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Technology Track – Session 5

Now and Into the Future: Legal Research with Fastcase and AI

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About the Presenter...

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The Model Rules of Autonomous Conduct: Ethical Responsibilities of Lawyers and Artificial Intelligence

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THE MODEL RULES OF AUTONOMOUS CONDUCT: ETHICAL RESPONSIBILITIES OF LAWYERS AND ARTIFICIAL INTELLIGENCE

Ed Walters[1]

INTRODUCTION

Practitioners use artificial-intelligence (AI) tools in fields as varied as finance, medicine, human resources, marketing, sports, and many others.[2] Now, for the first time, lawyers are beginning to use similar tools in the delivery of legal services.[3] Where once lawyers may have only used AI for electronic discovery (eDiscovery), today they are using AI for legal research, drafting, contract management, and litigation strategy.[4]

The use of AI to deliver legal services is not without its detractors, and some have suggested that the use of AI may take the jobs of lawyers—or worse, make lawyers obsolete.[5] Others suggest that using AI tools may violate the ethical responsibilities of lawyers or constitute the unauthorized practice of law (UPL).[6]

Although the ethical responsibilities of lawyers differ from state to state, most state codes are based on the American Bar Association's

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2. Daniel Faggella, *Artificial Intelligence Industry—An Overview by Segment*, EMERJ (Feb. 19, 2019), https://emerj.com/ai-sector-overviews/artificial-intelligence-industry-an-overview-by-segment/ [https://perma.cc/9ZRA-RXZH]; Dom Nicastro, *7 Ways Artificial Intelligence Is Reinventing Human Resources*, CMS WIRE (Mar. 12, 2018), https://www.cmswire.com/digital-workplace/7-ways-artificial-intelligence-is-reinventing-human-resources/ [https://perma.cc/5ZYA-E3YJ].

3. John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3041 (2014).

4. *Id.*

5. *Id.* at 3042.

6. Thomas E. Spahn, *Artificial Intelligence: Ethics Issues*, AM. L. INST. CONTINUING LEGAL EDUC., Feb. 22, 2018, at 2, TSZJ10 ALI-CLE 1.

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Model Rules of Professional Conduct (the Model Rules) and their interpretive comments.[7] This article reviews the responsibilities of lawyers who employ AI tools under the Model Rules and previews how the Model Rules might apply to AI software not yet developed but just on the horizon.

I. Rule 1.1: Duty of Competence

Lawyers have a duty to represent clients with competence, and the Model Rules spell out that this extends to complete and thorough preparation, as well as to a duty of technological competence.[8] Rule 1.1 specifically states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The associated commentary for the Model Rule also provides:

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence . . . .

       . . . .

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice,

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7. *Id.* at 1.
8. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 5, 8 (AM. BAR ASS'N 2016).

including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[9]

When lawyers represent clients, the Model Rules impose a threshold standard of competence in the engagement—there is no "caveat emptor" standard for legal work.[10] The Model Rules impose four measures of competence: the legal knowledge, skill, thoroughness, and preparation reasonably necessary to represent the client. Comment 5 clarifies what is reasonably necessary, requiring research and analysis into the relevant facts and law using the "methods and procedures . . . of competent practitioners."[11]

Comment 5 also makes clear that lawyers need not expend infinite resources in the pursuit of competence.[12] Comment 5 notes that the required effort and expense are driven in part by what is at stake in the matter.[13] It suggests something like the Learned Hand formula for negligence, only instead for professional responsibility: if the cost of a means of preparation (or the use of a technology) is less than the probability of it making a difference multiplied by the financial magnitude of that difference in the representation, it would be a breach of professional responsibility not to employ the means of preparation.[14]

Under the reasoning of Comment 5, if p represents the probability of making a difference, d represents the financial magnitude of the difference, and m represents the cost of the measure, then if $pd>m$, it would be a breach of responsibility not to employ the measure.[15] So if the measure has an extremely high price, a law firm would not have an obligation to employ it in low-stakes matters. Of course, as

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9. *Id.*

10. Spahn, *supra* note 6, at 2.

11. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 5 (AM. BAR ASS'N 2016).

12. *See id.*

13. *Id.*

14. *Id.*; Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 818 (2001).

15. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 5 (AM. BAR ASS'N 2016).

in measures of Hand-formula negligence, likelihoods and likely differences can be difficult to measure.

If it wasn't already clear, Comment 8 explicitly says that the duty of competence extends to technological competence.[16] For example, in a court that only accepted electronic filing, a lawyer who did not know how to use a computer would be required either to learn or to employ someone who could use a computer to file pleadings. Similarly, as the quality of work product created by lawyers augmented with AI surpasses the work created without AI, it is clear that lawyers will soon have a professional responsibility to employ new techniques.

An apparent example of this is in eDiscovery, which has been shown to surpass human review in both accuracy and recall.[17] For small litigation matters, eDiscovery may not be required.[18] But for larger matters, especially with large volumes of electronically discoverable information, it would not only be less expensive to review electronically, but it would also be more accurate, and lawyers would have a professional responsibility to use technology-assisted review, or "TAR," from an eDiscovery provider. This may be required by Rule 1.1, as well as by Rule 1.3's duty of diligence.[19]

The price for many AI services is already low and might be expected to decrease over time, which means that law firms may face a professional responsibility to employ state-of-the-art legal-research and drafting tools, at least where they show efficacy and become broadly used in the profession.[20]

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16. *Id.* cmt. 8.

17. Maura R. Grossman & Gordon V. Cormack, *Quantifying Success: Using Data Science to Measure the Accuracy of Technology-Assisted Review in Electronic Discovery*, in DATA-DRIVEN LAW: DATA ANALYTICS AND THE NEW LEGAL SERVICES 127, 142 (Ed Walters ed., 2019); McGinnis & Pearce, *supra* note 3, at 3048.

18. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 5 (AM. BAR ASS'N 2016); McGinnis & Pearce, *supra* note 3, at 3047–48.

19. MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.3 (AM. BAR ASS'N 2016). "A lawyer shall act with reasonable diligence and promptness in representing a client." *Id.* r. 1.3.

20. Erin Hichman, *Law Firms Need AI to Stay in the Game*, ALM INTELLIGENCE (July 2018), https://www.alm.com/intelligence/solutions-we-provide/business-of-law-solutions/analyst-reports/law-firms-need-artificial-intelligence-to-stay-in-the-game/ [https://perma.cc/KZT8-PA32].

Although AI tools are reasonably new to the world of legal research, new versions of legal research services, such as Westlaw, LexisNexis, and Fastcase, all incorporate elements of AI in the legal research tools.[21] These tools do simple operations, such as look up synonyms of search terms, interpret whether queries should be run as Boolean expressions or natural-language searches, and parse the meaning of natural-language queries.[22] AI tools rank search results across multiple dimensions, including using the aggregate history of past searchers to rank search results more intelligently for later researchers.[23] AI tools also provide the first pass of citator services, such as Shepard's, KeyCite, and Bad Law Bot.[24]

In addition, many legal research services, such as Casetext, Judicata, ROSS Intelligence, and vLex, now include brief-evaluation tools that use AI to analyze a brief, whether for a client or from an opposing party.[25] These services look at factors such as the procedural posture of the case, the pattern of citations, and even which citations may be missing.[26] They can evaluate strengths or weaknesses of a brief or pleading based on which claims are made or omitted. And, researchers at LegalMation have created document-automation tools that ingest complaints and with AI create the first draft of responsive pleadings, albeit for a small number of causes of action and in a small number of jurisdictions.[27]

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21. *Legal Technology, Tips, Tricks, & Treats 2018: Artificial Intelligence in Legal Research*, U. MINN. L. SCH., https://libguides.law.umn.edu/c.php?g=884434&p=6375963 [https://perma.cc/HX8F-M45U] (last updated Nov. 11, 2018, 11:45 PM).

22. *Id.*

23. NAT'L LEGAL RESEARCH GRP., INC., THE REAL IMPACT OF USING ARTIFICIAL INTELLIGENCE IN LEGAL RESEARCH 2, https://www.lawsitesblog.com/wp-content/uploads/sites/509/2018/09/The-Real-Impact-of-Using-Artificial-Intelligence-in-Legal-Research-FINAL2.pdf [https://perma.cc/L5GM-PSDQ] (last visited Apr. 9, 2019).

