



Thriving in "Interesting" Times

There is an ancient Chinese curse: "May you live in interesting times." I think most would agree that things have gotten a lot more interesting for us in recent years. Many of our clients are ...



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[How Multitasking Burns Money and Ruins your Brain](#)

As a busy family law attorney, I can tell you that many things consume my time. Here are my top ten time-burning, schedule busting activities:
10. Reading 12 emails from the same client



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This month, I get the honor of guest-editing the Elder Law issue of the Contra Costa Lawyer, a point of great pride for me. Elder law attorneys are

President's Message



[February 2011 President's Message](#)

Welcome to our very first online issue of the Contra Costa Lawyer! I think I can speak on behalf of the entire Board of Directors and the editorial board when I say that we are ...



[November / December 2010 President's Message](#)

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April 2011

Increasing the Bottom Line -
How lawyers can turn their practices into lean, mean fighting machines

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How Multitasking Burns Money and Ruins your Brain

Friday, April 1, 2011

CC Lawyer

As a busy family law attorney, I can tell you that many things consume my time. Here are my top ten time-burning, schedule busting activities:

10. Reading 12 emails from the same client anguishing over who has the right to walk the dog this weekend (generally sent between 2am and 3am)

9. Explaining to clients why taking all the money from the family bank account might not be such a wise idea

Dana L. Santos



8. Reviewing the email from opposing counsel that copies the letter that duplicates the fax that reiterates and confirms the telephone call I just had with opposing counsel

7. Picking up the same piece of paper I have already picked up 5 times during the past week, because the last 4 times I picked it up I read it and didn't want to deal with it
6. Being polite when my office mate walks into my office and insists on discussing why the football lockout is a crime against humanity and why football team owners are the spawn of Satan, even when a) I could care less about overpaid athletes and their "troubles" and b) I really, really, really need to get this pleading out
5. Giving a client the same piece of advice that I've given them the last 5 times they asked the question, because they think if they ask me enough times, the answer will change (clients who are also preschool teachers know intuitively this method will not work)
4. Reading those wonderful and disgusting joke emails from the uncle in Louisiana that must be read before any work gets done (why do all the really interesting looking people shop at Wal-Mart?)
3. Deleting all the email adds from West, Amazon, Travelzoo, Intuit, InkSell, TigerDirect, Hotwire, Yoshi's, Brookstone and other internet purveyors of unneeded consumer crack (there is a price for shopping online, what you save in gas you lose in lost years of your life getting off email lists)
2. Watching for that little email blurbie thing in the bottom right hand corner of my computer screen that tells me EVERY time an email comes in and like a Pavlovian dog, I immediately click on the email to see who likes me enough to send me email
1. Giving my clients excellent, well-reasoned, thoughtful advice, then doing the exact opposite myself

While the above is mostly tongue in cheek, the reality is we all waste a huge amount of time every day doing things we either don't need to do, or don't need to do RIGHT NOW. This results in lost income. How many times have you walked into your office at 9am, looked up at the clock at 5pm, and realized you had billed .8 all day?



I do not claim I am a master of time management. I am simply pointing out some techniques for people like me who want to try a few simple things to increase their productivity.

a. Buy a scanner. As a solo, this machine is worth every cent I paid for it (ScanSnap s1500.) I can read, forward to a client and electronically store information in seconds. While I have not slain the paper dragon, this technology has given it a mortal wound.

b. Resist the temptation to read email as it comes in. I know this is hard and if you're like me it will take months of really expensive therapy to fully understand why you want people to love you, but the fact is this is a huge time burner. Discipline yourself to read email on a schedule. I try to read first thing when I come in, then during or immediately after lunch, and finally at around 4pm.

c. Don't answer your phone. (Attorneys everywhere in the county are reading this and thinking "hmmm, I thought she was just avoiding me.") If you're just sitting at your desk sorting mail, pick up the phone. However, if you are in the middle of a task requiring concentration, which is more often than not, that phone call will cost

you (and your client) time and money. If I'm working on a three page declaration and I break for a call that is not an emergency, I have to reread that declaration from the beginning, re-collect my thoughts and attempt to recall the brilliant legal theory that was on the tip of my tongue when the phone rang. Instead, listen to your voicemail in the morning and return calls or reply by email as needed. Get work off your desk, and then take a break for calls before lunch. Do the same in the afternoon.

d. Reply to clients by email whenever possible, not phone.

As a solo I have to ensure that I am operating as efficiently as possible. It doesn't make sense for me to have a telephone call with the client, then write up my notes for the file, then write a letter to the client confirming the conversation. If a client has a question, you can respond quickly and thoroughly to their question by email, while simultaneously making your note for the file and providing something in writing to them to refer to at a later time, thereby saving them money when they need to review that piece of advice/information. While we know the in's and out's of our business, we sometimes forget that clients often have a huge learning curve and cannot retain all the information we give them.

e. Do one task at a time. Period. If your staff thinks an open door means you're free to talk, then either shut your door or let them know that you are not available. There is no such thing as a "quick question."

Finally, accept that your brain is no longer a steel trap (if you grew up during the summer of love and spent lots of time in the Haight, let's face facts, your mind was never a steel trap.) You might as well acknowledge this reality and come to terms with it. You are past the age of forty and your brain works differently than it did when you were twenty. You are capable of more complex thought and more sophisticated reasoning, but your ability to access short term memory is impaired. Encourage your brain's ability to focus and retrieve information by rejecting the temptation to multitask. Put systems in place to keep you organized, efficient and time effective, then do your best to follow those systems.

And finally, do as I say, not as I do.

Dana Santos is a certified family law specialist in San Ramon, California.

Thriving in “Interesting” Times

Friday, April 1, 2011

CC Lawyer

There is an ancient Chinese curse: “May you live in interesting times.” I think most would agree that things have gotten a lot more interesting for us in recent years. Many of our clients are struggling, which means that many of us or our colleagues are feeling the fallout. Whether you are thriving, struggling, or somewhere in between, here are some suggestions for improving both the quality of your practice and your life:

Turn Away Questionable New Clients/Cases Resist the temptation to take marginal cases just because nothing better is offering at the moment. Even if times are slow, there’s no point in taking cases that aren’t worth your time or on which you are unlikely to be paid. Things could change tomorrow and if you’ve filled up your dance card with questionable or unproductive work, that just guarantees that you won’t have time to adequately work the marvelous new case which is just around the corner.

Weed Out the Current Bad Cases The rationale for this is much like the prior point. Many colleagues have told me that they are very busy, but just not getting paid. Unless you know that the payoff is around the corner, that there will be resources to pay your fees at some time in the relatively near future, it is a bad idea to continue to work non-paying cases. You can’t abandon a client, but if they really can’t afford you, it is time to call them in and have a heart to heart talk about the realities of their situation and litigation budget. Chances are, if they can’t pay you now, most of them won’t be able to pay you later, either. Consider switching from full service to limited scope or getting out entirely if possible.

Send the Year End Thank You Letter Review your case list for the past twelve months, focusing on the cases you closed. Single out the handful of cases/clients you really enjoyed and would like to have more of. Send them a letter saying that it is your custom and practice to periodically review your list of cases from the prior year. Doing so recently reminded you what a pleasure it had been to work with them. Tell them why (and not just because they paid you a lot of money). What made the relationship satisfying? Be sincere, tailor the letter to the specifics and only send letters to the few you can be genuinely grateful for. They will be stunned that you took the time to thank them and will remember you when their friends need a lawyer or need additional legal work themselves.

Spend Some Time Thinking About What You Want Your Practice to be Five Years From Now If you have a little time on your hands (or even if you don't), it is never a bad idea to spend some time thinking about how you would like your practice to evolve. Are there areas of your practice you particularly enjoy? Do you have specific talents and interests that could be turned into a niche practice? Areas of practice you'd love to transition out of if you didn't need them to make payroll this month? Even an hour or two focused on these questions can have immense payback over time.

Go “Above and Beyond” for Your Best Clients This is the time to make sure you really are giving your best clients top notch service. Competition among lawyers for the “best” clients is only going to increase in the future. Making sure that the level of service you give sets you apart from the competition is never a waste of time or energy. You will improve your competitive edge, your clients will be happy and they'll send their friends to you.

Streamline Your Office Outflow This is the time to take a good look at the fixed and discretionary expenses of your office. Do you really need all the space you have? Do you have an empty office where the broken printer goes to die? Clean it out and rent to a newbie. There are lots of unemployed lawyers out there who thought they'd be in a firm and find they have to try to make it on their own. Take a critical look at your office technology and how you use it. Do you really need a dedicated fax line when most of us do business by

scanning and email? Review your library. Is there a set of books you didn't use multiple times in the last year? If so, cancel the update service. You can always use the set at the law library if you really, really need something you can only get there.

Eliminate Clutter This may not sound like a law office management issue, but it really is. Clutter usually consists of piles of things you meant to do but haven't gotten around to. If there's something you really do need to do, you'll find it. When you find it, DO it and then put it away. Close the files you can. As you close the files, note which ones you particularly liked or detested and why. That will help you get clearer on what you want and will serve as a reminder when their clone comes in to interview you in the future. Put away any files you aren't currently working on. You'll feel better, you'll identify things you need to do which are in danger of slipping through the cracks and when that wonderful new client interviews you, you'll have an advantage over the other attorney they consulted who had piles of files all over the place. Clutter doesn't make you look busy. It makes you look disorganized and unprofessional.

Everything cycles. Tough times are followed by prosperous ones. The practice of law is, by necessity, evolving in the face of changing client (and attorney) demographics, technology, economic challenges, evolving client expectations and competition from other providers. Use these times to clear out the dross in your practice, give some thought to what you want the future to hold for you professionally and streamline your practice. All of this will help you position yourself to pounce on the opportunities that are sure to be coming in the future.

M. Sue Talia is a Certified Family Law Specialist and a private family law judge. For the past fifteen years, she's taught a popular workshop called "How to Have a Law Practice AND a Life." A substantially expanded six hour version of that workshop has recently been recorded and is available for download at <http://www.nexusbooks.com> ← as an audio file. Information includes detailed topics such as Taming Your Office Outflow, Turning on the Income Spigot, and Slaying the Accounts Receivable Dragon.

Maximizing Profits: Practical Tips Concerning Your Written Fee Agreement and Interactions with the Client

Friday, April 1, 2011

CC Lawyer

The purpose of this article is to recommend practical tips concerning the decision to represent a client and after that decision is made, to recommend important provisions for your fee agreement. These provisions can help protect both you and the client, while at the same time preserving and increasing your profits. Additional practical advice concerning billing is also discussed.

Choosing the Client The Intake Process Before the client enters your office for his or her initial interview, employ a screening process to ensure discussions with the prospective client will not create a conflict of interest with respect to another. Assign the intake responsibilities to a paraprofessional. (If you do not have a staff person to provide this task, ensure that your screening procedures in your office are sufficient to avoid conflicts.) Some clients may attempt to purposely create conflicts. Have the paraprofessional inform the caller at the outset of the intake that no attorney client privilege is created by the conversation and none will be unless and until the prospective client has communicated with an attorney. The intake should accumulate all relevant information including any name that the potential client has ever used or any business name or fictitious name under which the client has transacted business. This is critical for the purpose of making a complete conflicts check. Basic information about the nature of the case is gathered and the billing rate of each attorney should be disclosed. That there is a fee for the initial consultation should be stated and the intake paraprofessional should note on the intake sheet that the prospective client was so advised.

Initial Consultation Some lawyers charge for their initial consultation, others do not. Giving a free initial consultation is not good practice, particularly if opinions are offered to the client. Every attorney's time is valuable. This concept should be imparted to the prospective client

at the first meeting. The initial consultation is the point at which the attorney decides whether to represent a client, assuming the client is interested in retaining the attorney. This is the point at which an attorney's instincts are important. No matter how well written and organized the attorney's fee agreement may be, like any other contract, it is only as good as the parties who sign it. The experienced lawyer should follow his or her gut with regard to whether to accept an engagement. The referral source, which should be established during the intake, is critical. If there is any doubt about whether to accept the representation, the referral source should be contacted, discreetly, to determine what he or she knows about the client. The phone call can be made to thank the referral source and then used as a means by which to gain information about the potential client.

