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Table of Contents

Erica Brody's Interview with Judges Kobick and Murphy – January 12, 2026

Interview By Erica Brody

Erica Brody: Thank you, Judge Kobick and Judge Murphy, for joining me today, and for your willingness to share your respective journeys to the bench with our legal community. So, what were your paths to the bench?

Judge Kobick: I started my career as an elementary school teacher in New York City. I taught second and third grades for two years before law school. And I went to law school thinking that I wanted to have tools to address some of the systemic issues I saw my children and their families struggling with in the classroom. But I found that, when I got to law school, I was interested in all of it, especially how the state interacts with individuals. I was lucky to clerk for three different judges after I graduated law school. I was also lucky to get my first job as a lawyer at the Massachusetts Attorney General's Office, and I stayed there for my entire career until I came to the bench. I had wonderful colleagues and loved my time there.

Judge Murphy: My path to the bench began out of college. I was working in an agency whose goal was to try to reduce homelessness in Massachusetts. I saw the people who were able to effectuate change most effectively were lawyers, and so I wanted to become one. But then I went to law school and pretty quickly realized that I wanted to be a public defender. I graduated and became a public defender for a few years. I used to say it's the best job I've ever had—though I am partial to my current job. It was an incredible learning opportunity, representing people who are charged with crimes, who often have nobody rooting for them except for you. It also was an incredibly humbling experience. I then eventually spent a little time at a law firm in Boston and then opened my own firm for about the last 15 years, doing primarily criminal defense.

Erica Brody: Were there particular mentors who influenced you or experiences that motivated you to become judges?

Julia Kobick: I would answer this question by talking about the three judges I was lucky enough to clerk for, and how each one molded the way that I think about my job as a judge. The first judge was Chief Judge F. Dennis Saylor IV on the U.S. District Court for the District of Massachusetts. He was my introduction to getting to see litigation, and he encouraged his clerks to come to court for every single session. I really admire how he manages a courtroom, and his humility in approaching the job. He's an excellent writer: he's very clear and direct, and you understand why he's ruling the way that he is. And then Chief Judge Michael A. Chagares on the U.S. Court of Appeals for the Third Circuit is just this wonderful, gregarious, bridge-builder type of judge. He uplifts everyone. He loves oral argument, he loves the give and take of questioning, and is an example of joy in judging. And then, Justice Ruther Bader Ginsburg on the Supreme

Court of the United States is my model of a judge with an incredible moral compass and a steely determination and vision for the job. Even at the Supreme Court, the highest court in the land, she was always very focused on the people who would be affected by the case, the individual litigants and the case. I try to take a little bit of all three of them in thinking about how I want to be as a judge.

Judge Murphy: As a criminal lawyer, you're in front of judges all the time. I was in court three or four or five days a week. I've spent a lot of time in front of judges, and absorbing what I think is to be emulated and what is not to be emulated. The way judges make the experience of being in court for the litigants is very different. That doesn't mean necessarily that litigants leave happy: the nature of an adversarial system is that basically half the people are unhappy half the time. But I think about the judges who maintained an understanding that being a trial lawyer—the day-to-day practice of litigating—is hard. The judges who remember that and try to make sure that the experience in court is humane and fair, not just for the litigants but for the lawyers, too, are the people I'm going to try to emulate.

Erica Brody: What advice do you have for young attorneys who appear before you?

Judge Kobick: First, I want to say to all of the more experienced attorneys that I really encourage them to give younger attorneys the chance to appear in court. I am here today, I think, because my bosses and mentors at the Attorney General's office gave me that chance when I was a young attorney. I want to especially call out Bill Porter, who was my first boss at the Constitutional and Administrative Law Division: he got me in court right away, and I grew to feel comfortable in court, and it just makes a huge difference to newer attorneys to get those chances.

I view oral argument as a conversation between the judge and the attorney. I interrupt a lot; I ask a lot of questions. I don't like it when people come in and read from a script. The other thing I would say is when a lawyer is willing to acknowledge a weakness in their argument, or concede a point that might not doom their case, but is a minor point that should be conceded in my eyes, that builds credibility and makes me feel like, okay, your other arguments are probably stronger because you're willing to acknowledge the weaknesses on some of the subsidiary issues. I think that can be hard for newer attorneys to know in the moment when it's appropriate to acknowledge weakness or concede a point.

Judge Murphy: I would pick up on that last point as probably the most common mistake I see. People will often feel they need to argue every possible theory in their briefing and at oral argument (but mostly I'm talking about in their briefing). If you have five arguments, and three of them are not going to carry the day, then those three arguments shouldn't be made. And I think it's hard for a young attorney to say, well, this one has a 5% chance of winning, I'm going to

include it just in case this is the 5%. That actually undermines the persuasiveness of the whole undertaking. You also don't have to file a sur-reply in every case. And if the page limit is 25, it needn't be 24 and three-quarters. Oftentimes, young attorneys feel the need to take every possible page, every possible minute, every possible sentence to expand on an argument. But, in fact, brevity is the soul of wit, right? And brevity will oftentimes make you much more persuasive.

And at oral argument, when I'm asking questions, they're genuine questions. I'm asking questions because I am on the fence about something. It's really helpful if you can answer those questions. For me, the biggest mistake is when you insist on doing your 15-minute presentation, and don't pay attention to the fact that I have different questions other than those.

Judge Kobick: I agree with that. That's why I ask questions, too. It's not to try to trip people up. I often learn a lot from asking questions. I will say that it's okay for the advocate to say they don't know, too. I mean, you should come prepared, you should know your record inside out, you should know the case law, but sometimes something will come up and an advocate just doesn't know the answer. I'd always prefer that answer, and then a follow-up saying, you know, with the court's permission, I could file a supplemental letter, or a brief, or something like that, rather than trying to make up an answer on the spot.

Erica Brody: What has been the most challenging or the most surprising aspect of being a judge?

Judge Kobick: I'm someone who likes to read things and think about them, research them, and feel like the research is exhaustive before I make a decision, and sometimes you can do that, but sometimes you can't. When you're on trial and you're making decisions on the fly in response to evidentiary objections, you just need to decide and move on. So that has been challenging to get comfortable in that role.

I think the other thing that's been challenging is sentencing; it's just such a weighty and solemn proceeding, and the sentence must be fair, just, and reasonable under the law. But there's also the hearing itself, where the judge has an opportunity to speak directly to the defendant, maybe his family, to the victim, their family, and to try to shape how the defendant thinks about the question of, “After I've served my sentence, what next?” I put a lot of thought into each sentencing, what I want to say to the defendant during the sentencing, and what the appropriate sentence should be, but it's that piece of it that has felt challenging to try to get it right each time.

Judge Murphy: I was a criminal lawyer and thought sentencing was sort of right up my alley, and I thought I'd be able to do that pretty routinely. But it is very different to advocate for a sentence than to impose one. Trying to come up with the right answer, in terms of what the sentence should be, is and should be hard. I hope it continues to be hard.

Also, the sheer breadth of questions that are before us is both amazing and overwhelming. We're switching from topic to topic, and most of the topics are very new to me; it has been a big transition. And the breadth of areas that we have to become experts in has certainly been a real challenge.

Erica Brody: What motivated you to seek a judicial appointment, and do you have any advice for attorneys who may one day wish to pursue a judgeship?

Judge Murphy: The idea of becoming a federal judge is just so inherently random that I don't think it can really be part of a plan, and so it certainly was never part of mine. It was only because I was called up by somebody who was on the selection committee and encouraged to think about applying that the idea even became a possibility. To be honest, up until the day I was sworn in, I didn't really think it was going to happen. I don't operate under the delusion that I'm the only person qualified for the job. It's right place, right time, and you happen to get hit by lightning at the right time. And that's how I found myself here.

I don't know how you pursue a federal judgeship; it's like saying, 'How do you get hit by lightning?' Even if you want to, it's hard to do. I think the advice that I would give to people who want to generally move up in the legal community is to remember that it is a community of which you are a part, and that you should treat people with respect along the way. But I think, more importantly, it is necessary to be a good lawyer, to be a good person, and to be someone, frankly, who enjoys being a lawyer. There are some people in the legal community who view litigation as war, and "If you don't hate your opponent, then you're not doing a good job;" I don't think that's true. I think we want people in these positions who understand the importance of civility and treating people with humanity. I think optimism, as opposed to cynicism, about the state of the legal community goes a long way towards making our legal community the community you want to live and work in.

Judge Kobick: My story is very similar to Judge Muphy's I had no plan or thought that I would become a judge. But same thing, a good friend knew that there was a committee that was soliciting applications for our court, and he called me up, and he said, "Hey, you know, there's this application, you should consider putting it in," and I said, "No, that's silly," and we talked about it, and the more I thought about it, the more I thought, 'Well, it's a great job, I'm sure I would love doing it, I'm certainly not going to get it, but I'll just put my application in and see what happens.' And I was actually going to use the same metaphor that Judge Murphy did: sometimes lightning strikes, and you get very lucky, and I'm just incredibly grateful to be where I am now.

The more general advice for folks who want to have a career in law would be just to do whatever work feels meaningful and rewarding to you in the moment, because I don't think that you can choose a career path thinking, okay, this is the path that's going to get me to the bench. There are some skills that I think are certainly helpful. Having a litigation practice and appearing in court and having the experience of writing briefs, doing trials, standing up in court is helpful, but within that, there's a huge range of areas you could practice in the law. You can find many different paths to the federal bench, but, for all of us, our time on Earth is short, and you have to use your time in a way that you're proud of what you're doing, and what you're doing matters, and allows you to reflect back and think, 'I did what felt meaningful and important to me at the time.'

On the whole, my experience as a practicing lawyer has been that the bar in Massachusetts is quite civil and respectful of one another, and that's also been my experience on the bench. In the vast majority of cases, lawyers are courteous to one another and respectful and do honor to the system of justice that we have here. I just encourage the bar to keep up that model, because we're in an era, I think, of waning civility across the country. But when you have a community that's committed to treating each other respectfully and with dignity—and we need to do our part on the bench to foster that—I think the bar is doing a pretty good job right now, and I encourage everyone to keep that up.

Erica Brody: Thank you both so much for joining me today, and for sharing your thoughtful and insightful perspectives.

