LEGAL ETHICS AND RISK MANAGEMENT IN THE TIME OF PANDEMIC

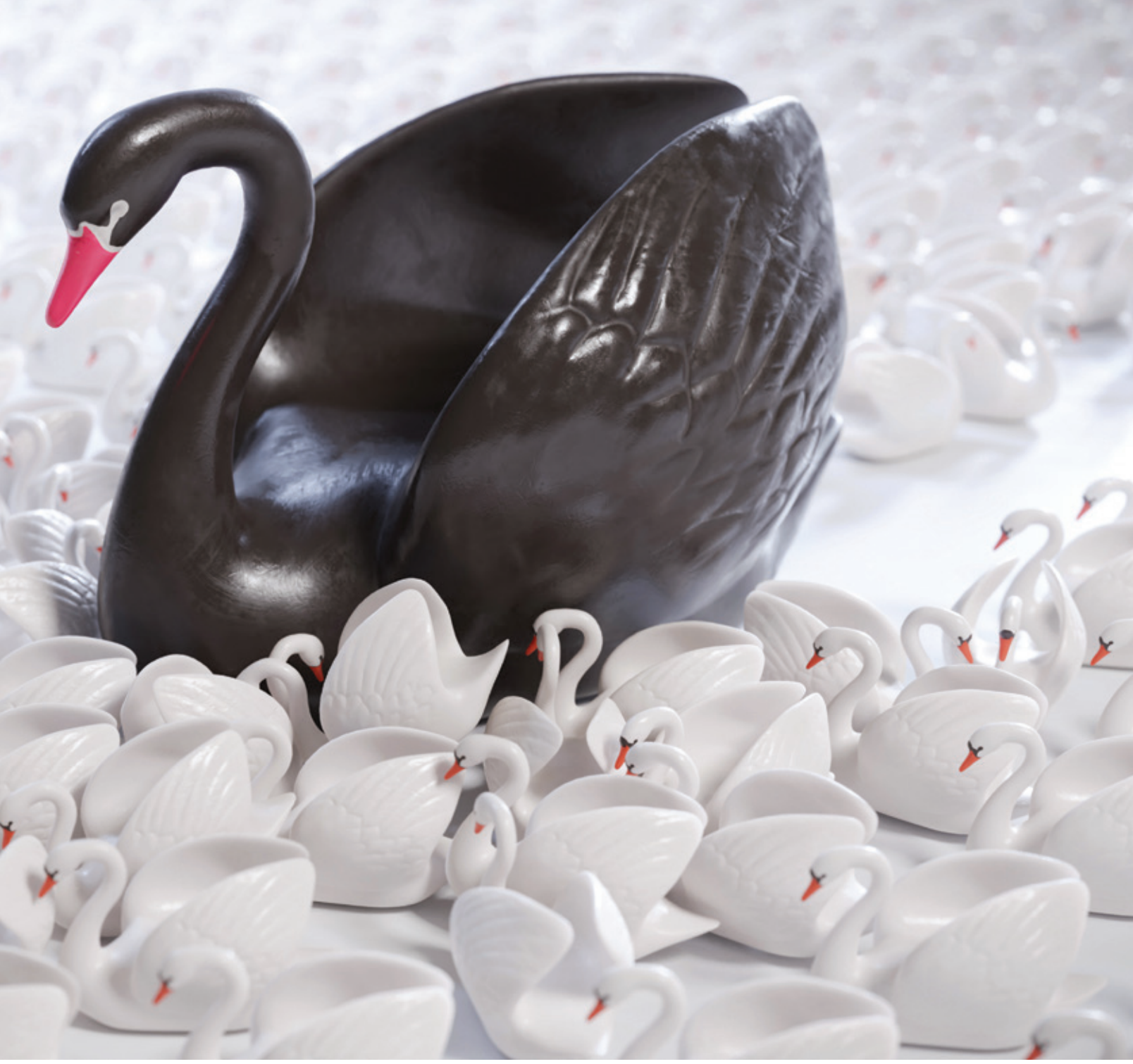
By Chuck Lundberg

Annual HCBA Bar Benefit held at the Lumber Exchange Event Center

This is all still pretty new. Even though it feels like it's been forever, at this writing the covid-19 pandemic crisis is not yet 60 days old.

