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ANALYSIS

AI and Practicing Law: Potential Traps for the Unwary

By Joel G. MacMull | May 18, 2023 at 10:12 AM

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Unless you've been living in a cave since late last November, you, like the rest of us, have been inundated with news surrounding the release of artificial intelligence content generators (AICGs) like ChatGPT, Perplexity, Jasper, and other similar platforms. While reports about these new tools have expressed enthusiasm for their capabilities, alarmists among us have warned of rampant plagiarism in academic settings and the decline of traditional content-based industries. The current Hollywood writers' strike and their ongoing row with major studios over AI-generated content is the most recent high-profile example. Precious little, however, appears to have been written about "AICG best practices" for service professionals, including, of course, us lawyers.

Although empirical data is lacking, anecdotal evidence strongly suggests that both newly minted and seasoned legal practitioners across a variety of practice areas are turning to AICGs to aid them in their everyday tasks. Most obviously, these tasks would include things like answering legal research questions and drafting documents, such as legal briefs and operating agreements. It is also likely that many users are naïve in their use of AICGs because they do not have the knowledge base to identify, much less resolve, the cavalcade of problems that can come from using these tools as a lawyer. But by developing a consciousness for these potential pitfalls, the hope is that lawyers (and other service providers) can use AICGs to significantly aid, but not substitute for, their ethical (and perhaps moral) responsibilities to their clients. This article seeks to raise awareness among practicing lawyers where it otherwise may be lacking.

Privacy Concerns. As a lawyer, the most compelling concern with AICGs involves issues of privacy. Beyond the sanctity of the attorney-client privilege, we also have a duty to safeguard a client's proprietary or confidential information. But AICGs are language models. Platforms use these conversations to constantly improve their performance, and it's important to understand at a basic level how they work.

New York Law Journal

A seemingly innocuous transmission of data like a client's home address, telephone number, a company's revenues as expressed as a line item in a spreadsheet, or the identification of a client's customer once entered into a chatbot, immediately becomes part of the aggregate dataset on these platforms. And, while you might think that the deletion of an account will resolve the unauthorized disclosure of client information should it occur, the consensus among engineers and others familiar with these tools appears to be that account deletion does not result in the removal of content from the platform. Of course, this makes perfect sense when you think about how these tools are designed, and how they learn and evolve with each new input.

The potential liability exposure for lawyers who inadvertently disclose their client's information on AICGs is not insignificant and can arise in a number of ways. First, and most obviously, is a direct breach, wherein a lawyer inputs a client's information into an AICG without authorization. Second, what if the lawyer discloses information provided by the client that the client was under a contractual obligation with a third-party not to disclose? There may be restrictions on the client's ability to share its customers' or clients' confidential information with third-parties, including, of course, with AICGs themselves. These sorts of indirect breaches can certainly give rise to liability.

Issues of Quality. One of the well-documented shortcomings with AICGs is their propensity for inaccuracies. This is particularly true for events occurring after 2021, where many, if not all, of these platforms have significant "blind spots." These shortcomings extend to recent developments in the law, too. I experienced this myself recently, when, in a test drive of sorts, I turned to AICGs to draft a section of a legal brief. The results were poor, as multiple AICGs cited irrelevant cases and missed altogether a landmark decision decided by the U.S. Supreme Court in 2021 that resolved the issue entirely. Given these flaws, and their seriousness, AICGs cannot, and should not, be used as a substitute for conventional legal research and writing, at least not yet.

Potential Loss of Goodwill. Closely related to the issue of quality, is the potential for lawyers to lose valuable goodwill by relying too heavily on AICGs. This can occur in at least a few ways.

First, clients are paying in many cases several hundred dollars per hour for our legal expertise. But we undermine our economic value, and the client's expectation in our skills that comes with our high fees, when, at the end of the day, the substantial bulk of our work-product is derived from a few choice keystrokes. Such goodwill is further eroded if and when the client ever discovers that, for example, the research we conducted was never really performed by "us" in any appreciable sense of the word. And what sort of affirmative obligation do we as lawyers have to inform our clients about our use of AICGs at the time of engagement? I, for one, fail to see how utilizing AICGs to service a client is any different from the need to identify upfront that a client's matter will be serviced by associates and paralegals at varying rates. This, naturally, leads to perhaps the fundamental concern for lawyers: our fees. Where AICGs are principally utilized in connection with servicing a client, is it ethical to charge that client the same rate as if the lawyer were doing the work themselves? The answer is undoubtedly complicated and likely turns on each individual state's ethics rules. But these rules, even in the most progressive of states, contain only marginal guidance at best at the moment.

New York Law Journal

Intellectual Property Considerations. The use of AICGs has several varied implications for the use and ownership of intellectual property. Recently, the U.S. Copyright Office wrestled with content generated by AICGs, rejecting in February of this year the argument that images created solely via AICGs are copyright eligible. The office's position, "doubling down" on its prior rulings, remains, at least for the moment, that "authorship" under the Copyright Act must be that of a human being. Aside from creating additional questions for lawyers who practice in this space regarding who or what authored the work, or how much of the author's own mental impressions are embodied in the work, lawyers who do not practice in this area nevertheless need to be aware of potential intellectual property-related risks that come with the use of AICGs. At least two concerns are worth noting.

The first, which again arises from how these platforms work, concerns copyrightable content. That is, there exists at least a risk that the content that AICGs churn out may be deemed a derivative work of copyrighted works that were used to train each platform. And, legal briefs, and perhaps most obviously, are properly the subject of copyrights. See, e.g., *Newegg v. Ezra Sutton*, 2016 WL 6747629, at *1 (C.D. Cal. Sept. 13, 2016); *White v. West Publishing*, 29 F. Supp. 3d 396 (S.D.N.Y. 2014). Thus, the lawyer who believes (naively) that the outputs produced by AICGs cannot give rise to infringement may be in for a surprise, particularly if the content generated by an AICG meets the "substantiality similarity test" vis-à-vis the original copyrighted worked that was used to train the platform.

The second risk relates to the above discussion concerning privacy. To the extent a lawyer submits client or a client's customer's information into a chatbot conversation for analysis, and that same data is then later extracted by a third-party, not only is the confidentiality of that data compromised, but the argument that client took reasonable steps to safeguard that same content, at least in the case of a trade secret, is also undermined. Put somewhat differently, as I often tell my clients, if a trade secret is truly a trade secret, well, then, it must be kept a secret! Needless to say, pouring confidential data into a chatbot accessed by millions is the antithesis of a secret.

Naturally, given that this technology is so fresh, the above considerations are by no means exhaustive. They are, however, intended to aid lawyers, irrespective of their practice areas, to develop an appropriate awareness that may better serve their clients and themselves.

Joel G. MacMull is a partner and chair of Mandelbaum Barrett's intellectual property, brand management and internet law group and is a member of the firm's commercial litigation group.