Avoiding Artificial Adequacy in Class Litigation: An AI adequacy test

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Abstract

Artificial intelligence (AI) is permeating all aspects of the legal practice, and class litigation is no exception. Recognizing AI's potentially harmful effects for legal clients, the American Bar Association's Standing Committee on Ethics and Professional Responsibility in 2024 provided guidance in a formal opinion for attorneys, signaling client disclosure and consent were required to employ AI in the representation. But the ABA's opinion did not address or apply to class litigation, where putative class members and class counsel share no attorney-client relationship. Indeed, class members presently have little to no means to consent to or question class counsel's prosecution of the litigation. AI can change this dynamic and revolutionize class litigation. A few scholars have already recognized AI's potential to provide class members with a critical voice and facilitate the resolution of a greater volume of class claims. But while AI stands to benefit class members, it can also diminish the quality of their legal representation and negatively impact their litigation outcomes. Class counsel is required, under Rule 23(g) of the Federal Rules of Civil Procedure, to adequately represent the interests of absent class members, but with often conflicting interests, this directive is insufficient to protect the class from class attorneys' negligent use of AI.

This Article proposes a novel test within Rule 23(g)'s existing framework to protect class members from class counsel's AI misuses. It begins by addressing AI's potential impact on the quality of class members' representation, translating the promises and perils AI presents traditional litigants into the class environment. The Article then proposes an AI adequacy test aimed at ensuring that class counsel's use of AI outputs in the litigation neither negatively affects class members' legal representation nor otherwise harms class members. The test directs courts, empowered under Rule 23(g)'s broad authority, to inquire into class counsel's past and intended use of AI in the litigation and assess whether such use has or will impair class members' interests. The Article also applies the AI adequacy test to various hypotheticals and addresses potential criticisms.

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Ultimately, it demonstrates how the proposed AI adequacy test can provide class members similar protections as other litigants while incentivizing class counsel to responsibly employ AI to further class members' interests.

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INTRODUCTION

Artificial intelligence (AI) stands to revolutionize class litigation for class members, and it should. Class members have, since class actions' nascence, been marginalized and sidelined throughout all stages of the litigation.[1] This somber reality, described by some scholars as the "class action paradox," reflects the irony of a vehicle meant to amplify the voices of hundreds, thousands, and often millions of similarly harmed individuals that has instead effectively silenced them.[2] AI can take significant steps towards resolving this paradox and improve

1. Alissa del Riego & Joseph Avery, *The Class Action Megaphone: Empowering Class Members with an Empirical Voice*, 76 STAN. L. REV. ONLINE 1, 3 (2023) ("Class members are sidelined at all points in the litigation process."); Debra Lyn Bassett, *Constructing Class Action Reality*, 2006 BYU L. REV. 1415, 1468 (2006) (discussing class members' marginalized status).

2. Alissa del Riego & Joseph J. Avery, *Resolving the Class Action Paradox*, 46 CARDOZO L. REV. (forthcoming 2025) (manuscript on file with author) (describing the class action paradox); *see also* Debra Lyn Bassett, *Class Action Silence*, 94 B.U. L. REV. 1781, 1789 (2014) (explaining "class actions currently are structured to maintain greater silence from absent class members than is necessary"); del Riego & Avery, *supra* note 1, at 2 (observing "class litigation often silences class members").

class members' representation.[3] While most scholarship to date has concentrated on AI's impact on traditional litigants,[4] a few scholars have begun to explore AI's potential to improve class litigation for class members.[5] This scholarship, however, has yet to address the technology's potential to harm class members and decrease the quality of their legal representation.

The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility in the summer of 2024 recognized the need for guidance to protect legal clients from the negligent use of AI by their attorneys.[6] The Committee's opinion failed, however, to address class litigation, where the ABA Model Rules of Professional Conduct governing client communication, consent, disclosure, and confidentiality do not apply.[7] This is troubling as class members' absence in the litigation subjects them, more so than traditional litigants, to the harmful effects of AI defects, misuses, and abuses that can reduce the quality of their representation, saddle them with sub-par litigation outcomes, and cause other harms. This Article thus proposes a test for courts to apply when assessing and appointing interim class counsel at the outset of the litigation and class counsel at class certification that considers counsel's intended and actual use of AI in the litigation. The test, elaborated below, is necessary to afford class members similar protections as other litigants against attorneys' irresponsible use of AI.

Imagine class counsel uses a predictive AI tool after several class claims are dismissed, and the algorithm determines that class certification of the remaining claims is only fifteen percent likely and success at trial only eight percent likely. As a result, class counsel accepts a subpar settlement offer. The algorithm's

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3. Del Riego & Avery, *supra* note 1, at 4–8.

4. *See generally, e.g.*, Drew Simshaw, *Access to A.I. Justice: Avoiding an Inequitable Two-Tiered System of Legal Services*, 24 YALE J. L. & TECH. 150, 154–57 (2022); Jessica R. Gunder, *Rule 11 Is No Match for Generative AI*, 27 STAN. TECH. L. REV. 308, 313 (2024); Hadar Y. Jabotisnky & Michal Lavi, *AI in the Courtroom: The Boundaries of Robolawyers and Robojudges*, 35 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 286, 302–53 (2025); John Villasenor, *Generative Artificial Intelligence and the Practice of Law: Impact, Opportunities, and Risks*, 25 MINN. J. L. SCI. & TECH. 25, 31–37 (2024); Raymond H. Brescia, *What's a Lawyer for? Artificial Intelligence and Third-Wave Lawyering*, 51 FLA. ST. U. L. REV. 543, 592–95, 587–95 (2024); James A. Sherer et al., Comment, *A Model Approach to Attorney AI Practice – Function or Folly in an Age of AI?*, 61 CAL. W. L. REV. 353, 376–79 (2025).

5. *See, e.g.*, del Riego & Avery, *supra* note 1, at 5–8 (proposing AI tools assist in communicating with class members and gaining insight on class members' interests and preferences); Joshua P. Davis, *Of Robolawyers and Robojudges*, 73 HASTINGS L.J. 1173, 1191–92 (2022) (proposing AI assist judges in assessing the adequacy of class settlements); Peter N. Salib, *Artificially Intelligent Class Actions*, 100 TEX. L. REV. 519, 522 (2022) (proposing AI be used to resolve individual questions in class suits).

6. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 512 (2024).

7. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-445 (2007) (opining the attorney-client relationship does not begin until after expiration of the opt-out period); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-438, n.3 (2006) (noting lawyers representing class members "may not have a full client-lawyer relationship with each member of the class"); W. Morgan-E. Lawrence Water & Sewer Auth. v. 3M Co., 737 F. App'x 457, 465–66 (11th Cir. 2018) (same); Kincade v. Gen. Tire & Rubber Co., 635 F.2d 501, 508 (5th Cir. 1981) (noting the inapplicability of traditional rules governing attorney-client relationship in the class context); Dodona I, LLC v. Goldman, Sachs & Co., 300 F.R.D. 182, 187 (S.D.N.Y. 2014) (collecting cases).

dataset, however, failed to consider cases that were reversed on appeal, which would have increased the likelihood of class certification to thirty-five percent and trial victory to twenty percent. Imagine that counsel also failed to ask the tool to distill the results to opinions within the district, which would have increased the likelihood of class certification to fifty percent and trial victory to sixty percent. Finally, had counsel successfully amended the claims dismissed in an amended complaint, the likelihood of class certification would have increased to seventy percent and trial victory to eighty percent.

Next, imagine class counsel uses an AI tool to evaluate a settlement offer from a defendant in a data breach case that compares the offer to other settlements approved by courts in data breach class cases. Suppose the algorithm has a comprehensive dataset of every data breach class settlement and adjusts for class size and concludes the settlement offer is better than seventy-five percent of other approved data breach settlements. Class counsel thus accepts the offer, even though the algorithm could not (because such information is not public) consider the specific facts established in discovery of each case. Discovery in the instant case demonstrated the defendant purposefully reduced its data security protections to allow a third party to breach its records in exchange for payment—a fact not present in any other data breach case. Now, imagine the AI tool's terms and conditions allow the company that owns the tool to disclose data input into the tool by its users, defeating privilege and exposing class members' private information.

Or imagine the more traditional example, where class counsel uses ChatGPT or another large language model to respond to a motion to dismiss, and ChatGPT fails to identify relevant caselaw, misinterprets other caselaw, and cites to inexistent case law. Class counsel does not perform independent research, and the court dismisses the class complaint with prejudice as a result.

In all these examples class members' representation was negatively impacted by class counsel's use of AI, yet class members today can do nothing to prevent, question, or challenge class counsel's use of AI. Unlike other litigants, class members have virtually no control over class counsel during the litigation; this includes the remedies sought, the legal claims raised, the legal fees charged, the legal experts engaged, the settlements rejected or accepted,[8] and now, class counsel's use of AI. Class members have no means to control or be informed of the AI tools and outputs class counsel will employ in the litigation. In fact, most class

8. Pearson v. NBTY, Inc., 772 F.3d 778, 787 (7th Cir. 2014) (noting class members "have no control over class counsel"); Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. 1259, 1262 (2017) ("[A]bsent class members have virtually no ability to control class counsel."); *see also* Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1146 (2009); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3 (1991); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677–684 (1986).

members are even unaware litigation has begun on their behalf[9] and never communicate with class counsel.[10] Recognizing class members' absence in both nomenclature and fact, Rule 23 of the Federal Rules of Civil Procedure tasks federal courts with ensuring class members' interests are adequately represented in the litigation.[11] This includes ensuring class counsel,[12] class representatives,[13] and settlements amounts are "adequate."[14] But, given recent examples of attorneys misusing AI,[15] what safeguards exist to protect class members?

In mid-2024, the ABA Standing Committee on Ethics and Professional Responsibility recognized that attorneys' use of generative AI tools "raise[s] important questions under the ABA Model Rules of Professional Conduct"—including those of competency, confidentiality, client communication, and fees—and it issued its first formal opinion involving attorneys' ethical use of generative AI.[16] While the opinion provided some guidance, it did not categorically state when AI use would be proper or when client consent was necessary. Instead, the Committee explained that "any informed decision about whether to employ a [generative AI] tool must consider the client's interests and objectives"[17] and that "[t]he facts of each case will determine whether . . . lawyers [must] disclose their [generative] AI practices to clients."[18] The opinion's language tracks Rule 23's mandate that class counsel must "fairly and adequately represent the interests of the class,"[19] but in no part of the fifteen-page opinion did the Committee address class litigation specifically.

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9. Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 90–91 (2007) ("[M]any class members are unaware of the class action litigation . . ."); Bassett, *supra* note 2, at 1790–91 (noting "the reality that absent class members are unaware of the class action's pendency"); Macey & Miller, *supra* note 8, at 20 (1991) (observing class members "are often entirely unaware that the litigation is pending until after a settlement has been reached").

10. Alissa del Riego & Joseph Avery, *Inadequate Adequacy?: Empirical Studies on Class Member Preferences of Class Counsel*, 2024 UTAH L. REV. 499, 515 (2024); Robert H. Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 762–64 (2008).

11. Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1100 (E.D.N.Y. 2006), *rev'd on other grounds by* McLaughlin v. Am. Tobacco Co., 552 F.3d 215 (2d Cir. 2008); Debra Lyn Bassett, *When Reform is Not Enough: Assuring More Than Merely "Adequate" Representation in Class Actions*, 38 GA. L. REV. 927, 931 (2004).

12. *See* FED. R. CIV. P. 23(g)(1)(A).

13. *See* FED. R. CIV. P. 23(a)(4).

14. *See* FED. R. CIV. P. 23(e)(2).

15. *See, e.g.*, Park v. Kim, 91 F.4th 610, 615 (2d Cir. 2024) (attorney uses LLM-hallucinated (inexistent) caselaw); Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 449 (S.D.N.Y. 2023) (same); Sillam v. Labaton Sucharow LLP, No. 21-cv-6675, 2024 WL 3518521, at *2 n.2 (July 24, 2024) (noting plaintiff's brief contains "repetitive language" that "does not present any advocacy; it only restates general principles of law without making argument" and "is not helpful to the Court"); Hailey Konnath, *Class Action Atty Sanctioned For 'Egregious' Bogus Citations*, LAW360 (Sept. 10, 2025, 11:50 PM), https://www.law360.com/articles/2386758/class-action-atty-sanctioned-for-egregious-bogus-citations.

16. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 512, at 2 (2024).

17. *Id.* at 5.

18. *Id.* at 8.

19. FED. R. CIV. P. 23(g)(1)(B), (2).

This is important because courts and the ABA have previously determined that putative class members (i.e., class members in an uncertified class) are not legal clients and attorneys representing class members are thus not subject to the ABA Model Rules of Professional Conduct governing the the attorney-client relationship.[20] For example, Model Rule 1.4 on attorneys' duties to communicate with clients, referenced by the Committee as relevant to when attorneys might have to disclose their use of AI to clients,[21] does not apply to class counsel.[22] Similarly, the Committee's suggestion that attorneys communicate their intended AI use in client engagement letters does not apply because most class members do not sign an engagement letter.[23] The ABA's formal opinion thus does little to guide disclosure, confidentiality, and communication requirements for class attorneys using AI. How then can class members be protected from class counsel's AI misuses and abuses if they are never informed of them?

This Article proposes adding AI adequacy to the present Rule 23(g) adequacy test courts already apply when appointing interim class counsel at the outset of the litigation and class counsel at class certification. Under the proposed test, "AI adequacy" would be satisfied, if and only if, class counsel's use of AI caused class members no harm. This means class members' representation in the litigation was not negatively impacted and class members suffered no collateral tangible harm resulting from counsel's use of AI. The proposal borrows inspiration from Professor Jay Tidmarsh's "do no harm" recasting of Rule 23(g) adequacy.[24] Professor Tidmarsh proposes assessing adequacy of representation based on whether class members are "no worse off than they would have been if they had engaged in individual litigation" or, stated differently, whether "class representation did not worsen

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20. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 25 (2018) [HEREINAFTER MODEL RULES] (noting class members are not clients for conflict purposes); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-445, 3 (2007) (opining the attorney-client relationship does not begin until after expiration of opt-out period); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-438, n.3 (2006) (noting lawyers representing class members "may not have a full client-lawyer relationship with each member of the class"); Dodona I, LLC v. Goldman, Sachs & Co., 300 F.R.D. 182, 187 (S.D.N.Y. 2014) (collecting cases); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. l (AM. L. INST. 2000) (noting "according to the majority of decisions . . . prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients"); Bassett, *supra* note 11, at 968 (noting courts have evaded application of the *Model Rules* "in the class action context" "by characterizing them as 'impractical'"); Bruce A. Green & Andrew Kent, *May Class Counsel Also Represent Lead Plaintiffs?*, 72 FLA. L. REV. 1083, 1098 (2020) ("Absent class members' relationships with class counsel are even less like an attorney-client relationship."); John Randall Whaley et al., *Precertification Discovery: A User's Guide*, 80 TUL. L. REV. 1827, 1854 (2006) ("[C]ourts have explicitly refused to find that the Model Rules of Professional Conduct are applicable to class actions.").

21. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 512, at 8–9.

22. *See supra* note 20.

23. Mindi Guttmann, Note, *Absent Class Members: Are They Really Absent? The Relationship Between Absent Class Members and Class Counsel with Regards to the Attorney-Client and Work Product Privileges*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 493, 501 (2009) (noting "absent class members do not sign an engagement letter").

24. *See* Tidmarsh, *supra* note 8, at 1176.

the expected litigation outcomes of class members."[25] While this Article does not embrace such an assessment of representational adequacy, its core principle serves well when assessing AI adequacy.

The proposed AI adequacy test, which would form part of the larger Rule 23(g) class counsel's adequacy analysis, is necessary to ensure class counsel's financial motivations do not impair the class's interests. Any use of AI that prevents class members from communicating their interests, obscures their interests, conflicts with their interests, or otherwise impairs their interests would be presumptively "inadequate." Similarly, any use of AI that negatively impacts class members' representation or causes them some other collateral tangible harm would also be "inadequate." The test is fact-determinative. For example, employing an AI chatbot to communicate with class members may or may not impair their interests. It depends on several variables, such as: what the standard practice for communicating with class members was before the employment of the bot; what information the bot can provide; what information did the bot provide; whether the information provided by the bot was accurate; whether class members could access class counsel in addition to communicating with the bot; how resources saved by using the bot were employed by class counsel, etc. Use of a particular AI tool might be adequate in one litigation but not another. Similarly, use of an AI tool might be adequate for one purpose in a litigation, but not another.

The Article proceeds in four parts. Part I explains class members' absent status in the litigation. It describes the class action paradox—the muted class member litigation scene into which AI enters. It highlights class members' lack of control over the litigation, which Rule 23 acknowledges and provides safeguards to address. These safeguards include directives to class counsel, class representatives, and class courts. Part I ends by explaining the importance of courts' fiduciary role to ensure class members, class representatives, and settlements are adequate.

Part II provides a brief overview of AI's potential promises and pitfalls for traditional litigants. It translates each of these to the class environment. This Part explores how AI might positively and negatively impact class members, specifically in terms of accessibility, accuracy, and privilege. Part II also speculates ways AI can produce a much-needed sea change in class litigation by empowering class members to ensure litigation outcomes reflect their needs and preferences.

Part III introduces and explains the proposed AI adequacy test. It subsumes AI adequacy within courts' Rule 23(g) class counsel adequacy analysis. The test makes AI adequacy contingent upon class counsel's intent to further the interests of class members and the effects of the AI output's use in the litigation. The test aims to provide AI accountability. Part III then describes how courts would practically apply the test during the litigation, including during the appointment of interim class counsel and class certification.

