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Contents

The Future of Law Firms (and Lawyers) in the Age of Artificial Intelligence

By Anthony E. Davis

Anthony Davis is Of Counsel at Clyde & Co US LLP. He is a Lecturer in Law at Columbia University Law School and a Past President of the Association of Professional Responsibility Lawyers.

This article explores the future for lawyers and law firms in the light of the changes that Artificial Intelligence ("AI") is already bringing to the universe of legal services.[1] Part I briefly describes some of the ways AI is already in use in ordinary life – from facial recognition, through medical diagnosis to translation services. Part II describes how AI is transforming what it means to provide legal services in six primary areas – litigation review; expertise automation; legal research; contract analytics; contract and litigation document generation; and predictive analytics. Part III explores the providers of these AI driven legal services – often non-lawyer legal service providers – and how these providers are replacing at least some of what clients have traditionally sought from lawyers. Part III also discusses the implications of all these changes both for the future role of lawyers individually, focusing on what services clients will still need lawyers to perform: judgment, empathy, creativity, and adaptability. In turn this Part examines what these changes will mean for the size, shape, composition, and economic model of law firms, as well as the implications of these changes for legal education and lawyer training. Part IV identifies the principal legal, ethical, regulatory, and risk management issues raised by the use of AI in the provision of legal services. Finally, in Part V the article considers who will be the likely providers of AI based services other than law firms – legal publishers; the major accounting firms; and venture capital funded businesses.

Introduction

Will law firms as we have known them still exist when our grandchildren are adults? This essay is intended to initiate a discussion about the future for lawyers and law firms in the light of the extraordinary changes that artificial intelligence ("AI") is already bringing to the universe of legal services. The essay is intended as a precursor of a fuller treatment of the topics raised; its focus is identifying the principal questions and issues that confront the profession as a result of the rise of AI.

The legal spend of corporations in the United States on traditional law firms remains flat, year after year, while the spend on in-house legal departments and on other legal service providers is exploding.[2] More and more, both in-house counsel and these new legal service providers (and, to a limited extent law firms) are using AI in ways that are transforming both what it means to provide legal advice, and the ability of clients to assemble data, establish performance and payment metrices, and manage—and control—the outside law firms to which they have traditionally turned for advice and representation. In Part I, this article will briefly describe what AI is and the different ways it can be (and is being) applied to solve problems and provide solutions that benefit clients. Part II will review the different kinds of AI platforms that are already in use or late-stage development to provide substantive legal assistance to clients in ways that previously were the domain of a large number of (principally younger) lawyers. Part III will consider how AI is likely to affect both the future role of lawyers and the implications of AI for the likely structure and composition of law firms. This section also examines how these changes will in turn affect law firms'

hiring needs, the hiring models they will use, and the ways in which legal education, both pre- and post-admission, will have to change if law is to survive as a profession. Part IV will discuss the ethical, legal, regulatory, and risk management issues that face law firms today when they introduce or provide AI platforms or solutions to their clients. Finally, Part V will consider whether other service providers, both professional and otherwise (including but not limited to developers of AI solutions), have economic and marketplace advantages that will enable them to replace lawyers and law firms.

Part I – What is Artificial Intelligence Anyway?

What Does It Do?

It does (some of) the things we ask – *e.g.,* Alexa.

It does facial recognition – e.g., Apple's face ID software.

It translates – *e.g.*, Google Translate.

It does medical diagnoses (very accurately) – see, e.g., its use to identify skin cancers.[3]

It wins games - *e.g.*, GO.

How Does It Work?

AI is all about inferences of various kinds; logical, statistical, and a combination of both. And in case you were wondering, statistical inference is based on very high-level math ("… automatically computing (and adjusting) the step size for gradient-based neural net training algorithms [by] estimating and tracking the largest eigenvalue of the Hessian matrix of a neural net's error surface." *Yann LeCun,1993*.)[4] But it isn't necessary to understand the underlying math to be able to code or to teach software to learn skills. "If a typical person can do a mental task with less than one second of thought, we can probably automate it using AI either now or in the near future."[5]

Why Now?

Between 2000 and 2017 three critical things happened simultaneously in the technology universe: (1) computer processing power increased from 10^3 to 10^7; (2) the cost of data storage reduced from $12.4 per GB to $0.004 per GB; and (3) there was astronomically large data growth. In other words, we are now in an age when it's easy to harness computer power to engage in learning; it's cheap, and there are massive amounts of data from which to learn.

Part II – What Can AI Do In Law, and What Is It Doing NOW

In general, there are six ways that AI is currently used in the legal arena: (1) e-discovery; (2) expertise automation; (3) legal research; (4) document management; (5) contract and litigation document analytics and generation; and (6) predictive analytics.

What Do They Do – And How Do They Affect the Delivery of Legal Services?

E-Discovery. This was the first use of AI in law and is quite well established. In essence, e-discovery is software that enables a vast number of documents to be surveyed and those relevant to the search criteria

to be identified at a fraction of the cost, in a fraction of the time, and generally much more accurately than when the same survey is performed by teams of lawyers or paralegals looking at computer screens.

Expertise Automation. This is the commoditizing of legal knowledge that enables clients (as well as lawyers) to find answers to questions using software developed for particular areas of legal information that once would have required interaction with a lawyer. Examples include software developed to enable individuals to draft a will or enable companies to give their employees access to answers to common questions in a specific area, such as employment law. For example, a factory manager in a jurisdiction can ask the software what rights to family leave a pregnant employee has without the need to speak to a lawyer either within the company's legal department or its outside counsel. In addition, this is the realm of software increasingly developed to increase access to justice for individuals who do not have the resources to hire a lawyer. These tools include will drafting, and even assisting individuals in litigation contexts such as housing court or fighting traffic tickets.

Legal Research. Publishing companies, like LexisNexis or Westlaw, have huge databases of information including laws and regulations in multiple jurisdictions. They have developed software packages that enable clients (or lawyers) to do fast, accurate (and therefore cheap) research that would have taken individual lawyers much longer (and more expensively and, probably, less accurately) in earlier times. Some of them even offer services that will do the work of answering questions using the software and providing the solutions directly to clients' legal departments without an outside lawyer.

Document Management. Corporations often have thousands or tens of thousands of similar documents, such as contracts, that need to be managed for consistency and enforcement. An example was publicized by JP Morgan in 2017. The Bloomberg.com headline read: "JP Morgan Software Does in Seconds What Took Lawyers 360,000 Hours."[6] Readers who follow the Artificial Lawyer website[7] will see almost daily announcements of new software packages designed to assist corporations to accomplish similar outcomes.

Contract and Litigation Document Analytics and Generation. There are now numerous AI tools that help lawyers draft consistent, appropriate, and up-to-date documents both in the transactional and litigation spheres, by reference to huge databases of precedents. In addition, there is a growing group of AI providers that provide what are essentially do-it-yourself tool kits to law firms and corporations to create their own analytics programs customized to their specific needs.

Predictive Analytics. There are two main groups of AI tools that fit within this category. The first are the tools that will analyze all the decisions in a particular sphere, input the specific issues in a case including factors like the individual judge assigned to hear the case, and provide a prediction of likely outcomes. This is the group that the French have recently criminalized[8] (a decision that seems about as likely to succeed in the long run as the early English king (Canute) who stood at the sea shoe and ordered the tide to turn). The other kind of analytics, of which there are now at least four available in the marketplace, will review a given piece of legal research or legal submission to a court and identify the key relevant precedents and authorities that are missing from the research or submission. In the United States, one of these tools is available for free to judges, which raises the question of whether it is now legal malpractice for lawyers not to use such a tool before filing legal papers with the court.

Part III – What Does the Advent of these AI Solutions Mean for the Economics and Structure of the Legal Profession and the Training of the Next Generations of Lawyers

The two fundamental questions presented by the arrival of these new tools are: (1) who will provide the solutions to clients' problems, and, as a follow-up to that question, what will the lawyer's role be

in providing those solutions; and (2) how will the answers to those questions affect the composition, structure, and economics of law firms?

Who Will Provide Clients with Legal Solutions?

Thomson Reuters and the consultant Adam Smith, Esq., predicted in 2018 that in the United States, the expenditures of corporations on legal solutions from both outside law firms and their internal legal departments will decline between 2017 and 2027, while the expenditure on alternative legal service providers (*i.e.*, principally the providers of AI based solutions) will increase at least seven fold (from an estimated $12 Billion in 2017 to $85 Billion in 2027).[9] Another market research report issued in 2019 by Zion Market Research suggests that the global legal AI market will grow at 35.9% per year/CAGR [Compound Annual Growth Rate] in terms of revenue between 2019 and 2026.[10]

What does this mean for the role of individual lawyers in this new environment? Perhaps the best example of the most fundamental change is the reduced time it will take AI to provide clients with an answer, as in the example of the report referred to earlier under the Document Management heading that JP Morgan in 2017 developed and used software to do in "Seconds What Took Lawyers 360,000 Hours."[11] The drudge work traditionally done by new lawyers is already vanishing and will ultimately disappear almost entirely. That holds true in *all* of the realms in which AI provides solutions, as described above, not just document management. However, contrary to the purveyors of gloom and doom about the future existence of the legal profession, lawyers will still have vital roles to perform—but those roles will be different and more refined than in the past.

Lawyers of the future will provide four basic functions that AI cannot provide (and will not be able to provide unless and until "General Artificial Intelligence" – where computers are creative in ways analogous to the human mind, rather than producing data based solutions to specific problems that current AI technologies provide – becomes available at some point in the future). Those functions are: judgment, empathy, creativity, and adaptability. In other words, lawyers will provide the last mile of solution delivery—the application of those human functions to the output of the AI tools. To take a simple example: suppose a predictive analytics tool tells the user that in a certain case before an identified judge in a particular jurisdiction, the likelihood of a successful outcome is 60%. That prediction does not actually tell the lawyer or client what the client should actually do—that is, whether the client should proceed or not. That takes a lawyer using his own judgment to advise the client, using the lawyer's understanding of the client's needs (empathy), on which path to choose.

How Will This Change in Roles Affect the Composition, Structure, and Economics of Law Firms?

This question especially deserves extensive treatment. Here we can only give a brief summary of the likely implications of the impact of the changes being brought on (forced?) by the advent of AI solutions into legal services. The changes will be most focused in three areas: (1) the training and qualification of future generations of lawyers (and where that training will happen); (2) the composition and structure of law firms; and (3) the economics of law firms.

Lawyers of the future will not need to be able to "code," but they will need an intimate and continuing understanding of how to identify and use AI solutions to meet their clients' needs. In particular, given that there is currently no rating system for the adequacy or effectiveness of individual AI solutions (see the section below on the ethical implications of AI-derived legal service solutions), future lawyers will need to know how to be able to assess the relative strengths and weaknesses of particular solutions. Notably,

the London-based global firm Linklaters recently announced the creation of a special Legal Ops "track" for lawyers skilled in precisely this way.[12] Further, O'Melveny & Myers recently announced that in order to be considered for a summer associate position (the usual initial track for prospective associates at the firm), applicants would have to participate in an AI-based online computer game designed, in essence, to test their teambuilding (*i.e.*, empathy) skills.[13]

How and Where Will the Next Generations of Lawyers Be Trained?

Where and when will lawyers receive the training they will need to survive and prosper in this new world? A small number of law schools are developing and offering a variety of technology training programs. But for now, these programs reach only a minority of law students. There is a second component to the problem faced both by individual lawyers and their firms: the ability to provide the critical "last mile" component of legal services—*judgment*. Future lawyers will need to develop that skill over time, imposing a rigorous training requirement on law firms that will continue over an extended period of time.

It inevitably follows that law firms will need to change their composition and structure in two critical ways. First, they will not need to recruit armies of young lawyers to perform services that are no longer needed, with the expectation that not all will survive the first few drudge-filled years. In other words, the "old" model of hiring and then letting go large numbers of young lawyers cannot survive. Instead, because of the burdens of continuous training, firms will need to make much more discriminating hiring decisions, designed to identify the next generation of providers of the "last mile" services, with the particular goal that instead of these lawyers being a fungible and replaceable commodity, they will actual join the firm and stay with the firm for the long haul. Second, they will need to develop a serious, long-term program to train the next generation to become, over time, the judgment providers. In short, hierarchical structures of future law firm—of whatever size and geographic reach that looks like—will need to be flat, not a pyramid. While we make no predictions about which of the current generation of firms will be able to adapt in this way (and make the economic changes discussed below that are a necessary corollary of these structural changes), it seems likely that firms of the future will be much more focused on specific practice expertise where they become the obvious providers of the "last mile" services in their chosen fields. The "general service law firm" model of the past, was one where firms sought to provide services in multiple practice areas, requiring different levels of skills. But more and more of those services are already or will very soon be replaceable by the kinds of AI solutions described here and will inevitably replace the leverage profitability model that has become the basis of many such firms' profitability. It is hard to see how that that general service law firm model can survive the changes we envision.

