PANEL: INTERDISCIPLINARY DISCUSSION ON ETHICS

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Blake Klinkner: Well, first off, I'd like to thank everybody for joining us for a wonderful day of symposium. I'd like to thank the Law Review for entrusting me to serve as a moderator today, and thank you, finally, to our guests, our wonderful guests, for being here. So today is a little bit of a- I guess you could maybe say a little bit of a lightning round, a potpourri in terms of general ethics and professionalism. I plan on asking questions ranging from AI and cybersecurity, which we already heard a lot on, and there's definitely more to learn, to things like disciplinary matters, business practice, social media, and of course we welcome all of your questions too. So definitely please write down your questions on the note cards, and we'll be happy to have some audience participation questions. So, my first question is, how have you seen—over the last five years—how have you seen ethics and professionalism change over the last, say, five years? We can start with Ben.

Ben Kastan: I don't think the core has changed very much, right? I think this is, you know, part of what I realized as I was preparing for this talk was even on the technology stuff—where the technology has changed a lot, where the reality has changed a lot—the basic principles haven't really changed, right? You have to be competent. You have to do all the things Jason was talking about in terms of knowing your client and providing them effective advocacy. You have to maintain client confidentiality. So, the way in which you do that changes as the world changes, but I don't think the core of the matter really does or has changed very much over the last five years.

Blake Klinkner: Okay. Professor McGinniss?

Michael McGinniss: Yes, I agree with Ben. I think [there are] a couple of things I could add. The technology changes, including more remote work, more people working remotely, more court proceedings being done remotely

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via Zoom. [Zoom] was already in process before the pandemic, but then that just accelerated everything, [and it] has created some challenges, but the same standards apply. It's just trying to find ways to make them effective with working with these changed practice circumstances. So, the same with AI. The same principles are there about managing partners, setting up correct policies for their firms, and reasonably supervising the behavior of lawyers and non-lawyer assistants. It's just added application challenges, but the same concepts are there. I also say that it creates new challenges in the sense of professionalism. In a society where there's more distrust, where people tend to be more separated and don't know their neighbors and know their community in the same way as perhaps they would—maybe that goes back further than five [years], but it's also there. And in the profession, too, finding ways in order to encourage people to understand the importance of respect and sorts of relationships, which you talked about—this importance of connecting and finding ways to do that, even if it may sometimes be more remote or different ways of connecting, making sure that the human element isn't lost so that people can still have that skepticism. You still have to be, you know, "trust but verify," but this idea of relationship is really important in terms of the quality of life in the profession perhaps and how people relate to each other.

Jason Ochs: In Wyoming, our bar counsel, they'll always send out an email publicly disclosing whatever sort of reprimands they do to a variety of attorneys that get in trouble with the bar, and I think that's one way to, you know, discourage people from getting in trouble so they're not getting public, you know, email to every single bar member in the state. What I've seen, Blake, in the last five years is, I think, a huge uptick in lawyers or lawyer staff dipping their hands in a client trust account.

Blake Klinkner: Professor McGinniss, I'll start with you for my next question. So social media, that certainly has changed the way we interact with each other and certainly with our clients, perhaps, how we market to them, how we communicate, and also how they review us. One question I wrote down thinking about this panel is how should you respond to a client who leaves a negative review online? They go to Facebook, they go to Google reviews, they go to Reddit, on a public bulletin board, and they trash you as a lawyer. How can you respond? Should you respond? Would it be appropriate or not appropriate in responding to a bad social media comment?

Michael McGinniss: That's an excellent question. It's one that the ABA addressed a couple of years ago in a formal opinion, and I agree with what their guidance is. First, you have to realize that the fact that someone makes a complaint about you on a social media forum, or on some form of review site, Avvo, whatever it might be, does not then give you permission to

disclose confidential information. There is an exception to confidentiality requirements for responding in a proceeding such as a disciplinary complaint or a legal malpractice action, but a website of that nature is not a proceeding, and they haven't waived confidentiality by complaining about you. So that's the first principle to apply. So, in terms of how it's best to respond, one of the ways to do it that people do is—[that] I think is good general advice—to say "professional considerations prevent me from responding," or words to that effect. And then basically the reader can sort of take that [statement to place the review] into context. If you think it's particularly egregious or maybe defamatory, you can contact the provider—say it's an Avvo website—and see if it's possible to have it taken down, but under no circumstances should you respond. There are disciplinary cases that are out there. One that comes to mind [is one] from Colorado with a public reprimand where [the lawyer] provided information in response to [the review] and was thinking, "I'm just defending myself," but it violates the confidentiality obligation. So, it's tough to do that. I understand it would be tough to do that. No one likes to be on the receiving end of that kind of critique, but to the extent that the reader can see [that] you're the kind of person who responds professionally even when attacked, I think that can perhaps lessen the sting. You can say, "Well, I'm going to be a stand-up person and follow my obligations even if I feel like I've been unjustly critiqued."

Blake Klinkner: Okay, and Jason, I'll kind of ask a follow-up along the same lines. So, in addition to and aside from the ethical rules, just from a business reality standpoint, business practicality, how would you respond to that? How would you maybe preempt that to begin with? What maybe would you do in place to try and prevent perhaps the client going online and bad mouthing your firm?

Jason Ochs: I had that happen once to me, and I drafted a very stern defamation letter and had him personally served with it. If he didn't remove it within 24 hours, I'd be suing him. It wasn't a threat. It was a promise.

Blake Klinkner: Okay.

Michael McGinniss: That's a viable solution.

Blake Klinkner: Great. A question about AI and billing. So, I think attorneys right now are struggling with how do I bill for AI? Can I bill the same amount of time I would have spent? Do I have to shave something off? Is it more of a flat fee? So, I'll start with Ben. Any thoughts on AI? And what if your outside counsel used AI and didn't tell you? What would you think about that?

Ben Kastan: Yeah, so it's been really interesting to see, to hear from Jason and some of the other practitioners here because I was just up in New York at a cyber counsel event—which is a bunch of in-house cyber counsel,

a bunch of Fortune 500 companies, as well as a few of the major global firms—and one of the partners at one of the firms talked a lot about how they are using AI to enhance productivity. What's interesting is, I think you're right, that the incentive structure for billable hours sort of cuts against efficiency in some way. Where if you don't get to bill X number of hours anymore for the same project, then that's harmful to the firm's bottom line. I think from a client perspective, I think we would expect the firm to bill, obviously, honestly. If you didn't spend the time doing the work, you don't get the bill for that time. So, one of the things we've done is, when you look at, especially discrete projects, as opposed to ongoing litigation type stuff, is some of what Jason talked about in terms of a fixed fee. We've done this with firms. I've looked at doing this with firms literally on multiple continents now, where if we have a specific objective and it is sort of a time-bound project that's well-defined with well-defined deliverables, then that's a very easy solution to that issue. Because then they can use all of the efficiency tools, and they're not getting dinged for being better at what they do. So that's one approach, but it's a challenge. I don't think anyone's figured out exactly how to deal with it.

Blake Klinkner: Professor McGinniss?

Michael McGinniss: I think that's excellent, and just one thing I'll add, because this came up in Jason's comments too, about fixed fees or set fees. In North Dakota, you can do that, and there's actually a rule that allows it to go into the operating account at the time when it's received. The key is, as he referenced, if there's a termination before the job is complete, you still have an obligation to refund that. Now, I'll give a little bit of background. I won't go on and vent too long, but as a member of the Joint Committee on Turning Standards—which I currently chair—for a number of years, there had been an issue that arose out of a North Dakota case about so-called non-refundable fees, which do not really exist. There is no such thing as a fee that is non-refundable, if you've taken Professional Responsibility, you [may] remember my little rant on this, but the idea is false because if you are terminated, you have to refund the fee. It cannot be retained if it's not earned. So, the key is, if you're in a situation where you're in a state that it can be put in the [operating account], you still need to recognize [that] if you don't do the job, you need to return the unearned portion of it and prorate it appropriately. A better practice, I think, in the states that Jason alluded to, the other states that do require it to go in the trust account, is you simply identify—and maybe [for] a short, discrete project [this] isn't the case, but for a longer-term project—certain benchmarks. So, you set a benchmark in your fee agreement. By the way, always have a written fee agreement [even] if it's not required by your state's rules. I think my colleagues on the panel would agree with

that, but set benchmarks. This amount will be earned. Let's say it's $10,000 for this overall project, and then X amount will be earned at this trigger; this will be a trigger for earning this portion, and the full amount will be earned upon this. If you do that, then you can protect both the client's interest in securing the funds and also your ability to draw down and keep your cash flow going.

