



TEXAS A&M UNIVERSITY

School of Law

“TAMU Law Answers” Webinar Series

LEGAL ISSUES IN THE AGE OF THE CORONAVIRUS

“Legal Ethics and Lawyering in a Pandemic and Post-Pandemic World”

Joint TAMU Law/Dallas Bar Association Ethics CLE Webinar

Presented June 11, 2020

Panelists:

- [Kelli Hinson](#), Partner and General Counsel, Carrington, Coleman
- [Janis Meyer](#), Of Counsel, Clyde & Co.
- [Milan Markovic](#), Professor and Co-Convener of the Program in Law and Social Science, Texas A&M University School of Law
- Moderator: [Susan Fortney](#), Professor and Director, Program for the Advancement of Legal Ethics, Texas A&M University School of Law

While the panelists are all attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.

TRANSCRIPT:

- Howdy. My name is Susan Saab Fortney. I'm a professor at Texas A&M School of Law and Director of our program for the Advancement of Legal Ethics. Texas A&M Law School is pleased to co-host this webinar with the Dallas Bar Association. This webinar is on ethics and lawyering in a pandemic and a post pandemic world. And so thanks to the Dallas Bar Association for co-hosting, co-sponsoring this webinar and for their work in publicizing it.

The webinar that we're doing today follows a series of webinars that Texas A&M organized and this series focused on CARES Act issues. That included matters related to individual and business incentives and health care implications, as well as issues related to real estate and workplace concerns related to the virus. The videos, materials, including transcripts for those

programs are available on the law school's website. And at the end of this program, we'll have a final slide that includes the address for accessing those materials. [[TAMULawAnswers.info](https://www.tamulawanswers.info)]

And the program today is going to focus largely on professional ethics and liability concerns for lawyers. And to address these topics, we have three experts in the field of legal ethics and malpractice and what I'm going to do is briefly introduce them in the order in which they'll speak. So I could spend our entire program I think going over their credentials. But I just wanted to give you a little information on their positions and areas of expertise.

So we have Professor Milan Markovic, who will speak first. Milan teaches professional responsibility and conducts empirical research related to the legal profession. At a time that we are dealing with our economic downturn, I think lawyers in the audience would be most interested in a major study that he conducted that examined lawyer satisfaction and impact of the 2008 recession in Texas.

So Milan will be followed by Kelli Hinson. Kelli's a partner and general counsel at the Dallas based firm of Carrington & Coleman. Kelly provides ethics and risk management guidance to firm lawyers. In addition, she represents lawyers in professional liability cases.

We also have Janis Meyer from the New York office of Clyde & Co. Clyde & Co., a global law firm that has the home office in the UK. Janis is a member of Clyde & Co's law firm liability regulatory and investments group. Janis previously served as general counsel of another global law firm. She also teaches professional responsibility at Columbia and Hofstra Law Schools

Although our panelists will be discussing law and ethics, nothing in the webinar should be taken as legal advice on individual problems. Attendees should be sure and consult their own legal advisor to address any individual concerns that you have. If you do have general questions for the panelists, please submit them on the zoom link. And so for today, our game plan is that each of the presenters, the panelists, will take about 10 to 12 minutes to focus on a particular area. And then they'll address questions. So

We'll first turn to Milan. And Milan will share some observations related to lawyer discipline and areas of concern for lawyers who are working remotely and in circumstances when in-person interactions are limited. So, Milan.

- Thank you, Susan.

OK, thank you. Thank you for that kind introduction. And I'm very pleased to be here with you today. And I look forward to hearing from my distinguished colleagues as well. So I'm going to be focused on attorney discipline in the COVID-19 era. And in my goals are as follows. First, I want to give you a sense of some of the risk factors for discipline, relying on recent empirical research on the legal profession.

And then second, I'm going to connect those factors to specific pitfalls in this very dangerous, uncertain time caused by the pandemic, where obviously our lives have been disrupted in so

many ways. And I look forward obviously to any questions you might have at the conclusion of all of our presentations.

So what do we know about attorney discipline? I think we all have a general sense of how attorney discipline operates and perhaps some risks and how one might find themselves in ethical discipline. So for example, we all know very well that misappropriating or commingling client funds with our own funds is hugely problematic, often a basis for discipline. We know that neglecting client matters is often a huge cause for discipline, perhaps, unfortunately related sometimes to substance abuse issues.

But recently there's been a surge in empirical research on attorney discipline. And my favorite study just came out and it looked at a million lawyers' records practicing in 19 different states, including Texas. And I think it shed some really interesting light that is particularly relevant today. So what you can see here, if you can sort of look over the caption, is we have various areas of law and the percentage of lawyers with misconduct records in these areas.

And you could see that family law, bankruptcy law, and criminal law, tend to have higher misconduct rates than other areas, particularly areas such as intellectual property, antitrust, et cetera. And I want to be very clear here. This does not mean that lawyers who practice family law or bankruptcy law or criminal law for that matter are any less ethical than other attorneys.