24. *See* Sheila Baldwin, *Fastcase's Newest Addition: Bad Law Bot*, GA. B.J., June 2013, at 62, 62 https://www.gabar.org/newsandpublications/georgiabarjournal/loader.cfm?csModule=security/getfile&pageID=26130 [https://perma.cc/LQB2-TX49].

25. Bob Ambrogi, *Vincent Joins CARA, EVA and Clerk as the Latest AI-Driven Research Assistant*, LAWSITES (Sept. 20, 2018), https://www.lawsitesblog.com/2018/09/vincent-joins-cara-eva-clerk-latest-ai-driven-research-assistant.html [https://perma.cc/45BE-WM8F].

26. *Id.*

27. LEGALMATION FAQ, https://www.legalmation.com/faq/ [https://perma.cc/3PXG-5F2J] (last visited Feb. 28, 2019).

Lawyers also have new opportunities to provide data-driven legal advice, especially using data analytics. Services such as Lex Machina and Ravel Law on LexisNexis, Westlaw Edge, and Docket Alarm on Fastcase provide empirical insights into judges, law firms, parties, and causes of action.[28] These services aggregate information from docket sheets, briefs, motions, pleadings, and judicial opinions to give quantitative, fact-driven assessments about litigation strategy.[29] Lawyers and their clients can use these tools to choose the most favorable forum in which to file suit, assess whether to pursue particular claims in front of certain judges, assess the settlement strategy of an opposing party, and much more.

These services are not science fiction—all of them today use AI techniques or data analysis to help lawyers improve their strategic decision making. Many lawyers are just learning about these tools for the first time, but if they are not yet the state of the art in legal-service delivery, it is clear that they soon will be the "standard of competent practitioners."[30] Indeed, in the near future, competent legal practice may be impossible without the assistance of machine augmentation:

> To remain successful and practice at the top of their licenses, lawyers are going to need increasingly powerful cognitive exoskeletons. Skillful non-biological helpmates may enable them to thrive as more and more free and low-cost services handle commodity work.
>
> We rightly marvel at the subtle power of the human mind, yet its non-biological progeny may outdo all but a vanishing few of its own capacities. . . . Lawyer time may be the whale oil of today's economy that is eclipsed by the

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28. *See* Matthew Hutson, *Artificial Intelligence Prevails at Predicting Supreme Court Decisions*, SCI. MAG. (May 2, 2017, 1:45 PM), https://www.sciencemag.org/news/2017/05/artificial-intelligence-prevails-predicting-supreme-court-decisions [https://perma.cc/H6GS-RHW7].

29. *See id.*

30. James Summers, *Professional and Ethical Traps for Technophobes and Technoweenies*, MEM. B. ASS'N J., Jan. 2004,
http://www.allensummers.com/sites/396/uploaded/files/Professional_Traps_Jan_2004.pdf [https://perma.cc/47L2-MVFP].

kerosene of intelligent legal knowledge tools.

Many lawyers implicitly assume that artisanal intransigence will prevail over AI . . . . Lawyers should embrace knowledge technologies as complements to professional service. Those technologies can be augmenters and accelerants, not just substitutes. If they learn to leverage machine intelligence, even average lawyers can outperform machine intelligence alone.[31]

For years, lawyers and law firms have considered their duties to clients to be a reason to be skeptical about new service providers. Their professional duties of confidential representation, for example, require them to carefully vet new tools for the delivery of legal services and to go slow in adopting new technologies. In this case, however, the Model Rules actually propel lawyers and their firms forward. Rule 1.1, read in conjunction with Comments 5 and 8, requires law firms to employ measures, including AI and data analytics, to ensure that they meet standards of reasonable competence in representation.

II. *Rule 1.6: Duty of Confidentiality*

Client-Lawyer Relationship

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation . . .

. . . .

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a

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31. Marc Lauritsen, *Toward a Phenomenology of Machine-Assisted Legal Work*, 1 J. ROBOTICS ARTIFICIAL INTELLIGENCE & L. 67, 78–79 (2018).

client.[32]

Lawyers for years have been using third-party tools to handle client data: from the early days of copying machines and fax machines, to computers and word-processing software, to hosted e-mail, practice-management software, and cloud computing. As with the older tools, lawyers and their firms will need to ensure the confidentiality of sensitive client information analyzed with AI.

