UNDERSTANDING THE ETHICAL OBLIGATIONS OF USING ARTIFICIAL INTELLIGENCE

"I'm sorry Dave, I'm afraid I can't do that."

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I.   **Introduction**

Before we talk about ethical obligations that arise with Artificial Intelligence ("AI"), we need to know what we are talking about. Let's first talk about algorithms. An algorithm is a set of instructions which are carried out mechanically, so that a result can be obtained. It is a type of formula.

Machine learning, another term you need to understand, is when computers use rules ("algorithms") to analyze data and learn patterns to obtain information from the data. In effect, the computer teaches itself and learns from its experience. Because it can learn from its experience it will constantly increase its capabilities. AI is the creation of computer programs that do tasks that normally require human intelligence. One author has defined AI as "…whatever computers can't do until they can…"[1]

Most of you use one or more of the commercial providers of legal research: Westlaw, LexisNexis and Fastcase. All of them utilize machine learning to provide both analysis and recommendations. Interestingly, the search results for a similar search vary significantly. This difference is a function of the difference in the algorithms, which power each product. Fundamentally, since the algorithms are created by human beings who each make choices on how the algorithms work those choices have implications for the results of any particular search. Those choices create the biases and assumptions that are built into the systems.

Another area where AI is being used is in electronic discovery. This is the process where computers search a database for keywords that the searcher has identified as relevant. This process uses predictive coding of algorithms, which will find specific words and phrases in various configurations.

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[1] Designing AI to Make Decisions, Harvard Business Review, Aug 10, 2018 interview of Kathryn Hume.

Additionally, legal analytics uses AI to make predictions or identify trends from data sets. It can predict how specific judges will decide cases and provide the attorney with recommendations for arguments tailored to a specific judge. There is a product called ROSS that can conduct online legal research and analysis using natural language.

Kira, another AI system, conducts automated contract analysis and data extraction in the due diligence process of mergers and acquisitions. These are just some of the early applications of AI to the practice of law. What is certain is that its use will expand. This expansion raises many ethical issues that must be addressed. This paper will discuss several of the most significant Rules of Professional Conduct impacted by AI.

II.   Rules of Professional Conduct

A.   Rule 1.1 – Competent Representation

i.   Rule 1.1 – Competent Representation

ABA Model Rule of Professional Conduct 1.1 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.

Louisiana's Rules of Professional Conduct are identical. However, the drafters of Louisiana's rules did not adopt the comments to the Model Rules. Comment 8 to Model Rules of Professional Conduct 1.1 states that competent representation requires an attorney "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,* engaged in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject."

Technological competence is now specifically identified as a feature of modern law practice.

ii. *State Comparison*

Other states have also amended their ethics rule to reflect technological advancements. Delaware, for example, amended its model rules to include Comments about technology and the Supreme Court created a Commission on Law and Technology to educate the bench and bar on matters related to technology and the amended rules.[2]

In September 2016, Florida amended its Rules of Professional Conduct and now its version of Rule 1.1 provides that competent representation may involve a lawyer's association with or retention of a nonlawyer adviser with established technological competence.[3] It also requires that a lawyer's responsibility to maintain competence includes "…an understanding of the benefits and risks associated with the use of technology…."[4]

In addition, Rule 1.1 also now requires that Florida lawyers must take at least three hours of CLE in an approved technology program over a three-year period.[5] At this time at least 31 states have adopted rules for the ethical duty of technological competence. California issued an opinion concerning technological competence in e discovery. The opinion provided three choices to an attorney when presented with unfamiliar technology:

1) She can become familiar with the technology.

2) She can consult with or assign to someone who is familiar with the technology

3) She can decline to represent the client.

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[2] Delaware Supreme Court, "Rules of the Commission on Law and Technology."
[3] Florida, "Florida Rules of Professional Conduct", R. 1.1.
[4] Florida, "Florida Rules of Professional Conduct", R. 1.1.
[5] Florida, "Florida Rules of Professional Conduct", R. 1.1.

iii.   Implications re: AI

Since an ever-increasing reliance on the use of algorithms is occurring, lawyers will need to have competence in the use of algorithms. Westlaw, LexisNexis and Fastcase all use search algorithms. It is the algorithms that identify the cases deemed relevant. As such, most lawyers don't know how the algorithms generated the results.

