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## Chaos or Continuity? The Legal Profession: From Antiquity to the Digital Age, the Pandemic, and Beyond

Jan L. Jacobowitz

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# Chaos or Continuity? The Legal Profession: From Antiquity to the Digital Age, the Pandemic, and Beyond

*Jan L. Jacobowitz\**

## ABSTRACT

*The idea of individuals entering into a social contract to relinquish some of their rights in order to have a civilized society protect their fundamental rights originates at least as early as ancient Greece, where it was espoused by the philosopher Epicurus. Implicit in a social contract is the enactment of laws to achieve a democratic, civilized society and the concept of advocacy. Advocacy exists to protect an individual's rights. The legal profession originated organically as the citizens of ancient Greece and Rome recognized the need for professional advocates. From this nascent beginning, the legal profession has evolved over centuries to adjust to cultural changes in society.*

*The digital age has altered cultural norms and permeated society, thereby challenging the legal profession to adapt. Technology's tremendous impact on the legal profession appears not only in a lawyer's daily practice but also in the development of alternative business models designed to increase access to legal services and in the clamoring for regulatory reform. No doubt, the COVID-19 Pandemic has further propelled the legal profession to innovate and embrace technology.*

*This Article briefly explores the development of the legal profession from its origins in ancient Greece and Rome to its reemergence in medieval England and then fast-forwards to the beginnings of the legal profession in the United States. Next, this Article explores the historical impact of technology on the legal profession and the profession's ongoing challenge to adapt to the digital age. Finally, this*

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*Article concludes with some observations about the practice of law during the COVID-19 Pandemic and the future of the legal profession.*

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### I. INTRODUCTION

*“What does it mean to be an advocate? In its broadest sense, advocacy means ‘any public action to support and recommend a cause, policy or practice.’ . . . Advocacy is a communicative act. Advocacy is also a persuasive act.”*

—John Capecci & Timothy Cage (2015)<sup>1</sup>

*“Lawyers advocate more so than state their own positions.”*

—Arlen Specter (2009)<sup>2</sup>

Throughout much of history, advocacy has been recognized as a necessary component of our society; a component that has been both respected and ridiculed. Advocacy on behalf of another developed as a cultural adaptation and a societal innovation to facilitate both dispute resolution and business transactions. In fact, third-party advocacy birthed the legal profession, which in turn evolved to adapt to cultural

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1. JOHN CAPECCI & TIMOTHY CAGE, *LIVING PROOF: TELLING YOUR STORY TO MAKE A DIFFERENCE* 206 (expanded ed. 2015) (emphasis omitted).

2. 155 CONG. REC. 8035 (2009) (statement of Sen. Arlen Specter).

changes in society. Today, the legal profession is fully entrenched in society and far from being thought about as an innovation. Instead, the legal profession finds itself confronted by the innovations of the digital age. Technology is challenging both the legal profession's adaptability and the nature of the attorney-client relationship.

The attorney-client relationship likely originated in ancient Greece and Rome.<sup>3</sup> While scholars have documented much earlier findings of various societies establishing and imposing laws on their citizens, the concept of employing an advocate and the rise of a legal profession did not take root until much later.<sup>4</sup> In fact, "[t]here is not the slightest trace in ancient times of a distinct legal profession in the modern sense."<sup>5</sup>

The enactment of laws approximately fifteen hundred years<sup>6</sup> before the establishment of a nascent legal profession is consistent with the concept that "almost any sect, cult, or religion will legislate its creed into law if it acquires the political power to do so."<sup>7</sup> Moreover, literature suggests that lawyers were unnecessary in preclassical times because the law was "divinely sanctioned and revealed."<sup>8</sup> The answers to legal issues could be provided by a king, oracle, or priest who possessed "the divine stamp of approval" and served in a judicial function.<sup>9</sup> In fact, ancient civilizations relied on the divine connection between their leaders and various recognized gods and goddesses who channeled messages of acceptable conduct. Court proceedings involved a review of documents and testimony from witnesses who took an oath to the gods.<sup>10</sup>

The ancient Greeks developed a legal system that evolved to provide informal representation and the foundation for a new

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3. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1389 (2004) (citing ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 32–58 (1953)).

4. WILLIAM FORSYTH, *THE HISTORY OF LAWYERS: ANCIENT AND MODERN* 14 (1875).

5. William P. Alford, Mary Ann Glendon, Brian Lawrie & Geoffrey Sawer, *Legal Profession*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/legal-profession> (last updated Aug. 29, 2019); see generally R. BLAIN ANDRUS, *LAWYER: A BRIEF 5,000 YEAR HISTORY* 76–81 (2009).

6. See ANDRUS, *supra* note 5, at 59–60.

7. ROBERT A. HEINLEIN, *REVOLT IN 2100*, at 333 (Baen Books 1986) (1953).

8. ANDRUS, *supra* note 5, at 84.

9. *Id.*

10. See, e.g., J. Russell VerSteeg, *Legal Procedure and the Law of Evidence in Ancient Egypt*, 9 TUL. J. INT'L & COMPAR. L. 233, 240 (2001); Thomas R. White, *Oaths in Judicial Proceedings and Their Effect upon the Competency of Witnesses*, 51 U. PA. L. REV. 373, 374–75 (1903).

profession.<sup>11</sup> Ancient Rome elevated the status of legal representatives to paid professionals.<sup>12</sup> From ancient Rome through present times, both the law and the legal profession have continued to evolve to incorporate historical, cultural, and technological changes throughout the world. Contemporary lawyers practice in diverse environments and differing legal systems throughout the world. Yet, the attorney-client relationship, an interpersonal relationship characterized as one involving the employment of effective advocacy, remains remarkably the same in its essential components of competence, diligence, communication, and confidentiality.<sup>13</sup> What continues to change is the manifestation and facilitation of the relationship, especially as technology continues to impact our lives.

## II. IN THE BEGINNING . . .<sup>14</sup>

Evidence of established law has been found in civilizations that existed as long ago as 2113 BCE. During the 1950s and 1960s, archeologists found three tablets of laws from the Third Dynasty of Ur, an ancient country that was located between the Tigris and Euphrates Rivers in southwest Asia.<sup>15</sup> Perhaps more commonly known and studied is the Hammurabi Code of the ancient Babylonians.<sup>16</sup> The laws of ancient civilizations support the notion that when members of a group obtain political power, their cultural values become codified. The fact that laws govern a group, however, may not necessarily address the manner in which the laws are imposed. In other words, the right to represent oneself and to oppose the imposition of a law may not exist in a particular society. Moreover, if the laws are presumed to be mandates from infallible divinities who have channeled their edicts through a divinely connected ruler, then there probably is not much room for advocacy or debate.<sup>17</sup> Thus, perhaps it comes as no surprise that

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11. *A Brief Guide to the History of Lawyers*, SMOKEBALL (May 8, 2018), <https://www.smokeball.com/blog/brief-guide-to-the-history-of-lawyers/> [<https://perma.cc/A5FZ-M7U5>]; see generally ANDRUS, *supra* note 5, at 90–101.