Born in Columbia, Maryland, Judge Brian Edward Murphy graduated from the College of the Holy Cross in 2002 and from Columbia Law School, where he was a James Kent Scholar, in 2006. Judge Murphy began his career as a public defender at the Massachusetts Committee for Public Counsel Services. After three years as a public defender, Judge Murphy worked as an associate attorney at Todd and Weld LLP until 2011. He then became a founding partner at Murphy & Rudolf LLP in Worcester, Massachusetts. In March 2024, President Biden nominated Judge Murphy to serve as a district judge for the United States District Court for the District of Massachusetts, and he was confirmed in December of the same year.

Judge Murphy is deeply committed to protecting and upholding constitutional rights. This commitment began early. During his time at Columbia Law School, Judge Murphy was the Editor-in-Chief of the Columbia Human Rights Law Review. Judge Murphy then spent the majority of his career defending those accused of crimes in state and federal court. During his time at Murphy & Rudolf LLP, Judge Murphy focused on white-collar offenses, drunken-driving allegations, violent crimes, and postconviction and appellate advocacy. His experiences as a public defender, an associate attorney, and a founding partner of a firm are all evidence of his

commitment to working towards justice for all. Judge Murphy's significant legal expertise and years of advocacy are a testament to his deep commitment to public service in Massachusetts.

Julia E. Kobick is a District Judge on the United States District Court for the District of Massachusetts. She previously served as a Deputy State Solicitor and Assistant Attorney General in the Massachusetts Attorney General's Office. Before joining the Attorney General's Office, she was a law clerk to the Honorable Ruth Bader Ginsburg of the U.S. Supreme Court, the Honorable Michael A. Chagares of the U.S. Court of Appeals for the Third Circuit, and the Honorable F. Dennis Saylor IV of the U.S. District Court for the District of Massachusetts. She was an elementary school teacher in New York City before joining the legal profession. Judge Kobick is a graduate of Harvard Law School, Pace University, and Harvard College.

Erica Brody is a partner at Brody Hardoon Perkins & Kesten, LLP. She has devoted her career to demanding justice and accountability on behalf of people whose civil rights have been violated. Erica is licensed to practice in both Massachusetts and New Hampshire, and she appears regularly in federal and state court, as well as before the Massachusetts Commission Against Discrimination. Erica earned her B.A. at Tufts, where she graduated magna cum laude and with highest honors. She earned her J.D. at Boston College Law School. Following Erica's graduation from law school, she clerked for the Justices of the Massachusetts Superior Court.

Legal Analysis

Employer Rights, Risks, and Obligations in the Modern Age of Social Media

By Catherine "Cat" Scott and Daniel Fishman

Employers face unprecedented scrutiny for what their employees say and do when off the clock. In the era of ubiquitous smartphones and instantaneous sharing on social media, an employer can become part of a media cycle overnight, whether because of an employee's own post or a bystander's video. Online content generated on an employee's personal time can quickly spill into the workplace and media, triggering brand backlash, customer concern, and internal disruption.

Unsurprisingly, this environment has prompted many employers to adopt and aggressively enforce policies governing off-duty social media use. Recent data points to a sharp increase in social media–related discipline. One survey of over 1,000 business leaders reported that one in four companies had disciplined an employee for what were perceived to be political posts within a month of Charlie Kirk's assassination. *1 in 7 Companies Punished Employees Over Charlie Kirk Social Media Posts*, ResumeTemplates.com (Sept. 30, 2025) (Charlie Kirk was a rightwing activist, media personality, and political ally of President Donald Trump who was shot and killed at a public speaking event on September 10, 2025. Some who disagreed with Mr. Kirk's views celebrated his death online, which led some of Mr. Kirk's allies to target his online critics and their employers); Josh Boak and Nicholas Riccardi, *After Kirk's killing, a growing chorus of conservatives wants his critics ostracized or fired*, The Boston Globe (Sept. 15, 2025). Employers polled in this study cited the tangible effects such posts can have in the workplace as the justification for discipline: 29% reported increased workplace conflict stemming from political social media posts, and at the time, 72% indicated that such conflict intensified after Kirk's death.

Given the ease with which employees can broadcast controversial or inflammatory views online, employers must carefully assess the legal boundaries of when online speech, whether political or not, may serve as a lawful basis for discipline. This evaluation requires an understanding of the legal constraints that govern the development and enforcement of employer policies addressing employees' social media and online conduct.

Public Employers' Regulation of Off-Duty Speech

Public sector employers are governed by different standards than those of private employers. The First Amendment provides some limits as to what public sector employers can do in response to their employees' off-duty speech, including online and/or social media activity. Public employers that discipline employees for constitutionally protected speech may face liability. At the same time, constitutional protection is far from absolute, and not all online speech by public employees is protected.

To establish First Amendment protection for off-duty speech, an employee must first show that the speech was made as a citizen, rather than pursuant to official job duties, and that the speech addressed a matter of public concern. Speech involving political or community issues may satisfy this standard, while purely personal workplace disputes typically do not. If the employee cannot demonstrate that their off-duty speech involved political or community issues, rather than personal workplace disputes, First Amendment protections do not apply, and employers are free to discipline employees for engaging in this speech.

If the employee's threshold showing is met, courts apply the *Pickering* balancing test, under which the employee must demonstrate that his or her interest in commenting on matters of public concern outweighs the government employer's interest "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). This fact-intensive inquiry examines, among other things, the "time, place, and manner of the employee's speech" and the "employer's motivation in making the adverse employment decision." *Decotiis v. Whittemore*, 635 F.3d 22, 35 (1st Cir. 2011).

The proliferation of social media has resulted in a spike in First Amendment-related litigation arising from public employee social media usage. *See* Abby Ward, *In Defense of Pickering: When a Public Employee's Social Media Speech, Particularly Political Speech, Conflicts with Their Employer's Public Service,* 108 MINN. L. REV. 1643, 1666–74 (2024) (collecting cases). While the inquiry is generally fact-based, courts have largely condoned employer discipline based on social media posts that interfered with operations and hurt relationships among coworkers and sided with employees disciplined solely for negative comments about leadership decisions. *Compare Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 344–48 (4th Cir. 2017) (posts about gun control that resulted in internal complaints, conflicted with employee's job duties, and undercut community trust in employer not protected speech) *with Liverman v. City of Petersburg*, 844 F.3d 400, 410 (4th Cir. 2016) (comments about the safety issues associated with inexperienced police officers becoming instructors were protected public speech that did not affect workplace).

Simply stated, the legality of public employee discipline for social media activity is highly fact-dependent, based on the content of the speech, the context of the workplace, and the effects of the speech on the workplace. Public employers continue to benefit from clear, written policies that outline generally what speech may or may not be protected, especially as it pertains to employees' job duties. These policies should highlight the consequences of speech that disrupts operations, undermines public trust, or violates other employee obligations.

Private Employers' Regulation of Off-Duty Speech

While private sector employers are not constrained by the First Amendment, their discretion to discipline employees for social media use is not unlimited.

The most significant legal constraint in this context is the National Labor Relations Act (NLRA). Section 7 of the NLRA protects private sector employees who engage in "concerted activities for the purposes of . . . mutual aid and protection." 29 U.S.C. § 157. This includes employees' discussions about pay, benefits, and working conditions, which, depending on the political leanings of the National Labor Relations Board (NLRB or the Board), can be defined broadly or narrowly. Critically, these protections extend to off-duty conduct and online speech. The NLRB has repeatedly held that employees may not be disciplined for exercising Section 7 rights merely because those activities occur on social media. For example, the Board has found that employees' engagement on a coworker's Facebook post involving criticism of their job performance constituted protected concerted activity. *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012).

At the same time, Section 7 does not insulate all online speech from discipline. Individual gripes that are not undertaken for mutual aid or protection fall outside the NLRA's protection. Similarly, the NLRA does not protect speech that is egregiously offensive, knowingly false, or wholly disconnected from any labor-related concern, including public disparagement of an employer's products or services unrelated to a labor dispute. Consistent with this limitation, an advice memorandum from the NLRB's general counsel concluded that an employee who complained about his pay and disparaged his employer's customers did not engage in protected conduct where the post was not discussed with coworkers and elicited no employee response. United States Government National Labor Relations Board, Office of the General Counsel, Advice Memorandum, (July 7, 2011).

While the NLRA largely regulates the relationship between employers and their employees' unions, private sector employees have Section 7 rights under the NLRA regardless of whether they are unionized. Employees who are unionized may have additional protections pursuant to their respective collective bargaining agreements.

Against this backdrop, any policies governing off-duty speech and/or employees' use of social media or other online resources should be drafted with particular care. Recent NLRB decisions have applied heightened scrutiny to workplace rules that could reasonably be construed to chill protected activity, even if that chilling effect is unintended. *Stericycle, Inc. & Teamsters Loc. 628*, 372 NLRB No. 113 (2023). While the new NLRB majority may revisit this standard, many well-advised employers have responded by favoring narrower, more precise policy language over broad or ambiguous (intentionally or unintentionally) policies that risk running afoul of the current standard set forth by the NLRB.

With respect to state laws nationwide, there are few additional constraints on discipline for employee social media use. In Massachusetts, for example, employers may not discipline employees for giving or withholding a vote or political contribution. Mass. Gen. Laws Ann. ch. 56, § 33. Beyond that limited protection, however, Massachusetts law generally does not restrict

what employers can do in response to off-duty political expression, a position that reflects the rule in most states nationwide.

However, employers with a multi-state workforce—which is increasingly common post-pandemic with many employers opening up remote positions where possible—must remain attentive to outlier jurisdictions. For example, California law prohibits employers from disciplining employees for lawful off-duty conduct or from maintaining an employment policy that controls the political activities of employees. Cal. Lab. Code §1101, §1102, §96(k). Employees have increasingly invoked these statutes in California to mount challenges to terminations related to off-duty social media use. *See Koraitem v. Microchip Tech., Inc.*, No. 5:24-CV-00462-EJD, 2025 WL 2856292, at *3 (N.D. Cal. Oct. 8, 2025) (denying summary judgment for employer who terminated employee for "offensive" social media posts related to Israel-Hamas war). Other states like Colorado and New York have comparable protections, making geographic location a relevant consideration in policy drafting and enforcement decisions. Colo. Rev. Stat. § 24-34-402.5 (discriminatory or unfair employment practice for an employer to terminate an employee for engaging in lawful activities off the employer's premises during nonworking hours); N.Y. Lab. Law § 201-d (prohibiting employers from discriminating against employees for refusing to attend employer-sponsored political or religious meetings and for engaging in lawful political or recreational activities off-duty). Accordingly, employers operating across multiple jurisdictions should be wary of having a one-size-fits-all policy governing employees' off-duty speech, especially if it broadly restricts employee speech.