The Washington Bar Association has opined that "a lawyer using [a third-party] service must…conduct a due diligence investigation of the provider and its services and cannot rely on lack of technological sophistication to excuse the failure to do so."[6]

As sophisticated tools, such as ROSS, get wider use and attorneys become more comfortable with the results as being trustworthy will lawyers eliminate their verification on other research platforms? Will that be considered unethical practice since the lawyer would no longer be making an independent professional judgment before advising a client?

At the end of the day, competence requires that an attorney understand the information they rely upon and must give clients advice that represents the attorney's independent and educated judgment.

B.   Rule 1.5 – Fees & Expenses

i. Rule 1.5 – Reasonable Expenses

The next rule we will discuss is Rule 1.5 regarding charging clients for the initial investment and use of AI.

ABA Model Rule 1.5 states that a lawyer ***shall not charge or collect*** an unreasonable fee or ***an unreasonable amount for expenses***, and must take into consideration, among other things; (1) the ***time and labor*** required, difficulty of the questions involved and the ***skill necessary to***

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[6] Wash. Bar Ass'n Comm on Prof'l Ethics, Op. 2215 (2012).

perform the services properly; (2) *fee customarily charged* in that *location* for similar services; and (3) the *volume* of the services involved and the *results obtained*.[7]

Comment 1 to the RPC 1.5 explains an attorney's fees and expenses charged to the client must be "reasonable under the circumstances."[8] Comment 1 further states that a lawyer can seek reimbursement for in-house costs, such as copying, telephone charges by charging an amount previously agreed to by the client or charging "an amount that reasonably reflects the cost incurred by the lawyer."[9]

ii. State Comparison

The case law discussing Rule 1.5 typically addresses excessive fees and failure to refund unearned fees. There is a lack of cases discussing the cost and expenses related to computer programs and AI specifically.

iii. Implications re: AI

This poses the question: How do attorneys charge clients for AI?

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[7] Model Rule 1.5 states, in pertinent part:
 (a) *A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.* The factors to be considered in determining the reasonableness of a fee include the following:
(1) *the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;*
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) *the fee customarily charged in the locality for similar legal services;*
(4) *the amount involved and the results obtained*;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.
[8] MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. 1 (Discussion Draft 1983).
[9] [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

To comply with the rule, one cannot charge the client excessive fees. In the context of AI, what is considered excessive? The different available AI programs have varying costs and the initial decision for each lawyer is which program is most helpful for his/her practice. However, she must also take into consideration how she will charge her clients for this cost.[10]

Are fees excessive if a lawyer chooses to charge a regularly hourly rate in lieu of using AI, which could perform the same job more efficiently? For example, instead of utilizing an associate to review a large amount of documents from opposing counsel to find important information that may take a few weeks or months, an AI program could perform that same search in a few minutes. To ensure the lawyer is complying with the rule and not charging excessive fees, what is the balance between using human power, or the power of computer algorithms?

The firms could choose to charge clients for AI similar to how they charge for legal research programs, like Westlaw and Lexis.[11] Whether they charge clients for the out of pocket cost or obtaining client consent to charge a reasonable markup for these services is a decision each lawyer or firm must decide going forward.

A lawyer may choose to charge for use of the AI programs by the hour, by a percentage or another cost structure, but he/she must compare/balance the decrease in attorney time on a file versus increased up-front costs for investment in AI technology. In either case, the attorney should discuss all costs and expenses with a client in advance of or at the beginning of the representation to avoid or minimize disputes.

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[10] *See* ABA Model Rule 1.8(e) allowing lawyers to advance reasonable court costs and expenses of litigation.
[11] Simon, Roy D., *Artificial Intelligence, Real Ethics*, 90 APR N.Y. ST. B.J. 34 (2018); *see also*, ABA Comm. On Prof'l Ethics & Grievances, Formal Op. 93-393 (1993)("Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass 'ethical muster' but, absent the client's agreement, a lawyer may not 'create an additional source of profit for the law firm' by charging above cost for computer research services or other non-legal services.")