Part IV puts Part III's AI adequacy test to the test. It begins by acknowledging several possible criticisms the test might face, including its potential to

25. *Id.* at 1139.

discourage AI use, endorse the very artificial adequacy it seeks to avoid, and ultimately harm class members. But it explains why, despite the validity of some of these concerns, the test remains necessary. Part IV then presents three hypothetical scenarios at different stages in the litigation in which a court would be called to assess class counsel's AI adequacy.

A reputable class action firm serving as co-lead counsel in a RICO fraud case faces sanctions in late 2025 "for the misuse of artificial intelligence" that could negatively impact the class.[26] Indeed, defendants in the case called for sanctions that would strike the class's responses to various motions and dismiss plaintiffs' case completely.[27] The often-praised national plaintiff's class action firm filed several responses and briefs with inexistent caselaw that was hallucinated by AI or failed to stand for the proposition cited.[28] According to the firm's response to the court's order to show cause, the partner that signed and filed the responses "did not use AI or intentionally make misrepresentations to the court."[29] Instead, the firm claimed, the partner's failure was "one of procedure" in failing to cite check the legal authorities cited by unappointed co-counsel that drafted part of the pleadings.[30] While the characterization of the mistake is debatable, what is not is that it is, as the court in the case observed, "unacceptable" and class members are entitled to adequate representation that does not put their claims and recovery in jeopardy because of negligent AI use.[31]

I. THE CLASS ACTION PARADOX

To discuss class members' "role" in class litigation is perhaps oxymoronic, as absent class members are in fact absent throughout the litigation. Class members' interests are stated to be paramount, but class members are not informed when a class lawsuit is filed on their behalf.[32] They do not get to choose the attorney or legal team that will represent their interests in the litigation.[33] They have no

26. Order to Show Cause Regarding AI-Generated Content in Opposition Briefs, N.Z. v. Fenix Int'l Ltd., 8:24-cv-01655 (C.D. Cal. Sept. 4, 2025), ECF No. 187; Jack Karp, *Hagens Berman Seeks to Limit Sanctions for AI Mistakes*, LAW360, Sept. 19, 2025 at 4:04 PM, https://www.law360.com/articles/2390295/hagens-berman-seeks-to-limit-sanctions-for-ai-mistakes [https://perma.cc/3Q68-9NJP].

27. Plaintiff's Reply in Support of Motion for Leave to Withdraw at 18, N.Z. v. Fenix Int'l Ltd., 8:24-cv-01655 (C.D. Cal. Sept. 11, 2025), ECF No. 190.

28. Id. at 7, 18, 21.

29. Plaintiff's Response to Order to Show Cause at 6, N.Z. v. Fenix Int'l Ltd., 8:24-cv-01655 (C.D. Cal. Sept. 18, 2025), ECF No. 193.

30. Id. at 6–7.

31. See Order Sanctioning Plaintiff's Counsel, Tercero v. Sacramento Logistics, LLC, 2:24-cv-00953 (E.D. Cal. Sept. 9, 2025), ECF 50 (also sanctioning class attorney for fabricated citations the court suspected were generated by AI); Craig Clough, *Hagens Berman Not Very Contrite About AI Errors, Judge Says*, LAW360 (Sept. 25, 2025, 10:10 PM), https://www.law360.com/articles/2392675.

32. Leslie, *supra* note 9, at 90–91; ("[M]any class members are unaware of the class action litigation"); Bassett, *supra* note 2, at 1790–91 (noting "the reality that absent class members are unaware of the class action's pendency"); Macey & Miller, *supra* note 8, at 20 (observing class members "are often entirely unaware that the litigation is pending until after a settlement has been reached").

33. Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1943 (2011); Del

attorney-client relationship with class counsel,[34] and as such, class counsel has no duty to communicate with class members prior to certification.[35] Conversations between class members and class counsel, at least prior to certification, are subject to discovery requests by defendants and thus practically discouraged.[36] Class members have no right to request certain remedies.[37] They are not informed of unaccepted settlement offers extended by the defendant.[38] Most class members are completely unaware of the litigation if and until class certification or a settlement is accepted by class counsel.[39]

Class members, per Rule 23, are entitled to "adequate"[40] representation, but they have little opportunity and means to challenge the adequacy of their representation. They cannot weigh in on the self or court-chosen attorneys to represent them or the class representatives those attorneys choose.[41] Those representatives, moreover, have no obligation to communicate with class members throughout the litigation or to decipher, appreciate, or understand other class members' interests.[42] Class representatives and members are also largely

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Riego & Avery, *supra* note 10, at 500.

34. *See supra* note 20.

35. *See* State Bar of Mich., Ethics Op. CI-1169 (1987) (implying that class counsel does not have the duty to communicate with unascertained members); del Riego & Avery, *supra* note 1, at 8 (proposing the creation of such a duty); Eli Wald, *Class Actions' Ethical "KISS": The Class Action Lawyer's Client is the Class*, 74 HASTINGS L. J. 1433, 1442 (2023) (suggesting lack of a duty because "it is hard to see practically how the class action lawyer can meaningfully . . . communicate with thousands if not millions of absent class action members as clients").

36. *See, e.g.*, Depina v. FedEx Ground Package Sys., Inc., No. 23-cv-00156, 2024 WL 1650847, at *1–2 (N. D. Cal. Apr. 16, 2024) (finding communications and survey responses by putative class members not protected by the attorney-client privilege because they occurred prior to class certification); Morris v. Gen. Motors Corp., No. 2:07-md-01867, 2010 WL 931883, at *5–6 (E.D. Mich. Mar. 11, 2010) (same); *see also* Debra Lyn Bassett, *Pre-Certification Communication Ethics In Class Actions*, 36 GA. L. REV. 353, 353–54 (2002). *But see* Glover v. EQT Corp., No. 5:19CV223, 2023 WL 5321810, at *6–7 (N.D. W. Va. Aug. 14, 2023) (finding attorney-client privilege applied to attorneys' communications with putative class members that communicated as prospective clients).

37. *See, e.g.*, Nat'l Treasury Emps. Union v. U.S., 54 Fed. Cl. 791, 803 (Fed. Cl. 2002) (noting that "class counsel determined that it would be in the interest of the class as a whole to adopt the remedial methodology approach"); *see also* Morris A. Ratner, *Class Counsel as Litigation Funders*, 28 GEO. J. LEGAL ETHICS 271, 296 (2015) (noting "[c]lass members do not determine . . . which claims and remedies to pursue").

38. *See* Del Riego & Avery, *supra* note 10, at 516 (explaining class members "are not aware of settlement offers that were previously rejected"); Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 660 (noting that although not presently required "courts should require class counsel to inform and consult with the named representatives on . . . settlement offers . . .").

39. Del Riego & Avery, *supra* note 10, at 500; Leslie, *supra* note 9, at 90–91; Macey & Miller, *supra* note 8, at 20.

40. FED. R. CIV. P. 23(g)(2).

41. *See* Amanda M. Rose, *Cutting Class Action Agency Costs: Lessons from the Public Company*, 54 U.C. DAVIS L. REV. 337, 383 n.194 (2020); Debra Lyn Bassett, *Just Go Away: Representation, Due Process and Preclusion in Class Actions*, 2009 BYU L. REV. 1079, 1116 (2009); Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytical Tool*, 81 NEB. L. REV. 1008, 1027 (2003).

42. *See* Melissa E. Crow, *Impact Litigation Reconsidered: Navigating the Challenges of Movement Lawyering at the Border and Beyond*, 31 CLINICAL L. REV. 107, 151 (2024) ("In fact, certified class

unaware of the legal work class counsel is performing, as class counsel typically does not need to disclose its hours, staffing, or engaged experts to class representatives or the class.[43] Class members are at a severe informational disadvantage to challenge the adequacy of their representation throughout the litigation.

The Federal Rules of Civil Procedure do permit absent class members to intervene if their interests are not being represented.[44] But the ability to intervene is only meaningful if a class member is aware of the litigation and somehow aware that their interests are not being represented in the litigation. This could of course occur as late as class certification or a class settlement, as it may be the first time a class member is aware of the litigation.[45] Yet at least a few courts have held that intervention at the class settlement stage is unnecessary, given that the class member could simply object to or opt out of the settlement.[46] Such impediments make intervention rare in most consumer class litigation.[47] The costs of intervening often fail to justify the time and effort spent intervening.

This is the class action paradox. The litigation vehicle meant to empower individuals as a larger class has completely isolated them from the litigation. There are, of course, practical reasons for the paradox. Class members are geographically dispersed and sometimes difficult to identify until later in the litigation.[48] It could also be unruly and unmanageable to involve thousands and sometimes millions of class members in the litigation.[49] Class members, even those that do not have a legal conflict, would also likely not uniformly agree on who to hire as their attorneys, litigation strategies to pursue, and desired litigation outcomes.[50] Moreover,

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representatives need not even consult with other class members before making critical case-related decisions on their behalf.") (citing Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709, 734 (1989)).

43. *Cf.* Michael D. Ricciuti, *Equity and Accountability in the Reform of Settlement Procedures in Mass Tort Cases: The Ethical Duty to Consult*, 1 GEO. J. LEGAL ETHICS 817, 831 (1988); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 93–94 (2007).

44. Standard Fire Ins. Co. v. Knowles, 568 U.S. 588, 594 (2013) ("Members of a class have a right to intervene if their interests are not adequately represented by existing parties."); *see also* WILLIAM RUBENSTEIN ET AL., NEWBERG & RUBENSTEIN ON CLASS ACTIONS § 9:34 (6th ed. 2022).

45. *See supra* note 33.

46. *See* Allen v. Bedolla, 787 F.3d 1218, 1222 (9th Cir. 2015); Travis v. Navient Corp., 284 F. Supp. 3d 335, 344 (E.D.N.Y. 2018).

47. *See* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 139 (1996); CYCLOPEDIA OF FEDERAL PROCEDURE § 24:63 (3d ed. 2024).

48. *See* Leslie, *supra* note 9, at 100 (discussing class members' geographic disbursement); David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Invisible" Remedies*, 79 GEO. WASH. L. REV. 542, 553 (2011) (discussing times class members may be difficulty to identify).

49. *See* Nicholas Almendares, *The Undemocratic Class Action*, 100 WASH. U. L. REV. 611, 635–38 (2023); Macey & Miller, *supra* note 8, at 20.

50. *See supra* note 43; Del Riego & Avery, *supra* note 10, at 535–41 (showing survey participants acting as class members chose different attorneys to represent the class); Expert Report of Joseph J. Avery, Ph.D., J.D., and Alissa Del Riego, J.D. at 1–2, 11–12, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., 3:24-md-03098 (N.D. Cal. Apr. 22, 2024), ECF No. 9-2 (showing class members differed on litigation strategy preferences).

some—if not most— class members have little motivation and time to meaningfully participate in the litigation. Class members are presently at the mercy of class counsel, class representatives, and class courts to protect their interests, but the following sections discuss why class counsel and class representatives may fail to protect those interests and why courts' Rule 23 fiduciary role to protect class members' interests is paramount.

A. CLASS MEMBERS' LACK OF CONTROL OVER CLASS COUNSEL

Class action attorneys are the driving force behind class litigation.[51] They, as further discussed herein, determine whether and when to file suit on behalf of class members, how the class is initially defined, who the class representatives will be, which claims will be asserted, what relief will be sought, what discovery will be requested, and what settlement outcomes are acceptable.[52] This is considerably more authority than attorneys wield in traditional litigations, where they must professionally and ethically consult with their clients and abide by their decisions. Class counsel and absent class members, however, do not share an attorney-client relationship.[53] While class counsel "must fairly and adequately represent the interests of the class," they do not have to communicate with absent class members to accomplish this directive. Indeed, they are discouraged from doing so to avoid accusations of solicitation[54] or having to disclose such communications to defendants.[55]

Class attorneys, not class members, decide if and when to file a class suit.[56] Indeed, class members are not permitted to prosecute a class suit *pro se*.[57] Class attorneys also choose their clients. Even if an injured consumer would like to prosecute a class claim, it is the attorney's prerogative whether to file suit and name them as a class representative. There are legitimate reasons for this. Class

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51. Del Riego & Avery, *supra* note 10, at 499-50 (discussing importance of class counsel's role); Macey & Miller, *supra* note 8, at 4 (noting "the fact that plaintiffs' attorneys—not the client—control the litigation"); Coffee, *supra* note 8, at 681 (describing class counsel as "an independent entrepreneur" because "client control is so weak").

52. *See, e.g.*, Outten v. Wilmington Tr. Corp., 281 F.R.D. 193, 202 (D. Del. 2012); *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. MDL 05-1720, 2005 WL 2038650, at *5 (E.D.N.Y. Feb. 24, 2006); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004); del Riego & Avery, *supra* note 10, at 506; Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 150–52 (2003).

53. *See supra* note 20.

54. *See, e.g.*, *In re* Matzo Food Prods. Litig., 156 F.R.D. 600, 608 n.7 (D.N.J. 1994); Tomassi v. City of L. A., No. CV 08-1851 DSF, 2008 WL 4722393, at *3 (C.D. Cal. Oct. 24, 2008); *see also* NEWBERG & RUBENSTEIN ON CLASS ACTIONS, *supra* note 38, at § 19:6 ("The primary concern arising from communications between putative class counsel and absent class members precertification is one of solicitation.").

55. *See supra* note 30.

56. Green & Kent, *supra* note 20, at 1098; Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 181 (1990); Ratner, *supra* note 31, at 296–97.

57. *See* Iannaccone v. Law, 142 F.3d 553, 558 (2d Cir. 1998); Rudgayzer v. Yahoo! Inc., No. 5:12-CV-01399, 2012 WL 5471149, at *5 (N.D. Cal. Nov. 9, 2012); Jaffe v. Cap. One Bank, No. 09 Civ. 4016, 2010 WL 691639, at *10 (S.D.N.Y. Mar. 1, 2010).

representatives must not only have standing[58] but also meet typicality and other adequacy requirements,[59] for which class attorneys must account. Class representative selection, however, is often not solely influenced by objective legal considerations. Class attorneys, for example, may prefer to have a golf club friend with little interest in the litigation that does not have strong opinions regarding the litigation and will not request updates to serve as a class representative.[60]

Class counsel also makes all litigation decisions without input from the class, including what documents to request, whom to depose, what experts to retain, how to staff the case, what legal arguments to raise, which claims to abandon and which to replead, which relief to focus on, which damages theories to pursue, how to define the class, whether to try the case, and which witnesses to call to the stand.[61] Class members are not consulted on any of these decisions. Class members are not aware of settlement offers that are made or received by class counsel.[62] Ultimately, class counsel decides whether a particular relief at a particular time in the litigation is in the best interest of the class.[63] Class members only receive notice of the litigation from counsel if a class is certified or a settlement is preliminarily approved and a class is certified for settlement purposes.[64]

This is, in theory, less troubling because class counsel and class members' interests are aligned to a degree—they both benefit from a successful recovery to the class. But interests are not perfectly aligned. For example, class counsel is often compensated by the lodestar fee calculation method, which calculates counsel's fees based on the number of hours counsel worked on the litigation multiplying them by counsel's hourly rate and sometimes an additional multiplier that adjusts the total amount based on the court's value of counsel's efforts.[65] Under the lodestar fee calculation method, class counsel is motivated to overstaff and prolong the litigation to increase their fee.[66] While class litigation often requires the expenditure of extensive resources and time, an over-expenditure not only delays relief to the class but detracts from their relief to compensate

58. O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Lewis v. Casey, 518 U.S. 343, 357 (1996).

59. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 607, 625–26 (1997).

60. Del Riego & Avery, *supra* note 2, at I.A.

61. *See* Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 68, 75–76 (2003); Burns, *supra* note 50, at 181–82; Del Riego & Avery, *supra* note 10, at 499-500; Macey & Miller, *supra* note 8, at 4.

62. *See* del Riego & Avery, *supra* note 1, at 4.

63. *See id.*; *supra* note 26.

64. *See supra* note 26.

65. *In re* Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941–42 (9th Cir. 2011); McDaniel v. Cnty. Schenectady, 595 F.3d 411, 414 (2d Cir. 2010).

66. Third Circuit Task Force Report on Court-Awarded Attorneys' Fees, 108 F.R.D. 237, 246–53 (3d Cir. 1985); Downs, *supra* note 32, at 667 (noting lodestar method has been criticized "as discouraging timely settlements where attorneys have not yet accumulated sufficient hours to obtain a large lodestar fee"); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 240 (1983) (noting lodestar fee calculation model "creates an incentive to multiply the hours" spent in the litigation).

counsel.[67] In theory, these incentives could be adjusted if the court applies a multiplier, increasing counsel's fees (say by two) when a favorable timely resolution is obtained for the class or decreasing counsel's fees (say by one-fourth) when it is apparent that counsel expended more resources than necessary.[68] However, the court is often ill-equipped to assess what resources were necessary or wisely spent in achieving the desired outcome and thus often grants counsel's fee requests without modification.[69]

For this reason, many courts have migrated to the percentage of the fund fee calculation method,[70] which awards class counsel a percentage of the settlement regardless of the hours class counsel ultimately invested in the litigation.[71] But the percentage of the fund method also fails to create a perfect interest alignment between class members and class counsel because counsel may be allured to accept an early, lower settlement to ensure some compensation for their services rather than prosecute the case longer to possibly obtain a financially larger and more desirable outcome for the class.[72] The method can also lead to a significant windfall when attorneys settle or otherwise obtain a favorable judgment on a case without expending significant resources, particularly when a defendant settles early and class counsel did little work.[73] Courts could, in theory, correct this by lowering the percentage awarded to counsel or by performing a lodestar cross-check,[74] but courts again often lack the information or resources required to make this determination.[75]

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67. *See supra* note 60; *In re* Activision Sec. Litig., 723 F. Supp. 1373, 1378 (N.D. Cal. 1989).

