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SERVING THE INTEREST OF JUSTICE

Editor
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THE PRACTICE PAGE

WHEN A DOG'S BITE IS WORSE THAN ITS BARK

HON. MARK C. DILLON*

Do you like dogs? I do. They like taking walks. They enjoy riding shotgun in the car with their heads out the open window, taking in scents along the route. They are loyal. They obey the leash. They even smile for photographs (even better than some of us humans, myself included). And for our single readers, they may even be a magnet for other singles that helps break the proverbial ice.

For all animal lovers, we'll focus on the case of *Cantore v Costantine*, 221 AD3d 56 (2023). The case addresses the very small percentage of dogs which … well, bite humans. Go figure. Those bites may be relatively minor, but on other occasions, they may be quite serious and, in the event of a full-on attack, even fatal (*e.g. Sutton v City of New York*, 119 AD3d 851 [2014]). For every tort-infused dog with a good set of teeth there is a corresponding plaintiff's attorney, especially given the dog-eat-dog nature of litigation.

But first let's touch upon the basics of dog bite liability law. Since 1816, the law of this state has been that the owner of a domestic animal who either knows or should have known of an animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities (*Vrooman v Lawyer*, 13 Johns 339 [1816]; see also *Collier v Zambito*, 1 NY3d 444, 446 [2004]). "Vicious propensities" include the propensity to do any act that might endanger the safety of the persons or property of others in a given situation (*Dickson v McCoy*, 39 NY 400, 403 [1868]). Knowledge of vicious propensities may be shown by proof of prior acts of a similar kind of which the owner had notice (*Benoit v Troy & Lansingburgh R.R. Co.*, 154 NY 223, 225 [1897]). Vicious propensities include a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm (Bard v Jahnke, 6 NY3d 592, 597

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THE PRACTICE PAGE

WHEN A DOG'S BARK IS WORSE THAN ITS BITE

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[2006]). The vicious propensities rule displaces the standard elements of negligence, and imposes strict liability upon an animal's owner when prior actual or constructive knowledge of vicious propensities is established (*Hastings v Suave*, 21 NY3d 122, 125 [2013]), *Collier v Zambito*, 1 NY3d at 448). Additionally, an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but which nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities — albeit only when such proclivity results in the injury giving rise to the lawsuit *(Bard v Jahnke*, 6 NY3d at 597). The reader will note the advanced age of some of the cases cited here, reflecting the long-standing law that has defined the concepts governing animal liability law for several generations. Including many generations of dogs.

Liability is not limited to the actual owners of the animal, but extends to those who harbor or exercise dominion or control over it (*Molloy v Starin*, 191 NY 21, 21 [1908]; *Matthew H. v County of Nassau*, 131 AD3d 135, 144 [2015]). The Court of Appeals recognized a special rule for veterinarians and other animal specialists in *Hewitt v Palmer Veterinary Clinic, PC*, 35 NY3d 541 (2020), where it was held that a patron of a veterinary clinic who was attacked in a waiting room by another patron's dog possessed a cause of action against the clinic, even though the clinic did not have prior notice of the dog's vicious propensities. The reason veterinary clinics can potentially be held liable in such instances, on a premises liability theory, is that veterinarians have specialized knowledge of animal behavior and can foresee that within their waiting rooms, dogs there may experience pain, stressors, and unfamiliar people, animals, and surroundings, creating a heightened and foreseeable risk of aggressive behavior at the facility *(Id.*, at 548).