Check the register of actions maintained by the Superior Court in the applicable counties to determine whether the potential client is involved in other litigation. If so, investigate accordingly. *Google* the client's name.

Use your instincts. Size the client up. Lawyers are paid to do this and they should do it on their own behalf and for their own benefit.

If there is serious doubt about the client's ability to pay, increase the retainer. But, make sure it is enough to cover a substantial amount of work because if one gets too far into the case, there are the ethical considerations of when and under what circumstances withdrawal is appropriate.

The Fee Agreement The initial consultation is the point at which the written fee agreement should be given to the client. Different lawyers have different practices with respect to when that agreement is executed. My practice has been to send the client home with the fee agreement to take the time to read it and understand it. Since the essential terms of the written fee agreement are (or should be) non-negotiable, in a real sense, it is a contract of adhesion. For that reason it is important for a prospective client to have an adequate opportunity to read and review the agreement prior to signing it. Schedule a second appointment, after the initial interview, to review and discuss the agreement, at no charge, with the client.

The final thing to do at the initial consultation is to get paid for your services. On the day of the initial consultation, prior to the meeting, have the client sign a form acknowledging that a fee will be paid at the conclusion of the consultation at the regular hourly rate of the attorney participating in the consultation. Include this provision in a form which requires the potential client to provide other information, not gathered at the intake, or to update information.

Important Provisions in the Fee Agreement Whenever it is likely that a fee in excess of \$1,000 will be charged, the agreement is required to be in writing pursuant to Business and Professions Code § 6148.

Like any other agreement, the fee agreement should be written in plain English and should cover all of the essential terms of the financial arrangements to be made with the client. The agreement should also anticipate areas that might result in financial problems for both the client and the lawyer, in advance, with a resolution method proposed.

Scope of Services The fee agreement should contain a section which accurately describes the scope of the attorney's employment. For instance, the agreement should specifically state that representation, if it is a litigation matter, is limited to the trial court in which the proceeding is pending and does not include appellate matters such as writs or appeals to higher courts. The agreement should further state that if appellate action will be taken, it will require a separate and specific retainer agreement to be executed between the attorney and the client or that such services are not available. The agreement should state that collateral matters will not be covered by the agreement, as well.

Best Efforts; Opinions The fee agreement should state that the attorney will use his or her best efforts consistent with the Canons of Professional Ethics and the Rules of Professional Conduct for California attorneys to obtain a favorable result for the client. It should also state that even though opinions may be expressed concerning the possible outcome of the engagement, the client acknowledges that these attorney-expressed opinions are opinions only and no guarantee is made at any time about the result of any litigation or any other aspect of the case over which the parties do not have any control.

Charges/Billing The fee agreement should set forth very plainly the manner in which fees for legal services are charged. If there are other lawyers or paraprofessionals in the firm, there should be an exhibit setting forth the schedule of fees and charges for each individual and for all costs. These costs might include copy charges, postage, toll calls, travel expenses, messenger service, deposition and court reporters, process servers and online record searches. If it is your practice to increase billing rates periodically, it should be stated clearly in the agreement. The agreement should clearly state at which intervals billing rates may be increased (i.e., annually) and the amount of notice a client will be given prior to the effective date of the new billing rate. In the absence of such a notice, it is not likely that the increase in the rate would be enforceable. The fee agreement should require a retainer payment as well as periodic replenishment of a specified amount or an “evergreen retainer.” The best and simplest practice is to require the client to make a “deposit” which is maintained in the client trust account and is never tapped for fees. Explain this to clients as akin to a security deposit or the payment for last month’s rent in advance in a commercial or residential lease. The agreement should state clearly that the unused portion of the retainer will be returned to the client upon the completion of services or if the attorney is discharged. It is good practice, as well, to disclose that the interest earned on the attorney’s trust account will be paid to the State Bar consistent with Business and Professions Code § 6211.

Since the attorney-client agreement is a contract of adhesion, it is wise to reserve the right, in the agreement, to require an additional retainer or deposit against fees in anticipation of a trial of the client’s case. The additional retainer is based on projected future costs. The fee agreement should state that a trial retainer shall be calculated when it is known the matter is likely to proceed to trial. The trial retainer should be a significant portion of the fees that an attorney anticipates will be spent through trial. It is important to present to the client a budget projecting and estimating the number of hours that will be spent on various activities and tasks to bring the case to trial, as well as costs. How much of that total amount is requested as a retainer depends on the level of trust and confidence the attorney has in the client and the cash available from him.

Bills should be sent on a monthly basis. Every activity in which the attorney engages should be described and should include a time description. If numerous tasks are performed on a given day, it is not good practice to total the amount of time and enter it at the end of the description. This process is known as “block billing” and it will bite you if there is a fee dispute and the matter is referred to mediation. The ABA disapproves of block billing and fee arbitrators tend to mark those charges down.

If you are able to obtain a guarantor for payment of your attorney’s fees and costs, he or she should execute the fee agreement on a signature line contained in the agreement.

Withdrawal/Discharge The agreement should make it clear that a client may discharge the attorney for any reason at any time. The attorney’s ability to withdraw from representation must be consistent with the Rules of Professional Conduct. Failure to make payments in accordance with the agreement is a valid basis for withdrawal so long as it does not occur at a time that will prejudice the client. The agreement should state that if the client wishes to retain the case file after the attorney is discharged or withdraws, counsel has a right to retain a duplicate of the case file at the attorney’s own cost and expense. Under all circumstances, invest in a copy of the file.

Remedies Consider whether to limit the remedies under the agreement for any claim or action, under the Rules of Arbitration. The arbitration agreement should be referred to in the fee agreement and there should also be a separate agreement covering the terms of the arbitration agreement. Arbitration agreements signed at the outset of representation are now valid and enforceable.

Execution of the Agreement The attorney should have the client initial every single page of the agreement. In addition, there should be a space for initialing in the margin next to any provision which may become controversial. For instance, consider having the client initial the provision confirming “opinions are not guarantees” and the provisions for additional retainers. If the relationship breaks down and the attorney ends up in a dispute with a client, this would be some proof that the particular provisions, specifically, were read by the client (even though the law presumes people read the contracts

they sign). Having given the client time to review the agreement independently prior to signing, along with offering not to charge for time associated with a client's questions about the agreement, are further evidence of the client's knowing and voluntary execution of the agreement.

The final and perhaps most critical point of this article is to stress the importance of not allowing a client to build arrears. A colleague once told me that a client owed him \$30,000 in unpaid fees. The attorney's wife asked him why he was so distracted and he responded that he was thinking of withdrawing from the case. When she asked him why he would walk away from \$30,000, he answered "better now than when he owes me \$100,000."

And there you have it.

Andy Ross, managing partner of the law firm Whiting, Fallon, Ross & Abel, LLP¹, is a Certified Family Law Specialist, certified by The State Bar of California Board of Legal Specialization. He has acted as Judge Pro Tem for the Santa Clara County Municipal Court 1980-1984; and for the Contra Costa County Superior Court 1997-2009.

Anyone for Hanging out a Shingle?

Friday, April 1, 2011

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The job market for attorneys is so challenging right now that the majority of recent articles in the ABA Journal have focused on law firm layoffs and unemployed law school graduates suing their law schools for misrepresenting job prospects. Many who are qualified to practice law, but are unable to secure employment, decide to hang out a shingle and open their own law firm. These sole practitioners run the gamut from enthusiastic entrepreneurs to reluctant individuals simply "buying themselves a job." Regardless, to be successful in the *business* of practicing law – and don't kid yourself, it is a *business*

¹<http://www.disso.com/index.html>

– one must stick to fundamentals and properly plan in order to be successful over the long haul and avoid becoming a business failure statistic.

Self-employment is an idea that many people ponder at some point in their career. The thought of having control of your destiny, setting your own hours and being your own boss conjure up images of riches, power, freedom and independence. However, the realities are often quite different. An independent business owner, to be successful, will likely work harder than ever. While there may be no time clock, the owner only leaves when all of the work is done and, when not actually present at the business, she is likely thinking about it – 24 hours a day! Instead of not having *a* boss, there are many. Clients, employees, bankers, government agencies, suppliers and vendors all look to and rely on the owner for decisions, support and immediate action.

The simple truth is that most businesses fail – over 80% within the first five years. Business failures are primarily due to:

- the owner’s eventual realization of entrepreneurial realities;
- insufficient business management skills and
- a lack of proper planning.

Insufficient Business Management Skills Regardless of the type of business pursued, there are three general categories of knowledge or skills one must possess to be successful:

- **Technical Knowledge** (Industry Specific) – Here, beyond the obvious ethical implications, if you’re going to run a law firm, you better know your *ex partes* from your *ex post factos*.
- **Generic Business Knowledge** (Applies to ALL Businesses) – This includes a basic understanding of accounting, operations, personnel management, customer service, marketing, governmental regulations and all other facets that are universal to every business regardless of industry type.

- **Entrepreneurial** (Business Specific) – Information pertaining specifically to your business. For example, who your target market is and how you plan to reach them, where your best vendors and suppliers are, your hours of operation – All the information that will be in your business plan.

From strictly a business perspective (and for illustrative purposes momentarily ignoring the legal and practical implications) it may surprise you to know that technical skills are the least significant measure of a business' likelihood of being successful. The reason for this is that you often can hire the technical expertise your business requires but you can't abdicate the organizational duties or having a working understanding of your business operations if you want to stay in business.

To illustrate this point, consider an automotive repair shop. If a good mechanic decides to open her own shop, it's reasonable to assume she could competently provide repairs to customer vehicles. To run the business, however, she needs to attract customers, maintain proper accounting records, keep good customer files, create a website, decide between DSL, cable and satellite Internet connection options and ISP providers, find parts suppliers and uniform vendors, design marketing and advertising strategies, manage personnel, etc., as well as comply with such agencies as the EDD, OSHA, BAR, IRS and BOE to name a few. As you can see, the skills required to run the business on a day-to-day basis have little to do with knowing how to properly diagnose and repair a car.

To bring the point home, **just because someone may be the best litigator in the world, or knows how to write an ironclad contract, doesn't mean that person will be successful *running* a law firm because the skills are different.**

The bottom line is that you should be realistic about your strengths and take advantage of the many educational opportunities available to help fill the gaps. Anyone possessing a technical skill can be successful owning a business if they take time to learn about the business side of their business.

Proper Planning When heading to an unfamiliar place, you likely first Mapquest or otherwise locate the destination and then study to determine the best route to take. If this process is bypassed, there's no telling where you'll end up. Alternatively, you could just start driving and go wherever the road happens to lead. But clearly, the probability of reaching your desired destination is not very good and, even if you were lucky enough to eventually reach that destination, you most certainly would not have taken the most direct route.

The same process should be used when starting a business. It's important to know where you want to end up so that you can determine the optimum way to get there. Not every entrepreneur has the same goals. Based on one's stage of life, long term personal goals or other factors, the business' objectives will be reflective of that difference.

In business, rather than a *map* to reach a destination, there is a *plan* to identify goals and objectives. This plan – **the business plan** – includes the basic outline of the business, how it will operate, a marketing plan and initial financial projections. When properly prepared and implemented, it serves as a “road map” to the business' goals and objectives.

When preparing the business plan the entrepreneur is able to examine his existing and anticipated circumstances in depth. This often leads to an awareness of needed operational adjustments, resource enhancements, marketing ideas to consider or a host of other “fine tuning” opportunities that may exist. It is a rare occasion when the business as ultimately described in the plan resembles the business owner's initial concept or idea.

