

The Case for Calling a Litigator Before Turning to Open Source AI

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You may be wondering: “Do I have a claim that can be pursued in litigation?” Or: “What defenses does my company have against the lawsuit we received?” Answering these questions once required a call to your litigation counsel. Today, you might be tempted to first prompt a preferred open source artificial intelligence (AI) model (ChatGPT, etc.) with similar questions to orient yourself to the litigation process or to inform future discussions with litigation counsel.



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Beware! Open source AI prompts and responses may not be privileged. And the AI analysis you plan on sharing with your counsel may increase your legal spend.

The privilege risk

Open source AI privilege rules are not settled. Some courts have ruled that open source AI prompts and responses may be privileged work product. See, e.g., *Morgan v. V2X, Inc.* (D. Colo. March 30, 2026). In New York, one federal district court ruled (in a criminal case) that open source AI prompts and responses are not protected attorney-client communications or privileged work product. See *United States v. Heppner* (S.D.N.Y. Feb. 17, 2026).

Inconsistent privilege rulings present considerable risk for litigants using open source AI before engaging litigation counsel. Prompts fed into open source AI might yield informative responses, but they may also reveal litigation strategies or compromising case weaknesses if revealed to an opponent.

Savvy litigants may seek relevant AI prompts and responses in discovery. And depending on the governing law, they may be entitled to get them. That means open source AI prompts and responses must be added to the electronic discovery materials that must be preserved, collected, reviewed and potentially produced in discovery.

Unless open source AI prompts and responses become universally privileged, consulting litigation counsel in the first instance remains the best way to protect any analysis of your case.

AI efficiency

AI has an emerging role in litigation, and that role will grow. Chances are, your preferred litigation counsel is already exploring or using closed source or proprietary AI platforms designed for lawyers.

These resources are specifically built to augment your counsel’s practice. They can facilitate legal research, document review, drafting and administrative tasks. They may also provide opportunities to reduce litigation spend, while maintaining privilege and

confidentiality protections.

Open source AI offers none of these advantages. Your counsel cannot take any open source AI analysis you may have obtained at face value, no matter how comprehensive or thorough it may seem. Your counsel must verify that any AI analysis is complete, accurate and free from hallucination—at your expense. If

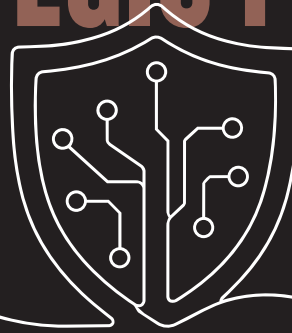
counsel’s review identifies any hallucination, the process starts over at square one—again, at your expense.

When engaging litigation counsel, ask what AI platforms they are using, how your data is protected within those platforms, and how your counsel will use AI to maximize efficiency and reduce costs. Make that call

before consulting open source AI resources that are not confidential, may not be privileged, and might ultimately increase your legal fees.

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