It began while I was on spring break vacation from my law school class, March 6-16. The night before I left, I attended the annual HCBA Bar Benefit. As the photo attests, the usual crowd turned out: hundreds of lawyers and judges, packed elbow-to-elbow in the Lumber Exchange ballroom enjoying great food and refreshing adult beverages. It was a wonderful night. I talked to some of my old partners and many other longtime friends; shook a lot of hands; and hugged a few people.

An utterly familiar scene—and one that we are not likely to see again for a long while.[1]



The day after I got back, the governor closed restaurant and bars statewide. By that time, the law school had already switched to entirely remote teaching, effective immediately. A complete statewide lockdown (except for "essential" services) followed the next week. And we have all been working remotely since then.

By the end of March, the coronavirus outbreak and resulting lockdown had already caused unprecedented disruption in law firms and created a host of new issues for firm general counsel and ethics partners. On March 30 I published a column in Minnesota Lawyer describing a number of new ethics and risk management issues that had arisen almost overnight.[2]

This article updates and expands on that column, from several sources. The ethics and risk issues for law firms have been discussed nationally on a daily basis in the legal press and various legal ethics and malpractice blogs and listservs. In Minnesota, the Firm Counsel Group[3] met via Zoom in late April and took a deep dive into the most pressing issues for firms and firm counsel.

What we are living through has been called a "black swan"—an unpredictable event that blows past the normal range of outcomes and has potentially severe consequences. Black swan events are characterized by their extreme rarity and severe impact. In itself, the emergence of a potentially dangerous new virus is not unpredictable; that happens every few years. What was entirely unprecedented this time was that the world and the economy were shut down in response.

The economic toll on law firms is now beginning to be felt and tracked, and it will be severe. In the weeks following the outbreak, most large law firms around the U.S. have engaged in massive layoffs, furloughs, pay cuts or distributions changes, cancellation or restructuring of summer associate programs, or other such cutbacks. Smaller firms are now or will soon be following suit.

It is also reported that law firm mergers—all the rage just a few months ago—have dried up almost completely due to the pandemic. Deal-making has come to a screeching halt; it is the first time in four years that the industry will see a decline in mergers or similar deals between law firms—if there is any significant number at all.

While some legal work is contracting, other practice areas seem to be experiencing substantially increased volume; Law360 has reported that restructuring work is exploding. Litigation funding deals are also keeping many lawyers busy.

Malpractice, anyone?

There will inevitably be a marked rise in legal malpractice claims in the coming months and years. If there is one thing that's an absolutely sure bet, it is that legal malpractice claims increase dramatically during an economic downturn.

But malpractice claims are even more likely to increase now, because in this setting, unlike any we have ever seen before, *the law itself is changing on a daily basis*, and in unprecedented ways. Statutes of limitation and procedural deadlines have been completely altered overnight—by order of court, by legislative action, or by emergency order of state governors. If lawyers are not keeping up with every single change in the law in their practice areas, legal malpractice claims are sure to follow.

Here is a textbook example of a new ethics problem that will result in a legal malpractice claim if not handled correctly. Analytically, it is called the "underlying work" conflict problem: Your firm does work for a client on project x. A year or two later, the x deal results in litigation or arbitration, and the subject of the client's dispute *is the very clause your firm drafted for the deal.*

Think of a *force majeure* clause, for example. The clause you drafted for the deal turns out to be too narrow to include an industry-wide shutdown caused by covid-19. (Google "*force majeure* clause"; there are pages of results from just the past few weeks illustrating this problem.)

So when litigation or other claim resolution proceedings ensue and the client (naturally) comes back to you as their lawyer to handle the new matter, can you do so? Don't you have a huge conflict?[4] And don't you have an ethical duty to advise the client that it may have a malpractice claim against you?