While the plan establishes the initial direction, it is and always will be a fluid, “working” plan, which may be subject to adjustment as market conditions or other circumstances dictate. Fundamentally it should not change. However, it should be flexible enough to allow course corrections that allow the business to remain competitive and profitable.

Once completed, the business plan serves many functions. A well thought out, properly prepared business plan instills confidence in the business' stakeholders regarding the business and its owner('s)

ability to perform. The business plan is often shared with prospective lenders, suppliers or other trade creditors and employees so that they can realize, share and participate in the attainment of the owner's vision and the business' goals.

Download this sample business plan outline², which includes a brief definition of the general categories that should be incorporated. Not all of these will necessarily be relevant. Once you've collected and assembled all of the data referred to in this outline, you should be well on the way to ensuring that your new law firm will not end up as one of the "statistics".

Stephen Gizzi, of Gizzi & Reep LLP³ in Benicia, is a longtime business owner, mediator, mediation instructor, and practicing attorney. He is the former vice mayor and city councilman for the city of Benicia. He has also chaired the Benicia Planning Commission.

How Technology Can Improve Your Bottom Line

Friday, April 1, 2011

CC Lawyer

By now, there are hopefully few, if any, practitioners without at least a computer and printer in their office. The advent of office technology has been a blessing and a curse. Time cycles for preparing documents and responding to clients has rapidly decreased first with faxes and now with email, texting and instant messaging. This has allowed for increased efficiencies but reduced an attorney's ability to think over a problem before the client (or opposing counsel) demands a response.

Electronic Service So, if we are stuck with constant communication and rapid response demands, how can all of these technological marvels

²<http://cclawyer.cccbba.org/wp-content/uploads/2011/03/BUS-PLAN-OUTLINE-FOR-CCCBA.pdf> ↩

³<http://www.solanolawgroup.com/2001.html>

improve your profitability (but not your sanity)? While there are a myriad of technologies available for an office, even simple things can help out. Among the easiest ways to save money for litigators is to use CRC Rule 2.251⁴ allowing electronic service in cases. A simple communication with all counsel in the case to convince everyone to serve notices under Rule 2.251(a)(2)(A) and all documents in the case can then be served via email. This can save a significant amount on postage. Plus, since almost every document is already created on the computer, it saves paper and toner, as there is no need to print out the document and put it in an envelope. Electronic service can greatly decrease an office's postage costs and, due to the postal services continuing money issues, postage costs are only going to increase.

Next, and related to the first suggestion, if you are faxing a document, there really is no need to also mail it unless required by the Code of Civil Procedure. Save the paper and postage by not mailing a document you have already faxed. However, if you are a belt and suspenders type of person, have at it.

Software Tips While there is lots of software available both specifically for the law office and for office work in general, this article is not going to recommend specific software for a law office with one exception. Instead, look at the programs that you most use in your office and think about whether there are ways to use them better and more efficiently.

The dominant word processor is Microsoft Word. An excellent resource for using Word in a law office can be found at the Payne Group website⁵. Payne Group has great publications on using Word (and Excel) in a law office. The books are a great investment and all one needs to do is simply look at the table of contents to see how to optimize Word in a law office. The books contain a significant amount of tips and how-to's that can save time in document creation.

⁴http://www.courtinfo.ca.gov/rules/index.cfm?title=two&linkid=rule2_251 ←

⁵http://www.payneconsulting.com/pub_books/ms_word_2003_lawfirms_pdf/ ←

Similarly, every office should already have Adobe Acrobat not only for scanning documents for serving via email (and electronic filing) but for form creation. Adobe knows that Acrobat has become indispensable to the law office and has created a blog⁶ for attorneys to learn how to make better use of the program in a law office. The blog can be found at <http://blogs.adobe.com/acrolaw/>

The one piece of software I will recommend for every office is a program that lets you type a short series of characters that then is expanded into a whole sentence or paragraph. On the Mac side, one such program is called TypeIt4Me⁷. On Windows, look for Breevy⁸. These programs work with any program on your computer (and Ettore Software even has a version for the iPad/iPhone). One simply types in the text and a shortcut into the text expander program and the next time that the shortcut is typed out in a word processor, billing program, or calendaring program, the text expander pastes in the full text. This can greatly speed up processes including adding boilerplate into a document or entering billing codes if your billing program doesn't allow the use of shortcuts.

Apps for your Smart Phone and Tablet Assuming that you already have a smart phone and maybe even a tablet, look into whether your calendaring program and billing program have apps for your smart phone/tablet. This can allow you to enter time and calendar items while on the run as it is easy to forget about that phone call or email sent out of the office. Having the ability to enter time on the phone that syncs back to your computer billing system can help capture those missed billing opportunities. If your programs do not have an app yet, contact the developer to ask when one will be available. Apple already has well over 350,000 applications available in its on-line store so if your developer is not already there, they need to get moving. While Android and Blackberry are well behind in app count, they will continue to expand. In prior issues, the Contra Costa Lawyer has published reviews of apps useful to the law office (download the

⁶<http://blogs.adobe.com/acrolaw/>

⁷<http://www.ettoresoftware.com/products/typeit4me/>

⁸<http://www.16software.com/breevy/>

article from the May 2010 issue⁹).

Filing & Naming Conventions An easy way to save time (and thus money) is to adopt standardized naming and filing conventions for electronic files. Hopefully, if you are still using paper files, you have them organized – usually correspondence in one section (by date), pleadings in another, discovery in a third, etc. There is no reason not to duplicate your paper filing method on your computer. For each case, you will have an identifier for the case/client that matches the identifier used for that case/client in your billing and calendaring systems. Within each client directory would be sub-directories for correspondence, costs, pleadings, etc. Then within each sub-directory, if necessary, you can break things down further. Once you reach the actual files, your office should adopt a standard naming convention for each document so that they are easy to identify. Now that DOS 8.3 (eight characters followed by a three character extension) names are history, there is no reason to limit the number of characters in a name. For example, when I prepare a letter I name it something like “11-03-15 Ltr to Jones re Discovery”. Using the date of the letter up front in year, month, day format causes all letter to be sorted by date with the name telling me who it was sent to (or received from) and the general topic. Also, if you are hunting for a document, don’t forget that both OS X and Windows 7 can index all documents on your hard drive and let you run simple searches on the name or content.

Tablets and the Cloud Now that you have trimmed around the edges with paper, toner and postage, there are potentially significant savings next time you need to purchase a new laptop. Unless your laptop is your primary (or only) computer, look at how you actually use the laptop and consider whether you really need a laptop. In all likelihood, a tablet (like the iPad or Xoom) will suffice for most trips. Attorneys are already using iPads in trial instead of laptops. The interface is simpler and if it crashes, it can be restarted in seconds. With cloud storage like SugarSync and Dropbox, anywhere one can obtain Wi-Fi or a cell signal, all of an attorney’s electronic files are

⁹<http://cclawyer.cccba.org/wp-content/uploads/2011/03/Pages-from-2010-05.pdf> ↩

available. In addition to potentially saving a large amount over the cost of a top of the line laptop (since no attorney wants to be caught using anything less than the best), your back and shoulders will thank you as tablets weigh much less than even the lightest laptop.

At the end of the day, technology is a tool. The better you understand what the tool can and cannot do, the better you can select which tool to use for which problem.

David Pearson, a Walnut Creek solo practitioner, is the current President of the Robert G. McGrath American Inn of Court. Since striking out on his own in 1996, he has concentrated his practice in the representation of closely held businesses and their owners. David can be reached at attorney@mac.com.

Starting Lawyer-Client Relationships

Friday, April 1, 2011

CC Lawyer

Nowhere is the phrase “Start with the end in mind” more profound than when entering into a lawyer-client relationship. This critical first phase has more to do with planning than the proper application of statutes or the knowledge of applicable case law. It also may be more important to both the client and the attorney involved than either the law or the skills of the firm.

The first and critical question that you must ask is: What kind of business am I running? Do I intend to have a profitable business? Is my goal to be a helping agency and non-profit? Perhaps I will end up as an outright charity?

Even before greeting the potential client at the first meeting, decide how you will handle the relationship. Naturally the intention is to be open and honest. Will you be casual and very user friendly? Will you be in charge of the relationship with firm client control? Open to do whatever the client asks like a loyal employee? Whatever your style, you are not in control of how the client’s situation presents itself

to you at the beginning of the case. Accordingly, your underlying question should be – How will the relationship end for you and this potential client?

An attorney may outright state that they will never sue a client. If your philosophy is that, as a helper, you should never sue a client for fees, you need to be firm with yourself as well as clear with your client where the economic lines are drawn. Part of this first meeting requires creating a clear understanding of the business side of your relationship, with guidelines for fees, costs and accounting discipline. It also requires foresight about the engagement – what it will take, in time and costs, to move from where the client is as she walks into your office to where the client wants to go (and just how far you are willing to guide her.)

Will you and your client agree to a renewable, or evergreen, retainer agreement? There are draft agreements of such available from the State Bar of California web site¹⁰. The goal of an evergreen contract is that your trust account balance is always in the green, and you are never left pining for your fees. The initial deposit must be sufficient to pay for your time and all anticipated costs – either entirely through the process for which you are being engaged or at least to a point of pause: that point where the case can be handed back to the client or to another attorney. At each “pause point” you, as the attorney and business person, are required to recheck the balance in this client’s account to ensure you have sufficient funds to proceed to the next point or require a renewal of the retainer – additional payment – to get to that next step. Without that renewal, are you prepared to quickly disengage/withdraw as her attorney as ethically appropriate?

Will you decide the client’s cause will become yours? Will you represent this client through and beyond the point of their ability to pay for services? Will you *contribute* your time and money once the client can no longer pay for your services, i.e., continue the case as a Pro Bono matter? If you are at a critical phase of the case, your professional responsibility as the attorney of record may require you to “grant credit” to your client as the Court will not allow you to

¹⁰[http://www.calbar.ca.gov/LinkClick.aspx?fileticket=Vi2mfjX4AYM%3d ←
&tabid=183](http://www.calbar.ca.gov/LinkClick.aspx?fileticket=Vi2mfjX4AYM%3d&tabid=183)

withdraw. You cannot tell, at the beginning, whether this Client will be credit worthy at that distant point in time; so you must ask yourself if the situation is so compelling that you are willing to financially support this Client in her cause?

The first actual meeting with the potential Client naturally includes gathering information and gaining an understanding of the legal matter(s) to be handled. The breadth of information must not be limited to those pieces relevant to the legal issues. The various legal issues required to prosecute the case certainly are legitimate areas to be gathered – thinking of your skill set or level of knowledge and amount of available time for research and pursuing the case. With your business hat on, you must also require/seek information about this potential client’s ability to fund the case including non-liquid assets you can look to later in the relationship. Litigation is generally more expensive than either the Client knows or the lawyer wants to believe, before the case begins. You need to ask “If this gets really involved, will I find myself worried about more than just doing my best legal work? Will I worry about prevailing on the legal side but losing on the business ledger?”

Once the information gathering part of the initial interview is complete, you and your client must mutually (remember you are not yet the advocate at this point but rather two individuals agreeing to a bilateral and mutually beneficial and respectful relationship) agree to the kind of relationship you will enter. There are several possible options, which include the following.

1. If the decision is not to continue you might agree to simply not have a business relationship and conclude the relationship with a non-engagement letter. You can thank her for considering your firm and be clear you are not her lawyer for the purpose discussed or at all. Be sure to relate that she would be wise to consult another attorney about her situation so as to protect her rights.
2. Similarly, if the need presented has been met and no further services are desired, here too you need to conclude the relationship

in writing, worded slightly differently, and include an invoice for your consulting services.

