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Confessions of a Malpracticing Lawyer or How I Learned to Stop Worrying and Love the Law

New Claims Against Lawyers: Cyber and Artificial Intelligence

A. Loss of or Threat to Client Confidentiality Due to Cyber Risks

The days of client "secrets" being exposed by the spoken word into thin air have largely passed us by. The development of document storage and, presently, electronic transmission and preservation of data has, however, proved to be a robust substitute for putting confidential information at risk of disclosure, whether by error or neglect. While these issues of technology are challenging enough for many lawyers, new claims have argued that the duty of lawyers to preserve the confidences of its clients is regularly breached by failing to take sufficient care of client information and data. Any lawyer who, in the course of doing business, obtains confidential and proprietary information from his or her client should be aware of these claims and the potential expansion of attorneys' perceived duty of care. Depending on how the courts treat the notion of duty to preserve information in an on-line world, technology decisions faced by law firms may no longer be just about how much money must be paid for an office system but may, in and of itself, be a source of ethical breach and legal liability,

The *Shore* Class Action Case

One noteworthy example of this new type of claim is the case of *Shore v. Johnson & Bell, Ltd.,* which was filed in May 2016 in the United States District Court for the Northern District of Illinois but remained under seal until December 2016. The case was brought as a class action seeking both equitable and monetary relief. The basis for the action was the defendant law firm's alleged failure to keep its clients' information secure because its computer systems purportedly suffered from "critical vulnerabilities in its internet-accessible web services." The plaintiffs alleged that, as a result of those vulnerabilities, the confidential information entrusted to the firm by its clients had been exposed and was "at great risk of further unauthorized disclosure."

Issues and Implications

Among the significant issues raised by Shore and similar actual or potential claims are:

- does breach of confidentiality constitute legal malpractice?
- if so, is mere exposure to loss of confidentiality sufficient to give rise to a cause of action?
- how are damages determined or calculated?
- what is a lawyer's duty with respect to implementation of technology?
- is this a legal duty or one of governing the lawyer's professional conduct (ethics)
- if a lawyer has a legal duty to maintain a certain level of technological sophistication in his or her practice, how is that standard established?
- how is "reasonableness" determined? Is it the same for a global mega-firm as for a solo practitioner?
- how would this play out in a court of law? Question of fact? Expert testimony?
- are there lessons to be learned from other professions, industries, countries?

Duty to Preserve Confidentiality and Other Rules of Professional Conduct

The Illinois Rules of Professional Conduct are similar to the rules of many other states governing lawyers. As they are the rules at issue in the *Shore* case, they are addressed here as an example of how they might apply to these kinds of claims and to lawyers' standards of care generally. The practitioner should be careful, however, to review the rules enacted in the particular jurisdiction involved in any such case and in evaluating the conduct of a lawyer or law firm.

As alleged in the *Shore* complaint, lawyers in Illinois are under a duty to protect client data. Rule 1.6(a)." Confidentiality of Information" states that, except under certain express circumstances, a lawyer "shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure."

Rule 1.1. "Competence" mandates that the lawyer provide competent representation to a client. Such competence, in turn, requires the legal knowledge, skill, thoroughness, and preparation necessary for the representation. Although not a rule that directly impacts the question of maintaining client confidentiality, the question of competence with technology and technology's role in providing legal services, including, for example, in communicating with courts and juries, could perhaps be used as a basis for arguing that a certain proficiency with many different aspects of technology as applied in the legal profession is required by rule.

Rule 1.15. "Safekeeping Property" mandates that a lawyer hold the property of clients in his or her possession in connection with a representation separate from the lawyer's own property. This rule is, by its terms, concerned primarily with financial matters and records but the term "property" is, itself, broad and the obligation to keep that property "safe" as embodied in the title of the rule could have implications on lawyers' duties with respect to a client's trade secrets, confidences and other proprietary information.