Lawyers have been using AI in their practices for years. When Microsoft Word autocorrects a spelling error, it's using AI.[33] Computer scientists often quip that "once it works, we stop calling it AI."[34] So, we should not be considering whether or when law firms will use AI in their practices. Siri and Cortana use AI, as does optical character recognition, or "OCR."[35] Smart speakers, such as Amazon's Alexa, use AI to understand spoken language.[36] Lawyers already use AI all the time in performing legal services, even if the tools tend to fade into the background once they work. Our question shouldn't be "whether" or "when" lawyers will use AI in their practices, but instead to examine how and when lawyers use these services, and especially what client information passes through them.

Law firms are beginning to use AI tools to understand their own matter data, seeking to differentiate both their specialized in-house matter libraries, as well as to create new legal services with AI tools.[37]

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32. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016).

33. Ed Walters, *AI Practice, Not Promise, in Law Firms*, L. PRAC. MAG. (Jan. 1, 2019) https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2019/january-february/JF2019Walters/ [https://perma.cc/E2DT-SJMJ].

34. *Id.*

35. Kevin Murnane, *Dumb and Dumber: Comparing Alexa, Siri, Cortana and the Google Assistant*, FORBES (May 3, 2018, 8:00 AM), https://www.forbes.com/sites/kevinmurnane/2018/05/03/dumb-and-dumber-comparing-alexa-siri-cortana-and-the-google-assistant/#630d4d8936e7 [https://perma.cc/L9J9-GRU4]; *Optical Character Recognition*, ARTIFICIAL INTELLIGENCE BLOG, https://www.artificial-intelligence.blog/terminology/optical-character-recognition [https://perma.cc/YEX4-32EG].

36. Bernard Marr, *Machine Learning in Practice: How Does Amazon's Alexa Really Work?*, FORBES (Oct. 5, 2018, 12:01 AM), https://www.forbes.com/sites/bernardmarr/2018/10/05/how-does-amazons-alexa-really-work/#73b1a2ad1937 [https://perma.cc/GZL5-SHJF].

37. Ed Walters, *supra* note 33.

Law firms are using AI to understand the distribution of their costs when providing legal services to clients. Law firms are using AI to dig deeper into their client billing history to better understand the resources required to handle different kinds of client matters. Clients increasingly request fixed-fee engagements or alternative fee agreements from law firms.[38] But if those firms do not understand their costs, a fixed-fee engagement poses a serious risk of cost overruns borne by the firm.

So instead of hand coding and curating past bills, firms are using AI to understand the range and distribution of costs, computing the mean and median costs for similar matters, and looking for facts that create outlier conditions. Firms are using tools, such as Digitory Legal or Fastcase's AI Sandbox, to analyze their billing data in this way.[39] Understanding costs mitigates risk for clients and for law firms, and it can help those firms be more competitive when seeking new business.

Although some providers request that firms turn over their data for analysis, this is unlikely to be practical for law firms. The better practice is for firms to maintain control of sensitive client information and to conduct their own analysis. This analysis with AI tools need not be exclusively in "on-premises" servers or hardware; however, firms will likely wish to employ cloud-computing platforms for the simplicity of scaling server resources and storage. Law firms working on the cloud should insist on having exclusive access to servers to maintain the confidentiality of sensitive client information.[40]

Similarly, some AI tools are trained by the data they analyze.[41] Even if the software or API is run on a data set that remains within the control of the firm, it is possible that AI tools of general application could learn specific facts or patterns from client-sensitive

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38. *Id.*

39. *Id.*

40. John Reed Stark, *Law Firms and Cybersecurity: A Comprehensive Guide for Law Firm Executive Committees*, CYBERSECURITY DOCKET (2016), https://www.johnreedstark.com/wp-content/uploads/sites/180/2016/04/Law-Firm-Cybersecurity-Guide-Final-PDF.pdf [https://perma.cc/RCT5-FS6N].