Perhaps most significant of all are the necessary economic and financial changes that will be required for law firms to prosper as the "last mile" providers. First, the billable hour, built on the back of the leverage system that made law firms so profitable in the past, where a large part of that profitability depends on employing associates to devote large numbers of hours which are then billed to clients at multiples of the cost of the associates to the firms, will necessarily be largely replaced as the primary billing model. There is no way to make a profit out of charging for time spent when what the client wants and needs are the "last mile" services of judgement, empathy, creativity, and adaptability. Instead, firms will have no choice but to develop a billing and profitability model based on the value of the judgment, empathy, creativity, and adaptability that they bring to their clients in order to accomplish the clients' objectives. This inevitable change in billing models is amplified by the structural changes described above—there will not be an army of associates whose time can be billed; rather there will be a cadre of next-generation lawyers who are at least in part an expense component (in terms of the ongoing training requirements) rather than primary revenue and profit generators as in the past. In other words, the billing and overall profitability model for the successful law firm of the future will have to be defined in terms of the value clients place

on those "last mile" services, having little or nothing to do with the time it takes for the lawyers involved to provide those services. To some extent these changes are already under way. As every firm that serves large corporate clients is only too well aware, clients are already pushing back with ever greater force at paying for the time charges of young lawyers, and alternative fee arrangements are increasingly the norm.

There is a second component to the economic changes that will have to enter the law firm universe. While law firms persist, for whatever set of reasons, in being modeled on a partnership rather than a corporate structure, most, if not all, of the profits necessarily get sucked out at the end of every financial year to pay the partners. In turn, this leaves very little reserve capital to invest in technology creation or in the other necessary structural changes described above. This problem is particularly acute in the United States, where the current, byzantine regulatory structure is explicitly designed to prevent law firms from becoming partners with, or accept investment, from non-lawyers. On the other hand, the model of alternative business structures in place in England and Wales, and the similar changes previously adopted in Australia and now being developed in Canada, show the way for the future of the economic prosperity of law firms as part of a wider array of "legal service providers." Notably, Utah has begun the process of considering how to accomplish these objectives with its innovative encouragement of such ventures in regulated "sandboxes," and California recently announced that it is close to adopting this approach.[14]

Part IV – The Legal, Ethical, Regulatory, and Risk Management Issues in the Provision of Legal Services Using AI

The foundational principles of the law governing lawyers, and of professional responsibility are implicated in the changes described in this article, including competence, confidentiality, supervision, communication, and liability for errors.

The Duty of Competence

The principal ethical obligation of lawyers when they are developing or assisting clients in identifying and using any AI solution is the duty of competence. In 2012 the American Bar Association (the "ABA") explicitly included the obligation of "technological competence" as falling within the general duty of competence which exists within Rule 1.1 of its Model Rules of Professional Conduct ("Model Rules"). Many states have already followed suit with their own rules.[15] Other jurisdictions, such as Australia, have also incorporated this principle into their rules.[16] The meaning and implications of "technological competence" go beyond AI solutions[17], but do have several specific implications for AI tools.

One issue about AI that is just beginning to be addressed among academic writers[18] and by regulators of commerce generally, is the problem of built-in, or implicit, bias and lack of transparency in the algorithms that underlie AI. For example, Michael Kearns and Aaron Roth report in *Ethical Algorithm Design Should Guide Technology Regulation,* "Nearly every week, a new report of algorithmic misbehavior emerges. Recent examples include an algorithm for targeting medical interventions that systematically led to inferior outcomes for black patients, a resume-screening tool that explicitly discounted resumes containing the word "women" (as in "women's chess club captain"), and a set of supposedly anonymized MRI scans that could be reverse-engineered to match to patient faces and names. Kearns and Roth suggest "that more systematic, ongoing, and legal ways of auditing algorithms are needed. . . . It should be based on what we have come to call ethical algorithm design, which … begins with a precise understanding of what kinds of behaviors we want algorithms to avoid (so that we know what to audit for), and proceeds to design and deploy algorithms that avoid those behaviors (so that auditing does not simply become a game of whack-a-mole)."[19]

Also problematic is the fact that there is no independent analysis of the efficacy of any given AI solution, so that neither lawyers nor clients can easily determine which of several products or services actually achieve either the results they promise, nor which is preferable for a given set of problems. Again, in the long run, it will be one of the tasks of the future lawyer to assist clients in making those determinations and in selecting the most appropriate solution for a given problem. At a minimum, lawyers will need to be able to identify and access the expertise to make those judgments if they do not have it themselves.

Legal Liability When an AI Solution Fails

In parallel to the ethical duty of competence are issues of legal liability in connection with the use of AI tools. Two particular liability issues are foremost. First, to what extent are, or will, lawyers be liable when and how they use, or fail to use, AI solutions to address client needs? One example explained above is whether a lawyer or law firm will be liable for malpractice if the judge in a matter accesses software that identifies governing or guiding principles or precedents that the lawyer failed to find or use. It does not seem to be a stretch to believe that liability should attach if the consequence of the lawyer's failure to use that kind of tool is a bad outcome for the client and the client suffers injury as a result. Much more complex and difficult to resolve will be questions of the apportionment of liability between the creator of a defective software solution and the law firm that uses it for the client's supposed benefit. Obviously, this will in part be decided by contract, but in the likely situation where the AI provider has a limitation of liability in its contract, what will happen to the lawyer's liability given that in some jurisdictions (including many states within the United Sates) the lawyer is not permitted to get an advance limitation of liability from the lawyer's client? And when determining relative liability between the provider of the defective solution and the lawyer, should the court consider the steps the lawyer took to determine whether the solution was the appropriate one for use in the particular client's matter?

The Duty of Confidentiality

A distinct and also vital ethical duty that lawyers will have to manage is to ensure that the use of AI solutions does not pose a risk to the general duty to preserve client confidences and to maintain and preserve the attorney-client privilege.[20]

The Duty to Supervise

Rules 5.1, 5.2, and 5.3 of the ABA Model Rules and the equivalent rules in place in every American state establish an express and explicit duty to supervise subordinates, including third party providers, in connection with the delivery of legal services by the lawyer or law firm. (Also *see* the Australian Solicitors Conduct Rules 2012, Rule 37 *Supervision of Legal Services*.) This supervisory duty assumes that lawyers are competent to select and oversee the proper use of AI solutions. Here again, this is not just a matter of the duty to supervise what goes on, and what tools are used within the law firm, but what third-party tools are used and how. Again, liability issues arise: did the law firm appropriately select the vendor, and did the lawyers manage the use of the solution?

The Duty to Communicate

In addition to the other duties already identified, lawyers have an explicit duty to communicate to their clients material matters in connection with the lawyers' services. This duty is set out in ABA Model Rue 1.4. Other jurisdictions have adopted similar rules.[21] Thus, not only must lawyers be competent in the use of AI, but they will need to understand its use sufficiently to explain the question of the selection, use, and supervision of AI tools.

Regulatory Issues

This article is not the place to discuss the role of the regulators of the legal profession in overseeing legal services being provided by non-lawyer alternative service providers. As we have seen, this is a rapidly expanding area of activity, to be contrasted with the likely contraction of traditional lawyer and law firm provided solutions. Some jurisdictions, such as England, Wales, and Australia have already recognized this, and others, such as certain Canadian provinces[22], are in the process of adopting and implementing entity-based regulation. This approach, at least in part, enables the regulators to oversee all the providers of legal services, not just traditional law firms and/or lawyers. In the long run, this approach – regulating all providers in the market - is going to be critically important in establishing appropriate compliance standards for all providers of AI-based legal services.

As mentioned above, addressing the significant issues of bias and transparency in AI tools, and, in addition, advertising standards, will grow in importance as the use of AI itself grows. Clients in jurisdictions whose regulators are limited to overseeing only the services actually provided by lawyers are likely to suffer from the provision of AI solutions that are outside the scope and authority of the regulators to supervise. The significance and implications of this regulatory deficit or imbalance will become ever more pronounced as alternative legal service providers play an increasing role in providing clients with legal services without any direct involvement of lawyers.

Part V – Who Will Be the Providers of AI-Based Legal Services

As discussed above, the traditional partnership economic model of law firms is essentially antithetical to the use of capital for the development of innovative technological solutions, except for the very largest firms with the deepest pockets. Even there, it must be remembered that lawyers and law firms are not intrinsically risk takers. Of course, there are a number of law firms that have developed, or are in the process of developing, AI-based solutions for particular applications to benefit their clients where they have identified existing needs (so that the risk element is reduced). But the resources law firms have allocated for technology solutions in the past, will now or in the future be miniscule in comparison with the billions of dollars invested by non-law firm entrepreneurs and venture capitalists in finding AI solutions to problems. This is inevitable, given that law firms traditionally distribute their capital to the lawyers in the firm, do not retain earnings for investment, and even if and when they do, it is not used for risk investment on the venture capital model.

Three groups are predominating the development of AI legal solutions. One group, identified earlier, are the legal publishers, such as Thomson Reuters and Wolters Kluwer. A second group, always perceived as a direct threat by lawyers, is the major accounting firms. Both groups have two advantages over even the largest and most prestigious law firms: they are structured on a corporate and not a partnership model, so that they can accumulate and invest capital. Further, they have an expressed interest in penetrating the global market for legal services. The third group is venture capital-supported entrepreneurs within the high-tech world. This group has been the source of the largest number and variety of AI solutions within all the categories described in this article. Interestingly, there is already underway a consolidation among some of the early developers. Tens of merger and acquisition deals were announced in 2019 among the early players in this universe, evidently in order to obtain improved penetration into the market for these services based on greater capitalization.[23] Notably, law firms have not been completely absent from this marketplace, in that there have been several joint ventures between traditional law firms and AI solution providers in recent months.[24] Nevertheless, the relative inability and normal unwillingness to raise and apply risk capital leave law firms in last place as the originators of the solutions that are being developed or will be developed in the future. The future lies with those willing and able to place venture capital at

risk. This is why the issues outlined in Section IV regarding the need for effective regulation of non-lawyer provided legal services is of critical importance going forward.

The changes to the way in which legal services will be delivered in the future have been on view for the past decade. They are inevitable, and cumulative. The dreadful impact of the Covid-19 pandemic is likely to accelerate the pace of these changes exponentially. Clients, hard pressed economically, are certain to put ever greater pressure on the leverage model of large law firm billing and profitability. Clients, under pressure to reduce internal as well as external costs, will turn to the developers and vendors of AI solutions to achieve outcomes more efficiently, faster, and more cheaply than law firms can deliver. Put another way, clients will increasingly seek to avoid as much as possible even the involvement of an increasingly irrelevant middleman: the law firm. As a result, on the other side of the fence, law firms will be under enormous pressure to reduce overhead costs, especially expensive real estate which remote working during the pandemic has resoundingly demonstrated to be in great part superfluous. Traditional models of law firms are not well suited to enable them to deal with these developments. To survive this tidal wave of change, firms will need to be nimble, looking at new billing models, based on new ways to demonstrate value. They will need to look at new management models and new hiring models. Candidates for future lawyers will need to be able to demonstrate emotional intelligence, and a deep understanding of the ways in which technology can aid in achieving client outcomes. These traits and skills will be at least if not more valuable than law school grades. The inflexion point for the delivery of legal services is upon us. The faint of heart, who seek to cling to the old models, will likely not survive long.

Endnotes

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14. *See* Utah Implementation Task Force on Regulatory Reform, https://sandbox.utcourts.gov/ (last visited July 6, 2020); Lyle Moran, *California bar gives approval to broad sandbox proposal,* A.B.A. J., May 15, 2020.
15. Thirty-seven states have something in their Rules about technological competence, and two more have ethics

opinions on it. *See Rule 1.1 Chart*, A.B.A. Center for Prof'l Responsibility, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc1-1-comment-8.pdf (last updated Dec. 1, 2019).

16. S*ee* Australian Solicitors Conduct Rules R. 4.1.3A (2015) [hereinafter Australian Solicitor Rules], *available at* https://www.lawcouncil.asn.au/files/web-pdf/Aus_Solicitors_Conduct_Rules.pdf.

17. Anthony E. Davis & Steven M. Puiszis, *An Update on Lawyers' Duty of Technological Competence*: *Part I*, N.Y. L.J. (Mar. 1, 2019) [hereinafter *Tech Competence Part I*]. *See also* Anthony E. Davis & Steven M. Puiszis, *An Update on Lawyers' Duty of Technological Competence: Part II*, N.Y. L.J. (May 3, 2019).

18. For a discussion of this topic generally, see Report, Michael Kearns & Aaron Roth, *Ethical algorithm design should guide technology regulation,* Brookings (Jan. 13, 2020), https://www.brookings.edu/research/ethical-algorithm-design-should-guide-technology-regulation/; for an effort by a regulator to address this issue, see *NYC's Task Force to Tackle Algorithmic Bias Issues Final Report*, JD Supra (Jan. 31, 2020), https://www.jdsupra.com/legalnews/nyc-s-task-force-to-tackle-algorithmic-93703/.

