will be turned off if it seems that the team does not like each other or are overly competitive with each other. Everyone who attends should be encouraged to speak during the meeting. Importantly, the team should leave phones in their bags and pay attention.

The majority of the meeting should be devoted to listening to the client. While the team should be prepared to ask relevant questions, the purpose of the meeting is to hear what the client truly needs. Before you launch into your proposed strategy, it is helpful to know whether the client is looking for a quick settlement or wants to take the matter to trial. You will also want to hear the client's expectations on how the matter will be staffed.

The meeting should be as conversational as possible. Make sure that the client understands what you are talking about. Avoid jargon or legal steps which may be too far into the weeds. The client is probably looking for the big picture and will not be thrilled to hear about the footnotes in a recent appellate decision.

After you have heard what the client needs, your job is to try to offer a solution. The client may need to make an immediate decision, so there may not be time to go back to the office and draft a memo. You should be prepared to offer a plan of attack. Do not hold back. Act as if you have been hired. While your firm has not been formally retained and you are not yet getting paid, do not wait to share your special plan until after you have been hired. While you may be reluctant to give away the store for free, you can be sure that at least one of the other competing firms has put together a detailed plan for the client. Tell the client how you will solve the client's problem, as quickly and inexpensively as possible.

The key part of your pitch will be your firm's "special sauce." Be prepared to share the compelling reasons why your firm should be retained. You can safely assume that the other firms that are being considered will appear to be similar to your firm. You may be able to differentiate your firm by emphasizing your experience before the assigned judge, your history in dealing with the adversary counsel, and your firm's success in handling very similar matters. The potential client will not be interested in paying a firm to learn a new area.

If the meeting has gone well, do not overstay your welcome. Undoubtedly, the client's representatives are very busy people and may not have time for one more war story from a colleague. Advise your team to make sure to read the room. If the general counsel starts to get out of the chair, it is a sure sign to wrap it up.

Follow Up—Win or Lose

Before the meeting ends, make sure to find out the next steps. If the client promises to make a decision in a week, follow up in a week. However, it is a good move to send a thank you promptly after the meeting and offer to provide any additional information or materials.

Hopefully, you will get retained. If you do not land the matter, you may be on the short list for the next one. In any event, if you are not hired, try to find out why your firm was not hired, and what you could have done differently. Constructive feedback is invaluable.

Get Help

Odds are that you did not learn any of the above in law school. Fortunately, there are trained professionals who can assist you in identifying potential targets for legal work, crafting your pitch and your materials, listening to rehearsals of your pitch, and helping you adapt your plans as you pursue business opportunities.

Your law firm may have a business development department that can assist you. In addition, seek out former or current in-house counsel who have sat on the other side of the table. Ask them what has worked and why some firms have failed in their pitches.

In addition, there are independent marketing coaches who can provide assistance. They can hold your feet to the fire as you pursue potential new business and can help you keep things in perspective. L

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

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Learn About New Practical Guidance Content and Resources

Review this exciting guide to some of the recent content additions to Practical Guidance, designed to help you find the tools and insights you need to work more efficiently and effectively. Practical Guidance customers, please follow this link.

