

Protecting Privilege in the Age of AI

Sarah Sawyer: Welcome to this week's OK at Work with myself, Sarah Sawyer, my colleague Russell Berger, both attorneys at Offit Kurman, and today we are talking about client use of AI. So our clients often, obviously search AI for things. We've mentioned it a couple of times here and there, in our episodes, and often sometimes we'll get on a call with a client and they've got one of those note takers, and that's very hard to get rid of. They show up and the client doesn't know that they're even there. And we're like, what's this note taker? There's a lot of those things going on. So obviously there's a lot of new tools that people are using and are excited to use and often can be used safely and it can be a good tool for people, but something that

we're really talking with clients about paying attention to, is making sure that they're not destroying attorney-client privilege and confidentiality, which is something that, [00:01:00] is really important in the client and attorney relationship because if it's not protected and you go, talking to people about things, you know, so before AI,

there would be the telling everyone at a bar that you did something, a problem, right? So that's not protected, that's not confidential, that's not privilege. But when you talk to us about it, if we're your attorney, it is. So as a basic concept, there's a lot more nuance to it.

But now we have folks who are going and putting things into AI specifically sometimes open AI, which means that the terms and service of that open AI says that they can share it. Which essentially is like telling the world whatever you just told AI. So it's very different than, coming to us.

And there's been some recent cases on this where clients have gone and used AI prior to hiring an attorney and then provided that what they found in AI to their attorney and then tried to assert that it was privileged or confidential because now [00:02:00] they've handed it over to the attorney.

And without going too deep into the weeds, that's not a good practice to engage in because there's a lot of reasons that could be susceptible to being turned over to the other side in litigation or being produced. So what are some things, Russell, with that framework that clients should really be thinking about as it relates to using these tools and anything that touches legal or a case or anything like that.

Russell Berger: Yeah, certainly when it touches legal and we talked about this a little bit on an episode we did a few weeks ago on what to do when you find how you've gotten sued. And where things said not to do was to go run it all through Chat GPT and, have it spit out your defense. Yeah.

So don't do that. I mean the risk there as you mentioned is that anything your communication with the AI program is not privileged and it's out there in a very public way and maybe there's some arguments in certain types of terms and conditions, but, it's much better to, tell your lawyer you want your lawyer to [00:03:00] leverage AI tools to help

flesh out ideas than for you to do it yourself. And I think that makes sense anyway because, if you had a car and it could only go 25 miles an hour and then we built an engine that could go a

hundred miles an hour you'd want someone that was a professional driver at 25 miles an hour to be the person handling the wheel at a hundred miles an hour and it's going four times faster.

It's kinda the same thing with AI and legal. It's not especially at this stage, and maybe this will change in the not too distant future, but for now, like AI is imperfect. It has inaccuracies. I was at a conference where someone said, it's right about 80% of the time, and that's probably gone up a little bit since I heard that statement.

But I heard 80% of the time think, well, that's terrible from a legal perspective. Because it is, and we should strive for much, much higher accuracy than that. And that's okay. You can be right four outta five times, but that's a pretty high failure rate when you're talking about legal issues.

And so you want someone who knows how to operate this high powered fast tool because, if you [00:04:00] don't, it's just as likely to drive you off the cliff fast. And you have that accident faster. Because it's Not more accurate than, human attorneys at this stage.

And again I think, we could be doing this in six months, 12 months, a couple years, whatever. And that might not be the case anymore. That's certainly where we're headed. But, I think from a privilege standpoint and from an accuracy standpoint, you want to leverage AI in a way, in conjunction with your attorney, under your attorney's supervision as opposed to just going off and doing it on your own where you haven't read the terms of the software you're using where it's not being directed by an attorney.

There isn't, someone that knows the legal ins and outs who's reviewing the output. And even if you're gonna put it into, an AI bot and then hand that printout to your attorney, I think we've made this joke before, it'd be like walking into the doctor's office with a printout from Web MD.

You don't need to do that. And you can certainly work with your attorney to figure out the best ways to use this new high power tool, which we should be using. And we are pro using [00:05:00] this technology, but using it in a safe, productive privilege kind of way.

Sarah Sawyer: Yeah. And I think it's exactly to those points.

Anything that's high stakes also and high something that's important to you from a legal perspective, you're going to ultimately end up talking to an attorney. So start there instead. As opposed to, 'cause obviously we have, the handing WebMD is a great analogy 'cause people come with something, I've got a fully baked something, and here you go. You don't won't have to do anything. And that's just, almost never the case, right?

Russell Berger: Yeah.

Sarah Sawyer: And so it,

Russell Berger: it reminds me of the time I punched in some symptoms I had in the WebMD and it told me I had network connectivity issues.

Sarah Sawyer: Love it. Yeah. So definitely you're gonna have to go and talk to the professional.

So just start with that step. I think that's really the main takeaway. And I think those are all great points We're gonna make use of it. It's a good tool. But you really have to be very careful as it relates to these topics.

Russell Berger: Yeah. That's for sure.

Sarah Sawyer: All right, well thanks Russell.

We'll see you next time.

Russell Berger: Bye Sarah.

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