C.   Rule 1.6 – Confidentiality of Information

i.   Rule 1.6 – Confidentiality

ABA Model Rule 1.6 states, in pertinent part:

> ***(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 client.***

Comments 18 and 19 to RPC 1.6 mandates that attorneys safeguard client information "against unauthorized access by third parties" or inadvertent disclosures by the attorney or persons supervised by the attorney.[12] Importantly, an attorney is not deemed to be in violation of RPC 1.6(c) if she employs "reasonable efforts to prevent the access or disclosure" of information related to her representation.[13] The comment also references RPC 1.1, discussed previously, and RPC 5.1 and 5.3 regarding responsibility of the supervision of lawyers and non-lawyer assistants, which we will cover in a moment.

There are several factors that determine what is reasonable under this rule:

1) Sensitivity of the information;
2) Likelihood of disclosure if additional safeguards are not used;
3) Cost of those additional safeguards;
4) Difficulty of safeguard implementation;
5) Whether implementation of these safeguards have an adverse impact on the lawyer's ability to represent her clients. For example, if the software is "excessively" difficult to use.

Of course, the client can either require the lawyer to implement additional security measures or waive the security measures that Rule 1.6 requires.

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[12] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 18, 19 (Discussion Draft 1983).

[13] MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (Discussion Draft 1983).

ii.   State Comparison

In 2017, New York amended its rules of professional conduct, and now requires lawyers to make "reasonable efforts" to protect confidential information against:

1) Inadvertent disclosure or use;
2) Unauthorized disclosure or use; and
3) Unauthorized access (e.g., hacking from outside or inside the firm).[14]

In an Illinois case, the state's supreme court opined that an attorney's efforts were "reasonable" in light of documents that were inadvertently produced because he supervised his non-lawyer assistants, and conducted an independent review of the relatively small number of documents produced. *Coburn Group LLC v. Whitecap Advisors, LLC*, 640 F. Supp. 2d 1032, 1038-40 (N.D. Ill. 2009). In contrast, an Ohio court held attorney's efforts were not reasonable due to the large number of documents disclosed and the attorney's failure to prepare a privilege log. *Inhalation Plastics Inc. v. Medex Cardiopulmonary Inc.*, 2012 WL 3731483 at *3-6.

The California State Bar issued an opinion stating an attorney that is not competent in e-discovery issues must either: (1) acquire the necessary expertise, associate or consult with others who are competent; or (2) decline the representation.[15]

iii.   Implications re: AI

Rule 1.6 has considerable implications when utilizing AI—namely, the security measures built into those programs. It is crucial to keep security at the top of your list of non-negotiables when vetting different companies and the AI programs each offer. Ask questions regarding the individuals or other entities that have access to the system, whether security is in-house or outsourced to third parties, identification of others who may assist the AI company in marketing,

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[14] Simon, Roy D., *Artificial Intelligence, Real Ethics*, 90-APR N.Y. St. B.J. 34 (2018).
[15] Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 11-0004.

programming, etc. As with any decision to hire business associates, there must be a level of assurance and confidence that the company has taken all available precautions to protect client information. Just as you would research an attorney you may want to hire, due diligence will go a long way to reduce risks of a security breach, although it is doubtful any company can provide a 100% guarantee a breach will never occur. All the rule requires is "reasonable measures," and what is reasonable will be evaluated on a case-by-case basis.

D.   Rule 2.1 – Advisor

i.   Model Rule 2.1- Advisor

Rule 2.1 mandates that a lawyer "***exercise independent professional judgment and render candid advice.***"   The advice may be based not only on the applicable law, but on other considerations, "***such as moral, economic, social and political factors, that may be relevant to the client's situation.***"[16]

Comment 1 to RPC states plainly a client is owed "straightforward" advice based on the ***"lawyer's honest assessment[.]"*** even if that advice will be uncomfortable or "unpalatable to the client."[17] "The rationale behind this rule is that a lawyer's autonomy is worthy of respect, and that lawyers are in the best position to judge how to proceed because they know enough about the facts of the case to make individualized decisions."[18]

ii.   State Comparison.

There is a notable lack of discussion of Rule 2.1 regarding the topic of artificial intelligence and the risk of lawyers allowing their reliance on AI to cloud their judgment when rendering legal advice, which may be more dependent on AI outputs, rather than based on independent judgment.

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[16] MODEL RULES OF PROF'L CONDUCT R. 2.1 (Discussion Draft 1983).
[17] MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 1 (Discussion Draft 1983).
[18] Medianik, Katherine, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1496 n. 120 (2018).

iii. Implications re: AI.