12. *A Brief Guide to the History of Lawyers*, *supra* note 11; *The History of Lawyers*, ALLEN L. FIRM, P.A. (Jan. 18, 2017), <https://westcolumbialawyer.com/the-history-of-lawyers/> [<https://perma.cc/3JLB-XY4V>].

13. See Andrews, *supra* note 3, at 1386, 1455, 1458.

14. An in-depth study of the history of law and the legal profession is well beyond the scope of this Article and in fact, has been compiled in lengthy articles and books, some of which are cited. What is offered here is a relative glimpse of history to provide a backdrop and a bit of context.

15. ANDRUS, *supra* note 5, at 59–60.

16. *Id.* at 65–66.

17. See *id.* at 91–93.

evidence of a legal profession is first noted in the ancient democratic societies of Greece and Rome.<sup>18</sup>

The Greeks of Athens began compiling a written body of law in approximately 620 BCE when the elite ruling class commissioned Draco, an Athenian politician and lawmaker, to assemble a code of law designed to control the masses. Draco's laws proved to be both harsh and ineffective, so twenty-five years later the Athenians elected the merchant and philosopher Solon as chief magistrate and authorized him to reform the political institutions of the state.<sup>19</sup> Solon's reforms laid the foundation for Greece's democratic institutions, which in turn set the stage for the development of a legal profession.<sup>20</sup>

Initially, Solon's reforms not only afforded an individual the opportunity to represent himself<sup>21</sup> but demanded it.<sup>22</sup> The legal system evolved over time to allow for a friend to speak for a litigant.<sup>23</sup> Litigants also sometimes hired a "secret" speechwriter.<sup>24</sup> As the courts developed, juries were composed of hundreds to thousands of citizens, and eloquence and persuasion became critical to success.<sup>25</sup> Enter the professional orator—the early iteration of today's lawyer. Eventually, lawyers became an integral part of the legal system despite the fact that in 403 BCE a statute was passed that prohibited attorneys' fees.<sup>26</sup> Scholarship suggests that there were a few reasons for prohibiting fees.

It was argued, in the first place, that to allow advocates to be paid gave the rich a decided advantage over the poor in that the former could afford the services of the most successful and, accordingly, most expensive advocates. In the second place, the payment of a fee to an advocate was frequently identified with bribery. And finally, Athenian democracy, at least in theory, insisted that mutual helpfulness among its citizens was solely a matter of civic-mindedness and, consequently, should not be degraded to a kind of professionalism or to a means of making money. There was, however, a further reason for the Athenian aversion to professional advocates: the sovereign Athenian people—and few peoples in history have been more insistent on the full exercise of sovereignty even in the most trifling matters—wanted to deal

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18. See Alford et al., *supra* note 5.

19. ANDRUS, *supra* note 5, at 90–91.

20. Anton-Hermann Chroust, *Legal Profession in Ancient Athens*, 29 NOTRE DAME LAW. 339, 342, 353 (1954).

21. The masculine pronoun is used because women were not permitted to represent themselves. See Craig Y. Allison, *Women and Law in Classical Greece*, 89 MICH. L. REV. 1610, 1613 (1991).

22. ANDRUS, *supra* note 5, at 91.

23. *Id.* at 100; Chroust, *supra* note 20, at 351–52.

24. ANDRUS, *supra* note 5, at 100.

25. *Id.*; Chroust, *supra* note 20, at 344, 379–80.

26. Chroust, *supra* note 20, at 353.

directly with the litigants or defendants rather than with their paid or “bribed” agents or representatives.<sup>27</sup>

Interestingly, the statute that prohibited fees was largely unenforceable and ignored. This reality gave rise not only to the early attorney-client relationship but also to a healthy disdain for the role of lawyers in society.<sup>28</sup> Lawyers’ superior skill and knowledge rendered them members of an elite or aristocratic profession that did not align with the notion of Athenian democracy that called for sovereignty to remain with the people. Citizens should assist one another based upon civic-mindedness and deal directly with one another rather than through paid representatives. Professional excellence was not only undemocratic but actually considered to be antidemocratic.<sup>29</sup> Anton-Herman Chroust, a professor of law, philosophy, and history at Notre Dame from 1946 to 1972,<sup>30</sup> explains that lawyers were generally not held in high esteem in Greek society.

As a matter of fact, throughout Greek literature we find many exceedingly unfavorable comments about lawyers and public prosecutors, indicating not only that the use of lawyers and public attorneys or prosecutors had become a common practice by the end of the fifth century B.C., but also that this practice had become very unpopular.<sup>31</sup>

Unlike ancient Greece, in ancient Rome, “the general sociological setting from which the Roman lawyer emerged was most favorable to the growth of a strong, competent, public-spirited and confident legal profession.”<sup>32</sup> Roman society considered the study of law to be honorable and held the legal profession in high esteem. In fact, the legal profession began with a Roman priestly caste that was comprised of accomplished and well-respected citizens who became the first lawyers and jurists. Thus, from the outset, the legal profession was deemed to be an “aristocratic, public-spirited, and honored calling.”<sup>33</sup> As Roman law evolved, its complexity compelled prominent men to acquire

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27. *Id.* at 353–54.

28. ANDRUS, *supra* note 5, at 100–02; Chroust, *supra* note 20, at 354. While not the focus of this Article, it is interesting to note that disdain for the legal profession is a theme as old as the profession. Critical commentary and unflattering humor are found throughout the history of the profession. See *A Brief Guide to the History of Lawyers*, *supra* note 11.

29. Anton-Hermann Chroust, *Legal Profession in Ancient Republican Rome*, 30 NOTRE DAME LAW. 97, 97 (1954).

30. *Anton-Herman Chroust Papers*, UNIV. OF NOTRE DAME ARCHIVES, <http://archives.nd.edu/findaids/ead/xml/chr.xml> (last updated July 2, 2018).

31. Chroust, *supra* note 20, at 356.

32. Chroust, *supra* note 29, at 100–01.

33. *Id.* at 101.



legal knowledge; some became known as “experts,” or jurisconsults, who were allowed to assist in litigation but could not advocate at trial.<sup>34</sup>

Roman Emperor Claudius legalized the profession and permitted advocates to charge a limited fee.<sup>35</sup> Despite the acceptance of the role of a professional advocate, the early Roman legal profession was not without its critics. Some characterized advocates as “ignorant and rapacious guides, who conducted their clients through a maze of expense, delay, and disappointment.”<sup>36</sup> Regulations were enacted to control legal fees, the venue in which advocates could plead a case, and registration requirements to appear in court.

### III. DISAPPEARANCE AND REEMERGENCE

Unfortunately, after the fall of the Western European Empire, the legal profession disappeared into the darkness.<sup>37</sup> The profession’s reemergence in thirteenth-century England brought with it criticism and the advent of regulation.<sup>38</sup> No doubt, ancient Rome influenced the development of both the English legal profession and common law, but remained in the background as a new iteration of the legal profession emerged.<sup>39</sup>

As the legal profession evolved in England, both aspirational and regulatory standards developed to encourage admirable conduct and to curb abusive behavior.<sup>40</sup> Once again, history finds the lawyer both praised and maligned.<sup>41</sup> Professional standards were reflected in various sources, such as oaths of office, statutes, and court cases. For example, the London Ordinance of 1280 was adopted and evidenced a “concern with excessive lawyers, their incompetence, and misconduct.”<sup>42</sup> It was believed that “prohibitions on . . . specified

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34. *Id.* at 100, 105.