With that all said, in *Cantore v Costantine*, *supra*, the defendant, Daikers Restaurant, was a dog-friendly restaurant which posted a sign at its entrance announcing that it was a pet-friendly establishment, and that animals there must be kept on a leash. On a day in 2019, the 3-year old infant plaintiff was bitten by a dog owned by two of the restaurant's patrons, the Costantine defendants. The plaintiff's complaint alleged *inter alia* that the restaurant had permitted the dog in question to freely roam the premises without a leash. Cross-claims between the restaurant and the dog owners flew like fur. The restaurant moved for summary judgment arguing that it had no prior knowledge of the dog's vicious propensities, that it had posted a requirement that dogs be kept leashed, and that contrary to the allegations of the plaintiff's complaint, the dog in question had actually been leashed at the time of the occurrence. The plaintiff opposed the restaurant's motion for summary judgment and cross-moved for partial summary judgment, arguing *inter alia* that despite the restaurant's lack of knowledge of vicious propensities, the restaurant could nevertheless be held strictly liable under the *Hewitt* standard, given that the restaurant was pet-friendly and had failed to assess whether any of the animals invited onto the premises posed a risk of injury to patrons. Which party was barking up the wrong tree?

The Appellate Division in *Cantore* determined that the *Hewitt* standard was not applicable to the restaurant, and therefore, the restaurant was entitled to summary judgment by virtue of it not having notice of the dog's vicious propensities. The court held, in effect, that the restaurant here, unlike the veterinary clinic in *Hewitt*, did not possess specialized knowledge of animal behavior as to exempt it from the vicious propensities standard for liability. The result reached in *Cantore* appears to be on all fours. A contrary result would have meant that all property owners who generally permit animals upon their premises would become subject to a general premises negligence standard, rather than be subject to the vicious propensities standard that has governed animal liability actions since 1816. In other words, in *Cantore*, the *Hewitt* tail was not permitted to wag the strict liability dog.

Hopefully for all of us going forward, only dogs' barks will be worse than their bites.

**Mark C. Dillon is a justice of the Appellate Division, 2nd Dep't., an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author to the CPLR Practice Commentaries in McKinney's.*

TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

TIM J. HIGGINS, ESQ., *LEMIRE & HIGGINS, LLC*

Expert witness properly precluded at trial of Child Victims Act claim.

Vasaturo v. Vasaturo (Clark, J., 2/29/24)

Plaintiff filed suit pursuant to the Child Victims Act of 2019, alleging he had been sexually abused between the ages of 7-12 by the defendant (his uncle). Supreme Court (Schreibman, J., Ulster Co.) granted defendant's motion to bifurcate the trial and preclude testimony by plaintiff's mental health counselor during the liability phase. After a jury verdict for defendant, plaintiff appealed the decision to bar his counselor's testimony but the Third Department affirmed, noting such expert testimony "is inadmissible when it inescapably bears solely on proving" that the alleged sexual abuse occurred. Testimonial evidence of the kind can be used to establish a claimant's symptoms and emotional presentation are consistent with an individual who suffered childhood sexual abuse, but is generally limited to child protective proceedings in Family Court.

Municipal liability claims.

Demarest v. Village of Greenwich (Fisher, J., 2/29/24)

Plaintiff's infant child died after he and another 7th grader, playing in a snowbank on private property used by the defendant Village to store excess snow, were trapped under the weight of snow dumped onto the snowbank by the operator of a public works department front-end loader. On a motion for summary judgment, the Village contended that under its oral agreement with the property owner to use the lot for snow storage, it did not owe a duty to decedent. Supreme Court (Bruening, J., Washington Co.) denied the motion and the Third Department affirmed, noting the "instrument of harm" exception to the general principle that a contractual obligation does not give rise to tort liability in favor of a non-contracting third party. While there was no dispute that the children were intentionally hiding from DPW employees in forts they dug into the snowbank, the Appellate Division found that the record also demonstrated that "DPW employees did not adhere to their safety training, establish a safe work zone or use the 'no trespassing' signs on the snowbank."

Wheat v. Town of Forestburgh (Pritzker, J., 1/25/24)

Plaintiff, hired by the defendant's highway superintendent to repair a damaged salt shed, was injured when the Genie lift he was operating drove off the edge of a loading dock and fell some 40 inches to the ground below. Wheat's motion for summary judgment on liability under Labor Law § 240(1) was denied by Supreme Court (Gandin, J., Sullivan Co.), as was the defendant's motion to dismiss the complaint. Affirming both rulings, the Third Department found questions of fact that precluded summary judgment for either party – including the defendant's contention that plaintiff was not its employee on the date of the accident (Wheat was using the lift to measure the shed but had agreed that repair work would not begin until the following day).