The use of AI will necessarily affect a lawyer's independent professional judgment if he/she relies too heavily on information provided by AI and the imbedded algorithms, which were initially developed by humans. The concern is lawyers may fail to exercise this independent judgment by trusting, and not verifying, outputs of AI, rendering their judgment something other than independent.

Additionally, AI cannot consider nonlegal factors, such as morals, economics and politics,[19] all human factors outside the capabilities of algorithms, at least for now.

Again, to avoid possible violation of RPC 2.1, it is necessary that lawyers confirm the accuracy and reliability of information provided by AI technology and should "use AI outputs as starting point, and [then] apply his or her own independent judgment to supply client[s] with relevant advice"[20] particular to each client's case. In essence, AI can be used to guide lawyers in the right direction, but it must be the lawyer's own judgment as to how to proceed down that path.

E. Rule 5.1 – Responsibilities of Partners, Managers, and Supervisory Lawyers

i. ABA Model Rule 5.1

Rule 5.1 requires attorneys with either managerial authority in a firm, or one with "direct supervisory authority over another lawyer" to ensure those they are supervising conform to the Rules of Professional Conduct.[21] Thus, internal policies and procedures must be implemented, which provide a degree of assurance the firm's attorneys are complying with the rules. Those efforts must be reasonable.

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[19] Medianik, Katherine, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1496 n. 130 (2018).
[20] Medianik, Katherine, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1496 n. 130 (2018).
[21] MODEL RULES OF PROF'L CONDUCT R. 5.1 (Discussion Draft 1983).

A lawyer is not deemed responsible for every violation of another lawyer, unless the supervising attorney either instructs the other attorney or has knowledge of and ratifies the specific conduct. A lawyer also may be responsible if he/she knows of the conduct and fails to act to avoid or mitigate the consequences of that conduct.

Comment 2 to Rule 5.1 identifies important procedures each firm should develop, including those that "detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."[22] Comment 3 states additional measures may be required depending on each firm's "structure and the nature of its practice[.]" and they also may rely on CLEs on professional ethics.[23]

Comment 3 also cautions lawyers that the "ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules."[24]

ii. State Comparison.

Iowa, New Jersey and North Carolina already require lawyers to vet vendors to ensure security to maintain confidentiality.[25]

iii. Implications re: AI.

How do we view rule 5.1 in light of AI's use in firms? A firm or supervising attorney's duty to supervise extends to the firm's programs, including software used by the firm, such as

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[22] MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 2 (Discussion Draft 1983).
[23] MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 3 (Discussion Draft 1983).
[24] MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 3 (Discussion Draft 1983).
[25] Battle, IV, W. Preston, et al., *Artificial Intelligence, State of the Industry and Ethical Issue*, 54-MAR TENN. B.J. 24 (2018).

Westlaw, Lexis, conflicts software and AI. One must know the capacity of the chosen AI technology to understand whether it will "conform to the Rules."

A firm or lawyer's "[d]uty to supervise may include understanding how AI services work and vetting vendors for things like security to maintain confidentiality of client information [,]"[26] which also implicates both Rule 1.6 (confidentiality) and 2.1 (independent professional judgment). It is not essential for lawyers to know exactly how the programs are coded or how they learn, as this is difficult to comprehend, but understanding AI's capabilities and limitations is essential.

F.   Rule 5.3 – Responsibilities Regarding Non-Lawyer Assistance

i.   *Model Rule 5.3 – Non-lawyer assistance*

Rule 5.3 is similar to Rule 5.1, but Rule 5.3 applies to non-lawyer assistance. Again, a managing partner or attorney with direct supervision over non-lawyers is responsible for implementing policies and procedures to ensure non-lawyers' "conduct is compatible with the professional obligations of the lawyer."[27]

It is important to note that in 2012, the title of rule 5.3 changed from "Nonlawyer Assistan*ts*" to "Nonlawyer Assistan*ce*" – signaling the rule applies to more than *human* assistants and to ensure the rule is still relevant as technology continues to advance.