19. Michael Kearns & Aaron Roth, *Ethical algorithm design should guide technology regulation*, Brookings (Jan. 13, 2020), https://www.brookings.edu/research/ethical-algorithm-design-should-guide-technology-regulation/.

20. For a discussion of these issues in greater depth, *see Tech Competence Part I*, *supra* note 17.

21. *See also* Australian Solicitor Rules, *supra* note 16, at R. 7 (Communication of Advice) & R. 8 (Client Instructions).

22. For a survey of entity regulation of lawyers internationally, including Canada, see International Perspectives on the Regulation of Lawyers and Legal Services (Andrew Boon ed. 2017).

23. For articles describing the process of consolidation now under way, s*ee* Artificial Lawyer, *supra* note 7.

24. To read more about the most recent example of multiple similar ventures, see *A&O's Fuse Returns With Legal + FinTech Streams*, Artificial Lawyer (June 1, 2020), https://www.artificiallawyer.com/2020/06/01/aos-fuse-returns-with-legal-fintech-streams/.

Model Rule 1.16(a)(2): Where Wellness Meets Withdrawal

By Mark J. Fucile

Mark J. Fucile of Fucile & Reising LLP in Portland advises lawyers, law firms and legal departments throughout the Northwest on ethics and attorney-client privilege matters. He is a former chair of the Washington State Bar Association Committee on Professional Ethics and is a member of the Oregon State Bar Legal Ethics Committee. Before co-founding his current firm in 2005, Mark served as an in-house ethics counsel for a large Northwest regional law firm. Mark also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus.

Introduction

The "wellness" challenges lawyers face today have been increasingly well-documented, and the organized bar both nationally and locally has responded with a heightened focus on providing a range of resources to confront them.[1] One provision of the ABA Model Rules of Professional Conduct, however, has long addressed lawyer impairment issues: Rule 1.16(a)(2), which requires withdrawal when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client".[2] Although plain on its face, the Rule is considerably more nuanced in application and is almost invariably painted against the backdrop of very difficult personal circumstances for the lawyers involved.[3]

This article examines three facets of Rule 1.16(a)(2). First, its history is briefly outlined for context. Second, its application is surveyed in both the regulatory and civil litigation contexts. Finally, the practical import for law firm risk management is discussed.

Historical Context

Unlike some other provisions of the ABA Model Rules, Rule 1.16(a)(2) does not trace its lineage to the Canons of Professional Ethics. Although Canon 44 addressed withdrawal, it did not include a requirement analogous to Rule 1.16(a)(2).[4]

Rather, this precept was first introduced as a regulation with DR 2-110(B)(3) in the ABA Model Code of Professional Responsibility in 1969. It required withdrawal if a lawyer's "mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively."[5] This requirement paralleled the simultaneous introduction of rules addressing competency and neglect specifically, DR 6-101(A)(1) and DR 6-101(A)(3).[6] Commentators have long noted the relationship between withdrawal, competency and, depending on the circumstances, neglect in the Model Code formulation and the duty of diligence under Model Rule 1.3.[7]

In developing what would become Model Rule 1.16(a)(2), the Kutak Commission[8] proposed a reformulation that was substantially similar to its Model Code counterpart, DR 2-110(B)(3): "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . (2) the lawyer's physical or mental condition materially impairs the

lawyer's ability to represent the client[.]"[9] That phraseology was adopted by the House of Delegates in 1983 and remains the same today.[10]

Neither the original comments proposed by the Kutak Commission nor those ultimately adopted by the House of Delegates discussed Model Rule 1.16(a)(2) or defined the term "impairs."[11] That, too, remains the same today. Knowledgeable commentators have pointed to the likely reason: the rule is "virtually self-explanatory."[12] There is nothing in the rule suggesting that the term "impairs" has any meaning beyond its dictionary definition.[13] As discussed in the next section, however, the rule has been applied in a wide variety of situations and includes a degree of nuance no doubt influenced by the difficult personal circumstances that are almost always present in the application of the Rule.

Application of the Rule

The Iowa Supreme Court observed within the past decade: "There is very little case law interpreting this rule (*e.g.*, Iowa's version of Model Rule 1.16(a)(2)) or its predecessor, DR 2-110(B)(3)."[14] Nonetheless, the rule and its forerunner under the Model Code have been applied in both regulatory and civil settings.[15] Although the focus with both has been on withdrawal, the rule has also been applied when work should have been declined.[16]

In the regulatory setting, the Rule, in keeping with its text, has been applied to both physical and mental conditions.[17] Substance use—whether alone or in combination with other circumstances—is often reflected in the decisional law surrounding the rule.[18] Professional "burn out" has also been cited when the result of such a condition is inability to manage client work.[19] When discipline under state variants of Rule 1.16(a)(2) is imposed, it is almost invariably coupled with other charges, most frequently violations of Rules 1.1, Competence, and 1.3, Diligence.[20] Depending on the circumstances, other charges—such as the failure to communicate, misrepresentation of the status of work or trust account violations—may also be involved.[21] The regulatory discipline imposed varies widely. Situations involving treatment and the prospect of successful return to practice are often included conditions on probation or reinstatement.[22] By contrast, situations that have spiraled out of control and lack the reasonable probability of a successful return to practice have resulted in disbarment.[23]

In the civil litigation context, the Rule has been cited primarily in cases involving sanctions[24], legal malpractice[25], motions for continuance or withdrawal[26] and procedural motions attempting to redress errors that have occurred due to the underlying physical or mental conditions involved.[27] In these settings, the Rule is usually cited as an ethical duty that the lawyer involved should have followed rather than a decision the lawyer should have made regarding continuing as counsel.[28]

Risk Management Lessons

The case law interpreting Rule 1.16(a)(2) suggests three broad risk management lessons for lawyers and their law firms.

First, although disciplinary sanctions involving the Rule primarily involve solo practitioners, this issue affects all types of practices. The tilt on the disciplinary side toward solos likely results from a combination of the lack of peer review and readily available internal firm support.[29] A common pattern in disciplinary cases involves a solo practitioner who develops a serious condition but attempts to continue with an ongoing matter without telling anyone or associating additional or replacement counsel. In a larger firm, withdrawal is often avoided when a firm member becomes ill—provided the firm has sufficient depth on its "bench"—by having another lawyer or team within the firm with similar

knowledge and experience handle the matter in the absence of the ill lawyer. However, this solution presumes adequate internal peer review and support. Even with sufficient peer review and support, these can be very difficult conversations within a firm.[30] Nonetheless, both due to supervisory duties within firms under state variants of Model Rules 5.1 and 5.2[31] and the firm's potential civil liability to its clients, they are conversations that must take place.

Second, clients cannot be ignored. A serious illness that impacts the continuing availability of chosen counsel to handle a matter fits squarely within the realm of case events warranting consultation with the client under the "communication rule"—Model Rule 1.4.[32] ABA Formal Opinion 03-429 (2003), addresses lawyer impairment issues arising within law firms[33] and suggests that a balance can be struck between the client's need to be consulted and and privacy concerns of the lawyer involved. The opinion counsels, however, that the client must be consulted in these circumstances when the lawyer involved is the principal handling attorney on the matter.[34]

Third, if a firm lawyer is in the disciplinary system due to an illness or similar condition resulting in a charge under state counterparts of Rule 1.16(a)(2), case law suggests that a cooperative approach with the regulatory authority and a proactive treatment plan will yield the best result.[35] Although illness and similar conditions can be a mitigating factor in lawyer discipline under Standard 9.32 of the Standards for Imposing Lawyer Sanctions,[36] disciplinary violations in this area often occur in multiple matters the lawyer is handling, triggering the aggravating factor "pattern of misconduct" in Standard 9.22(c).[37] Therefore, a cooperative approach involving meaningful treatment can be critical in providing a path for the lawyer's eventual return to practice.[38] By contrast, not having a realistic treatment plan or simply acceding to one and then not following it can be recipes for severe discipline.[39]

Summing Up

Rule 1.16(a)(2) informs lawyers and their firms when they must withdraw—or decline work—when physical or mental conditions prevent them from handling the matter concerned with the requisite competence. In the disciplinary context, it is usually coupled with other charges that reflect the unfortunate results that can and do occur when lawyers in this situation continue working on client matters despite their inability to handle matters adequately.

In a disciplinary case based on the Rule 1.16(a)(2)'s Model Code predecessor, a highly capable lawyer lost the ability to manage his successful practice due to a severe condition the lawyer did not acknowledge until it had overwhelmed him. Former Justice Edwin Peterson of the Oregon Supreme Court observed in his concurrence: "Over the years I have seen a host of intelligent, capable lawyers get into trouble because of their inability to recognize and resolve problems such as faced . . . [the lawyer] . . . in this case."[40] Justice Peterson made his observation nearly 40 years ago. Evidence suggests the pressures lawyers face today have not abated. The heightened focus on lawyer wellness, however, may encourage lawyers facing significant conditions to seek out available resources and, when necessary, transition out of matters in keeping with Rule 1.16(a)(2) during their recoveries.

Endnotes

1. *See generally* Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10, No. 1 J. Addict. Med. 46 (2016); Report of the ABA Working Group to Advance Well-Being in the Legal Profession to the ABA House of Delegates, https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_2018_hod_midyear_105.pdf (Feb. 2018); ABA Commission on Lawyer Assistance Programs, https://www.americanbar.org/groups/lawyer_assistance/ (last visited Apr. 24, 2020); ABA Profile of the Legal Profession 58-60 (2019), *available at* https://www.americanbar.

org/content/dam/aba/images/news/2019/08/ProfileOfProfession-total-hi.pdf.

2. Other areas of lawyer regulation have also long addressed impairment issues, including the mitigating factors listed in Standard 9.32 of the ABA Standards for Imposing Lawyer Sanctions and disability inactive status under Rule 23 of the ABA Model Rules for Lawyer Disciplinary Enforcement. *See generally* Judith M. Rush, *Disbarment of Impaired Lawyers: Making the Sanction Fit the Crime*, 37 Wm. Mitchell L. Rev. 916 (2011) (discussing lawyer impairment issues as a mitigating factor in regulatory discipline); Arthur F. Greenbaum, *Lawyer Transfers to Disability Inactive Status—A Comprehensive Guide*, 2016 J. Legal Prof. 1 (2016) (examining impairment issues within the context of disability inactive status).

3. *See also* Restatement (Third) of the Law Governing Lawyers §32(2)(b) (2000) (discussing the same concept in identical terms).

4. Canon 44 cast withdrawal in general terms: "The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause." Canon 44 is reprinted in the ABA Compendium of Professional Responsibility Rules and Standards 436 (2019).

5. *Id.* at 251.

6. *See generally* Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 Ark. L. Rev. 1, 15 (1970) (the chair of the committee that developed the Model Code notes that it introduced specific regulations addressing competency and neglect).

7. *See* Charles W. Wolfram, Modern Legal Ethics 552 (1986) ("The rule is one that reinforces the competence requirements and complements the needs of courts and other legal agencies for expedition."); Geoffrey C. Hazard, W. William Hodes & Peter R. Jarvis, The Law of Lawyering 21-7 (4th ed. 2016) ("Rule 1.16(a)(2) recognizes that a lawyer who is too ill to represent clients properly is at least temporarily unfit to enter into or continue a client-lawyer relationship. Such a lawyer by definition could not provide the competent or diligent representation required by Rules 1.1 and 1.3.").

8. In 1977, the American Bar Association created the Commission on Evaluation of Professional Standards to undertake a comprehensive rethinking of the ethical premises and problems of the legal profession. The Commission was chaired by Robert J. Kutak, until his death in early 1983. What became known as the Kutak Commission studied and drafted proposals for six years. Ultimately, the Kutak Commission produced the Model Rules of Professional Conduct under the leadership of Robert W. Meserve. The Model Rules were adopted by the House of Delegates of the American Bar Association on August 2, 1983. *See generally* A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013, vii, x-xi (2013).

9. *Id.* at 366.

10. *Id.* at 365-81.

11. *Id.*

12. The Law of Lawyering, *supra* note 7, at 21-7.

13. *See* Black's Law Dictionary (11th ed. 2019) (definitions of "impair" and "impairment").

14. Iowa Supreme Court Att'y Disciplinary Board v. Cunningham, 812 N.W.2d 541, 548 (Iowa 2012).

15. For simplicity, the examples in this section are drawn from both the respective Model Rule and the Model Code provisions and are referred to collectively as "the Rule."

16. *See, e.g.*, Mulkey v. Meridian Oil, Inc., 143 F.R.D. 257, 260 (W.D. Okla. 1992) (citing the Oklahoma version of the Rule in criticizing lawyers who continued to advertise for new clients despite serious physical and emotional conditions suffered by the two lawyers handling the matter concerned).