Blake Klinkner: Jason, you talk about return on investment, ROI, and how to update your billing. So how would you recommend attorneys consider the ROI when incorporating AI? When they're deciding, okay, it took me ten hours to draft this contract, now it's AI and I have a couple hours in the front and the back end, but you still want to have, of course, that income you had before last year doing it by the hour. How would you advise attorneys move to [a] flat rate, move to fixed rate billing? How should they kind of calculate what they still want to get for the same deliverable that before it was by hand, now it's by AI, but you still, of course, want to be able to pay the bills, pay your loans off at the end of the day? How should attorneys incorporate AI billing into the flat rate model, into just general practice?

Jason Ochs: So, I think it ends up requiring a different mindset, is what I think. I don't have the pressure on my firm to meet a certain billable goal if I have replaced a paralegal with AI, because I'm not paying that paralegal anymore. If I've replaced a paralegal with AI, presumably AI, it should be knocking out work like that [*snapping fingers], okay, which means that if I want to increase my numbers, you can take on more cases. So, I think if we keep ourselves in this rut of billable hours, I don't think you ever get out of it. It's an endless circle that never stops. Get out of the billable hours. The way you're going to make money is caseload. If you want to increase the amount of money coming into your office, you've got to increase caseload. Better time spent, in my opinion, on marketing, on mingling, on being out in the community to gather that attention so you can get those cases than honestly dealing with billable hours.

Blake Klinkner: Here's my next question for Ben. What are e-discovery best tips, best practices? What are some of the best things to do in working with your outside counsel, and what should we do to work with our in-house counsel clients? What are some of the common pitfalls? What are some of the butting of heads between an institutional client and their outside counsel when maybe there's some friction or a rift or a problem regarding e-discovery?

Ben Kastan: So, I think I'll have to defer to Jason on e-discovery. I don't really get or have to deal a lot with that in my current role, which is very transactional and regulatory focused and not so much litigation, knock on wood. I mean, just in general, in terms of engagement with outside counsel,

I think one thing that, again, from a client's perspective, that is most effective is when the outside counsel is- they have to provide their best view of the law, but they also need to understand the client's objectives. So, in a regulatory transactional context, if you're negotiating a contract, you don't necessarily want to take maximalist positions on every issue. That will prevent the transaction from going through, and your clients want to get the deal done. Sometimes lawyers have to hold themselves back and say, is this really important to my client? Is this ultimately worth fighting over for another X period of time? Especially if you're using outside counsel where they're billing you, you know, if it's a partner in a major global firm, $1,800, $2,000 an hour for a single attorney's work. I don't want that attorney spending another hour fighting over something that I don't care about. That ultimately is not going to matter down the road. So, I'll have to defer to others on the e-discovery piece.

Blake Klinkner: Sure. I'll open it up to Professor McGinniss and Jason. Where do you often see Rule 37 issues where they claim you're not producing data? Where are there, maybe, a dropping of the ball between the client and the lawyer and opposing counsel? What are some common e-discovery issues, spoliation issues? What do you tell your own clients about you needing to preserve things? Not delete photos, delete social media posts, for example, along those lines.

Jason Ochs: That's a great point. The first conversation I'll have with the client when they come in and talk to me is I want to know what their Facebook page is. I want to know what their Instagram page is. I'm going to scour through it because I know that's going to be relevant. I tell them you cannot delete this stuff. What do they do? They go home and delete it. It happens frequently. I tell them don't delete it because it doesn't go away. It will show up again. The defense will get it. The defense will archive this. Even if you think you've deleted everything—and then it becomes the issue in your case. That's the problem. It's no longer about the medical malpractice event. It's about your client deleting Facebook posts. You can't let that distraction into your case. I can deal with the Facebook post that's bad that you shouldn't have said about Donald Trump or Joe Biden. I can deal with that. We can keep that out. What I can't deal with is when the judge says there's going to be a sanction because your client is deleting stuff off of Facebook. That's a huge issue—e-discovery, big corporations, when you're getting e-discovery, you want to ask for metadata to be preserved. It's so important. Metadata is the information behind the PDF that tells you who wrote it, who the author was, and when it [was] created or edited. You will find gold in the metadata. Right from the get-go, we put together an e-

discovery protocol. We have to sit down with the defense lawyers. We have to agree to it. It always has a metadata preservation clause in it.

Michael McGinniss: I agree with everything that's been said. I'll just add a couple things. I'm now a new Civil Procedure professor. I've taught upper-level courses that touch on the topic, so I'm just kind of getting back into the e-discovery world as far as how all this happened on that since I was practicing. Very interesting, but the principles in terms of ethics are [the same] there, which is you instruct your client. You communicate with your client. It's the same idea. The client may do something against your instructions or not understand you. As far as your ethical obligation individually, you need to be able to say, this is the standard I followed. You're not responsible for your client's behavior if you instructed them to the contrary, so make sure that you cover yourself that way. It's good for your client if they follow the instructions, but that way, even if they don't, you're covered in terms of your own conduct as far as responding to the court and their questions.

Blake Klinkner: Jason, when you take on a client, from the moment of representation, do you advise your clients to stop using social media, to lock their account, to kick off people who are not really their friends? Any advice on how to manage that? Of course, don't delete, but aside from that, how can you still use your Facebook, your Twitter, whatever it may be?

Jason Ochs: I used to say, no more use of your Facebook, period, but nobody ever listened to that. Now I just say, listen, mild pictures of you and your family, okay, fine, that's fine, but you know what? If you're going to hire me because you got some broken leg in a car crash, I better not see any pictures of you jet skiing or water skiing on your Facebook page because they're going to find it. Those sorts of things, if I have any sense, I'm not taking that case anyway, but I make it very clear that you are responsible for your case, and if you want to have a good case, stay off social media.

Blake Klinkner: I'll ask a question from the audience. What policies or safeguards should firms put in place to ensure and promote ethical use of AI in practice? I'll just kind of open up the panel in general, whoever wants to jump in first.

Jason Ochs: Number one, I'll say right from the get-go, you got to make sure whatever AI you're using has confidentiality clauses on there. Usually most of these groups like ChatGPT and Perplexity and Gemini, they're using what you're putting in there to train their bots, to train their AI. If you're uploading a record that's confidential, you're in big trouble. We use Callidus. Callidus is made for lawyers. It has a great confidentiality [clause]. It has Amazon-grade security on it. If you're going to be uploading any documents, like maybe medical records to summarize them for you, or a deposition. I

uploaded a deposition not long ago. I needed all extracts referencing alcohol in it. It did that very quickly. So, I think the confidentiality jumps out at me right away.

Ben Kastan: Just to add a little bit on that point, whenever you use the free or most commercially available general Gen-AI tools, not only could they use it to train their models, [but] that information could end up in the response to some other person, right? So that happens accidentally, because if it's used to train the model, it could be spit back out as a response. There's also attacks called model inversion attacks, membership inference attacks, where somebody can try to extract specific information from the model that was used to train it, including potentially any confidential information that you're putting in these systems. You really need to know the terms of service for any of these AI tools you're using. They are really hard to read, especially for a company like Microsoft. They won't give you a single four-corners document to read. You will have probably seven different cross-referencing documents you need to try to figure out. If you ask the vendors' attorneys, they may not even fully understand how they all work together, so it's complicated. I think the one thing I would just recommend, probably just as a good governance perspective, is have a policy. Even if it's very one page, use this tool; don't use any publicly available tools. That way, especially if you have multiple folks in your company or your firm, and someone does something stupid, you can say, look, we had- and you get investigated, you get questions about it, look, we had a policy they violated a policy, the person was retrained or disciplined or whatever it was, and we have some documentation that this is our approach.

Michael McGinniss: I agree with both of their comments. Just to add one thing, there's an ABA formal opinion, which I think was referred to earlier. Maybe it was by you, Ben, on AI that just came out. One of the things it talks about is, again, the concepts are still the same, which is communication with your clients. To the extent that you're using [AI], it's ideal to use types of vendors that don't have those compromisers, that limit the exposure of confidential information. One thing you can do in terms of giving yourself more breadth is including that in your fee agreement or in your retainer agreement with the client and/or communicate with them. The key is, if you're getting informed consent, what does that really mean? Do they really understand? You have to understand first to what extent this is now going to be available out there by putting their [information in—and it] depends on what you're putting in, too. I think [it is good] to have a query where it has more general information about the case and another that's sensitive information. In that situation, if you have something in your retainer agreement about general use of AI, if you're going to use some tool that

perhaps creates more exposure, you have to consider the risks and advantages of that and explain that to the client and then get their consent to do that.