Comment 2 to RPC 5.3 recognizes that firms employ non-lawyer staff, "including secretaries, investigators, law student interns, and paraprofessionals [,]" that act on behalf of the lawyer.[28] Complying with the Rules of Professional Conduct requires the lawyer to provide

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[26] Battle, IV, W. Preston, et al., *Artificial Intelligence, State of the Industry and Ethical Issue*, 54-MAR TENN. B.J. 24 (2018).
[27] MODEL RULES OF PROF'L CONDUCT R. 5.3 (Discussion Draft 1983).
[28] MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. 2 (Discussion Draft 1983).

appropriate instruction and supervision to non-lawyers who "are not subject to professional discipline."

Comment 3 specifically addresses employing nonlawyers "outside the firm to assist the lawyer in rendering legal services to the client."[29] Just as with inhouse assistance, any outside assistance must be monitored and supervised to ensure those services "are provided in a manner that is compatible with the lawyer's professional obligations."[30] Communication with non-lawyers is key as they lack the foundation for understanding the ethical obligations of an attorney, although some are more experienced than others with these obligations. As with many things in the law, the standard is reasonableness under the circumstances.

ii. State Comparison.

New York's Rule 5.3 goes further and states "the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter."[31]

Arkansas, Tennessee, Texas and North Dakota have all replaced the word "person" in their rules with the word "nonlawyer."[32]

In a Louisiana case, *In re Cornish*, 889 So.2d 236, 245 (La. 2004), the Supreme Court discussed the importance of delegating tasks to non-lawyers, which includes "adequate instruction

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[29] RPC 5.3, cmt. 3 provides the following examples of third party assistance outside a firm: investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information.

[30] MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. 3 (Discussion Draft 1983).

[31] *See* N.Y. Model Rules of Prof'l Conduct, Rule 5.3 (N.Y. State Bar Ass'n 2009).

[32] Medianik, Katherine, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1496 n. 137 (2018).

when assigning projects, monitoring of the progress of the project, and review of the completed project."

iii. Implications re: AI

Rule 5.3 places a duty on lawyers to monitor nonlawyers, including AI. On the front end, this involves educating the nonlawyer, or the company which provides the technology, and oversight. The work produced by the AI program must be reviewed and its correctness confirmed before transmission to the client.

What a lawyer cannot do is completely and totally rely on AI outputs—this would amount to a breach of Rule 5.3 and the lawyer's obligation to properly supervise nonlawyers. After a lawyer works with an AI program for some time and is satisfied with the outputs, he may become complacent and comfortable with the technology to the point he fails to verify the results. This could also amount to a violation of his duty to supervise because of AI's ability to "learn."

There are a few steps one can take to ensure adequate supervision of non-human non-lawyers. First, hire an expert to vet the AI product. Just as with other technical areas which require experts, lawyers should retain experts to review and approve of AI technology, taking into consideration the firm's current IT capabilities and the learning curve needed to effectively utilize the system. Second, one must learn what the AI product can, and can't, do. It is necessary for lawyers to understand the possibilities of replacing certain tasks, such as document review, with AI, but also the limits of that program to close the gap between the roles of AI and human assistance. Third, verify, verify, verify. It is imperative that lawyers double-check the output of the AI product, and failure to do so may have serious consequences.[33]

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[33] Simon, Roy D., *Artificial Intelligence, Real Ethics*, 90-APR N.Y. ST. B.J. 34 (2018).

III.   **Where are we going now? What is "the practice of law"?**

Interestingly, neither the Restatement of the Law Governing Lawyers nor the Model Rules offers a definition of the practice of law. It is generally understood as the exercise of professional judgment regarding a specific legal doctrine for a specific client.[34]

One of the early challenges involved a book called "How to Avoid Probate" that was first published in the mid-1960s. The book had forms for wills and trusts and how to use them. Several state bar associations brought unauthorized practice of law charges against the author. Connecticut found the book to be the unauthorized practice of law.[35] In New York, however, the New York County Lawyers' Association brought an action seeking to enjoin the publication, sale and distribution of the book.