41. Walters, *supra* note 33.

data.[42] The team at IBM Watson has worked to create learning modules called "cartridges" for certain types of legal inquiries.[43] But these cartridges are trained on law firm data, so it is important to understand what information, if any, is extracted from AI tools, and the software company's policy (if any) to destroy data such as uploaded briefs, to ensure that the lawyer or firm remains within their contractual or professional obligations of confidentiality.[44]

AI tools do not necessarily present a special risk when dealing with clients' confidential data. Law firms have conducted business over telephones and unencrypted e-mail for decades. Lawyers using an iPhone or commercial PBX systems passively use AI to transcribe voicemail from clients, for just another example.[45] AI tools don't create new rules or risks of confidentiality, but they do pose another area in which law firms should be conscious and analyze what information is being stored or transmitted, how it is used, and whether and when that information is destroyed. This may additionally present an opportunity for law firms to once again see AI services in use in their firm, especially those that the firm takes for granted or no longer sees.

III. *Duty of Good Faith*

Rule 3.1: Meritorious Claims & Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a

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42. Zainab Hussain, *The ABCs of Machine Learning: Privacy and Other Legal Concerns*, L. PRAC. TODAY, (June 14, 2017) https://www.lawpracticetoday.org/article/machine-learning-privacy-legal-concerns/ [https://perma.cc/BHB8-2ZPX].

43. Jordan Furlong, *Thinking Differently About Legal AI*, LAW TWENTY ONE (May 17, 2018) https://www.law21.ca/2018/05/thinking-differently-legal-ai/ [https://perma.cc/T9UC-NCZ].

44. JACKSON LEWIS, DATA PRIVACY AND SECURITY: A PRIMER FOR LAW FIRMS (May 2010), https://www.workplaceprivacyreport.com/wp-content/uploads/sites/162/2010/09/Data-Privacy-Primer-for-Law-Firms-Sept-2010-FINA.pdf [https://perma.cc/MA7Y-9U4W]; Furlong, *supra* note 43.

45. Geri L. Dreiling, *Voice-to-Text Transcription for Voice Mail*, LAWYERTECHREVIEW.COM (Feb. 8, 2011), http://lawyertechreview.com/2011/voice-to-text-for-voice-mail/ [https://perma.cc/D8ZL-EY7P].

good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.[46]

The Model Rules impose an ethical obligation on lawyers to understand the basis in law for legal arguments, and it prohibits law firms from using arguments that they know to be without merit.[47] As the rule states, a lawyer may request in good faith that a court extend, modify, or reverse existing law, or to prove every element of a criminal case.[48] However, a lawyer who asserts an argument that he or she knows to be frivolous will be in violation of the rules of professional conduct.[49]

In the past, lawyers have used legal research, citators, and treatises to understand whether arguments are good law or nonfrivolous.[50] They were obliged to analyze whether law was good in a particular court but in a general way—for all judges in any particular jurisdiction or court level.

Law firms are looking at litigation analytics more than ever to analyze the merits of arguments and litigation strategies—in no small part because the tools of analysis are improving quickly.[51] For example:

> Tools from the recently launched Lexis Analytics and from Docket Alarm give a deeper look than ever at the strategies, judges, and law firms that help firms to understand litigation outcomes. Formerly the domain

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46. MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2016).
47. *Id.*
48. *Id.*
49. *Id.*
50. Walters, *supra* note 33.
51. *Id.*

of federal courts only, these tools are now expanding into state courts as well.

Markets may drive this trend toward a deeper understanding of legal analytics. Clients need better information to make strategic decisions about litigation, and they are becoming increasingly sophisticated about pricing risk. In addition, litigation financing companies will have hundreds of millions of dollars at stake, so they will demand that firms are using analytics to understand the risks at trial.[52]

In addition to these gains, lawyers have an increasing capacity to understand how individual judges are likely to rule in a case or whether certain motions are likely to be granted.[53] Today these tools are mostly descriptive; that is, they explain what has happened in similar cases in the past.[54] Future tools will be more predictive, describing what is likely to happen in a particular case in the future.

Lawyers have new probabilistic tools to analyze whether their clients are likely to prevail at trial, but the rules do not give clear guidance about how they should use them and what should be considered frivolous under the Model Rules.[55] When a lawyer receives a settlement offer that is in the ninety-first percentile of settlements in similar cases, does she have an obligation to recommend settlement to a client? What if the chances of winning at trial are 26%? Does that increase the obligation to settle a case?