35. *A Brief Guide to the History of Lawyers*, *supra* note 11.

36. ANDRUS, *supra* note 5, at 143 (citing EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* (2000)).

37. ANDRUS, *supra* note 5, at 147.

38. See Andrews, *supra* note 3, at 1390–93. France also had a reemergence of the legal profession and standards but did not ultimately impact the US profession as significantly as England. See Andrews, *supra* note 3, at 1409–13.

39. ANDRUS, *supra* note 5, at 175.

40. Andrews, *supra* note 3, at 1409.

41. See Jonathan Rose, *Medieval Attitudes Toward the Legal Profession: The Past as Prologue*, 28 STETSON L. REV. 345, 349 (1998) (citation omitted) (“[P]olitical songs ridiculed and satirized lawyers and judges. A fourteenth century poem said that pleaders ‘will beguile you in your hand unless you beware’ and ‘speak for you a word or two and do you little good,’ and attorneys would ‘get silver for naught,’ ‘make men begin what they never had thought,’ and the poem warned ‘no man should trust them, so false they are in the bile.’”).

42. *Id.* at 354.

misconduct . . . were necessary as few were being penalized for 'their foolish conduct.'"<sup>43</sup>

The [O]rdinance stated a lawyer's duty of respect for the court and other litigants ("make proffers at the bar without baseness and without reproach and foul words and without slandering any man"), duty of competence ("well and lawfully he shall exercise his profession"), the duty to avoid conflicts of interests (shall not "take pay from both parties in any action"), and the duty to not engage in champerty (shall not "undertake a suit to be a partner in such suit"). The final section provided that all persons who violated the act were subject to a variety of penalties, ranging from short suspensions to permanent disbarment and imprisonment.<sup>44</sup>

The focus on professional standards for lawyers in England ebbed and flowed through several centuries until 1986, when the Law Society compiled *The Guide to the Professional Conduct of Solicitors*.<sup>45</sup> While standards for the legal community appeared in various formats throughout the centuries, the fundamental values of competence, confidentiality, and loyalty remained.<sup>46</sup>

#### IV. FAST-FORWARD TO LAWYERS ACROSS THE POND

The legal profession traveled across the pond to the American Colonies and brought with it many of the standards and statutes from England.<sup>47</sup> However, the approach to regulation varied from one colony to another.<sup>48</sup> On the eve of the American Revolution, the legal profession had achieved reasonable distinction and recognition in several of the American Colonies, particularly in the larger urban centers.<sup>49</sup> Among the rural population, however, legal professionals were primarily engaged in debt collection and were often despised.<sup>50</sup>

The American Revolution and its aftermath directly affected the nascent US legal profession in several ways. First, the war decreased its membership due to both war casualties and the departure of British loyalists.<sup>51</sup> Second, despite the absence of a distinct body of US law, an

43. *Id.* (citing 2 MUNIMENTA GILDHALLAE LONDONIENSIS: LIBER CUSTUMARUM 280 (Kraus Reprint Ltd. 1967) (Henry Thomas Riley ed., 1860)). An English translation of this ordinance appears at 2 MUNIMENTA GILDHALLAE LONDONIENSIS: LIBER CUSTUMARUM, *supra*, at 595-97.

44. Andrews, *supra* note 3, at 1396-97.

45. *Id.* at 1408.

46. *See id.* at 1409. Andrews includes reasonable fees and public service in her analysis of standards for the profession; however, a discussion of the implications of those standards is beyond the scope of this Section of this Article.

47. *Id.* at 1413.

48. *Id.* at 1414.

49. 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 4 (1st ed. 1965).

50. *Id.*

51. *Id.* at 5.

unreasonable post-war rejection of anything English continued pre-war antipathy toward lawyers.<sup>52</sup>

Moreover, the economic fallout from the Revolutionary War caused lawyers to aggressively pursue foreclosures, debt collection, property recovery, and insolvency, often leaving debtors with nothing more than the clothes on their backs.<sup>53</sup> As Professor Chroust observed, “it is only natural that, in keeping with the popular tendency to confound cause and effect, the lawyers should be singled out as the real villains.”<sup>54</sup> Accordingly, interactions with lawyers and the legal system during this time were likely to be negative.<sup>55</sup>

Nonetheless, Chroust notes that the post-war period also laid the foundation for a formative “golden age” in the late eighteenth and early nineteenth centuries in which both US law and the US legal profession flourished.<sup>56</sup> He marvels that:

a small but efficient core of brilliant lawyers . . . successfully weathered through the Revolution and the trying post-Revolutionary years. They managed to preserve and carry on the high professional standards and accomplishments of the late colonial bar. The Revolution itself as well as the many challenges and problems of the post-Revolutionary period had called forth the greatest efforts on the part of lawyers. It was a sign of greatness that the budding American legal profession on the whole met these challenges successfully and enthusiastically.<sup>57</sup>

Notwithstanding Chroust’s praise, Carol Rice Andrews references the nineteenth century as the dark ages of legal ethics in the United States, but explains that there were scholars who made significant contributions towards codifying standards for US lawyers.<sup>58</sup> It is interesting to note that Abraham Lincoln’s well-respected practice during this time period is often cited in the context of attorney advertising rules as an example of advertising that was not regulated

52. *Id.*

53. *Id.* at 11–16.

54. *Id.* at 15.

55. *Id.* at 15–16.

56. Anton-Hermann Chroust, *Dilemma of the American Lawyer in the Post-Revolutionary Era*, 35 NOTRE DAME LAW. 48, 72 (1959).

57. *Id.* at 75–76.

58. Andrews, *supra* note 3, at 1423–24 (citation omitted) (“[B]y mid-century, American legal reformers were filling the void in two ways. First, David Dudley Field, the drafter of the highly influential New York ‘Field Code,’ introduced a new set of uniform standards of conduct for lawyers. This concise statement of eight statutory duties became law in several states in the second half of the nineteenth century. At the same time, legal educators, such as David Hoffman and George Sharswood, and many other lawyers were working to flesh out the cryptic outline of a lawyer’s duties. These men lectured and wrote about legal ethics in unprecedented detail and thus brought a new level of understanding to a lawyer’s duties.”).

and would ultimately be prohibited in the American Bar Association's (ABA) 1908 Canon of Ethics.<sup>59</sup>

## V. SELF-REGULATION AND TECHNOLOGY ARRIVE IN THE PRACTICE OF LAW

President Theodore Roosevelt's reference to lawyers as "hired cunning" in relation to representation of corporate interests, a growing number of lawyers, and decreasing standards of professionalism in the nineteenth century have all been cited as catalysts for the establishment of the ABA 1908 Canons.<sup>60</sup> The Canons evidence the US legal profession's innovation of self-regulation born of another attack on the scruples of the profession.