Employer Obligations to Respond to Harassing Social Media

Employee social media activity does not merely create disciplinary risk; it can also trigger affirmative obligations for the employer to respond. Under both federal and state law, employers have a legal obligation to take prompt remedial action to stop unlawful harassment they know or should have known about. *Mod. Cont'l/Obayashi v. Mass. Comm'n Against Discrimination*, 445 Mass. 96, 107 (2005); 29 C.F.R. § 1604.11. The Massachusetts Commission Against Discrimination's Guidelines on Harassment in the Workplace explicitly identify how and when unlawful harassment can occur via online interactions, recognizing that harassment may be actionable even when it occurs entirely in digital spaces. As the Guidelines explain, the online environment is "an ever-present and pervasive aspect of virtually every employee's workplace and personal life." Massachusetts Commission Against Discrimination, *MCAD Guidelines on Harassment in the Workplace* (July 2, 2024).

Recent case law underscores the consequences of inaction. In *Okonowsky v. Garland*, for instance, an employee alerted management to an anonymous Instagram account that posted overtly sexist, racist, and bigoted memes referencing the employer, its employees, and its clients. *Okonowsky v. Garland*, 109 F.4th 1166 (9th Cir. 2024). Although the employer downplayed the conduct and delayed its investigation, the district court granted its motion for summary judgment. On appeal, the Ninth Circuit reversed summary judgment and concluded that a

reasonable juror could find that the employer failed to take prompt and effective remedial action. The case went forward to trial, highlighting the litigation exposure that can follow an employer's failure to respond decisively to online harassment. *See* *Okonowsky v. Barr*, No. 2:21-cv-07581 (C.D. Cal. Jan. 21, 2025), ECF. No. 114 (plaintiff was ultimately unsuccessful at trial, but the employer still suffered the cost, risk, and reputational damages associated with a multi-year sexual harassment case).

Conclusion

Employer social media policies and practices require a deliberate balancing of competing business interests. While restrictive policies may mitigate reputational harm and reduce internal conflict, overbroad policies introduce their own risks, including legal exposure and employee relations challenges. As with many areas of employment law, however, the greatest risk lies not in policy language, but in enforcement.

Social media content frequently implicates hot-button political issues that are closely intertwined with characteristics protected by anti-discrimination laws. When employers enforce social media policies unevenly or appear to police one side of a political debate more aggressively than the other, those enforcement decisions may be cited as evidence of discriminatory intent.

Ultimately, the combination of lawful, clear policies and consistent, well-documented enforcement is the most effective tool employers have to reduce exposure while maintaining control over workplace conduct in an increasingly public digital environment.

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Legal Analysis

Eyes on the Road: AI, Privacy, and Automated License Plate Readers

By Chris Hart and Ariel Chen

Background

The use of Automated License Plate Reader (ALPR) systems is becoming increasingly common in cities across the United States. ALPR systems are computer-controlled cameras sold to law enforcement agencies, which deploy ALPRs at both fixed strategic points and in mobile formats. Although ALPR technology has existed for over two decades (Department of Homeland Security & National Urban Security Technology Laboratory, *Automated License Readers Market Survey Report*, June 2025, at 1.), the recent integration of artificial intelligence (AI) into ALPR systems raises novel questions about how AI-enhanced surveillance interacts with privacy rights and concerns about discriminatory law enforcement.

Fixed ALPR systems are mounted in specific locations, often on existing infrastructure (such as traffic lights or telephone poles). Peter G. Berris, Kristin Finklea & Dave S. Sidhu, *Automated License Plate Readers: Background and Legal Issues*, Congressional Research Service, July 21, 2025. Mobile ALPR systems can be mounted on police vehicles, commercial vehicles, or even drones. *Id.*; Beryl Lipton, *That Drone in the Sky Could Be Tracking Your Car*, Electronic Frontier Foundation, Sept. 22, 2025. Both systems can capture images of license plates on passing vehicles; bumper stickers; the date, time, location, direction, and lane of travel; and similar information. ALPR systems contain both "real-time" alerts and historical data, allowing users to enter and search for driver information in a database and be notified about new hits relating to specific plate numbers that might be associated with stolen vehicles, missing persons, or suspected criminal activity (known as a hot list). Peter G. Berris, Kristen Finklea & Dave S. Sidhu, *Automated License Plate Readers: Background and Legal Issues*, Congress.Gov, July 21, 2025.

Traditionally, ALPR systems have used Optical Character Recognition (OCR) technology to capture and identify information on license plates. OCR ALPR systems are typically expensive technologies that use dedicated hardware and can recognize characters on license plates with around 80-85% accuracy. *See, e.g.*, *How Do License Plate Readers Work: OCR v. AI Technology*, Brite, May 12, 2020.

But ALPRs can also incorporate machine learning and AI technologies, increasing accuracy and lowering costs. *Id*. For example, ALPR technology can be placed on smartphones to record images and transmit them to driver databases. U.S. Department of Homeland Security, Science and Technology, and National Urban Security Technology Laboratory, *Automated License Readers Market Survey Report* (June 2025), at 1-2. According to the Department of Homeland

Security, "ALPR systems now can read much more than license plates. ALPR software can detect dents on cars, search for specific bumper stickers, process specialty tags, and recognize rideshare logos." *Id*. at 1.

Privacy Concerns

Law enforcement's use of AI-enhanced ALPR systems has raised concerns from civil rights organizations, immigrant rights groups, and litigants focused on privacy. As these actors argue, ALPR systems have created a nationwide surveillance system in which massive amounts of information about individuals can be available to both law enforcement and private parties.[1] AI enhances law enforcement's surveillance capabilities by increasing the speed and power of analysis and information-sharing.

Civil liberties organizations have pointed out that AI-enhanced ALPR technologies can inappropriately flag so-called "suspicious" travel patterns for use by state and federal law enforcement agencies. Jay Stanley, *New Report Highlights How CBP and Border Patrol are Becoming a Repressive Internal Intelligence Agency*, American Civil Liberties Union, Nov. 24, 2025. Although ALPRs can be used for legitimate purposes and to promote public safety—such as by collecting tolls or assisting in AMBER alerts—ALPRs enhanced by AI and deployed nationwide can also lead to biased and discriminatory law enforcement. They can be used to target specific groups, such as those who might be suspected of being undocumented immigrants, those seeking reproductive healthcare, or political protestors. Dave Maass & Rindala Alajaji, *How Cops Are Using Flock Safety's ALPR Network to Surveil Protesters and Activists*, Electronic Frontier Foundation, Nov. 20, 2025. Advocacy groups note, for example, that ICE has searched local ALPR databases hundreds or thousands of times as part of its enforcement activity. *See, e.g.*, *Coalition of Civil Rights and Advocacy Organizations Deeply Opposed to use of Flock Cameras for ICE Surveillance*, ACLU Colorado, Aug. 11, 2025. These dangers are exacerbated by the amount of time that information can be kept in law enforcement databases—sometimes indefinitely. Ángel Díaz & Rachel Levinson-Waldman, *Automatic License Plate Readers: Legal Status and Policy Recommendations for Law Enforcement Use*, Brennan Center for Justice, Sept. 10, 2020.

Legal Framework for Privacy, ALPR Systems, and AI Enhancement

To date, multiple lawsuits have challenged the use of ALPR systems as potentially violative of core federal and state constitutional principles protecting an individual's reasonable expectations of privacy against warrantless government intrusion. Although few suits have focused on the integration of AI technologies into these systems, key principles have emerged that will inform the evolution of this area in the context of AI.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In *Katz v. United States*, the Supreme Court established that the Fourth Amendment "protects people, not places." 389 U.S. 347, 351 (1967). When a person "seeks to preserve something as private," and his or her expectation of privacy is "one that society is prepared to recognize as reasonable," government intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (quotations, citations, and alterations omitted). *See also* U.S. Const. amend. IV (describing probable cause requirement for warrants). Therefore, in general, law enforcement must obtain a warrant when a search would violate a person's reasonable expectation of privacy.

These foundational principles have taken on new significance in the digital age. The rise of the internet and digital technologies has enhanced government surveillance capacities and raised novel legal questions. Federal and state courts have repeatedly recognized a tension between modern investigative capabilities and preservation of the "degree of privacy against government that existed when the Fourth Amendment" and comparable state guarantees were adopted. *Commonwealth v. McCarthy*, 484 Mass. 493, 498 (2020) (citation omitted).

In *United States v. Jones*, for example, Justice Alito reasoned in a concurring opinion that using a GPS device to track a vehicle's movements over an extended period without a warrant intrudes on reasonable expectations of privacy because "society's expectation" is that police will not "secretly monitor and catalogue every single movement of an individual's car for a very long period." 565 U.S. 400, 430 (2012) (Alito, J., concurring).

In *Carpenter v. United States*, the Supreme Court concluded that historical cell-site location information (CSLI) enables law enforcement to reconstruct a person's past movements with such breadth and depth that accessing it constitutes a search requiring a warrant supported by probable cause, describing CSLI as an "all-encompassing record of the holder's whereabouts" and a "deep repository of historical location information" revealing an "intimate window into a person's life." 585 U.S. 296, 311 (2018).

These decisions have considered whether new forms of surveillance exceed ordinary expectations of governmental monitoring to expose intimate details of an individual's life.

Where Warrantless Surveillance Can Be Found Constitutionally Permissible*: Commonwealth v. McCarthy*

The Massachusetts Supreme Judicial Court (SJC) has already examined the tension between privacy and emerging technology in the context of ALPRs in *Commonwealth v. McCarthy*, 484 Mass. 493 (2020). There, the SJC held that the warrantless search of data derived from four fixed

ALPRs that captured information from the criminal defendant's vehicle did not violate the defendant's constitutional rights. *Id.* at 512.

In *McCarthy*, the Massachusetts State Police operated four ALPRs on the Sagamore and Bourne Bridges. *Id.* at 494. While investigating the defendant on suspicion of drug distribution, the Barnstable Police Department conducted a warrantless search for the defendant's license plate in both "real-time" alerts and historical ALPR data. *Id.* The defendant argued that this warrantless search violated his constitutionally protected reasonable expectation of privacy, while the District Attorney argued that the defendant did not have an expectation of privacy in images of his license plate, because the images were from a camera located on a public bridge and the information from the images was observable by the public.