3. If you decide that you are only willing/capable/client-funded to perform a portion of an expected longer legal process, a Limited Scope Representation agreement may be appropriate. This can be done with a Client Retainer agreement that you draft or with a Judicial Counsel Form designed for this purpose. Be aware, before presenting this option, of how to disengage. This engagement is not necessarily automatically terminated (eg one must still generally obtain a Substitution of Attorney after a limited scope representation has been completed) so that last bit of legal work required to end the relationship, if you intend to be paid, will require you to start the process before the trust account is fully expended.
4. Perhaps the total action is not expected to cost more than \$1,000.00 and no written engagement is required. While this may be correct, consider having a writing nonetheless. Through painful experience one learns the value of being clear about who will do what and for how long. Keep your client informed of how close to the end – of the task and of the funding – the case is coming so there are no unmet and unsupported expectations.
5. Contingent fee arrangements can sometimes hold the promise of a big payday at a future date. A written agreement is absolutely necessary and some special language is required to be included. The State Bar’s web site provides several sample fee agreements, including for Contingent Fee arrangements, which are commended to the prudent practitioner. No matter how promising the case, have the client fund the costs – being clear what those might be. If the Client feels no financial pain in the process, demands can be unrealistic or the weary or distracted client can become disinterested or unresponsive/unavailable. Either way, your expected result can be lost. No matter how large your portion of the recovery, that percentage of a zero result is still zero.
6. A “Standard” Retainer Agreement”, also available from the

State Bar web site¹¹, is required for all the others and you should do a good job setting forth requirements and duties of both the lawyer and the client. Do not expect a non-lawyer to understand them as you do, so time must be allowed for explanation with you and after the initial interview including the suggestion that they consult with another attorney about your relative rights and responsibilities. I would not recommend an “on the spot” engagement.

You and your potential new client are only now on the edge of a great adventure. You both will travel but you have the responsibility to manage, keep information flowing, and know when it may be time to end the relationship – even if that is before reaching the stated destination. Keeping the end in mind, your “end in mind” must be where you and your client legally disengage, with your bills fully paid, and both you and your client convinced that the best possible outcome was achieved at a just cost. This result will only be achieved by being clear at the beginning, informative through the process and ending – whether at the first meeting, at some set and agreed time during the course of the case, or at the completion of the journey – with a closing letter thanking them and stating the Attorney-Client relationship is over. When this is achieved, you will know success as a lawyer and success in the business of law.

D. J. Hartsough has been practicing law for more than 22 years. His practice in Brentwood, CA focuses primarily on commercial collection, some collection of spousal and child support, and, going forward, on Estate Planning.

What makes a website successful?

Friday, April 1, 2011

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It’s all about first impressions. . . It’s a given: in today’s Internet-

¹¹[http://www.calbar.ca.gov/LinkClick.aspx?fileticket=Vi2mfjX4AYM%3d](http://www.calbar.ca.gov/LinkClick.aspx?fileticket=Vi2mfjX4AYM%3d&tabid=183) ←
&tabid=183

driven culture, people turn to the web first to research their legal issues. When looking for an attorney, you can expect that most users will typically visit at least a dozen websites before deciding whom to call.

So, how do you ensure that your website stands out from the crowd?

The answer lies in how your website starts the conversation with your users, anticipates their questions, sets the right tone through content and design, and ultimately establishes your credibility and builds trust in your capabilities and services.

Below are a few exercises to help you form a solid framework for your new website.

Speaking with your audience The first step to ensuring your website is a success is to recognize that the focus of your website is not really you or your firm. . . the focus is really your audience.

Who is your ideal client? How old is she? What does she do? What's going on in her life?

Write a few paragraphs about your ideal client. Give her a name. Begin to think of her as more than an abstraction. It may help to find a random head-shot so that you have a concrete vision of her.

Imagine each step in the process of meeting her, engaging her, and working on her case. Refer back to her "bio" often as you continue through the process of crafting your website content and design.

By putting yourself in the shoes of your visitors, you can begin to think about how they will perceive your firm through your website's content and design.

How will she find you? Probably through a search engine. But, what would she type into that search engine to bring up your website?

Make a list of these keywords and phrases and keep it handy as you're drafting the content for your website.

By writing with your visitors' search habits in mind and peppering your content with the keywords and phrases that they might use to find you, your website will naturally be weighted to come up higher in the search engines' results for these important terms.

What are her questions and concerns? Your visitors, first and foremost, want to know: "Who are you?" and "Can you help me?"

If they don't find clear answers to these questions within seconds of scanning your homepage, they will leave your website never to return.

Make a list of the common questions you hear from prospective clients when they call your office or meet with you for the first time. Then, as you're writing your content, make sure you answer these questions.

You don't necessarily have to answer all of these questions on your homepage, but the path to these answers should be easy for your users to follow.

By thinking from the perspective of your visitors from the outset, and anticipating and answering their questions, you will automatically gain credibility by assuring them that they are in the right place and that you can help them with their legal issues. A professional web writer can help you craft prose that is both engaging to your users and search engine friendly.

Evoking trust & credibility through design Second only to content in welcoming your visitors and establishing your firm in their eyes is design. In today's saturated webscape, a thoughtful, well-executed design can give your firm an edge over your competitors.

However, it's important to note that design isn't just about pretty pictures or your favorite color. Good design will be as effective at communicating your firm's ethos and establishing your credibility as good content.

Again, let's think about your ideal user. . .

How should she feel when she firsts visits your homepage?
What do you want to convey about your firm, mission or services?

Make a list of these more visual and emotional keywords and phrases and keep it close by as you work through the design process.

A professional graphic designer can translate your creative vision into a visual statement through intelligent use of color, typography, photography, visual hierarchy and stylistic treatments.

Putting the pieces together The above exercises should give you a strong foundation for a successful website that speaks to your visitors through content and design and helps to assure them that your firm can help them with their legal needs.

A web professional or creative team can work with you through this process and ultimately help you bring your website vision to life.

Jessica Gore (www.gorecreative.com) is a graphic designer, website developer, Internet consultant, writer and photographer living in Alameda, California. She designed and built the CCCBA website in 2010 and developed the online version of CCCBA's *Contra Costa Lawyer* magazine earlier this year.

Social Networking and Legal Ethics: How Do They Coexist?

Friday, April 1, 2011

CC Lawyer

Earn **one hour of Legal Ethics MCLE credit** by reading the article below and answering the questions of the Self-Study MCLE test¹². Send your answers, along with a check for \$20, to the address on the test form.

The new world of social networking brings with it a whole new landscape of ethical questions. Imagine an attorney who writes a blog

¹²<http://cclawyer.cccba.org/wp-content/uploads/2011/03/MCLE-selftest-WILSON-2.pdf> ↩

about how spouses should divide up property upon divorce. In response to his post, a reader sends him an email. In the note, she divulges very personal information about herself, her addiction problems and her recent separation and impending divorce. At the end of the email, she asks the attorney to represent her in the divorce. But after seeing her name, the attorney realizes that he already represented the husband. Obviously, he can't represent her. But the case isn't so black and white. What about the new information the lawyer has about this marriage? Can he use it in his representation of her husband?

Many attorneys find that social networking is an effective and inexpensive way to communicate their message and market their services to a highly targeted audience. The use of blogs, email, Facebook and Twitter has information flowing more freely than ever before. But as exemplified above, when it comes to social networking and legal ethics, we are in uncharted territory. How can — and should — we utilize social networking within the current ethical framework?

Social Networking 101 There is a lot of talk about social networking. But what exactly does it encompass? Social networking is the interaction between people who discuss a common interest or connection on the Internet. I think of social networking as two separate categories: The first is in a communal setting, such as a blog comment, Facebook posting or contacts update through LinkedIn. The second type is one-to-one communication, where a visitor contacts the blogger directly, reaches out through a LinkedIn Inmail, or sends a direct message from Twitter.

Even the most tech-savvy among us can find the sudden rise in social networking an overwhelming topic to tackle. And just when you get the hang of using the most common sites, more seem to pop up. Between this continuous influx of new sites and millions of blogs, many attorneys find the whole subject so daunting they would rather ignore it and hope social networking turns out to be a passing fad.

Given the ongoing explosive growth of social networking and the increasing ways people are using it both personally and professionally, I believe that social networking is here to stay. And attorneys who think they can ignore social networking do so at their own peril.

Protect Yourself Becoming social networking savvy is about more than just getting new clients: It is about protecting your reputation online. That is because a growing number of sites include ratings and comments — often anonymous — that could define your reputation, either positively or negatively. A lawyer-specific site called Avvo.com allows clients to comment on how they like their attorney. Unvarnished.com allows an anonymous poster to write about his or her experience doing business with professionals. Although many people think of Yelp.com as a site for rating restaurants, it also includes law offices along with other professional services.

Lawyers without websites, blogs, or LinkedIn profiles risk having other people rightly or wrongly rate them on this growing number of rating websites. One way to combat negative press is to establish profiles on LinkedIn, Twitter, and Facebook. Fresh content will rank higher in search results, pushing down any negative press to a lower ranking. By setting up Google Alerts, you can be the first to know when someone comments on your services. When alerted, it gives you the chance to respond quickly rather than leaving those comments unanswered.

With all the different social networking platforms, figuring out the prevailing ethical guidelines could seem exceedingly complicated to figure out. But it boils down to two kinds of communications — one-way communications (advertising) and two-way communications (social networking).

One-Way Communications One-Way communications is just like it sounds: Classic examples are a television advertisement watched passively by a viewer or a billboard seen by someone driving 70 mph down the freeway. The rules governing these forms of advertising are spelled out in the California Business & Professions Code 6157-8 as well as the California Code of Professional Responsibility. For the Business and Professions code, the standard is “false, misleading, or deceptive,” while the California Code of Professional Responsibility is an even stricter standard that includes “confusing.”

Content that is posted to a website is considered one-way communication and clearly constitutes a form of advertising. Whether it is a website, blog or other site, little gray area exists when it comes to text.

For example, stating that you always exceed your clients' settlement expectations violates the false, misleading or deceptive standard. If you wrote, "I obtain settlements for my clients," that would probably be okay in and of itself. But what if next to that statement you included a graphic representation of a big bag of money? The money bag would probably violate the legal prohibition against using graphic representations that are deceptive when the page is taken in its totality.

- **The Issue of Specialization**

To avoid charges of making false, misleading or deceptive claims, attorneys also have to be careful when setting up their LinkedIn profiles. Like other State Bar Associations, for instance, the California State Bar certifies attorneys who meet several stringent requirements. They prohibit attorneys without that certification from claiming that they specialize in these certified areas. LinkedIn has a section called "specialties" and it is wise for an attorney *not* to include areas of practice covered by the State Bar's certification program, if the attorney is not certified in these practice areas.

- **Testimonials & Disclaimers**

The California Rules of Professional Conduct are very strict about how attorneys utilize testimonials on their behalf. CRPC Rule 1-400 Standard 2 states that if an attorney publishes a testimonial, it must also provide an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter." What does this mean for LinkedIn recommendations from clients? It is currently unclear. But it is smart to provide recommenders with disclaimer language at the bottom of the recommendation as a precaution against any ethics complaints.

- **How to Treat Blogs**

A recent ABA panel recommended that attorneys treat their blogs just as they would their websites: Make sure that your blog does not make false, deceptive, misleading or confusing claims about your legal practice. If you include disclaimers on your website, you might as

well include them on your blog. The same applies to any notice about websites constituting attorney advertising, if you might represent clients in states where the attorney ethics rules require such notice.

- **Websites You Don't Control**

If you have the ability to include proprietary text on a website that provides a profile for your law firm such as LinkedIn or Facebook, it makes sense to include the same disclaimer and notice language that you included on your website and blog. And remember, websites, blogs and social networking profiles *all* need to conform to the rule enshrined in the California code of professional responsibility: attorney communications regarding professional services must not be deceptive, false, misleading or confusing.

Two-Way Communications The murkier area is two-way communications, where clients or prospective clients can either comment on your blog, ask to connect as a friend to your Facebook or LinkedIn profile, ask a question or engage you to take their case.