68. *See* Monique Lapointe, Note, *Attorney's Fees in Common Fund Actions*, 59 FORDHAM L. REV. 843, 846–48 (1991) (discussing courts' use of multipliers).

69. *See* Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. REV. 1239, 1283–86 (2003).

70. *See* Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1267 (D.C. Cir. 1993) (listing and discussing cases "offer[ing] evidence of a trend toward percentage-of-the-fund calculations in common fund cases); Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) (adopting percentage of the fund calculation amidst criticisms of the lodestar approach).

71. *See* Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993) (noting percentage of fund calculation is more tied to outcome than hours expended).

72. *See* Fischel v. Equitable Life Assurance Soc'y of U.S., 307 F.3d 997, 107–08 (9th Cir. 2002) (noting percentage of the fund approach may lead to unreasonable results wherein attorneys are awarded a significant windfall); *In re* Copley Pharm., Inc., 1 F. Supp. 2d 1407, 1410 (D. Wy. 1998) (noting the Third Circuit's move towards the lodestar method in the 1970s because "the percentage of the fund method frequently yielded fee awards that were excessive and unrelated to the work actually performed" in the litigation).

73. *See* Green & Kent, *supra* note 20, at 1103 n.98 (noting "class counsel may have incentives to settle quickly, before investing many resources in litigation, in a way that can cut against the interests of the class"); Coffee, *supra* note 60, at 290–91 (same).

74. Sometimes courts also perform a lodestar cross-check to ensure there is no significant windfall in fees awarded to class counsel. *See In re* Enron Corp. Sec., 586 F. Supp. 2d 732, 751–52 (S.D. Tex. 2008); Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 GEO. J. LEGAL ETHICS 1453, 1454–55 (2005).

75. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 405–06 (2003); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 479 (2000); Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1797–98 (2004).

Even when interests perfectly align and class counsel is genuinely motivated to obtain the best result for the class and make decisions in the class's best interest, it may be difficult for counsel to divine that interest without communicating with class members. In theory, this should not be an issue because class counsel is in communication with class representatives who have claims and injuries that are typical of the class, but, in practice, the class counsel–class representative and class member-class representative relationships do not, as described in the following section, provide class members with genuine representation or an opportunity to have their voices heard.

B. CLASS REPRESENTATIVES' INEXISTENT ROLE

If class representatives served as a true liaison between class counsel and absent class members, the nonexistent relationship between class counsel and class members would be less troubling. Class representatives, however, are largely uninformed of other class members' injuries and outcome preferences.[76] "[T]here is no requirement that [class representatives] have express authority from the class members"[77] or that "all or a majority of the class members considers the[ir] representation adequate."[78] Rule 23 does require class representatives to "fairly and adequately protect the interests of the class"[79] in order "to protect the legal rights [due process rights] of absent class members."[80] But what constitutes adequate representation from class representatives is today a rather low bar. Additionally, in most consumer-based litigations, class representatives have little communication with class counsel or control over litigation decisions.[81]

Class representatives do not need to be numerous nor the best class members. The quantity of representation is irrelevant (e.g., one representative for a class of 3,000,000 would suffice).[82] That one representative, moreover, has no duty to consult with any of the other class members to ensure their interests or desired litigation outcomes are aligned. If class counsel is genuinely consulting with the one, five, or ten class representatives chosen, it is possible their views and perspectives may not reflect those of the class, particularly considering class counsel's possible

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76. *Cf.* Tidmarsh, *supra* note 8, at 1139, 1180 (proposing a more objective test for adequacy that is outcome—rather than motivation driven—that evaluates adequacy on the basis of whether class members would have been worse off in the litigation compared to bringing individual claims).

77. WRIGHT & MILLER, 7A FEDERAL PRACTICE AND PROCEDURE § 1765 (4th ed.) (citing Moss v. Lane Co., 50 F.R.D. 122 (W.D. Va. 1970)).

78. *Id.*

79. FED. R. CIV. P. 23(a)(4).

80. Lyons v. Ga.-Pac. Corp. Salaried Emps. Ret. Plan, 221 F.3d 1235, 1253 (11th Cir. 2000) (citing Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 726 (11th Cir. 1987)); *In re* Am. Med. Sys. Inc., 75 F.3d 1069, 1083 (6th Cir. 1996)); *see also In re* GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995).

81. *See* Rose, *supra* note 35, at 384; Downs, *supra* note 32, at 659 (noting "[c]lass counsel generally do not communicate with class representatives, thereby effectively removing the representative from the loop").

82. WRIGHT & MILLER, *supra* note 71, at § 1766.

selection bias. Class representatives (outside the securities context)[83] also do not have to be the "best" class members to represent the interests of the class.[84] Indeed, it would be impractical if not impossible for counsel or the court to identify the "best" representative in a class with millions of consumers.

Class representatives also do not need to be heavily involved in or have extensive knowledge of the litigation.[85] A basic understanding that they suffered an injury because of the defendant's conduct for which the litigation seeks compensation is often enough.[86] Courts have explained that a representative simply needs "a minimal degree of knowledge about the case,"[87] and that "[t]he threshold of knowledge required to qualify as a class representative is low[.]"[88] Participation requirements are also low.[89] Class representatives, for example, do not have to participate in settlement negotiations or be aware of settlement offers or demands to be adequate representatives.[90] Typically, responding to discovery requests and

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83. The Private Securities Litigation Reform Act ("PSLRA") requires the court appointment of "the [putative class] member or members . . . that the court determines to be most capable of adequately representing the interests of class members," i.e., "the 'most adequate plaintiff.'" 15 U.S.C. § 77z-1 (a)(3)(B)(i). The court appointed plaintiff under the PSLRA then retains counsel, subject to court approval. 15 U.S.C. § 77z-1 (B)(3)(v); John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 300 (2010).

84. McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981); *In re* Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 242 (E.D.N.Y. 1998).

85. *See, e.g.*, Duncan v. Governor of V.I., 48 F.4th 195, 209 (3d Cir. 2022); Gunnells v. Healthplan Serv., Inc., 348 F.3d 417, 430 (4th Cir. 2003); Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 62 (2d Cir. 2000).

86. *See Baffa*, 222 F.3d at 62 (2d Cir. 2000) (finding representative was not inadequate because he "appreciate[d] the limits of his knowledge and rel[ied] on those with relevant expertise" and was aware of the subject of the litigation and that he sustained a loss as result); Barnes v. Am. Tobacco Co., 161 F.3d 127, 141 n.17 (3d Cir. 1998) (agreeing with the district court's observation "that it is unrealistic to require the named plaintiffs to have an in-depth understanding as to the legal theories behind their claim" and that adequacy turns on their efforts "to actively seek vindication of [their] rights and engage competent counsel to prosecute the claims") (internal citation and quotations omitted).

87. *In re* Suboxone Antitrust Litig., 967 F.3d 264, 272 (3d Cir. 2020) (quoting *In re* Nat'l Football League Players Concussion Inj. Litig., 821 F.3d 410, 431 (3d Cir. 2016)); New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 313 (3d Cir. 2007).

88. Moeller v. Taco Bell Corp., 220 F.R.D. 605, 611 (N.D. Cal. 2004); *see also* Gamino v. KPC Healthcare Holdings, Inc., No. 5:20-cv-01126, 2022 WL 1043666, at *2 (C.D. Cal. Apr. 5, 2022) (same); Weiner v. Quaker Oats Co., No. 98C3123, 1999 WL 1011381, at *8 (N.D. Ill. Sept. 30, 1999).

89. *See* Vergara v. Apple REIT Nine, Inc., No. 19 CV 2027, 2021 WL 1103348, at *3–4 (E.D.N.Y. Feb. 5, 2021) (explaining representative's lack of knowledge of settlement demands made on behalf of the class did not affect their adequacy).

90. Khoday v. Symantec Corp., No. 11-180, 2014 WL 1281600, at *17 (D. Minn. Mar. 13, 2014) (noting that even if class representative "was unaware of settlement negotiations, this alone is insufficient to demonstrate her inadequacy"); *In re* Ins. Mgmt. Sols. Grp. Inc. Sec. Litig., 206 F.R.D. 514, 516–18 (M.D. Fla. 2002) (class representative that was unaware of class counsel's prior settlement demands was nevertheless adequate); Christman v. Brauvin Realty Advisors, Inc., 191 F.R.D. 142, 147 (N.D. Ill. 1999) (same); *cf.* Banyai v. Mazur, No. 00 Civ. 9806, 2004 WL 1948755, at *2 (S.D.N.Y. Sept. 1, 2004) (noting counsel has authority to exclude class representatives from settlement negotiations). *But see* Byes v. Telecheck Recovery Servs., Inc., 173 F.R.D. 421, 428 (E.D. La. 1997) (citing to the Louisiana State Bar Professional Rules of Conduct and holding class representatives must have "sufficient information to participate intelligibly in settlements and/or settlement negotiations . . . and to attempt to secure her authority to make settlement proposals on behalf of the class").

class counsel's communications is all that is required. Some courts have required class representatives to vigorously prosecute the litigation.[91] But even "vigorous prosecution" has been reduced to rhetoric, as courts have acknowledged that while "[i]n theory, the class representative should control the attorney[;] [i]n practice, class counsel often selects class representatives and is likely to pick one who is passive."[92] Several circuit courts have held the class representatives' duty of "vigorously prosecut[ing] the interests of the class" means "vigorously prosecut[ing] [those] interests . . . through qualified counsel."[93] The Third Circuit, for example, has bluntly acknowledged, "it is counsel for the class representative not the named parties . . . who direct and manage [class] actions. Every experienced federal judge knows that any statements to the contrary [are] sheer sophistry."[94]

Class representatives, moreover, may not replace class counsel just because they are dissatisfied with their representation.[95] Nor can they direct class counsel to accept or deny a particular settlement, or to file a particular motion, as it is ultimately class counsel's responsibility to act in the best interest of the class.[96] Indeed, courts have explained that "when a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs."[97] Class

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91. 5 MOORE'S FEDERAL PRACTICE, CIVIL § 23.25(2)(c) (2024); WRIGHT & MILLER, *supra* note 71, at § 1766.

92. *In re* Asbestos Litig., 90 F.3d 963, 1009 n.37 (5th Cir. 1996) (J. Smith, dissenting), *vacated on other grounds by* Ortiz v. Fibreboard Corp., 521 U.S. 2503 (1997); Armstrong v. Powell, 230 F.R.D. 661, 681 (W.D. Okla. 2005) (same); Gammon v. GC Servs. Ltd. P'shp., 162 F.R.D. 313, 319 (N.D. Ill. 1995) ("[C]lass actions are inevitably the child of the lawyer rather than the client when the client's recovery is going to be small in relation to the costs of prosecuting the case.") (internal quotations and citations omitted); *cf.* Bassett, *supra* note 11, at 953 (noting class counsel will sometimes "intentionally select[] representatives over whom they have control or power, so that the class representative remains mute and does not advocate for himself or others").

93. Cody v. City of St. Louis, 103 F.4th 523, 534 (8th Cir. 2024) (quoting Paxton v. Union Nat'l Bank, 688 F.2d 552, 562–63 (8th Cir. 1982)); *see* J.D. v. Azar, 925 F.3d 1291, 1312 (D.C. Cir. 2019); Beattie v. CenturyTel, Inc., 511 F.3d 554, 562–63 (6th Cir. 2007); Piazza v. Ebsco Indus., Inc., 273 F.3d 1341, 1346 (11th Cir. 2001).

94. *In re* Cmty. Bank of N. Va., 622 F.3d 275, 292 (3d Cir. 2010); *In re* Suboxane, 967 F.3d at 273 (same); s*ee also* Russell M. Gold, *"Clientless" Lawyers*, 92 WASH. L. REV. 87, 111 (2017) ("[T]he lawyer, rather than the client, has to make the critical decisions in 'clientless' [class action] litigation.").

95. Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2d Cir. 1995) ("The fact that the named plaintiffs in a certified class action have been found to be adequate representatives of the class does not, however, mean that they have the right to replace class counsel at will."); Green & Kent, *supra* note 20, at 1097–98.

96. *See* FED. R. CIV. P. 23(g) advisory committee's note ("[This sub=section]recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligation of counsel to individual clients."); *Maywalt*, 67 F.3d at 1078;Burns, *supra* note 50, at 181–82.

97. *Maywalt*, 67 F.3d at 1078 (quoting Pettway v. Am. Cast Iron Pipe Co., 576 F.2d 1157, 1176 (5th Cir. 1978)); *see also* Saylor v. Lindsley, 456 F.2d 896, 899 (2d Cir. 1972) ("[A]ssent of the [named] plaintiff (or plaintiffs) who brought . . . [the] action is not essential to a settlement").

counsel decides what is in the class's best interest, and class representatives' objections, if any, may be reviewed by a court but are not determinative.[98]

In practice, the less class representatives say and do, the better they serve the litigation.[99] Statements to friends, family, and colleagues, posts on social media, discovery responses, deposition and trial testimony are primarily used against the class. As such, disengaged and passive representatives may be the "best," giving class counsel further incentive to choose them. Class representatives, as Professor Linda S. Mullenix observes, act in effect as "potted-plants" following their "appropriate role [] to remain mute, provide background foliage, and do nothing more."[100] They are not the active fiduciaries that earlier caselaw and treatises envisioned them to be.[101] Indeed, at least a few scholars have suggested abolishing class representatives altogether,[102] because they do not provide absent class members with a true voice in the litigation or serve as an "effective means of protecting [] absent class members."[103] It is thus largely up to courts to protect class members' interests.

C. CLASS COURTS' REVIEW OF CLASS COUNSEL

Recognizing that class counsel and class representatives may fail to protect absent class members' interests, Rule 23 provides courts fiduciary responsibilities in class litigation.[104] The Rule tasks courts with evaluating, appointing, and compensating class counsel;[105] ensuring class representatives are adequate;[106] and ensuring any settlement entered into by class counsel and class representatives is

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98. *Maywalt*, 67 F.3d at 1078 (citing *Pettway*, 576 F.2d at 1177–78).

99. *See* Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Cases*, 57 VAND. L. REV. 1687, 1706 (2004)(noting "proving . . . class representative's adequacy . . . proceeds along the lines of 'the less said, the better'").

100. *See id.* at 1703–04.

101. *See id.* at 1704–5, 38; John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 384 (2000) ("[T]he class representative is usually a token figure, with the class counsel being the real party in interest.").

102. *See* Macey & Miller, *supra* note 8, at 6; Burns, *supra* note 50, at 165–66.

103. Macey & Miller, *supra* note 8, at 42.

104. *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1438 (2d Cir. 1993) ("A judge in a class action is obligated to protect the interests of absent class members."); Grunin v. Int'l House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975) (noting that "[u]nder Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members"); Riaubia v. Hyundai Motor Am., No. CV 16-5150, 2019 WL 3714497, at *2 (E.D. Pa. Aug. 7, 2019) (noting Rule 23's "procedures aim to provide . . . 'authority to the district court to act as a fiduciary for putative class members by guarding the claims and rights of absent class members'") (quoting Ehrheart v. Verizon Wireless, 609 F.3d 590, 593 (3d. Cir. 2010)); *see also* Elizabeth J. Cabraser, *The Essentials of Democratic Mass Litigation*, 45 COLUM. J. L. & SOC. PROBS. 499, 521 (2012) ("The function of the court as a fiduciary is a hallmark of formal class action litigation[.]"); Green & Kent, *supra* note 20, at 1100-01 (discussing class action courts' fiduciary relationship); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs In Securities Class Actions*, 104 YALE L.J. 2053, 2071 (1995) (noting "only the court is in a position to protect absent class members from overreaching by plaintiffs' attorneys").

105. *See* FED. R. CIV. P. 23(g), (e)(2)(A).

106. *See* FED. R. CIV. P. 23(a), (e)(2)(A).

adequate.[107] These responsibilities are functions legal clients typically perform, but given class members' truly absent status, courts step in to ensure class members' interests are adequately represented in the litigation. This section discusses class courts' fiduciary duties to class members in the chronological order they most naturally arise in the litigation.

First, courts are commonly tasked with appointing interim class counsel at the outset of the litigation.[108] In doing so, the court must ensure appointed interim class counsel is "adequate."[109] This, per Rule 23(g)(1)(A), requires courts to assess counsel's work "identifying or investigating potential claims in the action;" "experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" "knowledge of the applicable law;" and "resources counsel will commit to representing the class."[110] When several attorneys seek to represent the class, the court must determine the attorney or group of attorneys best able to represent the interests of the class, considering the factors listed above.[111] Rule 23(g) also allows courts to "consider any other matter pertinent to counsel's ability to fairly and adequately represent interests of the class" and "order potential class counsel to provide information on any subject pertinent to the[ir] appointment. . . ."[112] Ultimately, the court must satisfy itself that interim class counsel will "fairly and adequately represent the interests of the class" prior to appointment.[113]

Courts then may exercise their fiduciary duties at two other points in the litigation: class certification and class settlement approval. At class certification and certification for settlement purposes, courts must, *inter alia*, ensure that both class counsel and class representatives fairly and adequately represented the interests of the class.[114] Counsel's adequacy is assessed again under Rule 23(g)(1)(A)'s factors, but the court has been privy longer to how counsel has litigated the case before it, and defendants may raise adequacy challenges at this juncture. When there is a class settlement, courts must also evaluate the adequacy of the settlement. Courts look to: whether "the proposal was negotiated at arm's length"; whether "the relief provided for the class is adequate, taking into account: . . . the costs, risks, and delay of trial and appeal"; "the effectiveness of any proposed method of distributing relief to the class"; proposed attorneys' fee terms and "any agreement made in connection with the proposal"; and whether class members

107. *See* FED. R. CIV. P. 23(e)(2).

108. *See* FED. R. CIV. P. 23(g)(3).