17. *See, e.g.*, State ex rel. Oklahoma Bar Ass'n v. Southern (*Southern*), 15 P.3d 1 (Okla. 2000) (physical illness); Cincinnati Bar Association v. Brown, 678 N.E.2d 513 (Ohio 1997) (mental condition).

18. *See, e.g.*, *In re* Biggs, 864 P.2d 1310 (Or. 1994); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991).

19. *See, e.g.*, *In re* Loew, 642 P.2d 1171 (Or. 1982); *see also In re* Loew, 661 P.2d 922 (Or. 1983); *In re* Loew, 676 P.2d 294 (Or. 1984).

20. *See, e.g.*, *Cincinnati Bar Association,* 678 N.E.2d 513.

21. *See, e.g.*, People v. Mendus, 360 P.3d 1049 (Colo. 2015) (including a charge the Colorado RPC 1.4 for failing to keep the client concerned informed); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991) (included pattern of

misrepresenting status of work and trust account violations).

22. *See, e.g.*, *Southern,* 15 P.3d 1 (probation with conditions); *Heilbrunn,* 814 P.2d 819 (conditions on reinstatement).

23. *See, e.g.*, *Biggs*, 864 P.2d 1310 (lawyer who abandoned practice disbarred); Attorney Grievance Comm'n of Maryland v. Wallace, 793 A.2d 535 (Md. 2002) (lawyer disbarred for multiple diligence and related violations and failed to respond to subsequent disciplinary proceedings).

24. *See, e.g.*, Mulkey v. Meridian Oil, Inc., 143 F.R.D. 257 (physical and emotional issues triggered violations of scheduling order and resulted in show cause order on sanctions).

25. *See, e.g.*, National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 540 F. Supp.2d 900 (S.D. Ohio 2007) (plaintiff asserted its lawyer in underlying insurance defense matter had substance abuse problems that affected performance).

26.*See, e.g.*, Sterling Sav. Bank v. Fairfield (*Fairfield*), No. 39907, 2013 WL 5988958 at *2 (Idaho App. Aug. 20, 2013) (unpublished) (continuance); Northwestern Mutual Life Insurance Company v. Ulanowski, No. 11-35, 2012 WL 13028742 (D. Minn. Mar. 5, 2012) (unpublished) (withdrawal).

27. *See, e.g.*, Mead v. Shulkin, 29 Vet. App. 159 (2017) (seeking to excuse untimely filing of attorney fee petition); United States v. Real Property Commonly Known as 5535 Myers Lake Road, Belmont, Michigan, County of Kent, Cannon Township (*Real Property*), No. 1:91-CV-293, 1991 WL 239980 (W.D. Mich. Sept. 23, 1991) (unpublished) (motion to set aside default judgment).

28. *See, e.g.*, *Fairfield,* 2013 WL 5988958 at *2 ("[I]t is incumbent upon the attorney to move to withdraw from representation so that another attorney can take his place and protect the client's interests. *See* Idaho Rule of Prof. Conduct R. 1.16(a)(2)."); *Real Property,* 1991 WL 239980 at *3 n.1 ("When Attorney . . . knew he was unable to meet the deadline because of his mental condition, he should have withdrawn from the case or associated himself with someone able to meet the deadline. Mich. Rules of Prof. Conduct R. 1.16(a)(2) and 1.1.").

29. "The sole practitioner sometimes has no ear to bend, no ready assistance and no sympathetic counsel." *In re* Lowe*,* 642 P.2d 1171, 1174 (Or. 1982) (Peterson, J., concurring).

30. Cutler v. Klara, Whicher & Mishne, 473 N.W.2d 178 (Iowa 1991), for example, involved a law firm partner who committed suicide after being removed internally from his workload due to a severe illness.

31. *See* Model Rules of Prof'l Conduct R. 5.1 & 5.2 (2019) (supervisory duties over law firm lawyers); *see also* Model Rules of Prof'l Conduct R. 5.3 (2019) (supervisory duties for law firm staff).

32. Model Rules of Prof'l Conduct R. 1.4(a)(3) requires a lawyer to "keep the client reasonably informed about the status of the matter[.]" Model Rules of Prof'l Conduct R. 1.4(b), in turn, requires that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

33. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-431 (2003) (addressing reporting responsibilities under Model Rule 8.3 for lawyers outside the reporter's law firm).

34. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 481 (2018) (discussing the duties owed to clients if a material error has occurred).

35. *See, e.g.*, *In re* Bosket, 32 D.B. Rptr. 41, 45 (Or. 2018) ("[Lawyer] cooperated fully in the Bar's investigation of his conduct and the resolution of this formal proceeding."); Iowa Supreme Court Att'y Disciplinary Bd. v. Kingery (*Kingery*), 871 N.W.2d 109, 123 (Iowa 2015) ("[Lawyer's] detoxification, outpatient treatment, and subsequent efforts to cultivate a support system and abstain from alcohol are important and commendable.").

36. *See* ABA Standards for Imposing Lawyer Sanctions 9.32(c) (personal and emotional problems), (h) (physical disability) & (i) (mental disability or chemical dependency).

37. *See, e.g.*, *Kingery*, 871 N.W.2d at 122 ("Additionally, the sheer number of clients affected by . . . [the lawyer's] . . . conduct—more than a dozen—is an aggravating factor.").

38. *Id.* ("[T]he most significant mitigating factor is . . . [the lawyer's] . . . robust rehabilitative efforts[.]"

39. *See, e.g.*, *In re* Murrow*,* 336 P.3d 859, 869-70 (Kan. 2014) (lawyer suspended for a year due, in part, to his failure to propose treatment plan); Disciplinary Counsel v. Wickerham, 970 N.E.2d 932, 935 (Ohio 2012) (lawyer who did not fulfill required treatment plan disbarred).

40. *In re* Loew, 642 P.2d 1171, 1176 (Or. 1982) (Peterson, J., concurring).

Understanding Discipline and Reporting Requirements for Lawyer DUIs

By Mark A. Webster

Vice President, Aon Professional Services, Kansas City, Mo. Opinions expressed here are solely those of the author.

I. Introduction

Alcohol abuse and addiction are significant and well-documented problems in the legal profession. A recent joint research project by the American Bar Association and the Hazelden Betty Ford Foundation found that 20.6% of lawyers screened positive for problematic drinking, as compared to 11.8% of the rest of the "highly educated" workforce.[1] Beyond the obvious mental and physical health concerns related to alcohol abuse, impaired lawyers may miss important deadlines, make other critical mistakes, and act inappropriately around clients and colleagues. More to the immediate point, lawyers who abuse alcohol may engage in related criminal behavior, such as driving under the influence of alcohol ("DUI"). Lawyers who drive drunk not only risk criminal consequences and administrative penalties, such as the restriction or loss of their driving privileges, but their poor choices may also raise difficult professional responsibility issues.

Model Rule of Professional Conduct 8.4(b) states that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[2] Determining whether a criminal act—such as a DUI arrest—reflects upon a lawyer's honesty, trustworthiness, or fitness to practice law is not always a straightforward task. Whether good or bad, courts' interpretation and enforcement of Rule 8.4(b) varies by jurisdiction.

Model Rule 8.3(a), which mirrors much of the language of Model Rule 8.4(b), is also pertinent to alcohol-related criminal offenses because it requires a lawyer to report misconduct by another lawyer that raises a "substantial question" as to the other lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects."[3] The decision to report a fellow lawyer to professional authorities can be particularly difficult, especially when the lawyers involved are friends or colleagues. Indeed, lawyers are often hesitant to report colleagues' and friends' misconduct for fear of retaliation, ostracization, or other negative consequences.

Together, Rules 8.4(b) and 8.3(a) raise thorny questions with respect to lawyer DUI offenses. Does a single DUI reflect adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer? And if it does, must the DUI be reported (or even self-reported) to disciplinary authorities? This Article examines the professional discipline and reporting requirements that stem from lawyer DUI offenses. Part II of this Article surveys the treatment of lawyer DUIs by courts and disciplinary authorities under Rule 8.4(b). Part III then addresses the duty to report lawyer DUI offenses under Model Rule 8.3(a). Part IV concludes with recommendations for managing these sensitive matters.

II. Rule 8.4(b) and Discipline for DUI

Under what circumstances do DUI offenses reflect adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer, thereby violating Model Rule 8.4(b) and necessitating professional discipline? Most courts that have considered the question have only disciplined lawyers in the event of a DUI when one or more aggravating factors are present: (a) multiple DUI offenses; (b) additional non-DUI offenses; (c) behavior which negatively affects clients; or (d) injury or death caused by impaired driving. Except for one Colorado decision, a single instance of a misdemeanor DUI—without any additional offenses or aggravating factors—has not historically been sufficient to violate Model Rule 8.4(b).

A. Multiple DUI Offenses

Most of the cases disciplining lawyers for DUIs do so only in the event of a lawyer's second, third, or even fourth DUI offense. For example, in *State ex rel. Oklahoma Bar Ass'n v. McBride*,[4] the Oklahoma Supreme Court explained that while a single DUI conviction does not "facially demonstrate a lawyer's unfitness to practice law," repeated violations of DUI laws and other alcohol-related offenses violate the mandatory provisions of Oklahoma's versions of Model Rules 8.4(b) and 8.4(d).[5] In *McBride*, the lawyer was convicted of multiple DUIs, along with public drunkenness and possession of drug paraphernalia. The court publicly reprimanded the lawyer and suspended him for two years.[6] Similarly, the Arkansas Supreme Court concluded that a lawyer's fourth DUI—an automatic felony in Arkansas—constituted a "serious crime" and thus "serious misconduct" that warranted disbarment.[7] The Illinois Supreme Court likewise suspended an attorney's license for two years (but stayed the suspension based on probationary conditions) after he committed two DUIs and drove with a suspended license.[8]

B. Additional Non-DUI Offenses

Many of the cases which discipline lawyers for DUI involve additional offenses.[9] For instance, in *King v. Kentucky Bar Ass'n*,[10] the lawyer had been convicted of multiple offenses, including a third DUI offense, driving on a suspended license, and endangering the welfare of a minor.[11] Based on the cumulative effect of these offenses, the court easily found violations of Rule 8.4(b), publicly reprimanded the lawyer, and imposed two years of probation.[12] Consistent with this outcome, the Iowa Supreme Court handed down a two-year suspension in connection with a lawyer's convictions for DUI, domestic abuse assault, and several violations of a no-contact order.[13] Similarly, a New York court publicly censured a lawyer based on a single DUI and two related counts of child endangerment.[14]

C. Behavior Which Negatively Affects Clients

Courts considering discipline for DUI offenses also frequently focus on whether the offending lawyer's conduct negatively affected clients. In *McBride*, for example, the Oklahoma Supreme Court explained that discipline imposed in cases involving alcohol-related crimes has ranged from "severe, when coupled with harm to clients, to censure, when no clients were involved."[15] In another case, the Colorado Supreme Court suspended a lawyer from the practice of law for three years after the lawyer pled guilty to two DUIs.[16] In handing down the suspension, the court focused on the fact that, in addition to the two DUIs, the lawyer had failed to attend his client's hearing. The lawyer's failure to appear resulted in an award being entered against the client with no opportunity to appeal.[17] In the same vein, the South Carolina Supreme Court, upon disbarring a lawyer after his receipt of a third DUI, indicated that the lawyer's failure to adequately handle multiple client matters and failure to account for client funds heavily influenced its decision.[18]

D. Injury or Death Caused by Impaired Driving

Tragically, some of the DUI disciplinary cases involve situations where the lawyer's reckless actions injure or even kill someone. In *In re Cairns*,[19] a lawyer pled guilty to a misdemeanor count of DUI and vehicular assault after falling asleep at the wheel and injuring another driver in a collision.[20] The Delaware Supreme Court's Board on Professional Responsibility determined that causing injury while driving under the influence clearly violated Delaware's version of Rule 8.4(b), because it contravened the lawyer's duties to "the public, to the legal system, and to the legal profession."[21] The Board considered various aggravating factors (including the fact that the lawyer had caused a prior accident while driving under the influence) and mitigating factors (including the lawyer's absence of a prior disciplinary record, voluntary disclosure to the disciplinary board, and good character and reputation) in recommending a 21-month suspension.[22] The Delaware Supreme Court accepted the Board's findings and recommendations.