The nineteenth century also appears to be the juncture at which the arrival of early forms of innovative technology began its impact on the legal profession. For example, the typewriter was a speed demon in its day and proved to be revolutionary. It would take root to replace scribes and the quill pen as the new means for document creation and reproduction.<sup>61</sup>

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59. Jan L. Jacobowitz, *Ending the Pursuit: Releasing Attorney Advertising Regulations at the Intersection of Technology and the First Amendment*, 24 PRO. LAW., no. 2, 2017, at 1, 2 (citing Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 548 (1982)); *Lawsuit Against Florida Bar: Lawyer Abe Lincoln Violated Your Rules*, ST. BAR OF MICH. BLOG (Dec. 16, 2013, 12:15 AM), <https://sbmblog.typepad.com/sbm-blog/2013/12/lawsuit-against-florida-bar-lawyer-abe-lincoln-violated-your-rules.html> [<https://perma.cc/E743-C6K4>] (discussing the *Searcy v. Florida Bar* lawsuit that references Lincoln's 1852 law firm advertisement that promises "promptness and fidelity" as an example that would violate the Florida Bar advertising rules today due to the terms not being objectively verifiable). Lincoln's written solicitation to opposing parties preceding an 1855 case would have been a serious violation after the 1908 ABA Canons were passed. See JOHN J. DUFF, A. LINCOLN: PRAIRIE LAWYER 313-14 (1960); ABA CANONS OF PROFESSIONAL ETHICS Canon 27, at 582 (1908), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/1908\\_code.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1908_code.pdf) [<https://perma.cc/DR4T-2DZ4>]. In fact, the ban on commercial advertising, as evidenced by ABA Canon 27, remained in place through many different iterations of the Rules of Professional Conduct. This changed in 1977 when the US Supreme Court decided *Bates v. Arizona*, 433 U.S. 350 (1977), which found that attorneys have a First Amendment right to advertise in accordance with the commercial speech doctrine. See *Bates*, 433 U.S. at 363-84.

60. James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2399, 2411-16 (2003).

61. M.H. Hoeflich, *From Scribes to Typewriters: Document Production in the Nineteenth-Century Law Office*, 16 GREEN BAG 2D 395, 402 (2013). Between 1867 and 1872, two Americans, Christopher Latham Scholes and James Densmore, developed and patented what was to be known as the "typewriter." *Id.* at 403. It sped up document production and allowed for the use of carbon paper to produce multiple copies simultaneously. *Id.* at 404-05. Note that one might consider paper, writing instruments, and the printing press as the earliest "technologies" that impacted the legal profession; however, this author leaves the exploration of those fundamental innovations for another time.

The nineteenth century also saw the invention of the telephone. Alexander Bell patented his idea in 1876, and the popularity of the telephone rapidly spread.<sup>62</sup> Communication, speed, and efficiency rendered client contact more accessible; however, the legal profession demonstrated its early (and some would say ongoing) reluctance to embrace innovative technology.<sup>63</sup> Bell's prospective father-in-law, a prominent Boston attorney, viewed the telephone as a toy.<sup>64</sup> Other lawyers objected to the telephone as "destroying the simplicity of American life."<sup>65</sup> Moreover, they found the telephone to be unprofessional and a security concern. Some lawyers believed that their duties of competence and confidentiality failed to align with the use of a telephone. In fact, the prominent law firm Sullivan & Cromwell did not install a telephone in its office until nearly a decade after it became available.<sup>66</sup>

As the world moved into the late twentieth century, the landline eventually gave way to the cordless phone, the cellular phone, and the smartphone. With each iteration of the phone, not only would the instruments for client communication change but concerns about the security of the communication and client confidentiality would arise. The confidentiality concerns and general resistance to change would often cause the legal profession to pause before embracing a new technology. Often late to the party, the legal profession would arrive armed with ethics advisory opinions on the permissibility and protocols for the newest technology.<sup>67</sup> In fact, lawyers often adopted new technology at the urging of clients who had already adopted the technology, discovered safeguards, and insisted on their lawyers participation.

Of course, phones were only a small part of the communication technology puzzle. Word-processing computers and fax machines arrived to improve on both the production and transfer of documents. Telefax and overnight shipping corporations caused greater efficiencies

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62. Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U. MIA. L. REV. 445, 448 (2014) (citing Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 162 n.34 (1999)).

63. *Id.* at 447–48 (citing Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. U. L. REV. 1827, 1855 (2008)).

64. *Id.* at 448.

65. *Id.*

66. *Id.* (citing Lanctot, *supra* note 62, at 165).

67. See Jan L. Jacobowitz & Justin Ortiz, *Happy Birthday Siri! Dialing in Legal Ethics for Artificial Intelligence, Smartphones, and Real Time Lawyers*, 4 TEX. A&M J. PROP. L. 407, 409, 417 (2018).

and raised additional confidentiality concerns.<sup>68</sup> By the 1980s, attorneys and their clients benefitted from the fax machine's ability to meet filing deadlines without requiring a trip to the courthouse.<sup>69</sup> Not surprisingly, because of security concerns about the information being transferred and the possibility of a faxed document being discovered by someone other than the intended recipient, the use of the fax machine generated legal ethics concerns that delayed its use in some offices until the ABA released an ethics advisory opinion.<sup>70</sup>

The 1980s also brought early personal computers that were primarily employed to create and index documents and to manage contacts and calendars.<sup>71</sup> The personal computer and creation of the internet are often identified with the start of the digital or information age, although the timeline on which the digital age began and will likely end seems to be a source of disagreement.<sup>72</sup>

By the 1990s, the internet and personal computers created a platform for email as another highly efficient, but potentially problematic, vehicle for communication between attorneys and their clients.<sup>73</sup> Lawyers could now send documents and messages to multiple individuals with the click of one button.<sup>74</sup> Again, the ABA opined in 1999 on the propriety and protocol for using email in the practice of law. Interestingly, in 2017 the ABA released Opinion 477R to modify and update its 1999 opinion on a lawyer's duties to maintain competence and confidentiality with an emphasis on encryption as part of a reasonable response to a necessary threat analysis.<sup>75</sup> In fact, in 2012,

68. Ron Friedmann, *Back to the Future: A History of Legal Technology*, PRISM LEGAL (Dec. 2004), [https://prismlegal.com/back\\_to\\_the\\_future-a-history-of-legal-technology/](https://prismlegal.com/back_to_the_future-a-history-of-legal-technology/) [<https://perma.cc/6AJP-TTGF>].

69. Jacobowitz & Singer, *supra* note 62, at 450 (citing Linda Deutsch, *Fax Machines Give Lawyers a New Suit Tool*, L.A. TIMES (Oct. 22, 1990, 12:00 AM), [http://articles.latimes.com/1990-10-22/business/fi-2452\\_1\\_printing-fax-machines](http://articles.latimes.com/1990-10-22/business/fi-2452_1_printing-fax-machines) [<https://perma.cc/3QRB-8KWX>]).

70. *See id.* at 451. The fax machine was actually an invention of the nineteenth century, but it did not gain popularity in US offices until the 1980s. *See id.* at 450.

71. Friedmann, *supra* note 68.

72. Greg Satell, *The Industrial Era Ended, and So Will the Digital Era*, HARV. BUS. REV. (July 11, 2018), <https://hbr.org/2018/07/the-industrial-era-ended-and-so-will-the-digital-era> [<https://perma.cc/J89L-YC58>]; Tom Goodwin, *The Three Ages of Digital*, TECHCRUNCH (June 23, 2016, 11:35 AM), <https://techcrunch.com/2016/06/23/the-three-ages-of-digital/> [<https://perma.cc/TF8X-2RRK>].