109. Mullenix, *supra* note 94, at 1699.

110. FED. R. CIV. P. 23(g)(1)(A); *In re* BHG Data Sec. Litig., No. 6:22-CV-00150, 2023 WL 10554429, at *2 (E.D. Ky. Mar. 17, 2023); Ittai Paldor, *Lawyers on Auction – Protecting Class Members*, 89 U. CIN. L. REV. 344, 377–78 (2021).

111. FED. R. CIV. P. 23(g)(2).

112. FED. R. CIV. P. 23(g)(1)(B), (C).

113. FED. R. CIV. P. 23(g)(4).

114. FED. R. CIV. P. 23(a)(4), (e)(2)(A).

were treated "equitably relative to each other."[115] If the court satisfies itself that the settlement is likely "fair, reasonable, and adequate," it grants preliminary approval of the settlement.[116]

Once a class settlement is preliminarily approved, class members are provided notice of the settlement and a fairness hearing is conducted.[117] Class members can object to the adequacy of their representation and the settlement accepted by class counsel,[118] but they are rowing against a strong current.[119] First, class members lack the information and knowledge to make well-reasoned objections to the adequacy of their representation or settlement.[120] They likely only have access to class counsel's own self-serving statements about their chosen representative's adequacy and the fairness and adequacy of the settlement. While objecting class members can seek discovery from class counsel and the defendant,[121] discovery is typically "minimal and conditioned on a showing of need, because it will delay the settlement [and] introduce uncertainty. . . ."[122] It is not common for courts to reject class settlements based on class member objections,[123] maybe because of courts' distaste for serial objector attorneys, i.e., attorneys whose practice is to identify and represent absent class members and object to class settlements.[124]

In sum, courts are the ultimate authority on class members' representational adequacy and class members' most significant safeguard against representational inadequacy. Class members can assert little to no control over class counsel or class representatives. Class representatives, in turn, can assert no control over class counsel and are uninformed of other members' preferences or interests. Little is asked or expected of them in the litigation. Class counsel thus takes the reins. While class representatives, defendants, and objecting and intervening class members can mount adequacy challenges, it is ultimately the courts' responsibility to evaluate these challenges and independently assess class members' representational adequacy. This is the class litigation scene into which AI enters, and any proposal to protect class members from class counsel's AI misuses and abuses must be cognizant of it.

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115. FED. R. CIV. P. 23(e)(2), (3).

116. *See* FED. R. CIV. P. 23 advisory committee's note to 2018 amendment (discussing preliminary approval of proposed class certification under Rule 23(e)); Caccavale v. Hewlett-Packard Co., No. 2:20-cv-0974, 2024 WL 4250337, at *10 (E.D.N.Y. Mar. 13, 2024) (declining to grant preliminary approval of settlement agreement due to failure to show fairness, reasonableness, or adequacy).

117. *See* FED. R. CIV. P. 23(c)(2).

118. *See* FED. R. CIV. P. 23(e)(5); Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1630 (2009).

119. Del Riego & Avery, *supra* note 1, at 4; Fitzpatrick, *supra* note 112, at 1631; Leslie, *supra* note 9, at 114.

120. Del Riego & Avery, *supra* note 1, at 4.

121. *In re* Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions, 148 F.3d 283, 325 (3d Cir. 1998); NEWBERG & RUBENSTEIN, *supra* note 38, at § 13:32 (citing MANUAL ON COMPLEX LITIGATION (FOURTH), *supra* note 45).

122. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 45.

123. *See* Fitzpatrick, *supra* note 112, at 1631; Leslie, *supra* note 9, at 114.

124. *See* Brunet, *supra* note 69, at 426–29; Jay Tidmarsh & Tladi Marumo, *Good Representatives, Bad Objectors, and Restitution in Class Settlements*, 48 BYU L. REV. 2221, 2257 n.181 (2023).

II. AI'S PROMISES AND PITFALLS FOR TRADITIONAL LITIGANTS AND CLASS MEMBERS

AI has made its debut in the legal practice.[125] Traditional litigants and their attorneys are employing AI in a variety of ways to assist them in litigation. For example, AI facilitates attorneys' initial intake communications with prospective clients.[126] It completes tedious document review at a quicker pace and more accurately than many human reviewers.[127] AI generates first drafts of simple motions and pleadings.[128] It also assists in formulating and crafting legal arguments by mining expansive data sets via predictive coding and legal analytics.[129] AI stands to reshape litigation for clients and their attorneys. It has the potential to improve the accessibility and accuracy of legal services. But it can also negatively impact legal clients' access, quality of representation, and litigation outcomes. Scholars and bar associations have already begun to identify some of AI's potential promises and pitfalls for *pro se* litigants and legal clients.[130] This Part provides a brief overview of some of those most salient discussions and translates them into the class context, discussing for the first time how AI may benefit and harm *class members* specifically.

Class attorneys are undoubtedly using AI today. The technology is at the forefront of many litigation decisions.[131] For example, as part of a recent class settlement claims process, class counsel claimed requiring documentary evidence of eligibility was necessary "to prevent fraudulent claimants that harness bots and

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125. *See* Jabotinsky & Lavi, *supra* note 4, at 297–98; Sarah Martinson, *Generative AI Continued to Drive Legal Tech Scene In 2024*, LAW360 (Dec. 23, 2024, 8:01 AM), https://www.law360.com/pulse/articles/2258272 [https://perma.cc/N3PC-45TD].

126. *See* Katie Wolf, *How to Utilize AI in Your Legal Intake Process*, FILEVINE (Nov. 16, 2023), https://www.filevine.com/blog/how-to-utilize-ai-in-your-legal-intake-process/ [https://perma.cc/TL99-T5ZL]; Nicole Black, *What You Need to Know About Virtual and Chatbot Assistants for Lawyers*, ABA J. (Jan. 27, 2020), https://www.abajournal.com/web/article/what-you-need-to-know-aboutvirtual-and-chatbot-assistants-for-lawyers. [https://perma.cc/D7F2-VKPN].

127. *See, e.g.*, *From Beginning to Breakthrough: Navigating Document Review's AI Evolution*, RELATIVITY, from-beginning-to-breakthrough-navigating-document-review-ai-evolution.pdf [https://perma.cc/4NSS-CHFJ] (last visited Nov. 29, 2024); *see also* Cameron A. Parsa, Note, *Artificial Intelligence and the Pursuit of Fair and Reasonable Fees in Legal Practice*, 47 J. LEGAL PROF. 277, 279–80 (2023).

128. *See, e.g.*, AI LAW, https://www.ai.law/ai-that-drafts-litigation-pleadings/[https://perma.cc/9LK6-Z8YR] (last visited Nov. 29, 2024); *cf.* Mortazavi v. Booz Allen Hamilton, Inc., No. 2:24-cv-07189, 2024 WL 4308032, at *1 (C.D. Cal. Sept. 26, 2024) (disclosing use of AI to draft a motion to remand per court order).

129. Simshaw, *supra* note 4, at 154.

130. *See generally* Davis, *supra* note 5; Simshaw, *supra* note 4; Rachel Beithon & Jonathan Germann, *AI Diversity and the Future of "Fair" Legal AI*, 40 GA. ST. U. L. REV. 863 (2024); Lance Eliot, *American Bar Association Lowers the Boom and Lays Down the Law on Lawyers' Proper Use of Generative AI*, FORBES (July 31, 2024, 12:16 AM), https://www.forbes.com/sites/lanceeliot/2024/07/31/american-bar-association-lowers-the-boom-and-lays-down-the-law-on-lawyers-proper-use-of-generative-ai/ [https://perma.cc/65LP-KM2M]; Alex Ebert, *AI Guidance from Florida Bar Builds on Classic Ethics Rules*, BLOOMBERG L. (Jan. 19, 2024, 2:32 PM), https://news.bloomberglaw.com/litigation/ai-guidance-from-florida-bar-builds-on-familiar-ethics-rules [https://perma.cc/2AMW-YM6J].

131. *See* Michael Mann, *Using AI to Predict Outcomes in Class Action Litigation*, LAW.COM (May 3, 2024 at 12:10 PM), http://law.com/2024/05/03/using-ai-to-predict-outcomes-in-class-action-litigation/?slreturn=20250307151428 [https://perma.cc/HBN5-5R8A].

AI to increase the scope and effectiveness of fraud."[132] With the number of class action lawsuits involving AI steadily increasing,[133] attorneys are becoming increasingly cognizant of the technology. A class action defense firm advised its clients that it expected AI to "revolutionize class litigation" by, *inter alia*, allowing the "plaintiff's class action law firms to handle more lawsuits with fewer lawyers in less time"—creating "a potential surge in class action lawsuits."[134] The review also explained how AI was "increasing the speed and accuracy of e-discovery," "aiding in class member communication, and automating information distribution in class action settlements, enabling information to be disseminated, just as the printing press revolutionized the dissemination of information."[135]

Scholars have also begun to speculate how AI might improve class litigation. Professor Peter N. Salib, for example, proposes using AI to resolve individual questions of fact that might arise in class litigation, making more claims certifiable as common issues predominate.[136] Professor Alissa del Riego, the author of this paper, and Professor Joseph J. Avery, in turn, urge class counsel and courts to use AI to improve class wide communications and decipher class member preferences.[137] Professor and class action practitioner Joshua Davis suggests AI will assist judges in assessing the fairness, reasonableness, and adequacy of proposed class settlements,[138] by comparing a proposed settlement with other average outcomes and creating a process by which the parties feed evidence into the algorithm to take into account the specific facts of the case.[139]

This Part explores AI's potential to impact traditional litigants and class members across three broad categories: (1) access, (2) quality, and (3) collateral, specifically privacy and privilege, effects. AI, of course, could have other effects. This Part thus provides a limited window into AI's potential impact. AI could of course be used by other actors in class litigation, including courts, special masters, class representatives, class defendants, and defense counsel. These actors' use of AI could also negatively impact class members' legal outcomes, but the focus of this Part and Article is class counsel's use of AI. The following sections thus center on AI's potential impacts when used by traditional litigants and their attorneys, class members and class counsel, and the potential similarities and differences between the two litigations.

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132. *In re* Cal. Gasoline Spot Mkt. Antitrust Litig., No. 3:20-cv-03131, 2024 WL 3925714, at *8 (N.D. Cal. Aug. 23, 2024).

133. *See* Jay Dubow et al., *The Increase in Artificial Intelligence-Related Securities Class Actions*, LAW.COM (Nov. 26, 2024, 1:04 PM), https://www.law.com/thelegalintelligencer/2024/11/26/the-increase-in-artificial-intelligence-related-securities-class-actions/?slreturn=20241128103619 [https://perma.cc/AAN5-8H6V].

134. *10 Key Trends in Class Action Litigation*, DUANE MORRIS CLASS ACTION REVIEW - 2024, www.duanemorrisclassactionreview.com (last accessed Nov. 28, 2024).

135. *Id.*

136. Salib, *supra* note 5, at 522.

137. Del Riego & Avery, *supra* note 1, at 5; Del Riego & Avery, *supra* note 2, at Part IV.

138. Davis, *supra* note 5, at 1191–92.

139. *Id.* at 1192.

A. ACCESSIBILITY: AI'S IMPACT ON THE AVAILABILITY AND COST OF LEGAL SERVICES

One of AI's most heralded contributions is its ability to reduce costs for legal providers and clients, providing a greater percentage of the population access to legal services.[140] Those in need of legal services who cannot afford an attorney can now obtain some legal guidance and services with AI.[141] Attorneys can also use AI to reduce costs and pass down those reductions to clients,[142] thereby rendering legal services more affordable. AI's potential to reduce the cost of legal services has been heralded as a great equalizer;[143] instead of one party to a litigation having access to counsel and the other party unable to afford any legal representation, AI could change that landscape, ensuring every party has at least some access to legal services.[144] But, of course, not all legal services are of equal quality.

1. TRADITIONAL LITIGANTS

Parties to a litigation stand to benefit from AI's ability to provide legal resources, counseling, and services. In civil litigation, parties can more effectively represent themselves *pro se*.[145] They could present their legal problems to AI, which can direct them to proper legal authorities, provide them legal advice, and draft or provide a template for an initial complaint or answer based on information

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140. Alfredo Contreras & Joe McGrath, *Law, Technology, and Pedagogy: Teaching Coding to Build a "Future-Proof" Lawyer*, 21 MINN. J.L. SCI. & TECH. 297, 324 (2020); Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70 HASTINGS L.J. 173, 176 (2018); Simshaw, *supra* note 4, at 162; Drew Simhaw, Essay, *Interoperable Legal AI for Access to Justice*, 134 YALE L. J. FORUM 795, 796–97 (2025); Stephanos Bibas, *Lawyers' Monopoly and the Promises of AI*, 134 YALE L. J. FORUM 920, 920 (2025).

141. Adam Crepelle, *Tribes and AI: Possibilities for Tribal Sovereignty*, 25 DUKE L. & TECH. REV. 1, 23 (2024); Ashwin Telang, *The Promises and Peril of AI Legal Services to Equalize Justice*, HARV. J.L. & TECH. (Mar. 14, 2023), https://jolt.law.harvard.edu/digest/the-promise-and-peril-of-ai-legal-services-to-equalize-justice [https://perma.cc/ZPN4-2F2A]; Katherine L. W. Norton, *The Middle Ground: A Meaningful Balance Between the Benefits and Limitations of Artificial Intelligence to Assist with the Justice Gap*, 75 U. MIAMI L. REV. 190, 202 (2020).

142. Adam N. Eckart, *Transactional Artificial Intelligence*, 26 LEGAL WRITING: J. LEGAL WRITING INST. 273, 282 n.38 (2022); Taylor B. Schaefer, Note, *The Ethical Implications of Artificial Intelligence in the Law*, 55 GONZ. L. REV. 221, 225 (2019).

143. *See* Jake Heller, *Is AI the Great Equalizer for Small Law?*, ABOVE THE LAW (Aug. 18, 2018, 4:00 PM), https://abovethelaw.com/2018/08/is-a-i-the-great-equalizer-for-small-law/ [https://perma.cc/L96F-4HEB]; Viren Shah, *Artificial Intelligence: The Great Equalizer*, FORBES (Aug. 16, 2023, 8:45 AM), https://www.forbes.com/sites/forbestechcouncil/2023/08/16/artificial-intelligence-the-great-equalizer/?sh=6d1199345cd2 [https://perma.cc/EQ2N-9H42].

144. *See* Joseph J. Avery et al., *ChatGPT, Esq.: Recasting Unauthorized Practice of Law in the Era of Generative AI*, 26 YALE J.L. & TECH. 64, 129 (2023); Samuel D. Hodge, Jr., *Revolutionizing Justice: Unleashing the Power of Artificial Intelligence*, 26 SMU SCI. & TECH. L. REV. 217, 229 (2023); Xin Dai, *Who Wants a Robo-Lawyer Now?: On AI Chatbots in China's Public Legal Services Sector*, 26 YALE J.L. & TECH. 527, 533 (2023) (discussing use of "chatbots to close the gap in access to legal services").

145. *See* Brooke K. Brimo, Note, *How Should Legal Ethics Rules Apply When Artificial Intelligence Assists Pro Se Litigants?*, 35 GEO. J. LEGAL ETHICS 549, 550–51 (2022); Maura R. Grossman, et al., *The GPTJudge: Justice in a Generative AI World*, 23 DUKE L. & TECH. REV. 1, 27 (2023); Norton, *supra* note 135, at 196; Villasenor, *supra* note 4, at 36–37.

provided. AI can also identify relevant caselaw on a particular legal issue,[146] make arguments based on provided facts,[147] and prepare deposition and trial outlines for *pro se* litigants.[148] Putting aside unauthorized practice of law claims and concerns,[149] AI stands to provide greater access to legal services to the public. Litigants could limit the scope of legal services provided by attorneys and reduce costs in that manner.[150] For example, a client could have their attorney develop a litigation strategy, draft all court pleadings, and argue those in court but have AI review produced discovery and provide a draft of a settlement agreement or proposal.

Greater access, however, is not without potential drawbacks for traditional litigants. While AI stands to improve the predicament of some litigants with insufficient resources to hire or consult with an attorney, it may lead to poorer outcomes for those litigants who could have engaged an attorney but now believe they can be just as successful and more cost-efficient without one.[151] In some instances, AI or an inexperienced AI user may not be able to achieve the same results as a bar-certified attorney.[152] Litigation costs could increase if AI leaves the litigant paying higher damages, incurring the costs of an appeal, accruing greater legal fees to address prior litigation missteps, or ultimately forgoing entitled to damages and remedies. Litigants may be ill-equipped to decide when AI can substitute bar-certified legal counsel, thus forgoing an attorney when they truly need one. Moreover, litigants seeking to cut costs may not pay for premium AI legal services that might prove more effective or may lack the proper knowledge to determine which AI tools to use.[153]

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146. Teresa Phelps & Kevin Ashley, "*Alexa, Write a Memo": The Promise and Challenges of AI and Legal Writing*, 26 LEGAL WRITING: J. LEGAL WRITING INST. 329, 332 (2022)]; Lee-ford Tritt, *The Use of AI-Based Technologies in Arbitrating Trust Disputes*, 58 WAKE FOREST L. REV. 1203, 1244 (2023).

147. *See, e.g.*, *Legal AI Tools and Assistants Essential for Legal Teams*, Thomson Reuters (Jan. 31, 2023), https://legal.thomsonreuters.com/blog/legal-ai-tools-essential-for-attorneys [https://perma.cc/63AF-RLSZ]; *see also* Kevin Frazier, *Practicing Law in the Age of AI – Practice Guide: How to Integrate AI and Emerging Technology into Your Practice and Comply with Model Rule 3.1*, 25 MINN. J. L. SCI. & TECH. 67, 69 (2024); Hodge, *supra* note 138, at 228; S. Sean Tu et al., *Artificial Intelligence: Legal Reasoning, Legal Research and Legal Writing*, 25 MINN. J. L. SCI. & TECH. 105, 120–21 (2024).