In a recent Colorado Supreme Court disciplinary case, a lawyer drove under the influence of drugs and alcohol, resulting in the death of two people and earning the lawyer a 12-year jail sentence.[23] The court observed that lawyers who injure others while driving under the influence may receive a wide variety of discipline, depending on the aggravating or mitigating factors present in each case. The relatively mild punishment of censure, for instance, requires the existence of significant mitigating factors.[24] In the case at hand, however, the court reasoned that the resultant deaths, the attendant 12-year prison sentence, and the lawyer's "extensive prior discipline" were significant aggravating factors that necessitated a three-year suspension of the lawyer's license to practice.[25]

E. People v. Miller

Despite the overwhelming majority of lawyer DUI cases in which courts have required aggravating circumstances to impose discipline, a contrary 2017 Colorado decision, *People v. Miller*,[26] stands out. In *Miller*, a Hearing Board convened by a Presiding Disciplinary Judge of the Colorado Supreme Court held that a lawyer violated Colorado's version of Rule 8.4(b) based on a conviction for a single misdemeanor DUI offense, even though the lawyer caused no actual harm to others and committed no additional criminal offenses or professional misconduct.[27] The lawyer, Dan Miller, had voluntarily pleaded guilty to a misdemeanor charge of DUI—his first DUI conviction.[28] He had also self-reported his DUI conviction and agreed to undergo an alcohol evaluation by a psychologist.[29] Based on these mitigating factors, Miller argued that he did not violate Colorado's version of Rule 8.4(b) – particularly since the Colorado Supreme Court had never held that a single DUI conviction, standing alone, amounted to a violation of the Rule.[30]

The Hearing Board agreed that a DUI conviction was not a "per se" rule violation but explained that, upon "reading the case law as a whole," it interpreted the "general tenor" of the Colorado Supreme Court's holdings as "reflecting a perspective that DUI often reflects negatively on a lawyer's fitness to practice."[31] Accordingly, the Hearing Board found that Miller's single misdemeanor DUI violated Rule 8.4(b).[32]

To support its finding, the Hearing Board noted that Miller's blood alcohol content at the time of arrest was "strikingly high," and opined that this signaled "a degree of callousness to the public and our body of criminal laws that casts doubt on a lawyer's commitment to faithfully respect the welfare of others and the interests of the legal system."[33] The Hearing Board further claimed that, according to some estimates, an average person will have driven drunk "roughly eighty times" before being arrested for a DUI.[34] The Hearing Board admitted that it was not aware of any cases in Colorado or any other states in which courts disciplined lawyers under the same circumstances, but rather relied almost exclusively on cases[35] where courts disciplined lawyers for first-time DUI offenses that caused injury or "potential injury."[36]

While the Hearing Board admitted that DUI offenses had not been previously deemed in Colorado to "seriously" adversely reflect on a lawyer's fitness to practice law, it concluded that the lawyer's decision to drive while intoxicated posed a "risk of significant harm to the public." Further, the Hearing Board stated that the legal profession "cannot ignore conduct representing this degree of indifference to fundamental legal obligations and to the public good."[37] Following this rationale, the Hearing Board publicly censured Miller.

In a sharp dissent, one Hearing Board member stated that despite "extensive research" of disciplinary case law involving DUI convictions, the Hearing Board was unable to identify any public case in Colorado or any other jurisdiction in which a lawyer was held to have violated Rule 8.4(b) under circumstances analogous to this case.[38] The dissent made clear that there was no finding that the lawyer was unfit to practice law; rather, the lawyer's clients were satisfied with his representation during his 42 years of practice, during which he had no disciplinary history and had never had an alcohol violation.[39] The dissent continued: "If a Colo. RPC 8.4(b) violation can be premised solely on a single misdemeanor conviction, the plain language of the rule will be rendered superfluous and low-level misdemeanor offenses of any type will always form the basis for discipline," thereby leading to a slippery slope that will result in "unlimited areas of lawyer regulation."[40]

Miller appears to be an outlier. Again, most states have been unwilling to impose discipline for a single misdemeanor DUI. Some states arguably *permit* discipline in such a circumstance—for instance, New York explicitly states that an attorney is automatically subject to discipline for any "crime or misdemeanor"—but in the event of a first-time misdemeanor or lesser offense, suspension is unlikely without aggravating circumstances.41

Some courts have also imposed discipline for first-offense DUIs in instances where the offending lawyer submitted a joint petition for consent discipline.[42] Because of the limited information available in these cases, however, it is impossible to know whether the DUI offenses included additional aggravating factors, or if additional offenses and charges were excluded from the consent petitions through negotiation. It is also unclear whether the offending lawyers received effective legal representation and guidance before they consented to discipline.

III. Rule 8.3(a) and the Duty to Report

In most jurisdictions, lawyers are required to report misconduct by other lawyers, and may be disciplined if they fail to do so. Model Rule 8.3(a) states that a "lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[43] This language essentially tracks the "honesty, trustworthiness or fitness as a lawyer" verbiage used in Model Rule 8.4(b).

A. Reporting Another Lawyer

Lawyers who are aware of another lawyer's DUI offense may wonder if they are required to make a report to professional disciplinary authorities. While some professional misjudgments clearly implicate a lawyer's honesty, trustworthiness, or fitness to practice and therefore necessitate reporting (e.g., perjury, fraud, theft, etc.), and others clearly do not, there is a "vast, ambiguous middle ground where little definitive guidance can be provided."[44] Non-felony alcohol-related offenses arguably fall within that middle ground. Neither the Model Rules nor available authorities directly discuss reporting lawyers for single misdemeanor DUIs, but because Model Rule 8.4(b) so closely tracks the "honesty, trustworthiness

or fitness as a lawyer" language of Model Rule 8.3(a), the case law concerning Model Rule 8.4(b) provides guidance for would-be reporters of lawyer misconduct. The fact that most courts are unwilling to discipline lawyers for a single misdemeanor DUI, without any aggravating factors, makes it unlikely that Model Rule 8.3(a) imposes a duty on a lawyer to report a fellow lawyer for such a violation. Even the *Miller* court, which imposed discipline for a lawyer's single, non-aggravated misdemeanor DUI, admitted that DUI offenses typically do not seriously adversely reflect on a lawyer's fitness to practice law.[45]

In some cases, however, a lawyer may be concerned that another lawyer's single DUI arrest involves significant additional aggravating factors or is a possible indicator of a more extensive underlying issue. If a lawyer then struggles with the idea that reporting the other lawyer to disciplinary authorities may be necessary, there are a few concepts related to Model Rule 8.3(a) that the lawyer should keep in mind.

First, even if a lawyer knows[46] about another lawyer's DUI, Model Rule 8.3(a) only attaches to ethics violations that raise a substantial question about a lawyer's honesty, trustworthiness, or fitness as a lawyer. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.[47] The comments to Model Rule 8.3 clarify that lawyers need not report every violation, explaining that "[i]f a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense."[48] Because a lawyer's reporting obligation is limited "to those offenses that a self-regulating profession must vigorously endeavor to prevent," a "measure of judgment" is required to comply with the rule.[49]

Second, lawyers must consider whether the DUI offense is a one-time mistake related to an evening of enthusiastic celebration or if it evidences a more serious pattern of misconduct. Although a single act by a lawyer may occasionally evidence a lack of fitness, in most cases a pattern of conduct is required to demonstrate that a lawyer is not meeting the obligations imposed by the Model Rules.[50] Comment [1] to Model Rule 8.3 states that lawyers must consider whether an "apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover,"[51] and some states have indicated that an isolated incident need only be reported when there are "reasonable grounds" that it is indicative of a pattern of misconduct.[52] Lawyers will likely need to draw on their knowledge of the offending lawyer's personality, professional track record, interactions with clients, and conduct history to effectively make such a determination.

Third, a lawyer must assess whether the DUI is evidence of significant lawyer impairment. An impaired lawyer is considered "unfit" under Rule 8.3(a) if the lawyer's condition materially affects the lawyer's ability to represent clients.[53] ABA Formal Opinion 03-431 suggests that a lawyer need not act on rumors or conflicting reports about another lawyer's impairment, and even knowing that another lawyer is drinking heavily or evidencing impairment in social settings "is not itself enough to trigger a duty to report under Rule 8.3."[54] Before making a report, the lawyer must know that a condition is "materially impairing" an affected lawyer's representation of clients.[55] This may be evidenced by a variety of behaviors, including repeatedly missing deadlines, failing to perform agreed-upon tasks, or failing to raise issues that competent counsel would be expected to raise.[56] *Id*. Because lawyers are not healthcare professionals, they cannot always discern severe impairment, but a lawyer is not permitted to "shut his eyes to conduct reflecting generally recognized symptoms of impairment."[57]

Finally, in addition to the duty to report under Model Rule 8.3(a), some observers have noted that lawyer impairment may also give rise to a duty under Model Rule 5.1, which requires partners and lawyers with managerial authority to make reasonable efforts to ensure that lawyers in a firm conform to the Model Rules.[58] Because lawyers have a duty to prevent impaired lawyers from violating the Model Rules, any failure to report awareness of substantial lawyer impairment could arguably violate both Model Rule

8.3(a) and Model Rule 5.1.[59]

B. The Duty to Self-Report

Model Rule 8.3(a) concerns misconduct of "another lawyer" and does not require lawyers to report their own ethical lapses to professional authorities.[60] Many states' versions of the rule follow suit, thereby freeing lawyers from a duty to self-report a DUI. In Louisiana, for example, a lawyer has no legal or ethical obligation to self-report a disciplinary violation—including for a DUI or other misdemeanor.[61] A few states, however, require lawyers to self-report misconduct. Kansas, for instance, has modified Rule 8.3(a) to require a lawyer with knowledge of "any" misconduct—including a lawyer's own misconduct—to inform the appropriate professional authority.[62] Other states require lawyers to self-report certain criminal offenses. California directs a lawyer to self-report any felony indictment or conviction, any misdemeanor conviction for a crime "committed in the course of the practice of law" or in which the client was the victim, or any misdemeanor conviction for a crime that involves "dishonesty or moral turpitude."[63] Georgia likewise requires members to report any felony conviction to the State Bar of Georgia, as well as any "misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer's fitness to practice law."[64] One author defined "moral turpitude" as an act which is "contrary to justice, honesty, modesty, or good morals," and which includes crimes like bank fraud, wire fraud, bribery, and obstruction of justice.[65] Based on available authority, a single misdemeanor DUI, without more, does not appear to fall under the moral turpitude umbrella.

Colorado uses broader self-reporting language, requiring every lawyer to self-report all criminal convictions "except those misdemeanor traffic offenses or traffic ordinance violations, not including the use of alcohol or drugs . . . . "[66] Because the "use of alcohol" is explicitly carved out of the misdemeanor traffic offense exception, it appears that any misdemeanor DUI offense—no matter how benign—must be self-reported in Colorado. Considering the wide variance in state self-reporting requirements, lawyers must be sure to review applicable state laws and regulations to ensure that they properly comply with self-reporting obligations.

IV. Conclusion

Alcohol abuse is a problem in law firms, and it leads to serious consequences. In addition to the toll taken on lawyers' health and the harm inflicted on clients, many lawyers commit alcohol-related offenses that lead to both criminal and disciplinary actions. DUIs are among the most common of such offenses. Based on available authority, a lawyer's single misdemeanor DUI—without aggravating factors—should not trigger professional discipline. Where DUIs lead to injury, harm to clients, or additional criminal conduct, however, courts have not hesitated to censure, suspend, or even disbar offending lawyers.

Deciding whether to report a fellow lawyer for alcohol-related offenses can be difficult, particularly in a profession where alcohol consumption is pervasive. Certainly, not every alcohol-related offense raises a substantial question about a lawyer's honesty, trustworthiness, or fitness to practice law, and would-be reporting lawyers are entitled to exercise a measure of judgment in each case. Based on the weight of authority interpreting Model Rules 8.4(b) and 8.3(a), it does not appear that a single, first-offense misdemeanor DUI or alcohol-related offense necessitates reporting, particularly if a lawyer has no reason to believe that it indicates a potential pattern of troubling conduct. If a lawyer is concerned that the offense is a symptom of a larger issue, or if the lawyer knows of a material impairment that impedes a lawyer's ability to represent clients, reporting may be required. A lawyer's duty to self-report misconduct, on the other hand, varies by state.

In the end, lawyers must carefully consider the Model Rules, state requirements, and case law when weighing whether to reporting a lawyer's alcohol-related misconduct to disciplinary authorities. The need for a measure of judgment here is substantial.