They could simply be handling matters that are more ethically fraught. Their clients could simply be more likely to file complaints. But the conclusion I think we have to draw from this is that practice area does matter if we're trying to assess the risks of attorneys facing sanctions. And this research focuses particularly on public sanctions. I'll talk more about private sanctions, private reprimands, and the like later on.

Another key factor related to attorney discipline is firm size. And you can see at the bottom here, the x-axis, we have the firm size and on the y-axis we have lawyers with misconduct record. Essentially what this graph shows is that for solos and lawyers who are in firms with two lawyers, they have much higher rates of misconduct. In other words, there are more lawyers who have misconduct on their records. From about 6% for solos, to 1% for lawyers who are at firms with more than 8 lawyers or so.

Again I want to reiterate this does not mean that solo practitioners and lawyers who work in two-person offices are less ethical than other attorneys. It could simply be a function of their different client bases, the likelihood that those clients are going to complain, and alike. Obviously when we're dealing with very large firms, dealing with corporate clients, who have many avenues of recourse against their attorneys besides the disciplinary system. But clearly firm size is another factor when we're trying to assess the likelihood of attorney discipline.

Perhaps the most interesting result from this research is that economic conditions very much matter when it comes to discipline. So that this chart shows is that a region, a zip code particularly, its income, median income is negatively correlated with the rate of misconduct of lawyers in that zip code. That's a somewhat fancy way of saying that in richer areas, there tends

to be less misconduct against lawyers. And the flip side of that is that as poverty rates increase in a particular zip code, the rate of misconduct also increases in that zip code.

So clearly the economy does matter when we're trying to assess the likelihood of attorney discipline. For our purposes what does this mean? Well, this means that we're probably going to see an increase in discipline against attorneys. We went from a very strong economy. Certainly if you look at most indicators in 2019, to a very unstable one. As I'm speaking, I think the Dow Jones fell about 1500 points today indicating the volatility.

But unemployment is at unheard of levels there's discussions of potentially a recession, the second worst recession in US history since the Great Depression. And what this chart shows is that as unemployment goes up, so does rates of misconduct by attorneys. Now there could be a number of reasons for this. It could be that as the economy sours, people are more likely to blame their attorneys if something goes wrong on their matters, right?

It could be that as the economy sours, attorneys worry more about their own livelihoods and perhaps are not as scrupulous about observing their ethical responsibilities. But whatever the precise cause, we can certainly expect more discipline, I think in the next few years because of the unemployment and general uncertainty in the economy.

And so here's some data from Texas. This is actually from the Commission for Lawyer Discipline that puts out a report every year. Much of this matches what I stated earlier. You can see that much discipline, and here they're looking at both public and private sanctions, are imposed on attorneys practicing family law, 27%, and criminal lawyers, 21%. I mean. That's almost 50% just in those two groups.

Civil as it is a kind of a big catch-all here as well, civil litigators. But it's important to keep this criminal and family law areas in mind because this is-- particularly family law and probate perhaps as well. These are areas right now that are actually seeing an increase in demand for services. So a lot of lawyers might be tempted now to kind of dabble in family law or probate. And I'll have some thoughts on that in a moment.

The Texas data also tells us that there are three main bases of discipline: communication, integrity, and neglect. I think in the current environment, all three of those categories are going to grow. Communication, because much harder to communicate in a virtual realm, much harder to have face-to-face communication that has traditionally been the bedrock of our profession. Integrity, because of some of the economic factors I've indicated. Lawyers might be inclined to be less scrupulous about safeguarding clients and being honest with their clients.

And in terms of neglect, given all the demands on lawyers' time both personal and professional, one could understand how client matters might fall by the wayside. Of course, none of us excuse that, but in this environment I think it's very likely that there'll be some lack of neglect of client matters.

So turning now to some specific pitfalls. The first I already referenced briefly is dabbling. Well what do I mean by dabbling? I don't just mean picking up new areas. Congress has passed

legislation like the CARES Act obviously attorneys should seek to become proficient in the law so they can advise clients. What I'm referring to here is taking on matters in new fields.

Think of the real estate attorney who decides to handle a bankruptcy matter. Think of the immigration attorney who decides to do some family law, right? Now, lawyers can of course become competent in a wholly new field for them by putting in the necessary study or perhaps by associating with another attorney. But as the Texas rules caution us, this is from the Texas Disciplinary Rules, Comment Five, a lawyer offered employment in a matter beyond the lawyer's competence generally must decline or withdraw from the employment.

So that is the general rule. Even though there might be clients who have bankruptcy matters, family law matters, that we would love to handle, we have to be very careful to avoid dabbling in these areas. And I think the Texas rules take a very hard line on this, actually a harder line than the model rules which serve as the basis for discipline in many different states.

Another related pitfall in the COVID era, fees. So you can see the little cartoon there. Obviously fees are a constant source of tension between attorneys and their client. So why might this be a particular problem in the COVID era? Well, lawyers cannot charge illegal or unconscionable fees in Texas. Well, what does that mean?

