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COMMENTARY



Responsibly Cautious: A Best Practices Guide for Implementing Generative AI in eDiscovery



As legal tech vendors race to incorporate GenAI into their platforms, it's important to take a responsible and low-risk approach.



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E-Discovery

By Xavier Diokno, Consilio | December 20, 2023 at 09:44 AM

Generative AI (GenAI) has captured the legal industry Zeitgeist over the last year, and for good reason. In eDiscovery, an industry dominated by formulaic searches comprised of keywords, which are often scattershot or “best guesses,” this newer, fast-evolving technology allows users to search their data using natural human-like questions. With new use cases and applications of technology only limited by our creativity, it is fueling a new headline almost daily.

GenAI can be applied to potentially any number of meaningful and useful workflows within eDiscovery, including, but not limited to, summarizing or translating documents, investigating documents, and enhancing document review. However, as legal tech vendors race to incorporate GenAI into their platforms, it's important to take a responsible and low-risk approach.

Speed Kills

Software vendors strive to be first-to-market with headline-grabbing claims. This is based on the false premise that being first equates to being the best or most innovative. However, like the tortoise racing the hare, experienced legal practitioners know that slow and steady (or having a documented defensible process) wins the race. eDiscovery practitioners operate at a thoughtful, measured, and deliberate pace, where speed can have catastrophic results—missed documents, production of privileged content, and worst of all, loss of client trust.

As we think about development around, and adoption of, GenAI in the eDiscovery space, we can conceive notable risks, including:

- **Unproven Software Risk:** GenAI algorithms have not been in use for long (or at all) within eDiscovery. Unlike well-established applications, such as Technology Assisted Review and structured analytics (e.g.,

Email Threading and Textual Near Duplication), GenAI has not been put through its paces to be “battlefield” tested. It is unclear how this technology will behave in all circumstances when analyzing varieties of “wild” data. As such, there is the risk of “building the plane as you fly”.

- **Inconsistent Answers:** One of the many remarkable capabilities of GenAI is its ability to generate new content (e.g., “suggest names for a new ice cream store”). Unlike deterministic AI, where a computer follows rules so that it always provides the same answer when asked the same question, GenAI’s neural networks are designed to explore multiple paths or options. When asked the same question, GenAI’s answers will largely contain the same substantive content, but will contain some variation in which it describes the content.
- **Prompt Risks:** Prompts drive the user interaction with GenAI. These are instructions that tell the GenAI algorithm how to behave, including what tasks to perform, how to perform those tasks, and what tasks not to perform. Since the way prompts are crafted plays a critical role, the industry still needs time to develop prompt guidelines and best practices. For example, the differences in GenAI’s response to the question, “what was the primary issue?” can be easily overlooked when compared to the question, “what was the key issue?”.
- **Risk of Inexperienced Servicers:** Placing new technology in the hands of inexperienced users often results in headline-grabbing news, leading to public misconceptions. GenAI is still new, as such eDiscovery practitioners have not had enough hands-on experience to understand how to use the technology in a responsible way. Like TAR’s adoption, practitioners will need to develop guidelines, best practices, and validation methods.
- **Hallucination Risk:** In our experience innovating on GPT-4, we have found that, despite instructions not to make up facts, and to only pull the facts from the provided corpus, it still does so occasionally. Currently, this is a fundamental limitation of the technology and why humans are still needed for validation.

Slow and Steady Wins the Race

Taking a step back, it might be helpful to look at Technology Assisted Review and structured analytics. These technologies, which have formed the backbone of any eDiscovery solution over the last decade, present the closest comparison for eDiscovery innovations. Both tools took time to iterate and improve upon to gain industry trust.

eDiscovery vendors would do well to take a more cautious approach when they innovate and adopt a GenAI-based technology or workflow. Starting small, using the technology for quality control, as a backup to human review, and deploying GenAI in parallel to traditional workflows are recommended practices to building confidence. Doing so mitigates the risk factors mentioned earlier and better positions eDiscovery practitioners to answer queries and provide guidance for attorneys on ongoing legal matters.

As Consilio explores the technology, we share some best practices for LegalTech

companies or law firms looking to test drive GenAI tools.

- **Transparency:** As developers, we have insight into the technology that our users do not have. Through hours of testing and development, we have marveled at its capabilities, but have also had some head scratching moments. Adoption of GenAI will increase as the industry's knowledge and expertise develops. This growth can only take place if users are given insight into how the technology works.
- **Silo Your Solution:** Opening a GenAI solution to the internet may cause chaos, including leaking client information. Moreover, the solution could pull potentially irrelevant data or worse, non-factual data, into its analysis. As we have seen, GenAI solutions that do not limit its analysis to a discrete dataset can result in false or incorrect facts.
- **Perfecting Prompts:** Talent firms are looking across the world of business for prompt engineers—this need in eDiscovery is more pronounced. A good prompt requires specificity, conciseness, and precise language. For example, “What states regulate artificial intelligence when used for hiring people?” can be improved by asking, “What states regulate the use of artificial intelligence in hiring and employment practices.”
- **Source Citation and Human in the Loop:** Despite being ruled as black letter law more than ten years ago, TAR still requires humans to validate its results. The same requirement applies to GenAI technology. Our testing shows that GenAI can serve as a guide that can help direct your investigation. However, to ensure the accuracy of this guidance, applications should allow users to view the underlying documents to validate GenAI's response.

GenAI is a new and nascent technology that will empower eDiscovery professionals by augmenting their workflows, processes, and platforms. However, given the current risks, early, “first-to-market” solutions, without incorporating a responsible approach that includes adequate transparency, may cause distrust in the technology, and ultimately slow down its adoption.

Xavier Diokno currently serves as Senior Director of Innovation Solutions at Consilio. Prior to becoming an attorney, his background was in computer science where he worked in the IT industry for 10 years. During this time, he worked closely with various technologies, including software development, server administration, VoIP deployment, and Cisco network devices.

After receiving his JD and passing the Illinois Bar, Xavier found his niche in the electronic discovery industry. For more than a decade he worked in data analytics, where he managed Consilio's Data Analytics Team. He currently oversees Consilio's Innovation Solutions initiatives, which involves identifying opportunities where technology can improve the company's Review Solutions services.

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