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January 2024 *Multnomah Lawyer Ethics Focus*

New Year, New Tech: Competence and Confidentiality

Mark J. Fucile
Fucile & Reising LLP

In what *The New York Times* described as a "cringe-inducing court hearing," a New York law firm and two of its principals were sanctioned this past year by a federal court in Manhattan for submitting a brief written by ChatGPT that included citations that the artificial intelligence "chatbot" simply made-up. The lawyer primarily responsible for the brief conceded that he simply assumed the citations were correct and did not check them himself. The other lawyer then signed the brief without verifying the citations either. The court was not amused. It held the lawyers' firm jointly liable along with the lawyers for the monetary sanction imposed.

The court in *Mata v. Avianca, Inc.*, 2023 WL 4114965 (S.D.N.Y. 2023), noted that "[t]echnological advances are commonplace." At the same time, the court also underscored that lawyers using technology remain responsible both for doing it competently and for the end product. In this column, we'll first discuss the duty of competence in the context of law firm technology. Because evolving law firm technology often involves the storage and transmission of client information, we'll then turn to the interplay between technology and the duty of confidentiality.

With both, we'll focus on the Rules of Professional Conduct. That said, failure to maintain necessary competence or negligently mishandling sensitive client information invites civil damage claims for legal malpractice. Oregon Uniform Civil Jury Instruction 45.04 on the standard of care for attorney negligence frames our duty this way: "An attorney has the duty to use that degree of care, skill, and diligence ordinarily used by attorneys practicing in the same or similar circumstances in the same or similar community." Similarly, statutory law beyond the RPCs potentially comes into play if client confidential information is involved in a data breach or other cybersecurity incident. ABA Formal Opinion 483 (2018) canvases this topic at length and is available on the ABA web site.

Competence

It shouldn't be surprising that the duty of competence is the first substantive rule in the RPCs. Oregon RPC 1.1 is patterned on its ABA Model Rule counterpart and summarizes this basic duty:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment 8 to ABA Model Rule 1.1 includes staying current with any technology a lawyer uses in practice:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology[.]

Although Oregon's RPCs do not have comments, Oregon authority is along the same lines—with, for example, OSB Formal Opinion 2011-187 (rev. 2015) on "metadata" noting that lawyers exchanging electronic documents have a responsibility under RPC 1.1 to understand the technology sufficiently to protect the inadvertent disclosure of client confidential information.

Another Oregon State Bar opinion—2011-188 (rev. 2015)—on cloud storage stresses that lawyers do not necessarily need to become experts on the technology they use as long as they obtain appropriate training or consult with internal or independent technical help to use the technology involved consistent with our duties as lawyers. As the *Mata* decision illustrates, however, using technology without adequately understanding it is not an excuse.

Confidentiality

Many developments in law firm technology interface with our duty of confidentiality under RPC 1.6. The two Oregon State Bar opinions noted earlier are ready examples. With metadata, lawyers have a duty to protect client

confidential information that may be included in electronic subfiles—such at attorney-client communications reflected in "track changes" to a contract being negotiated—before sharing the document involved with an opposing party. With cloud computing, lawyers have a duty to take reasonable steps to protect client confidential information during both the transmission between the lawyer and the cloud and during storage in the cloud.

RPC 1.6(c), which is also based on its ABA Model Rule counterpart, is not limited to technology but speaks to it:

> A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or authorized access to, information relating to the representation of a client.

Comments 18 and 19 to ABA Model Rule 1.6 amplify this duty and through their section title underscore the close connection to competence: "Acting Competently to Preserve Confidentiality." Comment 18 emphasizes that our duty is to take reasonable precautions to protect client confidential information—although it counsels that a client may require additional safeguards. Comment 19 then explains that what is "reasonable" depends on the circumstances and ordinarily includes a balance between the means chosen and the sensitivity of the information. ABA Formal Opinions 99-413 (1999) on email and 477R (2017) on data transmission reflect this general approach. ABA

Formal Opinions 498 (2021) and 507 (2023), in turn, apply these concepts to, respectively, "virtual" practice and office-sharing that have become increasingly common in the wake of the Covid-19 pandemic. All merit careful review—especially for lawyers or firms operating in "hybrid" or "remote" settings where the technological infrastructure found in traditional "brick and mortar" offices is often different.

Summing Up

Although the *Mata* decision we opened with involved an emerging technology, the court's analysis applies to any law practice technology: if you are using technology, you need to understand it because you are responsible for the results.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-

house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.