148. *See* John Armour et al., *Augmented Lawyering*, 2022 U. ILL. L. REV. 71, 87 (2022); *4 Steps to Acing Your Next Deposition Using AI*, THOMSON REUTERS (Aug. 31, 2023), https://legal.thomsonreuters.com/blog/4-steps-to-acing-your-next-deposition-using-ai/#step-1 [https://perma.cc/TE3C-AQ73]; *The Future of Trial Preparation: How AI Can Transform This Legal Process*, LOGIKCULL, https://www.logikcull.com/blog/the-future-of-trial-preparation-how-ai-can-transform-this-legal-process [https://perma.cc/PU2S-NZQ7] (last visited Nov. 29, 2024); Jimmy Chestnut et al., *Don't Throw the Bot Out with the Bathwater: Embracing Generative AI in eDiscovery Work*, ACC DOCKET, at 4 (Apr. 22, 2024).

149. *See generally* Avery et al., *supra* note 138 (discussing unauthorized practice of law concerns in the era of generative AI).

150. *See* Simshaw, *supra* note 4, at 164–67.

151. *See* Jessica R. Gunder, *Why Can't I Have a Robot Lawyer? Limits on the Right to Appear Pro Se*, 98 TUL. L. REV. 363, 407–08 (2024).

152. *See id.*

153. *Cf.* Simshaw, *supra* note 4, at 172-177.

AI also stands to reduce the costs of legal services provided by attorneys, a cost reduction which should, per the ABA's Standing Committee's recent guidance, be passed down to clients.[154] Law firms could reduce labor costs by employing AI tools to perform certain tasks or provide first drafts of documents. AI can easily provide first drafts of a motion for extension of time, discovery requests, calendar court appearances and filing deadlines. Indeed, AI could perform many of the tasks that legal secretaries, paralegals, and even first- and second-year associates at law firms perform today, at a significantly reduced cost. Clients will demand law firms use AI to perform or assist with certain tasks to reduce fees. Sophisticated AI tools, of course, would not be free, but they would likely be cheaper than human labor. Cost reductions could provide greater access to legal services for litigants and prevent individuals from forgoing legal representation. That said, some attorneys may decide to save costs by using AI tools when human labor would lead to better or more accurate outputs. The best AI tools may only be accessible by the top law firms that charge unaffordable prices to most legal clients. AI could thus exacerbate the gap in the quality of legal services provided in certain contexts.

2. CLASS MEMBERS

Class members seemingly stand to benefit less from AI in terms of access and costs. Class members cannot represent themselves[155] or choose the attorneys that will represent them.[156] All class members, per Rule 23(g), are entitled to adequate legal representation, which must be provided by a licensed attorney with sufficient experience, legal knowledge, and resources.[157] Class members cannot presently weigh in on what they would and would not be willing to pay in legal fees and costs prior to a class settlement or judgment.

Conversely, class members are insulated from the consequences that might result when choosing to represent themselves *pro se* with the use of AI tools. Whether AI will ultimately reduce the costs of legal fees and litigation expenses for class members depends on courts. Because class counsel have captive clients that can neither hire nor fire them, they are less motivated to reduce fees or cut costs if they believe a sizeable recovery is inevitable. Courts can inquire into the fees counsel charge or the percentage of any successful settlement they intend to seek as compensation, but they rarely base appointment decisions on billable rates or projected fee awards.[158]

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154. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 512, 11–14 (2024).

155. *See supra* note 51.

156. *See supra* note 27.

157. *See* FED. R. CIV. P. 23(g); Burchfield v. Jones, No. 20-cv-06134, 2020 WL 9351632, at *1 (W.D. Ark. Dec. 14, 2020).

158. *See* Alissa del Riego, *Driving Diverse Representation of Diverse Classes*, 56 U. MICH. J.L. REFORM 67, 117–18 (2022).

That said, AI also has the potential to create greater access to the litigation for class members by ending the present communication void between them and class counsel.[159] AI, for example, could be used by consumers to alert them of potential class claims, prompting them to either use AI to further evaluate the viability of those claims or contact an attorney to file a class suit. This could transform at least some class litigation from being attorney-initiated, to consumer-initiated and motivated. Potential class members could also use AI tools to assist in determining whether they might be members of any filed actions, allowing them to intervene if necessary.

Class attorneys and courts could also use AI to identify some or all potential class members at the outset of the litigation and initiate communications with all members or a representative sample of them to ensure the litigation truly represents class members' interests and preferences in terms of representation, outcomes, and communications.[160] This could provide class members a voice in selecting their attorneys and class representatives. It could also direct counsel to pursue certain remedies over others. AI could additionally be used to assess class members' responses to attorney and court communications and predict those of the larger class or identify possible conflicts across a proposed class. AI can also facilitate access and communications between class counsel and class members throughout all stages of the litigation. Trained chatbots could, for instance, answer common questions and identify those that need counsel's attention.

AI could also reduce the cost of class litigation, but whether class attorneys are necessarily motivated to reduce such costs is another question. The lodestar method of calculating attorneys' fees does not encourage efficiency or the use of cost-saving AI tools. Instead, it encourages overstaffing cases and billing as many hours as possible to increase fee awards.[161] That said, class litigation is costly and risky for class counsel. While class counsel may sometimes receive significant attorneys' fee awards, they also stand to lose all the costs and time they sink into a litigation that is ultimately unsuccessful.[162] This could result in multimillion dollar losses. If an AI tool increases the probability of success, class counsel will be motivated to use it, as a reduced fee is certainly better than no fee. It would also allow attorneys to work on other cases with paying clients or distribute the risk among other class cases. The percentage of the fund attorneys' fee calculation would seemingly always encourage class counsel to use AI to reduce its labor and litigation costs. Savings produced by AI tools could translate into a greater net profit for counsel. It remains to be seen, however, whether those savings would be passed on to the class.

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159. *See* del Riego & Avery, *supra* note 1, at 8.

160. *See* del Riego & Avery, *supra* note 2, at 544.

161. *See supra* note 60.

162. *See* Pete v. United Mine Workers Am. Welfare & Ret. Fund of 1950, 517 F.2d 1275, 1290 (D.C. Cir. 1975); Coffee, *supra* note 60, at 230–33; Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2044–45 (2010).

Cost reductions for class counsel could, as some have already predicted, increase class litigation,[163] allowing consumers to recover for a greater number of injuries. Claims that before might have been too costly to file, given a lower likelihood of success or the difference between the expected cost of the litigation and potential scope of recovery, might now be more attractive. The class counsel pool might also increase, as more attorneys would be able to fund lower-costing class litigation. That said, AI might also discourage the filing or vigorous prosecution of meritorious class claims if predictive algorithms suggest a low percentage of success, which could ultimately reduce class members' access to the court system and justice.

B. ACCURACY: AI'S IMPACT ON THE QUALITY OF LEGAL SERVICES AND OUTCOMES

AI promises to improve the accuracy and thoroughness of legal arguments, though early anecdotes of AI misuses continue to make headlines.[164] This is because algorithms' effectiveness depends on how they are designed and the information they are provided to "learn" from.[165] A defective algorithm can cause widescale inaccuracies and harm.[166] Similarly, an algorithm based on a limited (potentially biased) data set will produce inaccurate outputs.[167] Well-designed algorithms with complete and accurate data, however, can consistently produce accurate outputs.[168]

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163. *See supra* note 127.

164. *See, e.g.*, Sara Merken, *Texas Lawyer Fined for AI Use in Latest Sanction Over Fake Citations*, REUTERS (Nov. 26, 2024, 8:20 PM), https://www.reuters.com/legal/government/texas-lawyer-fined-ai-use-latest-sanction-over-fake-citations-2024-11-26/ [https://perma.cc/VT9F-KZYR]; Sara Merken, *Lawyer who used flawed AI case citations says sanctions unwarranted in whistleblower case*, REUTERS (Aug. 27, 2024, 5:27 PM), https://www.reuters.com/legal/transactional/lawyer-who-used-flawed-ai-case-citations-says-sanctions-unwarranted-2024-08-27/ [https://perma.cc/RCR8-QPP7].

165. *See* Anne Dulka, *The Use of Artificial Intelligence in International Human Rights Law*, 26 STAN. TECH. L. REV. 316, 341 (2023); Sylvia Lu, *Algorithmic Opacity, Private Accountability, and Corporate Social Disclosure in the Age of Artificial Intelligence*, 23 VAND. J. ENT. & TECH. L. 99, 118 (2020); Danny Bradbury, *AI Caramba, Those Neural Networks are Power-Hungry: Counting the Environmental Costs of Artificial Intelligence*, REGISTER (Sept. 13, 2021), https://www.theregister.com/2021/09/13/ai_environmental_cost/ [https://perma.cc/8PRV-E3L9].

166. *See* Elizabeth Napolitano, *UnitedHealth Uses Faulty AI to Deny Elderly Patients Medically Necessary Coverage, Lawsuit Claims*, CBS NEWS, (Nov. 20, 2023, 4:25 PM), https://www.cbsnews.com/news/unitedhealth-lawsuit-ai-deny-claims-medicare-advantage-health-insurance-denials/[https://perma.cc/P453-N33P].

167. *See* Pushkar P. Apte & Costas J. Spanos, *Adding More Data Isn't the Only Way to Improve AI*, HARV. BUS. REV. (July 13, 2022), https://hbr.org/2022/07/adding-more-data-isnt-the-only-way-to-improve-ai [https://perma.cc/FAY2-XAKJ]; Zhisheng Chen, *Ethics and Discrimination in Artificial Intelligence-Enabled Recruitment Practices*, 10 HUMANITIES & SOC. SCI. COMMC'N 1, 5-6 (2023).

168. *See, e.g.*, Gina Kolata, *A.I. Chatbots Defeated Doctors at Diagnosing Illness*, N.Y. TIMES (Nov. 17, 2024), https://www.nytimes.com/2024/11/17/health/chatgpt-ai-doctors-diagnosis.html [https://perma.cc/B9LA-MREM]; Ganes Kesari, *AI Can Now Detect Depression From Your Voice, And It's Twice as Accurate as Human Practitioners*, FORBES (May 24, 2021, 6:50 AM), https://www.forbes.com/sites/ganeskesari/2021/05/24/ai-can-now-detect-depression-from-just-your-voice/[https://perma.cc/55N5-LAXR].

The two main arguments in the literature in favor of algorithmic decision-making have been dubbed by Professors Daniel Solove and Hideyuki Matsumi as the "Awful Human Argument" and the "Better Together Argument."[169] Somewhat intuitively, the "Awful Human Argument" posits that human decision-making is flawed because it is prone to bias, noise, limited experience, impulsiveness, and inconsistency,[170] whereas, algorithms eliminate bias, noise, and inconsistency, reduce error, and increase predictability.[171] The "Better Together Argument" contends that AI and humans make better decisions together than humans do on their own because AI can provide more information and a check on human intuition that might be biased or flawed.[172] Similarly, humans can improve the mechanic decisions of AI that lack empathy and other important human attributes.[173]

Scholars, however, have challenged these arguments. Professors Solove and Matsumi, for example, argue that algorithmic decision-making can be worse than human decision-making for a myriad of reasons, including algorithms' tendency to focus on factors that can be easily quantified, while ignoring other important qualitative factors; their lack of flexibility; and their difficulty negotiating conflicting goals.[174] Additionally, a biased algorithm has the potential to affect a greater number of decisions because it can make largescale decisions quicker.[175] They also explain that "[m]erely stringing humans and machines together will not readily make an inspired blend of the best each has to offer."[176] An AI-human collaboration, Professors Rebecca Crootof, Margot Kaminski, and Nicholson Price warn, could "all too easily foster the worst of both worlds, where human slowness roadblocks algorithmic speed, human bias undermines algorithmic consistency, or algorithmic speed and inflexibility impair humans' ability to make informed, contextual decisions."[177] Using AI does not necessarily improve legal representation.

1. TRADITIONAL LITIGANTS

Traditional litigants stand much to gain with AI that can predict litigation outcomes with accuracy; providing litigants more information regarding the viability of their claims and defenses. This can assist in deciding whether to file suit, how vigorously to prosecute or defend a suit, how much to spend litigating a suit, and

169. Daniel J. Solove & Hideyuki Matsumi, *AI, Algorithms, and Awful Humans*, 92 FORDHAM L. REV. 1923, 1924 (2024).

170. *Id.* at 1925.

171. *Id.* at 1926 (citing Cass R. Sunstein, *Governing by Algorithm?: No Noise and (Potentially) Less Bias*, 71 DUKE L. J. 1175, 1177–78 (2022)).

172. *Id.* at 1926.

173. *See id.* at 1939; Tritt, *supra* note 140, at 1223 (discussing the ways in which an AI system may fail to replicate human decision-making); Jeffrey M. Hirsch, *Future Work*, 2020 U. ILL. L. REV. 889, 898 (2020).

174. Solove & Matsumi, *supra* note 163, at 1929–1934.

175. *Id.* at 1934.

176. *Id.*

177. *Id.* at 1935.

whether a particular settlement amount might be advisable. Algorithms, however, cannot always account for facts that may come to light later in a litigation or may have a difficult time evaluating facts outside a data set. The output's accuracy depends on the information fed to the algorithm. That said, AI outputs will likely not be the only factor that forms part of litigants' calculus when making litigation decisions. Emotions and other strategic business planning could also motivate these decisions.

AI can also improve the thoroughness of legal research, but we have also witnessed its potential to hallucinate sources, particularly inexistent caselaw.[178] Attorneys can generally verify whether "authorities" identified by AI truly exist, but *pro se* litigants may not be able to. If litigants represent themselves *pro se* because they believe they will have access to the same authorities through AI, they may be putting themselves in a position to have viable claims dismissed due to poor motion practice. While *pro se* litigants may have a claim against the tool designer, the terms and conditions of AI tools will likely contain disclaimers, perhaps leaving them without redress. Inaccurate outputs could also be the result of user error as opposed to design error. If attorneys, on the other hand, perform legal research with AI tools that manufacture nonexistent caselaw without verifying the veracity of those sources, they stand to be disciplined, and litigants may have some redress *vis-a-vis* malpractice claims.

AI can also provide a check on biased human analyses, intuitions, and decision-making.[179] Conversely, overreliance on AI outputs to the exclusion of human knowledge, intuition, and oversight can also have negative consequences. *Pro se* litigants may be particularly likely to overly rely on AI outputs when the output is outside their area of expertise. Attorneys may also overly rely on AI outputs, even when their experience and intuition would indicate a different outcome. Most AI outputs cannot account for human emotions, decision making, and judgment[180]—all relevant factors in litigation outcomes. AI may be able to craft a persuasive legal argument, but an attorney may know a particular judge better and have a better sense of which arguments might be more persuasive. Similarly, humans might be better at determining which individuals to depose, how to prepare to depose those individuals, and what questions to ask off-script. AI might make traditional litigants' representation worse if true human oversight and decision-making are taken out of the equation.[181]

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178. *See supra* notes 15, 158; Armour et al., *supra* note 142, at 89–90.

179. *See* Brian Sheppard, *The Reasonableness Machine*, 62 B.C. L. REV. 2259, 2285 (2021); Sunstein, *supra* note 165, at 1177–78; Kimberly A. Houser, *Can AI Solve the Diversity Problem in the Tech Industry? Mitigating Noise and Bias in Employment Decision-Making*, 22 STAN. TECH. L. REV. 290, 294 (2019).

180. *See* Mark Purdy et al., *The Risk of Using AI to Interpret Human Emotions*, HARV. BUS. REV., (Nov. 18, 2019), https://hbr.org/2019/11/the-risks-of-using-ai-to-interpret-human-emotions [https://perma.cc/TE2J-JHKG]; Sofia Ranchordás, *Empathy in the Digital Administrative Age*, 71 DUKE L. J. 1341, 1379–80 (2022).

181. *See, e.g.*, Mata v. Avianca, Inc., 678 F. Supp.3d 443, 448–49 (S.D.N.Y. 2023); *see also* Norton, *supra* note 135, at 243–44; Solove & Matsumi, *supra* note 163, at 1925.

2. CLASS MEMBERS

Class members face many of the same accuracy benefits and challenges as traditional litigants, but there are some differences. First, predictive AI will likely only be used by class attorneys, as *pro se* litigants cannot prosecute a class action and often have less of an incentive to initiate such litigation.[182] While AI outputs are useful when accurate, they may result in the abandonment of meritorious claims if they are not.

Class counsel may also use and potentially misuse AI tools more than other litigators because they are not required to explain such tools to a client, obtain client consent to use them, or even disclose their usage, as they do not share an attorney-client relationship with absent class members and do not typically disclose such details to class representatives.[183] This lack of accountability disincentivizes counsel from investigating how an algorithm functions, the data upon which it was trained or that forms its dataset, and the veracity of past outputs. While class counsel could be sanctioned if the court uncovers this lack of supervision or competence, the risk the court might uncover AI misuse might be low if AI outputs do not make their way into a pleading or motion. For example, the court might have a difficult time uncovering AI deficiencies in document review.

While class members can sue class counsel for malpractice,[184] the threat is virtually nonexistent.[185] First, the malpractice class would have to prove the attorney was effectively incompetent or inadequate, but, if the class was previously certified, a court already found the attorney adequate,[186] precluding, at least according to some courts, a malpractice claim.[187] Other courts have held that class members are collaterally estopped from asserting malpractice claims when they failed to object to class counsel's adequacy at certification.[188] Yet others have applied an anti-suit injunction rule to class counsel malpractice claims.[189] Assuming a claim could be asserted, liability would also be difficult to prove, as the class would have to demonstrate injury—that but for the alleged malpractice there would

182. *See supra* note 51; Fymbo v. State Farm Fire & Cas. Co., 213 F.3d 1320, 1320–21 (10th Cir. 2000).