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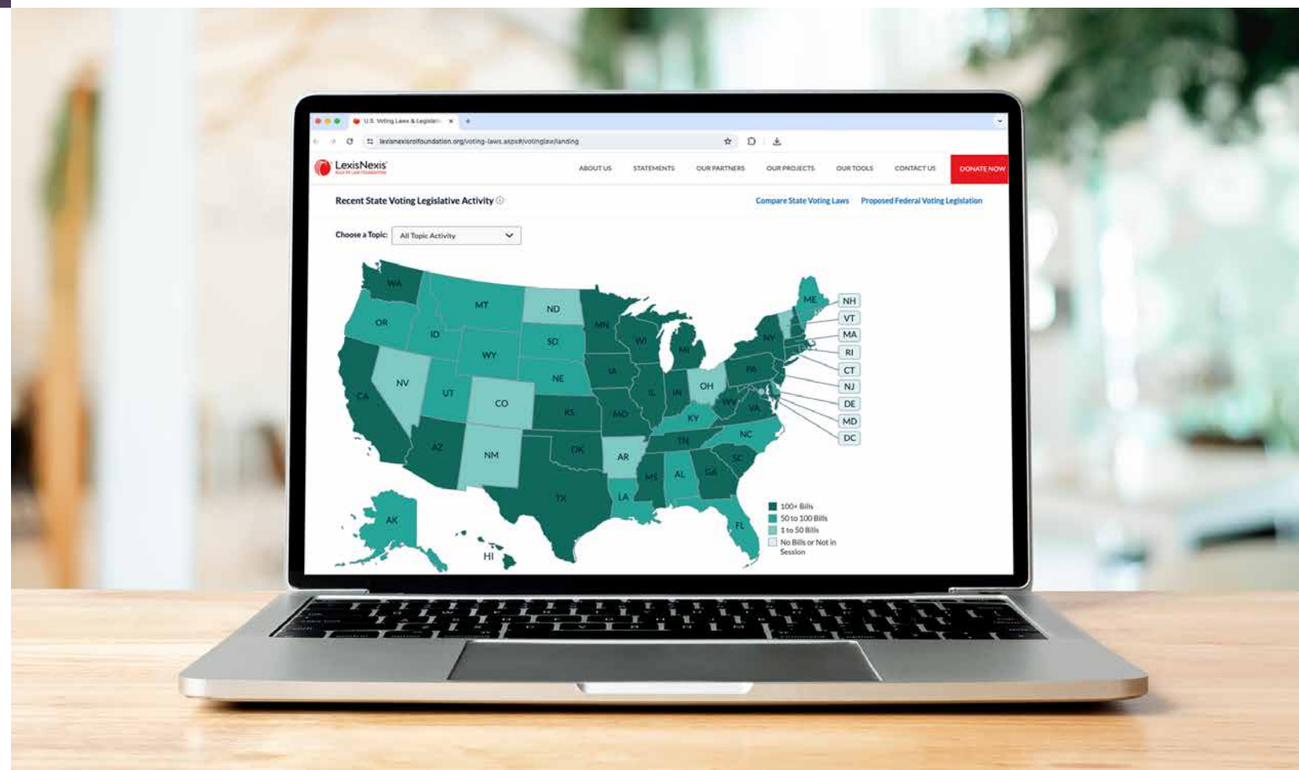
LexisNexis Rule of Law U.S. Voting Laws & Legislation Center Presented at Recent ABA Section Conference

The American Bar Association Litigation Section's Annual Conference in Washington, D.C. included a panel discussion on Election Protection. Lexis Practical Guidance Sr. Product Manager Randi-Lynn Smallheer represented LexisNexis and the LexisNexis Rule of Law Foundation during the discussion.

THE ABA ASKED SMALLHEER TO SPEAK AS A PANELIST on Election Protection, showcasing the LexisNexis® U.S. Voting Laws & Legislation Center to judges and lawyers from across the country. The U.S. Voting Laws and Legislation Center tracks recent state legislative activity impacting voting and voter's rights.

The attendees praised Lexis's commitment to transparency in the law, especially in the area of election laws. Following the presentation, Section Chair *Anne Marie Seibel* encouraged the 50+ leadership members in attendance to incorporate the U.S. Voting Laws & Legislation Center into their election protection workflow.

Transparency is a critical cornerstone of the Rule of Law. The LexisNexis® U.S. Voting Laws & Legislation Center's voting legislation tracking tool is provided by the LexisNexis Rule of Law Foundation to provide citizens with free access to the most comprehensive collection of U.S. voting laws, legislative developments, and news.