- **Blog comments**

If you have a blog that allows readers to comment, be careful in responding. For example, if someone from a jurisdiction where you do not practice law writes a comment to your blog asking for assistance on a legal matter and you respond via the blog, you could be considered having provided unauthorized practice of law.

Another issue is the possible violation of client confidentiality, if you approved the comment. One option is to not approve the post and then to reply directly to the person who commented.

Remember, it is not enough to claim that the visitor is not a client. If the visitor who writes a blog post asking for advice is a *prospective* client, this could be an issue. If you argue that the client was first to make the information public, they could argue they were not aware of the implication of providing this information through a blog, where you as an attorney will be held to higher standard than your prospective client.

- **Publicly Connecting to a Client**

Whether it is Facebook, LinkedIn or any other social networking website, your clients may want to add you to their list of contacts. Depending upon the type of practice, this could be problematic. If your practice is in a sensitive area like bankruptcy or divorce, you may want to fully disclose that the consequence to your client is making such a relationship public. Or you might simply inform your clients that, to protect their confidentiality, you do not make such connections public.

- **Prospective Client Communication**

Two issues arise when communicating with a prospective client — anyone who queries your website, blog, LinkedIn or Facebook profile seeking your legal representation — and they reveal personal information about their situation. If a prospective client emails you asking for representation, does that constitute engagement? Probably not. But to be safe, you can state that sending an email in no way constitutes the attorney’s engagement for services with the client.

A more difficult situation arises where a prospective client divulges potentially confidential information in an email sent from the website, blog or LinkedIn profile. If the attorney is already representing the other side in the dispute, does the attorney have to treat this information as confidential?

What if the attorney states on his website, blog or Facebook profile that no attorney client confidentiality applies to any email sent to him? Is that enough to protect him or her from an overeager prospective client? Not according to the State Bar ethics opinion. They require a plain text statement because prospective clients should not have to understand legalese. The statement needs say something like, “I understand and agree that lawyer will have no duty to keep confidential the information I am now transmitting to the lawyer.”

- **Does “real time” chat qualify as direct communications?**

California is proposing to adopt much of the ABA Model Rules of Professional Responsibility. In particular, the State Bar wants to eliminate the distinction between solicitation and communication. Under

the old rules, online chat or “real time” electronic communications was not considered solicitation. But that has changed in the new rules, which cover such communication. In the ABA model, they are looking to adopt restrictions to various forms of direct communications.

This raises more questions. What is “real time” electronic communication? Does Twitter qualify? What about a chat between people who connected through an online group but have never met face to face — does that qualify as direct communications? To be safe, it is probably best *not* to initiate communications with prospective clients on such sites.

• **Best Social Networking Practice: Disclaimers**

Disclaimers are not invincible shields against all litigation. But it is better to have good ones than bad ones — or nothing at all. Here are some suggestions based on both California State Bar and ABA ethics opinions addressing websites and disclaimers:

- **Be clear.** Make it clear to your website visitors that visiting your site or emailing you does not establish a client relationship.
- **Make your disclaimer prominent.** If you have a Contact page, have the disclaimer(s) on the same page. I have seen law firm websites that have a separate page for the disclaimer. However, this does not address the essential issue: making sure that the prospective client is aware of any limitations or provisions about the attorney’s legal representation *at the point of contact*.
- **Separate out the disclaimer regarding engagement in legal services from confidentiality.** Attorneys often collapse these issues into one disclaimer. But they are very different. Only those who are looking to actually engage the attorney or law firm need to understand what constitutes legal engagement. Confidentiality relates to the information provided by anyone writing to the attorney in an email, blog comment or through a social networking inquiry. Typically, attorneys do not guarantee to keep this information confidential, but this should be clearly stated.

- **Email disclaimers.** Social networking websites typically require that users provide them with email addresses. When a person has received a posting or message on his or her social networking profile, he or she is often notified through this address. To make sure that anyone who sends a message through one of these sites understands the terms of engagement and confidentiality, you can use an auto-response email that includes a clear disclaimer either in the body of the email or the footer. This prevents you from having to individually monitor or craft a response for every email sent to you from every one of your social network websites.

An Ethical Question Answered So what does the law say about the hypothetical woman who emailed her husband's attorney? According to a 2005 California State Bar Ethics Opinion and the ABA ethics opinion mentioned above, the woman is considered a prospective client for purposes of confidentiality. The next question is whether the attorney has to treat the information the woman provided him as confidential. Both opinions concluded that a legalistic disclaimer alone will not protect the attorney. The lawyer's disclaimer must be extremely clear, making sure that the person who sent the email understood that the lawyer had no duty to keep the information transmitted confidential. Remember that a cautious, educated approach to social networking clearly benefits attorneys both in marketing their practices and adding value for their clientele.

Download the MCLE Self-Study test form here:¹³ Earn one hour of Legal Ethics MCLE credit by reading the article above and answering the questions of the Self-Study MCLE test¹⁴. Send your answers, along with a check for \$20, to the address on the test form.

Randy Wilson is an attorney who assists other attorneys with their business development and marketing needs including website development, social networking strategy and ethics. Randy has a B. A. from

¹³<http://cclawyer.cccbba.org/wp-content/uploads/2011/03/MCLE-selftest-WILSON-2.pdf> ←

¹⁴ ../wp-content/uploads/2011/03/MCLE-selftest-WILSON-2.pdf

UC Berkeley and J. D. from the University of Santa Clara School of Law. He is an active member of the California Bar and a co-chair of the Alameda County Bar Association's Business Law Section Executive Committee.

Interview with Eric Samuels of David M. Sternberg & Associates

Friday, April 1, 2011

CC Lawyer

Eric I. Samuels is an associate with David M. Sternberg and Associates in Walnut Creek, CA. With more than 25 years of experience, the law firm specializes in Real Estate, Probate, Bankruptcy, and Business Litigation. Learn more at <http://www.davidsternberg-law.com/>

Eric I. Samuels, who joined David M. Sternberg & Associates five years ago, has been an active supporter and panel member of the Contra Costa County Bar Association's Lawyer Referral and Information Service (LRIS). The CCCBA sat down with Eric and spoke with him about his experience and success with the LRIS.

Have you had any particularly successful LRIS referral story you would like to share with us?

Eric Samuels: There are three basic categories of LRIS clients that we get: The first type of potential clients – small business owner, individual, couple – who come in are people who have a real legal matter, a pressing legal issue that they want to discuss with a lawyer.

They want to see whether: 1) Can our firm handle this case, is it within our area of expertise? 2) How much is it going to cost to move forward? 3) What are the chances of success?

That is the category of clients that we love because these are clients who will be hiring a lawyer for something they want to move forward on, once they become comfortable with a lawyer.

Just in the past year or two, I met with a couple who had their home foreclosed on after spending many months trying to work out a modification of their principal loan with their lender. As you can imagine, individuals get very frustrated trying to work with their lender, trying to get a modification, providing paper work and so on. This particular couple came into my office following a foreclosure after months of trying to negotiate a modification.

After meeting with them and looking through all of their documents, it was determined that the bank messed up, in terms of agreeing to a modification and then not accepting their money and foreclosing anyway. It was a classic case of the left hand not knowing what the right hand was doing. To make a long story short, we initiate a law suit against the lender and the outcome was very successful.

We saved their home, we got a deal, we got the principal on their loan reduced, and we got them into a good monthly payment plan. The couple got their home back, and it was only because they know to call the Bar Association's Lawyer Referral Service, who then got the couple in touch with me, and that is the most successful outcome for many reasons:

1) We helped a couple in Contra Costa County; 2) We helped them save their home, which obviously helps the economy; and 3) we made money – we got a referral that turned into a good case. So that is the most successful story in that particular type of case.

The second category of clients we see are individuals, couple, small business owners, who maybe just have one particular issue they have to deal with. With those types of referrals, we either try to solve that problem within the 30 minute time period or we count them as what we call 'one-time billable'.

There's one specific task that they want us to get done and we bill them for the amount of time it takes or we charge a flat fee for that task and that's it – it's a one-time deal. We deal with the legal issue and move on. So that's the second category of success – where you meet with someone, you find out what the problem is, you deal with it and it's done. Again, we call these one-time billables and we've had many of those.

The third category of success includes situations that may not generate any revenue for us but it makes me feel the best. That's when I talk to individuals who really don't have any money and they can't afford any money for legal fees.

Maybe they owe a credit card debt, maybe they're being evicted – they don't have the money for a lawyer. The \$30 they paid to the Bar Association as a referral fee is the extent of what they can pay. So, these are the types of people I try to counsel within those 30 minutes, to give them the tools to handle the situation on their own.

Many times, I've had individuals leave my office just so completely satisfied with what I've given them – forms, information, or just tools so they can deal with the situation on their own, so they don't have to spend the money on legal fees. Instead they can use that money and pay the creditor, for instance, to deal with the situation. Again, they may not turn into clients that pay, but they are the most satisfactory and the most successful stories.

It all relates to the fact that when you give individuals the tools to deal with problems on their own, I think it helps the legal community as a whole: Maybe, I'm keeping them out of Contra Costa County Superior Court, maybe I'm keeping them out of Judge Mill's court room maybe I'm keeping them out of Judge Baskin's court room, so they don't have to deal with these issues, because I gave them the tools to deal with it on their own.

How long have you been a member of our Lawyer Referral & Information Service (LRIS)?

Eric Samuels: For approximately 5 years, which is the exact time that I have been working here, as an associate attorney for David M. Sternberg and Associates. Upon my joining this firm, I signed up for the LRIS.

What motivated you to become a part of the LRIS panel?

Eric Samuels: I was given an opportunity to read about the LRIS, I investigated the services provided to the community, and I felt that the benefits were twofold: First, it would provide me with a great referral source. We felt that the LRIS is a great source of referrals. In

addition, it's a great way to give back to the community – the legal community and the public here in Contra Costa County.

Do a lot of your clients connect with you through LRIS?

Eric Samuels: Not every individual, couple, small business owner I meet with through the LRIS turns into a client. We consider them potential clients. I do meet with a lot of individuals, couples, small business owners from the LRIS – probably 3-5 a week, almost one person every day. But not all of them, of course, turn into clients. I would say that about 30 – 40% of our clients potentially come from the LRIS.

In your experience, what are the benefits of joining the LRIS?

Eric Samuels: It makes me feel good. It makes me feel good to meet with a couple, an individual, a small business owner who has a legal problem, in a setting where money is not an issue. The potential clients have already paid the Bar Association the \$30 referral fee and they get 30 minutes of my time with no pressure regarding what it's going to cost. We then try to identify their legal issue within those 30 minutes.

It simply feels good to actually talk with individuals about their legal problem and then give them a course of action – to give them either a solution or a plan of what they can do to address their legal problem. 99% of the time, when they walk out of my office or the conference room, I have usually addressed their situation satisfactorily. Now I can't promise I will solve their problem within those 30 minutes, but I give them a course of action, I give them a plan, I let them know that they're not alone, that there is recourse from whatever legal problem they are facing.

So yes, it's a great referral source, business-wise, but it also makes you feel good to watch people leave your office satisfied that they have had their problem addressed. It makes me feel like I'm giving back to the community and helping people make good decisions.

Our LRIS staff described you as one of the “go-to guy” for real estate –related matters. Are most of your referrals real-estate related, i.e. foreclosures, evictions?

Eric Samuels: As you can imagine, in the past few years foreclosures have been very prominent in our practice. In addition to Real Estate Law, part of our firm also deals with bankruptcy protection. So, we do meet with a lot of people who experience financial distress – facing foreclosure, facing problems with their debt. Those are the areas where we get most of our referrals.

Unlawful detainers, evictions – These are the types of areas where the referral service provides a very valuable service: You’re dealing with people who don’t have a lot of money, they’re facing a serious financial crisis, and they’re potentially facing being kicked out of their home.