183. *See supra* note 20.

184. *See* Fidel v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., No. 95-55262, 1996 WL 742482, at *6 (9th Cir. Dec. 19, 1996); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Prods., Inc*., 80 CORNELL L. REV. 1045, 1145–46 (1995).

185. *See* Gold, *supra* note 89, at 124 n.228 (noting "[m]alpractice suits against class counsel are basically a nonstarter"); Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 14 (1995) (noting in 1995 that "no case has held class counsel liable for malpractice").

186. NEWBERG & RUBENSTEIN, *supra* note 38, at § 19:34 (citing FED. R. CIV. P. 23(g)(2)).

187. *See* Koehler v. Brody, 483 F.3d 590, 598 (8th Cir. 2007); *cf.* Wyly v. Weiss, 697 F.3d 131, 144 (2d Cir. 2012) (holding that where parties had a "full and fair" opportunity to litigate the "reasonableness" of counsel representation, a subsequent action for legal malpractice is "preclude[d]").

188. *See* Laskey v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers Am., 638 F.2d 954, 957 (6th Cir. 1981).

189. *See* Thomas v. Powell, 247 F.3d 260, 264 (D.C. Cir. 2001); Golden v. Pac. Mar. Ass'n, 786 F.2d 1425, 1427–29 (9th Cir. 1986).

have been a different, more favorable outcome for the class.[190] All these hurdles make malpractice claims against class counsel for AI misuse unlikely, further reducing accountability.

C. AI COLLATERAL EFFECTS ON PRIVILEGE AND PRIVACY

AI can have several collateral effects on its users and those whose data is used. For example, AI may reduce the amount of time litigation takes by performing tasks more quickly and efficiently than a human would.[191] This benefits both litigants—either in terms of a quicker remedy or resolution, potentially shortening expensive litigation by months or perhaps years. AI, however, can also have negative collateral effects. For example, it could result in the disclosure of privileged information and compromise litigants' privacy, depending on what is shared with the algorithm. The scope of collateral effects is broad, but this section focuses specifically on the potential loss of privilege and other privacy harms.

1. TRADITIONAL LITIGANTS

Traditional litigants representing themselves *pro se* use AI at their own peril. They decide what information, if any, to share with the AI tool. Should the terms and conditions of the AI grant it or third parties access to store, share, and "learn" from its users' data, the litigant has likely contractually consented to such practices. There may be data harms that result, but those are ultimately between the AI tool and the litigant. Conversely, when an attorney is retained and uses AI tools, the attorney is required to obtain client consent before sharing privileged information with anyone (including AI) that is not automatically bound by the privilege.[192] This consent requires disclosure, and the client may be prompted to ask additional questions about the AI tool (e.g., its functions, data security, and data sharing practices) and how the attorney will review and use its outputs. Moreover, if a litigant or attorney uses the same AI tool as the defendant in a litigation, it may be possible for the defendant to obtain their information through the tool or through discovery (if privilege has been lost) or obtain a competitive advantage in the litigation.

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190. NEWBERG & RUBENSTEIN, *supra* note 38, at § 19:34.

191. *See* Jonathan H. Choi et al., *Lawyering in the Age of Artificial Intelligence*, 109 MINN. L. REV. 147, 147–48 (2024) (finding through trials that access to GPT-4 improved the speed at which all law school students completed realistic legal tasks).

192. *See In re* von Bulow, 828 F.2d 94, 100–01 (2d Cir. 1987); Cathina L. Gunn-Rosas, Note, *Beyond the Binary: AI, Ethics, and Liability in the Legal Landscape*, 10 TEX. A&M J. PROP. L. 389, 399–400 (2024); *cf.* Brooke K. Brimo, *How Should Legal Ethics Rules Apply When Artificial Intelligence Assists Pro Se Litigants*, 35 GEO. J. LEGAL ETHICS 549, 568–69 (2022) (discussing the potential breach of information that would be deemed confidential and privileged with the use of legal AI).

2. CLASS MEMBERS

Class members face many of the same collateral effects as traditional litigants, but their exposure to those risks varies. On the one hand, class counsel and class members typically have no attorney-client relationship and class counsel is thus less likely to be privy to privileged information when inputting information into an AI tool.[193] Moreover, because class members and class counsel do not normally communicate during the litigation, the risk is even lower. That said, class counsel can obtain information regarding class members from defendants and third parties and share potentially sensitive information with an AI tool that may not have the best data security practices or that shares, uses, or "learns" from such information, per or against its terms and conditions. Class members, moreover, have little to no recourse in protecting their information, as they have no knowledge of or control over the AI tools employed by class counsel. Class members may never learn their information has been shared or compromised until it is too late. This would surely result in tangible collateral harm to the class, and a harm they could not have prevented.

AI's potential benefits and pitfalls in the class context should inform any proposal to regulate or monitor the technology's use. AI could greatly improve class litigation for class members, and class counsel should be encouraged to explore ways in which AI provides class members with greater access to the litigation. This includes employing AI in ways that facilitate communications with the class, assess the class's interests, and achieve outcomes that are commensurate with those interests. Class counsel, however, should be strongly discouraged from using AI in ways that negatively impact class members' representation or otherwise expose them to other tangible harms. The test proposed in Part III aims to accomplish these two overarching objectives.

III. INTRODUCING THE AI ADEQUACY TEST

Class members lack the same control and protections against AI misuses and abuses by those representing them in the litigation. Absent an attorney-client relationship, class members require some oversight to ensure class counsel's use of AI does not negatively impact their representation. Class courts, as Rule 23 recognizes, are presently best situated as fiduciaries to the class to provide such oversight. This Part thus proposes a practical test for courts to review class counsel's AI use under Rule 23(g)'s representational adequacy assessment. Pointedly, as explained in this Part, if class counsel's use of AI outputs negatively impacts class members' access to counsel, quality of the representation, fair treatment, or otherwise causes class members tangible harm, class counsel's use of AI would be inadequate. This Part proceeds in two sections. The first discusses courts' present

193. *See* Med. & Chiropractic Clinic, Inc. v. Oppenheim, 981 F.3d 983, 990–91 (11th Cir. 2020) (suggesting duty of confidentiality does not even exist between class counsel and class representatives).

authority under Rule 23(g) to assess class counsel's use of AI and explains the proposed AI adequacy test courts should apply when assessing class members' representation. The second section explains how courts would assess class counsel's AI adequacy in practice during the litigation.

A. THE PROPOSED RULE 23(g) AI ADEQUACY TEST

Rule 23 presently provides courts with ample authority to review class counsel's use of AI, and courts should rigorously use that authority to ensure class members' representation does not suffer because of class counsel's poor use of the technology. This section first discusses class courts' duty, under Rule 23(g), to appoint class members "adequate" attorneys to represent them in the litigation and how prospective class counsel's adequacy is assessed under the Rule. It then explains why class counsel's employment of AI in the litigation should form part of courts' class counsel adequacy analysis. Finally, it proposes AI adequacy—a practical test to assess class counsel's use of AI in the litigation—that evaluates counsel's proposed use of AI based on its intent to benefit the class and its actual use of AI based on litigation outcomes, ensuring class members' representation did not suffer.

1. RULE 23(G) AUTHORITY FOR AI ADEQUACY

Courts must, as previously discussed in Part I, appoint adequate counsel to represent a certified class.[194] Adequacy requires that class counsel "fairly and adequately represent the interests of the class."[195] In determining class counsel's adequacy, Rule 23(g)(1)(A) requires courts to consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> (iii) counsel's knowledge of the applicable law; and
> (iv) the resources that counsel will commit to representing the class[.][196]

When more than one attorney or law firm or group of attorneys or law firms seeks to be appointed class counsel, courts "must appoint the applicant best able to represent the interests of the class."[197] Courts are also permitted to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class[,]"[198] and Rule 23(g)(1)(C) authorizes courts to "order

194. FED. R. CIV. P. 23(g)(1).
195. *Id.* at 23(g)(4).
196. *Id.* at 23(g)(1)(A).
197. *Id.* at 23(g)(2).
198. *Id.* at 23(g)(1)(B).

potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs[.]"[199]

These sections of Rule 23(g) provide courts the authority to inquire into prospective class counsel's past and future planned uses of AI in the litigation. Rule 23(g)(1)(B), which gives courts broad authority to consider "any [] matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," and Rule 23(g)(1)(C)—which allows courts to order the request of "information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs" of class counsel—permits courts to consider and request information regarding class counsel's use of AI. Poor use of AI tools or use of poor AI tools could lead, for example, to a failure to detect a significant document in discovery, a misevaluation of the class's claims, and a missight of important legal authority—all effects that would impact counsel's ability to "fairly and adequately represent the interests of the class."[200] Likewise, counsel's refusal to use AI tools that would result in more thorough and efficient legal research or factual development make them not the best to represent the interests of the class.

Courts' required consideration under Rule 23(g)(1)(A)(i) of prospective class counsel's work "in identifying or investigating potential claims in the action[,]"[201] also provides an avenue of inquiry into class counsel's use of AI to perform such work. For example, an AI tool might have assisted in reviewing thousands or millions of documents produced or otherwise obtained in the litigation. Courts' required evaluation of the resources class "counsel will commit to representing the class," under Rule 23(g)(1)(A)(iv), should also encompass AI resources. Access to advanced tools that improve the accuracy and efficiency of the litigation is also "pertinent to counsel's ability to fairly and adequately represent the interest of the class."[202] Contrastingly, use of mediocre AI tools or lack of trained personnel to use such tools could impact courts' analysis of prospective class counsel's resources.

2. THE AI ADEQUACY TEST

Having established courts' authority to inquire into class counsel's use of AI under Rule 23(g), this Part proposes a test to evaluate class counsel's use of AI in the litigation. At its core, the test seeks to answer one question: will or did class counsel's employment of AI in the litigation negatively affect class members' representation? Stated differently, will or did class counsel's use of AI harm class members' interests? If not, AI adequacy is established. Conversely, if AI misidentified class members' interests, decreased the quality of class counsel's

199. *Id.* at 23(g)(1)(C).
200. *Id.* at 23(g)(1)(B).
201. *Id.* at 23(g)(1)(B), (4).
202. *Id.* at 23(g)(B).

representation, negatively affected the outcome of the litigation, or caused class members other tangible, adverse effects, AI *in*adequacy is established, and class counsel's adequacy under Rule 23(g) is jeopardized.

The test does not require counsel's use of AI to improve class members' representation. It simply requires that their use not reduce the quality of their representation or cause class members tangible harms, such as compromising class members' sensitive information. Why not require AI *improve* class members' representation? The bar should not be set so high. Class counsel should be encouraged, not discouraged, from using AI in the litigation. Moreover, class counsel's representation without AI has (to date and in the past) been adequate. A higher bar should not yet be established. At the same time, class members should not be attractive guinea pigs for novel AI tools' efficacy. They should not bear the negative consequences of AI defects, misuses, and abuses. Class counsel should be properly motivated, beyond their presently uncertain duties, to ensure this is the case.

The test borrows inspiration from Professor Tidmarsh's "do no harm" adequacy test, which he applies to class members' overall representation. According to Professor Tidmarsh, class counsel's representation is adequate if the representation did "not worsen the expected litigation outcomes of class members" had they pursued their claims individually, as opposed to through class litigation.[203] The "do no harm" test works well for class counsel's AI use. Instead of comparing class members' representation or litigation outcomes to those expected in individual litigation, the test compares the outcome of class counsel's representation with AI tools to a representation without AI tools. While it may be difficult to determine where the path to the road not traveled might have led (i.e., a litigation without AI tools) and the existing wealth of data on class representations without AI may be of limited aid, given the practically enumerable variables that impact class litigation outcomes, the AI adequacy test nevertheless works because it is aimed at identifying AI defects, misuses, and abuses. Humans, for example, do not hallucinate cases. They can misinterpret caselaw and overlook crucially relevant documents, but such failings would likely render class counsel inadequate. Class counsel's AI use should not be treated differently. Class members are entitled to adequate representation regardless of whether AI is employed.

It is worth noting that Professor Tidmarsh's test did not gain traction in practice. This perhaps could be because his test casts aside required Rule 23 factors,[204] calls for adequacy assessments too frequently in the litigation,[205] hyper focuses on class conflicts,[206] or provides too low an adequacy bar for lower-value consumer claims that would have no value or a negative value if pursued individually.[207] But these potential shortcomings are not present in the proposed AI adequacy test. AI adequacy, as explained, is meant to operate within Rule 23's

203. Tidmarsh, *supra* note 8, at 1139.
204. *See* Duncan v. Governor of V.I., 48 F.4th 195, 212 n.19 (3d Cir. 2022).
205. *See* Tidmarsh, *supra* note 8, at 1189–90.
206. *Id.* at 1189.
207. *Id.* at 1191.

framework. Indeed, it forms part of Rule 23(g)'s class counsel adequacy inquiry. AI adequacy also only calls for adequacy determinations at two specific junctures in the litigation. Although it can be used (if need be) at other points in the litigation, it is only meant to capture instances of gross inadequacy that would require little effort from the court to evaluate. AI adequacy is also not meant to supplant the entire adequacy assessment but rather compliment the courts' assessment of class counsel's adequacy. It enlarges the adequacy inquiry, rather than reduces it. While not meant to be an extremely high bar either, AI adequacy's comparative measure is not focused on the individual claims process, but rather on prior adequacy in class litigations without the use of AI. The test would thus still be relevant for low value individual claims. In sum, the proposed AI adequacy test does not require a change in precedent or legislation and can be more easily and practically applied than Professor Tidmarsh's envisioned test.

The AI adequacy test, moreover, is meant to be objective. Prior to appointing interim class counsel at the outset of the litigation, courts should inquire into counsel's past, present, and intended future uses of AI in the litigation. While this initial inquiry presently would only weed out obvious misuses and abuses of the technology or an unwillingness to use AI tools, this will likely change. When competing for class counsel positions, attorneys will soon tout the AI tools they have at their disposal and their previous successful use of AI in class litigation. Caselaw will inform courts' evaluation of previously used AI tools or specific uses of AI in litigation. Courts similarly will be better equipped to preliminarily assess class counsel's past and intended uses of AI as their exposure to AI tools increases.

Finally, the test is flexible and adaptable to new technologies. Regardless of the AI tool used or its use in the litigation, the adequacy barometer remains focused on its impact on class members' representation. The test aims to prevent artificial adequacy by practically assessing the impact of the technology on class members' representation. This forthcoming assessment will require class counsel to be mindful of its AI use in the litigation, document and keep a record of such use, and consider its ultimate impact on the class. While this will likely lead to self-touting statements by counsel regarding their effective use of AI, these statements stand to be questioned by courts, defendants, and objecting class members.

B. A BLUEPRINT TO ASSESS AI ADEQUACY IN PRACTICE

This section focuses on *how* the proposed AI adequacy test would be employed in practice. Considerations include at which stages of the litigation the court's inquiry should occur; what class counsel's AI proffer to the court should contain; what can and should the court inquire into; and what information absent class members and defendants are entitled to. The answers to many of these questions are discussed here in the order they would chronologically arise in the litigation: (1) the appointment of interim class counsel, (2) litigation prior to moving for class certification, and (3) class certification.

1. ASSESSING AI ADEQUACY WHEN APPOINTING INTERIM CLASS COUNSEL

Courts often appoint interim class counsel at the outset of the litigation to establish with clarity the attorneys heading the litigation.[208] Prior to appointing interim class counsel, courts typically issue an order calling for class counsel applications and instructing applicants to provide the court with support of their adequacy to represent the class, specifically addressing Rule 23(g)'s adequacy factors.[209] In this order, courts can request that counsel discuss (1) their past or intended use of AI, "in identifying or investing potential claims in the action," per Rule 23(g)(1)(A)(i); (2) the AI resources counsel has at its disposal and "will commit to representing the class," per Rule 23(g)(1)(A)(iv); (3) how counsel's use of AI has or will contribute to "fairly and adequately represent[ing] the interests of the class," per Rule 23(g)(1)(B); and (4) how counsel intends to tax class members for AI tools and reduce attorneys' fees by employing such tools, per Rule 23(g)(1)(C). The court could also express a preference for counsel that will employ AI in ways that will provide greater access to absent class members, afford class members an opportunity to communicate their aims or otherwise participate in the litigation, improve the quality of the representation, and reduce costs for class members.

Such an order would put the court in a better position to assess AI adequacy, as each class attorney's motion for appointment would be well-served addressing the court's request. Even if the court, however, did not issue such an order, the market might lead class counsel applicants to address their access to and use of AI tools that give them an edge over other class counsel candidates. For example, if one class counsel applicant boasts of AI tools they have used effectively in the past to ensure their litigation goals reflect class members' interests, it might prompt other class counsel applicants to commit to using those or other better tools. Similarly, if one firm has invested in proprietary AI that creates factual timelines based on relevant documents in a production and claims the tool allows them to prosecute the case to trial faster, other class attorneys may follow suit to ensure they are competitive class counsel applicants.

An important question is how much information interim class counsel candidates should disclose about the AI tools they have used, have at their disposal, and intend to use. Class counsel applications are typically publicly filed, meaning the defendant would have access to them. Providing too detailed an account of counsel's intended use of AI throughout the litigation might give defendants a competitive advantage. Courts should be mindful of the same when requesting such information at this stage.[210] Moreover, class counsel should not commit itself to using AI tools it later determines it does not need. Like litigation

208. *See* FED. R. CIV. P. 23(g)(3) ("The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.").

209. Del Riego, *supra* note 152, at 117–18.

210. *See* FED. R. CIV. P. 23(g)(1)(C).

strategies or expert engagements, disclosure of AI tools at the interim class counsel appointment phase should not be highly detailed. They should, however, disclose enough for the court to assess how class counsel generally intends to use (or not use) AI in the litigation and how such tools will serve class members' interests.

