

# Using Data and Innovation to Reduce Legal Malpractice Risk

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Innovation is not limited to large-scale issues like ChatGPT, even though that is dominating the conversation these days. Similarly, innovation is not limited to outward-facing initiatives, even though those may sometimes get more publicity. Rather, innovation that leverages existing data and enhances internal procedures can significantly reduce malpractice risk, while also improving the firm's efficiency, profitability, and client service.

In the sections that follow, we offer insights centered on this approach from three different perspectives. First, we explain how we at ALAS are using our own data in innovative ways to help our member firms understand and reduce malpractice risk. Second, we describe ways we have seen firms use their data and innovation to address key malpractice risk areas. Third, we propose some additional ways firms may use readily available data to understand and reduce malpractice exposure. Finally, we offer some words of caution to keep in mind to the extent you engage in deliberation around use of generative AI tools like ChatGPT.

## Using our own data in innovative ways to help our firms reduce malpractice risk

Over the course of our more than 40 years focused on legal malpractice matters, we have accumulated a tremendous amount of data on the topic. In fall 2020, we offered our member firms a self-service window into that data via our newly created DataView™ tool. This tool, which leverages the capabilities of Microsoft Power BI, contains a set of dashboards that allows each member firm to visualize and examine its malpractice claims profile, history, trends, and performance against benchmarks. This helps member firms better understand the frequency, severity, and source of their malpractice matters. DataView™ also includes links and references to targeted loss prevention resources tailored to the data results, as a way to help firms advance their risk mitigation efforts. In addition to those member-facing benefits, we use information from DataView™ and other Power BI tools internally to assist with handling claims and creating loss prevention resources.

We are not satisfied with descriptive efforts alone, however. Rather, we are continuing to explore ways in which we can be predictive as well. Some of our predictive efforts involve dovetailing our data with third-party sources, like Leopard Solutions data on lateral lawyer movement and PitchBook data on business transactions. When these more predictive investigations bear fruit, we publish our findings to our member firms in our ALAS Edge: Data Insights™ online publication. Certain of these findings have already been particularly useful in providing additional quantitative credence to the loss prevention lessons we seek to impart to our member firms.

## Firms using data and innovation efforts to address key malpractice risk areas

In addition to our own data and innovation efforts, we have watched with interest as certain firms have taken up the mantle of targeting data and innovation efforts at

reducing legal malpractice risks. We have taken particular interest in the work of some firms that have focused efforts on areas like mistakes and conflicts of interest, as these two areas—along with unworthy clients and bad acting lawyers—can be some of the more troublesome. Those efforts on mistakes and conflicts of interest merit further discussion.

## Mistakes

In recent years, mistakes have been the leading cause of malpractice claims against law firms. For many years, however, mere mistakes were not a leading cause of serious claims for ALAS. Since the early- to mid-2000s, however, claims based on provable blunders have become more frequent. The principal reasons for the increase in mistake claims appear to include increased time pressures, cost concerns, and client demands endemic to the contemporary practice of law.

Given that business environment, it makes sense that lawyers would use documents from prior engagements as templates to jump start their efforts on new matters. However, a lawyer using a document from a prior similar matter as a starting point may fail to think through ways in which the current matter differs from the prior matter. By focusing on the documents from an earlier deal, for example, a lawyer may overlook subtle, but important, peculiarities in that deal that may not work for the current one.

To help avoid these pitfalls while leveraging the efficiencies of templates from prior work, one firm has integrated its document management and knowledge management systems. The knowledge management information provides richer context and detail on the matters underlying the documents, helping lawyers find more apt exemplars. The knowledge management information also includes the contact information of the teams that created the documents, so that lawyers can verify appropriate fit. A solution like this not only reduces mistakes but also enhances the speed and efficiency of client service. Moreover, it may be low cost, as many firms already license document management and knowledge management software. In those instances, an effort like this would merely involve more full use, in a combined way, of already licensed technology.

Document errors are not the only type of mistakes that cause trouble. In fact, missed deadlines are perhaps the archetypal lawyer mistake. Lawyers often erroneously think that deadlines are an issue only for the litigation practice. Although deadlines are obviously vitally important to litigators, deadlines also present problems for other practices. They are a leading cause of claims against patent prosecutors, for example. Transactional lawyers are not immune either. Botched UCC filings, late filings with other governmental authorities, and failures to meet contractual time limits for items such as claims against escrows, exercising stock options, notices of renewal, cancellations, or notices of breach all cause claims.

To manage all this deadline information, paper calendars and Microsoft Outlook are not enough. Rather, firms should have specialized docketing/calendaring software. As one firm learned, however, buying software without making any other changes may leave opportunity unexplored. Instead, in conjunction with its software upgrade, this firm also

reevaluated how to train and task its related personnel to best use the software capabilities. In addition, and perhaps most notably, the firm considered how it might integrate its docketing and deadline data into its larger data universe. While doing so, it found ways that this data—essential, but perhaps mundane on its own—could provide valuable insights relevant to various other efforts, like analyzing utilization, identifying conflicts, and compiling experience for pitches.

### Conflicts of interest

Our experience shows that conflicts poison the defense of legal malpractice claims. They give rise to arguments that lawyers were greedy and disloyal, which can inflame a judge or jury and complicate the defense of an otherwise defensible claim. Indeed, we have seen this play out in mock jury exercises, where adding a mere whiff of a conflict to an otherwise-identical hypothetical multiplies damages awards significantly.