Well, there's I think a number of different behaviors and my colleague Susan Fortney has written about this, that lawyers might tend to engage in, particularly if they're worried about their livelihoods. For example there is "churning the bill." For those of you who are not familiar with the concept, what that means is putting far more hours, far more time onto a file than is warranted. Essentially it's just to claim higher fees.

Another process, unethical practice, that unfortunately is quite common and might be especially common in a difficult economy, where lawyers are worried about layoffs, we all read about layoffs in Law.com and other sources seemingly on a daily basis. So padding hours is when you simply, you know, continue to round up your hours so it appears that you have more billable hours and the client ends up paying for those billable hours, even though you didn't actually put all those hours into client matters. Unethical, but in a difficult economy, we might well see more of an increase in that kind of behavior.

The Texas rules indicate that there's two factors that regulators are going to consider when assessing whether a fee is unconscionable. This is beyond obviously looking at entirely unethical practices like churning or padding hours. But even just scrutinizing fee agreements. They're going to wonder whether, if the fee agreement might have been the product of overreaching by the lawyer. Then they're going to wonder whether there was a clear communication between the attorney and client at the beginning of their representation.

Because of COVID, I think it's fair to say that they're going to be many more vulnerable clients out there. And again, because of COVID, it's probably fair to say that the communications about fees might not have been, or are not as robust as they would have been in an environment where we're meeting regularly with clients in our offices. Now of course, if you have a longstanding

relationship with a client, that's slightly different, but particularly when you're dealing with newer clients, that is something to keep in mind.

And just to return to the point I mentioned earlier, this connection between the deteriorating economy and discipline rates, it could be caused by a variety of factors. But part of it could be that the clients are especially vulnerable and thus unscrupulous attorneys can more easily take advantage of them.

So now turning to the kind of perennial topic of the day, we are all very familiar with Zoom, perhaps too familiar. Speaking of the stock market, Zoom stock has been surging ever since the start of the pandemic. So they've been one winner during the pandemic era. My colleagues will talk a little bit more about Zoom in particular, the confidentiality concerns. I will just make a few points here.

First Zoom is working all the time to improve its security. But it is not a secure platform. There are many vulnerabilities that hackers can very easily exploit. For that reason, many corporate clients will not permit their lawyers to use Zoom. If you must use Zoom, you should avail yourself of the waiting room and password features to ensure that interlopers aren't part of your Zoom meetings.

So do not send out links to Zoom that aren't protected by a waiting room or a password. But more importantly, at least from my presentation is, I worry about communication. That's kind of been a consistent theme with my remarks today. Does the client understand the risks of Zoom? There's many jokes about lawyers being a little bit behind the times. But we shouldn't automatically assume that our clients understand Zoom fully and understand how their information might be exposed via Zoom.

Just to give you an example, often the default option in Zoom is to record meetings. Have you as the attorney, had a discussion with the client about recording? Have you discussed the recording might be loaded to the cloud? So I think these are discussions that absolutely have to occur and are arguably required under the lawyer's duty to communicate in Texas and in other states. And last, but perhaps most important, we've all found ourselves in this Zoom era and we've done the best to adapt and the courts have done the best to adapt, but I'm a little bit concerned that there is a rush to kind of assume that the Zoom is somewhat equivalent to face-to-face contact.

And the reason I say that is as follows. There's some really interesting empirical research on telephone consultations versus face-to-face consultations. And what that research reveals is that telephone consultations lead to much less follow up and in general are much less useful for the clients. I suspect we might find something similar with Zoom. It's very difficult to develop trust, particularly with a new client. We shouldn't assume that everything we're saying to our client is being absorbed via Zoom, particularly if this isn't a longstanding relationship.

So I would say that we should constantly think about whether the best way to serve our clients is via availing ourselves of Zoom or some other interface, when perhaps face-to-face contact, safe, socially distanced face-to-face contact might be warranted. And last, and this will also be another

point that my colleagues pick up on, I'd like to talk briefly about supervision in the COVID era. Obviously we're all working remotely. Many of us are working remotely.

Very understandable tendency to delegate if one feels overworked and overstressed. We should be mindful that all lawyers are responsible for their own conduct, but partners and supervisors, and supervisors can even include associates, can also be responsible for their subordinate's actions under certain circumstances. Supervision can be difficult in the virtual environment, and what's made it even more difficult is the uncertainty around the bar exam.

So I won't go on in too great a detail about this. But there's obviously some uncertainty about whether we're going to have a bar. The plan right now is to have the bar in July. Everyone's studying for the bar and there's also another bar exam in Texas scheduled for September. But the Supreme Court has also issued an order allowing recent graduates, JDs who graduated from an accredited law school in the state and actually elsewhere, to obtain supervised practice cards if they can find supervisors who attest that they would directly supervise the newly minted law graduate.