In their interim class counsel appointment orders, courts should discuss appointed counsel's commitment to use AI to further the interests of the class. A few years ago, a court rejected an unopposed motion for the appointment of class counsel because of proposed counsel's lack of gender diversity.[211] This denial, whether right or wrong, sent a clear message. Courts could send a similar message regarding class counsel's AI use by rejecting an unopposed motion for appointment that does not explain whether AI will be used (and, if so, how it will be used to further the interests of the class) or that states AI will not be used. Regardless, courts should begin to discuss AI expectations in their appointment orders. Information requested in a class counsel application order that is not later discussed as a factor that merited appointment may signal a lack of importance. The order should also clearly articulate the AI adequacy analysis the court applied and will more vigorously apply at certification—did class counsel's use of AI in the litigation improve or negatively impact class members' representation or cause class members tangible harm? The court might include the following language:

> While the court expects that all uses of AI in the litigation ultimately improve class members' representation and/or further class members' interests, any use of AI that negatively impacts class members' representation or otherwise causes class members tangible harm will be deemed inadequate and weigh heavily against class counsel's adequacy at certification.

The order should also instruct class counsel and its staff, experts, and agents to keep meticulous records of their AI use.

2. ASSESSING AI ACCESS DURING THE LITIGATION UNTIL CLASS CERTIFICATION

Courts must remain vigilant throughout the litigation of any misuses or abuses of AI that come to their attention. If it is evident that class counsel's use of AI is negatively affecting class counsel's work product, discovery obligations, or performance, the court should address it. Beyond this, however, courts should avoid exclusive inquiry into class counsel's use of AI during the litigation. AI's inputs and outputs may be privileged. They may reveal strategies, opinions, or undisclosed facts that could prejudice class members. Disclosure would also likely provide defendants with an unfair competitive advantage. Courts should, therefore, treat

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211. *See In re* Robinhood Outage Litig., No. 20-cv-01626, 2020 WL 7330596, at *2 (N.D. Cal. July 14, 2020) ("The Court is concerned about a lack of diversity in the proposed lead counsel. For example, all four of the proposed lead counsel are men, which is also true for the proposed seven lawyers for the 'executive committee' and liaison counsel.").

class counsel's use of AI during this period as they treat defendants' or any other attorney's use of AI. Some courts, for example, have required both parties to affirm in submitted filings that they have personally reviewed any AI outputs for their accuracy and validity,[212] and others have issued standing orders requiring disclosure of the use of AI to draft pleadings.[213] Standing orders that apply to both parties in the litigation avoid prejudicing class members.

Class counsel and its staff, experts, and agents should keep meticulous records of their AI use. This includes keeping records of the AI tools used, user inputs, algorithm outputs, how those outputs were reviewed and verified, and how those outputs impacted litigation strategies or decisions if at all. Certain uses of AI will be inconsequential and thus not need to be documented. For example, if class counsel uses ChatGPT to look for alternative word choices, restructure a sentence, better state a heading, or ask the meaning of a particular sentence to ensure its clarity, these likely do not need to be documented. However, if class counsel used AI to provide a first draft of a class settlement, that would be more significant and would require documentation. When in doubt, class counsel should err on overdocumentation. While this might seem burdensome, most AI tools can keep records of tasks. Those using the tool, however, must document how they ultimately used the AI output.

3. ACCESSING AI ADEQUACY AT CLASS CERTIFICATION

AI adequacy should be most vigorously assessed when counsel moves for class certification. At class certification, class counsel must establish their adequacy.[214] But with no other competing class counsel applicants, they are less motivated to discuss their use of AI, as defendants could use such information as an avenue to argue class counsel's inadequacy. Courts must thus compel a discussion of AI adequacy in motions for class certification. Class counsel's AI adequacy proffer when moving for certification should, at a minimum, include: (1) a brief description of AI tools whose outputs were used during the litigation by counsel and their staff, agents, and experts; (2) a description of how AI outputs were used, including efforts taken to ensure their veracity or assurances provided in prior testing as to the tool's efficacy; (3) how AI improved class counsel's representation of the class, furthered class members' interest, or was aimed at furthering their interests; and (4) an assurance that neither class members nor their representation suffered as a result of counsel's use of AI. Defendants will then be afforded the opportunity to question and challenge these representations in their opposition to class certification.

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212. *See Tracking Federal Judge Orders on Artificial Intelligence*, LAW360, https://www.law360.com/pulse/ai-tracker [https://perma.cc/YXB2-4BMT] (last visited Mar. 18, 2025).

213. *See* Lauren G. Leipold & Owen R. Wolfe, *Rules for Use of AI-Generated Evidence in Flux*, REUTERS (Sept. 23, 2024, 9:36 AM), https://www.reuters.com/legal/legalindustry/rules-use-ai-generated-evidence-flux-2024-09-23/#:~:text=On%20a%20piecemeal%20basis%2C%20some,before%20submitting%20to%20the%20court [https://perma.cc/7MGC-ANLZ].

214. FED. R. CIV. P. 23(g).

At this point, the court must decide whether to inquire further into class counsel's AI adequacy. If there is any indication of AI inadequacy during the litigation, defendants raise a colorable AI adequacy challenge, or the court has independent concerns regarding class counsel's motion, the court should request more information from counsel. Courts should provide class counsel with the opportunity to assert privilege over such information or otherwise request it be submitted only *in camera*, as there may be legitimate reasons why class counsel does not want to disclose more information. For one, it might provide defendants with a competitive advantage in the instant or future litigations. Second, it might invite an evidentiary hearing to challenge the accuracy, fairness, and efficacy of every AI tool disclosed by class counsel. Conversely, public disclosure would allow a more thorough review of AI adequacy and provide more guidance. Ultimately, the court must decide whether public disclosure is in class members' interest and whether the privilege truly applies.

When the court issues an opinion on class certification, it should address AI adequacy in its discussion of class counsel's adequacy. It should state the AI adequacy test it applied and explain, in sufficient detail, why class counsel's use of AI met or failed to meet the standard. This will provide guidance for future litigations. It will also cement the importance of meeting the needed AI adequacy standard, putting class counsel on notice that improper and irresponsible uses and abuses of AI will not be tolerated by courts and could lead to significant consequences.

Class counsel may also move to certify a class for settlement purposes. Courts may only approve a settlement proposal that binds class members after a hearing and "finding that [the settlement] is fair, reasonable, and adequate[.]"[215] Such a finding requires, *inter alia*, courts to consider whether "class counsel ha[s] adequately represented the class."[216] This requires an assessment of class counsel's adequacy and now AI adequacy. Class counsel's proffer and the court's AI Adequacy review in these instances should be the same as those in an opposed motion for class certification. But the court's review requires greater vigilance because defendants will be little motivated to challenge class counsel's adequacy and AI adequacy, when they want the settlement approved. Courts should additionally inquire into whether class counsel used AI outputs when negotiating, assessing the value, or drafting the proposed settlement agreement, as courts are required to ensure the negotiation process was fair to class members.[217] Similarly, courts should inquire whether AI will be used by a settlement administrator or others in the claims administration process.[218] Finally, courts should consider class counsel's AI use when determining the fairness of any fee award.

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215. *Id.* at (e)(2).
216. *Id.* at (e)(2)(A).
217. *See id.* at (e)(2)(B).
218. *See id.* at (e)(2)(C)(ii).

Once a settlement is preliminarily approved, class members are notified of the settlement.[219] At this juncture, class members may lodge objections to the fairness and adequacy of the settlement and their representation.[220] Objecting class members may request discovery from the parties,[221] and AI adequacy discovery should be no exception. The court should grant reasonable requests and entertain AI adequacy objections at the final approval hearing. These include objections concerning class counsel's use of AI during the litigation and at the settlement table, along with counsel's or the settlement administrator's proposed use of AI during the claims administration process. Class counsel should respond to these objections to the court's satisfaction prior to final approval.

A final order approving the settlement and appointing class counsel should also address AI adequacy in its discussion of class counsel adequacy. Orders should clearly indicate why AI use was or was not adequate and did not or did negatively impact class members' representation and settlement outcome. The order should also address class counsel's use of AI throughout the settlement process, AI's intended use in the claim administration process, and class counsel's use of AI when assessing the fairness of a fee award. Under the lodestar attorney's fees calculation method, class counsel might have abstained from using AI to capitalize on a higher fee. Class counsel should not benefit from their inefficiencies. If reasonably available and competent AI tools existed that perform the work attorneys performed in the litigation for a fraction of the cost, class counsel's multiplier should be reduced to reflect those inefficiencies. Under the percentage of the fund fee calculation method, class counsel would be motivated to use AI, as any cost saved would benefit class counsel. But class members, like other legal clients, should reap some of the cost-saving benefits AI produces. Courts should thus consider reducing the percentage of the settlement awarded to class counsel when AI has substantially reduced class counsel's costs, but that cost saving is not represented in counsel's fee request.

IV. EVALUATING AI ADEQUACY

This Part evaluates the AI adequacy test proposed in Part III. It begins by recognizing and addressing criticisms AI adequacy might face. Despite the legitimacy of some of these criticisms, this Part explains why AI adequacy is nevertheless essential. Next, this Part puts the proposed AI adequacy test to the test by applying it to three fictional hypotheticals involving the use of AI outputs by class counsel at three different stages in the litigation. In doing so, it demonstrates the ease with which AI adequacy can be reviewed.

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219. *See, e.g.*, Allen v. Bedolla, 787 F.3d 1218, 1221 (9th Cir. 2015); *In re* Nat'l Football League Players Concussion Inj. Litig., 301 F.R.D. 191, 199–200 (E.D. Pa. 2014).

220. FED. R. CIV. P. 23(e)(2), (5); Gold, *supra* note 89, at 114–15; Leslie, *supra* note 9, at 84–85.

221. *See* NEWBERG & RUBENSTEIN, *supra* note 38, at § 13:32.

A. POTENTIAL CRITICISMS OF AI ADEQUACY

It would be remiss not to consider AI adequacy's potential criticisms. This section addresses concerns that class courts' review of AI adequacy when applying the proposed test will: (1) discourage class counsel from using AI; (2) unprecedently and unnecessarily micromanage class counsel; (3) motivate class counsel to be dishonest about AI output use; (4) provide defendants with an unfair advantage in class litigation; (5) result in an artificial review of AI adequacy; and (6) further harm class members when class counsel's use of AI is deemed inadequate. The first paragraph of each subsection makes an argument against an AI adequacy review and the following paragraph(s) explain why the concern does not merit abandoning Part III's test.

1. DISCOURAGES AI USE TO CLASS MEMBERS' DETRIMENT

Given the disclosure and justifications AI adequacy requires, class counsel may choose to avoid the AI adequacy landmine completely by abstaining from using AI in the litigation, to class members' detriment. Establishing AI adequacy for class counsel would then be easy: (1) neither I nor my staff, agents, and experts used any AI tool outputs during this litigation; (2) I used no AI tool outputs and thus did not need to ensure their veracity; (3) AI was not used and therefore did not improve class counsel representation; and (4) AI was not used and therefore did not harm class members' representation or cause them any other tangible harm. As AI formed no part of the representation, class members' representation was as adequate as it would have been without AI.

There are a few reasons that such an approach will not work for long. First, if other class counsel candidates tout their AI capabilities and prior successes with AI in litigation, attorneys who avoid AI will not be competitive class counsel candidates. Second, and more importantly, defense counsel will be using AI tools to better represent their clients. To compete, class counsel will either have to expend significantly more resources or use AI. Because class counsel only recovers financially if the litigation is successful, they will be motivated to use all AI tools that increase the probability of a successful outcome. Finally, some experts and agents essential to the litigation may refuse to work with class counsel if they are prohibited from using AI.[222] Avoiding AI swims against the current and will soon likely be viewed as negligent as conducting legal research with outdated casebooks.[223]

It is instead more likely that class counsel may shy away from newer, unproven, or less proven AI tools or avoid blind reliance on those tools' outputs. While this may reduce class counsel's efficiencies and, in some instances, reduce the quality of

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222. *See* Simone Jones et al., *AI Use in Class Actions Comes With Risks and Rewards*, LAW360 (Apr. 22, 2025), https://www.law360.com/articles/2326588/ai-use-in-class-actions-comes-with-risks-and-rewards [https://perma.cc/YB2M-9D4Y] (discussing how class experts have been using AI tools for some time).

223. *See* Natalie A. Pierce & Stephanie L. Goutos, *Why Lawyers Must Responsibly Embrace Generative AI*, 21 BERKELEY BUS. L.J. 469, 472-74 (2024); Note, Norge A. Iñiguez, *The More You Avoid AI, the More You Violate the Model Rules*, 15 UC IRVINE L. REV. 370, 390–91 (2024).

class members' representation, such caution better serves the class. Importantly, the proposed AI adequacy test is structured to favor AI use. Class counsel does not have to demonstrate that AI improved class members' representation. They must only demonstrate that AI did not worsen class members' representation or otherwise cause class members tangible harm. It is unlikely that the courts' review of AI adequacy will cause class counsel to abstain from AI use in the litigation.

2. UNPRECEDENTEDLY MICROMANAGES CLASS COUNSEL

Requiring class counsel to disclose its use of AI outcomes unprecedentedly micromanages class counsel. Courts, for example, typically do not inquire into how class counsel chooses to staff the case (e.g., whether the appointed attorney or law firm will have a legal team of two or three partners, or three or five associates, or one or two paralegals, courts usually pass no judgment). Nor does the court require counsel to disclose all the human attorneys, experts, or other individuals whose opinion or expertise they relied upon throughout the litigation. Why should attorneys' use of AI be held to a greater level of scrutiny?

The fact is that AI is already held to greater scrutiny outside the class context. Several courts are requiring both litigating parties to disclose whether AI was involved in any of the research and drafting of motions and pleadings filed with the court.[224] Corporate and sophisticated clients also inquire into its use in litigation.[225] AI is not subject to the professional code attorneys are obligated to follow. AI cannot make moral or other human judgments.[226] AI is also presently in a nascent state and has proven to harm legal clients when used negligently.[227] For all these reasons, class members deserve a level of protection from AI inadequacy.

3. MOTIVATES DISHONESTY OF AI USE

The proposed AI adequacy test discourages class counsel from disclosing its use of AI outputs and instead encourages them to be less than forthcoming about AI's negative impact on class members. Indeed, it is difficult to imagine a situation where class counsel would admit their use of AI outputs negatively impacted class members' representation or caused the class tangible harm. Admitting the

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224. Jessiah Hulle, *Litigators Must Do Court-by-Court Homework as AI Rules Flourish*, BLOOMBERG L. (Nov. 4, 2024, 4:30 AM), https://news.bloomberglaw.com/us-law-week/litigators-must-do-court-by-court-homework-as-ai-rules-flourish [https://perma.cc/B7SW-35BQ].

225. *See* Jeremy Glaser & Sharzaad Borna, *AI: the New Legal Powerhouse – Why Lawyers Should Befriend the Machine to Stay Ahead*, REUTERS (Oct. 24, 2024, 10:31 AM), https://www.reuters.com/legal/legalindustry/ai-new-legal-powerhouse-why-lawyers-should-befriend-machine-stay-ahead-2024-10-24/ [https://perma.cc/SGY9-N2W6].

226. *See* Edmund Mokhtarian, *The Bot Legal Code: Developing a Legally Compliant Artificial Intelligence*, 21 VAND. J. ENT. & TECH. L. 145, 145 (2018); Joe McKendrick & Andy Thurai, *AI Isn't Ready to Make Unsupervised Decisions*, HARV. BUS. REV. (Sept. 15, 2022), https://hbr.org/2022/09/ai-isnt-ready-to-make-unsupervised-decisions [https://perma.cc/C8PE-FGDA].

227. *See supra* notes 15 & 175.

same would be tantamount to admitting AI inadequacy and their own inadequacy. Furthermore, how would a court, defendant, or class member ever learn of AI outputs that class counsel used but never disclosed?

Attorneys, class counsel included, are officers of the court and have ethical duties to be honest with the court.[228] Class counsel's (or its staff's, agents', and experts') use of AI outputs is a factual issue—they either used AI outputs or they did not. Failing to disclose when required to do so would be a fraudulent misrepresentation to the court. While the probability of being caught in a lie may be low, if such undisclosed use it discovered, it would likely result in sanction if not disbarment. Defendants may be able to provide evidence suggesting class counsel used AI or objecting class members could request records that might demonstrate AI use. Attorneys could refuse to produce such documents, but the same argument could be made about all litigants in discovery. While class counsel may never believe their use of AI negatively impacted their representation, the AI adequacy proffer is not wholly worthless. It requires class counsel to also consider *ex ante* the potential negative effects of using AI.

4. DISCLOSURES PROVIDE DEFENDANTS WITH AN UNFAIR ADVANTAGE

Class counsel's disclosure of AI output use could afford defendants an unfair competitive advantage. If defendants were aware of the AI tools class counsel used, they could use the same tools to obtain similar outputs, thus gaining access to information that may be privileged. Defendants not subject to an AI adequacy test would yet be allowed to keep their use of AI outputs secret. Defendants would thus be litigating with knowledge of both their cards and those of their opponents, while class counsel would be disadvantaged by the information asymmetry, thus harming class members.

The proposed AI adequacy test, however, does not require class counsel to disclose the specific AI tools it has or intends to use at the outset of the litigation. It does not require a disclosure of AI inputs or even a disclosure of the actual outputs. During the bulk of the litigation, the proposed test would not be applied, as the court should not inquire into class counsel's AI use unless there is some indication that class members' representation is suffering because of AI. Any other disclosure requirement during the litigation should be imposed equally on both parties, such that neither would have a competitive advantage. Even at class certification, when most of the pretrial litigation has been completed and disclosure is arguably less harmful, the disclosure requirement should not afford defendants a significant advantage. If the court requires more information, class counsel can assert privilege. If class counsel's arguments hold water, the court could review class counsel's AI records and submissions in response to the court's questions *in camera*. The process instructs courts to be mindful and careful not to give defendants a peek behind the strategy curtain.

