Ethical Considerations Related to, *inter alia*, the Use of AI in Mass Tort Insurance Coverage Litigation

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Meet the Speakers



Elizabeth Mazzocco, Foley & Lardner LLP

Elizabeth Mazzocco is a Senior Counsel and litigation attorney with Foley & Lardner LLP. Her practice focuses on insurance litigation and arbitration across the industry on behalf of insurers, reinsurers, brokers, and policyholders. She has broad experience handling reinsurance arbitrations, insurance coverage litigation, broker liability disputes, bankruptcy-adjacent insurance litigation, and insurance insolvencies. Her work spans an array of insurance lines, including life, property/casualty, commercial general liability, directors and officers (D&O), long-tail liability coverage and others. Ms. Mazzocco also handles complex general commercial litigation matters in federal and state courts across the country. She is a member of the firm's Insurance and Reinsurance Practice Group and its Business Litigation and Dispute Resolution Department.



Eileen Ridley, Foley & Lardner LLP

Eileen Ridley is a partner and litigation lawyer with Foley & Lardner LLP. Ms. Ridley has extensive experience in litigating, arbitrating and trying complex commercial matters for a variety of industries including the high-tech, oil and gas, telecommunications, construction, insurance and health care industries. She practices with the Business Litigation & Dispute Resolution; Construction; Insurance and Reinsurance Litigation; Intellectual Property Litigation; Trademark, Copyright & Advertising; Privacy, Security & Information Management; and Appellate Practices, as well as the Litigation Team. She is the firm's Chief Diversity Partner, a role in which she is a catalyst for and leader in carrying out the firm's commitment to diversity. Ms. Ridley serves on the firm's national Management Committee, and serves as vice chair of the Litigation Department and co-chair of the Privacy, Security & Information Management Practice. She is the former managing partner of the firm's San Francisco office.

Ms. Ridley's work has involved anti-trust and class actions, unfair competition, trademark, trade secret and copyright matters, product liability claims, insurance coverage litigation, commercial disputes and employment issues. She also has extensive experience in insurance coverage and litigation issues regarding a wide variety of insurance programs. Ms. Ridley's insurance work has included reinsurance and runoff matters representing both cedents and reinsurers in the domestic, European and off-shore markets concerning issues related to claims handling, treaty and underwriting compliance, risk sharing agreements, subrogation and indemnity, agency issues, and the doctrine of following forms/fortunes. Through Ms. Ridley's appellate practice, she has briefed and/or appeared before California's State Appellate Courts, the California Supreme Court, the 9th Circuit and the 7th Circuit.



Angela Rockwell, PhD, Bates White

Angela Rockwell, PhD, PStat®, is a Partner at Bates White with more than a decade of experience applying statistical analysis, sampling, and damages methodologies to high-stakes insurance coverage, reinsurance, healthcare, and mass-claims disputes. She analyzes large claims datasets and case records to address questions of liability, valuation, and coverage, with particular experience in matters involving construction defects, environmental contamination, and medical monitoring. She has supported evaluations of potential PFAS liabilities in bankruptcies and corporate transactions, including *In re Kidde-Fenwal* and fraudulent-conveyance litigation arising from the Corteva-Vylor separation. Her work has supported insurers, policyholders, and debtors. An Accredited Professional Statistician recognized by the American Statistical Association, Dr. Rockwell has submitted expert reports and provided deposition and trial testimony.

Mass Tort Coverage Cases Introduce Unique Ethical Issues

- Mass tort (asbestos, talc, clergy abuse, etc.) coverage litigation can involve many claims over long periods of time
- Dollar values may be very high
- Public visibility
- High volume of documents, some highly sensitive (medical information, therapist records, confidential victim identities, etc.)

Mass Tort Coverage Cases Introduce Unique Ethical Issues

- Mass tort coverage cases may intersect with other pending or prior matters
  - The policyholder may be a debtor in bankruptcy
  - Individual lawsuits pending against the policyholder
  - Claims filed in the bankruptcy
  - Prior similar litigation
  - Confidential mediations
- There may be multiple protective orders and other confidentiality requirements at work
- AI is a useful tool in mass tort coverage cases
  - Analysis and review of documents, policies, and claims on a large scale
  - Claims valuation
- But there are important ethical considerations, particularly when using AI, that lawyers must bear in mind

ABA Model Rules: Competence and Confidentiality

Lawyers making use of AI in mass tort coverage litigation must adhere to ethical rules

Model Rule 1.1: 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.

Comment [8]: 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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Model Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) [Exceptions permitting disclosure omitted]

(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.

ABA Model Rules: Candor and Fairness

Model Rule 3.3: Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. . . .

[Paragraphs (b)–(d) omitted]

Model Rule 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

[Paragraphs (e)–(f) omitted]

ABA Model Rules: Supervision

Model 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.

Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, 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 the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the 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 person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

PHASE 1

Initial Document Intake and Analysis

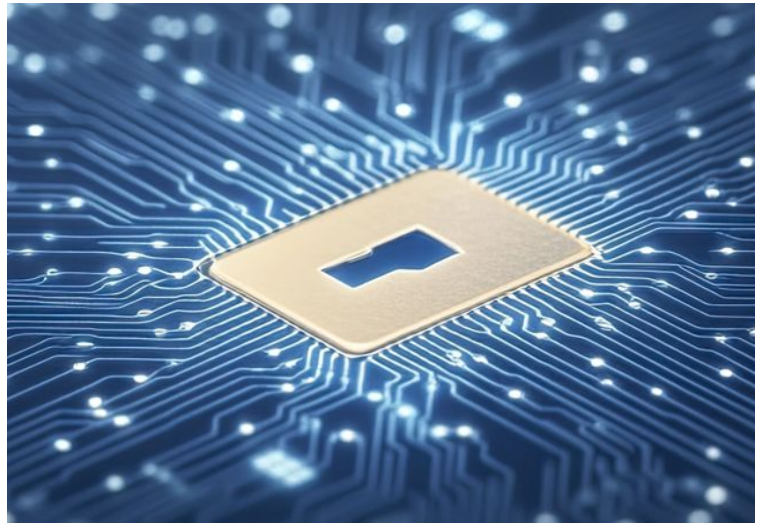
Ethics of claims analysis: data and outcomes

- Claims analysis often involves private health, exposure history, and financial information
- Objectives beyond processing high-volume data
  - Protect confidential and personal information
  - Use information only as needed for the defined task
  - Produce accurate, supportable allocation/valuation
- **Key considerations for use of AI:**
  - Transparency, validation, quality control
  - Attention to **data protection** and **decision quality**
  - Human supervision and quality control



Deliberate controls needed for data intake

- Apply data minimization to sensitive information where feasible
  - Collect and use only information relevant to the defined scope
  - Limit access based on role and need
  - Separate data and permissions by matter, client, and claimant population
- Understand the network security and AI environment
- Align early with clients and counsel on permitted AI use cases and potential discovery obligations
  - Protective orders, expert stipulations, standing orders



As a tool for efficiency, AI can…



- Find and organize
  - Categorize documents
  - Categorize topics within documents (e.g., exposure, diagnosis, occupation)
- Extract and standardize
  - Extract text into a targeted, searchable database
  - Create draft translation tables to standardize names, locations, terminology, etc.
- Support analysis
  - Assist with coding and identify inconsistent or incomplete records
- **Humans are still responsible for judgment calls and conclusions**