The *Shore* complaint alleges that the defendant law firm had acknowledged the specific dangers of cyberattacks on law firms and the need for firms to take steps to keep its records and data free from intrusion and to implement proactive safeguards. To the extent that the complaint or others like it that could be based on the alleged assurances or promises of the law firm to keep clients' information confidential, one should note Rule 7.1. "Communications Concerning a Lawyer's Services," which prohibits a lawyer making a false or misleading communication about his or her services and deems a communication "false" or "misleading" if it contains a material misrepresentation of fact or law, omits a fact necessary to make the statement not materially misleading or if it is "likely to create an unjustified expectation about the results the lawyer can achieve." Given the sophistication of modern hackers and the widespread nature of the problem, can a plaintiff legitimately argue that any "promise" or assurance that a firm will keep data confidential is a violation of Rule 7.1 as one creating unjustified expectations about the results that lawyer can achieve?

Traditional Notions of Professional Liability and Standard of Care/Judging What is "Reasonable" in Law Firm Technology

The above discussion of various rules of professional conduct should give one pause when considering the scope of a lawyer's exposure to claims for malpractice. It is not atypical that a state common law holds that a violation of a rule of professional conduct does not, in and of itself, constitute professional negligence. The preamble to the American Bar Association's Rules of Professional Conduct provides that violation of a Rule should not in itself give rise to a cause of action: "Violation of a Rule should not itself give rise to a cause of action against a lawyer, nor should it create any presumption in such a case that a legal duty has been breached." It is also noted, however, that a violation of a Rule can be evidence of the breach of the standard of ordinary care. The Preamble provides that, although "[the Rules] are not designed to be a basis for civil liability . . . these Rules may be used as non-conclusive evidence that a lawyer has breached a duty owed to a client."

Therefore, a proper analysis of the potential malpractice of attorneys arising out of an alleged breach of confidentiality must take place at two distinct levels. First, the question of whether the lawyer has breached a rule of professional conduct may certainly be germane and relevant and may lead to evidence that can be admitted in a malpractice action. However, even if the professional rule has been breached, one cannot automatically conclude that the attorney has committed malpractice or is otherwise liable to the client in tort. That second question requires an assessment under the standards applicable in legal malpractice actions, whether, as in *Shore*, under a contract, negligence or other theory. When negligence is alleged, traditional notions of duty of care must be considered.

In order to prevail on a tort-based claim of attorney malpractice, a plaintiff generally must prove that the attorney-client relationship created a duty on the part of the attorney and that the attorney breached that duty. An attorney's duty of care arises upon formation of the attorney-client relationship. An attorney breaches his or her duty of care when failing to exercise the care and skill expected of a member of the legal profession when handling the client's case.

The plaintiff in a legal malpractice action must also establish that, "but for" the attorney's negligence, the client would not have suffered any damages. For example, damages for legal malpractice in the course of litigation arise only if the client would have prosecuted or defended the underlying lawsuit successfully but for the attorney's neglect of his client's affairs. Because attorney malpractice rarely results in personal injury or property damage, the damages plaintiffs seek most often in malpractice claims against attorneys are for economic or pecuniary losses allegedly caused by the attorney's failure to exercise adequate care.

In certain jurisdictions, the plaintiff in a professional negligence case bears the burden to establish the standard of care through expert witness testimony. This requirement is premised on the proposition that, without expert testimony, jurors, not skilled in the profession, are not equipped to judge the professional's conduct. Courts have recognized two exceptions to this rule: where the professional's conduct is so grossly negligent, or the procedure so common, that the jury can readily appraise it without the need for expert testimony. As explained in the Restatement (Second) of Torts, the skill a professional must exercise is "that special form of competence which is not part of the ordinary equipment of the reasonable man, but which is the result of acquired learning, and aptitude developed by special training and experience." Restatement (Second) of Torts §299A, comment. a, at 73 (1965).

