

Using AI tools to analyze and oppose a trial or appellate brief

An outline of how to use Generative AI and some of the products available

By Michael G. Colantuono

The release for free public use of ChatGPT in November 2023 has sparked a revolution in the use of artificial intelligence for every manner of human endeavor. Artificial intelligence tools, depending on their definition, have been around a while, appearing in such things as your Netflix suggestions list. But generative AI – tools that generate new written material – are the significant new development for present purposes. We'll leave for another day "agentic AI" – AI tools which work as agents to do things like operate chatbots, plan travel, schedule staff, or book reservations.

Generative AI is a powerful new technology and is already changing the way we do so many ordinary tasks, like choosing a movie to watch, sending a text message, picking a place to eat, or surfing the internet. It is infiltrating law practice, too, and lawyers are sorting out what tools are available and how best to use them. I explain here how I use AI tools to analyze and oppose an argument – whether it be a demand letter, trial court moving papers, or an appellate brief. This is, of course, my approach. There are others and you should integrate AI tools into your work flow in ways that work for you. But you should start using these tools, as your competitors and clients are.

I will describe how I approach writing an opposition generally and comment on how I am working AI tools into that work. Here are the steps in my process:

First, review

First, I remind myself of the context of a case or dispute so I remember my view of it and am not overly influenced by my adversary's presentation. So, I review the pre-litigation correspondence, pleadings, or briefs to date to get a sense of the big picture, my take on the case, and the client's objectives. I list my main points.

AI can help with this step, as AI tools are very good at summarizing documents, searching databases, and identifying themes. Some use ChatGPT and other public tools but remember that these can hallucinate (make up things or make mistakes) and the prompts you give them may not be confidential. My firm uses ClearBrief to manage evidence and finds its chronology and summary tools very helpful. Such Law Tech products do not draw from unvetted materials, hallucinate far less, and promise to maintain confidentiality by deleting your data after use or sequestering them on your server.

It is helpful to remember at this point the big-picture objective – you are trying to win a dispute, typically a lawsuit, by persuading the decision maker that both justice and law are on your side. You are not trying to win a best-brief award. So, give thought to what this decision maker needs to know, now, to be persuaded to rule for you. Write in language appropriate to this setting.

In court, this means writing for judges and research attorneys. They are generalists and should not be assumed to understand the jargon of your client's business or the nuances of law in which you are expert and they are not. If you know a judge is steeped in an area of the law, it can still be risky to assume specialized knowledge – he or she might be out the day your motion is heard and you might lose the research attorney as a well-placed advocate for your cause.

I maintain fact and law "buckets" in my cases – a Word document or an email folder in which my team saves ideas as they occur to us during a case, such as a factual point or a legal authority, that may be helpful later. Each time we start drafting a substantive document, we review those "buckets" to see what is useful.

Most electronic-discovery platforms now have AI features and these can be fodder for brainstorming, too. My firm uses Logikull to manage email evidence. ClearBrief and other tools are powerful tools to summarize, search, and manage such evidence. We had one recent case under the California Environmental Quality Act with a 29,000-page administrative record. By the time we wrote our respondent's brief on appeal, only one health impact remained in dispute. While we did have to review the record the old-fashioned way to meet the standard of care, it was a big help to ask ClearBrief to identify every reference to this health impact, too, to make sure we did not miss anything. And AI tools do not just search for word matches, they look for different ways an idea can be expressed.

Outline

Second, and with this background, I prepare a top-level outline – with the level of detail appropriate to a table of contents – to set out the case from my perspective. This should cover all the issues I intend to brief and be organized logically and consistently with my view of the issues. AI can help here, too, as it is a very powerful brainstorming tool, allowing you to spot issues, summarize complex evidence, and identify themes and subthemes. ClearBrief allows you to assemble all your evidence in electronic form and then query that database to generate a chronology, a summary of issues, or a theme. ChatGPT, Claude, and other public tools can do this, too, but have the risks noted above.

What did opposing counsel say?