It is not far-fetched to imagine that AI tools will analyze causes of action, briefs, motions, and settlements in the future and make predictive recommendations. Although lawyers may often agree with these recommendations, there will certainly be occasions when the lawyer disagrees.[56] When AI is sufficiently skilled at making

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52. *Id.*

53. *Id.*

54. *Id.*

55. Sarah McCormick, *The Use of AI in Predicting Legal Outcomes*, LEGAL BUS. WORLD (Feb. 10, 2017) https://www.legalbusinessworld.com/single-post/2017/02/10/The-Use-of-AI-in-Predicting-Legal-Outcomes [https://perma.cc/88PN-H3D8].

56. Walters, *supra* note 33; *see* Jason Millar & Ian R. Kerr, *Delegation, Relinquishment, and*

predictive recommendations, conflicts between expert lawyers and expert analytics are likely to create new ethical conflicts as well as malpractice insurance issues. Will malpractice insurers raise rates on lawyers who advise clients not to follow the advice of machines that have very high rates of accuracy?

What about lawyers who advise clients based on the ill-advised recommendation of expert AI or data analytics? Just as very good autonomous cars can make mistakes that human drivers would not, predictive AI will become very good at its job.[57] It will also make mistakes and maybe even some mistakes that lawyers would not. Malpractice insurers (and perhaps the Model Rules) may create incentives for lawyers to advise in accord with expert AI systems, but that may create negligence liability for law firms.

As predictive AI and expert systems get better, Model Rule 3.1 may seek to create a safe harbor for lawyers who advise their clients with the assistance of expert systems. Individual cases may offer the opportunity for courts to create a common law of probabilistic reasonableness, when the predicted odds become so long that there is not a reasonable basis in fact to think it will be successful. In addition, malpractice insurers and rule makers should be careful to give guidance for lawyers about when it is ethical to trust automated systems and when those lawyers should override the recommendation of a software system in advising a client.

IV. Rule 5.1: Duty of Supervision

Rule 5.1 provides:

> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving

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Responsibility: The Prospect of Expert Robots, *in* ROBOT LAW 102 (Ryan Calo, A. Michael Froomkin, & Ian Kerr eds., 2013).

57. *See* Walters, *supra* note 33.

reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.[58]

Rule 5.1 establishes that partners and managers of law firms take reasonable efforts to ensure that lawyers make sure that the lawyers they manage conform to the requirements of the Model Rules.[59] Lawyers obviously cannot shirk their professional responsibilities when their teammates break the rules.

When lawyers use expert systems in the practice of law, such as software that assists lawyers in drafting a pleading, these AI tools will perform tasks that previously were handled only by lawyers. This also raises UPL issues that the next section addresses. The Model Rules say nothing about the responsibility of a lawyer to make sure that software she manages conforms to the Rules of Professional Conduct, but the rationale would be no different.

When a law firm uses software instead of people in part (or in all) of the legal-service delivery, that firm would presumably have the same professional responsibility to ensure that the software comports with the rules—for example protecting client confidentiality, not making frivolous arguments, or not making false statements to the tribunal.[60] Presumably a court that received a pleading with a false statement or with a frivolous argument would not care whether the document was prepared by AI or by an associate at the firm. The managing partner of the firm would be responsible to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional conduct."[61]

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58. MODEL RULES OF PROF'L CONDUCT r. 5.1 (AM. BAR ASS'N 2016).
59. *Id.*
60. MODEL RULES OF PROF'L CONDUCT r. 1.6, 3.1, 3.3 (AM. BAR ASS'N 2016); *see* Spahn, *supra* note 6.
61. MODEL RULES OF PROF'L CONDUCT r. 5.1 (AM. BAR ASS'N 2016).

Without resorting to calling the software a "robot lawyer," it would be a natural extension of the rule to require law firms to make the same reasonable effort to ensure that the software conforms to the Rules of Professional Conduct. On the other hand, it will be very difficult for law firms to understand whether software is conforming to the rules. Law firms cannot do a forensic examination of all the software they use in the firm.