73. Jacobowitz & Singer, *supra* note 62, at 451–52 (citing David Hricik, *Lawyers Worry Too Much About Transmitting Client Confidences by Internet E-mail*, 11 GEO. J. LEGAL ETHICS 459, 462–63 (1992)).

74. *Id.* at 452 (citation omitted).

75. *See* Jacobowitz & Ortiz, *supra* note 67, at 431–32; ABA Comm. on Ethics & Pro. Resp., Formal Op. 99-413 (1999); ABA Comm. on Ethics & Pro. Resp., Formal Op. 477R (2017). Today, email may be considered by some to be “old school” technology, but email remains a central part of the legal landscape. *See* Christopher B. Hopkins, *The Misguided Practice of CC'ing Clients*

prior to Opinion 477R, the ABA amended the notes to Model Rule 1.1 Competence to include a lawyer's understanding of the "benefits and disadvantages" of technology.<sup>76</sup> To date, approximately thirty-eight states have adopted this language, bringing the concept of "tech-savvy" into the mainstream definition of a competent lawyer.<sup>77</sup>

## VI. BEYOND COMMUNICATION: SOCIAL MEDIA'S IMPACT ON THE PRACTICE OF LAW

The impact of technology on the legal profession discussed thus far has primarily involved efficiencies in document creation and production, as well as enhanced communication among lawyers, clients, opposing counsel, and the courts. While these changes dramatically altered the daily practice of law, social media networks and other interactive websites have caused unprecedented disruption. Social media networks arrived in the mid-2000s and have grown exponentially to create a huge subculture populated by billions of people.<sup>78</sup> Often described as ubiquitous, social media has become woven into the

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*on Emails to Opposing Counsel*, PBCBA BULL., Jan. 2020, at 17, <https://securerusercontent.com/198.71.233.184/d7f.2f7.myftpupload.com/wp-content/uploads/2020/01/2020-cc-clients-emails.pdf?time=1577988628> [<https://perma.cc/8ZGE-C3LF>]; Robert A. Barrer, *Ethical Implications and Best Practices for Email*, N.Y. LEGAL ETHICS REP. (Mar. 1, 2015), <http://www.newyorklegaethics.com/ethical-implications-best-practices-for-use-of-email/> [<https://perma.cc/G4SL-Z5WQ>]. In fact, both civility and ethics issues abound as evidenced by high-profile incidences of the infamous reply-all email. See, e.g., Joe Patrice, *Biglaw Partner So Peeved by Pro Bono Assignment He Hits Reply All to Whine About It*, ABOVE THE LAW (May 4, 2020, 1:18 PM), <https://abovethelaw.com/2020/05/biglaw-partner-so-peeved-by-pro-bono-assignment-he-hits-reply-all-to-whine-about-it/>; Debra Cassens Weiss, *'Reply All' Email by Miffed Federal Appeals Court Judge Tells Colleague He Isn't Paid to Save the Planet*, ABA J. (Aug. 19, 2019, 4:30 PM), <https://www.abajournal.com/news/article/reply-all-email-by-miffed-federal-appeals-judge-tells-colleague-he-isnt-paid-to-save-the-planet> [<https://perma.cc/EC79-TCLH>].

76. JAN L. JACOBOWITZ & JOHN G. BROWNING, LEGAL ETHICS AND SOCIAL MEDIA: A PRACTITIONER'S HANDBOOK 3 (2017); MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2016).

77. See Nicole Allen, *What You Don't Know Will Hurt You: Technology Competence in the Time of COVID-19*, LITSMART E-DISCOVERY (Mar. 24, 2020), <https://www.ktlitsmart.com/blog/what-you-dont-know-will-hurt-you-technology-competence-time-covid-19> [<https://perma.cc/K2RT-2VUF>].

78. See Drew Hendricks, *Complete History of Social Media: Then and Now*, SMALL BUS. TRENDS, <https://smallbiztrends.com/2013/05/the-complete-history-of-social-media-infographic.html> [<https://perma.cc/9PPY-T5Z6>] (last updated Nov. 25, 2019); STATISTA, SOCIAL MEDIA USAGE WORLDWIDE 3 (2020) (estimating that 3.4 billion people were using social media sites and apps worldwide in 2019); see also Kristi Kellogg, *The 7 Biggest Social Media Sites in 2020*, SEARCH ENGINE J. (Feb. 3, 2020), <https://www.searchenginejournal.com/social-media-biggest-social-media-sites/#close/> [<https://perma.cc/59E8-M328>] (Facebook is the largest social media platform in the world with around 2.45 billion monthly users. Instagram has around 1 billion active users while Twitter has 330 million monthly users, Snapchat has 360 million monthly users, and LinkedIn nets around 310 million monthly users.).

fundamental fabric of society.<sup>79</sup> Perhaps not surprisingly, many in the legal profession initially failed to appreciate social media's significance or to adopt the use of social media in their legal practices.<sup>80</sup>

We might imagine that if the ancient Greeks and Romans visited today, they may understand and embrace the communication technologies that have been discussed thus far. Social media, however, would be quite a shocking development—the impact of social networks on the world was unimaginable even twenty years ago, much less two thousand years ago. (Perhaps the Greek juries of five hundred people, their intense focus on pure democracy, and the impact of the large gatherings on the orators of the day is a close but quite imperfect analogy). Because social media has created a new culture of communication with a global reach, a lawyer's attention to basic confidentiality concerns when using the phone or email no longer suffices to render the lawyer competent.<sup>81</sup>

In fact, technology and social media have infiltrated the practice of law and the attorney-client relationship from the first meeting with a potential client to the closing of a case.<sup>82</sup> Investigating a potential client's social media footprint before accepting a case has become essential to competent lawyering in some areas of the law.<sup>83</sup> When pursuing a case, social media may be a factor in considering jurisdictional and service of process issues.<sup>84</sup> Social media also provides a treasure trove of information and evidence to be explored in the investigatory and formal discovery stages of litigation.<sup>85</sup> Moreover, spoliating or discovering evidence and failing to analyze its admissibility may create problems for the lawyer who lacks social media savvy.<sup>86</sup> Likewise, failing to consider social media in the context

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79. Jan L. Jacobowitz, *Lawyers Beware: You Are What You Post - The Case for Integrating Cultural Competence, Legal Ethics, and Social Media*, 17 SMU SCI. & TECH. L. REV. 541, 541 (2014); Elizabeth G. Thornburg, *Twitter and the #So-Called Judge*, 71 SMU L. REV. 249, 250 (2018) (“One hundred forty characters may be insufficient to deliver a treatise on the judiciary, but it is more than enough to deliver criticism of the third branch of government. Today, these tweeted critiques sometimes come not from the general public but from the President himself.”).

80. JACOBOWITZ & BROWNING, *supra* note 76, at 3–4.

81. *Id.* at 13. In fact, early ethics opinions in this area specifically advised lawyers that competence required an understanding of social media and its impact on the practice. *See id.* at 37–50 (listing a series of state bar opinions on advising clients about social media).