Ben Kastan: I think that makes sense. The only other thing I'll say is it's everywhere. Even for tools that are not AI tools, increasingly vendors are incorporating generative AI capabilities, chatbots or whatever, into otherwise just HR tools. So, you have to be really diligent when you're working with any tool that you're going to use at your organization or in your firm. Does it incorporate AI? Do you understand where, if it does, what kind of AI it is incorporating? Is it the kind that would be used to potentially train other models? Are there confidentiality obligations? Confidentiality should just go along with that. It's sneaky. Companies are constantly adding these features, and they won't necessarily proactively disclose it if you don't ask.

Blake Klinkner: Great. I'll ask another question that came from the audience. Do you foresee the ABA rules of ethics and professionalism adding rules on AI usage, or what are the current ones that might be most implicated, and also do you believe that the current rules are adequate to even combat the current issue?

Michael McGinniss: I can go ahead and start on that. Right now, there's not specific talk of doing AI rulemaking at the Model Rules level, although that could change. I think they put out the ABA formal opinion as a way to try to highlight some of those key rules: 1.4 on communication, 1.6 on confidentiality, 5.1 on the responsibility to have policies in your firm, which deals with supervising of your law firm. So, I think currently they're focused on [explaining the application of the existing rules to AI.] And also, of course, [there are] the ever-present litigation misconduct issues with AI in briefs that reflect cases that don't exist or hallucinated cases. Right now, what's really kind of hot on that is courts responding with sanctions, under Rule 11, and kind of upping the ante, including one that happened some months back, where the sanction that was imposed was not just a monetary sanction, since that didn't seem to work, but [ordering the lawyer that] you need to notify the judges at every court in which you're now counsel of record about this sanction and notify your clients. So, they're trying to up the ante. The other thing that is also happening, and this may be something that will come later, but I'll just allude to it because it's a hot question right now, is now judges misusing AI. The Senate Judiciary Committee is now very on top of this, writing letters and asking for responses about what the Judicial Conference is going to do about dealing with this, and maybe legislation from Congress (question of whether it's constitutional or not?), to try to regulate AI in the judiciary. So, it's happening more at that level in terms of immediate effects, and I think at the ABA level it's just kind of a little bit of wait and see, let this play out a bit, and if necessary, adopt some specific rules.

Blake Klinkner: A follow-up question to that, when you mentioned judges using it, I've often heard about bias in AI. That could be the issue. They're concerned about this. There's sort of a black box issue. If you don't know how exactly AI comes up with an answer, right? What are those concerns about bias? Where have we perhaps seen some bias in AI and its outputs that we may not understand, and what perhaps can we do to mitigate those biases that may be built into the system and you're not even aware of?

Michael McGinniss: From the judicial standpoint, that hasn't been so much of an issue because they're generally using it to write opinions, right? If they were asking for—in the cases that have been discussed—tell me what the outcome should be. Then you're kind of worried about bias. If they're just using it as a drafting tool, that's different. Certainly, any AI tool is going to be drawn from a particular universe or database, a data set. So, to the extent that it reflects biases of that which has been input into it, that's going to be reflected in the output. So, I think that's on the mind; I'm sure it will be, when the judicial and the administrative office of the courts is working on that question at the judicial level. Also, it's one where I think lawyers should be mindful of what they [are] going to be getting, especially with something like ChatGPT that draws in such a wide range of sources, whether or not that's going to be taken with a grain of salt before they simply rely on it.

Blake Klinkner: Another question from the audience is, many students, law students, are concerned that AI could take their jobs, that AI will replace them. AI can already do many of the sort of basic tasks that the first-year associates will be doing, and therefore you probably don't need as many first-year associates. So, what advice does our panel have for those concerned, nervous law students who are wondering if there in fact will be the job waiting for them at the end? Will they be replaced by AI? How can they perhaps prevent being replaced by AI? What would you say to those nervous students?

Jason Ochs: Find a skill set, okay? I don't see AI entering the courtroom anytime soon. So, get into the courtroom via [the] public defender's office or DA's office right away. Other areas of specialty that are unique, I think IP litigation is one, very highly unique. AI is going to have a place, but we still need lawyers who are very good in IP law. Really big right now are institution and church sexual abuse cases. Sadly, we've got a lot of LDS church stuff going on in our part of the world, and it's coming. We have a huge institutional litigation going on in Wyoming with the Department of Corrections. That's going to be an area I don't see how AI infiltrates those. So, start looking at niches. Start looking at niches, not broad things.

Ben Kastan: I think one, so part of it is a challenge for the firms. I think this is probably more of a challenge, like Jason was saying, for traditional

large law firms that use associates to do basic research and drafting. I think those are the roles that are most at risk of being replaced or significantly reduced because I think to the extent that a Copilot researcher or whatever can do that basic research or the basic first draft generation, it's going to be hard for a firm to justify having the same kind of first-year class that they may have had in the past. I think there's only so much you can do as a student on this broader trend, but I do think part of being an effective lawyer now and going into the future will be knowing the tools, knowing how to integrate it into your practice, knowing the risks and benefits. Then that way, when you're talking to a firm, when you're talking to a partner about who's looking to hire you or potentially bring you on, when they ask this, I would expect, increasingly if it's not already happening, these questions to come up in the interview. How would you use AI in your practice? Where would you integrate it into your drafting or your research? So, I think to the extent you can be thinking about that, to the extent you can be taking classes on it or, you know, preparing for those kinds of questions, I think you'll be better positioned than those who have no idea [and] have never thought about it.

Blake Klinkner: Another question from the audience that sort of dovetails with this is, what will the law firm look like in the future, in the next, say, 10 years? Will it be mainly small firms? Will they rely heavily on AI? Will you have a merger of the biggest firms or [will they] continue to get bigger? Are the national firms going to become international? Are we just going to have this giant kind of consolidation among firms? What are we going to see in the next 10 years?

Jason Ochs: I think it depends geographically a little bit. In New York, I don't see any, you know, big fancy firms leaving anytime soon. In D.C. and the East Coast, certain parts of Southern California, I don't see any big firms leaving. In rural America and Wyoming and North Dakota and Iowa and Nebraska and Montana, I see far more solos. Just because, frankly, it's cheap. If you run it cheap. You don't need the brick and mortar anymore. You don't need, you know, all the fancy, you know, phones and all that sort of thing. You need a cell phone and a laptop, and you can be a lawyer. I think a lot of people, especially, we'll see how strenuous our economy becomes over the next five years, but if it becomes more strenuous people are going to start getting rid of the brick and mortar and start getting rid of the low-level employees and they're going to, really in rural areas, they're going to be at home with a cell phone and laptop. I think that's a good thing. I think that's a great thing.

Michael McGinniss: Yes, I'm inclined to agree. I think it's going to depend on geography and what makes sense for the type of practice that's going on. I think it is going to vary, right, the ability to use technology to

reduce overhead. I mean, you'll still be paying for the use of the technology, whatever kind of subscriptions or things you need to do in order to effectively carry out your practice, but the sort of physical overhead requirements are going to be just not as strong. I mean, there's always going to be some demand for that, and there's always going to be contexts in which that's going to work well, and be necessary or perhaps close to necessary, but I think it's going to create more of that, as opposed to necessarily eliminating the prior structures.

Ben Kastan: I think the other thing that is likely to change is the nature of the kinds of services, especially big firms, offer to institutional clients. Part of what we're starting to see already is some firms offering legal AI as a service, where they will offer AI-powered research using data that they consolidated and trained a model on, and using that to say, hey, we won't necessarily give you a memo; we'll give you an AI model, right? So that you can ask it questions. You can say, okay, here's my new scenario. The fee structure for that kind of project may look very different than a traditional partnered legal memo, but I think the kinds of services, the way in which those services are delivered may have changed quite a lot. It may look like delivering a legally trained agent as opposed to a memo.

Blake Klinkner: So, it sounds like we may be moving in many areas towards virtual practices. How can a virtual practice implicate our ethical duties? For example, one of them at the top, how can a remote practice, a virtual practice, implicate handling of sensitive data, keeping it confidential, making sure you don't reply all or forward to the wrong side, or who knows what? What are some of the confidentiality issues in particular, like docket handling storage, that are going to be implicated if you're going to go virtual?