Rule 5.1(b) requires only that the managing lawyer make "reasonable efforts," and it would be unreasonable to expect a lawyer to inspect the code base of the software the firm employs.[62] A reasonable safe harbor in a circumstance like this would be for software to have the imprimatur of an industry group or a certification of accuracy. However, no certification group currently exists. Malpractice insurers may have an incentive to set up a testing consortium as legal software takes on more tasks previously reserved for human lawyers to create a safe harbor for malpractice claims against lawyers and firms that use tested and certified software.[63]

V. Rule 5.5: Unauthorized Practice of Law

Rule 5.5(a) specifically provides, "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." Comment 2 further provides:

> The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for

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62. *Id.*
63. Walters, *supra* note 33.

their work. *See* Rule 5.3.[64]

The Model Rules prohibit lawyers from violating the law of a jurisdiction, for example practicing before a court without a license from that court, which could make it seem like the UPL rules only apply to lawyers.[65] On the contrary, almost every state has a statute or regulation prohibiting someone who does not have a law degree from engaging in the practice of law.[66] The penalties for violating UPL rules can be severe, ranging from fines to criminal charges.[67] Two-thirds of states have made UPL a criminal misdemeanor, and in a few states it is a felony.[68]

Statutes in all fifty states seek to protect consumers by requiring that legal services are only delivered by lawyers who have attended an accredited law school, passed the bar exam, and passed a character-and-fitness review.[69] By providing legal information and advice directly to consumers without going through an attorney, it is possible that software services are "practicing law" without a license. Moreover, as computers get smarter and software becomes more and more capable, AI is likely to encroach more into what would traditionally be considered legal practice.

Although software might violate UPL rules, it is not at all clear which software and which services would do so, and in which states. There is no universal standard for what constitutes "the practice of law" in the United States. Instead, UPL rules are set by a patchwork quilt of regulations, state statutes, case law, bar ethics committee opinions, and attorney general opinions.[70] Each state has its own

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64. MODEL RULES OF PROF'L CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS'N 2016).

65. *Id.*; Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2581 (1999).

66. *See* AM. BAR ASS'N, *Appendix A: State Definitions of the Practice of Law*, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/model_def_statutes.pdf [https://perma.cc/V79V-NV3N]; Denckla, *supra* note 65.

67. Denckla, *supra* note 65, at 2585.

68. *See, e.g.*, N.Y. EDUC. LAW § 6512 (McKinney 2019) ("Anyone not authorized to practice under this title who practices or offers to practice or holds himself out as being able to practice in any profession in which a license is a prerequisite to the practice of the acts, . . . or who aids or abets an unlicensed person to practice a profession . . . shall be guilty of a class E felony.").

69. *See* MODEL RULES OF PROF'L CONDUCT r. 5.5 (AM. BAR ASS'N 2016).

70. *See, e.g.*, *id.*; EDUC. § 6512.

standards and its own understanding of what constitutes unauthorized practice, and those standards are rarely well-defined. States generally restrict activities such as representing clients in court, drafting paid legal documents, or signing opinion letters as the "practice of law," but the rules in each state vary greatly.[71]

The Model Rules of Professional Responsibility Rule 5.5, Comment 2, states the conundrum well: "The definition of the practice of law is established by law and varies from one jurisdiction to another."[72] The Restatement (Third) of the Law Governing Lawyers goes further to say that "the definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas."[73]

For example, in 1997, the Unauthorized Practice of Law Committee of the State Bar of Texas brought suit against Parsons Technology, maker of the CD-ROM Quicken Family Lawyer, claiming that the company's library of computerized, fillable legal forms constituted the practice of law.[74] The court in that case found that the Quicken Family Lawyer program did constitute UPL, holding that the software purports to select the correct legal form, customizes the document, and "creates an air of reliability about the documents, which increases the likelihood that an individual user will be misled into relying on them."[75] It was only after a lobbying campaign by Parsons Technology that the Texas legislature amended its UPL statute to make clear that software such as Quicken Family Lawyer did not constitute the practice of law.[76]

Many states, such as New York and Massachusetts, do not consider basic form-filling to be law practice at all and allow

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71. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 5.5 (AM. BAR ASS'N 2016).

72. *Id.*

73. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 (AM. LAW INST. 2000) cmt. c.

74. Unauthorized Practice of Law Comm. v. Parsons Tech., No. Civ.A. 3:97CV–2859H, 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999).

75. *Id.* at *6.