82. *See id.* at 25–50.

83. *See id.*

84. *See id.* at 21–24.

85. *See id.* at 51–73.

86. *See id.* at 51–54, 75–90.



of jury selection, jury monitoring, and evaluating the judge may result in ineffective representation.<sup>87</sup>

The bottom line is that failing to consider social media may alter the outcome of a client's case, thereby calling into question a lawyer's fundamental duties of competence, diligence, and communication. The technological impact on the legal profession of social media cannot be overstated. The importance of incorporating a social media discussion, if not exploration, into the attorney-client relationship renders social media in a category of its own compared to prior technological innovation that primarily concerned confidentiality issues when using enhanced methods of communication and document production.

Social media has also provided new opportunities for expanding a lawyer's business, but hidden below the surface of these opportunities are ethical landmines for the uninformed lawyer. For example, attorney advertising has never been more accessible and affordable; that is, if executed in compliance with the attorney advertising rules, which are quite stringent in some states.<sup>88</sup> Similarly, "global" networking through Facebook, LinkedIn, and Twitter may provide greater name recognition and referrals. However, using a client's name or identifying information about a case without consent violates the confidentiality rules whether the reference is used to advertise a positive outcome or defend oneself when confronted with a client's negative online review.<sup>89</sup> Additionally, providing online legal advice on various websites may lead to the inadvertent and problematic establishment of an attorney-client relationship.<sup>90</sup>

Thus, the contemporary legal profession's landscape has been inexorably altered by the advent of social media and its transformative effect on society and the legal system. Of course, technological innovation is not stagnant—as the discussion of social media becomes more commonplace, the legal profession must move forward to ponder the next dramatic chapter: the impact of artificial intelligence on the practice of law.

## VII. ARTIFICIAL INTELLIGENCE ARRIVES ON THE LEGAL SCENE

Artificial intelligence (AI) is another technology that has been in development for many years but has only relatively recently infiltrated

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87. *See id.* at 93–126, 139–71.

88. *Id.* at 185–86.

89. *Id.* at 192–94.

90. *Id.* at 191–92.

the technophobic legal profession.<sup>91</sup> AI has been defined as “the ability of a machine to perform what normally can be done by the human mind. AI seeks to use an automated computer-based means to process and analyze large amounts of data and reach rational conclusions—the same way the human mind does.”<sup>92</sup>

AI programming may involve machine learning, natural language processing, and vision and speech recognition.<sup>93</sup> While a deep dive into the workings of AI is beyond the scope of this Article, the various uses for the legal profession are worth noting. Although AI has not yet fully infiltrated the legal profession, lawyers are using it for contract review, document review, legal research, and predictive analysis.<sup>94</sup> The general consensus is that lawyering skills involving judgment and creativity will not be replaced by robots; however, there is also agreement that AI will replace tens of thousands of legal service functions.<sup>95</sup>

The world of AI raises legal ethics issues beyond and more expansive than those that are implicated by earlier technology and the ongoing use of personal computers and cell phones. As previously discussed, early technological innovation primarily raised concerns about maintaining confidentiality between attorneys and their clients. The ongoing use of computers and cell phones heightened security concerns so that encryption, virtual private networks, and a general knowledge of cybersecurity threats became necessary. While those concerns remain, the use of AI generally involves outsourcing legal service tasks to a third-party nonlawyer entity, which brings with it additional legal ethics considerations.

In fact, outsourcing is a wonderful vehicle through which to review many of the fundamental legal ethics rules because once a lawyer retains a nonlawyer to complete tasks related to a client’s case, then a duty of supervision arises. For example, a lawyer must explain a research project to a law clerk, await the law clerk’s memorandum, and then carefully review a law clerk’s research and memorandum

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91. Lauri Donahue, *A Primer on Using Artificial Intelligence in the Legal Profession*, JOLT DIG. (Jan. 3, 2018), <https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession> [<https://perma.cc/8RML-5E3Y>]; Jacobowitz & Ortiz, *supra* note 67, at 412–15; Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 GA. ST. U. L. REV. 1305, 1328–31 (2019).

92. Jacobowitz & Ortiz, *supra* note 67, at 412–13 (citing Wendy Wen Yun Chang, *Competence: What Are the Ethical Implications of Artificial Intelligence Use in Legal Practice?*, 33 Laws. Man. on Prof. Conduct (ABA/BLAW) 284 (May 17, 2017), <https://aprl.net/wp-content/uploads/2016/09/3.-Ethical-Implications-of-AI.pdf> [<https://perma.cc/RXM3-D4U6>]).

93. Jacobowitz & Ortiz, *supra* note 67, at 413.

94. Donahue, *supra* note 91; Jacobowitz & Ortiz, *supra* note 67, at 414–15.

95. See Donahue, *supra* note 91; Jacobowitz & Ortiz, *supra* note 67, at 414.

before adopting its conclusions into a pleading or an article for publication. An AI program may be able to conduct the same research and produce a superior memorandum in much less time and at less expense to the client.<sup>96</sup> Because employing AI usually means hiring an independent entity, a lawyer must understand the company's methodology, its security measures, and the monetary cost. In other words, the lawyer must comply with his obligations to the client that require competence, diligence, communication, reasonable billing, and confidentiality.<sup>97</sup> All of these duties require the lawyer to understand and thoroughly investigate the AI provider to comply with the lawyer's ultimate duty of proper supervision.

What may appear to be a complex analysis nonetheless must be conducted in order to properly delegate legal work to a third-party AI vendor. Moreover, the failure to use AI may eventually beg the question: Does a lawyer who fails to consider an AI solution render himself or herself less competent? The question becomes especially compelling when AI may significantly reduce a client's legal fees and expedite his or her case.<sup>98</sup> Regardless of the current answer to the AI competence question, the general question of competence in connection with the use of technology and the appropriate role for third-party vendors is a central question in the current debate on the future of lawyering.

#### VIII. TECHNOLOGY, DISRUPTORS, AND THE FUTURE OF LAWYERING

As previously discussed, the role of lawyers evolved over time from the unpaid "secret" speechwriters and advocates in ancient Greece to the government-regulated early lawyers in Rome and medieval England. In the United States, the legal profession developed its own character and eventually innovated a system of self-regulation evidenced by the 1908 ABA Canons. The Canons evolved through the years to become the contemporary Model Rules of Professional Conduct from which all of the states derive their own rules.<sup>99</sup> The legal profession has slowly adapted to the impact of technological innovation, and the Rules and related ethics advisory opinions have been amended to reflect technological savvy as an element of fundamental

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96. See Steve Lohr, *A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet.*, N.Y. TIMES (Mar. 19, 2017), <https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html> [<https://perma.cc/ACC7-R2J8>].

97. See Jacobowitz & Ortiz, *supra* note 67, at 416–18.

98. See *id.* at 419.

99. Jacobowitz & Singer, *supra* note 62, at 462–65.

competence.<sup>100</sup> However, a relatively straightforward but nonetheless conceptual amendment may no longer suffice to address the growing challenges confronting the legal profession in relation to both technology and access to legal services.