Serba v. Town of Glenville (Mackey, J., 1/11/24)

New York's Municipal Home Rule Law § 10 permits local governments to enact laws requiring prior written notice of a defect on their property as a condition precedent to filing suit for injuries allegedly caused by the defect. Here, the plaintiff fell on ice in a Town parking lot but conceded there was no evidence of prior written notice to the defendant about the supposed hazard. Relying on the "affirmative act of negligence" exception to the prior written notice law, plaintiff opposed the Town's summary judgment motion, in part, with an expert affidavit opining that the defendant improperly paved the parking lot and created a seam in which water and snow "froze, causing ice to be formed in the seam." Supreme Court (Buchanan, J., Saratoga Co.) dismissed the case and the Third Department affirmed, rejecting the plaintiff's proof because such exception only applies where the municipality's conduct "immediately resulted in the existence of the dangerous condition" – the parking lot paving had occurred several years before the plaintiff's fall.

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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

(Continued from Page 3)

Plaintiff's counsel cannot be excluded from neuropsychology IME.

McNamara v. Buresh (Powers, J., 1/4/24)

As permitted by CPLR § 3121, defendant arranged for the plaintiff (who alleged a traumatic brain injury after a car crash) to undergo a 2-day neuropsychological examination. Plaintiff's counsel sought to be present for the entirety of the exam, to which defendant objected, claiming attendance during the testing portion might compromise the validity and reliability of that part of the expert's assessment. Supreme Court (Weinstein, J., Albany Co.) denied defendant's motion to preclude, and the Third Department affirmed, citing a hole in defendant's proof – "evidence of an industry-wide standard, accepted within the neuropsychology field, pronouncing that testing validity is adversely impacted by the presence of a third-party observer."

Medical malpractice claims.

Kelly v. Herzog (Reynolds Fitzgerald, J., 2/29/24)

The defendant orthopedic surgeon repaired plaintiff's left knee injury but the plaintiff complained of post-operative pain, swelling and discoloration. Later diagnosed with reflex sympathetic dystrophy (RSD) and in pain management treatment, the plaintiff (4 months post-surgery) was eventually sent to an emergency room and diagnosed with septic arthritis in the knee. More medical care followed, ending with a total knee replacement. Her suit against the orthopedist and several subsequent medical providers was dismissed by Supreme Court (Farley, J., St. Lawrence Co.) which credited the defendants' 'medical impossibility' argument – namely, that the plaintiff "could not have had an undiagnosed and untreated staph infection for months" without it causing a much worse outcome for her. The Third Department reversed and reinstated the complaint, finding the defendants' expert staph infection theories were not grounded in fact, speculative, conclusory and lacking in probative value.

Lindgren v. Anoia (Garry, P.J., 2/22/24)

The defendant dentist performed a root canal procedure on the plaintiff in 2012, and this malpractice action was filed over 4 years later. Almost 5 years later, plaintiff filed her Note of Issue ("NOI"), after which defendant sought summary judgment, contending the suit was time-barred.Plaintiff made a change of attorneys, and later moved to vacate the NOI and re-open discovery. Supreme Court (Auffredou, J., Washington Co.) denied plaintiff's motion and granted summary judgment to the defendants. Affirming, the Third Department found no abuse of discretion by the trial court in refusing to vacate the NOI ("plaintiff was afforded ample time – roughly five years – to complete discovery") and that plaintiff's suit was untimely, even considering the possibility that the one-year "foreign object" exception applied, given plaintiff's theory that metal filings had been left in one of the teeth involved in the original root canal procedure.

Summary judgment improper despite "readily observable" hazard.