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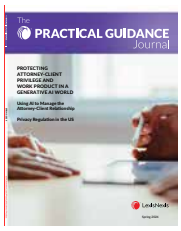

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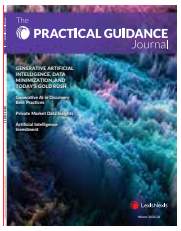

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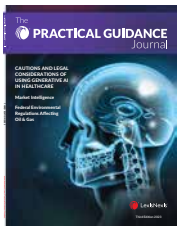

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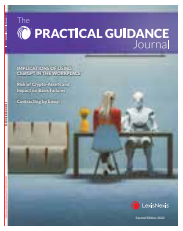

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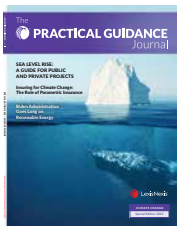

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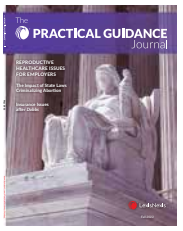

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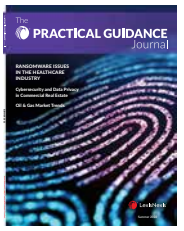

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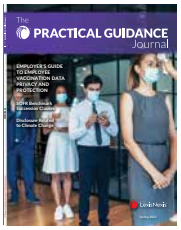

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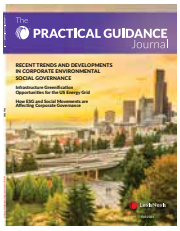

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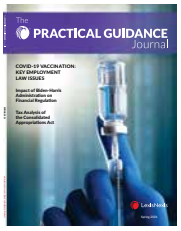

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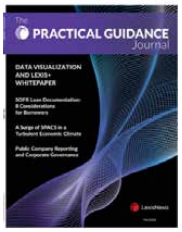

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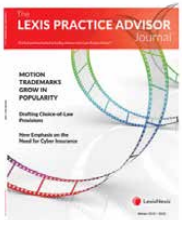

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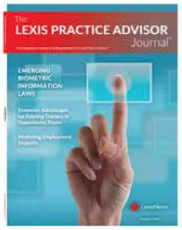

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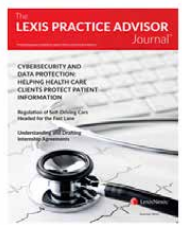

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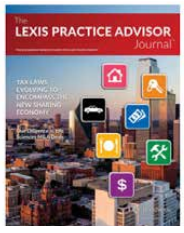

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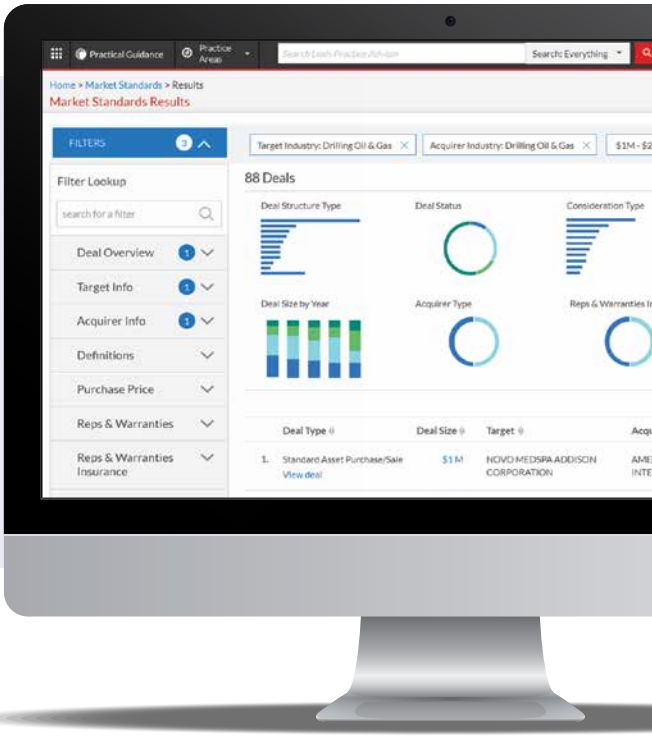