Michael McGinniss: Sure, no, that's a great question, Professor Klinkner. So, the ABA did actually have an ethics opinion come out about that around the time right before the pandemic, if I recall the year. It talked about that because it was already becoming more of a trend. I think one of the things that, you know, some of the same principles still apply. Cloud storage may be an option if, say, your virtual practice is in your home. [You need to] be mindful of protecting confidentiality where you're having meetings, given a space so that you're not exposing confidential information to others in your household, because it isn't "all in the family." You're supposed to be able to maintain that confidentiality and those restrictions in terms of protecting client information. So one of the issues that has come up over the years is, if you're practicing remotely and you're in Wyoming but you're not admitted to the Wyoming bar—I'm just picking on Wyoming because Jason's here, but I haven't looked up their rules—but there are some states that are more sensitive [and] say well, you're practicing law in our jurisdiction, even though you're just doing New York law, you're a New York

lawyer, you just happen to like being in Wyoming and you prefer it as your landscape. More and more people are understanding—[and] I pitched for this years back, back to when I was a disciplinary counsel in my former life—that practicing in a jurisdiction is really about practicing the law of that jurisdiction for people who reside in that jurisdiction for their legal needs. The fact that you may be physically sitting there and doing the law for other people outside of the state about other law is not practicing law "in this jurisdiction." So, that's been generally understood. Some states have been a little slower to kind of recognize that, but they're changing their rules gradually to do that, to make sure it's clear. But in any event, that's an area to be mindful of if you're going to do a virtual practice: where are you, and what are the restrictions, and how have they interpreted their rules?

Blake Klinkner: Another follow-up question along these lines is the duty of communication. How can an over-reliance on technology implicate your duty of communication? For example, if you're over-relying on technology, are there some clients who are more or less likely to not get messages? Have you yourselves, with your clients, have you seen issues where you tried tech and your client just can't fumble through the technology, and you have to kind of dial it back? Thoughts on using things like client portals, you know, whether email or just simply snail mail, what would be considerations in which to use for some clients who may be more tech-challenged?

Jason Ochs: Yeah, I think it depends on the client. If you know, our older clients are usually snail mail, but I always ask that up front. It's a question I have up front. I don't want them to have expectations I'm not aware of. So, do you want me to text you? Do you want me to email you? Do you want me to just call you? So, just make sure the expectations are set. Everybody's on the same page.

Blake Klinkner: Another question from the audience. In your opinion, will AI offer opportunity or a hazard for court systems and the bar to increase access to justice and provide pro bono offerings?

Ben Kastan: Yes. I mean, I think it's both. It's a risk, and it's a benefit. I think, in the sense that, so take Agentic AI, right? In today's, you know, enterprise-level Microsoft Copilot, create an agent based on a body of documents, and you can ask it questions. It cannot, ethically and legally, substitute for legal advice. So, you may still need a supervising attorney to supervise the agent and potentially others who are helping with the pro bono work, as you would a paralegal or an attorney who's not licensed in the relevant jurisdiction. I think there is a lot of opportunity there to help more people at a lower cost. You know, I think we're still figuring out how to do that, but I think there's a lot of opportunity there to really increase access to

limited legal resources to make legal aid more efficient. In a way that helps more [and] helps them reach more people without significantly increasing their funding or whatever.

Blake Klinkner: Professor McGinniss, have you seen any shifts, any trends among states, among jurisdictions in sort of loosening the unauthorized practice of law rules to maybe accommodate AI-assisted, who knows what, to allow the court to direct them towards those resources perhaps?

Michael McGinniss: Not specifically directed to AI itself, but there has been loosening of [unauthorized] practice in progress for a number of years in terms of understanding the reality I was describing, which is that mobility is real, that we're going to look at the substance of what is being done as opposed to the location of where it's being done. That part has been going on for some years, but I think there, with the AI piece, I don't know that it's yet kind of taken hold on that. I think they're still allowing it to develop in the other forms, but I think it ultimately may need to be looked at.

Blake Klinkner: My next question, I'll open with Jason and whoever else wants to jump in as well. How do you- what would you recommend for best practices for litigating what I guess I'll call the high-profile case, the very public case? Of course, you do high-stakes litigation, often very emotional, high damages in these cases. Those cases are tried in the 24-hour media cycle. They're tried on social media. There's strong public opinion, right? Whether it's on TV, the news, social media. What are your thoughts, your advice on what I again will call trying the high-profile public case? Do's and don'ts?

Jason Ochs: You got to get out early. Get out early and you [will] be in charge of the narrative. Don't let someone [on] the other side take over the narrative, and the narrative may be, for example, if you have a criminal case with a high-profile client, maybe there's a sexual abuse allegation, something of that sort. If it's a male client and you've spoken to him and he contends that it's consensual, you got to get out early and fast on something like that. You want to define the narrative; you don't want the other side to define the narrative. That's what I would say [about] high-profile. Once you get out there and establish it, then shut up. Keep it quiet, and keep your client quiet. You do it, not your client.

Blake Klinkner: Any additional thoughts?

Michael McGinniss: Not on that, but I had a thought on the unauthorized practice question. It's more [than] a little sci-fi, right? Because it did occur to me, this hasn't really been something that's been looked at regulation-wise. This idea that this artificial intelligence is actually engaging in practice, right? I think it's still understood, at least in terms of the capabilities that exist, that it's a tool. That it's a piece of technology that

simply assists lawyers in carrying out their tasks. But to the extent there's speculation about whether they can, how far they can push it, right? That you actually end up having an "AI lawyer"? And someone establishes an AI lawyer created by a human being, and then all of a sudden that becomes the tool to provide legal advice, and it sort of detaches it from the human person who doesn't actually meet with the client or have that interaction themselves. It's simply the AI device that they created, maybe using this database of this great information and experience that they've created, and all of a sudden that becomes our "lawyer." I guess you could charge the AI [device] with unauthorized practice of law, or you would charge the lawyer [who created and operates it] with assisting the unauthorized practice of law. So, it's all a little speculative; [like] I said, a little sci-fi, but [it] depends on how far the technology goes and what applications people do with it.

Ben Kastan: I saw at least one case where a pro se plaintiff did try to deploy an agent attorney that was completely AI. It was on a Zoom call, a Zoom hearing in front of a judge. Their attorney was an AI agent with an avatar they created, and the judge was trying to figure out who the heck this person was. Ultimately, they said that it's not going to be permitted. You have to either represent yourself or go away; you cannot use this agent to do it. One of the models I think could work, and I've heard some discussion on, but I don't think there's anything formal yet, is treating, especially Agentic AI, like AI agents as non-legal professionals who are assisting an attorney. So, you have the same duties to supervise their work as you would a paralegal or a non-licensed professional.

Michael McGinniss: I think that's sound. I think that's essentially what they are, but you're still responsible for whatever it does.

Blake Klinkner: Next question is how are younger lawyers redefining professionalism and ethics? How are they redefining how the business of law is being practiced, how you manage your staff, your attorneys, for example, if you're a partner? Basically, how are the people in this room going to define, how are they going to change things when they graduate in the next year or two and become attorneys? So, what are you bracing for? What are you preparing for? What are you learning about for taking on our next generation of lawyers in your employment offices?

Jason Ochs: Oh man, I'm excited about it. I mean, I think these young lawyers, first of all, you have a command of the internet and the social media that is untouched by the rest of us. Seventy-three percent of us are getting our news now from social media. If you can learn how to harness that, if you can learn how to tap into that from a marketing standpoint, it's going to explode for you. I just think it's so incredibly opportunistic for the young generation. I'm really excited for you. I think you can be so much more efficient than the

rest of us because you're going to know AI a lot better than us old folks do, and you're going to be able to utilize it in a way that's going [to] create tremendous productivity for you. I think it's a really exciting time to be walking out of law school right now.

Blake Klinkner: Question for Ben. To what degree will outside laws like the GDPR, the General Data Protection Regulation of the European Union, to what extent will foreign law, like international law, especially the GDPR, will that impact and implicate American lawyers, American attorney ethics, professionalism, how we handle data, how we manage e-discovery, confidentiality issues? Have you seen that in your own office, your own practice, that you're actually looking overseas into what you got to do, maybe because it's a more stringent, stricter requirement than even here and you might as well not get in trouble with the EU?

Ben Kastan: I think it depends on the nature of your practice and the clients that you're supporting. So, for my practice, yes, I mean 80% of my day is not advising on U.S. law. I'm working with my counterparts in Europe or South America or Asia or [the] Middle East, to understand GDPR or the, you know, the Indian CERT-In regulations, to advise because the impacts are, you know, we're a U.S. company, at least the publicly traded entity is, [but] we're [also] subject to all the laws in all of the places where we operate. So it absolutely impacts us, you know, I do think to the extent that there are new state privacy laws that don't yet have interpretive guidance on what a specific concept means or what a specific term means, and it's a term or a concept that exists in the GDPR and some of these more established privacy regimes outside of the United States, you could look to things like there's a an organization called the EDPB, the European Data Protection Board, that issues essentially advisory opinions on how you do X, Y, and Z under the GDPR that may not be formally part of the regulation, but it's part of the supervisory guidance that the regulator issues. You can look to that as persuasive authority, essentially as to how to interpret some new U.S. [laws], especially a state privacy law that has no such interpretive guidance yet.