76. Unauthorized Practice of Law Comm. v. Parsons Tech., 179 F.3d 956, 956 (5th Cir. 1999).

unlicensed people to assist consumers with many forms directly.[77] Other states leave ambiguous when software constitutes UPL or have not yet faced the question.[78]

The lack of clear guidelines and uniformity has the potential to create a chilling effect on innovation and access-to-justice efforts. Software developers can never really know whether they are violating UPL statutes in their state. And if they are deemed not to violate the UPL laws of one state, they would still be subject to ambiguous and different UPL statutes of the other forty-nine states, plus the District of Columbia.

So, although software has great potential to help close the access-to-justice gap, the risk of criminal penalties, combined with uncertainty about what is permitted, may well deter many otherwise-enthusiastic developers from even trying to enter the market. Thus, in their current nonstandard and ambiguous form, UPL statutes represent a daunting obstacle to those who would address the access-to-justice gap with software.

UPL rules serve an important purpose of protecting clients from receiving ill-informed or incompetent legal representation. The interest they are designed to protect is that of the consumer in need of sound legal advice, not that of lawyers concerned about disruption in the industry. Of course, there is room for legitimate concern that some software companies may have low standards and will provide bad legal advice. Consumers need to be protected against potentially faulty software every bit as much as they need to be protected against unqualified human advisers.[79] Unfortunately, the current system disincentivizes all legal-software development, both the good and the bad, because it focuses on who can give legal advice rather than how development can affect the quality of legal services that are provided for clients.

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77. MASSACHUSETTS RULES OF PROF'L CONDUCT r. 5.5 (MASS. SUPREME JUDICIAL COURT).

78. Robert Ambrogi, *Latest Legal Victory Has LegalZoom Poised for Growth*, ABA JOURNAL (Aug. 2014),
http://www.abajournal.com/magazine/article/latest_legal_victory_has_legalzoom_poised_for_growth [https://perma.cc/3PKX-EY3N].

79. *Id.*

CONCLUSION

The Model Rules are an important framework to protect consumers of legal services. Historically, states sought to govern the accreditation and conduct of lawyers, requiring that they conduct their business following a code of conduct that protected their clients.[80] In this history, however, many people have been excluded from legal services.[81] AI and data analytics hold out the promise of a new era of legal services. Rules-based AI systems can provide one-to-many legal assistance, and data-driven legal analytics can provide new insights to clients. In many cases, such as duties of confidentiality, the text of the Model Rules, or a simple application of the rationale behind the text, will also protect consumers of legal services.

However, in some cases, the Model Rules may need an update, in particular with respect to UPL. This article does not argue for robot lawyers or a displacement of lawyers—far from it. It does suggest, however, that lawyers and others increasingly will provide legal services with software and that new protections will be necessary to protect consumers. It will be important as well to define more clearly what constitutes the "practice of law" so that innovators and law firms alike will have safe harbors for innovation.

Special problems remain for AI in the practice of law. In particular, when AI tools reach conclusions, they should be able to explain to lawyers and judges how they did and on what data they relied so that lawyers can exercise their duties of supervision. Lawyers and judges cannot protect clients from bias, for example, if their AI is little more than a "black box" producing legal conclusions.

The Model Rules do not prohibit the use of AI or data analytics; in fact, the Rule 1.1 duty of competence and the Rule 1.3 duty of

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80. MODEL RULES OF PROF'L CONDUCT preface (AM. BAR ASS'N 2016).

81. Selina Thomas, *Rethinking Unauthorized Practice of Law in Light of the Access to Justice Crisis*, 23 PROF. LAW., no. 3, 2016, at 1, https://www.americanbar.org/content/dam/aba/publications/pro fessional_lawyer/volume_23_number_3/ABA_PLN_v023n03_04_rethinking_unauthorized_practice_la w_light_access_justice_crisis.authcheckdam.pdf [https://perma.cc/X3CE-82XK].

diligence increasingly will *require* lawyers to use these tools.[82] Where the Model Rules may have served as an impediment for lawyers to experiment in the past, increasingly they will be a catalyst moving lawyers into the data-driven practice of the future. Where AI and data can provide empirical, objective answers to questions, it may no longer be ethical for law firms to employ conjecture (at best) or hunches (at worst) in delivering legal services to clients. Far from prohibiting AI and data analytics, the Model Rules increasingly may require their use.

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82. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.3 (AM. BAR ASS'N 2016).

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