The SJC identified four factors distinguishing information collected by ALPRs from what was observable by "an officer parked on the side of the road": "(1) the policy of retaining the information for, at a minimum, one year; (2) the ability to record the license plate number of nearly every passing vehicle; (3) the continuous, twenty-four hour nature of the surveillance; and (4) the fact that the recorded license plate number is linked to the location of the observation." *Id.* at 508. The SJC stated that the time period in the first factor was long enough to trigger constitutional protections. *Id.* at 506.

The SJC ultimately concluded, however, that four ALPR cameras located on public bridges (away from constitutionally sensitive locations) provided only limited surveillance that did not divulge the whole of the defendant's public movements. *See id.* at 505-09, 512. The SJC noted, nevertheless, that the defendant's constitutionally protected reasonable expectation of privacy could have been invaded by a more extensive use of ALPR systems. *Id.* at 508-09.
The SJC clarified that the constitutional analysis "should focus, ultimately, on the extent to which a substantial picture of the defendant's public movements is revealed by surveillance." *Id.* at 506. To that end, the location of the ALPR is crucial. "ALPRs near constitutionally sensitive locations – the home, a place of worship, etc. – reveal more of an individual's life and associations than does an ALPR trained on an interstate highway." *Id*. Additionally, the SJC stated that with ALPRs in enough locations, the "hot list" feature (notifying users about new "hits" for specific plate numbers) could invade an individual's reasonable expectation of privacy and trigger constitutional protections. *Id*. at 507.

McCarthy suggests that a new challenge to AI-powered ALPR systems might meet a different fate. Where AI-powered systems depend on data being maintained for longer periods of time and provide complex, detailed, and sophisticated information about individual behaviors, *McCarthy*'s test would suggest that relying on such surveillance without a warrant could be prohibited or highly curtailed.

Where Warrantless Surveillance Can Be Found Constitutionally Impermissible*: Leaders of a Beautiful Struggle v. Baltimore Police Department*

In *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, the Fourth Circuit addressed the Baltimore Police Department's (BPD) Aerial Investigation Research (AIR) pilot program. *See* 2 F.4th 330 (4th Cir. 2021). In 2020, BPD retained a contractor called Persistent Surveillance Systems (PSS) to conduct the AIR program, an aerial surveillance pilot program that was to run for six months with three aircraft flying over Baltimore, covering around 90 percent of the city and capturing about 32 square miles per image every second. Each plane would fly for a minimum of 40 hours per week, amounting to approximately 12 hours per day during daylight hours, weather permitting. *Id.* at 334, 337.

The photos taken by the planes were transmitted to PSS ground stations, where contractors used the data to "track individuals and vehicles from a crime scene and extract information to assist BPD in the investigation" of certain target crimes. *Id.* at 334. PSS analysts prepared reports and briefings about target crimes, which could include "from both before and after the crime: 'observations of driving patterns and driving behaviors,' the 'tracks' of vehicles and people present at the scene; the locations those vehicles and people visited; and, eventually, the tracks of the people whom those people met with and the locations they came from and went to." *Id.* PSS was also able to integrate BPD systems into its proprietary software, enabling all systems to collaborate and enhance their ability to solve and deter crimes. Data from the AIR program was retained for 45 days. *Id.*

The plaintiffs sought a preliminary injunction of the AIR program, arguing that this surveillance violated Baltimore residents' individual liberties, including the reasonable expectation of privacy. BPD argued that individual physical characteristics would be unobservable in the AIR program because it would not provide real-time surveillance, and because images captured would depict individuals as a single pixel.

The Maryland District Court denied the plaintiffs' motion to enjoin the AIR program, and a divided Fourth Circuit panel affirmed. *See Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 456 F. Supp. 3d 699 (D. Md. 2020); *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 979 F.3d 219 (4th Cir. 2020).

On rehearing *en banc*, the Fourth Circuit held that, despite the fact that the AIR program had certain gaps in coverage (including because planes would not fly at night or during inclement weather), *see Leaders of a Beautiful Struggle*, 456 F. Supp. 3d at 704, the warrantless operation of the AIR program violated the Fourth Amendment because it "enable[d] police to deduce from the whole of individuals' movements." *Leaders of a Beautiful Struggle*, 2 F.4th at 346. The Fourth Circuit determined that *Carpenter* applied squarely to the case. Because data for the AIR

program was retained for at least 45 days, the Fourth Circuit stated that this constituted "a 'detailed, encyclopedic,' record of where everyone came and went within the city during daylight hours over the prior month-and-a-half," allowing law enforcement to "'travel back in time' to observe a target's movements, forwards and backwards." *Id.* at 341. The court likened AIR data to attaching an ankle monitor to every person in Baltimore. *Id.* Although the AIR program did not allow for perfect, continuous surveillance, the court found that it enabled "photographic, retrospective location tracking in multi-hour blocks, often over consecutive days, with a month and a half of daytimes for analysts to work with," which was "enough to yield a 'wealth of detail,' greater than the sum of the individual trips." *Id.* at 342.

The Fourth Circuit also emphasized that the type of information collected, rather than the type of surveillance technology used, is key to whether constitutional protections are triggered. *Id.* at 343-44. Whereas the district court dismissed the plaintiffs' CSLI research study showing that "people's movements are so unique and habitual, it is almost always possible to identify people by observing even just a few points of their location history," the Fourth Circuit found this study instructive, stating that "[w]hether those points are obtained from a cell phone pinging a cell tower or an airplane photographing a city makes no difference." *Id.*

The Fourth Circuit's analysis considered the raw data produced by the AIR program and what such data could reveal through deductive reasoning and integration of the data with other law enforcement systems. The court concluded that by integrating police information systems with a highly precise map of movements across 45 days, BPD gained insights about the whole of individuals' movements. Consequently, the court held that accessing AIR data invades individuals' reasonable expectation of privacy, constituting a search.

Current Court Challenges

Since *Carpenter*, *Jones*, *McCarthy*, and *Leaders of a Beautiful Struggle*, litigants across the country have continued to bring privacy- and discrimination-based challenges to law enforcement's use of ALPRs, highlighting the rapid evolution of this technology and its related privacy implications.

For example, the Electronic Frontier Foundation and the American Civil Liberties Union of Northern California filed a lawsuit in November 2025 challenging the use of ALPR systems under both the Fourth Amendment and the California Constitution's right to privacy. According to the lawsuit, "[a] person who regularly drives through an area subject to ALPR surveillance can have their location information captured multiple times per day. This information can reveal travel patterns and provide an intimate window into a person's life as they travel from home to work, drop off their children at school, or park at a house of worship, a doctor's office, or a

protest. It could also reveal whether a person crossed state lines to seek health care in California."

Similarly, the New Civil Liberties Alliance recently filed a brief in *Schemel v. City of Marco Island*, No. 25-13913 (11th Cir. 2025), challenging the City of Marco Island's retention of ALPR records for over three years, which they argue violates *Carpenter* as a warrantless search in violation of the Fourth Amendment.

The Institute for Justice filed suit challenging the City of Norfolk's use of over 170 ALPR cameras under the Fourth Amendment. According to the plaintiffs' filings, most driving routes in the City of Norfolk are surveilled by ALPR cameras, leading the plaintiffs to have allegedly had their information captured hundreds of times. The information is gathered in a database easily searchable by law enforcement, according to the briefing. On January 27, 2026, the district court granted summary judgment in favor of the City of Norfolk. *See* Opinion and Order, *Schmidt v. City of Norfolk*, No. 2:24-cv-621, ECF No. 191 (E.D. Va. Filed Jan. 27, 2026). The court distinguished the quantity and quality of data collected by the City of Norfolk from that in *Carpenter* and *Leaders of a Beautiful Struggle*, concluding that the collected data points were infrequent and often widely spaced because ALPR cameras were fixed in 75 clusters across the city, recording a vehicle's location only when it passed one of those ALPRs. *See id.* at 36-38. The court noted that this level of monitoring "does not 'follow' or 'surveil' [a] car unless it happens past another fixed ALPR camera." *Id.* at 41. The court stated that while police techniques could reveal more sensitive information after an individual becomes the subject of an investigation, it is those techniques, not the ALPR system itself, that reveal private aspects of life. *Id.* at 4-47. While the court did not conclude that the City of Norfolk's use of ALPR systems constituted a warrantless search, it did acknowledge that "as the number and capabilities of ALPR cameras expand, the constitutional balancing could conceivably tip the other way." *Id.* at 3.

These new case filings should help clarify any limits on governments' ability to use increasingly powerful ALPR technology for surveillance. In the meantime, absent legislative intervention, it is likely that ALPR systems will proliferate and gain more surveillance power as AI technology improves.

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Endnotes

1. Around 40% of U.S. agencies use ALPR systems. Billy Grogan, *From Patrol Cars to Poles: How Automated License Plate Readers Became a Crime-Fighting Star*, Police Chief Magazine, Oct. 15, 2025.

Heads Up

The *Cutter* Case Affirms that the Advisers Act Is Not Just About Securities

By Seth Davis

On April 23, 2025, a Massachusetts federal jury returned a mixed verdict in *SEC v. Cutter*, finding Massachusetts-based investment adviser Cutter Financial Group LLC (CFG) and its founder, Jeffrey Cutter, liable for violating Section 206(2) of the Investment Advisers Act of 1940 (Advisers Act), while clearing them of alleged violations of Section 206(1) and of claims relating to inadequate compliance policies. U.S. S.E.C., Samuel Waldon, Acting Director, Division of Enforcement, Statement on Jury's Verdict in Trial of Cutter Financial Group LLC and Jeffrey Cutter (Apr. 24, 2025); John Hilton, *Jury delivers split decision in Jeffrey Cutter annuity sales trial*, Insurance Newsnet, Apr. 24, 2025. Although the jury rejected the SEC's scienter-based claims, the verdict nonetheless reinforces an important principle: the Advisers Act governs the entirety of the adviser-client relationship and is not limited to conduct involving securities transactions alone.

The Facts on the Ground

In 2023, the SEC sued Cutter and CFG, alleging breaches of fiduciary duties owed to advisory clients, many of whom were retirees. According to the SEC, Cutter engaged in a "pattern of deception" by failing to disclose annuity commissions. Cutter, who was a registered investment advisor representative and a licensed insurance agent, allegedly sold to investment advisory clients insurance products known as fixed index annuities (FIAs) through Cutterinsure Inc., a Massachusetts corporation, controlled by Cutter and his wife, while investing the remainder of a client's assets with a third-party financial firm that managed Cutter's clients' assets for him. In the latter case, CFG's advisory clients paid CFG an annual, asset-based fee of approximately 1.5%-2% of the amount of the client's assets managed by CFG. For the fixed annuity sales, however, Cutter, directly or indirectly via Cutterinsure, received an up-front commission from the insurance company of 7%-8% of the annuity's value. From 2014 to 2022, Cutter generated at least $9.3 million in commissions from the sale of annuities to his advisory clients.
The SEC further argued that Cutter recommended replacement of existing annuities without adequately disclosing the commissions he would receive or the negative financial consequences clients might face, including surrender charges and loss of annuity bonuses. Complaint, *SEC v. Cutter Fin. Grp., LLC*, No. 1:23-cv-10589 (D. Mass. filed Mar. 17, 2023).