Blake Klinkner: Another audience question. This one is specifically addressed for Jason. It's a two-part question. I'll ask the first part. How do you effectively work from home and create an appropriate confidentiality barrier while working from home?

Jason Ochs: My office is in the upstairs room that's only an office. So, it's kind of separate from the house. Number one. Number two is my kids are in school all day and usually in practice in the afternoon. But if they are home, I can completely shut myself off separately from the main household. So that's a good question.

Blake Klinkner: And where do you meet your clients when they want to meet with you?

Jason Ochs: We do all Zoom. And if I need to meet my client, [if] there's some reason—I mean, most of my clients don't even live in Wyoming— so Zoom is really the only way I can meet them. But if I need to meet them, I'm going to them. I'm going to go to them. I want to see their house. I want to see what their lives are like. They don't need to see what my life is like. I need to see what their life is like so I can understand them a little bit better, and understand their parents, and understand their kids, and get to know their spouse. I go to them.

Blake Klinkner: Great, and the second part of this question is, how do you maintain work-life balance with a home-based law firm?

Jason Ochs: I have not found that to be a problem. I don't know. Initially, I didn't think I would like working from home, and now I love it because I can take a break and I can go take the dogs for a walk and not get in the car. I can, you know, make myself some coffee, you know, and visit with my wife for a second. I mean, it has really become a place where I just seem to be far more productive. I honestly thought it would be the opposite initially.

Blake Klinkner: Question for the whole panel: have you seen with the last five years of moving to Zoom and Teams meetings [that] going online for a lot of meetings with clients, with opposing counsel, with even the court—have you seen that remote hearings have seemed to increase professionalism or not increase professionalism? Have you seen a decline over the last five years, or people not as friendly when they're over Zoom when they would otherwise face-to-face be more respectful? Thoughts, observations?

Jason Ochs: I litigate a lot in California, and the judges are wonderful about Zoom hearings. So, you just have to give notice, and you can appear via Zoom. I've actually found it to be incredibly helpful. I think there are some tremendous advantages to taking a deposition via Zoom as a lawyer. We've had even mediations, which I initially didn't like mediations over Zoom. I'm fine with that now. But there are some tremendous advantages one has at a Zoom deposition. I can have my screen up; I can be Googling things; I can be AI, you know, inserting questions when I get some answer from an expert that I know is bogus, that I can pull up right away and hit them with it on a cross-examination question that, you know, you can't do that at a counsel table in a deposition. I think there's tremendous advantage in the Zoom world; I do. And clients aren't getting charged for the costs for me to travel. So, they're saving money and their money's going up at the end of the day, and my risk is going down because I'm not having to expend that money anymore.

Michael McGinniss: I think all those things are available, and I think they have definitely increased efficiencies for lawyers and often for clients as well. One thing that [students in] my Professional Responsibility class may recall, there's an ethics opinion that came out talking about witness preparation and also behavior during depositions. One of the things that remote technology has also allowed, and it's hard to catch, is misconduct during depositions. So, you have people passing notes. It used to be where they can signal to witnesses, there may be somebody in the room that you don't see, and they're signaling answers to the witness. So, it's hard to catch that, and when it does get caught, then there have been sanctions brought for that. But there were various ways that people engaged in misbehavior during depositions before this. It allows a little more for that, but I think the question is, as with any kind of innovation, do the benefits outweigh the risks? There seem to be a lot of benefits that have come from it as well.

Blake Klinkner: I want to talk a little bit about mental health and wellness. So how can we as employers of young attorneys, all attorneys, all kinds of attorneys, how can we promote mental health and wellness within our offices?

Jason Ochs: I think, free gym membership. We provide free gym memberships. We require you to be in two activities, and right now, when I had sixteen employees, everybody had to be in two activities, and that was twofold. One was so they're out in the community, but the second part is when you're involved, when you're mingling, when you're out there, you're not in the office. When you're not in the office, honestly, you're typically in a better frame of mind. So, get them out. Let them out. You know, I always let people out early on Fridays. It's something as simple as that. You know, noon comes around on a Friday, and there's nothing going on. Get out of here. Go home. Go do something fun. So, little things like that. I think little observations around people when they need to get out and get into other things is great. I would send out my old paralegal to go get coffee for all of us, and I said, I don't want you back for two hours. Go get coffee and bring it back, but I want you out. Enjoy yourself. It's a beautiful day. Little things like that.

Ben Kastan: Yeah, I mean this is not specific to legal practice, but at our company, along the lines of what Jason was just saying, we have a practice policy where during the summer months there's supposed to be no meetings on Friday afternoons, or no meetings at all on, sorry. During most of the year, there are no meetings on Friday afternoons, and then during the summer, you can also just check out at 12 p.m. or 1 p.m. or whatever it is and just go do whatever. That's a totally acceptable practice in the company. Of course, you have to manage that with the business obligations and anything

that's actually urgent, but there's an expectation that you will go take your time. You're not getting tracked at, you know, you're not being overseen at that level of detail so long as you're getting your work done; people are generally cool with you taking time for yourself to make sure that you're healthy both physically and mentally.

Michael McGinniss: I think those are great observations and great tools to use to promote wellness. I think the overall theme is this idea of flexibility and humanity. Basically understanding that the people who work with you and for you are human beings and they benefit from—even if it's for pleasure or whether it's a situation that has arisen they have an ability to build into their life and their work life—the capacity to have those times when they can take care of other things and I think taking that pressure off where they sort of feel like they're sort of stuck in a pattern that they have to keep all the time. I think that itself is helpful.

Blake Klinkner: Any thoughts, any advice on attorneys using mental health counseling, therapy, those sorts of services? Any way that lawyers can overcome stigma if they, for example, do wish to use those? How would disciplinary counsel maybe look at a case where the person is trying that? Would that be a mitigating factor, for example? To what extent would that be revealed or kept confidential?

Michael McGinniss: Oh, absolutely. I'll comment on it from my background as a disciplinary counsel too. That was always something that we thought very carefully about when we were looking at the conduct of a lawyer and making a recommendation on sanctions, in particular. If they engaged in misconduct, were they pursuing, say, mental health counseling, were they, if they had substance abuse problems, were they seeking treatment for that, were they following through on the treatment for that? That was something that was impactful, because when you're within the disciplinary system, you're trying to impose a sanction that's going to protect the public. You're trying to also deter other lawyers from engaging in similar misconduct, but you want to promote the overall well-being of the profession, protect the public, and help encourage a lawyer through the disciplinary process to get the assistance that they need; [that's] part of that, right? It's not just a punishment system; it's designed to address misconduct and then try to hopefully get a lawyer back in a good direction if he possibly can. So that was something we did. We also did a lot of it informally. We had [a] lawyers assistance [program] we worked with. [For example,] we'd have a situation where a lawyer hadn't engaged in misconduct yet, but we [had] reports that there were issues starting to arise that were causing concern. Getting them connected and having them get help. Some of the things I look back on in my 12 years as a disciplinary counsel with the most satisfaction were the

disciplinary cases we never had to hear because the lawyer got help. I was able to play a part in promoting that process, so those are the things that, as a human being and as a person who's trying to promote other human beings for flourishing, really made a difference to me. And I think the more we can do that both at the lawyer level and at the student level, the more ways we can promote that success and those processes to work, the better.

Blake Klinkner: If an attorney were to receive privileged material through email, e-discovery, what would you recommend those attorneys do when they've inadvertently disclosed something they shouldn't have?

Ben Kastan: The attorney receives, you know, privileged information from the co-counsel or third party?

Blake Klinkner: Both perspectives. Number one, you realize that you have disclosed something you shouldn't have. Number two, you received something that you assume they didn't want to give you. How would you approach both of those?

Ben Kastan: I think there's formal guidance, I think at the ABA level and probably in a lot of state bars about what you do when you receive, you accidentally receive privileged information from opposing counsel. So, I mean, I'll let the others who are more familiar with that guidance speak on that, but in terms of the, if you lose information, whether it's through a hack or through a misdirected email, that's compromised information, and so I think in most jurisdictions that would be considered something you probably have to tell your client about, because it's a compromise of their confidential data.