Endnotes

1. Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. Addiction Medicine 46, 48–51 (2016).
2. Model Rules of Prof'l Conduct R. 8.4(c) (2019).
3. Model Rules of Prof'l Conduct R. 8.3(a) (2019).
4. 175 P.3d 379 (Okla. 2007).
5. *Id.* at 385.
6. *Id.* at 380–82, 390.
7. Ligon v. Stewart, 255 S.W.3d 435, 440–41, 443–44 (Ark. 2007).
8. *In re* Kunz, 524 N.E.2d 544, 545 (Ill. 1988).
9. *See, e.g.*, Wickersham v. Ky. Bar Ass'n, 585 S.W.3d 766, 766–68 (Ky. 2019) (involving consent discipline predicated on charges of first degree wanton endangerment of a child, public intoxication, and DUI).
10. 377 S.W.3d 541 (Ky. 2012).
11. *Id.* at 542.
12. *Id.* at 542–43.
13. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Sears, 933 N.W.2d 214, 223–26 (Iowa 2019).
14. *In re* O'Brien, 765 N.Y.S.2d 71, 72 (App. Div. 2003).
15. State *ex rel.* Okla. Bar Ass'n v. McBride, 175 P.3d 379, 387 (Okla. 2007).
16. People v. Madigan, 914 P.2d 346, 347–48 (Colo. 1996).
17. *Id.*
18. *In re* Dumas, 419 S.E.2d 791, 793 (S.C. 1992).
19. No. 34, 2016, 2016 Del. LEXIS 57 (Del. Feb. 5, 2016).
20. *Id.* at *3.
21. *Id.* at *12–13.
22. *Id.* at *15–21, 26–27.
23. People v. Smith, No. 18PDJ050, 2019 Colo. Discipl. LEXIS 16, at *6–7 (Colo. Apr. 9, 2019).
24. *Id.* at *17–18.
25. *Id.* at *18–19.
26. 409 P.3d 667 (Colo. 2017).
27. *Id.* at 678.
28. *Id.* at 668.
29. *Id.* at 669.
30. *Id.* at 672.
31. *Id.* at 673 (footnote omitted).
32. *Id.*
33. *Id.* at 673–74.
34. *Id.* at 673.
35. All but one of the referenced cases involved accidents resulting in injury or death. *Id.* at 674. The lone exception was *In re* Bratton, 33 N.Y.S.3d 743 (App. Div. 2016), in which the court found that a lawyer engaged in conduct that adversely reflected on his fitness as a lawyer, warranting public censure. *Id.* at 744. The lawyer there drove the wrong direction down a parkway while intoxicated, leading to DUI and reckless endangerment convictions.
36. People v. Miller, 409 P.3d 667, 674-77 (Colo. 2017).
37. *Id.* at 675, 677.
38. *Id.* at 678 (Rogers, T., dissenting).
39. *Id.* at 679 (Rogers, T., dissenting).

40. *Id.* at 679–80 (Rogers, T., dissenting).
41. N.Y. Judiciary Law § 90(2) (2019); Barbara F. Smith, *Going Up River: Lawyer Discipline, Lawyer Assistance and the Legal Profession's Response to Lawyer Alcoholism*, 12 Gov't Law & Policy J., Fall 2010, at 78.
42. *See, e.g.*, *In re* Henry, 245 So. 3d 1041, 1041 (La. 2018) (ordering a one-year deferred suspension after the submission of a petition for consent discipline admitting to a first-offense DUI and a violation of Rules 8.4(a) and 8.4(b)).
43. Model Rules of Prof'l Conduct R. 8.3(a) (2019).
44. Saul Jay Singer, *Speaking of Ethics: To Report or Not to Report: That is the Question*, Wash. Law., at 1 (Nov. 2011), https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/november-2011-speaking-of-ethics.cfm.
45. People v. Miller, 409 P.3d 667, 675 (Colo. 2017).
46. Mere suspicion of misconduct is insufficient to trigger a duty to report; some level of knowledge that allows a reasonable lawyer to conclude that the conduct has (or more than likely has) occurred is required. Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-regulation*, 12 Geo. J. Legal Ethics 175, 185–86 (1999) [hereinafter Richmond, *The Duty to Report*].
47. Model Rules of Prof'l Conduct R. 8.3 cmt. 3 (2019).
48. *Id.*
49. *Id.*
50. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-431, at 2 (2003) [hereinafter ABA Formal Op. 03-431].
51. Model Rules of Prof'l Conduct R. 8.3 cmt. 1 (2019).
52. Ariz. State Bar Comm. on the Rules of Prof'l Conduct Op. 90-13, at 4 (1990).
53. Douglas R. Richmond, *Law Firm Partners as Their Brothers' Keepers*, 96 Ky. L.J. 231, 260 (2007/2008) (citing Model Rule 1.16(a)(2)).
54. ABA Formal Op. 03-431, *supra* note 50, at 3.
55. *Id.*
56. *Id.*
57. *Id.*
58. Lennes N. Omuro, *Lawyer Impairment and Related Ethical Considerations*, Haw. Bar J., Feb. 2017, at 13, 13.
59. *Id.*
60. Model Rules of Prof'l Conduct R. 8.3(a) (2019); Richmond, *supra* note 46, at 201.
61. Dane S. Ciolini, *Must I Self-Report My Own Misconduct*?, La. Legal Ethics (July 13, 2015), https://lalegalethics.org/must-i-report-my-own-misconduct/; *see also* Ky. Bar Ass'n Comm. on Ethics & Unauthorized Practice of Law Op. E-430, at 22 (2010) (stating that Kentucky does not generally require a lawyer to self-report professional misconduct).
62. Kan. Rules of Prof'l Conduct R. 8.3(a) (2019).
63. *Guidelines for Attorney Mandatory Reportable Actions*, State Bar of Cal., http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Self-Reporting-FAQ (last visited Oct. 9, 2019) (citing Cal. Bus. & Prof. Code § 6068(o)(4)–(5) (2019)).
64. Ga. Rules of Prof'l Conduct R. 9.1(a) (2019).
65. Joyce E. Peters, *The Perils of Misdemeanors: Serious Crimes and Moral Turpitude*, Wash. Law., June 2004, at 2 https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/june-2004-bar-counsel.cfm.
66. C.R.C.P. § 251.20(b) (2019).

Ethical Obligations to Protect Client Data when Building Artificial Intelligence Tools: Wigmore Meets AI

By Daniel W. Linna Jr. & Wendy J. Muchman

Daniel W. Linna Jr., Director of Law and Technology Initiatives & Senior Lecturer, Northwestern Pritzker School of Law & McCormick School of Engineering; Wendy Muchman, Professor of Practice, Harry B. Reese Teaching Professor 2020-2021, Northwestern Pritzker School of Law. *Professors Linna and Muchman wish to acknowledge the hard work of Maveric Searle and Abigail Sexton (Northwestern Law JD 2020) without whose assistance this paper would not have been possible. In addition, thank you to Liuzhuoyi Liu (Northwestern Law JD 2021) and David Skoler (Northwestern JD/MBA 2022) for their expert editing skills.*

Introduction

Artificial intelligence and data analytics ("AI")[1] tools are regularly proposed as critical tools that will lead to the transformation of many legal tasks: legal research, contract review, contract management, the prediction of litigation outcomes, and more.[2] While roughly two-thirds of in-house attorneys are ready to try new technology and say they have access to client data, only around half of that number of lawyers feel they are effectively using client data.[3] What is holding them back?[4] Is it a fear that AI will replace lawyers? If so, it is worth clarifying the functionality and capabilities of AI tools that exist now and that are likely to exist soon. Moreover, developing tools that automate and augment legal tasks provides lawyers with more time to employ emotional intelligence, still unique to lawyers, and give creative and strategic advice when handling client matters.[5] There is no shortage of complex problems to be solved. There are countless ways in which lawyers can help develop AI to provide value to clients and society, while at the same time increasing the value provided with uniquely human skills.

Despite the growth in opportunities that AI offers, it also presents new ethical issues. The intersection between legal ethics and AI is an emerging and rapidly changing area. This can cause confusion when lawyers try to understand what is required of them. Ethics opinions, case law, data breach notification requirements, and disciplinary cases will continue to illuminate the specifics of a lawyer's ethical obligations concerning AI in this evolving landscape.

The advent of new technology requires an ongoing assessment of how a lawyer's ethical obligations intersect with the use of technology.[6] In this piece, we will examine lawyers' ethical obligations when using client data to build AI tools and how lawyers can minimize the potential ethical risks that arise. Use of client data in AI tools encompasses a variety of ethical responsibilities including those regarding competent representation (Model Rule 1.1), client communication (Model Rule 1.4), client informed consent (Model Rule 1.6), protection of client property (data) (Model Rule 1.15), and client confidential information (Model Rule 1.6).

A Look at Wigmore's Data Analytics Tools: Four Scenarios

Scenario One

Let us start with a hypothetical: the Wigmore law firm. Imagine that Wigmore creates a data analytics group. A Wigmore attorney believes that there is a market for a data analytics tool that predicts the likelihood of success in litigation involving commercial leases. This Wigmore attorney and the data analytics group collect data from hundreds of commercial lease cases from publicly available dockets of local courts. Wigmore launches a product (Lease Dispute Analyzer 1.0), which predicts the likelihood of a commercial lessor prevailing in a lawsuit to collect unpaid rents for the duration of a lease after a lessee abandons the property. Wigmore wants to use Lease Dispute Analyzer 1.0 to help its clients predict the likelihood of success in future litigation. In this scenario, assuming no Wigmore client data is used in Lease Dispute Analyzer 1.0, Wigmore has the general obligation to represent all firm clients competently, to properly supervise its data analytics group,[7] and in most jurisdictions, to avoid assisting in the unauthorized practice of law or sharing legal fees with nonlawyers.[8]

Scenario Two

Let us now change the hypothetical and create a second scenario. Imagine that Company X is a large commercial real estate company that owns and manages hundreds of commercial buildings. Company X is the plaintiff in a pending case at the summary judgment stage, and it retains Wigmore to advise it whether to settle or continue to litigate. Company X has a significant amount of data regarding prior cases in which it was a party. Wigmore is interested in developing a data analytics tool using Company X's data to advise Company X about the strength of its case and the benefits of pursuing a settlement at this stage. Company X provides its data to Wigmore. What are Wigmore's ethical obligations to Company X?

Scenario Three

Consider now a third scenario, in which Wigmore has a longtime client Company Y, another large lessor of commercial properties. Through its past representations of Company Y, Wigmore has extensive records on the results of hundreds of cases Company Y has litigated, providing for considerable data points for data analytics.[9] Many of these data points have been obtained by Wigmore as a result of, and in the course of, its representation of Company Y. Because there are many thousands of data points, Wigmore would like to have its in-house analytics department include Company Y's data in the development of the model for Company X. What obligations does Wigmore now have to Company Y? To Company X?

Scenario Four

Finally, envision a fourth and final scenario, in which Company Z, a large lessor of commercial properties, wishes to engage Wigmore to file numerous lawsuits against commercial lessees who have vacated properties before the expiration of their leases. Company Z has asked Wigmore to use the models created for Company X and Company Y, and the underlying data, to create a tool that will help Company Z analyze and evaluate their prospective lawsuits. What are Wigmore's obligations to Company X, Y, and Z?

We will consider various ethical issues arising from Wigmore's use of its three clients' data to develop AI tools in these four scenarios.

Competence

Under all scenarios, Wigmore is required to provide competent representation.[10] "The legal rules and procedure, when placed alongside everchanging technology, produce professional challenges that attorneys must meet to remain competent."[11] Competent representation requires an awareness of the "benefits and risks associated with relevant technology."[12] For example, lawyers need to be knowledgeable about and able to advise clients on the selection of appropriate AI-driven predictive coding tools for e-discovery.[13] A lawyer's duty of competence is nondelegable to a nonlawyer, even when the client employs an expert in any of the processes.[14] Although a lawyer may not delegate the duty of competence, he or she may rely on advisors of established technological competence in the relevant field.[15] Therefore, if the lawyer or law firm and its data scientists are developing models to predict acceptable settlement ranges, the lawyers must satisfy their duty of competence which means the lawyers must understand the model, how the data was obtained and input, and be satisfied that the settlement amount is within an appropriate range.

