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Using Virtual Assistants in Law Practice: Risk Management Considerations

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Virtual assistants are nothing new. Some are software-centric, such as web or phone apps. Others are hardware devices, such as "smart speakers." Using them in law practice is not new either. Their re-emergence as artificial intelligence tools, however, has refocused attention to the risk management considerations when using them in law practice. Most of the current focus is on competence and confidentiality and we'll discuss those twin threads today. As AI-enabled virtual assistants evolve, however, lawyers need to remain attentive to changing risks as well.

Although virtual assistants increasingly use human voices, there is one rule we won't be talking about today: RPC 5.3, which is entitled "Responsibilities Regarding Nonlawyer Assistance." Oregon's rule is based on a mixture of the former Oregon Code of Professional Responsibility and the corresponding ABA Model Rule. All of them, however, address human assistants—at least for now. Virtual assistants, by contrast, are currently addressed primarily through our duties of competence and confidentiality when using technology.

Competence

RPC 1.1 outlines the regulatory duty of competence:

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

Uniform Civil Jury Instruction 45.04 frames the corresponding notion in terms of the civil standard of care:

> 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.

From either perspective, the idea is simple: we need to know what we are doing. That includes understanding the technology we use in law practice.

When the ABA updated the Model Rules in 2012 to reflect evolving law practice technology, it included staying current with applicable technology within the obligation to maintain competence:

> 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 does not have comments to our RPCs, OSB Formal Opinion 2011-188 (rev. 2015), which addresses cloud file storage specifically and

law practice technology generally, essentially makes the same point. The Oregon opinion is available on the OSB web site.

When it comes to virtual assistants, a pair of cases that garnered national media attention provide cautionary examples. *Mata v. Avianca, Inc.*, 678 F. Supp.3d 443 (S.D.N.Y. 2023), and *People v. Crabill*, 2023 WL 8111898 (Colo. Nov. 22, 2023) (unpublished), both involved lawyers who used ChatGPT as a virtual assistant to research and write briefs the lawyers filed with courts without checking the case citations. In both instances, the chatbot made-up multiple citations. When the non-existent citations surfaced, both lawyers claimed they didn't understand how ChatGPT worked. The lawyer in *Mata* was sanctioned while the lawyer in *Crabill* was disciplined under the Colorado version of RPC 1.1.

Mata and *Crabill* offer sobering examples of what *not* to do. They underscore that although there is nothing inherently wrong with using a virtual assistant, the lawyer-user is responsible for both understanding how it works and for its results. They also make the point that if a lawyer does not understand the technology the lawyer plans to use, the lawyer needs to seek out the resources—within or outside the lawyer's firm—necessary to use the technology in keeping with the duty of competence.

Confidentiality

RPC 1.6(a) states our bedrock duty of confidentiality:

> A lawyer shall not reveal information relating to the representation of a client[.]

RPC 1.6(c), in turn, notes that the duty of confidentiality includes taking reasonable steps to protect client information from unauthorized disclosure:

> 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 client.

With both, the term "information relating to the representation of a client" is defined broadly by RPC 1.0(f) to include both privileged conversations and other information that "the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Mata again provides a useful example of what *not* to do. The lawyer used the "free" version of ChatGPT that includes a prominent warning that a user's prompts are not confidential. Nonetheless, the lawyer fed an increasingly specific series of prompts into the chatbot that arguably revealed client confidential information. OSB Formal Opinion 2011-188 counsels that when using any product or service with which client confidential information is shared, the responsibility is on the lawyer to ensure that the vendor has contractual

assurances of confidentiality consistent with our duty as lawyers. Although the Oregon opinion focused on electronic file storage, that principle applies with equal measure to virtual assistants. ABA Formal Opinion 498 (2021) made a similar point with virtual assistants that are "always listening" so they can respond to voice prompts. With some products, the information is shared with the vendor. The ABA opinion noted that if used in law practice, privilege might be waived and advised that the "always listening" function be disabled absent contractual assurances of confidentiality by the vendor. Again, the obligation is on the lawyer to understand the technology and to use it consistent with the duty of confidentiality.

ABOUT THE AUTHOR

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