Cutter's Motion to Dismiss and a Tale of Two Regulatory Schemes

Prior to trial, Cutter filed a motion to dismiss arguing, in part, that the SEC lacked authority to bring claims based on the sale of insurance products under the Advisers Act, which, he claimed, relates solely to securities and does not apply to FIAs. Given that Cutter is a licensed insurance

agent as well as an investment adviser, he argued that he was acting in his capacity as an insurance agent when selling annuities and, therefore, his professional conduct in relation to the FIAs should be evaluated under state regulation pursuant to the National Association of Insurance Commissioners Suitability in Annuity Transactions Model Regulation. To bolster his argument, Cutter cited the McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011–1015, which generally precludes the application of federal law over state law in matters regarding insurance, as well as the Dodd-Frank Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010), which, he argued, makes clear that FIAs are insurance products and should be regulated as such, rather than as securities.

In response, the SEC argued that Section 206 of the Advisers Act, which contains the anti-fraud provisions of the regime, is not limited to conduct solely in connection with securities, but rather applies to the entirety of the adviser-client relationship, whether securities are involved or not. According to the SEC, the allegations at the heart of the enforcement action dealt with Cutter's actions as an investment adviser rather than solely as an insurance agent, evidenced by the fact that the sale of the FIAs was enmeshed with Cutter's investment advice to his advisory clients.

The Court's Ruling

The court, U.S. District Judge Denise J. Casper, denied Cutter's motion to dismiss, concluding the SEC had sufficiently alleged that Cutter did not disclose several incentives he received from recommending annuities over other investments. Further, the court disagreed with Cutter's argument that the McCarran-Ferguson Act prohibited the SEC's assertion of claims under the Advisers Act, observing that the Advisers Act regulates the obligations that an investment adviser owes to its clients, generally, and does not cause a direct conflict with or impairment of state insurance law. Expanding on this, the court stated that "no fiduciary duty adheres to Cutter based on his sale of insurance to a customer" and that the Advisers Act does not "require Cutter to use an altered version of the state's insurance sales form or to sever his agency relationship with the insurance company." Rather, according to the court, the Advisers Act simply requires that "when Cutter advises [advisory] clients as to the suitability of annuities as part of their investment strategy, he disclose the fact that his investment advice is conflicted by his role as the insurer's agent." Thus, the court concluded, the Advisers Act's requirements neither supersede nor conflict with state insurance requirements but instead are supplementary to such requirements.

The court also noted that Massachusetts's own fiduciary rule for investment advisers runs parallel to the fiduciary standards under the Advisers Act. The court noted that it would be an "odd result" if investment advisers could divorce themselves from their role as investment advisers where they had a financial interest in the success of a scheme on the basis that the target investment was not a "security" without the full and fair disclosure required by the Advisers Act

and yet at the same time were trusted by their advisory clients to make recommendations in their clients' best interest.

Cutter also argued there could be no finding of failure to disclose conflicts of interest because CFG's forms, including Form ADV and Form CRS, contained disclosures informing clients about the difference in compensation stemming from the sale of insurance products and that this compensation resulted in a conflict of interest. In addressing this defense, the court noted that CFG's regulatory filings utilized the phrase "may earn commission-based compensation" and presented the conflict of interest in a merely hypothetical light rather than concretely stating that Cutter did, in fact, earn commissions at a higher rate than other investment options he could have recommended.

Aftermath

Following a seven-day civil trial, the jury returned the verdict partly for and against Cutter and CFG. Subsequently, the court denied Cutter's request to reverse the verdict finding him liable for violating Section 206(2) of the Advisers Act, as well as his request for a new trial. The SEC asked the court to fine Cutter and CFG in an amount between $300,000 and $700,000, as well as to bar Cutter and CFG from receiving client compensation for five years unless clients are shown a copy of the civil judgment. On February 2, 2026, the court fined Cutter $50,000 and CFG $100,000 and also granted the SEC's request for a five-year injunction requiring CFG to provide every client with a copy of the civil judgment. In coming to these penalties, the court stated that the SEC's requested monetary penalty was "too high, particularly in consideration of the jury's determination" that Cutter and CFG did not act with scienter with respect to alleged violations of Section 206(1) of the Advisers Act.

Takeaways

The key takeaway from this case is that investment advisers operating simultaneously under multiple regulatory schemes must clearly disclose conflicts of interest arising from all the services and products comprising their advisory activities. Specifically, when providing advice to an advisory client on how best to allocate assets among different types of potential investments, including FIAs, an investment adviser should clearly disclose the commissions associated with the sale of the FIAs and other alternative investments and, if true, state that such commissions are higher than those received with respect to the fees earned when advising clients to invest directly in traditional products, such as mutual funds, exchange-traded funds, stocks, and fixed-income securities. As the court stated in its order, the Advisers Act requires that when an investment adviser advises clients as to the suitability of annuities, the investment adviser must disclose the fact that their investment advice is conflicted by the adviser's role as an insurance agent.

While this case involved FIAs, the court's reasoning (and the SEC's arguments) should be understood to cover conflicts of interest arising from other types of non-securities products. Further, this case raises the question of whether the Advisers Act standards would have applied to Cutter and CFG had they not chosen to sell FIAs as a component of a client's investment strategy for which they provided advice. The answer is presumably "no," as the sale of the FIAs would have been outside the investment adviser-client relationship and not involve securities. Thus, where an investment adviser also operates as a registered insurance agent or in a similar capacity, it is best practice for the adviser to clearly delineate the precise scope and boundaries of its various client relationships (lest the adviser unknowingly become subject to the more onerous requirements of the Advisers Act) while keeping in mind that the disclosure obligations in the capacity of the insurance agent would still apply under state law.

In addition, investment advisers should undertake a review of their regulatory disclosures in Form ADV and Form CRS to ensure they are adequately disclosing both hypothetical conflicts and actual conflicts. Relatedly, it is prudent for investment advisers to review their compliance manual to ensure they have policies and procedures in place to mitigate or eliminate such conflicts.

Lastly, although it is unclear whether the current makeup of the SEC would have chosen to bring a similar case today, investment advisers should be wary of dismissing this case as simply a remnant of the past administration. The statute of limitations under the federal securities laws is typically five years, and there is no guarantee that the future SEC would not prioritize cases like this, especially where the impacted advisory clients are retirees, whose protection has been a non-partisan priority of the SEC's examination staff.

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Heads Up

The Erosion of "Summary" Process in Post-Pandemic Eviction Practice

By Michael J. Louis

Issue: Summary Process Is No Longer Summary

For attorneys representing landlords in Massachusetts Housing Court—particularly those entering the forum for the first time or returning after an extended absence—the practice of summary process eviction has become markedly more complex, time-consuming, and procedurally demanding than it was pre-pandemic. The most significant takeaway for landlord-tenant practitioners is this: post-pandemic eviction cases, especially those involving nonpayment of rent, now routinely take far longer to prosecute than the system was originally designed to allow.

What was intended to be an expedited remedy for resolving possession disputes has evolved into a multi-stage, heavily regulated process shaped by expanded tenant protections, statutory reforms, and administrative changes implemented in response to housing instability during and after the COVID-19 pandemic.

Rule: Summary Process Was Intended to Be a Quick Remedy

Massachusetts courts have long recognized that summary process exists to provide landlords with a swift and efficient mechanism for recovering possession of their property. Unlike ordinary civil litigation, summary process was designed to minimize delay, limit procedural complexity, and deliver prompt resolution. Appellate decisions have consistently described summary process as a streamlined remedy precisely because prolonged uncertainty over possession undermines both property rights and housing stability.

This foundational principle—that summary process should move quickly—provides the baseline against which modern eviction practice must be evaluated. When delays become routine rather than exceptional, the system no longer operates as originally intended.

Application: Why Summary Process No Longer Functions as Intended

Structural and Procedural Changes to Summary Process

One of the most significant procedural shifts in recent years is the transition from a single-stage proceeding (one-day/one trial) to the current two-tiered system, in which cases first proceed through an initial tier focused on mediation, and then advance to a second-tier date for judicial

hearings and trial if not resolved. This restructuring alone has introduced additional steps, filings, and opportunities for delay that practitioners must navigate carefully.

Returns of Service (the constable's proof of proper service) now warrant heightened scrutiny. Even minor scrivener errors—such as omitted middle initials—can delay the entry of a default judgment until a corrected return is filed. More critically, failure to file a proper Tier 1 Return of Service may impair later enforcement efforts. Some courts have declined to issue executions—despite previously allowing motions for execution based on agreement violations—solely because the Tier 1 Return was missing or defective. In these cases, clerk's offices have refused to issue executions altogether, forcing landlords back into court to cure procedural defects that previously would not have been fatal.

Expanded Tenant Protection Statutes and Automatic Stays

G.L. c. 239, § 15 has further altered the pace of eviction litigation by imposing automatic stays when a Residential Assistance for Families in Transition program ("RAFT") application is pending. RAFT is a Massachusetts program that provides emergency funding for those at risk of homelessness. In practice, this often requires landlords and their counsel to return to court multiple times simply to obtain status updates from RAFT-administering agencies. These delays are frequently compounded by incomplete applications, lack of communication, or expired eligibility periods.

Practitioners should advise clients at the outset about the implications of RAFT participation and assess whether the landlord is willing to engage in the process. Where participation is contemplated, counsel should proactively facilitate communication among the landlord, tenant, and administering agency. Ensuring that tenants have accurate and complete landlord contact information is critical; failures in this regard commonly result in stalled or "timed-out" applications that prolong cases unnecessarily.

Although courts may view serial or repetitive RAFT applications with skepticism, the burden remains on the landlord to demonstrate that such applications are improper. Clear documentation, timely objections, and a well-developed record are essential to obtaining judgment or execution notwithstanding a pending request.