PHASE 2

Client Representation in Litigation

Parallel cases, protective orders, and confidentiality

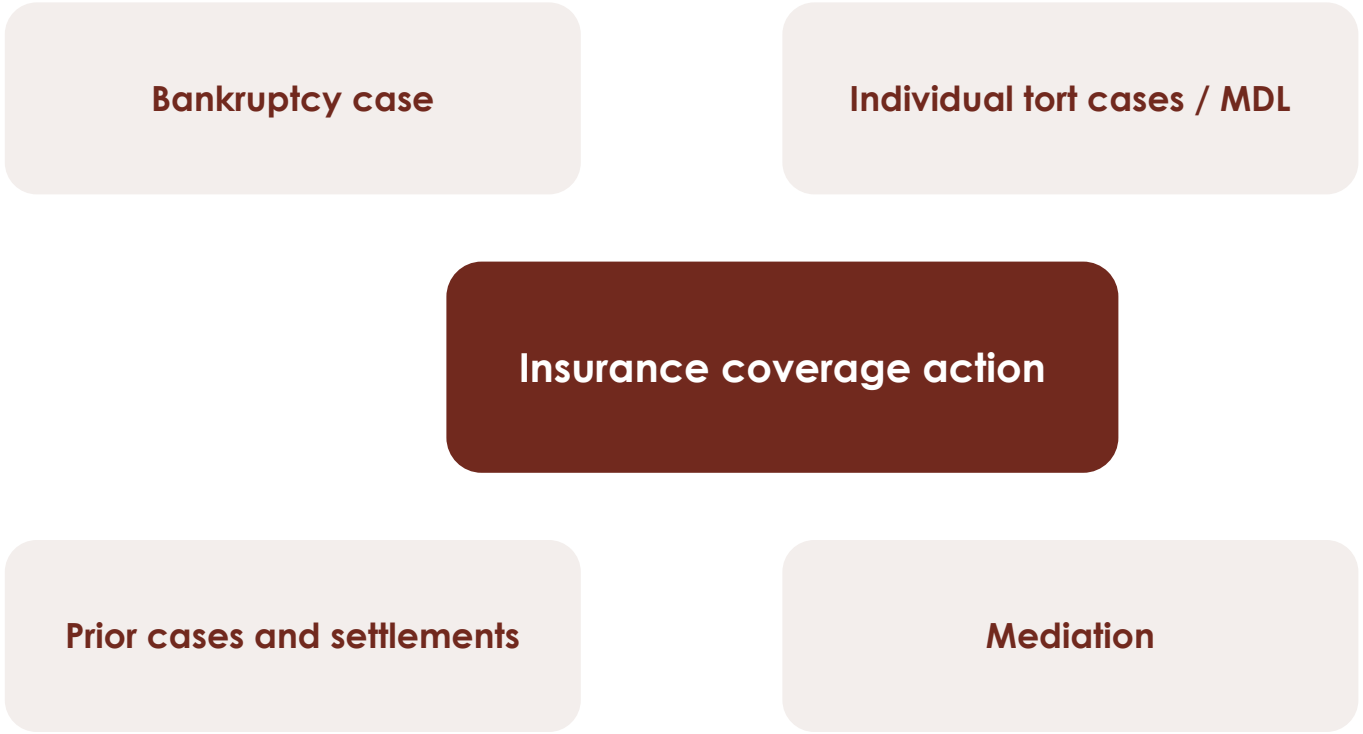
Obligations Among Insurance Layers

- Primary insurer obligations
  - Defense
  - Reporting to higher layers
  - Provision of information (including documents culled and analysis obtained through AI)
  - Reasonable settlement
- Excess and umbrella insurer obligations
  - Compliance with any drop-down obligations
  - Assessment of the underlying case (including reasonable settlement obligations)
  - Coordination with lower and upper layers

Document Discovery and Production

- Plan before you prompt
  - Define the scope and objective of the document review
  - Identify the documents, custodians, attorneys, confidential material, and protective orders likely involved
  - Consider how documents will be used and where they may ultimately be produced (e.g., bankruptcy, coverage action, other cases)
  - Design the review to capture confidentiality, privilege, and protective order designations up front, so documents can be reused without re-review
- Using TAR and AI to review documents
  - Comply with any requirements to disclose AI use and review protocols under court rules, protective orders, or ESI protocols
  - Validate TAR and AI review with sampling and recall metrics
- Lawyers are responsible for complying with protective orders and confidentiality requirements and for ensuring accuracy

The Web of Parallel Proceedings



- Each proceeding may have its own protective order, confidentiality rules, and privilege rulings
- Orders can conflict on who may see documents and how they may be used
- Documents may move between cases only if the orders allow it
- Mediation confidentiality adds another layer
- Documents and material from prior cases may be relevant, but bring their own orders and destruction obligations into play

Protective Orders: Identify, Then Implement at Scale

Track protective order and confidentiality information for all documents at scale

- Keep documents, confidentiality, and protective order information in one place
- Track which parties have received the documents, and in which proceedings
- Track signed acknowledgments (e.g., Exhibit A undertakings)
- Track any clawbacks or challenges
- Track destruction requirements

Confidentiality Considerations

- Use of AI
  - Must consider the type of data involved and whether it requires higher confidentiality protections (e.g., financial, health, personally identifiable information)
  - Must consider the permitted use of data, what will be disclosed, and to whom
  - Must consider applicable privacy laws, protective orders, etc.
- General considerations
  - Must consider prior settlements and applicable privacy provisions and/or mediation protections
  - Must consider the use of redactions
  - Must consider whether the confidential information will be required to be disclosed at trial (or by court order)
  - Must consider what will be done with data once litigation has ended (e.g., destruction)

PHASE 3

Settlement and Resolution

Claims and exposure valuation

Individual claims or aggregate estimates?



- Key questions
  - What is the unit of analysis?
  - What is the unit of decision?
  - Are sampling or other statistical methods appropriate?
- AI can support both individual and aggregate workstreams
- Individual-level determinations generally involve more
  - Detailed and sensitive evidence
  - Expansive source-document support
  - Extensive demand for human review
- A method suitable for estimating total liability may not be sufficient to determine a particular claimant's allocation

Beyond AI-generated results, processes and workflows involving AI need comprehensive QC.



AI and quality control—best practices

- Assess the workflow on multiple dimensions
  - Accuracy
  - Reliability
  - Reproducibility
  - Validity
- Devise comprehensive QC strategies
  - Targeted review of outcomes
  - Enhanced review of nonstandard records
  - Comparison of AI-supported outputs against human review
  - Random sampling to estimate overall process error rates
- Preserve prompts, sources, and outputs in accordance with discovery obligations

Questions?

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