On a more mundane, workaday level, one noted authority has focused on "hoarding and dabbling" problems:

> As business dries up, lawyers are worried their compensation will be cut or they may even lose their jobs. In desperation, some lawyers may start "hoarding" work.... [W]hen a transactional lawyer learns that her client has a dispute with a business partner, the lawyer tries to solve the problem herself instead of passing it on to the firm's litigation group, because she thinks she needs more billable hours.
>
> A related problem is "dabbling," where a lawyer—due to similar financial concerns—starts to drift outside his practice area. For example, a commercial litigator whose business is slowing down due to court closures may put out feelers for employment, bankruptcy, or insurance work, because that is where most of the business seems to be.
>
> Hoarding and dabbling are dangerous because they almost inevitably lead to mistakes, which lead to unhappy clients and, in some cases, malpractice claims. Law firm management should remind lawyers of their duties of competence, caution against straying outside their practice areas, monitor client intake forms to ensure that new matters are allocated to the correct practice groups, and spot-check time entries to confirm that lawyers are spending their time appropriately.[5]

Supervision & Rule 5.1 issues

Under Rule 5.1 of the Minnesota Rules of Professional Conduct, all supervisory lawyers in a firm have an ethical duty to make efforts to ensure competent practice by all lawyers in the firm, and to supervise the subordinate lawyers with whom they work:

> **Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer**
>
> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer's conduct conforms to the Rules of Professional Conduct.

Even before the pandemic hit, the 5.1 supervision issue had become a new focus of attention. Office of Lawyers Professional Responsibility Director Susan Humiston's article in this journal last December raised some troubling issues about what firms are required to do to satisfy their Rule 5.1 supervision duties.[6] The article suggests that firms may have to do formal audits to reasonably ensure compliance—that only when a firm has in place formal policies and procedures, training, and auditing, can the firm feel confident that it has the required 'measures' in place to assure compliance. And Bill Wernz has a forthcoming article on the same issue that will appear in this magazine next month.

In any event, Rule 5.1 is not subject to a pandemic exception. Indeed, the practical steps that firm management and supervisory lawyers must now take to fulfill the duties imposed by the Rule are entirely different and magnified when the lawyers to be supervised are practicing not down the hall but scattered remotely across a greater metropolitan (or rural) area. How do you effectively deal with these issues? Firms should be having videoconferences for the entire firm, as well as for individual practice groups. During this time of self-isolation, firms should consider other creative measures to encourage regular communication among lawyers and staff.

Ideally, associates and nonlawyer staff should feel free to pick up the phone and call senior lawyers and partners to ask questions or bounce ideas around. And a friendly check-in call from a partner or senior lawyer should not be so rare that it creates a sense of trepidation in the associate.

New cybersecurity and confidentiality concerns for remote work

Working from home has become the new normal, and even during the various, yet-undetermined stages of "reopening," it will remain a major factor. The pandemic has forced law firms into a new

work paradigm, switching overnight to a remote workforce. A recent ABA panel of experts warned that law firms need to be mindful of how employees working remotely because of the pandemic can avoid computer viruses and other cybersecurity risks.

Even if cybersecurity was not a top-of-mind risk issue for law firms before (it should have been), it is now. Cybercrime is on the rise because the transition to a fully remote work environment creates new vulnerabilities for the hackers to exploit—among them technology systems in disarray and unsophisticated users thrust into new ways of working and communicating. In fact, there was substantial evidence in the literature of a new and more serious risk of malware threats earlier this year, before the pandemic hit.

Law firms must protect their clients' sensitive personal information whether it is viewed at a lawyer's home or at the firm. In addition, firms must guard against the predictable tendency for lawyers to be less careful at home that they would be at the office.

Lawyers working remotely must also be careful to consider the security and confidentiality of their procedures and systems. Some basics include protecting computer systems and physical files and ensuring that telephone and other conversations and communications remain privileged. As Susan Humiston notes elsewhere in this issue (see p. 6), privilege issues that never would have occurred in the office are now implicated. How does working from home (with kids? a spouse/partner/roommate?) implicate attorney-client privilege and confidentiality? Many commentators also caution that Alexa units and any other smart devices with microphones around the home should be unplugged. (Cybersecurity expert and Bench & Bar columnist Mark Lanterman discusses remote work security concerns in his recent columns, including this month's on page 8.)