Michael McGinniss: Yes, the rule that Ben's referring to is Rule 4.4(b) of the ABA Model Rules, which most states have adopted. What you need to do in that situation, when you're a lawyer representing a client [and receive] inadvertently disclosed information such as privileged [communications—for example,] it's included in a package of documents, or it comes through your email because they put you on there instead of their client—your duty is to notify the sender. It doesn't say return the document; it doesn't say specifically what to do, but [it does say to] notify the sender. The theory is that they can then take steps to the extent necessary to protect their interest concerning whether [or not] there's a waiver of privilege. You also have the ability to do more than that. That's simply the minimum, that you're subject to discipline if you don't notify the sender. I always try to tell students, think about what's the right thing to do, not just what it is that's going to get you in disciplinary trouble. That's where your own professional philosophy of lawyering comes in. Do you simply return the document, notify them, and say we're not going to use that? There's some discussion in the comment to the Model Rule that says that this decision about what to do in response to

that in terms of whether to use it or not is a matter that's generally left to the lawyer's discretion. There is a little bit of a debate whether you should still tell the client, and you can say, "Well, this is my discretion; we're not going to use that," because of your communication duties. But what seems to be clear is you're not under an obligation to use it. It's not a client situation where the client says, "Well, I don't care about your conscience and what you think is good courtesy; you have to use it." There seems to be some, at least in the ABA Model Rule and its comment, some encouragement to think about it as something that's ultimately up to the lawyer once you've notified the other side.

Blake Klinkner: A question for the panel, I'll start with Ben. When you're looking at a vendor contract, a third-party contract, maybe it's e-discovery or your AI platform or your storage, what are some of the core provisions from a cybersecurity standpoint and privacy, just your general ethical duties you got to carry out? What are some of the core provisions you should see and perhaps demand if they're not in there? And if you don't get those, what are the things that should be a red flag you're going to walk away [from]? So, what are some of the core provisions that you have to see in those contracts if you want to make sure that your clients' data is protected, that you're following your ethical duties?

Ben Kastan: Yeah, so I mean it does; it varies a little bit based on what services the vendor is going to provide, what data you're going to be exposing to that vendor because if it's client confidential information versus, you know, less sensitive information, the obligations may vary. At the very least, if it's personal data, you know, personal information that's regulated under privacy and data breach law, you need to make sure that they have some explicit commitments, reps and warranties in the contract that they're going to implement a reasonable information security program, and I talked a little bit earlier about what that looks like. Different vendors will approach that a little differently. Some will say, you know, we'll have some general paragraph about, you know, consistent with applicable law, we've implemented a reasonable security program as documented in a written information security policy and it does the blah blah blah. For more sensitive contracts, I mean, I think you should try to insist, to the extent you can, and you don't always have that negotiating power, especially with larger vendors, on a more explicit commitment in terms of the basic things, especially if you're operating in a regulated environment. If you're a law firm and you're supporting financial institutions, if you're supporting healthcare institutions, you need to make sure that there essentially is the flow down security obligations, right? So, your clients are likely to insist in their engagement letter with you on certain security obligations. You need to make sure that

when you're engaging a vendor, that any security commitments you've made to your clients, especially regulated clients, are flowed down or at least are consistent with the security terms in your contract. I think the other thing I would probably insist on in pretty much every contract is a provision on notice in the event of government disclosure requests. So especially if you're like in a cloud environment or electronic communication service provider, they are subject to legal demands by law enforcement and other government agencies, and there should—and this is standard so it shouldn't be controversial—but there should be something in every single contract where you're disclosing confidential information to somebody who may get a government subpoena or a search warrant, an ECPA order, that they will tell you to the extent they can. They may not be able to, you know, there are gag orders that go along with these things, but you should absolutely insist on those things in most vendor contracts.

Blake Klinkner: Jason, I'll ask you my next question. How do you navigate the line between legal advice and personal counseling and providing, you know, advice in another area where you're not, you know, you're not qualified? I often hear lawyer friends say, oh, my client thinks I'm their psychologist or their therapist or their social worker or their accountant even. What's the best practice when your clients start to ask you for things, and you probably shouldn't be saying a whole lot?

Jason Ochs: Well, I don't know if I want to answer that with a professor of ethics right next to me. I'm sure I blur those lines, Blake, quite frankly, just candidly. I feel like half the time I'm a counselor with my clients. I really do. I don't treat them like I'm a doctor; I treat them like a friend, and I treat them like my dad might talk to me or a friend of mine might talk to me. I just think that's necessary to get to the heart of a lot of truth of what's going on with your clients. So, it happens frequently. I enjoy that time with my clients, to be honest. I enjoy getting to know them. I think it makes me a better lawyer. I never couch it in a way where it sounds like this is, you know, [medical] advice or psychological advice. If I feel they need that, I will be the first person to say, hey, can I help you find a professional?

Michael McGinniss: Well, I actually, I think that's a great answer. I don't have any concern about that. In fact, [I] mentioned earlier this morning Rule 2.1, my favorite rule of professional conduct, which talks about non-legal considerations. You want to provide detached advice, objective advice, independent advice on the law, right? But there's also reference, in that rule, that you may advise on non-legal considerations, and there's a range of social considerations, moral, economic. Basically, [the rule tries] to capture the idea that your clients' needs when they come to you are not purely law. And of course, if it's an area where you're, you know, asked to diagnose [medically]

or [something like that], you should be circumspect about that. Encourage them to get that professional assistance in whatever area it is, whatever form it is, accounting or others that are outside of your comfort [zone] in terms of your competence. But in terms of having this counseling conversation with a client, every lawyer is going to have a different approach to that and how comfortable they feel doing that, based on their own background [and] their own personality, but the rule itself builds in space for that. Sometimes that's exactly what the client needs. One of the things I talk about in my scholarship [on] Rule 2.1 is this idea of being "independent" [in exercising professional judgment in advising clients] doesn't just mean sort of like you're not under outside pressure, but it's really just sometimes you have to tell the client something they don't necessarily want to hear. That's hard to tell them, but in the area of counseling, the discretionary piece, it's that you're helping them understand their situation and maybe how it impacts them in a way that they may not yet understand. You've seen clients in similar situations, for example, [when] you've been practicing as long as Jason has, right? You've seen a whole bunch of people who maybe have [had] similar kinds of problems. Basically, you're not sharing anything about what you said to those people, but you also have a base of understanding about how other clients have gone through this [or] that [and] you've kept in touch with them. You know that. So, you can give them probably better advice than you think you can, just in terms of you'll get through this. It'll be okay. You know, I've seen clients go through these situations before. It will be okay. That's a kind of a counseling role, but it's not strictly the law, but it's incredibly valuable in order for your client as a human being to be able to, as I think the wonderful discussion that Jason had on fear, was when they're afraid, they understand there's hope. They can get through this.

Blake Klinkner: Do you want to add to that?

Ben Kastan: I'm just going to add the magic term that I've heard a lot: prudential considerations, right? So, as in-house counsel especially, I think that's such a critical part of what you do as a business partner, you're providing legal advice, but a lot of what you're doing is also providing some objective, not removed, but a little bit more independent prudential advice on how this would look. There's a lot of things that are, you know, I've heard different terms: legal but stupid, lawful but awful, you know, things that are, you know, maybe technically legal but probably not a good idea, and that's actually, I think those kinds of things, that kind of counseling role, makes especially in-house advice super fun. That's part of what makes the practice enjoyable.

Blake Klinkner: Great, my next question is from the audience, and I'll direct it to Ben. Do you foresee legal liability issues arising with AI

pertaining to the AI companies? For example, people who are using AI and they self-harm? Is that the next wave of litigation? Of course, with Jason too.

Ben Kastan: Curious for Jason's thoughts on the potential there for litigation. But yes, I mean, I think you're already seeing that. I think more so far, it's been more on the IP infringement context where you've had multiple content creation companies, newspapers, and the like threaten litigation. I can't remember if any has actually been filed to OpenAI and to Anthropic overuse of their IP without permission. I think there's a lot of IP litigation risk that's already happening, is likely to continue until the rules are clarified. That's in two ways. That's one IP infringement where you're training the model on trademarked, copyrighted data. The other piece is if you're using the output of generative AI in a patent application or in something that you hope to maintain trademark copyright protections for, to what extent can AI-generated content actually get those protections in the first place? To what extent is that original human work that is protectable under IP law? There's, I think, a lot of interesting guidance that's coming out from the Patent and Trademark Office on those kinds of things. So, I think that's a developing area in the legal field.

Blake Klinkner: Right. And Jason, do you see that?

Jason Ochs: Tremendous potential there. Anthropic paid 1.5 billion dollars to get out of that case. I think there's tremendous opportunity in the AI world, especially for you young folks who are really well versed with it. IP's going to be a huge issue, and I would study, if I were you and you have any interest in that, I'd go on PACER, and I'd pull off the Anthropic case, the entire case file and study it because I think that's the beginning of some really big cases.