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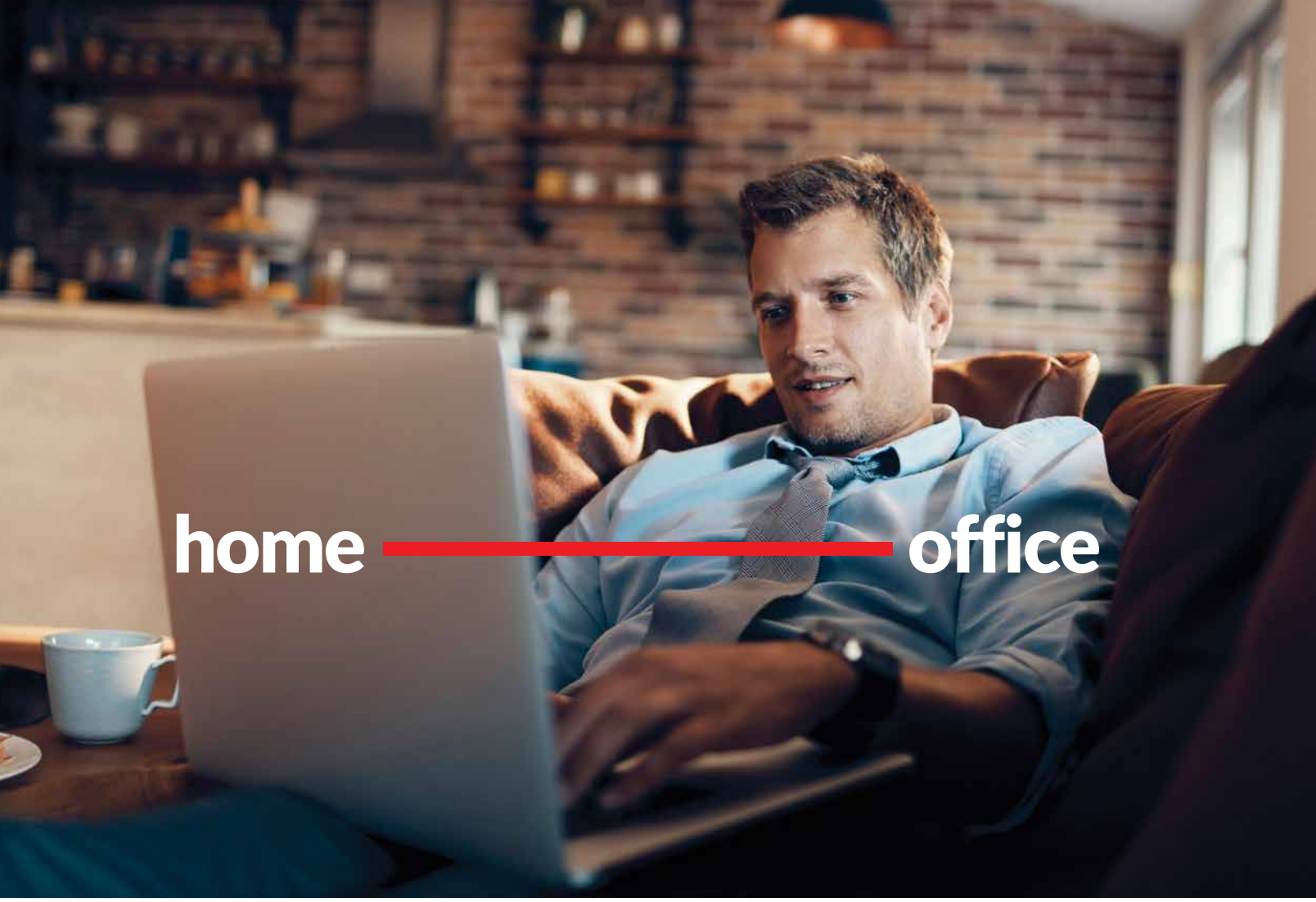

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