In addition, we deal with a lot of cases that involve small claims jurisdiction –obviously, less than \$7,500. As I counsel people, typically attorney fees run quite a bit higher than \$7,500 for whatever matter you have. In litigation, the only winners are the lawyers – So unless you have a large dispute, it really makes sense to settle it, or resolve it, or go to small claims.

I do find that I meet with a lot of individuals that have a relatively minor legal problem – minor in the sense that it doesn’t involve a lot of money – but it’s helpful to meet with them, give them advice, let them know how to make a demand letter, for instance, or go to small claims.

Most of the referrals that I’ve been receiving in the last couple of years have been real estate related, dealing with foreclosures or predatory lending type of situations, which can turn into a large case, of course, and then dealing with evictions and small claims type of matters.

In your experience, are there practice areas that benefit more than others from LRIS referrals and the careful screening of the LRIS specialists?

Eric Samuels: The screening is vital and very helpful. It does identify whether there is a time sensitive issue, where you need to file something

within a particular time period that requires meeting with a lawyer right away – maybe your response is due to some pleading, maybe you have a statute of limitations issue, maybe you only have a couple of days to do something.

Screening is very important and it happens quite often where I get a call from a LRIS representative, saying that a potential client needs to come in right away, either later that same day or the next morning. Typically, we make time for those types of situations. We understand that time is pressing.

In that sense, screening is very important. In addition, it also allows attorneys such as myself to be somewhat prepared, as best as we can, for the meeting. This is very helpful going into a meeting with a potential client referred by the LRIS – I'm only giving them 30 minutes of my time, so it's helpful to already know what the legal issue is, even if it's just a one-sentence description, letting me know why they're here, if I need to do a little bit of research, get a code section, get a statute, get some information for the client, etc. Sometimes it's a matter of filling out forms, so I already have the forms printed out and we can fill them out together.

These are things that help expedite the meeting and make it more efficient. I think that's very helpful for both the individual coming to see me and myself.

Would you recommend joining the LRIS to young lawyers and lawyers new to this county? Would you say that joining LRIS is a good way to build your practice?

Eric Samuels: Absolutely. 100%. As I mentioned earlier, it's a huge referral source for our firm. But especially as a new lawyer coming to this county, it allows you to start making connections and business contacts with other attorneys and people in the legal community in Contra Costa County.

Most of all, it helps you keep the flow of your business going. Even if you go a week or two weeks without any of the referrals turning into business, it's ok: You're giving back to the community, you're gaining experience listening to other legal problems, you're doing

some research, you're providing a service and then you are going to receive referrals that are going to turn into cases.

The Ethics Corner: When and How to Withdraw

Friday, April 1, 2011

CC Lawyer

Dear Ethics Corner: I have a client I will call Servco. Servco has been my client for five years. They have always been a client who pays promptly and I have never had to battle them over fees, until now. It must be the economy, but they now "nickel and dime" me on every bill. The other day the CFO told me that he did not want to pay me for arranging a deposition date because he said my secretary should have done it. But I have always worked with opposing counsel to arrange dates myself and they always paid in the past. I believe that the more friendly contact I have with opposing counsel, the better it is at settlement time.

The CFO also told me that reviewing documents should be done by a paralegal. The CFO has begun to micromanage the case even to the point of telling me what motions I can file (read: what he is willing to pay for).

I guess I am at my wit's end and want to let this fish go. We are just getting through with the discovery phase of trial so it is a good point to "cut bait." I am worried though that he will fight me on this as I have given him a good deal and cut down his bill more than once in an effort to keep him happy, and I have done it for so long that he might not want to let me out of this case. Also, there is some animosity between us not only because of his tightfisted ways but because he values his case far higher than I do for settlement purposes. I think he sees it as a way to win a financial cushion for the company.

Even worse, I am worried he might say I did something wrong in the case in an effort to hedge his bets; i.e. if he loses, he goes after my

carrier to cover his loss. I anticipate a battle, whether I withdraw or stay in. What should I do?

Very truly yours,

Worried in Walnut Creek



Carol Langford

Dear Worried:

Unfortunately this is a common problem in 2011 and has been for a few years as clients seek ways to cut their costs. Lawyers have to be very careful when a client (who may or may not be a lawyer themselves) tells their attorney what she can and can't do in a case, as it may just set the attorney up for a malpractice suit when the client loses. Generally, clients have the ultimate right to determine whether to accept a settlement offer, but it is the lawyer who must make strategic decisions in a case. You are wise to seek a way out of being Servco's unpaid servant.

First, I would advise you to make sure your file is in order. Look through it and think about any possible complaint your soon-to-be former client could have about your handling of the case. Is there anything left undone or anything which needs to be documented for later proof that whatever occurred happened? For example, if you orally gave your client a settlement valuation of the case, did you put it in writing? Make sure you do before you turn over that file to new counsel. Any “CYA” e-mails or letters should be done now if they were not done before.

Second, you should try to get the client to sign a substitution of attorney form. The problem with that is sometimes clients hem and haw and drag out the process just to keep the attorney in the case and on the hook, even when they are not being paid. I have seen more than one attorney so worried about the client’s anger and a potential suit that he stays in hoping the client eventually gives him a signed substitution.

As they say in New Jersey, “Fuggetabout that noise.” If you cannot get a signed substitution from the CFO, then move on and file a withdrawal motion and base it on a personality clash with your client. A breakdown in the attorney-client relationship is a ground for allowing the attorney to withdraw. The fact that the CFO has a different valuation than you of the case alone may not be grounds for withdrawal. The mere refusal of a client to settle is not a ground for withdrawal because of the client’s right to reject settlement being absolute, unless he reneges on a settlement.

But before you file the motion, really think hard about whether you want to cut this “fish” loose. The economy is definitely improving and that anxious CFO might be less tightfisted as his company starts turning a profit. Ask yourself how much of your disgust with this client is really just your frustration with having to recreate yourself and your billing practices in hard times. The lawyer that cannot be flexible in these trying times will unnecessarily suffer.

If you still want to move forward with the motion, do it in camera and ask that opposing counsel not be present. That is because you have a duty to protect the confidential information of the client and you may have to describe the nature of the conflict with your client

in general terms. But be careful – if you think arguing the merits of your motion will prejudice your client before the judge who will hear his case, ask that the motion be heard by another judge. The bottom line here is to say only what you need to say and to avoid speaking negatively about the client, even though it is tempting to do so.

Lastly, don't charge the client for the motion. There is a North Carolina ethics opinion on this issue that essentially says that a withdrawal motion is really for the benefit of the lawyer and his professional obligation so shifting the cost to the client is unfair. There may be some exceptions to this where it is done with the client's consent to advance his objectives, like in the situation where an insurer wants to be relieved of the duty to defend so the lawyer files his motion.

Good luck with this. It is always hard to say goodbye to an old client. But clients have to compensate you fairly and if they refuse, it is better to move on, market yourself to another CFO and "pray for rain."

Very truly yours,

The Ethics Corner

Carol M. Langford is a lawyer specializing in ethics and attorney in Walnut Creek. She was recently selected to be a NIFTEP (National Institute For Teaching Ethics and Professionalism) Spring 2011 fellow. She is an adjunct professor of ethics at U. C. Berkeley, Boalt Hall School of Law.

The Top 10 Ways the Court Can Save You Time and Money

Friday, April 1, 2011

CC Lawyer

Although these are very challenging times, the Court continues to

look for ways we can streamline procedures or enhance our ability to process documents and payments for everyone’s benefit. Below are the top 10 ways the Court can/will save you time and/or money:

Current Efforts:

1. **The use of “Court Call” to make routine telephonic appearances:** For many types of court appearances, parties are allowed to appear by telephone. In some departments, parties must make arrangements for a telephone appearance by contacting CourtCall® at 1-888-882-6878. Other departments maintain their own protocols for telephone appearances. Please check the court’s website for details at: www.cc-courts.org/phoneappearance.
2. **Expedited Jury Trials:** The Expedited Jury Trials Act (Assembly Bill 2284 [Evans]; Stats 2010, ch. 674, effective January 1, 2011), establishes a new expedited jury trial process as an alternative, streamlined method for handling civil actions to promote the speedy and economic resolution of cases and to conserve judicial resources. An expedited jury trial is heard by a smaller panel of jurors, and the goal is to complete the trial in one day. The parties’ participation is voluntary. The decision of the jury is binding on the parties, and appeals and post-trial motions are strictly limited. A key feature of the expedited jury trial model is its flexibility, which allows the parties to enter into agreements governing the rules of procedure, including the manner and method of presenting evidence and high/low agreements on damages. The scheduling of expedited jury trials and the assignment of judicial officers are left to each superior court. (Visit the CCCBA’s Litigation Section web page to find out more about Expedited Jury trials¹⁵).
3. **Online Court Forms & Forms Packets¹⁶:** The Court has posted all Court forms and forms packets online at no cost to attorneys and parties, which are otherwise available for a fee at the Clerk’s Office.

¹⁵<http://www.cccba.org/attorney/sections/litigation.php>

¹⁶<http://www.cc-courts.org/index.cfm?fuseaction=page.viewPage&pageID=5504> ←

4. **Clerical Backlog Tactical Plan:** The Court has initiated a comprehensive clerical overtime plan to address the mounting backlog of unprocessed court filings, using the Court’s one-time reserves.
5. **Attorney line:** The Court expanded the use of “attorney only” lines to the Unlimited Civil windows in the Clerk’s office in Martinez Monday through Friday 8:00 a.m. to 1:00 p.m.

Future Efforts:

1. **Case File Tracking System:** The Court is exploring the possible installation of a case file tracking system to more easily locate files using microchip GPS technology.
2. **Interactive Voice Response System:** The Court will be replacing its current antiquated telephone system with an Interactive Voice Response (IVR) System with the ability to establish “Call Center” Services to better serve callers.
3. **Instant Check Payment Verification at Public Counters:** The Court will be installing check cashing readers that will debit the checking account when the transaction is processed at the public counter, thus avoiding the subsequent rejection of court filings for non-sufficient funds. The Court recently installed credit card readers to allow credit card payments at all Clerk’s Office public counters, in addition to web-based credit card payments for traffic fines.
4. **High Volume Mail Processing System:** The Court is exploring the possibility of installing a sophisticated mail processing system to more efficiently process high volume incoming mail, primarily for traffic and criminal fine payments.
5. **Electronic Filing System for General Civil:** The Court is anticipating the implementation of electronic filing of general civil documents upon transition to the state’s California Case Management System (CCMS), currently scheduled for 2016.

Keeping it

Friday, April 1, 2011

CC Lawyer

In the world of tax, it is about keeping it, not making it. We share our revenues with Uncle Sam (and Uncle Jerry). Last December, Congress and the President made history with the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act, an amazing collaboration of the parties which took us all by surprise.

So how did attorneys fare? The top income tax rates, which were scheduled to rise to 39.6% from 35%, will remain at 35% for two years. Capital gains rates will remain at 15% and dividends will continue to be taxed at capital gains rates. However, most attorneys in California determine their tax due by calculating their tax under the alternative minimum tax scheme. Under this calculation, taxpayers are not allowed to deduct state income or property taxes. The rate applied is lower than the regular rates, but with California's high state income tax not allowed as a deduction, the alternative tax is the tax paid by most attorneys.



Mark Ericsson

There has been little change in the calculation of the alternative minimum tax. There has been a cost of living adjustment upward in the exclusion. Otherwise, the calculation will remain the same until January 1, 2013. With a presidential election looming in 2012, we will have to wait and see where the rates go in 2013.

More important for attorneys, the self employment tax (and Social Security Tax for those receiving a paycheck) will be cut by 2% for 2011. This is a automatic raise of two percent in the amount taxpayer's keep.

In 2013, attorneys will be taxed an extra 3.8% on their unearned income and 0.9% on self employment income. While retirement income avoids the definition of unearned income, gain of sales of non-business property does not.