Third, only after these tasks are complete, do I closely read the work I am to oppose. I might look quickly at it while outlining to make sure I cover all its issues, but I want my view of the case firmly in mind before I start reading the other side's work, so I do not lose my thread in opposing counsel's view of the world. I tend to review opposing briefs as pdfs and use "sticky notes" to mark every point I have a response to, being consciously overinclusive. This is a brainstorming, idea-generating, creative stage, not the critical review and refining stage.

Copyright © 2025 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



I note carefully any concessions a brief makes or any of my arguments that it fails to rebut. Those are often my strongest points and I want to use them in my opposition. Then I consider *when* to raise my points: in the letter or brief I am writing, at some later point in a dispute (some arguments are best saved for reply so as not to forearm one's opponent) and some not at all.

AI can help with brief review, too. I use both Westlaw's Drafting Assistant and ClearBrief to critique opposing briefs. ClearBrief provides a list of authorities in a brief with an easily scanned list indicating how faithfully the brief describes and applies that law. Westlaw Drafting Assistant's Quick Check provides a list of authorities tied to the headings of a brief, noting good authority, bad authority, cases at risk of being overruled (due to changes in the law they apply), and – importantly, a list of other authorities on a topic not included in a brief that bear on its arguments. It also has a nifty tool to evaluate whether quotations in a brief are accurate.

It is, of course, necessary to read the key authorities opposing counsel cites and reread your own key authorities, too. You should read all the cases in their entireties. Busy lawyers often cite the first case they find on a point without realizing that there is additional discussion in the case that undermines their position. If that's the case, find a better cite. If your opponents do this, use their authorities against them.

Back to the outline

Fourth, I refine my outline by taking the top-level outline I prepared at step two and harvesting all my sticky notes from my close read of opponents' brief. These become discussion points in my outline and I note the page of the opponents' brief to which I am responding. When you rebut a point, it helps to cite to what you are rebutting so the court knows you are, in fact, responding to something, and to what. I find the "contra" signal for cites helpful, making a point and then citing the contrary claim in the opposing point with this signal.

You will find that many of your sticky notes from various points in opposing counsel's brief can be collected into one point on rebuttal – lawyers repeat themselves and a point can resurface even in tight, well-edited work. The resulting outline can be what I call "shrubby" – a bit disorganized and overly long in some places and terse in others, reflecting what opposing counsel had to say and my reactions to his or her points rather than my fully flowing version of the argument. So, it is important to smooth out the outline to make sure it covers what is needed, drops what is not, and flows well.

AI can help, here, too. Run your detailed outline through ClearBrief, Westlaw's Drafting Assistant or other AI tools and ask it to critique your authorities, logic, etc. Use that feedback in refining your outline.

At this point, I often share the outline with my colleagues or my client for comment. Their input is helpful and the sign-off is, too – it can discipline the committee editorial process that may sometimes follow to remind folks they approved a point or its presentation earlier.

In framing my case, I want to claim or reclaim the narrative from opposing counsel. I want to be sure I am telling my story and not accepting my adversary's framing of the case – unless I like that framing better, as I sometimes do. Sometimes, an opponent's reframing amounts to a telling concession – "The answer brief does not contest the law presented in the opening brief, contesting only factual issues. Therefore, substantial evidence review applies here."

It is also helpful to remember the basic role of the brief you are writing. A response to a demand letter rebuts the demand and establishes defenses. It makes a record and may persuade. An opening brief, opens, of course, but it responds to what has gone before, too – in prelitigation dialogue, in lower courts, in earlier appeals. A respondent's brief, of course, responds to opening papers. Anything you fail to rebut may be taken as a silent concession. A reply brief should note those omissions and silent concessions. New arguments on reply are forbidden or disfavored depending on the context, but new authorities and new angles on issues are okay.

I do not use generative AI tools to draft, although I know other attorneys do. Using public tools to draft is risky because they are not restricted to quality inputs – they draw from all text on the internet, treating scholarly articles and legal authorities the same as social media posts heavy on opinion and light on facts and logic. I do use generative AI to provide something like a bench memo on a topic – to get me started and to identify the key authorities on part of a brief.