How then is one to assess the question of a lawyer's exercise of care and skill in the context of that lawyer's use of technology to safeguard a client's confidential information and data? Is adequate technology determined by what is possible, as testified to by technology experts? Or, in contrast, would testimony of a lawyer's standard of care be offered by a lawyer, who would presumably discuss what law firms typically use or should use when implementing technology? If the latter is the standard applied to lawyers, does it matter whether the law firm defendant is a global mega-firm with hundreds of millions of dollars in revenue or a local solo practitioner earning less than $100,000? Are standards applicable to client confidences different for different lawyers? Should a client's expectations and potential legal remedies for breach of those confidences depend on the size of the firm or, more accurately, the amount of money spent on technology?

There are presently no answers to these or an abundance of similar questions. Many go to the fundamental tenets of the attorney-client relationship and impact the philosophical, moral and economic questions of whether legal practice by solo and small firm practitioners will be encouraged or allowed to continue. The gravity of these issues and their impact on our profession should sound a clear and loud warning to bar associations across the country and encourage their proactive involvement in forging solutions to these issues. Alternatively, we can sit back passively and await the rulings of various courts, confronted by perceived innocent "victims" of third-party hackers who have obtained information through their lawyers' computer systems. It is indeed ironic that law firms and individual lawyers, themselves often victims of these third-party criminal acts, may, as a result, be subject to increased legal liability of their own.

Liability Without Breach

As noted above, one of the more interesting issues raised in by the *Shore* case is the fact that the plaintiffs did not allege that the defendant firm's systems had, in fact, been hacked or that any confidential client information had, in fact, been obtained or accessed by a third party. In contrast, the plaintiffs claimed that the information was exposed and easily accessible and that such disclosure was "inevitable." This, in turn, led to the firm's argument that exposure does not equal breach and that plaintiffs lacked standing to bring a claim as they had suffered no concrete injury. Plaintiffs countered that argument by claiming that the firm had entered into a contract and charged fees that were based, at least in part, on its promise to keep the plaintiffs' information safe and secure.

Are such allegations sufficient to give rise to a cause of action for professional malpractice? Can a plaintiff's burden to prove damages in a tort claim be satisfied simply by demonstrating that its confidential information was exposed to but not accessed by a third party? Will the alleged loss of a bargained-for benefit express or implicit in the attorney-client relationship sustain a tort action against the attorney?

Questions likewise abound with respect to the damages that could, under such scenarios be sought or recovered. Defendant attorneys will certainly argue that there can be no standing to sue where there is no actual breach of confidence and that there is therefore no cause for granting a plaintiff either compensatory damages or equitable relief. In contrast, must a plaintiff wait until the confidence is breached before enjoying legal rights? This is a pertinent concern given the view of some courts that potential or threatened publication of private information may constitute irreparable harm given that, once the information is made public, there is nothing a court can do to mitigate or eliminate the potential for that harm.

One potential answer to this conundrum lies in the ability of the client to obtain information relating to its lawyer's methods for preserving its confidential information. A client is certainly free to pick and choose its lawyers based in whole or in part on the perceived ability of those lawyers to keep information protected and confidential. Even if the client suffers some loss of the benefit of a perceived bargain with its counsel when discovering that its information may be exposed, it is free to change lawyers rather than merely await a purportedly "inevitable" breach of confidence. Furthermore, if such a change of lawyers is made and results in excess or increased fees to the original or replacement counsel, recovery could arguably be sought through a breach of contract action – a claim that is fundamentally different than one for legal malpractice and professional negligence.

Cyber Lessons?

A lawyer's duty to preserve the confidentiality of client data in a world where privacy and confidentiality are under consistent attack presents a fascinating set of new and challenging issues for attorneys. Clearly, considerable study is needed to determine the degree to which attorneys are taking due care with their clients' confidential information. Clearly, attorneys are

subject to rules of professional conduct requiring them to safeguard this kind of information and their use of technology, as opposed to the old briefcase filled with handwritten notes, opens up new exposures and, potentially, new obligations. Moreover, in certain circumstances, presumably when actual breach is found and attorneys have failed to take reasonable care to protect client information, a case for legal malpractice may represent an appropriate remedy. Judging the proper standard of care in those situations will, in itself, present a considerable challenge.