And the idea is that this would occur, not only until the bar exam, until after. Because we're obviously not sure when we're actually going to admit this next class of lawyers. So what does that direct supervision mean? Well, they must sign filings, appear at hearings, either remotely or in person, and provide final approval of legal instruments. Given that the supervision is not occurring under one roof, I would suggest any attorneys who are supervising to make sure that they are regularly consulting with their supervisees, not just looking at final, quote unquote, final drafts of documents, but perhaps earlier drafts as well so that there's sufficient time to remedy any errors.

Because at the end of the day, not only do we owe it to the profession, but you might be found responsible for the individual you're supervising, their particular conduct. So I will stop there. I hope I've give you a sense of some of the risk factors for discipline, and particularly some pitfalls that we're all facing in this very uncertain time. Thank you.

- Very good. Thank you, Milan. And on the issue of Zoom, some of the members of the audience might be interested in a recent ABA Journal article [[“Zoom boom: How videoconference tools are changing the legal profession,”](#) by Ellen Rosen] that came out on June 3 that deals specifically with Zoom and has some practical suggestions in addition to the ones that Milan had mentioned. So thank you very much. Why don't we turn to Janis to share some additional ethics concerns.

- OK. I unmuted myself and now I'll see if I can actually figure out how to do this. So let me go back. Screen sharing. How do I go back? All right, well while I'm trying to figure out how to get myself back here to the beginning, I just want to follow up on what Milan said about supervision. Because I just actually did learn today that in New York we have a much more strict rule about supervision, as to not only do we have to supervise, but we have to take reasonable measures to make sure that people are doing what they're supposed to do.

And as someone who has now been home, as you probably noted I'm not in Texas. I've been home. I'm in Manhattan and I've been home for three months now. And I go outside, but that's about it. And the problem of trying to have your associates and your colleagues be on the same page and be working is, it's one that we have to constantly be thinking of. (Is there a way that I can move this back?)

- You can hit slide show from the beginning.

- I don't have that option.

- It should be on back on your PowerPoint.

- It should be but it's not, I know. I don't know what I'm doing wrong here.

- There's also a little blue arrow at the bottom of your slide. Perhaps that will--

- There it is. Here we go. You know, I'm required to show you the Clyde logo, so what can I do? All right. But in any event, while it's funny, I gave a program about what we should be doing about supervising our associates, and one of the comments was, this was an HR-- this was supposed to be an ethics program. And it was some HR things.

Well the whole point is so much of what we do in order to ensure that we are engaging in ethical conduct and that the people we supervise are engaging in ethical conduct relates to good HR practices. And so we need to be thinking about that as we go through this. So, I'll just very quickly go through what, not what Milan said, but just in terms of what are some of the things we have to look at when we're working remotely.

And we have, nothing stops our professional responsibility obligations. We went home in New York anywhere from about March 5th to March 18th was my last day in the office. You realize I remember it. And you practically ran out of the office, not quite like refugees, but almost you know grabbing a laptop and some files and figuring we'd be gone for two weeks. So it wasn't such a big deal.

And three months later, I'm still home. And there's no end in sight. There's no way I'll be going back to the office probably before September. So we're dealing with issues that we just haven't dealt with before, and may be unfamiliar technology and Milan passed briefly on this. You know, a lot of this technology is unfamiliar to us. And then at the same time we have client expectations. What are they going through and what are they expecting?

And I'll be, later on in the program, talking about the fee issues a little bit more because I actually have a different view about the fee issues and what the problems will be. But and these are just the rules. I put them in here because it's an ethics program. But when we get the technology, this is constantly changing. I mean what was a modern and up to date device yesterday is not today.

Things, I noticed I look at my iPad or I look at my telephone, and they've suddenly changed the screen and I didn't even know it. They just did it. So we have to say, stay on top of this. And we have to presume, just as Milan said about our clients, is we can't assume that even the people who work for us who are supposedly younger and grew up with technology knew about this, know about it. So we have to keep all of that in mind as well plus while balancing everything else.

Make sure that your network is secure. And what that means, for example, is if you have, you know, I'm sure you do, have Wi-Fi coming into your home. Make sure that you've changed the password on that Wi-Fi. I don't mean just on your computer, but on your Wi-Fi. Don't just connect into your client files without using VPN or Citrix. I'm a big believer in VPN, but I know a lot of people use Citrix.

You have to set up ground rules for use of your personal devices. And that's true all the time, but particularly now. Because when this is over and with luck, this will be over, we need to be able to find the communications that we made and know what it is that we sent to people. I mean, for example, people should not be texting to clients.

I mean, that is not an official record. And so we need to be careful about how we're communicating to our clients and make sure that we're doing it in a way that when we all wake up from this nightmare six months now, whatever, we know where things are. And Milan mentioned the video conferencing platforms. And I'll just follow up.

I'm one of the firms, we're not allowed to use Zoom for anything that would be confidential. This we can obviously use. But I always said I'd be happy to see if somebody, you know, Zoom bombed one of my CLEs. But in terms of anything confidential, you don't want that to be happening. And there are secure platforms out there. But you do have an obligation to make sure that you understand the terms and you've explained the terms to the clients.

