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Commentary

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Artificial Intelligence (AI) is transforming how companies and individuals do business—and law firms are no exception. Although some forms of AI are established tools of the legal industry, such as the machine-learning algorithms that enable attorneys to locate the most relevant documents at early stages of document review, Generative AI (GenAI), which creates original content, could fundamentally alter how law firms staff cases and serve clients. GenAI has the potential to accelerate the post-COVID contraction of the legal industry—particularly at the junior ranks—because of its ability to perform rote work and lower-level tasks. Although no one has suggested that GenAI is an adequate substitute for the business judgment and acumen of an attorney who has moved up the ranks from first-year associate to senior attorney, law firms will have to contend with how best to train its junior talent if a significant swath of legal work is ceded to GenAI. Without the support of law firms and mentors, the legal profession may have a “lost generation” of associates, who by virtue of COVID-19

and GenAI, may not develop the requisite skills or be equipped to assume leadership in the profession.

I. COVID-19 And The Legal Industry

Before examining how GenAI may upend the practice of law, it is important to acknowledge the impact COVID-19 has already had on the legal industry. Although some law firms were forced to conduct layoffs, many offered home office stipends and implemented temporary pay cuts in an effort to keep attorneys and staff employed.¹ Despite these initial concerns, many law firms held steady or had higher revenue: demand for legal services and hourly rates increased by 6.6% and 6.5%, respectively.² In turn, hiring “skyrocketed in 2021, when lawyer moves between firms was up 111% nationally.”³

Post-COVID, however, the demand for legal services cooled and layoffs ensued.⁴ Not only have layoffs affected junior associates,⁵ those seeking new employment face a tough market.⁶ The junior associates who have held on to their jobs have a different hurdle: skepticism from senior attorneys and clients that they have received adequate training from remote work.⁷

II. AI And The Legal Industry

Post-COVID, GenAI Takes Center Stage

Now consider the potential impact of GenAI. GenAI is a subfield of AI that uses prompts—usually a user asking a question—to create text responses, images, computer code, videos, and music.⁸ GenAI is able to create content through machine learning that is trained of large volumes of data.⁹ What makes GenAI unique is its ability “to match the style and appearance of the underlying training data.”¹⁰ It “also ha[s] been shown

to have capability overhang, meaning hidden capabilities that [its] developers and users did not anticipate but that are emerging as the models grow larger.”¹¹

Although several GenAI models are in the market,¹² none has taken the world by storm like Open AI’s ChatGPT, a free chat-bot that, in its own words, “stands out for its ability to understand and generate human-like text.”¹³ According to one study, ChatGPT “surpassed 1 [million] users in just 5 days, the fastest that any company has ever reached this benchmark.”¹⁴ However, commentators have warned that as GenAI enters the workplace, “[e]xcitement is warranted, but caution is required.”¹⁵ This is particularly true of the legal industry, where clients often bring high-stakes personal or commercial matters that require the highest standard of accuracy and confidentiality, and judges expect legal research to be correct. A sober illustration of how the use of ChatGPT for legal research can go terribly wrong is the instance where seasoned lawyers used ChatGPT for a brief, only to be questioned by opposing counsel and the Judge on citations that were later revealed to be “hallucinations.” The cases cited in the brief were non-existent, and the lawyers were sanctioned as a result.¹⁶ A federal judge in Texas now requires lawyers appearing before him to certify that they have not used AI to draft their filings without human interaction checking the accuracy of content.¹⁷

GenAI And Junior Associates

GenAI already has a foothold in the legal industry through e-discovery, which utilizes Technology Assisted Review (TAR).¹⁸ The prompt in TAR comes from the attorney, who suggests keywords to the e-discovery professional. From there, TAR goes through the database and sorts and ranks what it determines are the most relevant documents. The attorney reviews the TAR sample and provides additional feedback until he or she determines that the important documents are at the front of the queue and less relevant documents deferred for later review.¹⁹ TAR gained enough traction in legal profession for courts to deem its use black-letter law.²⁰

The thornier issue arises when GenAI is used to perform more sophisticated tasks. The Harvard Law School Center on the Legal Profession recently published an article identifying four areas where ChatGPT and similar technology may transform the legal profession:

(1) Legal Research—To assist lawyers in legal research by quickly scanning through large amounts of text data and providing relevant information on a given topic;

(2) Document Generation—To generate legal documents such as contracts and briefs;

(3) Providing Legal Information – To provide general legal information to the public, such as FAQs or the type of advice provided through Web sites like avvo.com; and

(4) Legal analysis – To provide suggestions and insights based on what it gleans from legal principles and precedent.²¹

Significantly, the tasks listed above have traditionally been viewed as necessary training for junior associates. Only after these basics are mastered are junior associates entrusted with more advanced work. ChatGPT offers junior associates a shortcut that eliminates opportunities to create work product from scratch and develop critical thinking skills. For example, when questions were posed to ChatGPT, such as “[e]xplain the concept of personal jurisdiction” and “[d]evelop a list of deposition questions for the plaintiff in a routine motor vehicle accident in Massachusetts,” both of which produced passable work product.²² When given a fact pattern and the court jurisdiction, ChatGPT was able to generate an initial draft of a complaint.²³ With its “potential to churn out persuasive and eloquent copy that would take a human hours, days, months or even years to write . . . there is plenty of hand-wringing about how [Gen-AI] could make lawyers obsolete.”²⁴

Not all commentators think that GenAI is a death knell for associates. A recent McKinsey & Company study offered a more optimistic view, that GenAI “leaves room for more substantive learning soon, empowering junior to dig into the substance of the law early and put it all in context.”²⁵ At any rate, as evidenced by the recent debacle with ChatGPT in New York federal court,²⁶ junior associates may take some comfort in the fact that their employment is secure for now. There is also the looming question of whether using ChatGPT, which does not delete specific prompts,²⁷ waives the attorney-client privilege;

there is no threat to privilege if a junior associate is doing the work.