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228. *See* Morales v. K Chocolatier Inc., No. 2:21-cv-08522, 2022 WL 19829446, at *4 (C.D. Cal. Oct. 31, 2022) (citing U.S. v. Associated Convalescent Enters., Inc., 766 F.2d 1342, 1346 (9th Cir. 1985)).

5. COURTS' REVIEW OF AI ADEQUACY GENERATES ARTIFICIAL AI ADEQUACY

It could also be argued courts are poorly situated to review AI adequacy, and, even if they were not, their review would fail to uncover AI inadequacy. According to a 2020 study, the average age of a federal judge is sixty-nine[229]—not the typical age of an AI connoisseur, early adopter, or eager user.[230] Indeed, older adults may be more skeptical of the technology's benefits than the general public.[231] Nevertheless, the proposed test would have the federal bench assessing whether class counsel's use of AI outputs negatively impacted class members' representation. Even assuming such a constituency could understand the technology and its outputs, the test provides courts with too little information to properly assess AI adequacy. This would lead to the very same artificial AI adequacy the test was meant to avoid.

First, it might be good to have a skeptical population reviewing AI adequacy. This, in theory at least, would provide a more robust review of class counsel's use of AI outputs. Mistrust breeds scrutiny, but this is much-needed scrutiny as class members cannot supervise class counsel. Class counsel should be mindful of this and provide the court with enough information to satisfy itself that class counsel is using AI outputs responsibly and in furtherance of the class's interests.

Second, the AI adequacy test walks the same balance as all other Rule 23 adequacy tests. Courts must make an adequacy assessment of class counsel's representation of the class while only privy to class counsel's self-serving statements, filed motions and pleadings, and performance in court. Sometimes defendants may challenge class counsel's adequacy, but such challenges usually relate to conflicts and not to counsel's actual performance in the litigation.[232] Similarly, courts must make an adequacy assessment of class representatives without ever meeting them and based solely on class counsel's self-serving statements about the representatives' adequacy and defendants' ensuing challenges. Similarly, when reviewing the adequacy of class settlements, courts only have the self-serving statements of the parties that the settlement was fair, reasonable, and adequate under the circumstances.[233] Courts may in all these instances request class

229. Francis X. Shen, *Aging Judges*, 81 OHIO ST. L.J. 235, 237 (2020).

230. *See* Brian Kennedy et al., *Public Awareness of Artificial Intelligence in Everyday Activities*, PEW RES. CTR. (Feb. 15, 2023) https://www.pewresearch.org/science/2023/02/15/public-awareness-of-artificial-intelligence-in-everyday-activities/ [https://perma.cc/H28E-YLPP] (observing participants aged 65 and above had the lowest percentage of a high level of awareness of artificial intelligence applications in daily life).

231. *See* Wenjia Hong et al., *Why Do Older Adults Feel Negatively about Artificial Intelligence Products? An Empirical Study Based on the Perspectives of Mismatches*, 11 SYS. 551, 551–52 (2023); Mohammad Mominur Rahman et al., *Motivation, Concerns, and Attitudes Towards AI: Differences by Gender, Age, and Culture*, 15439 LECT. NOTES COMP. SCI. 375, 376–77 (forthcoming 2025) (on file with author); *cf.* Simhaw, *supra* note 134, at 798, 803–04 (also arguing courts should be the most important players in ensuring AI's access potentials are properly employed to close the access-to-justice gap and ensure fairer outcomes for litigations).

232. *See* Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671, 689, 692 (2004).

233. *See* FED. R. CIV. P. 23(e)(2).

counsel to further address their adequacy concerns, but they always operate with incomplete information.[234]

Third, courts' consideration of AI adequacy requires class counsel to consider it as well. This may make class counsel less likely to engage in uses of AI outputs that would be inadequate. And, finally, even if the test fails to identify all instances of AI inadequacy, it provides some relief for gross inadequacy.

6. AI INADEQUACY PUNISHES CLASS MEMBERS

If class counsel's use of AI fails the AI adequacy test, then the harm class members suffered in the reduced quality of their representation is compounded by being denied class certification due to class counsel's inadequacy, which could ultimately results in extinguishing class members' claims and denying them any relief. An AI adequacy review thus might exacerbate class members' injury rather than redress it.

A finding of AI inadequacy, however, should suggest class counsel inadequacy but not be determinative. As courts have recognized, "not every misstep by [class] counsel warrants denial of class certification."[235] Indeed, courts are tentative to find class counsel inadequate for a judgment lapse, particularly one that does not cause "serious doubts about the adequacy of counsel" that "jeopardizes the court's ability to reach a just and proper outcome in the case."[236] It is possible that all other factors towards class counsel's adequacy collectively would warrant a finding that class counsel fairly and adequately represented the interests of the class, despite its poor use of AI. Perhaps the embarrassment of an AI inadequacy finding is enough to deter future AI blunders.

Even a finding that class counsel is inadequate, however, does not require denial of class certification. As the Manual for Complex Litigation explains, denial of certification because of counsel's inadequacy when a "class appears otherwise certifiable . . . is very problematic."[237] For this reason, courts have allowed plaintiffs to "substitute in independent and adequate replacement counsel" to continue with the case.[238] Instead of completely substituting class counsel, who by the time of class certification has usually spent significant time on the case and possess considerable knowledge, courts have also allowed class representatives to seek additional counsel.[239] These alternative reliefs better "align[] interpretations of Rule

234. *See supra* note 69.

235. Kulig v. Midland Funding, LLC, No. 13-cv-4175, 2014 WL 5017817, at *6 (S.D.N.Y. Sept. 26, 2014); *see also* Victorino v. FCA US LLC, 322 F.R.D. 403, 408 (S.D. Cal. 2017).

236. *Victorino*, 322 F.R.D. at 408 (quoting White v. Experian Info. Sols., 993 F. Supp. 2d 1154, 1171 (C.D. Cal. 2014)).

237. MANUAL FOR COMPLEX LITIGATION (Fourth), *supra* note 45, at § 21.272.

238. Lou v. Ma Lab'ys, Inc., No. C 12-05409, 2014 WL 68605, at *5 (N.D. Cal. Jan. 8, 2014); *see also* Kay v. Wells Fargo & Co., 247 F.R.D. 572, 579 (N.D. Cal. 2007).

239. *See* E. Me. Baptist Church v. Regions Bank, No. 4:05-CV-962, 2007 WL 3022220, at *9 (E.D. Mo. Oct. 12, 2007).

23(g)[] with the core goal of adequate representation: protect[ing] . . . absent class members."[240] AI inadequacy should not extinguish class members' claims.

Courts' review of AI adequacy is presently dire. Anecdotes of negligent AI use by attorneys abound. While most litigants can assert some control over their attorneys' use of AI and AI outputs, class members cannot. The AI adequacy test proposed in Part III is not perfect, but it offers class members some protection. It encourages counsel to commit to using technology that will enhance class members' representation. It elevates the importance of responsible AI-output use for class counsel. Aware they will be subject to an AI adequacy test, class counsel and its staff, agents, and experts will be more mindful of their AI practices and keep records of their AI use. AI adequacy determinations also permit courts to review AI uses and ensure class members' representation is not negatively affected. At the class certification stage, moreover, the AI adequacy test affords absent class members an opportunity to object and inquire further into those practices. Finally, an AI adequacy review could also lower litigation fees and costs, thereby maximizing class members' relief.

B. TESTING THE AI ADEQUACY TEST

The following sections provide fictional hypotheticals illustrating class counsel's use of AI during three different stages of the litigation: the appointment of interim class counsel, the pre-certification litigation, and the class certification. Each hypothetical discusses the court's application of the AI adequacy test, thereby demonstrating the test's practical application.

1. *IN RE FLODGER*: APPOINTMENT OF INTERIM CLASS COUNSEL

On September 3, 2024, Flodger, a social media company, advised its users of a data breach that compromised their data. At a minimum, users' names, email addresses, credit card information, and relationship statuses were accessed during the breach. Within a few weeks after the breach, multiple class action lawsuits were filed by various attorneys seeking to represent Flodger users against the company for its negligent security measures. The data breach also caused Flodger's stock prices to drop, putting them at risk of bankruptcy. Some of the attorneys seeking to represent the class wanted to settle the case quickly before a threatened bankruptcy, but others wanted to obtain formal discovery from Flodger first to ensure they understood the scope of the breach and the facts leading up to it. After these preliminary settlement discussions occurred, all class suits were consolidated and several law firms sought to be appointed class counsel.

The court entered an order requiring all attorneys interested in representing the class to file a motion for appointment addressing Rule 23(g) factors and to address specifically: (1) their past and intended use of AI in the litigation "in identifying or

240. NEWBERG & RUBENSTEIN, *supra* note 38, at § 3:87.

investing potential claims in the action," per Rule 23(g)(1)(A)(i); (2) the AI resources they "will commit to representing the class," per Rule 23(g)(1)(A)(iv); (3) how AI will (or will not) be employed to "fairly and adequately represent the interests of the class," per Rule 23(g)(1)(B); and (4) how counsel intended to tax class members for AI tools or reduce attorneys' fees by employing such tools, per Rule 23(g)(1)(C).

Several motions for appointment were filed, including one by Fuerte & Johnson P.A. that represented it had not used AI to identify or investigate the claims. It also assured the court that neither it nor its staff, agents, or experts would use AI outputs in the litigation. All work instead would be performed by humans. It claimed this was necessary to ensure class members the best representation.

Another motion was filed by Singhal & Turner LLP (S&T), which represented that it had used an AI tool to determine the viability of the claims asserted in its complaint. It also represented it would use an AI discovery tool that identified relevant and potentially crucial documents amongst those produced and would create timelines based on those documents for counsel to review and use in the litigation. S&T also indicated it would use AI tools to assist with legal research and drafting, but that all research and documents would be reviewed by humans for accuracy prior to any filing. S&T claimed these tools would improve class members' representation by allowing it to engage in discovery-related tasks and legal research more quickly and accurately, allowing its attorneys to focus on other aspects of the litigation. S&T also represented it would take any cost savings into consideration when it moved for fees later in the litigation.

Another motion was filed by McCarthy & Hernandez LLP (M&H). M&H represented it had access to a discovery tool to review documents, which it intended to use, if necessary, in the litigation. It, however, indicated it would employ humans to review the documents identified as relevant by the AI tool and perform random reviews of documents the AI tool determined irrelevant to ensure accuracy. Finally, the firm represented it had used and intended to continue using an AI tool that identified potential class members and sought to gather their preferences. The tool analyzed survey results and identified potential shortcomings of the survey sample. Part of M&H's motion also contained the AI tool's report that demonstrated that most class members surveyed (eighty-two percent) preferred obtaining formal discovery and litigating the case, despite the risk of bankruptcy. M&H explained that employment of these AI tools ensured class members had a greater voice in their representation. Finally, M&H committed to passing reasonable savings it achieved using AI to the class.

The court issued an order appointing M&H to serve as interim lead class counsel. It discussed class members' entitlement to the law firm "best able to represent the interests of the class."[241] That firm, the order stated, could not be one that refuses to use AI that could improve the quality of class members' representation. The court also commended M&H for using AI to decipher class members'

241. FED. R. CIV. P. 23(g)(2).

preferences and commitment to pursue those in the litigation. Overall, it was convinced, considering all Rule 23(g) factors, that M&H was the best firm to "fairly and adequately represent the interests of the class."

2. *IN RE GRAIN WORKS*: PRE-CERTIFICATION LITIGATION

Class action law firm Michaels & Diaz P.A. (M&D) filed suit against Grain Works for its purportedly deceptive statements that its Mega Marsh Munch cereal, composed primarily of marshmallows, provided a well-balanced breakfast diet for most toddlers. After the court appointed M&D to serve as lead class counsel, Grain Works filed a motion to dismiss arguing M&D's claims of fraud could not survive dismissal because, *inter alia*, the statement at issue was an opinion and no reasonable person would believe that Grain Works was claiming that marshmallows were an ideal diet. In preparing plaintiffs' response to Grain Work's motion, M&D used an AI tool DiscussPPT to identify relevant caselaw and draft an initial response to the motion. Several attorneys at M&D reviewed the draft. These attorneys deleted some arguments, improved the language of the motion, and rearranged other arguments. The AI tool's initial research, however, was never independently reviewed. As it so happens, the AI tool missed relevant caselaw that was favorable to plaintiffs. It also misinterpreted caselaw and cited inexistent caselaw.

The court's standing order required disclosure by both parties of the AI tools they used and relied upon in researching and drafting any filed motions or pleadings. Defense counsel had disclosed its use of Spellbook in identifying relevant portions of cases and ChatGPT in improving word choice and sentence structure. M&D disclosed its use of DiscussPPT in performing legal research and drafting its response to the motion to dismiss. Both defense counsel and M&D represented that they had verified the accuracy of the AI tools' outputs prior to filing their motions.

The court could not find some of the authorities cited by M&D and others it could find did not stand for the proposition stated. When the court entered an order asking M&D to provide the authorities cited, M&D admitted that it could not find some of them because they likely did not exist and that it had failed to independently verify the veracity of its legal citations. The court referred M&D to the local bar and indicated it would find M&D inadequate in any subsequently filed motion for class certification or certification for settlement purposes. The court provided plaintiffs sixty days to obtain alternative counsel and file another response to the defendant's motion to dismiss.

3. IN RE MAXTERMIGHT: CLASS CERTIFICATION

Davis & Zhang LLP (D&Z) filed a products liability class suit against Maxtermight, a small appliances manufacturing company, and was appointed interim lead counsel by the court. D&Z's complaint alleged that Maxtermight knowingly failed to include an additional screw in its CLP 6 slow cooker that could, after

fifty uses and likely after the thirty-day warranty period expired, cause leaks. When the court appointed D&Z, it indicated that it would require at certification: (1) a brief description of all AI tools whose outputs were used during the litigation by counsel and counsel's staff, agents, and experts; (2) a description of how the outputs of the tools were used, including efforts taken to ensure their veracity; (3) how AI improved class counsel's representation, furthered class members' interest, or was aimed to accomplish either; and (4) whether class members' representation suffered as a result of the AI tools counsel employed or whether class members experienced any tangible harms resulting from counsel's use of AI. After engaging in extensive discovery and motion practice, D&Z and Maxtermight reached a settlement, wherein each class member would be awarded fifty-five dollars, the average cost of the CLP 6 slow cooker.

In its motion for preliminary approval and certification, D&Z represented it had used several AI tools, for which it provided a description, including: a discovery tool that reviewed all produced documents and marked them for second-tier human review; an AI tool that provided a timeline of relevant documents identified by human reviewers; a chatbot to communicate with class members that could answer over sixty common questions about the litigation and directed class members to an attorney at D&Z when the bot could not assist; and a proprietary AI tool that assisted it in settlement negotiations. It generally explained how these tool's outputs were verified by its attorneys or staff and subsequently used in the litigation. D&Z represented that its use of AI outputs either enhanced or did not harm class members' representation. It stated that in some instances the quality of the representation was not improved, but the time taken to perform tasks was reduced, permitting its attorneys to focus on other aspects of the case. Finally, because of the efficiency AI created, D&Z committed to seeking twenty-five percent of the settlement fund, instead of the thirty percent it had customarily sought and been awarded.

The court was satisfied with class counsel's adequacy proffer, including AI adequacy, and granted the motion for preliminary approval. When the class received notice of the settlement, one class member represented by counsel objected and requested discovery on the AI settlement tool class counsel used. The court permitted limited discovery into the tool and class counsel's use of its outputs. Specifically, the objector wanted to know what data the tool "learned" from to generate its calculations and whether the data it was provided was accurate and representative of data from other class cases. The objector received documents and was allowed to take one deposition. Both the documents and deposition transcript were designated "for attorneys' eyes only," thus protecting them from outside review. Satisfied, the objector dropped their objection.

Ultimately, the court issued an order, which, *inter alia*, addressed AI adequacy. In relevant part, it commended class counsel for its candor in establishing AI adequacy, stating the expectation that class counsel employ AI to further class members' interests. The court found that class members' representation was not

negatively impacted by class counsel's use of the technology and that class members were not otherwise tangibly harmed by class counsel's use of AI in the litigation. Furthermore, class members enjoyed a fee reduction because class counsel efficiently used AI.

CONCLUSION

In 2016, leading class action scholar Professor Robert H. Klonoff predicted that by 2026 "[t]echnology will make the class action device more transparent and democratic, so that unnamed class members will be able to play an active part in the process."[242] We are not there yet. But AI can and should make this possible. It can provide a more transparent, accessible process for class members to participate in,[243] and it can facilitate the resolution of a greater volume of class claims.[244] Class members should reap the benefits AI promises. However, their presently absent and tenuous position in the litigation, makes them particularly vulnerable to AI misuses and abuses. Courts must, as Rule 23 fiduciaries, ensure class members' representation is adequate, which requires an assessment of class counsel's AI practices. This Article's proposed AI adequacy test encourages AI innovation that furthers class members' interests and discourages irresponsible use of AI. The proposed test provides flexibility as AI tools evolve and norms develop, but it shapes those norms by ensuring class members' interests are forefront. Class counsel's AI adequacy, however, is but one piece of the puzzle. Courts, practitioners, and scholars must work to ensure AI is employed to achieve class litigation's true aim: representing and furthering class members' interests.

242. Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1655 (2016).
243. *See* Del Riego & Avery, *supra* note 1, at 8.
244. *See* Salib, *supra* note 5, at 522.