I'm sure there are a lot of people that don't realize that Zoom is recorded by Zoom, not by the entity that's using it, but by Zoom itself. And I was telling the folks on the screen here the other day that shortly after we started working from home, I was on the phone with one of our partners from DC, and we were talking about a client issue, and I suddenly heard what I was saying being repeated. And I said, what is that?

And it was Siri. And Siri was saying what I had said. And I think Siri records it. I don't know. It wasn't on my phone. It was on the other person's phone. And I don't know how that happened. But it did. And the same thing can happen with Alexa, even more so. And what's the other one, Echo, you shouldn't have those on in your home when you're having any kind of confidential conversation or anything that you don't want people to hear.

And you need to be telling the people who work for you, again and again, to make sure that they're being careful about technology and making sure that they're not inadvertently violating confidentiality and letting clients' secrets out into the ether somewhere.

One other issue that's come up up here in New York and in other states, I don't know if it's as much of an issue where you are, but we have a lot of people working out of the state. In fact, some of them may even be working in Texas. They're not admitted in Texas. They're just New York lawyers, or they may be California lawyers, or wherever, and the only place they had to go, was in out of state.

And it's been a big issue for law firms worrying about whether or not their lawyers are engaged in the unauthorized practice of law. I mean, there is one opinion, the DC committee on UPL issued an opinion back in March saying, we call this "temporary" practice. So if you're here in DC because you were here because of remote working due to the closure of your office, then you are engaged in temporary practice within the meaning of the rules and it's OK.

But I haven't seen other jurisdictions issue that. My read is that it's not unauthorized-- but let me put it this way. My read is that I doubt any regulator is going to try to discipline someone if they are genuinely there because of the pandemic. But you know, we don't know whether that's going to happen, what's going to happen once this is over. But people may still stay home, as we'll talk about it a bit.

But in any event, those are just some of the issues that we've come across actually in dealing with this. And we have to make sure we're constantly-- particularly that we are keeping our clients' confidences and doing a competent job while we're doing it, which is continually the challenge.

- Thank you, Janis.

- So Kelli, if you could, please share with us some of your perspectives related to lawyering in these times and specifically risk management.

- Sure, let me see if I can get my slide up there, sure. So as Susan mentioned, I am the general counsel of my law firm. And so I'm charged with dealing with our risks and potential claims and claims against our firm. And I also represent other law firms and lawyers in dealing with actual and potential malpractice claims against them. And so you know, I spent a lot of time thinking about these issues and talking to general counsel of other firms about what they are doing and what's keeping them up at night.

Let's see. Trying to advance my slide here. There we go. And so we talk to our insurance company a lot, their loss prevention group, and we talk to each other about what are we worried about, what's keeping us up? What are the malpractice claims arising out of this time period going to look like? And Milan mentioned that as the economy goes down, ethics complaints go up. The same is true for malpractice claims.

And so, we know we're going to see increased malpractice claims out of this era. And what are those things going to look like and what can we do to mitigate the risks? Some of the risks that I worry about are clients under stress and lawyers under stress. I think that desperate times sometimes lead people under the best intentions to engage in desperate conduct. And that can lead to risk, obviously.

Some of the client stress issues, Milan touched on some of them as relates to ethics complaints. But I think the same factors can lead to malpractice complaints. And one of those is shifting the blame. There are going to be businesses that go under. There's going to be businesses that fail. And as people pick up the pieces and look around for why did this happen, lawyers are going to be one of the targets to blame and say, had you advised me differently or had you done things differently my outcome would have been better.

And so when the finger pointing starts, a lawyer with a healthy malpractice policy is going to be someone who gets pointed at. Similar to that, is the lawsuit as a source of income. When times are good and people are making money doing the thing that they're meant to do, they tend to focus their efforts on that. But when times are bad and they maybe aren't bringing in revenue through their original business plan, they can look at a lawsuit as a way to bring in more money to the company.

And so, you may have more time also to focus on the lawsuit if your business is not going well. And you know, clients under stress will push the boundaries. They're looking for new sources of revenue. They may be branching out into areas of business that they aren't skilled in or don't have the resources for, and they may be taking risks that they otherwise wouldn't take and you don't want to be pulled down with them .

Our malpractice carrier calls this “the good client gone bad.” It's a client that you've had for years. They've been a very ethical and responsible client. They've made good decisions. You've learned to trust them. But now they're under stress, and they may be making poor decisions. And you just need to be on the lookout for that, and not assume that they're going to stay that good, reputable client that they've always been.

Another issue is lawyers under stress. And Milan touched on some of these issues as well. But lawyers are trying to deal with decreased revenue, decreased productivity. And so they may be taking on cases that they are not really qualified on. And that can lead to ethics complaints, but it can also lead to malpractice. Because there are a lot of very particularized practices and particularly in terms of bankruptcy practice, suits on sworn accounts, things like that have very specialized rules. And if you're dabbling and you don't know what you're doing you can get yourself into a lot of trouble.