IV. Legal Risks Of Using GenAI For Lawyers

While there are clear use cases mentioned above where the use of GenAI will aid lawyers to be more efficient with their time, ultimately providing higher value work product to their clients, there are also risks associated with the use of GenAI that lawyers should be mindful of when experimenting with it. There is support to restrict and regulate AI, including from consumer groups,²⁸ the Federal Trade Commission,²⁹ and through the enactment of state, federal, and international data privacy laws.³⁰ In using GenAI, lawyers may bump against new regulations without knowing they exist. In addition, GenAI has developed because programmers train AI tools by feeding it data, which it uses to generate new content.³¹ This data comes from all over the internet and includes vast amounts of copyrightable material.³² Outputs from AI models may directly include copyrighted materials or derivative works that may be a potential copyright infringement.³³ Further, using client data in the use of GenAI could potentially be a violation of the Rules of Professional Responsibility,³⁴ including the professional ethic of keeping client information confidential,³⁵ as well as a violation of outside counsel guidelines. Although this list is not complete, all lawyers using GenAI would do well to research and understand the risks associated with the use of GenAI before they plunge in.

V. A Lost Generation Of Lawyers?

The effect that the pandemic and GenAI may have on junior associates is not lost on law firm leaders—or clients. There is a concern that the work from home environment has stymied associate development. According to the Chair of an AmLaw 100 firm, the pandemic deprived junior attorneys of “observational learning, being able to see the body language and intonation of how lawyers talk to opposing lawyers and clients.”³⁶ Another managing partner asserted that the lack of observational learning translates to poor communication skills at the senior level, reasoning that “[i]f you can’t handle a meeting live with a client, whether litigation or transaction, that’s a problem. . . . And if you have a gap in that reading-the-room thing, that’s going to be problematic.”³⁷ Other law firm leaders have been blunter in their assessment, claiming that “lawyers were simply not trained to the level a firm would expect” and “third- to fifth-years were instead equivalent to second- or third-years.”³⁸

Clients have expressed similar reservations. One in-house lawyer questioned “how junior lawyers were picking up those critical skills gleaned from observation, and pondered whether clients would ever seek reduced fees for their work.”³⁹ The expectation that law firms will reduce costs and rates is exacerbated by the use of GenAI, creating a vicious circle for junior associates. It is possible that “[w]ithin the next year or so (and maybe sooner), GCs and in-house counsel can and will demand that law firms do their work more efficiently. And they will not pay for law firm associates to spend five hours on something that would have taken them 15 minutes if those associates had used generative AI.”⁴⁰ Given the intersection between GenAI output and junior associate responsibilities, the five hours sacrificed would have been a valuable training exercise.

VI. Conclusion

GenAI offers previously unheard-of efficiencies that will enable attorneys to do their jobs in a cost-effective manner. The trade-offs are the legal risks presented by the use of GenAI and that GenAI is displacing junior associates, who may then face a gap in legal and interpersonal skills that interferes with their advancement and client relationships.

This presents a challenge for junior associates. These attorneys may be the first to be laid off because of (1) the perception that working from home prevented them from acquiring requisite skills; and (2) GenAI can perform their work in less time and at a lower cost. For similar reasons, junior associates may be perceived as less marketable and remain in the job market longer, further delaying their professional development.

Law firms and senior attorneys can bridge this gap with renewed efforts on mentoring and training that focuses on the skills that have been supplanted by the use of GenAI. Although firms are struggling with how to bring lawyers back into the office, it will be necessary to find creative ways to balance face-to-face interactions with respecting associates’ preference to work remotely. New mentoring techniques must be developed, with the understanding that GenAI will change the way all lawyers perform their legal work. Instead of prohibiting the use of GenAI, ask associates to be part of the solution and bring use changes to the firm to figure out how to navigate the sticky issues of using GenAI. Associates are technologically savvy, creative, and enthusiastic. They may more clearly see

creative strategies on how to extinguish the risk of being displaced by GenAI.

On an optimistic note, it remains to be seen whether GenAI will eliminate jobs and result in a “lost generation” of lawyers—or have the opposite effect by creating the first cohort of attorneys who have mastered legal and communication skills while harnessing the power of GenAI. It is incumbent upon senior lawyers to give them this opportunity, along with the more traditional training, that develops independent critical thinking skills. Similarly, associates should embrace the future of our profession and start figuring out how they can enhance the practice of law using GenAI with appropriate guardrails.

Endnotes

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