Wolfe v. Staples, Inc. (Lynch, J., 2/22/24)

Shopping in the defendant's store, plaintiff selected an item off a shelf, stepped backwards, and as she turned, tripped over a stabilizer bar (brace) that was attached to a rolling metal ladder used by store employees. Supreme Court (Zwack, J., Columbia Co.), concluding that the stabilizer bar was readily observable and not inherently dangerous, granted defendants' motion for summary judgment. The Third Department reversed, noting that even if the ladder (left in an aisle contrary to store policy) was readily observable, such fact would merely obviate the "defendants' duty to warn of the ladder's presence but not defendants' continuing obligation to maintain the property in a reasonably safe condition."

THE J-1 EXCHANGE VISITOR VISA AND UPSTATE NEW YORK'S PHYSICIAN SHORTAGE

DAVID W. MEYERS, ESQ., *MEYERS & MEYERS, LLP*

I saw an article recently in our local weekly newspaper, Saratoga Today, reporting that the Northern Border Regional Commission ("NBRC"), a federal-state partnership for economic and community development within the most distressed counties of Maine, New Hampshire, Vermont, and New York, launched their J-1 Visa Program. The program is designed to make quality healthcare accessible to rural and medically underserved areas across, for our purposes, upstate New York and the North Country. This is actually a pretty big deal, and I would argue that it did not get nearly the attention it deserved.

A little background. The J-1 exchange visitor visa category is very broad (i.e., it has fifteen (15) subcategories like, e.g., interns or trainees, physicians, camp counselors, au pairs, summer students in the travel/work program, etc.). One aspect of the J-1 visa category, which is unique from other nonimmigrant visa categories, is that some people who are admitted under it are subject to what is called a "two-year foreign-residency requirement."[1] The two-year foreign-residency requirement can be triggered in several ways including, for purposes of this discussion, if the individuals who entered the United States on the J-1 visa obtained medical training in the United States.

Fortunately, there is the ability to obtain a "waiver" of the two-year foreign-residency requirement, but it's not always that easy to do and, for international medical graduates, it can be extremely complex.[2] Although there are five (5) types of waivers that are available for J-1 exchange visitors, for international medical graduates, generally speaking they (with the assistance of their future employer) will be making an application (i) to an "Interested Government Agency" ("IGA"), where they will endeavor to show that the J-1 exchange visitor's departure from the United States would be detrimental to one of its programs or that the exchange visitor's stay in the United States is vital to one of its programs (the rationale being that it is in the public interest to have the exchange visitor remain in the United States), or (ii) to one of the several types of federal, state, or what are called "Conrad 30" programs for foreign medical graduates, where here, the NBRC is acting as an agency interested in facilitating the foreign medical graduate's employment in a federally designated "Health Professional Shortage Area" ("HPSA") or a Medically Underserved Area ("MUA").[3]

So, why is this so important? Because, quite candidly, the areas where these foreign medical graduates would need to practice are incredibly underserved by medical professionals.

In order to be eligible for the waiver in a federal, state, or what is called a "Conrad 30" program, generally the foreign national must agree to be employed full time (as an H-1B nonimmigrant worker) at a health care facility located in an area designated by U.S. Department of Health and

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[1] This basically means that someone subject to this requirement must reside and be physically present for a total of two (2) years in either his or her country of nationality or country of legal permanent residence before he or she becomes eligible to change to certain other nonimmigrant visa categories (e.g., H-1B specialty occupation worker) or before obtaining permanent residency (i.e., getting a green card).

[2] There are so many discreet practice areas in the immigration law, and physician immigration is a specialty all unto itself.

[3] The other bases for applying for a waiver are (a) showing exceptional hardship to a U.S. citizen or lawful permanent resident (LPR) spouse or child, (b) persecution or (c) a no objection statement from the foreign national's home government (the latter, though, not being an option for international medical graduates).

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THE J-1 EXCHANGE VISITOR VISA AND UPSTATE NEW YORK'S PHYSICIAN SHORTAGE

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Human Services ("HHS") as a HPSA, MUA, or a Medically Underserved Population ("MUP"). At this point, the NBRC is limiting its waiver recommendations for physicians who will practice primary medical care (including general or family practice, general internal medicine, pediatrics, or obstetrics and gynecology) in a designated primary care HPSA ***or*** designated MUA or psychiatric care in a designated Mental Health Professional Shortage Area.