All property purchased for the business can be expensed, bringing the current tax bill down. There are a few limitations which won't apply

to most practitioners. On the other hand, it may be advantageous to depreciate the property over a period that will see higher tax rates.

The itemized deduction phase-out is suspended for two years.

Incorporating allows the taxpayer to pay a salary to him or her which will include withholding. If the corporation is an S Corporation, the balance of the income (after deducting the salary) is not subject to self employment tax. As to whether this advantage makes up for the fees associated with incorporating, talk to an accountant.

For those that receive fees from low income tax states such as Nevada, Washington, Texas, Alaska and Florida, the practitioner may want to consider moving to one of those states to receive tax free income. The sad fact is that California is one of the most heavily taxed states. For any attorney with a large taxable event looming in the horizon, it would be well worth the time to analyze the advantages of a change in residency.

For those of us that die, our children will receive much more under the new law. The exclusion (the amount we don't pay tax on) is set at \$5,000,000 with a 35% rate on property transfers exceeding \$5,000,000. The same is true for the gift tax, making this two year window an ideal time to consider gifts. It may be advantageous to wait until late in 2012 to make the gifts since there are a large number of commentators that believe that the estate tax may be repealed before the end of 2012 when the current rates cease.

Of course, part of increasing income is avoiding penalties. Unless it is repealed, you are required to file a form 1099 for payments to corporations and payments for goods (not just services) of over \$600. Amazingly, the legislative record includes billions of dollars as a "revenue raiser" from the \$50 penalty for each failure to comply.

For the self employed, making those quarterly payments is a problem. The estimated penalty is the equivalent of a low interest loan (3% currently – not deductible) and it may be appealing to pass on the payments. The big penalties are associated with failure to file and failure to pay payroll taxes for employees. This should never be an option. The failure to pay tax liabilities carries penalties and interest

roughly equal to market rates, but subjects the taxpayer to the IRS collection process which is an unpleasant experience at best.

Earning more income is at the top of everybody's agenda. Keeping an eye on keeping it can equally profitable.

Mr. Ericsson practices taxation, business and estate planning law as a partner in the Walnut Creek firm Youngman & Ericsson and is a past president of both the Contra Costa County Bar and its taxation section.

Five Ways Attorneys Can Increase Their Billable Time – While Actually Working Less

Friday, April 1, 2011

CC Lawyer

Attorneys know that effective time management is *the* key to maximizing personal productivity and firm profits.

The numbers tell the story and it all boils down to time management. If you bill for your time directly or on an hourly basis, diligent timekeeping is something you must do in order to get paid for all of the work you perform for clients. If you bill on a fixed fee basis, accurate time records help determine how profitable specific clients and projects really are – and if unprofitable, time records help us realize the viability of a client for the long term.

How can you increase your billings while working the same amount, or preferably, less?

1. Make Accurate Timekeeping a Top Priority You must have an accurate account of how you spend your time. Without it, you may lose significant pieces of legitimate billable time. In other words, you *performed* the work, but were unable to bill because you lost track of it.

In fixed fee engagements, accurate time tracking will allow you to gauge the profitability of a given project, client or both. Given the number of hours you put into a project or client, was the engagement worthwhile? Should you quote a higher price next time? Should you ditch a money-losing client? A solid handle on your time will make answering these questions much easier.

2. Reconcile Your Time Daily (At Least) Chrometa¹⁷ recently surveyed more than 500 billing service professionals – a group that included many attorneys – about their billing and time tracking habits.

Respondents that billed hourly estimated they were capturing *only 67%* of their legitimate billable time, so they are working three hours for every two they are able to bill! This means that a firm with \$200,000 in gross billings could be losing as much as a \$100,000 a year for work they performed, but never billed.

How often do these folks reconcile their time? Quite infrequently, they admitted. Over half of all respondents said they usually didn't reconcile their time more than once a week – with some reconciling only monthly and some not at all.

On average, respondents spent over two hours each week on this reconciliation, searching through sent e-mails, calendar entries, notes and other items to build a seat-of-the-pants, somewhat inaccurate “forensic analysis” to reconstruct their time.

As you'd expect, respondents who reconciled their days more accurately and more frequently were able to account for *all* their time.

3. Record Your Time Concurrently Do you remember what you worked on yesterday morning? How about Tuesday of last week?

After the fact, it's very difficult to recall exactly what work you performed. We're all busy throughout the work day amidst a barrage of interruptions – the phone rings, an e-mail hits your inbox – you know the drill. It's getting harder and harder to focus.

¹⁷<http://www.chrometa.com/>

The longer you go without recording your time, the more difficult it is to recall. The optimal time to record your time is to do it *as you are working on something*. Granted, due to the ever-increasing urge to multitask, this is easier said than done, but you'll make your life a lot easier if you can jot down notes or time entries as you work.

4. Work on One Thing at a Time Interruptions are a real killer. It's amazing how fast you can get something done – if that's all you do. These days, we sit at our computers in a state of “continuous partial attention.” We mentally register everything, while comprehending little.

What you really need to do is to look at everything you have on your list and pick the *single most important thing*. Then work on it, uninterrupted, until it's completed.

By far, the uninterrupted part is the toughest. It's very easy and tempting to check your messages, answer the phone, respond to an instant message or click over to a website, but if you can master the ability to focus singularly on one thing, you'll boost your productivity significantly. You'll be able to work maximize your productivity by working smarter.

5. Invest in a Mobile Smart Phone Smart phones have come a long way from the infamous “Crackberry” devices of yesteryear that seemed to merely tether us further to our e-mail inboxes.

The leading mobile smart phones on the market today – Apple's iPhone and Google's Android – are graceful devices that not only improve your productivity, but liberate you from your desk and office.

The ability to read and respond to e-mail anytime, anywhere, can greatly help you stay on top of your inbox. Personally, I never realized how much time I previously lost while running day-to-day errands – such as standing in the grocery store line. Now, instead of scanning National Enquirer headlines, I'm cranking through e-mail – and best of all, my device automatically synchronizes with my desktop e-mail client. Pre-Android, I had to wrestle my large Windows laptop into operation just to get to e-mail. Now, it's right in the palm of my hand, available on-demand.

Of course, you'll want to be sure to capture the time you spend reading and responding to e-mails. But don't worry – there's an app for that!

About the Author

Brett Owens is CEO and Co-Founder of Chrometa¹⁸, a Sacramento, Calif.-based provider of personal time-capture software for the legal community that records activity in real time. Gains include the ability to discover previously undocumented billable time, saving time on billing reconciliation and improving personal productivity. The newest version¹⁹ of Chrometa takes advantage of current technologies through a web-based interface. Brett is also a blogger and founder at ContraryInvesting.com²⁰, as well as a regular contributor to two leading financial media sites, SeekingAlpha.com²¹ and Minyanville²².

What are the warning signs that tell you when it's time to get out of a case?

Friday, April 1, 2011

CC Lawyer

- When the client wants to pay the retainer over time. Remember that old saying “The most money I ever made on a case is the one I didn't take” – *Matthew Guichard; Guichard, Teng & Portello*
- The client starts telling me about all these attorneys (without naming any names) who achieved the client's desired outcome in a case “identical” to the one at issue after I've told the client it's not going to happen in his/her case. – *Warren R. Peterson*

¹⁸<http://vimeo.com/16255493>

¹⁹<http://app.chrometa.com/>

²⁰<http://www.contraryinvesting.com/>

²¹<http://www.seekingalpha.com/>

²²<http://www.minyanville.com/>

- Insufficient probability of economically or ethically achieving the client's goals. – *Tom Cain*
- Stories from a friend, nothing bad ever happens to me. I know nothing about these scenarios. Sign that one should get out of a case: Long telephone calls from client, where client tells attorney what the law is, repeatedly, with cites, where client is wrong. (If client was correct, but just annoying, it wouldn't be so bad, but client is profoundly legally inaccurate.) And simultaneously same client denies ever receiving significant emails undercutting client's factual case, when opposing side produces copies of such emails. Lots of yelling. – Did lawyer get out of case? No. Stupid lawyer. Similar but slightly different – long haranguing desperate phone calls or frequent very urgent irrelevant emails from client, referring attorney to articles on the internet about the generic legal problem faced by client. – Did lawyer get out of these cases? YES. Happy smarter lawyer.
- When your client starts blaming you for her/his decision to marry the opposing party. – *Timothy Hyden*
- When they think I'm their therapist and not their lawyer. – *Merritt Weisinger*
- When the client starts to nit-pick the bill. – *Merritt Weisinger*
- In my practice, if the client sounds rational it's time to leave. – *Merritt Weisinger*
- When my client threatens bodily harm, I have to start considering whether the relationship has deteriorated to the point . . . – *Anthony Ash*
- When the client cut-and-pastes different emails that I wrote to her, adds text I never stated and forwards the new email message to her employer claiming it came from me. True story!?" – *Jennifer*
- 1- When the client does not pay on a timely basis; or simply does not pay and the A/R gets out of hand. 2- When opposing counsel is so obstreperous that headway for settlement is frustrated and the issues cannot be resolved between counsel and must go to

the court for resolution. – *Richard Z. Schatz; Schatz Financial Group*

- When your client’s demands and volume of their voice exceed the size of the funds in your trust account. Alternatively, whenever you have to repeat for the 10th time what an order means and what the consequences could be to ignore or violate it. – *Dan G. Ryan; Law Office of Dan G. Ryan*
- When your client is lying to you. – *Ian R. Greensides; Law Office of Ian R. Greensides*
- Sure signs are – client’s retainer check bounced; client is past due 60+ days; client tells you nothing and refuses to give you information to assist the client; client thinks you are a hired gun and should go “get” the defendant no matter what. Softer signs are - client has stopped replying to your emails; client suddenly remembers the truth after a disastrous deposition; you discover client has greatly overstated damages. – *Wayne V. R. Smith*
- When the opposing client is on her 4th attorney, who thinks it’s fine to call me “Darlin” and my client ran out of money \$50,000 in fees ago, and the case is originally set for a two day trial in Oakland, but instead has been conducted in 3 hour sessions, with the 15th such session starting 2 ½ years after the first began. (Ok, I confess, it’s a compilation, but all true. . . .) Sadly, it’s usually when conditions are at their worst that it’s the least feasible when conditions are at their worst that it’s the least feasible to leave a case in good conscience. . . (Maybe I should’ve been a social worker. . . .) – *Mary McNeil, Law Offices of Mary McNeil*
- When the client refuses to listen to reason, and wants you to do something that simply isn’t supportable by the facts and law before you, and when the bill doesn’t get paid. – *John T. Schreiber, Law Offices of John T. Schreiber*
- The client stops communicating. – *Darcy Keith; DJKeith Associates, PC*
- I begin to look for warning signs at the initial consultation. How many attorneys has this client already been through? How

many ex-parte motions have they initiated and why? (This one usually applies if the client started in pro per.) Has the client appealed any court decisions, and if so, how many times? If everything checks out at the initial consultation stage and I start working on the case, the first warning sign is the client whose expectations defy reality and resist all of my attempts to adjust them. . . . And of course, the clearest sign that it's time to "get out", is the client who goes MIA and doesn't pay the bill.