Viewed through another lens, preservation of confidential data claims such as raised in *Shore* press the envelope of legal malpractice beyond its traditional common law boundaries and potentially obliterate traditional fundamental notions of negligence and duty. The issues raised certainly vividly portray the growing tension between the promise and threat of technology on the one hand and the ability of lawyers to protect their clients' confidences in the everyday practice of law. Likewise, the issues offer a dramatic wake-up call to the profession and, hopefully, to clients as well, to urgently address the risks inherent in law office systems operating in a cyber world fraught with hackers and trolls.

Shore may be a mere anomaly or it may augur a tempestuous future in the development of legal malpractice law. Regardless of its particular impact, however, what is becoming clear is that attorneys who, in the face of their undeniable duty to protect their clients' confidences, ignore the risk of their systems being compromised, are doing so at their own peril. Similarly, insurers who fail to either explicitly cover (and charge premium for) or exclude such claims run considerable risk of paying claims that underwriters traditionally would not have considered to be within the realm of professional errors and omissions. Today's email communication, stored time sheet and vpn server, all seemingly innocent vessels of progress and efficiency may, in fact, turn out to be tomorrow's carriers of tomorrow's malpractice epidemic.

B. Artificial Intelligence and its Malpractice Implications

News reports and the legal press have recently been heralding the coming (or arrival) of artificial intelligence and the booming presence of outside AI vendors attests to its trendiness, if not its popularity. As an ABA Journal article has described it, AI, "also referred to as cognitive computing, refers to computers learning how to complete tasks traditionally done by humans." (Sobowale, "How Artificial Intelligence is Transforming the Legal Profession," April 2016, p.3) In the context of law firms, AI software and programs intend to mimic or improve on the tasks performed by lawyers and paralegals. This raises a multitude of significant ethical and legal issues, particularly when those programs are designed and implemented by engineers and not by lawyers. Who, for example, is responsible for a glitch in the system that leads to errors in the performance or completion of the legal or paralegal work? Does AI legal work constitute the unauthorized practice of law for ethical purposes? How does a lawyer or law firm meet its professional fiduciary obligations of due care when it uses an AI program such as that which advertises itself with the come-on promise that lawyers can "ASSESS CONTRACTS WITHOUT READING THEM." What does AI do to the expectations clients have of their attorneys and the expectations of attorneys of the responsibility they have to their clients?

Even assuming the ultimate ability of law firms to successfully incorporate AI in their practices and to do so in a manner that truly improves their legal services, additional questions and concerns are present? Does a lawyer using AI instead of her brain and the "independent professional judgment" required by most states' ethical standards applicable to our profession, violate her ethical obligations? When we rely on AI have we improperly delegated or abandoned our independent professional judgment? Some would undoubtedly argue that the "I was only following what AI concluded" defense to a claim for professional negligence is simply the modern, equally futile and morally bankrupt version of "I was only following orders." These and other questions are certain to capture the attention of the courts as claims involving AI gone wrong become more prevalent. Clearly, traditional notions of legal malpractice and professional responsibility are under the microscope and subject to change in this area as well.

Where can we look to predict – using our human brains rather than predictive technologies – how the courts might look at the role of lawyers in a world of artificial intelligence? One undoubtedly fertile field offering guidance is that involving claims invoking the intersection of AI and products liability. Driverless cars will almost certainly be the subject of new and evolving legal principles and rulings that will likely impact how reliance by a lawyer on AI is or is not like reliance by the owner of a driverless car or the pilot of an aircraft on auto-pilot who similarly does not exercise immediate control on the product at issue. Likewise, the medical field is one which, like the practice of law, combines professional judgment with the use of machines but *quaere* as to whether the state of the law is developing any quicker with respect to medicine than it is in the legal arena.