Think of it this way: I do not know a single person who has been infected or otherwise affected personally by the covid virus. But I know of three law firms that have suffered serious computer attacks, such as malware or ransomware, in the last month or so. The widely reported hack of the Grubman Shire Meiselas & Sacks entertainment law firm in early May is one of the higher-profile examples of the problem

It is critical to determine whether a firm has adequate insurance coverage for data security losses—and to know that a legal malpractice policy does *not* offer it. These events can be incredibly expensive—six figures, easy. Consider whether you need to supplement your firm's coverage.[7]

Attorney wellness issues

Until about three years ago, "attorney wellness" as a law firm risk management issue wasn't even a thing. It is now one of the top five concerns in the ethics and risk management arena. And without question it has become a much bigger issue in the time of pandemic.

Wholly aside from the physical health issues inherent in a pandemic, mental health and wellness issues loom large. By now we are all acquainted with the dire findings of *The Path to Lawyer Well-Being*, the milestone 2017 report that chronicled the high incidence of stress, depression, and unhealthy substance use in the profession. As Joan Bibelhausen of Lawyers Concerned for Lawyers writes elsewhere in this issue (see p. 27), the current pandemic and the many dislocations it's causing are rife with challenges to mental and emotional stability.

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In view of this, law firms must maintain regular communication with their lawyers and staff members, so that they notice if someone drops off the radar. Practice group leaders should keep track of who attends weekly conference calls and check in personally with anyone who is missing. Monitoring time records is another way to track engagement. If someone has not entered their time for several days, it is a good idea to check in with them to see how they are doing.

Here's another entirely new problem: Traditionally, law firm staffers have been management's eyes and ears in the office. If a lawyer seems off or is making odd demands, the staff is often the first to notice and to talk about it. Usually, word gets back to firm management. But now, since the staff never sees the lawyers at all, that effective early warning system is simply gone.

The ABA Commission on Lawyer Assistance Programs has published a list of resources titled "Mental Health Resources for the Legal Profession During covid-19." And the MSBA has just launched a new webpage devoted to covid-19 resources for Minnesota legal professionals that includes resources on coping and wellness at *www.mnbar.org/covid-19-resources*.

Competence: Keeping up with changes in the law and standards for practice

Across all practice areas, it's an ethical imperative to ensure that all lawyers are competent in using any new technology—such as meeting with a client on the suddenly inescapable Zoom. (Speaking of Zoom, have you checked the privacy policy for that app to see what information is being collected about you?)

This was practically a catechism even before the pandemic—ethical competence now *includes* technological competence. The Rules were amended a few years ago to specifically so state. But the competency issues raised by the pandemic range far beyond learning to use new technologies and keep them secure. In every area of practice there are new and different challenges posed by the new normal:

- In litigation, court rules, calendars, and statutes of limitation have been suspended.
- Commentators suggest that by halting trials, the coronavirus may push more parties to the settlement table. Now could be an opportune time for litigants to reach out to opposing parties to see if resolution is appropriate in light of the circumstances.
- What about the new normal for depositions? Sure, you were a competent taker of depositions before, but have you mastered the new and different skills required to depose a witness over Zoom?
- In employment law, the pandemic raises numerous new issues revolving around HIPAA, medical issues, and new law governing family or medical leave and emergency sick leave.

- Estate planning experts have expressed new concerns about children or other beneficiaries contacting the parents' attorney to have elder parents' estate plan changed. More fundamentally, how are documents to be executed in the era of social distancing?
- Immigration law has entirely new problems to confront.
- M&A practice has been fundamentally changed, as has mediation/arbitration, which is now conducted via Zoom and other remote technology.
- How do firms keep up with the changes that are occurring almost daily as governments respond to the pandemic? Every day, general counsel responsible for workers across multiple jurisdictions are trying to get up to speed on new mandates, while seeking advice from outside counsel and other external resources.

A new paradigm for civility and reasonableness?

In March, the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee called for a new emphasis on lawyer civility:

> "In light of the unprecedented risks associated with the novel Coronavirus, we urge all lawyers to liberally exercise every professional courtesy and/or discretional authority vested in them to avoid placing parties, counsel, witnesses, judges or court personnel under undue or avoidable stresses, or health risk... Given the current circumstances, attorneys should be prepared to agree to reasonable extensions and continuances as may be necessary or advisable to avoid in-person meetings, hearings or deposition obligations."