For several years, third-party legal services technology “disruptors” have been running in the background of the legal services landscape, challenging the legal profession’s insular business model that remains subject to the profession’s self-regulating rules. Companies that are not law firms are providing the public with greater access to a range of legal services through the use of AI and other technology.<sup>101</sup> Some of these companies may want to collaborate with law firms, but lawyers are generally prohibited from sharing fees or otherwise partnering with nonlawyers. Moreover, these companies allegedly violate the unauthorized practice of law restrictions in various states but nonetheless hold great appeal to certain segments of the general public.<sup>102</sup>

Thus, the legal profession’s early innovation of self-regulation and its insular, technology-resistant history has resulted in another challenge to its manner of practice. The advent of low-cost legal services offered by legal service tech companies has multiplied to a degree that the legal profession can no longer ignore.<sup>103</sup> Once again, technology is fueling society’s changing landscape, and the legal profession is divided as to how to proceed. Consequently, there are task forces in many states that are analyzing the legal ethics rules or self-regulation impediments to collaboration in an effort to recognize the value of making room for

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100. *Id.* at 465.

101. *See, e.g.*, Ryan Duffy, “Robot Lawyer” DoNotPay’s Plan to Fight Big Business, MORNINGBREW (Feb. 5, 2020), <https://www.morningbrew.com/emerging-tech/stories/2020/02/05/robot-lawyer-donotpays-plan-fight-big-business.html> [<https://perma.cc/CZD6-6JS8>] (“The app uses chatbot technology and AI screening to provide 150 legal services. Among the most popular: [c]ontesting parking tickets[,] [c]ancelling subscriptions/memberships after the free trial[,] [and] [suing] someone.”); *see also infra* note 111.

102. *See* JORGE GABRIEL JIMÉNEZ & MARGARET HAGAN, LEGAL EXEC. INST., A REGULATORY SANDBOX FOR THE INDUSTRY OF LAW 3 (2019), <http://www.legalexecutiveinstitute.com/wp-content/uploads/2019/03/Regulatory-Sandbox-for-the-Industry-of-Law.pdf> [<https://perma.cc/QK7H-BSB3>]; JASON SOLOMON, DEBORAH RHODE & ANNIE WANLESS, STANFORD CTR. ON THE LEGAL PRO., HOW REFORMING RULE 5.4 WOULD BENEFIT LAWYERS AND CONSUMERS, PROMOTE INNOVATION, AND INCREASE ACCESS TO JUSTICE 3 (2020), [https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/Rule\\_5.4\\_Whitepaper\\_-\\_Final.pdf](https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/Rule_5.4_Whitepaper_-_Final.pdf) [<https://perma.cc/6ANX-REVV>]; Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2596 (2014); *see also The Future of Lawyering*, ASS’N OF PRO. RESP. LAWS. (2020), <https://aprl.net/aprl-future-of-the-legal-profession-special-committee/> [<https://perma.cc/3S2H-XM3U>]; *Unlocking Legal Regulation Knowledge Center*, UNIV. OF DENVER, <https://iaals.du.edu/knowledge-center> [<https://perma.cc/MTU6-7RTN>] (last visited Dec. 9, 2020).

103. *See* SOLOMON ET AL., *supra* note 102, at 6.

vendors who may not only increase access to legal services for the public but also who are determined to remain.<sup>104</sup> Utah, one of the states in the forefront, has conceived a regulatory sandbox to experiment with new approaches to expanding the services to the public via third-party providers that do not necessarily exist in a traditional law firm setting and whose employees may not have law degrees.<sup>105</sup>

The profession has come a long way from the unpaid advocates in ancient Greece. Because there will always be a need for third-party advocacy in our society, the public will exhibit both reverence and ridicule for the advocates. The question that has arisen at this juncture is how those advocates will continue to be defined and regulated. Formulating the answers to that question is an ongoing process that may have recently been both interrupted and expedited with the arrival of a Black Swan: the COVID-19 Global Pandemic.

#### IX. THE COVID-19 PANDEMIC AND THE RAPID EMBRACE OF TECHNOLOGY

“A small number of Black Swans explain almost everything in our world, from the success of ideas and religions, to the dynamics of historical events, to elements of our personal lives.”<sup>106</sup> In his best-selling book, *Black Swan: The Impact of the Highly Improbable*, Nassim Nicholas Taleb defines the three main characteristics of a Black Swan event: rarity, extreme impact, and retrospective predictability.<sup>107</sup> He explains that the Black Swan phenomena “illustrates a severe limitation to our learning from observations or experience and the fragility of our knowledge.”<sup>108</sup>

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104. See *id.* at 7–8; Rhode & Ricca, *supra* note 102, at 2608. Arizona, California, and Illinois provide three examples. See TASK FORCE ON THE DELIVERY OF LEGAL SERVS., REPORT AND RECOMMENDATIONS 1 (2019), <https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf?ver=2019-10-07-084849-750> [<https://perma.cc/MM5V-BXX6>]; STATE BAR OF CAL. TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVS., FINAL REPORT AND RECOMMENDATIONS 3 (2020), <http://www.calbar.ca.gov/Portals/0/documents/publicComment/ATILS-Final-Report.pdf> [<https://perma.cc/7646-7NKV>]; CBA/CBF TASK FORCE ON THE SUSTAINABLE PRAC. OF L. & INNOVATION, TASK FORCE REPORT 4 (2020), <https://chicagobarfoundation.org/pdf/advocacy/task-force-report.pdf> [<https://perma.cc/ZEN6-Z3YR>].

105. See THE UTAH WORK GRP. ON REGUL. REFORM, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION 1–2 (2019), <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf> [<https://perma.cc/LX74-49M6>].

106. NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE*, at xxii (2d ed. 2008).

107. *Id.*

108. *Id.* at xxi.

It comes as no surprise that several commentators have already deemed the COVID-19 Pandemic to be a Black Swan.<sup>109</sup> Because the Pandemic is a rare event that is having an extreme impact throughout the world, the retrospective analysis is ongoing and not yet conclusive. In the context of this Article, it also exists as another example of both disruption and technology impacting the legal profession.

Mark Cohen recently reflected on both the Pandemic's danger and the opportunity for the legal profession.

The danger is inertia of entrenched stakeholders—law firm equity partners, general counsel, tenured law school faculty, regulators, Bar Associations, and the judicial system. Their stasis is rooted in legal culture, anachronistic structural, economic, and delivery paradigms, fiefdoms, self-regulation, and hubris. The legal profession, until recently synonymous with the industry, has been acculturated to respect precedent, avoid making mistakes, and adapt to an insular, homogeneous, conformist, risk-averse, inward-focused culture that promotes the myth of its exceptionalism. . . .