Lawyers are also, I think, tempted during this time period to take on sketchier clients that they normally would have passed on. But because they are not as productive as they've been or they need some more revenue, they're going to take on a client that they maybe shouldn't have. I also worry about the efficiency of our client intake systems during this time. Because everyone's working remotely. It's harder to collaborate and talk to folks about what you're doing.

Another risk that I worry about is lawyers giving advice on evolving issues. There are lots of things changing right now, lots of things that we don't understand. The laws, particularly with regard to the PPP loans are changing on a weekly basis. And a lot of the questions that our clients are having right now just don't have answers.

And so we're giving advice about things that we don't fully understand. And it's going to be too easy, I'm afraid in hindsight, for clients to say, well, you should have given me different advice. You should have seen the way the tide was turning and you should have given me different advice. Particularly with regard to the PPP loans or the CARES Act moneys, but also on employee protection, what do you have to do to keep your employees safe as law firms start bringing them back into the office.

What about contracts? Lots of clients have questions about whether they can cancel contracts for their force majeure clauses and such. Can they take advantage of cancellation provisions in the contract based on COVID conditions or stay at home orders or whatnot? Those are all really untested areas of the law that our clients need advice on, and we need to make sure that we're advising them of the grayness of the areas of law at this point. And the same with insurance coverage. People are going to be asking for advice about getting business interruption insurance and other kinds of insurance coverage on really areas that are still evolving.

Another malpractice risk that I think is coming out of the current events are mistakes. I know that, at least for the insured group that I'm in, we're insured by ALAS, and mistakes for them have historically been a very low percentage of their overall claims. But in recent years, the mistake claims have been rising, being increasingly more frequent. And I think the factors that lead to the general increase of mistake claims are particularly prevalent in the circumstances we find ourselves in today.

You know, one of the big fears that I've been talking to my lawyers about is deadlines. We're not in the office talking to each other. And we need to make sure that people have redundant deadline calendaring systems so that everyone knows what the deadlines are and those deadlines don't get missed. Particularly if someone gets sick, or the family member gets sick and the lawyer is out of commission for a week or so, is someone else knowledgeable about what has to get done and what deadlines are out there.

There's also the issue of distractions. Many of us are working at home. I've been working at home until yesterday, was my first day back in the office. But you know at home, you've got little kids around. You've got pet stepping on your laptop. You've got laundry going maybe in the other room. You've got the you know, contractors coming in or whatnot to your house. And so, it's very easy to get distracted and to lose focus.

And when you're doing something that requires a lot of focus, like proofing a contract or you're doing deep analysis on an issue, those distractions can lead to mistakes. And so you need to do what you can to try to minimize those distractions and to get yourself in a place where you can really devote your full attention to the legal work that you're doing.

I think proofreading is another issue. I am a firm believer that you should proofread on paper. There are studies out there that say you catch more mistakes if you're reading on paper than you do when you're reading on a screen. But it's harder to print things out and proof them on paper when you're working from home. And so there are other techniques you can employ like, reading in a different font or just giving a day between your drafting and your proofing to help catch those mistakes.

The remote working also prevents difficulties in collaborating with your co-workers. You know, before it would've been really easy to just pop down the hall and asked a subject matter expert a question about something or run an idea by someone to see if it made sense. It's harder to do now. You have to pick up the phone to call someone or schedule a Zoom call or something. And so, that can lead to mistakes, because you just don't have a sounding board or someone to get good advice from.

Another problem in this day, is that scammers are taking full advantage of everyone working from home and various programs that people are unfamiliar with. And they're using those-- taking advantage of those opportunities to scam lawyers and clients. And so you just need to be really vigilant in making sure you're not clicking on links in emails that are going to lead to malware getting infected on your computer. You need to make sure that the person you're talking to is really the person you think you're talking to. If you're having an entire relationship with your client via email, you need to make sure you know who's on the other end of that email.

And you know we have lately been seeing a rise of wire transfer fraud. And that is increasingly a problem when everyone's working remotely. And that's where you know, a scammer somehow gets involved in the email traffic and diverts the wire transfer information to their own bank account. And we caution our lawyers not to accept wire transfer changes via email because of that risk. But when everyone's working remotely, it's kind of hard to verify those types of changes. But you just need to be extra vigilant for email scams.

And the last one I'll talk about is unfortunate emails. This is another risk that's always been present, but because we're communicating with everyone via email rather than in person, it's on the rise. So just think about what you're typing before you hit send on an email. And if you are tempted to disparage your client, your co-worker, a judge, don't do that in an email. Pick up the phone if you can't resist.

Another problem is claiming incompetence. You know, you get an email assignment from a supervisor and you write back well I can take this on but, I really don't know what I'm doing. If there's a later malpractice claim, and that email is produced, then you know, that's going to be a problem. It's going to turn a potentially very defensible claim into a goldmine for the plaintiff's lawyer.