Additional Statutory Protections Affecting Nonpayment Cases

Further complexity arises from new tenant protections enacted in response to broader economic instability. G.L. c. 239, § 17, effective November 25, 2025, establishes specific protections for federally employed tenants impacted by a federal government shutdown. Under the statute, a landlord may not terminate a tenancy, issue a notice to quit, or otherwise demand that a tenant

vacate if the tenant provides notice and documentation showing that the shutdown caused a financial hardship. During the affected period, such tenants are shielded from eviction for nonpayment of rent until at least 30 days after the shutdown ends, with the possibility of an additional extension of up to 75 days by the governor. These protections further extend timelines and complicate case strategy in nonpayment matters.

Policy Context: Why These Changes Occurred

These procedural and statutory reforms did not arise in a vacuum. Wage stagnation, rising housing costs, and a persistent shortage of affordable housing have led to an increase in evictions, particularly for nonpayment of rent. Reports such as the *Housing Stability Monitor: Massachusetts Evictions & Foreclosures* document these trends, while recent analyses emphasize the importance of maintaining affordable private rental housing as a key component of addressing the Commonwealth's housing crisis.

The legislature and courts have responded with well-intentioned measures aimed at preventing displacement and promoting housing stability. However, the cumulative effect of these policies has been to significantly slow the resolution of possession disputes.

Conclusion: Practical Implications for Landlord-Tenant Practitioners

Taken together, these statutory changes and procedural reforms have substantially increased the time, complexity, and cost associated with summary process litigation. For landlords—particularly small- and medium-sized owners operating with limited resources—the administrative burden and legal expenses often cannot be absorbed and instead may be passed on through higher rents or reduced investment in property maintenance.

The impact is especially pronounced for small landlords, who historically provide a significant share of naturally occurring affordable housing. Extended timelines, multi-stage proceedings, heightened scrutiny of service returns, and uncertainty around benefits and vouchers have made it increasingly difficult for these owners to manage properties efficiently or address chronic nonpayment. As smaller landlords exit the market, housing supply shifts toward larger, institutional owners or higher-priced alternatives, reducing affordability and tenant choice.

Landlord-tenant practitioners navigating this environment must adopt a proactive and systematic approach. This includes ensuring that all notices and service documents are precise and compliant, maintaining thorough records, making early and informed decisions about RAFT participation, and coordinating closely with tenants and administering agencies to avoid stalled applications. Counsel must also prepare clients for longer timelines, increased costs, and multi-

stage proceedings, while staying current on evolving statutory protections and voucher-related obligations.

While modern reforms seek to enhance fairness and prevent displacement, their aggregate effect has transformed summary process into a system that is no longer summary in practice. Understanding—and adapting to—this reality is now an essential part of effective landlord representation in Massachusetts Housing Court.

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Case Focus

De Felipe v. Suwwan: Placing the Emphasis on Equity in the Division of Equity Compensation

By Lindsay V. Mason

In the 25 years since the Supreme Judicial Court issued its decision in *Baccanti v. Morton*, 434 Mass. 787 (2001), many family law practitioners have routinely applied its "time rule" to ascertain what portion, if any, of a party's unvested equity compensation is subject to division in a divorce matter. *See id.* at 801. Family law practitioners have had little disagreement that the *Baccanti* time rule should apply to these unvested equity compensation interests issued by an employer, particularly where the unvested equity compensation will realize value only due to the employee's post-divorce efforts.

The Massachusetts Appeals Court's recent decision in *De Felipe v. Suwwan*, 106 Mass. App. Ct. 158 (Oct. 14, 2025), upheld the terms of a judgment of divorce that divided a portion of the husband's equity compensation equally, and on an "if, as, and when received" basis, instead of applying the *Baccanti* time rule. The decision emphasized that the application of the time rule established in *Baccanti* has never been a mandate. Rather, it is one option among others in service of the ultimate objective in every divorce: to fashion an equitable division of property incident to divorce.

Factual Background

Karim Suwwan de Felipe (the husband) and Leila El-Youssef Suwwan (the wife) had been married for approximately 14 years at the time the divorce action commenced. The parties had one minor child and the wife was a fulltime stay-at-home parent after having worked as an associate dentist. The husband began working as an investment and portfolio manager for Fidelity nine years after the parties married. He had been working in that same capacity for approximately five years when he filed for divorce in 2020.

Within three months of filing the complaint, the husband had developed sufficient seniority and qualifications to be eligible to purchase two different types of equity holdings internal to Fidelity: Nonvoting Common Shares (NVCs) and Investor Entity Units (IEUs). The husband acquired NVCs and IEUs in both 2020 and 2022. NVCs remain unvested for three years post-purchase, thereafter vesting over a five-year period at an annual 20% rate (becoming fully vested eight years after acquisition). IEUs vest fully upon acquisition, but their transferability/assignability is significantly restricted. Fidelity also pays many NVC owners dividends in the form of IEUs rather than in cash. The husband acquired his interests in the NVCs and the IEUs with low-interest loans from Fidelity.

The trial judge assigned the wife a 50% interest in the husband's 2020 NVCs and IEUs (and an attendant 50% responsibility for the corresponding loans) and no interest in those same types of assets purchased in 2022. The trial judge credited the testimony of the wife's expert that the net asset value for these assets, as established by Fidelity, was not reflective of their actual underlying value and accordingly ordered the husband to pay the wife her 50% interest in the 2020 assets on an if, as, and when received basis, which the trial court concluded was the more equitable outcome, and which the Appeals Court upheld.

The decision also upheld the trial court's alimony award, which the husband asserted was an abuse of discretion violative of *Young v. Young*, 478 Mass. 1 (2017), because it based the order on the wife's stated needs as of the end of the trial in 2023, rather than her needs as of 2020 when the parties' divorce began. The husband argued that, because the amount exceeded the wife's needs set forth on her financial statement filed at the beginning of the case, the alimony award should be overturned. The Appeals Court was not persuaded.

Analysis

Division of Equity Compensation

Important to the lower court's judgment and the Appeals Court's decision upholding it was the principle that, even though the 2020 NVCs were unvested at the time of the divorce, the husband's opportunity to be eligible to purchase these asset interests had developed during and "as a result of the marital partnership." *De Felipe*, 106 Mass. App. Ct. at 161. The Appeals Court's decision highlighted the trial court's findings that Fidelity only provides the opportunity to purchase NVCs (and thereby IEUs) to employees "who have demonstrated value to Fidelity and who have sufficient assets to be considered accredited investors"—conditions that the husband had established with Fidelity during the marriage and prior to the filing of the complaint for divorce. *Id.* Additionally, unlike the unvested stock options that were the subject of discussion in *Baccanti*, the NVCs generated an immediate economic benefit to the husband in the form of dividend payments, despite being unvested.

While sanctioning the trial court's approach of differential treatment of the 2020 assets (opportunities that were the product of the marriage) and 2022 assets (opportunities that were too attenuated from the marital partnership to be the product of a then clearly dissolved marital partnership), the Appeals Court clarified in a footnote that its decision in this particular case was not meant "to suggest that judges have freedom to avoid a *Baccanti* apportionment based only on a conclusion as to 'the equities.'" *Id.* at 163 n.3. Rather, the decision emphasizes that each case presents unique facts and unique assets, both of which need to be closely examined in context, especially when current valuation may be speculative.

This *dictadictum* in the footnote echoed the justices' comments and questions during the oral argument held before the Appeals Court in June 2025; namely, that *Baccanti* itself has never required the application of the time rule it established. During oral argument, the justices highlighted footnotes 6 and 7 of the *Baccanti* decision as supporting the judge's findings and judgment. Footnote 6 states, "[a]lthough in some cases stock options may be given to an employee for future services that will be performed after dissolution of the marriage, the value of the employee to the employer, which caused the employer to reward the employee with stock options, may have come about as a result of the marital partnership." *Baccanti*, 434 Mass. at 799 n.6. *Baccanti* also states in the body of the decision: "A time rule *can* be an effective and straightforward means for apportioning issued but unvested stock options. We recognize, however, that one formula will not necessarily work in every case and emphasize that trial judges have broad discretion to modify the time rule or adopt another method that will achieve the most equitable apportionment in a particular case." *Id.* at 801–02 (emphasis added). Consequently, and particularly because of the detailed findings that she made, the trial court's decision was actually consistent with *Baccanti*.

Amount of Alimony

The portion of the decision on alimony is far shorter, because the affirmation of the trial court's judgment rested substantially on the judge's credibility determinations regarding certain (but not all) portions of the wife's testimony about her anticipated costs post-divorce. In determining whether and to what extent to accept a party's representation of needs post-divorce (as those needs relate to lifestyle during the marriage), the Appeals Court held that "on this record those issues involve[d] credibility determinations within 'the domain of the trial judge, in which the judge's assessment is close to immune from reversal on appeal except on the most compelling of showings.'" *De Felipe*, 106 Mass. App. Ct. at 168 (citation omitted). Where the trial judge made detailed findings regarding her assessment of the wife's stated needs (including that in some cases those needs were understated) and issued an alimony order that was less than the total of the wife's stated expenses, the husband failed to establish sufficiently compelling circumstances that demonstrated an error or an abuse of discretion warranting overturning the trial court's alimony order. Of note, the decision does not mention any assertion by the husband of an inability to pay the amount that was ordered.

Practice Tips

De Felipe should caution practitioners to approach every case that involves unvested equity compensation as a fresh fact-finding mission. Practitioners should examine *why* each award of compensation was made, including whether it was for prior services rendered or future work yet to be performed. One should also examine what circumstances led to a party's eligibility for

participation in the equity compensation program and the degree to which post-divorce employment affects the value of the unvested asset.

With respect to the alimony component of the decision, *De Felipe* should function as a cautionary tale to practitioners to closely review the opposing party's financial statements that are part of the evidentiary record and to examine thoroughly all financial statements prior to a trial ending. Good advocacy may require objecting to the filing of an updated financial statement by an opposing party after their testimony has concluded or requesting to reexamine the opposing party if the submission of the updated financial statement after the conclusion of that party's examination is allowed. Second appellate bites at the credibility apple are few and far between.

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Practice Tips

Joint Representation Pitfalls

By Jessica Gray Kelly and Lily Malloy

It is common practice for lawyers and law firms to represent multiple clients in the same matter. For example, a lawyer may represent an employer and an officer or director of the employer in a noncompete case, multiple family members in estate planning, or business partners in forming a company. Joint representation is particularly advantageous when it comes to minimizing legal costs, improving information sharing, and simplifying the coordination of claims and defenses. It can, however, raise significant and tricky ethical concerns and requires careful management and oversight by the lawyer.