Ben Kastan: Amazon, I just remembered that I saw yesterday that Amazon sued, I think it was Anthropic, over their agentic shopping agent, for, you know, I think one of the claims was something like CFAA, the Computer Fraud and Abuse Act, where they were having the agent, their bot, hit the Amazon website without appropriate permissions or without the appropriate, not following the terms of service or whatever on the website. So, there's all sorts of variations on these things that are going to come up in this space.

Jason Ochs: Real quick Blake, I was at a venture-capital-like meeting a couple weeks ago, and the issue they were talking about is how much more money do we want to invest with the risk of litigation because of the Anthropic settlement. So, it's even hitting the financial sector. They're concerned about it.

Blake Klinkner: Another question from the Law Review. What advice would you give to law students now to help them build careers grounded in ethical integrity?

Michael McGinniss: Take my courses. But you've already done that. No, all kidding aside. It would be to understand yourself, understand what your foundational values are. Those who have taken, or are taking, Professional Responsibility [will know that] I do a philosophy of law reading essay at the beginning of each semester. I do it at the beginning for a reason; I want you to be reflecting right from the outset about who you are and how you understand yourself and your personal values, the kind of practice values you could project yourself to aspire to, and then your institutional values—how you see the profession as a whole and understand your role in it. And obviously you're still [a lawyer] in formation. You're still forming your professional identity; but the more intentional you can be about that, and actually think about it rather than sort of reacting, "Well, here's what I'm doing, how do I react?" [Instead,] think ahead. Think about "who is it I want to be? Who is it I want to remain?" A person [with] integrity to the beliefs, the things that are very important to me, my convictions and my values. Then you navigate these challenges in a way that you have a core that you hold onto, that you have a compass to go with you. Because then whatever new things happen, and I've been around long enough now, there have been new things. I remember when email was new. When internet and when laptops were new. In fact, I took all my exams on paper. They had to work through these challenges. The internet then came around. So, yes, this is groundbreaking, but people have adapted to those things. The consistent thing is being grounded. Whatever the new challenges are, if you're grounded in your personhood and who you are and what's important to you, you can then navigate those things.

Ben Kastan: I think that's a really great answer. The only thing I would add is, I think having that sort of discussion with yourself about what your values are, what your priorities are, is so important. I think across different legal practices, like from my own experience, you know, at NSA, a lot of legal advice I provided was classified, top secret memos, never going to see the light of day. But you have to think about how you're going to act even when you're not in public, right? Are you going to act ethically when the spotlight's not on you, when it's never likely to be on the advice you're providing? I think that's where it's most important to really have that conversation with yourself about what's important to you, where your red lines are in terms of what you're willing and able to do.

Jason Ochs: The only thing I would add is, the data says that you will become the average of the five people you hang around most. So, give that some thought—who you choose to hang out with.

Blake Klinkner: Another question from the Law Review. So, for anybody who's in the audience today right now who says I am not a law techie, I am not a digital native, this tech stuff, cybersecurity, privacy, all this scares me. Is there any hope for me? What do I need to do today to become technologically savvy enough to comply with the rules? How can I start to implement cybersecurity and privacy? How can I start to do that in my own office? Where should they start, and how should they maybe not be so worried?

Ben Kastan: So, take Professor Klinkner's Cybersecurity Law and Privacy Law classes is certainly, I mean, those things didn't exist. I mean, I graduated law school thirteen years ago, and even at a school that really did a lot of national security law work, cyber law wasn't a thing in terms of what was taught. Privacy was barely a thing in terms of what was taught. So, take advantage of that while you're here, the classes that are offered. There are some, like Coursera courses and publicly available courses on things like, you know, tech for lawyers and stuff like that. This is really basic, like again, lawyers, I think even tech lawyers, don't need to be coders. You don't need to know how to code in Ruby or C++. You need to know enough about the technology to ask good questions. I think taking the courses that are available, finding the publicly available resources, things like the ABA Cybersecurity manual have some really great, very lawyer accessible sort of guidelines for solo practitioners and small firms about how to do this kind of thing as a legal professional. So, there are resources out there that are not treatises on deep computer science issues.

Blake Klinkner: Another question from the audience is, do you foresee, as AI advances, that lawyers themselves will throw up barriers that they'll engage in protectionist policies? Will bars start to throw up more protectionist policies to protect our sort of monopoly, quote unquote? Or do you see that we're just going to get- is this just the wave of the future and that's it?

Michael McGinniss: I'll just make a quick opening comment on that. Some of the early reactions from courts, thinking about briefs, were very reactive. We're going to bar the use of artificial intelligence in doing your briefs, or we're going to make you disclose it, and I think it was a reaction to some of the early challenges. So that's kind of started to fade out, I think a bit. Sometimes the disclosure piece is still there, but I think there's probably enough concern that there may be some efforts in that regard. I have a hard time foreseeing, though, because of the demand that's out there from clients

for them to be used, that that's going to be a particularly successful strategy if it is tried. I don't know how realistic it would really be to do that because it's, as Ben alluded to, it's all over. I mean, generative AI is a pretty new subcategory. But even that is being used for a lot of different applications. I'll just say this. As someone who used to try to enforce the rules, you don't want to have rules that are impossible to enforce because [the activity they're applied to has become] so widespread. You want to be very cautious about where you choose to say this is what's disallowed. When you make a rule, it's like the old [advice for] parents: don't have a lot of rules, but enforce them. I try to follow that myself, and I think it's good philosophy with this.

Ben Kastan: I do think there's a consumer protection argument to be made that's not purely just protecting lawyers because we want to protect legal jobs, on accountability, where we are going to use AI, we're going to have to use AI more, but at the end of the day, you know, our clients, I think like Jason was talking about where his client [that] said he was my doctor, I trusted him. Our clients look at us and will say, "You're my lawyer, I trust you," hopefully, and so I think if you have a pure AI agent that's not supervised by a human attorney and they provide, you know, incompetent or inaccurate advice, there is no one to hold accountable, right? I think there's going to be a natural incentive to keep a human in the loop for the foreseeable future so that there's somebody that could be held accountable, if for no other reason.

Michael McGinniss: I'll just jump in real quick just to agree with that, and I think that the existing rules could actually enforce that because you just say you can't have an unsupervised non-lawyer assistant, so you just make sure you enforce that rule to this new challenge and do so aggressively [rather than] have a ban on the use of it. I do think there's going to be an important step in terms of, I think it's right, this idea of trust. I tell students this too. You know, ultimately, what the client is getting from you is your judgment. They're getting your professional judgment. All these things are tools, and you shouldn't let what an AI device tells you substitute for your judgment and your experience. As the [technology] gets more and more sophisticated, there'll be more and more temptations to kind of let it decide whether we should settle this case, let it decide what we should do in terms of strategy. Yes, you take all that input in, but you should ultimately be the decision maker and the one who's actually giving human advice to your client.

Jason Ochs: I don't have much to add to either of those or both excellent answers. I think of earlier questions that you've asked Blake that might intersect. It was the younger lawyers asking about areas that they can be helpful to in the future. Embrace AI**,** and so the question we got from somebody, how does my firm kind of incorporate this? Go to these younger

lawyers, go to these students. Students, don't be afraid to tell these older lawyers like me how an AI program that you've worked on might be able to make my firm more efficient. Don't be afraid because we don't know. We're not used to this; we're not as comfortable with this as you are, okay? So, give that some thought. I will tell you one more thing. If you're a litigator and you're not typing in, I'm doing plaintiff work, and I will type in, I'm a defendant, ChatGPT, or I'm a defense lawyer, and I'm taking a deposition tomorrow of this guy with these issues and these kind of things going on with him. What are ways that I can really attack this guy? It'll give me [*simulating the AI generating questions], and I've just got something to prep my client with. The lawyers are doing that, at least where we're at. I will also do it on the other side. I'm a plaintiff lawyer. What damages? I can think of these damages, da-da-da-da-da. What am I forgetting? I mean, I've thought of those. It is phenomenal. You young people can help out the older people by, I mean, heck, you don't even need to tell them you got an AI. Be like, hey, you know, boss, you should consider this. They'll think you're a whiz kid.

Blake Klinkner: Next question, are traditional advertising and solicitation rules outdated in the digital age? What are some best practices for advertisers in the digital age to avoid those sort of solicitation rules that may come back to haunt us?