The same with falling on your sword. You know, we counsel folks that if you've made a mistake, pick up the phone and talk to someone about that, preferably your in-house counsel, if you have in-house counsel, because that can be privileged. But even if not, you need to have those conversations on the telephone rather than, you know, sending an email that says, oh my gosh, I just made a mistake. And if we don't fix this it's going to cost the client millions of dollars. You don't want that kind of email in the file.

The other problem is "humor." And I put that in quotation marks. Because things that seem funny at the time won't seem funny when you're sitting at your deposition and the email is blown up huge on a easel next to you or on the screen in front of you. You know, I always ask myself, I've tried to train this, before I press Send on an email, I ask myself, how would I feel talking

about this email in my deposition? And it honestly has prevented me from sending quite a few emails.

And so, I just encourage everyone to be diligent about that. People tend to get lazy about emails or they're not on their guard because they just assume they're privileged. And so, they're never going to see the light of day. But that's not always true.

There's lots of scenarios where those emails will get produced. If your client asks for their file or sues you for malpractice, you may have to turn those over. If the client files for bankruptcy, then the bankruptcy trustee gets access to all of those emails. And they're going to be looking for people to sue, and you don't want to give a big target for your law firm. And you know just other scenarios that you can't anticipate might come up and those emails will get released.

So while we're communicating with each other remotely, just be very careful about what you put in writing. And with that, I'll turn it back over.

- Very good. Well, Janis mentioned having not been in the office. In some parts of the country things are I think starting to pick up in terms of return to work. And I think we're starting to see some light at the end of the tunnel in some areas. So it's probably different in different parts of the country. But Janis, if you could reflect with us a little on what things will look like when we return to work.

- Can you hear me? I was muted. Just before we go on, One of the things I was laughing as Kelli was talking because when I was the general counsel at my former law firm I dealt with every single one of those issues, including the email saying, client was crazy. The email saying, this deal is going down. The email saying, we have a real conflict here. And I remember sitting for hours with my assistant general counsel going, how do we avoid giving this to our client? And there really wasn't a good way to say we're going to avoid that. So that's not just a rule for when we're remote working but in general. Why am I not moving here?

All right, so it took a little while, but I certainly-- I may have mentioned earlier, maybe not, the only clients that I represent are lawyers and law firms. So I'm very immersed in law firm activities all the time. And at least the large firms, and I think mid-sized firms as well, all over the country and the world, spend a fair amount of time planning for remote working. Because they knew it was going to happen and they had seen it in Asia and they knew this was coming.

And so it took a while and now the question is how long is it going to take to come back? And I think it's going to be a while. Firms are being very cautious about returning. Why? Because of health. Because of employment law issues. Because of transportation, which is more of an issue in some areas than others. It's certainly an issue in New York.

And economic issues. And I'll explain what I mean. I don't mean what I think you're probably thinking I mean about economic issues in a moment. So what are we going to go back to? Well, this is what we're going, back to. And it's not any better than when these articles were published a month ago. And you know we have many lawyers out of work now.

We have lawyers who are quote furloughed, unquote, which means that they may be going back soon or not. And we have, and this is what I was referring to with economic issues, is that many law firms have discovered that remote working really works. And that you do not need to have lawyers in the office. I know my firm has been so busy since we started working from home, that we can't find anybody to do our work. That's how busy it is.

And it depends on what your practice area is. But suddenly, as an economic matter firms are thinking, wait a second why do we need to go back to work? So what we're going to back to is not going to be Dad's law office. It's not going to be the same as the office we left. It's going to be accommodations for health reasons. There's going to be accommodations for the changed economic landscape.

And there's going to be accommodations for the changed perspective of our employers and our employees. What do people want to do? We have to ensure health and safety. But we have to address issues of illness, child care issues. In New York the schools have been closed since the middle of March. And it's not certain that the schools will open in September. So what do you do if your children are still home and you're a lawyer or a staff person at a law firm in terms of handling childcare?

Monitoring employee health. This is a big change. You know, I don't think any of us went to law school with the idea that we might be responsible for having to take the temperature of our employees when they came in or to have our own temperatures taken when we came into the office. And there are some guidance on this. And so that anyone who does have responsibility for handling these issues, you know the EEOC constantly issues Q&As and they update them. So you need to sort of check their website occasionally.

The CDC puts out many guidances. In Texas, there is an executive order on returning to work, not just for law firms but for employers in general. The New York State Bar Association, which I happen to be familiar with, because this is where I practice, issued a guidance on-- they formed a committee-- it was very professional because they asked all of us if we wanted to submit ideas. And they issued a guidance on reopening law firms, which can be obtained from their website. And then other states have guidance as well. So it's something to help us decide how we're going to handle reopening.

Short term what are people doing? They're social distancing obviously. And we've shown in New York that that works you know we went from this incredible number of cases down to still more than one death is more than one case we need. But it's still so much you know-- we have a tenth of what we had in March and April. But so what firms are looking for also is to stagger returns. So not everyone will go back to work at once.