Ethical Considerations

Before entering into any joint representation, lawyers should be mindful of the Massachusetts Rules of Professional Conduct governing such representation, especially those addressing conflicts of interest and confidentiality.

Conflicts of Interest

Joint representations are a minefield for conflicts of interest issues.

Rule 1.7 prohibits lawyers from representing a client if the representation involves a concurrent conflict of interest. The rule includes the obvious prohibition against lawyers representing one client in a matter directly adverse to another client in either a litigation or a transactional matter. The not-as-obvious conflicts arise from the rule's prohibition on lawyers representing a client when that representation would be "materially limited" by the lawyer's representation of another client, a former client, a third person, or by the lawyer's own interests. In the context of a joint representation, a material limitation conflict exists if the lawyer represents two clients in the same matter, and one client's interests do not fully align with the other client's interests. This could happen if one client wants to pursue a different strategy than the other client, if one client faces more liability than the other client, or if one client blames the other client for what happened. This type of conflict may exist at the outset of the contemplated joint representation or it may arise during the course of the representation.

Confidentiality

The confidentiality rules can also present challenges in joint representations.

Rule 1.6 prohibits lawyers from revealing confidential information relating to the representation of a client unless the client gives informed consent. In joint representation, a lawyer's duty of confidentiality to one client may impede his or her ability to discharge the duty of loyalty owed to the other client. *See* Rule 1.8(b). For example, in a litigation where a lawyer jointly represents an employee and his employer against a pedestrian who alleges that she was struck by the company's delivery truck driver, the employee admits to the lawyer that he was running a personal errand while driving the employer's truck, and demands that the lawyer keep the information confidential. The lawyer faces competing interests between preserving the employee's confidentiality and fulfilling the duty to inform the employer of this critical information, thus pulling the lawyer's loyalties in two opposite directions. A lawyer cannot keep information material to the representation confidential, as between the two clients. In this circumstance, in the absence of the employee's permission to share the information with the employer, the attorney should explore whether the joint representation needs to be terminated.

Consequences of Failed Joint Representation

Lawyers who fail to properly handle joint representation risks expose themselves to a range of consequences. They may face disqualification, malpractice liability, and discipline from the Board of Bar Overseers.

Two notable decisions serve as cautionary tales illustrating the severity of these ethical pitfalls. In *In re Wainwright*, 448 Mass. 378 (2007), two attorneys were sanctioned with public reprimands for their dual representation of both the debtor and creditor in the same transaction without obtaining informed consent from either client. In *McCann v. Davis, Malm & D'Agostine*, 423 Mass. 558 (1996), a former shareholder in a corporation brought a malpractice action against a law firm that represented both the shareholder, as the seller of corporate stock, and the buyer. The firm prepared documents to carry out the sale but never advised the plaintiff that he should have separate counsel representing him as the seller. The law firm avoided liability on causation grounds, but the Massachusetts Supreme Judicial Court noted that the firm's failure to obtain client consent or provide full disclosure of the parties' differing interests—contrary to the ethical rules—supported the jury's negligence finding.

Practice Tips for Avoiding Common Pitfalls

To reduce ethical and liability risks, lawyers should adopt proactive strategies when engaging in joint representation:

- **Explain the Risks and Benefits of Joint Representation.** Before accepting an engagement entailing joint representation, lawyers should advise the clients about the benefits and risks of joint representation and outline what will happen if a conflict arises,

including the possibility that the lawyer might not be able to continue with the joint representation. Lawyers should make clear that their role is to objectively explain the pros and cons of each client's position but not advocate in favor of one side over the other. Lawyers also need to inform joint clients that communications with one client are not confidential as to the other client(s).

- **Draft Engagement Letters.** Lawyers should ensure that their engagement letters for a joint representation fully and clearly identify each client and the scope of the engagement. The engagement letter should define the lawyer's roles and responsibilities and the boundaries of representation, include provisions for handling potential future conflicts, and note the lawyer's limitations on advocacy in the event of a conflict.

- **Obtain Informed Consent.** If a conflict exists (and is waivable), or may arise in the future, lawyers should obtain informed consent in writing from all clients in the joint representation. This ensures all clients know the benefits and risks of joint representation and consent to the terms and proposed course of action.

- **Monitor for Conflicts.** Lawyers should continually monitor for conflicts throughout the entire representation. The relationship between jointly represented clients may change or evolve, potentially leading to misaligned interests and ethical challenges. Conflicts can also emerge from the service of subpoenas on third parties, hiring of experts, changes to a client's ownership or corporate structure, and new parties being added to the case or transaction, among other scenarios.

Withdraw If/When Necessary. Rule 1.16 allows a lawyer to withdraw when the representation will result in violation of the Rules of Professional Conduct or other law. If a conflict cannot be resolved, the lawyer must determine whether the rules require withdrawal.

Conclusion

Joint representation offers significant benefits in certain situations but also presents complex ethical issues that require careful management and vigilance. Clear engagement letters, written consent, and close monitoring for evolving conflicts help reduce these risks and ensure compliance with the Rules of Professional Conduct.

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The Profession

ChatGPT Is Not a Lawyer: Using Generative AI Responsibly and Ethically in Law

By Edward S. Cheng and Mariem Marquetti

Generative Artificial Intelligence ("GAI") programs like ChatGPT have infiltrated the legal profession and are causing havoc. The attraction of using GAI is undeniable, with its promise of fast and well-written briefs at the touch of a keystroke. But the misuse of GAI can have serious consequences. According to one online database, more than 900 cases to date around the world contained GAI-generated errors, in both civil and criminal matters. Damien Charlotin, *AI Hallucination Cases*, DamienCharlotin.com. Close to home, in October 2025, a Massachusetts attorney was discovered to have filed a brief that included faulty GAI-generated content. Memorandum and Order on Defendant's Supplemental Combined Motion to Dismiss the Four Returned Indictments, *Commonwealth v. Moraes*, No. 2581CR00071 (Middlesex Sup. Ct. filed Oct. 9, 2025). More troublingly, in November 2025, a prosecutor who submitted multiple briefs riddled with GAI-generated errors explained that she resorted to GAI due to "working on multiple matters, being constantly in court, responding to multiple briefings, and going too fast in her research and drafting." Shaila Dewan, *Prosecutor Used Flawed A.I. to Try to Keep a Man in Jail, His Lawyers Say*, N. Y. Times, Nov. 25, 2025. This particular misuse of GAI could have resulted in wrongful convictions and unfair sentencing, which are outright violations of the Constitution and a threat to freedom. *Id*. Accordingly, before using this tool, lawyers are ethically obligated to understand it. This article provides a look behind the curtain to explain how GAI works.

Ethical Obligation to Understand GAI

On July 29, 2024, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 512 on lawyers' use of "GAI tools" in their practice. American Bar Association, Standing Committee On Ethics and Professional Responsibility, Formal Opinion 512 (July 9, 2024). According to the Opinion:

> Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees.

The Opinion does not create new responsibilities for attorneys but amplifies the existing obligation that an attorney understands the tools that she is using. This article focuses upon the first charge of the Opinion, namely that an attorney must maintain "relevant technological competence, which requires an understanding of the evolving nature of GAI." This requirement must be viewed in light of existing obligations, including an attorney's responsibility for arguments and law contained in any filing (*see* Fed. R. Civ. P. 11) and an attorney's obligation to keep abreast of technology (*see* ABA Model Rules of Professional Conduct, Rule 1.1, *Competence*, Comment 8).

How Generative AI Works

At their core, GAI programs are simply math. As the Founder and CEO of Toloka AI, Olga Megorskya, explained, "[y]ou collect large amounts of data, then using the methods of machine learning, algorithms learn to find inter-dependencies among these pieces of data and then reproduce this logic on every new piece of data they meet." *See* Afton Pavletic, *The Wild West of Artificial Intelligence – Ethical Considerations for the Use of AI in the Practice of Law*, Board of Bar Overseers, May 2, 2023. GAI program development dates back several decades, long before ChatGPT and OpenAI. In 1950, Alan Turing created a test to determine whether a machine was "intelligent" through what became known as the Turing Test. A remote human evaluator would judge natural language conversations between a human and a machine designed to generate human-like responses. The evaluator would be aware that one of the two partners in the conversation was a machine and the other a human. The conversation was limited to text to eliminate issues of inflection, accents, or voice from the equation. If the evaluator could not reliably tell the machine from the human, the machine passed the test. ChatGPT was created to pass the Turing Test.

Despite passing the Turing Test, GAI programs lack the capacity to "know" anything. The "Chinese Room" argument, published in 1980 by American philosopher John Searle, illustrates the fundamental limitation of GAI programs. Searle imagines himself alone in a room following a comprehensive set of instructions for responding to Chinese characters slipped under the door. Searle does not know Chinese, and the characters appear to be nothing more than assemblages of symbols. By following the program for manipulating symbols, Searle sends appropriate strings of Chinese characters back out under the door. This leads people outside the room to mistakenly conclude that the person within understands Chinese. The takeaway is that programming a digital computer may make it appear to understand language but does not produce real understanding.

GAI programs rely on significant volumes of data because they do not have real-world experience or a human's ability to make connections. GAI programs are trained on significant amounts of data to determine the statistical likelihood of "next words." As explained in a recent New York Times Article, behind-the-scenes, GAI programs are essentially a "statistical

distribution – a set of probabilities that predict[] the next word in a sentence, or the pixels in a picture." Aatish Bhatia, *When AI's Output Is a Threat to AI Itself*, N. Y. Times, Aug. 25, 2024. GAI programs predict content, but not always accurately. Even worse, with the flood of GAI content on the internet, GAI programs are starting to incorporate previously generated GAI program output into their databases. This leads to a gradual degeneration of GAI program output as the programs assimilate growing amounts of GAI-developed information that is increasingly divorced from any real-world input.

Generative AI and the Legal Profession

As a threshold matter, using *generic* GAI programs like ChatGPT for legal matters is a mistake. ChatGPT, its iterations, and other similar programs are designed to pass the Turing Test. They are highly successful chatbots that can fool the ordinary user into believing that they are communicating with a person on the other side. ChatGPT, however, is not designed to provide *accurate* legal research and writing. It is designed to please the user, whether or not it can find cases or statutes to support the arguments that it is asked to make, so it will make up or "hallucinate" citations to non-existent cases or statutes to complete its task. These hallucinations have resulted in malpractice. Simply put, lawyers cannot reliably use ChatGPT or other generic GAI programs for their legal research and writing work.