When you combine the general need in these medically underserved upstate New York areas with what our overall society is dealing with with the pandemic still in our rear view mirror, e.g., chronic stress of adults and children, the economy and concerns about our financial well-being, ongoing global crises (both far from and at our own borders), to name just a few among so many other stressors in our daily lives, the NBRC's new J-1 visa program is (if it's utilized properly) a big win for the communities being served by the NBRC and the foreign nationals who received their medical education here in the United States.

New York State, and historically and more specifically, New York City, has long been the preferred destination for new immigrants to the United States. Although immigrants no longer need to pass through Ellis Island to lawfully enter the country, many still come to our shores and settle downstate. The NBRC's new J-1 visa program will (we hope) contribute to mitigating the shortage of qualified health care professionals in rural upstate New York, and generally even promote much-needed immigration to these same communities.

AI – THE NEW LEGAL IMPERATIVE

DOUGLAS GERHARDT, ESQ.,[1] HONEYWELL LAW FIRM, PLLC

AI is the new imperative in the practice of law. Attorneys should use it daily. Those who don't fail to maximize their potential.

What is the foundation for such a bold, if not brazen assertion? This article explains. It describes how AI is used to improve and enhance legal practice. It cautions about risks of AI, sharing insight from the recently published New York State Bar Association Report on AI in the Law, as well as reminds practitioners how to apply ethical rules with AI. Finally, it explores how courts are tackling AI and how these may be reexamined.

The Case for Using AI in Legal Practice

Virtually every attorney is using AI, wittingly or not. Those who accept the proposed completed thought/sentence in Microsoft WORD or Outlook, use AI. Relying on Westlaw's autogenerated prompt as a search term(s) is typed, employs AI. And, implementing the summary of a PDF (clicking on 'AI Assistant') relies on AI. These seemingly benign examples show how AI has been infused seamlessly into the day-to-day practice of law.

More complex machinations also exist. Chat GPT and Gemini offer users the ability to instantly generate documents. Labor attorneys can generate a contract in no time. Results are often as good or better than what an associate may toil over for hours.

AI contract analysis is becoming a norm. An iteration of IBM's Watson analyzes contracts, extracting and classifying clauses, comparing them with other contracts and generating recommendations for

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AI – THE NEW LEGAL IMPERATIVE

DOUGLAS GERHARDT, ESQ., HONEYWELL LAW FIRM, PLLC

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future agreements.[2] This system can be faster and more consistent than humans. Litigators use generative AI tools to predict the likelihood of winning a case, potential settlement values and even what a judge might decide.[3] So, AI is the new legal imperative in part by default. It is nearly impossible not to use it.

AI also hones advocacy. Litigators formulate arguments and can use generative AI to find counterarguments. Case law supporting opponent's positions can be generated instantly allowing attorneys to refine strategy. Labor attorneys can use AI to anticipate opposing sides' responses to contract proposals. Because large language models rely on prior works and arguments, they generate quickly and efficiently what might take an attorney hours and days to accomplish. Generative AI (GAI) should be viewed less as a ghost in the machine but more as a ghost of lawyers past. It uses what has been created to generate a new result. *Stare Novus* in a field dominated by *stare decisis*.

Finally, AI improves attorney efficiency. It only makes sense for a labor attorney to have GAI draft a job description. It will pull from similar descriptions from the past and likely generate something the attorney can hone and tweak for a client. Productivity is enhanced. Greater productivity might help attorneys improve client relations, work on expanding their practice or create space for more work-life balance.