If Wigmore is developing predictive analytics for Company X, Company Y, and Company Z, competent representation requires that Wigmore understand the benefits and risks of using client data in developing those programs. The possible benefits of the use of client data include more accurate and therefore more effective predictions of litigation outcomes, with less effort, faster, increasing efficiency and perhaps producing cost savings. A possible risk includes the model producing low-quality predictions, but the accuracy of the predictions should be evaluated in comparison predictions made by other means, including by other technology tools and by humans.[16]

When accumulating data that triggers lawyers' confidentiality obligations, the risks of a data breach and possible inadvertent revelation of confidential information are of concern.[17] Additional risks that should be considered include lack of representativeness of the data used and bias introduced in data collection, data cleaning, and data creation. Like all humans, data scientists, engineers, and lawyers alike have biases, and these biases can impact decisions about what data to gather, how models are created, the resulting predictions those models make, and more.[18]

Part of being competent requires using tools that are effective. To assess an AI tool's effectiveness, the Wigmore lawyers must understand the risk of bias and how it will impact the tools developed by the technologists in its data analytics group. Additionally, lawyers must have heightened awareness of possible discriminatory bias that could be incorporated into, and perhaps be exacerbated by, AI tools.[19] In addition to exercising care to mitigate bias when using AI for decisions that history tells us are fraught with bias, such as hiring and evaluating employees, lawyers should carefully consider the ways in which bias could be replicated or exacerbated by any AI tool. That said, lawyers can also consider the ways in which AI tools may reduce bias in human decision-making processes and serve as a positive force for equity.[20]

Communication

Lawyers are required to communicate with their clients in certain ways. They are required to promptly inform clients of any decision or circumstance requiring the client's informed consent, as defined in Rule 1.0(e).[21] If Wigmore wants to use a client's data to build a tool, Wigmore must communicate with that client about the plans to build the tool and obtain the client's informed consent to use the client's data.[22]

Informed consent is a fundamental principle of lawyers' representation of clients. The requirement to obtain it is contained in almost one-third of all ethics rules. Informed consent is a substantial part of building good client communication.[23] As explained in Comment [6] to Model Rule 1.0, consent is *informed* when it is given after explaining (1) "the facts and circumstances" that apply to the situation,

(2) the "material advantages and disadvantages" of the proposed action, and (3) any "options and alternatives."[24]

Thus, as part of proper client communication, Wigmore must explain the AI tool and obtain each client's informed consent for the use of client data and the use of the tool. Lawyers must make plain: how the AI tool works, its purpose, the information that will be used in its development, the value it adds to the litigation, and what the lawyer will do with the information. The lawyers' explanations must be sufficient to allow the client to participate intelligently in decisions concerning the objectives of the representation and the means by which they are pursued.[25] For example, courts have found a lack of *informed consent* when a lawyer failed to explain "possible ramifications" and "potential consequences" of a proposed course of action to the client.[26]

Care of Property: Client Data is Property

When Wigmore uses client data to build predictive analytics tools, the lawyers and the firm are required to safeguard the client data with the care of a professional fiduciary.[27] Ethics opinions suggest that "property" includes information stored in electronic form.[28] ABA Ethics Op. 483 starts by noting that lawyers' obligations to protect client information do not change based upon whether the information is in paper or electronic form.[29] Recognizing that many courts have moved to electronic filing and law firms routinely transfer and store client information in electronic form, the realities of today's practice of law dictate that the requirement to safeguard client property extends to client property in electronic form.[30] These ethics opinions also recognize that when lawyers hold client information in an electronic form, they must still exercise reasonable precautions to safeguard client data under Rule 1.15, make sure the information remains in an accessible form, and guard against the risk of unauthorized disclosure.[31]

Confidentiality

Lawyers are required to protect all client information from both intentional and inadvertent disclosure.[32] Given the prevalence of law firm data breaches,[33] lawyers must be especially careful when acquiring and storing client data.[34] The ethical rules establishing a lawyer's duty of confidentiality to her clients explicitly allow for the disclosure of confidential information when it is authorized by the client's informed consent.[35] However, the confidentiality rule and interpretative ethics opinions are clear that absent informed consent, all client information is confidential and cannot be revealed regardless of its source and regardless of whether it is available in the public record.[36]

Confidential information may be revealed when permitted or required by an exception, but lawyers' use of confidential information to develop a software tool that will be used to assist other clients does not fall within any express exception.[37] Further, while the confidentiality rule allows for disclosure when it is impliedly authorized to carry out the representation, in most circumstances it would be risky to conclude that building a software tool is the type of disclosure contemplated by this exception.[38] As a general rule, building a analytics tool is not a routine part of representation covered under this exception. Therefore, lawyers should obtain the client's informed consent before using client information to develop AI tools.

As discussed above, informed consent is part of good communication with a client and requires the lawyer to communicate the underlying facts giving rise to the proposed course of conduct.[39] For example, when a lawyer seeks informed consent to use the client's information to develop an AI tool, the lawyer should also disclose if and how that tool may be used in the future for both the current client and other clients. In light of historical breaches of law firm data, communicated risks should include the possibility of a data breach and subsequent responsibilities under applicable rules of professional conduct and state data

privacy laws.[40]

Notably, depending upon the task to be performed, informed consent requires a discussion of the possible alternatives to the proposed conduct.[41] The lawyer must communicate the possibility of achieving a similar result without the use of AI. Lawyers should also consider advising the client on various AI options: categorizing and clustering documents; flagging and extracting information from documents; generating drafts of contracts, pleadings, motions, briefs, and other documents; and predicting litigation outcomes; to name a few, and the multitude of potential uses.[42] All of these disclosures should be made with the intention of ensuring that the client has enough information to make an informed decision.[43] While informed consent for the disclosure of confidential information is not typically required to be in writing, best practices would suggest that the consent should be in writing to provide a clear record of the details of the client's consent.[44]

The initial engagement letter is a good vehicle by which to memorialize the client's informed consent. By obtaining informed consent to use client information to develop AI tools from the start of the representation, the lawyer minimizes potential ethical issues. While many of the potential confidentiality concerns surrounding the use of AI technologies can be addressed in the initial engagement letter, situations will inevitably arise that were not originally contemplated. For example, if after a representation has begun a lawyer begins to develop AI tools and later wishes to use the client's data to further develop the tool. When these situations occur, the lawyer should revisit the informed consent to ensure the required proper discussions with and disclosures to the client have occurred and that the client has provided informed consent.

With respect to inadvertent disclosures of confidential information, the ABA has issued guidance related to the use of technology. Ethics opinions and the Model Rules require a lawyer to make "reasonable efforts" to prevent the inadvertent or unauthorized disclosure of client information.[45] To determine what constitutes "reasonable efforts," lawyers should consider factors such as: "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients."[46]

Complex confidentiality issues arise when Wigmore wants to use one client's data for another client, such as X's data for Y or X and Y's data for Z. Because AI tools are generally most effective in learning to make predictions when they have access to the largest pool of relevant data,[47] Wigmore has an incentive to feed as much relevant client information into the tool as possible. In this situation, the client's confidential information essentially becomes part of the tool, thus providing value to other clients. Wigmore should also consider that using this tool with other clients may expose the underlying confidential information to those other clients.[48]

Wigmore should consider how to minimize the amount of confidential information that is used in the creation or application of the tool. A common thread through the ethical rules involving the disclosure of confidential information, when not authorized by the client, is that the lawyer should take pains to disclose the minimum amount of information necessary.[49] This concept applies to the use of client information in AI tools as well. To minimize the risk of disclosure of information, lawyers should tailor the client data used to the actual needs of the tool to accomplish its task. To do this, lawyers must have a basic understanding of what the AI tool is doing and what types of information are necessary. For example, an AI tool designed to predict litigation results at various stages of a dispute has little need for the social security numbers of each party to the disputes that it analyzes.

Another way to minimize the risk that AI tools can pose to client confidentiality is by contemplating the deliverable or end product given to the client. For example, if each client is given access to not only the AI tool but also the underlying training data, there is a much higher risk that confidential information will be learned about other clients. This risk is reduced by providing only the output generated by the AI tool instead of all the input data.[50] Regardless of what the deliverables look like, the form of deliverable is important to discuss at the time that the lawyer obtains informed consent.

Third-Party Vendors and Confidentiality

Now consider one more scenario. Assume that Wigmore decides not to make the tool in-house. Not all firms have an analytics department, or the capacity or the desire to produce complex models. Lawyers may seek to contract out the development of an AI tool to an independent developer, or they may seek to purchase and use commercially available AI tools.[51] When hiring an outside expert or vendor, the attorney retains responsibility for the work.[52] If Wigmore uses a third-party service provider to develop its tool, the firm's duty to supervise nonlawyers is implicated.[53] When a third-party is used to create an AI tool, or when a third-party cloud provider is used to store data used to develop an AI tool, lawyers must take steps to fulfill their duties of confidentiality to their clients.

When a lawyer uses a third-party to incorporate AI into her practice, either through contracting for the development of a proprietary tool or by purchasing a commercially available tool, additional confidentiality risks arise when working with the third-party. It is imperative that the lawyer remember that ethical obligations do not change because she is working with a third-party and consider how those obligations impact the particular situation.

As an example, the rise of cloud computing, and its subsequent treatment by the legal community, provides a template for how lawyers should approach situations where confidential information will be shared with third-party technology providers. Storing client information in the cloud presents potential confidentiality issues because it requires a lawyer to place confidential information in the possession of a third-party: the cloud storage provider.[54] Despite this, states have routinely held that lawyers may use online storage for confidential client information as long as they take reasonable care to ensure that confidentiality will be maintained.[55]

Taking reasonable care that confidentiality will be maintained in these situations includes: ensuring that the third-party provider has an enforceable obligation to preserve confidentiality and security and that the provider will notify the attorney if the disclosure of client information is ever required; investigating the provider's security measures, policies, and recovery methods to ensure that they are adequate under the circumstances; employing technology to guard against reasonably foreseeable attempts to access the client's data without authorization, and; investigating the storage provider's ability to purge and wipe the client's data.[56]

These same guidelines can be applied in the context of dealing with third parties to incorporate AI tools into a legal practice. First, in many of the situations in which a third-party is involved in the development of an AI tool, cloud computing and storage will be directly involved, either because it will involve a commercially available AI tool that is cloud-based, or because the third-party who was contracted to develop a proprietary tool will take advantage of the benefits of cloud storage.[57]

Second, even if cloud storage is not directly involved, the principles set forth in opinions dealing with the confidentiality concerns of cloud computing apply when developing AI tools. In both scenarios, there is a legitimate risk that client information may be disclosed because of the use of an emerging branch of

technology. Further, the same measures described in the various opinions on cloud storage[58] will likewise help to minimize the confidentiality risks of involving third parties in the context of AI tool development.

Therefore, whenever a third-party or third-party tool is used to develop an AI tool, the lawyer should ensure that the third-party has an enforceable obligation to protect the confidentiality and security of the client's information. This agreement should include language that limits the third-party's use of the client information exclusively to the purpose that was agreed to by the client. The agreement should also require that the third-party take adequate precautions to ensure the safety of the data from theft.

As in the case of cloud computing, the lawyer has an obligation to investigate and determine the adequacy of the precautions, safety measures, and policies of a third-party AI developer or service. In conducting these investigations, if the lawyer lacks sufficient understanding of the technology, the lawyer should seek the advice of technologists, data scientists, or others with an understanding sufficient to enable the lawyer to ensure the safety of the client's data.[59] Relying on the advice of experts to explain the workings of the particular technology under consideration should help the lawyer in taking "reasonable care" to safeguard the client's information.[60]

Conflicts of Interest

The Wigmore firm must also consider possible conflicts of interest between clients X, Y, and Z, or any combination of current or former clients' interests, or the interests of the law firm in building and marketing the tool. Will the tool be used for the benefit of future clients of the firm?[61] If so, then Wigmore's duties to former clients pose an ethical dilemma.[62] Would it be appropriate to use confidential data from client X or Y to develop a tool that Wigmore would then use to help Company Z?

There are many scenarios that could create a conflict of interest in the development of data analytic tools to be used by the firm for multiple clients.[63] Resolution of the conflict of interest issues under Model Rules 1.7 and 1.9 require a careful analysis of the facts and, again, possibly informed consent and a waiver. Knowing that those risks are present and seeking guidance in resolution of those risks before using client data to benefit one client or the firm can help Wigmore steer clear of ethics issues.

Conclusion

The increasing prevalence of AI technologies is an exciting development for lawyers. AI holds the promise to help lawyers and other legal-services professionals to improve their services to clients and find new ways to deliver value for clients and society. However, like all new things, technology presents certain risks that lawyers must understand in order to utilize it and fulfill their ethical obligations to clients. While the law regarding lawyers' ethical obligations in the context of AI continues to develop, the Rules of Professional Conduct, Ethics Opinions, and related laws provide guidance for lawyers incorporating AI into their practices.

Endnotes

1. We use "AI" to refer broadly to various forms of artificial intelligence tools and the use of data analytics. The specific analyses that follow may differ, for example, when using deep learning versus traditional linear regression. But given our focus on the use of client data and lawyer confidentiality obligations, we aim to identify generally applicable principles without parsing the nuances of potential risks and benefits of the specific types of tools lawyers and technologists create and use. These are discussions that lawyers and technologists should have with their clients and customers.

2. Justine Rogers & Felicity Bell, *The Ethical AI Lawyer: What is Required of Lawyers When They Use Automated*

Systems?, 1 Law, Tech. & Humans 80 (2019), *available at* https://lthj.qut.edu.au/article/view/1324/843.

3. *Thomson Reuters Report Highlights Legal Departments' View of Technology*, Artificial Intelligence (Oct. 3, 2017), *available at* https://www.thomsonreuters.com/en/press-releases/2017/october/thomson-reuters-report-highlights-legal-departments-view-of-technology-artificial-intelligence.html.

4. Roy D. Simon, *Artificial Intelligence, Real Ethics*, New York State Bar Association Journal (Apr. 2018), *available at* https://www.nysba.org/Journal/2018/Apr/Artificial_Intelligence,_Real_Ethics/.