The author lost in the trial and appellate courts, but the New York Court of Appeals reversed and held:

> [T]hat the publication of a legal text which purported to say what the law is amounts to legal practice, and that the mere fact that the principles or rules stated in the text may be accepted by a particular reader as a solution to his problem, does not affect the matter, and that the publication of a multitude of forms for all manner of legal situations is a commonplace activity and their use by the Bar and public is general, and that the conjoining of the text and the forms with advice as to how the forms should be filled out does not constitute the unlawful practice of law[.][36]

Legal Zoom provides legal forms on its website. The customer answers a set of questions and the software generates a legal document. It has been challenged in several states and its practices have been found to be the unauthorized practice of law in several.[37]

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[34] Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811 (2002).
[35] *Grievance Comm. v. Dacey*, 222 A.2d 339, 341-43 (Conn. 1966) pg. 18.
[36] *New York Lawyers' Assn. v. Dacey*, 21 N.Y.2d 694 (1967).
[37] See *Janson v. LegalZoom.com Inc.*, 802 F. Supp. 2d 1053 (W.D. Mo. 2011).

It appears that the cases stand for the proposition that if the form provider gives any kind of advice it will likely be found to be the unauthorized practice of law.

The bar of Texas brought suit against the provider of "Quicken Family Lawyer" seeking to enjoin the defendant from selling its product within Texas, which the district court granted.[38] While the case was on appeal to the Fifth Circuit the Texas legislature revised the definition of practice of law to specifically exclude "…the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."[39]

Reynoso Case

In an interesting case originating in an adversary proceeding in bankruptcy, a trustee filed a complaint against a web-based software company alleging violation of sections of the Bankruptcy Code. A company sold access to websites where customers could access browser-based software for preparing bankruptcy petitions and schedules, as well as informational guides promising advice on various aspects of bankruptcy law.

Mr. Reynoso bought the license and entered his information into the dialog boxes which then generated a complete set of bankruptcy forms. The Ninth Circuit found that this constituted the practice of law and the conduct was the unauthorized practice of law.[40]

Lola Case

David Lola, an attorney licensed to practice in California was hired by the New York law firm, Skadden, Arps, Slate, Meagher & Flom LLP to conduct document review for the firm in

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[38] *Unauthorized Practice of Law Committee v Parsons Technology, Inc.,* No. Civ. A. 3:97: CV-2859H, 1999 WL 47235 (N.D.Tex. Jan. 22, 1999).
[39] TEX. GOV'T CODE ANN. §81.101(a) (1999).
[40] *In re Reynoso*, 477 F.3d 1117 (2007).

North Carolina. He claimed he was entitled to overtime pay because his review was devoid of legal judgment and thus was not engaged in the practice of law.

The Second Circuit' in remanding the case back to the trial court, held that when the attorney undertakes a task that could be "performed entirely by a machine cannot be said to engage in the practice of law."[41] Of course, what this would mean as machines increase capabilities more and more of what lawyers do will no longer be called the practice of law.

On a different front the U.S. Supreme Court is increasingly questioning the rights of professions that can self-regulate by the states. In *North Carolina State Board of Dental Examiners v. FTC,*[42] the court held that state-sponsored, non-sovereign, public-private hybrid entities controlled by active market participants should be disregarded for purposes of determining the immunity of their actions from antitrust liability under the state action doctrine. To have immunity the board's acts must be shown to be pursuant to state policy and proactively supervised by regular state agency bureaucrats.

"Scope of practice" is the area where there is the most exposure. This is in large part because these types of determinations are inherently exclusionary and have broad impact. Louisiana, like most other states, regulates lawyers under the jurisdiction of the Louisiana Supreme Court. The court adopts and enforces the Rules of Professional Conduct and establishes who can and cannot practice law. Under this regime, it would seem Louisiana would come under the state action exception to the Sherman Act as identified in *North Carolina State Board of Dental Examiners*. The area of greatest risk seems to be in the unauthorized practice of law issues. The

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[41] *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 Fed. Appx. 37 (2015).
[42] *North Carolina State Board of Dental Examiners v. FTC*, 134 S.Ct. 1101 (2015).

question will be if rules and regulations prohibiting the unauthorized practice of law are protecting

consumers or protecting lawyers.

IV.   <u>**Conclusion**</u>

In the not too distant future, computer programs will be capable of writing our briefs. Will

the computer program need to be licensed?

This, and other ethical questions are not merely an academic exercise. The Rules of

Professional Conduct will need to be examined to deal with the reality of the power of these

programs and their impact on the practice. The understanding of what is or is not the practice of

law must evolve as technology evolves.