AI Risks in Practice

The New York State Bar Association Task Force on Artificial Intelligence Report and Recommendations to the NYSBA House of Delegates (April 6, 2024) ("Report")[4] mentions these and several other benefits of AI, including reducing human error. The Report stands as one of the most comprehensive treatments of AI in the legal profession to date.[5]

The Report also points out drawbacks. It finds AI widens the justice gap, raises data privacy concerns, creates potential for security breaches, and raises some broader social issues.[6] Readers are commended to the Report for a fuller, considered treatment of each. The succinct message – AI has great benefit and potential but with that comes responsibility.

One key element are the ethical issues. Regardless of the latest shiny toy attorneys have at their disposal, the same ethical code applies. Rule 1.1 of the NYS Rules of Professional Conduct[7] mandates attorney competency. This is having the requisite skills, thoroughness, and preparation necessary to represent a client. Plugging a prompt into a generative AI search engine then using the result is the antithesis of competency. The rule requires checking work, sources and producing original content. Recent notorious examples illustrate the pitfalls of not doing so.[8]

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[2] https://www.ibm.com/blog/watson-discovery-contractpodai-legal-excellence/

[3] https://www.akingump.com/en/insights/media-mentions/brian-daly-authors-op-ed-in-bloomberg-law-on-secs-plan-to-regulate-ai

[4] https://nysba.org/app/uploads/2024/02/Task-Force-on-AI-Report-final.pdf, April 6, 2024

[5] The author is a neutral observer of the Report not involved in its crafting.

[6] Id.

[7] 22 NYCRR 1200 *et. seq.*

[8] See, Mata v Avianca, Inc. 2023 WL 4114965 (S.D.N.Y., June 22, 2023); see also, Park v. Kim, 91 F.4th 610 (2nd Cir. 2024).

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AI – THE NEW LEGAL IMPERATIVE

DOUGLAS GERHARDT, ESQ., HONEYWELL LAW FIRM, PLLC

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The rule of diligence remains. Rule 1.3 requires attorneys act with reasonable diligence and promptness and not be negligent in any legal matter entrusted to them. Asking AGI to create a contract that an attorney sends to a client as a final product is negligence, not diligence.

Rule 1.6 also applies. Attorneys "cannot reveal information relating to the representation of a client unless the client gives informed consent." Confidentiality is paramount to practice. Using AI jeopardizes confidentiality. Inserting client information to an AI/GAI engine eviscerates confidentiality. This should never be done. A non-agent is now privy to confidential information and the attorney loses control of who else may have it. Rule 1.6 is breached.

Intellectual property concerns also exist. New York Times Company v Microsoft Corp., OpenAI, Inc. OpenAI LP, et. al.[9] is the most prominent example. The *Times* claims unlawful use of its work to create AI products that compete with and threaten its ability to provide its news service. This, it claims, is being done due to GAI being fed tremendous quantities of *Times* content and in breach of its copyright.[10] When an attorney prompts a large language model the attorney must be particularly careful to not violate copyright and/or not call someone's work their own.

Court Responses

Courts have responded to AI in practice. A standing order by a judge in the Southern District of Ohio, effective as of July 2023, prohibits the use of artificial intelligence in the preparation of any filing submitted to the court.[11] The rule imposes an affirmative obligation on parties and their counsel to inform the court if they become aware of the use of AI in any document.[12] The order does not apply to legal search engines, citing Westlaw and LexisNexis, as well as Google or Bing.[13]

A federal judge in the Northern District of Texas requires attorneys certify that no portion of their pleadings was drafted with "generative artificial intelligence." Similar orders have been issued in the fifth circuit court of appeals in New Orleans and in the district court in the eastern district of Pennsylvania. More are likely to follow.

The purported rationale for such rules is clear – to ensure attorneys produce original work and are consciously aware of what is submitted. Courts are signaling they do not want a repeat of Mata or Kim. These objectives are fair and reasonable. But the breadth of the rules may be cause for concern.

As shown, AI is used in nearly every facet of practice. Broad court rules may not account for this. Is the attorney who templates a pleading with GAI but then refines it before submission doing something improper? Likely not but they would be violating the court order in Ohio. What about the attorney who relies on some auto-complete sentences by Microsoft Word? Possibly. And, more advanced uses of AI – e-discovery, document review – will become commonplace but may be prohibited by court rules.