Disclosure of AI use in a brief

If you do use a generative AI tool to draft even part of a brief, you must treat its output like you would the work of a green attorney. Trust nothing, verify everything, and rewrite comprehensively. This is your ethical obligation to the court. Many courts now require disclosure of such use of generative AI. Duke Law School maintains a list of such rules at https://rails.legal/resources/resource-ai-orders/ Check the local rules, too, especially when you are in a new forum. Federal judges' standing orders (effectively local, local rules) have bitten me on occasion.

Currently available tools

Many AI tools are available for these tasks. I use ClearBrief, Westlaw's Drafting Assistant and, occasionally ChatGPT (though, more often for law firm management than advocacy). My team tried CoCounsel before Westlaw acquired it and most of us did not find it sufficiently helpful to justify Westlaw's price. Lexis+AI is comparable to the Westlaw tool, but we decided to stay with Westlaw because we rely on secondary authorities not available on the Lexis platform. Harvey AI is an expensive (from where I sit), custom-fit tool used by the biggest firms.

Those with international practices find vLex's Vincent useful for its depth in the law of other nations. There are many new entrants in the Law Tech marketplace, so it makes sense to keep an eye on the legal trade press. My firm is reexamining Westlaw's AI offering now, as it has been a year since we last did. I think it will be some time before the market settles down into a manageable constellation of known

Copyright © 2025 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



players. Developments can be fast and furious in this market!

Draft, revise, edit and polish

Fifth, I draft, revise, edit and polish the opposition. I recommend you always draft from an outline, even if it is in your head (for something short) or scratched on notepaper (even for emails). Without an outline, you will wander and repeat yourself – the natural inclination of the human mind. It takes focus to tell a story in efficient, logical fashion. Use an outline to assist.

We must always edit our work. Always. Even emails. As the 19th century English writer Robert Graves put it, "There is no such thing as good writing, only good rewriting." AI tools can help. A colleague in solo practice needed help getting an appellate brief down to the 14,000-word limit and time did not permit him to get help. So, he entered his brief, paragraph by paragraph, into Claude and asked it to rewrite his work more concisely and clearly. He used the result to edit his work. (He cautioned that this process must be done carefully. These AI tools can be effective editors, but they tend to err on the side of cutting too much.)

I use tools specific to the editor's task – the spelling and grammar-checking features of Word are widely available and easy to use. WordRake integrates with Word and produces a redline highlighting common weaknesses in writing – passive voice, failure to maintain consistent number between subjects and verbs, needless complexity, etc. We found it pretty affordable, and we require everyone on our team to use it. There are competing products out there, too.

On important work, it is a good idea to put a brief aside before a final, polishing edit. Sleeping on it gives you sharper eyes for typos and the like and can refine your thinking. I often wake up the day after focusing on something with new insights. I also find proofing in hard copy is much more effective than doing it on the screen.

When you are nearly done, and your brief is drafted, edited, and polished and includes tables of contents and authorities, run it through ClearBrief or Westlaw's Drafting Assistant one more time. These tools can confirm that your quotations are correct, your citations sound (and in the proper format – The California Style Manual for state court, Blue Book for federal court), and that the status of your authorities has not changed and no new on-point cases have issued.

None of this remotely approaches asking a robot lawyer to produce a responsive brief. It is still lawyering by an experienced lawyer applying the traditional tools of the craft – research, strategizing, writing, editing, and thinking. But AI can automate many aspects of this work and make you more effective.

If you have not tried AI lawyer tools yet, my advice is – come on in, the water's warm!


Colantuono

Michael is a shareholder of Colantuono, Highsmith & Whatley, PC *and certified by the California State Bar as an appellate specialist. He is a past president of the California Academy of Appellate Lawyers, an elected member of the American Law Institute, and has argued 14 cases in the California Supreme Court. He appeared in all six of the California District Courts of Appeal, as well as trial courts around the State, and in the 9th Circuit. AI is only a side interest.*

Copyright © 2025 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**