Conflict identification and resolution can be a challenge. Complicated relationships among entities in a family of companies can make those tasks even more difficult. Yet it remains vitally important that they are completed successfully. To assist in that regard, one firm has begun to use APIs to import information on affiliated entities into the conflicts process quickly and consistently. This has helped enhance the depth, accuracy, and efficiency of its conflict clearance efforts. In addition, the firm is working to implement similar techniques to help it more proactively anticipate conflicts that may arise as a matter progresses. These midstream conflicts can be particularly difficult to identify, but just as troublesome when they do arise, making efforts to surface them quite useful.

### Additional ways firms may use readily available data to reduce malpractice risk

For those searching for a way to start or progress their data and innovation initiatives, a deeper dive into time, billing, and staffing data may produce significant benefits for relatively low investment. Firms have long examined this type of data when assessing lawyer utilization, and these days firms are also looking into such data more deeply for DEI and related purposes.

Staffing-related issues amplify many malpractice risks, including those related to:

- Dabbling lawyers (who may be more prone to mistakes)
- Lone wolf partners (who may be more prone to mistakes, advances of unworthy clients, and undetected impairments)
- Under-supervised associates (who may be more prone to mistakes)
- High hour lawyers (who may be more prone to mistakes and undetected impairments)

- Low hour lawyers (who may be more prone to advances of unworthy clients and undetected impairments)
- Siloed teams (who may be more prone to advances of unworthy clients)

Interactive dashboards to visualize and interrogate current time, billing, and staffing data on demand can help practice group and other firm leaders more easily identify and resolve these staffing-related malpractice risks before they fester and potentially emerge as malpractice matters.

### **Some notes of caution for those deliberating on the use of generative AI tools like ChatGPT**

Although generative AI should not constitute the entirety of the data and innovation conversation, the recent publicity about ChatGPT has piqued the interest of many law firms. In contrast to certain algorithmic and machine learning tools (e.g., technology assisted review of documents in litigation discovery and similar contract and deal analysis in transactional matters) that have demonstrated sufficient accuracy, reliability, and security to be used in legal practice, ChatGPT raises numerous unresolved risks. Firms understandably do not want to be late in implementing useful technologies, and generative AI tools ultimately may offer benefits for lawyers, but we think firms would be wise to prohibit the use of ChatGPT for client legal work, at least as the technology presently stands.

ChatGPT does not inform users of the sources it draws upon and makes no guarantee of accuracy or completeness; indeed, numerous reports confirm that it quite regularly returns incorrect information and may have unknown biases. Remember, generative AI tools do not think or analyze, but instead predict word use based on data from other sources they access. This means that whatever a tool like ChatGPT generates must be scrupulously reviewed and analyzed, which may vitiate any time or cost savings gained by using it as a shortcut. Without scrupulous review, relying on such tools could lead to all sorts of mistakes, which in turn could lead to disciplinary action and malpractice claims.

As noted above, mistakes are the leading cause of malpractice claims against law firms. Troublingly, use of generative AI tools like ChatGPT could lead to an increase in dabbling-related mistakes, as lawyers may think they can fill in gaps in their expertise by consulting the tool. While the competence required by ABA Model Rule of Professional Conduct 1.1 can be achieved by association with a lawyer of established competence, tools like ChatGPT would not so qualify. In fact, using the tool could constitute, lead to, or aid in the unauthorized practice of law.

Mistakes are not the only issue, however. Model Rule 1.6 requires that lawyers protect information relating to the representation and take steps to prevent unintended disclosure or unauthorized access to that information. Prompts posed to generative AI tools like ChatGPT may reveal client information or information that could lead to such

disclosure. Such tools do not promise confidentiality. In fact, their design is explicitly dependent on use of the data gained by the prompt and output. In addition, and beyond its potential to use confidential information to improve its performance, there is no guarantee that the tool will not share your confidential information with someone else entirely, perhaps even in creating a response to another user's inquiry. Proprietary systems can also present similar issues, as compliance with measures like conflicts screens must be ensured.

In addition to the above, there are a multitude of other ethical concerns and malpractice risks that firms will need to contend with before allowing generative AI tools like ChatGPT to be used for substantive legal work. The primary task for firms will lie in determining which tools are safe and reliable enough to use in client legal work and which—like ChatGPT in its current form—are not. Thankfully, many firms have an IT policy in place that requires lawyers to get advance approval from the firm before using new technologies for client or firm work, whether available in an app, on a website, or otherwise. We recommend firms follow those policies in the case of generative AI tools so that use of the tools does not get out ahead of thoughtful consideration of the various risks and constraints. Moreover, in undertaking this thoughtful consideration, be mindful of Model Rule 1.4(a)(2)'s dictate on reasonably consulting with clients about the means by which their objectives are to be accomplished.

## Conclusion

Thinking about data and innovation can be daunting and overwhelming, especially with the volume of options and pace of change these days. Given that context, firms should remember that they do not need to go big and broad for their data and innovation initiatives to have significant impact. Rather, firms can start small and internally and nonetheless have a large, multifaceted, and positive impact—on both malpractice risk and otherwise. And if firms do think generative AI may be useful to their overall data and innovation efforts, they nonetheless should remain mindful of the likely disqualifying risks associated with certain specific tools like the present iteration of ChatGPT, including those risks discussed above.

*Attorneys' Liability Assurance Society (ALAS) was founded by its owner-insured law firms to provide a superior source of insurance coverage along with a level of service that cannot be replicated in the commercial marketplace. ALAS is managed and staffed by lawyers that leverage their unique blend of industry knowledge and real-world experience to provide unparalleled services to members including industry-leading risk management, claims management, underwriting and other member services. For more on ALAS visit our [website](#), and follow us on [LinkedIn](#).*