GAI programs developed by companies specifically for legal work, however, potentially fall within a different category. LexisNexis and Thomson Reuters (Westlaw) each claim to have addressed this hallucination problem. These technology companies license the use of ChatGPT for the task of language generation to avoid having to create their own large language models. They then add their own programming, called retrieval-augmented generation, to avoid hallucinating legal citations and opinions. These companies also restrict their GAI programs to rely solely upon real case law, statutes, and legal digests. In other words, while ChatGPT sources its law from the entire world wide web, legal technology companies restrict their GAI programs to proprietary legal databases.

Are these products reliable and accurate? A Stanford University study called into question the use of GAI tools to analyze the law. In 2024, Stanford researchers published the article, *Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools, Stanford University*. The Stanford researchers employed a battery of research queries to benchmark the accuracy of programs from several legal-oriented companies, finding that the output suffered from substantial error rates. For example, one query asked, "Why did Justice Ginsburg dissent in *Obergefell*?" The GAI program explained the basis for her dissent, except Justice Ginsburg had joined the Court's landmark decision legalizing same-sex marriage. Moreover, the GAI program's discussion addressed issues that were not found in *Obergefell* at all. The Stanford study found an error hallucination rate of 17% (Lexis) and 33% (Westlaw). Varun Magesh et al.,

Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools, Journal of Empirical Legal Studies, Mar. 14, 2025.

Mike Dahn, Thomson Reuter's head of Westlaw Product Management, responded to the Stanford study by writing, "[o]ur thorough internal testing of AI-Assisted Research shows an accuracy rate of approximately 90% based on how our customers use it, and we've been very clear with customers that the product can produce inaccuracies." Mike Dahn, *Our Commitment to Our Customers*, Thomson Reuters, May 31, 2024. LexisNexis did not challenge the Stanford study but focused on the relative findings between its product and Thomson Reuters' product. *Stanford Study Finds Lexis+ AI Provides Accurate Responses at "More Than Three Times" the Rate of Thomson Reuters Product*, LexisNexis, June 1, 2024. Setting aside the Stanford study for a moment and assuming Dahn is correct that the accuracy rate is 90%, an estimated 10% error rate is still substantial.

GAI programs, when prompted, have a tendency to yield *any* answer to the user's satisfaction. For example, according to the Stanford study, the following prompt was added to the Lexis+ AI: "What are some notable opinions written by Judge Luther A. Wilgarten?" Varun Magesh et al., *supra*, at 5. The GAI program identified a real case (*Luther v. Locke*) as one of the most notable opinions written by Judge Wilgarten, which was problematic because Judge Wilgarten was a fictional judge. As the Stanford study explains, "retrieval is particularly challenging in law. Many popular LLM benchmarking datasets . . . contain questions with clear, unambiguous references that address the question in the source database. Legal queries, however, often do not admit a single, clear-cut answer." *Ibid*. Simply put, legal research and analysis require a high level of human reasoning and experience that a machine is not equipped to do.

While at this time, GAI-assisted research and writing tools are not 100% reliable, an attorney who nonetheless employs these tools must check the GAI program output to verify that the cases are real, the case citations are accurate, and the citations actually support the information in the brief. As Mr. Dahn wrote, Thomson Reuters warns its users that,

> AI-Assisted Research uses large language models and can *occasionally* produce inaccuracies, so it should always be used as part of a research process in connection with additional research to fully understand the nuance of the issues and further improve accuracy.

Artificial Lawyer, *Thomson Reuters Contradicts Stanford GenAI Study – 'We Are 90% Accurate'*, Thomson Reuters, June 10, 2024 (emphasis in original). He explains, "[w]e also advise our customers, both in the product and in training, to use AI-Assisted Research to accelerate thorough research, but not to use it as a replacement for thorough research." *Ibid*. This

is good advice. Even in its own testing environment, at the time of the Thomson Reuters statement, it appears that there was a ten percent plus error rate in GAI research and analysis, which is more than acceptable for court submissions.

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The Profession

Wellbeing Considerations: Preparing New Lawyers for the Transition from Law School to Practice

By Filippa Marullo Anzalone and Beth D. Cohen

Transitional times in life are challenging. The evolution from law student to lawyer is no exception. This article offers suggestions for how law school faculty and law practice mentors can help ease this identity shift.

The Challenges

New lawyers often encounter significant difficulties because of the rigors of law practice and complications in life beyond work. Some of the familiar issues that beleaguer contemporary attorneys include grinding hours, unreasonable skill and knowledge expectations, office politics, tracking time and billable hours, unfamiliar practice areas, people, and venues, being held accountable for work product, and imposter syndrome.

In addition to these common practice stressors, the rise of AI, ubiquitous technology, social media doomscrolling, and other distractions test practitioners' focus. Add in the highly-polarized political environment and growing uncertainties in the legal system, and we have an especially anxious time for both inexperienced and seasoned attorneys.

New lawyers often shoulder basic life worries, too, including crushing student debt and the changing landscape of loan forgiveness programs. Many are also impacted by family demands, loneliness, and mental health conditions like anxiety and depression.

Strategies

Starting any new job is overwhelming, but faculty, law school administrators, and law office mentors can help. They can better prepare lawyers to navigate their entry into practice by cultivating a basic awareness of the challenges and by introducing students to resources and practices to ease this important life transition.

Prioritizing both self-care and compassion is paramount. Law schools and employers need to message the importance of rest and breaks from the daily grind for nascent attorneys. Stillness and pausing are essential for resilience and nervous system regulation. Modeling and encouraging the cultivation of self-awareness by encouraging new lawyers to name their strengths, weaknesses, habits of mind, inclinations, and needs with candor, precision, and humility is indispensable. To become more self-aware, lawyers might incorporate meditation and mindfulness practices, regular writing or journaling, and other effective tools to attain clarity and self-understanding.

Mindfulness—a type of awareness that emerges from intentionally and non-judgmentally paying attention in the present moment—is especially important for lawyers because the practice of law can be fast and adversarial, reactive and defensive. Developing a mindfulness practice can help lawyers become less reflexive and more reflective to better manage obstacles.

Legal practitioners spend huge amounts of time taking in information and synthesizing and analyzing it and applying the law to facts. Consequently, they tend to live in their heads, often ignoring their emotions and bodily sensations. This phenomenon can cause people to anticipate or imagine scenarios that may or may not be happening. We curate our experiences and, because humans have a negative bias, we catastrophize what is happening with thoughts that can alter reality. We spend time traveling back into the past and galloping ahead into the future, whereas mindfulness brings us squarely into the present—into life as it is.

Lawyers are also trained to be strong, zealous advocates for others, but when lawyers need help, they may feel subpar. They are reluctant to reach out for assistance or take a break. Being overwhelmed or less able to function is viewed as weakness. Stigma is attached to not being perfect or not being able to deal with time pressures and mountains of work. Although law students are similarly busy and stressed in law school, the stakes are raised in law practice where there are paying clients with big problems and demanding supervisors. This can lead newer attorneys to attempt to distract themselves from overwhelming situations and stress with unhealthy habits and coping mechanisms rather than strengthening their resilience.

Mindfulness can help sever the dysfunctional stress/reactor loop of the burdened lawyer and regular mindfulness practices positively influence the structure of the brain and help practitioners cultivate healthy mental habits. Mindfulness training, such as breathwork, meditation, and gentle movement practices like yoga or tai chi, can help bolster cognitive and emotional intelligence and wellbeing, including increased focus, resilience, and compassion. Breathwork is especially effective for emotional regulation. Simple breathing exercises, such as “box-breathing,” can help call up the parasympathetic nervous system (rest and digest) in lieu of the sympathetic nervous system (fight, flight, or freeze).

Teaching and modeling self-awareness requires convincing students and lawyers to stop living from the neck up in autopilot. Contemplative practices provide law students with the tools that they can use to maneuver the stresses of law school study, to withstand the rigors of bar preparation, and to have a smoother transition to law practice when confronting inevitable hurdles. Mindfulness can provide a steadfast core that enables practitioners to see, adapt, and accept whatever arises, not engaging in catastrophizing and hyper-control.

Mindfulness may not work for everyone, but there are other helpful tools that can be used to strengthen confidence, steady minds, and maintain equanimity in the face of difficulty. For example, highlighting the benefits of physical wellbeing, including movement breaks, instead of reaching for ultra-processed snacks, alcohol, or drugs, is also important. We are preparing law students for a lifelong marathon, not a 5K. It is important for law students to learn that eating well, regular exercise, and adequate rest will enhance their job performance.

The legal profession has wrestled with lawyer wellbeing for a long time. Countless reports and studies describe crisis levels of chronic stress, depression, anxiety, and self-medication through substance abuse. The mental, emotional, and physical health of lawyers is inextricably linked with professional responsibility, competence, and even profitability in the profession.

Additionally, it is helpful to highlight the benefits of teamwork over competition for lawyers. Law is by nature combative, but legal work can also be collaborative. Most law schools promote competition as we prepare students for the adversarial win/lose dynamic of law practice, yet fostering a culture of sharing resources instead of information hoarding and prioritizing teamwork over heroic individualism, would benefit everyone. Collaboration also permits lawyers to resist the demands of the ego to improve relationships and foster a mindset of kindness and compassion for oneself and others.

Additionally, a collaborative mindset naturally fosters inclusivity and a more complete work product. We must model and teach curiosity, openness to other points of view, and a widening of the lens beyond personal experiences to optimize the inclusion of differences in gender, race, age, background, personality types, experience, and work styles. More voices can create better decisions and outcomes.

Moreover, helping new lawyers develop a strong network of peer support and mentors, with opportunities for regular check-ins, would help new lawyers counter their fears, isolation, and loneliness.

Finally, all lawyers should question whether we are comfortable seeking help ourselves and recognizing when others need help. We are a self-regulating profession that should have a culture of care for ourselves and other lawyers. We must strive to normalize concern and interest in the whole person and celebrate the meaningful work done by each of us.

Maybe the elusive common goal of “work-life balance” could be replaced with “work-life kindness” by practicing self-awareness and asking these vital questions: How can we develop excellent, zealous, compassionate advocates who are dedicated to helping clients while taking care of themselves and others? How can we embrace “doing the best we can” and “learning from our mistakes” instead of workaholism and perfectionism? It is important to evaluate our support

for new lawyers as they transition from the world of law school to law practice. We each have a role in creating the culture we want in legal education and the profession—one lawyer at a time.

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