A notorious decision out of the federal district court in Chicago in March (known among ethics nerds at "the Unicorn case") vividly illustrated the new paradigm. A company that creates "lifelike portrayals of fantasy subjects" such as elves and unicorns sought an emergency hearing in its trademark infringement suit. The court deferred the hearing for a couple of weeks, citing health and safety issues arising from the coronavirus.

Plaintiff's counsel promptly moved for reconsideration on an emergency basis. The court was not amused: "Plaintiff has not demonstrated that it will suffer an irreparable injury from waiting a few weeks. At worst, Defendants might sell a few more counterfeit products in the meantime. But Plaintiff makes no showing about the anticipated loss of sales. One wonders if the fake fantasy products are experiencing brisk sales at the moment.... If there's ever a time when emergency motions should be limited to genuine emergencies, now's the time."

The opinion concluded with this gem: "The filing calls to mind the sage words of Elihu Root: 'About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.'... The world is facing a real emergency. Plaintiff is not."

Now the point is this: Two months ago, before covid hit, there would have been nothing particularly remarkable about counsel pressing for an expedited hearing as he did. But everything has changed now. The pandemic has suddenly narrowed the Overton Window of reasonableness in litigation.

Finally, consider soberly the issue of how best to communicate with clients when we can only communicate with them remotely. For some *it's just not the same* as in-person contacts. Communication with clients in the time of pandemic should be handled delicately. One commentator has noted that when you call your clients now, the first few minutes of any conversation should have nothing to do with the legal matter at hand. "It's time to discuss life, family, fears, and of course, health. This is also a time to be honest and transparent. We're all going through this. No one is immune." ▲

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Notes

[1] Think about what we've all lost here, at least for now: Bar association gatherings like this have long been on my list of "must attend" events. For decades I have attended the spring Bar Benefit, the summer MSBA convention, the fall Judges Social, the winter Ramsey County Bench & Bar dinner, etc. It's automatic. But no more: this year's bar convention has already been cancelled, at least as to any live event—especially the bar event of the year, the annual President's Reception. And does anyone really think things will be sufficiently back to normal so that we can have a Judges Social this year?

[2] *https://minnlawyer.com/2020/03/30/quandaries-and-quagmires-legal-ethics-risk-management-in-pandemic/*

[3] I have written in this journal before about this group. The 25 largest firms in Minnesota all have experienced general counsel who spend all or much of their time representing and advising the law firm. For more than 10 years they have met regularly to discuss breaking or troublesome ethics or risk issues.

[4] Law360 recently published an article directly on point: "Think Twice Before Using Deal Counsel as Litigation Counsel," 4/17/20 (paywall). More fundamentally, the underlying work problem is so well-recognized that there is an entire section on the topic in the online Bible of conflicts of interest, *Freivogel on Conflicts*: *http://www.freivogelonconflicts.com/underlying-work.html*

[5] See Hyland, "Tips For Minimizing Law Firm Liability During covid-19." *https://www.law360.com/articles/1268179/tips-for-minimizing-law-firm-liability-during-covid-19*

[6] Susan Humiston, "Your ethical duty of supervision," Bench & Bar of MN (December 2019). *https://www.mnbar.org/resources/publications/bench-bar/columns/2019/12/01/your-ethical-duty-of-supervision*

[7] The ABA Standing Committee on Lawyers Professional Liability recently published a second edition of *Protecting Against Cyber Threats: A Lawyer's Guide to Choosing a Cyber-Liability Insurance Policy*. This very handy guide to insuring against this increasingly dangerous exposure—a 32-page paperback book, retailing for $22.50 for ABA members—has been described as "extremely useful for law firms that are looking to purchase a cyber liability policy" and "a must read for any law firm that recognizes that it's not a matter of 'if' but 'when' a data breach happens; (and) how a cyber policy can protect the firm and effectively manage the breach." Here's the link: *https://www.americanbar.org/products/inv/book/385016340/*