Michael McGinniss: That's a good question. The rules were revised by the ABA in 2018 to try to update them to a certain extent, and I think they're still solid. Not every state has adopted them. North Dakota hasn't made changes yet with regard to its rules since then. I think the principle is to try to give as much opportunity for lawyers to be able to get the word out about their services, consistent with prohibitions on false and misleading information. The fight is going to be on how much, and also to create more space for them to reach out to clients. In fact, the rules have been modified over the years to create more space for contact, even with persons known to need legal services, as long as it's done in writing and it doesn't matter whether it's using technology or a letter or a paper letter in the mail, to let [them] know that you're willing to help. I think to that extent they've already been trying to create more space for that; they've taken out some of the old, cumbersome disclosure requirements that had to be included in ads, because knowing that advertisement is done through text messages or it's done sometimes on Twitter, or as it's now known as X. So, I think it's going to be a continued evolution. There's still pushback that that's too restrictive still, but the worry has always, the concern has always been to protect the consumer and the public, so they understand and aren't manipulated in a way that's going to be detrimental to their interests or that causes them to make an uninformed decision about who to retain as counsel.

Blake Klinkner: How can law offices best promote a culture of ethics, a culture of professionalism? So, what can partners, owners, bosses do so that ethics and professionalism start all the way at the top and trickle all the way down to the bottom throughout the entire office?

Jason Ochs: I think it starts at the top. It starts at the top, and when there is a breach, or there is an issue that comes about, how do you handle it? I don't think necessarily it needs to be one and done, but there are some types of violations that probably warrant one and done. So, I think you have to look at each issue and determine what's the best, but I do think that the guy on the letterhead sets the tone for the entire firm.

Ben Kastan: I think that's true for all law offices regardless of whether it's a firm or an in-house group or government agency. I think the general counsel, the leadership set, hopefully set clear expectations for their workforce as to what they expect. I think it's a balance between accountability for egregious violations with not biting someone's head off when they make a mistake. So long as they are transparent about it, they tell you about it, and they fix it. I think that's, you know, that's part of running an office that's not going to have a whole bunch of issues just lying underneath the surface, is having a culture of accountability and transparency, where people are held accountable, but you have folks feel the ability to surface issues as they come up.

Michael McGinniss: I agree with both of those, and just to take you back to my disciplinary counsel days here. We [sometimes] had trouble with solo practitioners, but when we had trouble with [law] firms, it tended to be about firm leadership. Even if it was someone that wasn't the firm leader who had actually committed the misconduct, but there were certain firms where the lawyers who practiced there just tended to have more disciplinary problems. As Delaware was a small bar, just like North Dakota is, we knew which firms were likeliest to have the problems coming from them, and it was [often about] firm culture. It was the ones that had this idea of not having transparency, this idea of [the importance of] fixing your mistakes, the idea of accountability, and that starts at the top, as Jason said.

Blake Klinkner: Are there any particular apps or other programs or law office technologies that you would recommend everybody in this room consider? Apps on your phone to help you with maybe time management, tracking, maybe docket management? Any efficiency apps, any sort of programs that you'd recommend everybody take a look at? Maybe some tech that can help make our lives a little bit easier.

Jason Ochs: I think that texting is how a lot of us communicate. I think if you can make it easier for your clients to communicate with you via text, I think that's a good thing. It reduces phone calls; it reduces you know, non-

billable time if you will. MyCase is a case management system we use. You can text your client directly in MyCase and it archives all those texts in his or her case file. I like that, but there are so many good programs out there. I'm not sure I can say you got to do this, or you got to check this out. There are so many good ones out there.

Blake Klinkner: If you text a client, do you bill for that as one? Just do it, right?

Jason Ochs: I never, yeah, back when I was doing a lot of billing, I never billed for any of that stuff.

Ben Kastan: I will say some firms do. I still see, not necessarily for the email, the sending of the email, but for the research and the writing that goes into the drafting of the email, I've certainly seen firms bill for that work.

Blake Klinkner: So, we have a couple more minutes, I guess one question we'll ask and then allow everybody to have a closing thought. If you had a magic wand and you could wave your wand and change one thing about attorney ethics, attorney professionalism, the disciplinary process, any of the rules, what would be the one thing you would change?

Jason Ochs: Oh, I'll go first. I mean, I think we got to keep an eye out on something. I'm going to put your professor on the spot here. Can non-lawyers own a law firm?

Michael McGinniss: No.

Jason Ochs: Not true. Arizona.

Michael McGinniss: Oh, depends on the state, but-

Jason Ochs: He's right, he's right in every other state.

Michael McGinniss: It's the same in D.C.

Jason Ochs: He's right in every other sense.

Michael McGinniss: You could have a non-lawyer in there too.

Jason Ochs: These are called alternative business structures in Arizona, and I think we got to keep a close eye on them because we're going to have a lot of venture capital money coming into Arizona, starting law firms, and it's going to change the dynamic. There's tremendous tax revenue that's going to come into Arizona as a result, and there are going to be other states that look at these, out there called ABSs, alternative business structures, and they're going to say, "We can get, you know, tax revenue too," and they're going to start thinking about it. So, I'm uncomfortable with that. I'm uncomfortable with that, but I think it's coming.

Michael McGinniss: I'll give a short version of my rant about Rule 4.1 of the Model Rules of Professional Conduct, which I've written about in my scholarship on negotiation ethics. The Model Rule, in short, makes allowance for [it] not being considered a false statement of material fact to actually misrepresent your client's settlement authority that they've explicitly given

you and come out and say, "This is my bottom line for my client," and actually that's not true. Because they say that's part of, in paraphrase, that's part of how negotiations work. They understand it's not [to be] taken as a statement of material fact because that's what people do. Also puffing with regard to pricing and things like that. So, I think that's very Machiavellian and it also creates a culture in the profession where [the norm is] applied that people wonder why lawyers don't trust each other and that's part of the reason, is that they're given permission to lie, whereas if they made the same statement with a judge in the mediation at a court supervised mediation or arbitration, they'd be in violation of Rule 3.3. So, I think that's an example where honesty needs to be promoted at every level, [instead of] making excuses for those kind of [misrepresentations]—and it's so easy to avoid that kind of a statement. You just deflect and you say, "I'm not going to share that with you," and change it to another tactic. Thankfully, North Dakota doesn't have that comment to the rule. So, if you're practicing in North Dakota: don't even think about [doing] it, right? I'm proud of that.

Ben Kastan: I don't have any particularly insightful response to what I would change on the ethics rules. I mean, I think, again, like I'm not an expert on the ethics rules themselves, but I do think a lot of the core ideas are still very valuable. I think the hard part and where I think we all could benefit from more guidance from disciplinary counsel, from bars, and from the ABA are helping, and I think they've tried to do this as new topics have come up, additional advisory opinions and informal guidance on how to deal with some of these things, that seem novel and oh my god, how do I apply this general principle to this very specific situation? I think those kinds of things are helpful.

Blake Klinkner: Great. Well, with the last minute and a half, I'll give you each thirty seconds. What's your final parting thought for our audience? Let's start with you, Jason.

Jason Ochs: First of all, I've had a wonderful time. The last 24 hours have been excellent. Thank you for having me again, parting thought. Think big. Go for it. You're young; you can risk it. You can lose everything and start right over again. But think big.

Michael McGinniss: Thank you again. I owe especially my own thanks to Jason and Ben being here and doing such a wonderful job, and you all staying here today on a Friday and hearing what we have to share. My advice is hold true to the truth, to your values, your convictions, your core, and be willing to learn. Sometimes you'll learn things and you'll change what your convictions are, your beliefs and convictions and values, but don't let it be because of some other decision or because you were going with the flow or simply going along because that's what people do. Hold on to what's true.

Ben Kastan: So, first of all, again, thank you to the university for having me and having us, and to the Law Review staff and Abby for helping arrange everything with the symposium; it's been great. I think I would leave just with two thoughts. One is for all the reasons we talked about today; you're entering—for the law students in the room—the profession in a scary and exciting time. There's a lot of change, there's a lot of uncertainty, and that can be frightening, but I think there's also a lot of opportunity. I think you're entering an environment where there are no experts, where everybody's trying to figure it out at the same time. That's a great opportunity for new lawyers to come in and to be that person who has a good idea because no one has the solutions already baked, you know, already figured out. The second piece, just generally for careers is, I think lawyers, law students tend to be sort of type A people where we're like, okay, I have a five-year plan, I have a ten-year plan, and then I have a five A plan, and if it doesn't go according to plan, then oh my gosh, what am I going to do? Sort of along the lines of what Jason was saying too is, careers zig and zag; you're not stuck where you start. So, I think so long as you're looking at opportunities, finding opportunities that are interesting, that are exciting, that help you build skills, that will benefit you down your career, it doesn't matter if it's not the perfect job right out of school. I think, you know, you have a lot of flexibility to change over time, the kinds of law you practice, the kinds of areas you practice in. You know, I think careers are hopefully long and diverse and you can try a lot of different things throughout.

Blake Klinkner: Great, well let's hear it for the panel.

Michael McGinniss: And for Professor Klinkner for doing such a great job moderating.