Another area to look for guidance, less foreign to law and, perhaps, more directly on point, is the body of law dealing with the responsibilities of supervising lawyers for the work of their subordinates. Is there any reasonable rationale for distinguishing the professional ethical responsibilities and the legal duties of supervising attorneys for the work of subordinates from the potential responsibilities and duties of attorneys for the work performed not by human subordinates but by AI programs purchased from third parties?

In that regard, Rule 5.1 of the ABA Model Rules of Professional Conduct states:

> ***Rule 5.1 Responsibilities of Partners, Managers, And Supervisory Lawyers***
>
> *(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 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.*
> *(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:*

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Are the responsibilities imposed by Rule 5.1 and their state equivalents transferable to supervision of AI tasks completed by non-human or engineered by humans who are non-lawyers? Does it make a difference if the engineer behind the AI is, in fact, a lawyer? Even if the engineer is a lawyer or the work of the AI vendor is overseen or vetted by a lawyer, is that someone over whom the law firm has "direct supervisory authority?"

How are layers to deal with the question of ratification? What work needs to be done to ensure that the AI program is accurate and comprehensive? Is this work that need be undertaken only at the time of the purchase of the AI program? What are the responsibilities thereafter? How do attorneys make certain that the AI systems in place in their firms or offices keep up with legal trends and human legal thinking?

Others might suggest by analogy that some kind of *res ipsa loquitur* analysis may be imposed on lawyers, making the lawyer responsible for the AI work unless it can be shown that the defect was essentially a product defect in the AI system and not the fault of the operator/lawyer. (See*, e.g.* the excellent discussion offered at https://www.quinnemanuel.com/printnews/?pid=13059). Yet, this, too, would seem to run afoul of the strict fiduciary obligations imposed on attorneys that make us ultimately and finally responsible for our legal work and the services we offer. Should a client who is victimized by an error in the application of legal AI be deprived of a remedy from the lawyer it retained merely because that lawyer chose to use an arguably defective AI program? To the contrary, the more likely course would be one that makes such an AI defect claim one that can be legitimately pursued by the lawyer against the AI vendor but that does not vitiate the lawyer's obligation to her client to make certain that the legal service provided meets the highest standard of professional care. Relying on inadequate AI would seem to offer no greater a defense to malpractice than the suggestion that we have no liability because we hired an incompetent associate.

Nevertheless, exposure and liability in the area of artificial intelligence offers the same kind of food for thought and potential for transforming notions of professional malpractice as does cyber claims and the need to preserve the confidentiality of client data. How will courts determine standard of care and what obligations concerning AI will be imposed? The possibilities range from the suggestion that the lawyer ought not be liable to her client at all if she can prove that the problem was with AI despite her best efforts and due diligence, to the possible application of *res ipsa* standards, to the determination that lawyers are responsible for everything coming out of their offices, regardless of how their work was performed or crafted.

With so many questions, there is clearly room for a good century's worth of litigation over these issues. Fortunately, we simple humans will most likely not need to worry ourselves about what the ultimate outcome may be. We can cancel our conferences, cease writing analytical papers and blogs and simply purchase an AI program that can then turn on it "predictive technology," churn away and predict the endgame for us. Of course, it the AI proves to be incorrect, we best keep our errors and omissions coverage fully in force.

Lawyers would do well to remember in the emerging AI marketplace that our legal services are our own and that AI is just another tool. When that tool is misapplied – whether through our direct error or a problem with the program - the fault is indeed likely to ultimately be our own and our standard of care to our clients precisely the same as when we apply human intelligence with all its limitations. For, as Cassius so cogently remarks in Shakespeare's *Julius Caesar* (Act I, Scene III, L. 140-141):

> The fault, dear Brutus, is not in our stars
> But in ourselves, that we are underlings.