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[9] Case 1:23-cv-11195, District Ct. S.D.N.Y., December 27, 2023.

[10] Id.

[11] https://www.ohsd.uscourts.gov/sites/ohsd/files//MJN%20Standing%20Civil%20Order%20eff.%2012.18.23.pdf

[12] Id.

[13] Id.

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AI – THE NEW LEGAL IMPERATIVE

DOUGLAS GERHARDT, ESQ.,HONEYWELL LAW FIRM, PLLC

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Just as attorneys must exercise caution in practice, so too must court rules fully account for how AI can be used in productive and helpful ways which do not confound court procedure.

Conclusion

AI is being integrated in every facet of business. The legal profession cannot be an exception. Practitioners should familiarize themselves with AI/GAI, understand limits and limitations; always ensure confidentiality and most of all, zealously, competently and completely represent clients. This imperative, the bedrock of our practice, has not and will not change.

AUTOMATIC REMAND IN LOCAL COURT FOR A DEFENDANT CHARGED WITH A FELONY AND HAVING TWO PRIOR FELONY CONVICTIONS? MAYBE NOT.

John D. Leggett, Esq., Saratoga County Public Defender's Office

Since the advent of the bail reform laws, practitioners have grappled with the nuances of the law related to the release of the defendant upon arraignment on "non-qualifying offenses" or when monetary bail or remand is appropriately decided by a court. To add another layer to this quandary, CPL § 530.20(2)(a)(ii) seems to continue the practice of direct automatic remand of defendants at arraignment in city, town or village court if they are charged with a felony and it appears they have two prior felony convictions.

However, consider the following scenario. A defendant is arraigned in a local criminal court on a charge of Grand Larceny in the 4th Degree in violation of Penal Law § 155.30, an "E" felony. Normally, this defendant would be released on non-monetary conditions as Grand Larceny in the 4th Degree is a "non-qualifying offense" for purposes of consideration of monetary bail. Say this defendant has no other qualifying factors which would trigger the consideration of monetary bail (i.e. possible persistent felony offender sentencing consideration under Penal Law § 70.10, felony committed while serving a sentence of probation or while released to post release supervision, etc.). If the defendant appears to have two prior felony convictions, a city, town or village court would be required to remand the defendant pursuant to CPL § 530.20(2)(a). Likely the defendant would be held until a bail application could be heard by a superior court and then promptly released on their own recognizance or under non-monetary conditions.

People ex rel. Bradley v. Baxter, 189 N.Y.S.3d 893 (N.Y. Sup. Ct. Monroe Co. 2023), explores just this scenario. In this case the defendant Petitioner was detained in Rochester City Court following his arraignment on a number of non-qualifying offenses (one being a class E felony). Having two prior felony convictions for DWI related offenses, the defendant was remanded without consideration of non-monetary release or bail pursuant to CPL § 530.20(2)(a). Subsequently, the Supreme Court, Monroe County, upon consideration of an Article 78 Petition by the defendant, found that "an analysis of the plain meaning of CPL §§ 530.10 and 530.20, examined in conjunction with additional statutory interpretation aids and policy considerations, requires a construction of CPL § 530.20(2)(a), which limits its application to qualifying offenses as defined in CPL §§ 530.20(1)(b) and 510.10(4)." Id. at 898.

People ex rel. Bradley v. Baxter crafts a practical solution to a looming problem of impracticability. Why would the legislature mandate the holding of a defendant by a court in a situation where release by another court hours or days later would be required? Time will tell if courts adhere to the sensibilities pronounced in this persuasive opinion. Notably, in People v. Arroyo, 190 N.Y.S.3d 273 (Rochester City Ct. 2023), the Court rejected the reasoning of Bradley v. Baxter and staunchly adhered to a strict reading of the statutory language of CPL § 530.20(2)(a). It seems, for the time being, the New York criminal practitioner will continue to contend with the impractical and sometimes absurd situations created by criminal justice reforms.

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