. . . The Corona virus has harnessed the potential of underutilized tools and alternative work paradigms long resisted by the legal establishment. Entrenched ways of doing things have been altered with astonishing speed, ease, and acceptance.<sup>110</sup>

Cohen also discusses the opportunity for change in both the delivery of legal services and legal education, including incorporating some of the third-party nonlawyer legal service providers discussed above.<sup>111</sup> While he comments on the astonishing speed and ease, there have been some speed bumps in the road on the way to the expressway. For example, there have been admonishments from the judicial branch regarding maintaining proper “pandemic perspective” when filing a request for a hearing and deeming it an “emergency,” engaging in

109. See Chuck Lundberg, *Legal Ethics and Risk Management in the Time of Pandemic*, BENCH & BAR MINN., May/June 2020, at 16, 17; Jake Evans, *The 2020 Black Swan—COVID-19 and Its Impact on the Practice of Law*, LAW.COM: DAILY REP. (Apr. 13, 2020, 8:00 AM), <https://www.law.com/dailyreportonline/2020/04/13/the-2020-black-swan-covid-19-and-its-impact-on-the-practice-of-law> [<https://perma.cc/ATS8-5MMR>].

110. Mark A. Cohen, *COVID-19 and the Reformation of Legal Culture*, FORBES (Apr. 14, 2020, 8:29 AM), <https://www.forbes.com/sites/markcohen1/2020/04/14/covid-19-and-the-reformation-of-legal-culture/#28f8f4ca171d> [<https://perma.cc/E55B-EESL>].

111. Cohen highlights Joshua Browder, an entrepreneur who as a teenager created the DoNotPay bot that has saved consumers millions of dollars in parking fines. See *id.* DoNotPay now includes apps for consumers to represent themselves in other matters. *Id.* Cohen observes, “Joshua Browder, the founder of DoNotPay (DNP), personifies a new breed of legal delivery pioneer, consumer rights advocate, and legal professional. DNP has just released a 50-State unemployment benefits claim app in response to the unprecedented COVID-19 layoffs. Browder told me a team of seven rolled out the app in less than a month. This fast, scaled, accessible, affordable (\$3/month bundled subscription for all 100 DNP apps) solution to widespread, urgent, real-life challenges provides a glimpse into the potential of reimagined legal services in the digital age.” *Id.*

civility with opposing counsel, and appearing appropriately dressed for a Zoom hearing.<sup>112</sup> One Florida judge found it necessary to post recommendations for lawyers that included wearing a shirt and not appearing in bed, especially if under the covers.<sup>113</sup> Moreover, the rapid deployment of attorneys and legal staff to home quarantine raises cybersecurity and confidentiality concerns that run the gamut from protecting against malicious hackers to avoiding well-intentioned family members' inadvertent exposure to confidential documents and conversations.<sup>114</sup>

Speed bumps aside, there is a growing consensus that because the legal profession has been shocked into embracing technology, the practice will emerge into a new normal that includes Zoom or other video court hearings, client meetings, and smaller physical footprints with more lawyers and their staff engaged in remote working.<sup>115</sup> Clio, a legal management software company, recently conducted research that reveals that sixty-nine percent of the legal professionals surveyed consider technology to be more important now than before the Pandemic.<sup>116</sup> Forty-seven percent indicated that they are using more types of technology than before remote work became mandatory.<sup>117</sup> Thirty-eight percent agreed that they are more comfortable with technology.<sup>118</sup> Both the data and the anecdotal evidence indicate that “[f]ive to [ten] years of technological advances have taken place [in the legal profession] over a mere two months.”<sup>119</sup> While the legal profession

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112. See Lundberg, *supra* note 109, at 20; Debra Cassens Weiss, *Lawyers Are Dressing Way Too Casual During Zoom Court Hearings, Judge Says*, ABA J. (Apr. 15, 2020, 9:24 AM), <https://www.abajournal.com/news/article/lawyers-are-dressing-way-too-casual-during-zoom-hearings-judge-says> [<https://perma.cc/4SVP-XK6Y>].

113. Weiss, *supra* note 112 (quoting Broward County Judge Dennis Bailey's comments posted on the Weston Bar Association website: “We've seen many lawyers in casual shirts and blouses, with no concern for ill-grooming, in bedrooms with the master bed in the background, etc. One male lawyer appeared shirtless and one female attorney appeared still in bed, still under the covers. And putting on a beach cover-up won't cover up [that] you're poolside in a bathing suit.”).

114. Lundberg, *supra* note 109, at 18–19; Ellen Rosen, *The Zoom Boom: How Videoconferencing Tools Are Changing the Legal Profession*, ABA J. (June 3, 2020, 8:00 AM), <https://www.abajournal.com/web/article/ethics-videoconferencing-tools-are-changing-the-legal-profession> [<https://perma.cc/E3R6-J4XL>].

115. See Peter Vaira, *Changes in the Law Practice After COVID-19 . . . What Will Be the New Normal?*, LAW.COM: THE LEGAL INTELLIGENCER (May 11, 2020, 12:36 PM), <https://www.law.com/thelegalintelligencer/2020/05/11/changes-in-the-law-practice-after-covid-19-what-will-be-the-new-normal/> [<https://perma.cc/M6ZD-C2JV>].

116. Andrea Solan, *The Impact of COVID-19 on the Legal Industry, in Numbers*, MD. ST. BAR ASS'N (May 13, 2020), <https://www.msba.org/the-impact-of-covid-19-on-the-legal-industry-in-numbers/> [<https://perma.cc/NB8L-29D9>].

117. *Id.*

118. *Id.*

119. *Id.*

was being nudged in this direction for several years, it has taken a Black Swan to catapult the profession into the heart of the digital age.

## X. CONCLUSION

From antiquity through today, both advocacy and change have been mainstays of society. The legal profession has evolved through the centuries; however, the lawyer's fundamental role of competently and loyally advocating for another remains remarkably the same. One can imagine the ancient Athenian and Roman advocates presenting a client's case with the same passion as litigators of today. What has dramatically changed is the venue and a lawyer's instruments for advocacy. A lawyer's advocacy "toolbox" has grown to include the inventions of the digital age. The internet, computers, smartphones, teleconferencing, social media, and AI inform today's lawyer and the practice of law. High-tech courtrooms have replaced ancient forums as the legal profession continues to integrate technology into the practice of law. Technology has undoubtedly changed the nature of everyday life in our global society and with it, the snapshot of the contemporary lawyer. This snapshot will continue to morph, but interestingly was forecast by Justice Sandra Day O'Connor in a March 1994 article in *Law Practice Management* magazine entitled "The Role of Technology in the Legal Profession" in which she opined:

Twenty or even 10 years ago, employers' reluctance to accommodate work at home and part-time work may have been understandable. People . . . had to be in the office to get memos and documents; they had to be physically present for meetings; they had to have access to the library. But with today's technology, all of that has changed considerably, and it will change even more . . . in the . . . near future. . . . E-mail systems and faxes can let people send and receive documents from home in seconds. Teleconferencing, and soon videoconferencing, can greatly decrease the need for physical meetings. The result will surely be a widespread acceptance of more flexible office schedules, a reduced need for law firm office and library space, and a much happier home and work environment. . . .

. . . .

. . . Technology is never a panacea. It won't make our laws more just, or make lawyers more ethical or more collegial. But it is a valuable tool: a tool for making ourselves more efficient and more competent; a tool for making the legal system more accessible; a tool for making the legal profession easier on the legal professional.<sup>120</sup>

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120. Sandra Day O'Connor, *The Role of Technology in the Legal Profession*, LAW PRAC. MGMT., Mar. 1994, at 24, 26.