5. W. Bradley Wendel, *The Promise and Limitations of Artificial Intelligence in the Practice of Law,* 72 Okla. L. Rev. 21 (2019).

6. For a broad overview of AI and Ethics, *see* 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 (2018); Eduard Fosch Villaronga, Peter Kieseberg & Tiffany Li, *Humans forget, machines remember: Artificial intelligence and the right to be forgotten*, 34 Comp. L. & Sec. Rev. 304 (2018); David Lat, *The Ethical Implications of Artificial Intelligence*, Above the Law, https://abovethelaw.com/law2020/the-ethical-implications-of-artificial-intelligence/ (last visited Aug. 26, 2020); Ed Walters, *The Model Rules of Autonomous Conduct: Ethical Responsibilities of Lawyers and Artificial Intelligence*, 35 Ga. St. U.L. Rev. 1073 (2019); Katherine Medianik, *Comment: Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 Cardozo L. Rev. 1497 (2018).

7. Model Rules of Prof'l Conduct R. 5.3 (2016) [hereinafter MODEL RULES].

8. Model Rules R. 5.4 - 5.5.

9. Data points might include things that are clearly relevant to the facts of each case, such as (1) whether the case involved residential or commercial tenants; (2) the reason for the lawsuit (nonpayment of rent, breach of lease, holding over); (3) the amount of damages requested by Company X; and (4) the court type (landlord-tenant, county, state, federal district), the specific court, the jurisdiction, and judge. In addition, leases, court documents and Company X's own records would hold significant other information with less obvious significance, such as (5) the age, gender and nationality of the tenant; (6) the type of business involved in a commercial case; (7) the size of the space being leased; (8) the annual rent collected under the lease; (8) the number, if any, of missed payments; (9) the solvency of the business or individual at the time of the dispute; (9) the duration of the lease; (10) the firm and specific lawyers representing the counterparty, and so on.

10. Model Rules R. 1.1.

11. State Bar of Cal., Formal Op. 2015-193 (2015).

12. Model Rules R. 1.1 cmt. 8. Many ethics opinions speak to the lawyer's obligations to protect the confidentiality of client data and what to do in the event of a breach. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018); State Bar of Cal., Formal Op. 2010-179 (2010); Ill. State Bar Ass'n, Advisory Op. 16-06 (2016).

13. For some resources on e-discovery, see Maura R. Grossman & Gordon Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective And More Efficient Than Exhaustive Manual Review,* XVII Rich. J.L. & Tech 11 (2011)https://www.natlawreview.com/article/everything-you-need-to-know-about-e-discovery; Harry Surden, *Machine Learning and Law*, 89 Wash. L. Rev. (2014); Tom O'Connor, *Will Lawyers Ever Embrace Technology in eDiscovery*, New Orleans Bar Association (Feb. 13, 2019), https://www.neworleansbar.org/news/committees/will-lawyers-ever-embrace-technology-in-ediscovery.

14. *See* Anthony Davis & Steven M. Puiszis, *An Update of Lawyers' Duty of Technological Competence: Part 2*, 261 N.Y.L.J. No. 86, at 3 (2019). Lawyers can be sanctioned for failing to comply with the duty of technological competence *See, e.g.*, State ex rel. Oklahoma Bar Ass'n v. Oliver, 369 P.3d 1074 (2016); *In re* Goudge (Ill. 2013), reprimand, *available at* http://www.iardc.org/HB_RB_Disp_Html.asp?id=10819.

15. Katy Ho, *Defining the Contours of an Ethical Duty of Technological Competence*, 30 Geo. J. Legal Ethics 853, 864 (2017).

16. *See* Dan Linna, *Evaluating Legal Services: The Need for a Quality Movement and Standard Measures of Quality and Value – Chapter in Research Handbook on Big Data Law* (Mar. 12, 2020), https://www.legaltechlever.com/2020/03/evaluating-legal-services-the-need-for-a-quality-movement-and-standard-measures-of-quality-and-value-

chapter-in-research-handbook-on-big-data-law/.

17. *See* Susan N. Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 Law Libr. J. 387 (2017), *available at* https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1997&context=articles.

18. *Id*.; *see also* A.B.A. Resolution 112 re Artificial Intelligence (Aug. 12, 2019), *available at* https://www.americanbar.org/content/dam/aba/images/news/2019/08/am-hod-resolutions/112.pdf.

19. Jamie Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society*, 69 S.C. L. Rev. (2018), *available at* https://ssrn.com/abstract=3097250. *See also* State of Wisconsin v. Loomis, 881 N.W. 2d 749 (Wis. 2016); Sean La Roque-Doherty, *Not all litigation analytics products are created equal*, A.B.A. J. (Aug. 1, 2020) (discussing differences in data available from various litigation analytics products).

20. See Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan & Cass R. Sunstein, *Discrimination in the Age of Algorithms*, 10 J. Legal Analysis 113 (2019), *available at* https://doi.org/10.1093/jla/laz001.

21. Model Rules R. 1.4.

22. Model Rules R. 1.4(a) (A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules."); *See also* cmts. 1, 2 & 5.

23. Charles J. Northrup, *Inform Yourself about Informed Consent,* 105 Ill. B.J. at 52 (Oct. 2017), https://www.isba.org/ibj/2017/10/informyourselfaboutinformedconsent.

24. Model Rules R. 1.0 cmt. [6].

25. Model Rules R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *See also* cmt. 5.

26. *In re* Ingersoll, 186 Ill. 2d 163 (1999).

27. Model Rules R. 1.15 cmt. 1. *See also, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018); State Bar of Ariz., Advisory Op. 07-02 (2007); D.C. Bar Op. 357 (2010).

28. *Id*.

29. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 at 7.

30. *Id*. at 12

31. *See* State Bar of Ariz., Advisory Op. 07-02 (2007); D.C. Bar Ethics Op. 357 (2010).

32. Model Rules R. 1.6(a) & (c).

33. Anthony E. Davis, *The Ethical Obligation to be Technologically Competent* (Jan. 8, 2018, 3:00 AM), https://www.law.com/newyorklawjournal/almID/1202746527203/The-Ethical-Obligation-To-Be-Technologically-Competent/?mcode=0&curindex=0&curpage=2.

34. Model Rules R. 1.6(a) ("a lawyer shall not reveal information relating to the representation of the client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).").

35. *See id*.

36. *Id*.; *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Ops. 480, 481 & 483.

37. *See* Model Rules R. 1.6(b)(1)-(7).

38. For example, the Model Rules of Prof'l Conduct state that lawyers can disclose client information when the disclosure is "impliedly authorized in order to carry out the representation" of the client. *Id*.

39. Model Rules R. 1.0(e) cmt. [6].

40. Christine Simmons, Xiumei Dong & Ben Hancock, *More Than 100 Law Firms Have Reported Data Breaches. And the Problem is Getting Worse,* Law.com (Oct. 15, 2019), https://www.law.com/2019/10/15/more-than-100-law-firms-have-reported-data-breaches-and-the-picture-is-getting-worse/; *see also* John G. Loughnane, *2019 Cybersecurity*, A.B.A. (Oct. 16, 2019), https://www.americanbar.org/groups/law_practice/publications/techreport/abatechreport2019/cybersecurity2019/.

41. *Id*.

42. *See, e.g.*, Daniel Faggella, *AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications*, EMERJ (Mar. 14, 2020), https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/; *see also* Roy Strom, *Ogletree Deakins Partners With AI Company to Build Better Data*, Law.com (Jan. 9, 2019), https://www.

law.com/dailyreportonline/2019/01/09/ogletree-deakins-partners-with-ai-company-to-build-better-data/.

43. *Id*.

44. Model Rules R. 1.6(a) & 1.0 cmt. [7].

45. Model Rules R. 1.6(c); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018).

46. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018).

47. *See* Harry Surden, Essay, *Machine Learning and Law*, 89 Wash. L. Rev. 87, 100 (2014).

48. Some research has suggested that, in some circumstances, the possibility exists for an AI tool to be reverse-engineered in ways that could allow a person to obtain information about the tool's underlying set of training data. *See, e.g.*, Nicolas Papernot et al., *Semi-Supervised Knowledge Transfer for Deep Learning from Private Training Data* (2017) https://arxiv.org/pdf/1610.05755.pdf; Reza Shokri et al., *Membership Inference Attacks Against Machine Learning Models*, https://www.cs.cornell.edu/~shmat/shmat_oak17.pdf. The extent to which this is possible, and at what point it would trigger additional confidentiality concerns, requires a thorough understanding of the methods and specific data used, which is outside the scope of this article.

49. For example, the exceptions to the confidentiality rule for preventing death or bodily harm only permit a lawyer to disclose information *to the extent necessary* to prevent such harm. Model Rules R. 1.6(b)(1).

50. As discussed in note 49, it might be possible to reverse engineer a system to learn about the training data. But even if the underlying training data from prior client is not exposed in any way to the latter client using the tool, the latter client benefits from the use of the prior client's data in the process of creating the AI tool.

51. For example, lawyers can purchase commercially available software that allows them to use AI to analyze contracts or predict an opposing litigant's argument based on an analysis of briefs previously filed by the opposing counsel. *See, e.g.*, Kira Inc., https://kirasystems.com/how-it-works/contract-analysis/ (last visited Feb. 7, 2020); Casetext, Inc., https://casetext.com/ (last visited Feb. 7, 2020).

52. Model Rules R. 5.3 cmt. 3 ("A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. . . . When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. . . . When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.").

53. *Id*.

54. *See, e.g.*, Davis & Puiszis, *supra* note 14; Stuart Pardau & Blake Edwards, *The Ethical Implications of Cloud Computing for Lawyers*, 31 J. Marshall J. Info. Tech. & Privacy L. 71, note 10 (2014); Ill. State Bar Ass'n, Advisory Op. 16-06 (2016). In addition, storing information on the lawyer's computers also creates risks, such as the risk of a data breach discussed above. Also consider that many lawyers may not be aware that they use the cloud indirectly, such as in connection with their email or email-security service. The cloud is ubiquitous and difficult to avoid. Moreover, many cloud solutions may in fact be more secure than what most law firms could offer. These are important questions to discuss with clients, and some clients will clearly dictate their preferences, particularly sophisticated clients.

55. *See, e.g.* Alaska Bar Ass'n, Op. 2014-3 (2014); State Bar of Ariz., Advisory Op. 09-04 (2009); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2010-179 (2010); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-184 (2012); Fla. Bar, Advisory Op. 12-3 (2013); Ill. State Bar Ass'n, Advisory Opinion 16-06 (2016); Iowa State Bar Ass'n Comm. on Ethics & Practice Guidelines, Op. 11-01 (2011); Me. Bd. Overseers of the Bar Prof'l Ethics Comm'n, Op. 194 (2008); Me. Bd. Overseers of the Bar Prof'l Ethics Comm'n, Op. 207 (2013), Mass. Bar Ass'n, Op. 12-03 (2012), N.H. Bar Ass'n, Advisory Op. 2012-13/04 (2012); N.J. Advisory Comm. on Prof'l Ethics, Op. 701 (2006); State Bar of Nev., Formal Op. 33 (2006); N.C. State Bar, Formal Op. 6 (2011); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 842 (2010); Or. State Bar, Formal Op. 2011-188 (2011); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility & Philadelphia Bar Ass'n Prof'l Guidance Comm., Joint Formal Op. 2011-200 (2011); Bd. of Prof'l Responsibility of Sup. Ct. of Tenn., Formal Opinion 2015-F-159 (2015); Vt. Bar Ass'n, Advisory Op. 2010-6 (2010); Va. State Bar, Legal Ethics Opinion 1872 (2019); Wash. State Bar Ass'n, Advisory Op. 2215 (2012); Wis. Formal Ethics Opinion EF-15-01 (2017).

56. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 842 (2010).

57. Some AI tools do offer on premises installation on a law firms' computers.

58. Formal Op. 477R (2017); Ill. State Bar Ass'n, Advisory Op. 16-06 (2016); Ala. State Bar, Op. 2010-2 (2010); State Bar of Ariz., Advisory Op. 09-04 (2009); Iowa State Bar Ass'n Comm. on Ethics & Practice Guidelines, Op. 11-01 (2011); State Bar of Nev., Formal Op. 33 (2006); Bd. of Prof'l Responsibility of Sup. Ct. of Tenn., Formal Opinion 2015-F-159 (2015); Wash. State Bar Ass'n, Advisory Op. 2215 (2012).

59. While lawyers will typically not be required to have the same level of expertise in these technologies as the specialists that they rely on, they should "stay abreast of technological advances and the potential risks" that they pose. Model Rules R. 1.1, cmt. 8.

60. The ABA has indicated that reliance on the technical advice of cyber experts is appropriate when analyzing the security of communicating client information over the internet and the same logic would apply here. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) ("Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.").

61. Model Rules R. 1.7 - 1.9.

62. Model Rules R. 1.9(c) ("A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.").

63. Model Rules R. 1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.").

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