Stagger days of work in the office. Some people will-- I understand, I know I was working with a firm in Texas couple weeks ago and their general counsel was telling me that they're going some days they're going in two days a week. Others are coming in three days a week and staggering who goes into the office when. Staggering the hours in the office so that people may be in in the morning. They may be in in the afternoon, early evening, whatever.

I don't know about elsewhere but I knew in New York you don't go anywhere without a mask. It's almost like a badge of honor. And it's not a political statement. It's just, you wear a mask. Mine has the New York Yankees on it by the way. And we go to wipes, enhanced cleaning the offices. The offices will have to be cleaned much more than they were before.

Taking temperatures, some firms are going to do that. They don't want to, but sometimes buildings are requiring it. So they'll have to take temperatures. I know San Diego was requiring it. Changing office configuration, social distancing, putting a plastic guard around desks. So for example, when you go into a building, the guard may have a desk around her now.

I certainly know the building I live in, I live in an apartment building, there are plastic guards around the doorman. And I mentioned cleaning. One of the things is one way hallways. People should only go one way in the hallway. That doesn't work in every office because I know for example, it doesn't work in mine. We don't have a way to get around everywhere with just one way.

And then another thing is bringing your own food to the office so that you're not everybody isn't hanging around the kitchen all the time. And then we'll get into some things that is we're sort of running short on time here. But you're going to have to train everybody on everything, on all of this. You're going to have to train people on social distancing and procedures for vendors and guests and all of these.

What do you do about people who want to stay at home? People have worked home already and they've said, you know, I can work at home. I did a good job. I did all my work. I want to stay home. Maybe you'll let them stay home but then you have to upgrade their electronics. Because I know a lot of firms did not have the real capability of having all staff work from home. And they sort of had to do a very quick and dirty sort of getting that up to speed.

And then we touched on this, somebody that doesn't want to come back to the office. Maybe they're afraid to come back to the office. What do you do about the employee who insists on coming back to the office, but he or she is over 70 or over 65 or whatever the age is and you don't want them to come back. You have to be thinking about that.

And then, guests, your client comes in for a meeting. Are you going to insist on taking her temperature or his temperature? What are you going to do about business travel? I certainly think that at least the consensus is among the big law firms around the country, there are people who aren't going to be traveling for business for a long time because they just don't want people to be exposed.

And another issue is, what do you do about the person, the senior partner, who comes into the associate's office and sits down a foot away from the associate to carry on a conversation. That associate may be afraid to say anything and doesn't know, leaving aside there could be a sexual harassment component there, just as a general health situation, what are you going to do about those situations? I don't necessarily have an answer for those. But those are things that we're grappling with right now in terms of how to deal with a return to work.

While all this is happening, we still have our obligations to the clients. We still have all our duties of competence and confidentiality. But a lot of the things that we thought were temporary are going to be part of our regular life. And cybersecurity, very important, as was mentioned before, to make sure that we are careful about that.

If you do have people working in another state, check on the tax issues. There are tax issues involved. And you know, this is some of the things we're dealing with. What do general counsel want from outside counsel? You know what they want from outside counsel? They don't want to have to pay their bills right away. I'm serious.

And earlier Milan was talking about overcharging. I don't think the issue is going to be overcharging. It may be in some sectors. But certainly, the corporate sector is facing clients saying, we can't pay your bill yet. We want to pay our bill in 120 days. And by the way, we want a discount and we want a permanent discount.

And this may be something that given that work will be short, as has been mentioned before, we may just have to deal with that. And then, of course the real estate business, the real estate business in New York, for example, people are really worried. We have a lot of real estate for law firms. Do they really need all of that if they're people going to be working at home and something to be coping with.

I'm -- crystal ball here -- changing relationships have been going on for a long time between lawyers and clients, the way services are delivered. Maybe you don't need a lawyer to do it. Maybe they will do-- they can just use tech people to do it. Fee models. I don't think client, corporate clients, at least are just going to accept everyday fees. And the real issue is going to be the end of the day, can we all adapt quickly enough to be able to handle of this through the pandemic. Not to end on a non-cheery note, Susan. But I think we need to be thinking about this.

- Very good. Great. Janis. Thanks to Janis, and the other panelists for all these very helpful suggestions. Time has flown by we've come to the end of our hour.

These slides will be on the TAMU website [[TAMULawAnswers.info](https://www.tamulawanswers.info)], along with the materials from these other webinars that I previously mentioned. So there, we also have these upcoming webinars. And the dates are provided there. So we'd encourage you to consider joining those webinars as well. Once again, thanks to all the panelists for their observations. Thanks to the audience who joined us.

We sincerely hope that this program has provided you some guidance in navigating these troublesome times. And we wish you and yours the best over the next few months. Thank you all. And we've answered a number of the questions online. Sorry, we didn't get to more. Thank you all.

While the panelists are all attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.