- When the client tells you, during court ordered mediation, that they don't need to compromise because god is on their side. . . and since I suspected something like this might happen, I brought along a substitution with me and had the client sign before we left the mediation. – *David S. Pearson, Law Offices of David S. Pearson*
- My firm does a lot of probate and trust litigation and trials, typically often involving disputes between siblings (and their family dysfunction, which we all have to a certain extent!). Here are some of the signs we have found that it may be time to get out of the case: 1) You realize that what your opposing counsel has been saying all along about your client is all true. 2) You realize that your client's dysfunction is the victim mentality, and your client, not too long into the case, includes you in their long list of controllers and oppressors. 3) You realize that your client does not want to give an inch or a dollar to settle their case, but ultimately complains about how much it has cost them to have you try the case, and thinks that you should severely discount your fees. – *Peter Sproul; Mullen & Sproul LLP*
- You dread calling the client, delay sending casework information, delay sending the bill. Time to get out. – *Jerome Fishkin*
- If the intake interview takes more than 3 pages of notes, this is a sign. If the client tells you that he has a number of attorney friends who have told him that he has a great case, but they can't do it because they are "too busy", start composing your kiss off letter. If the client calls you collect from jail, wants

your cell phone number or uses the phrase “trust me” more than once in a conversation, it is time to bail. – *Ronald Rives, Esq.*

How to Make Your Law Practice More Satisfying – Lawyers in the Library

Friday, April 1, 2011

CC Lawyer

Even when we love law practice, it can become stale after 20 or 30 years. For younger lawyers, volunteer opportunities develop associations with more experienced practitioners. New approaches, ideas and relationships offer pleasure. This is particularly so when the lawyer is not taking on responsibilities and problems which will stretch into months and years.

A chance to enjoy pure law is available through the “Lawyers in the Library” program at the Contra Costa County Public Law Library in Martinez. Carey Rowan, Librarian, and the library staff graciously host this program on the second Tuesday of the month. From 1:30 to 4:30, volunteer attorneys meet with self-represented individuals. There is no confidential meeting and no attorney-client relationships are formed. The attorneys work in tandem in the conference room. Questions are asked, stories are briefly told (20 minutes per individual), and general legal information and direction is given. It is a grounding and gratifying experience.

About twenty members of the public usually come in, sign the information form, and wait their turn. Most are grateful for any assistance they can get. Recently, more individuals are coming in with foreclosure problems and credit card debt. Some decide to try to pay their bills, some decide to negotiate, some consider bankruptcy, and some decide to assert defenses. We point them to resources in the Law Library, to legal service and clinic programs, and to the moderate means programs available through the Contra Costa County Bar Association (925) 370-2544.

For most of us, it is a pleasure to practice law in this County. My law practice focuses on contested probate, will and trust matters. Over the years I have learned that many of our colleagues quietly provide pro bono service. One such example is the guardianship assistance program being offered by Mark Frisbie (925) 947-1714 and Gloria Sanchez. If you are not satisfied with your work, maybe it's time to stop and smell the roses.

To volunteer with Lawyers in the Library, please contact

Thomas W. Cain, Program Director

The Congress of Neutrals

(925) 937-3008

www.congressofneutrals.org

Toxic Client Syndrome

Friday, April 1, 2011

CC Lawyer

*This article, previously published in the March/ April 2008 issue of FORUM magazine²³, Consumer Attorneys of California, was provided to the Contra Costa Lawyer by Fishkin & Slatter LLP. Thank you!

The State Bar discipline system is largely driven by disgruntled clients who complain about their attorneys. Many of those likely complainants can be identified well in advance. We use the term Toxic Client Syndrome to describe those clients who are likely to cause trouble for the otherwise competent, ethical attorney. These clients will lodge State Bar complaints against you, challenge your fees, and try to find ways to sue you for malpractice. Even when the client's underlying case is just, the client is going to be a source of trouble for you.

²³<http://cclawyer.cccbba.org/wp-content/uploads/2011/03/Toxic-Client-Syndrome.pdf> ←

Toxic Client Clues at the Pre-Retainer Stage When a prospective client comes calling, the following are examples of people who are likely to be toxic clients.

Whenever a client comes to you after being represented by multiple attorneys, the sheer quantity of those previous attorneys tells you that this is a difficult client. Typically this sort of client has unrealistic expectations, either as to case outcome or attorney fees. Or both.

Be very suspicious of the client who comes to you on the eve of an important deadline. People with good legal cases seldom wait until the last minute to seek counsel. Typically, they have been rejected by several attorneys before you, for reasons you will soon discover. Be doubly suspicious if you are a new attorney with no connection to the prospective client.

JF: In my first year of practice, I accepted a dog bite case on the eve of the expiring statute of limitations. It turned out that the “vicious dog” was a miniature poodle, there were no medical records, and the client had been streetwalking in front of the defendant’s house at the time of the alleged attack.

Watch out for the overbearing client. This person rejects your initial observations and advice. Or they will constantly interrupt you to make a point. They wave off your observations of problems in their case. They will later blame you for the bad outcome and deny that you ever warned them of the downside.

Also be wary of the client who assures you that the other side will settle or cave in as soon as you write “just one letter.” Or the one that reiterates that the case is a “slam dunk” and won’t take much time. If the prospective client makes dishonest overtures up front, they will generally be doing dishonest things later. The person who offers a discount cash payment (wink wink) will probably lie under oath, too. So will the client who asks, how should I testify about how fast I was going at the time of the accident?

The prospective client who can’t afford your retainer, or objects to your hourly rate, is going to be a person who won’t keep up with the bill. Remarkably, that client gets angry at you for wanting to be paid. Ironically, the client who is starting a lawsuit “for the principle, not

the money,” is never going to be satisfied with the outcome of the case or the attorney.

The foregoing are types of cases that the objective, thinking attorney can see coming. But there are situations that rely less on facts and more on feelings. Thus, we advise attorneys to decline people with whom there is a personality clash. Sometimes two people just don't mix well. They may be perfectly good clients, but not for you.

Hardest for attorneys is the rule, obey the queasy feeling in the pit of your stomach. We attorneys are trained in reason and logic. We sometimes feel there is something wrong with the prospective client, but we overrule our internal warning system because we can't figure out what's wrong. If you don't follow your intuition, you will find out later (read the rest of this article).

Our Advice: Turn down the prospective client Do so with neutral language. Skip the urge to bill for the consultation. Do not quote an outrageous retainer to scare them off. Sooner or later, somebody will pay it, and you will rue the day you overrode your good judgment to accept the client.

The good news is that this is the group of toxic clients least likely to cause you trouble, if you simply decline the case. However, it is always a good idea to stick to neutral language; you never know where that letter will surface. And always document your declination.

JF: As this article is written, an opposing party has made a motion to disqualify me because he alleges we spent 15 minutes discussing his case. My phone bill shows 2 minutes, and my phone note shows that he told me he had already employed other counsel by the time I called him back.

We now turn to two categories of toxic clients who cause you a lot more trouble – those whose problems surface after you have accepted the case, and those whose problems surface after the case has settled or gone to verdict.

Clients Who Become Toxic Once the Relationship is Underway Beware of the partial bill payer. This person makes partial payments on all bills, but the balance keeps growing. You can't just quit working

on the case. Rule 3-700 expressly requires us to continue protecting client rights until we are discharged.

LKS: The State Bar is not concerned with the balance due when evaluating a possible disciplinary case, only the process by which you withdrew.

Be suspicious of clients who cannot produce simple documents, such as bank statements or phone records. Perhaps they cannot document work history or obtain mechanic's bill for car repair. They are generally hiding something. The defense will probably find it, and the client will generally blame the attorney for what goes wrong when the hidden information finally surfaces.

There are demanding clients, and there are overly demanding clients. The latter call you daily, or ask you to repeat explanations of routine things repeatedly. They get overwrought about simple things. They get upset if you don't call back within an hour, or if you are unavailable at odd hours.

JF: I will be trying a case later this year, where the client showed up at random times at the attorney's office to inspect the file. When the case ended, sure enough, a lot of paper was missing from the file.

Unrealistic clients are always a challenge. Most clients hope for a better outcome than we can reasonably achieve. The Toxic Clients want promises of success. They want a guaranteed maximum bill, or a minimum guaranteed recovery. The unrealistic will hold to their goals in spite of all reason or logic. The spouse who wants 90% of the community property, the client who insists on a \$1,000,000 offer for whiplash, the parent who believes you can magically make a juvenile offense disappear – those are a few of the common examples.

LKS: The State Bar is not concerned about the viability of the client's claim, simply with what you did (or did not do) during the course of the attorney client relationship.

How do you deal with clients who threaten you with malpractice suits or State Bar complaints in the midst of the representation? Even if you finish the case with an outstanding result, they will probably do so anyhow.

Never put up with abusive clients. In our office, staff has authority to hang up on abusive callers. The lawyer then explains to the client, we do not tolerate any personal abuse, and if it ever happens again, we will fire the client.

Once again, the foregoing can usually be assessed primarily on objective facts. The next group can slip by you for a long time, unless you are attuned to the signals.

I can't stand it anymore Sometimes there are clients who grate on me over time. They were okay for a week or a month or a year, but I wake up one day and realize that I dread dealing with that person any more. Time to send the client to somebody who can deal with their shtick.

Bad people mix. Sometimes I get along quite well with the client, opposing counsel, and judge, as long as I don't put them all in one room at the same time. Some groupings of people just don't work.

The Solution: Get Out of Dodge . . . but do it in accord with the rules *LKS: Remember – The State Bar does not care why you withdrew, only that you withdrew in accord with the rules.*

The disciplinary principles that govern client withdrawal are:

(1) We have to give the client adequate notice, so the client has a reasonable time to try to employ another attorney. The more complicated the case, the more lead time the client needs.

(2) We cannot withdraw at a time or in a manner that would prejudice client rights. We can't withdraw on the eve of trial or a hearing on MSJ. Client consent may not save you from the State Bar case, as the client may not realize the significance of substituting you out at the last minute.

(3) If we are in litigation, we have to follow the rules of the forum for withdrawal. The closer you are to a trial date, the less likely you will get an order of withdrawal. Judges are very protective of their calendars.

The decision to withdraw from a case should be viewed as a business decision. That is, I have decided to quit doing business with a specific

customer. I now want to cut my losses and move on with the profitable side of my business.

Generally speaking, the longer you represent the toxic client, the more grief you will see at the end. So make the decision, organize the file, tell the client, and persistently push the withdrawal until it is completed.

Keep your cool, act like the professional you are, and always use neutral language. I like to tell the fired client that the attorney-client relationship is no longer working, so it is time for them to get another attorney. No blame, no detailed explanations. This person will never speak well of me, but I don't want to give them more ammo to use in State Bar complaints, malpractice cases, fee disputes.

Be careful about suing for fees or asserting liens, especially when the amounts are relatively low. Your time is probably better spent on happy, fee-paying, current clients. Remember: this is a business decision, not a religious epiphany. You can easily spend 20 – 30 – 40 hours on a fee dispute. Even if you are successful, and even if you are not cross complained for malpractice, what kind of results can you expect in the fee dispute versus the next case, for that sort of time?

In these circumstances, don't be petty, and do avoid useless arguments. For example, don't have the client come pick up the file; send it via some form of delivery that will show proof of delivery. Don't ask the client to sign a document that says they got the whole file. (How does the client know?) Don't get in the blame game, because you can't win the argument.

Clients Who Catch Us at the End Gotcha! The case is over, and the client tries to get leverage by one or more of the following:

- The client demands a fee waiver or concession because you didn't get a written fee agreement, or you got sanctioned in discovery, or the judge made disparaging remarks about your presentation.
- The client refuses to complete a settlement.

- The client threatens a State Bar complaint if you don't reduce your fee.
- The client threatens a legal malpractice suit if you don't reduce your fee.

This is probably the worst time to develop attorney properitis (the hidden disease that renders attorneys totally unable to act rationally while representing themselves).

We have seen attorneys turn what should be low grade disputes into unmitigated disasters by taking steps on their own behalf that they would never take on behalf of clients. ("But," they exclaim to us, "that ungrateful client ... (well, reader, you fill in the blank here)")

The Solution: One size does not fit all Sometimes, a frank chat with the client will resolve the issue. If the client won't consummate a settlement, explain (first orally, then in writing) the time and cost of resisting a valid settlement. Explain what your role can, and cannot, be.

Many clients believe that you forfeit your fees due to some perceived breach, when in fact you are entitled to a reasonable fee. (See Bus. & Prof. 6147(b), 6148(c), and *Huskinson v. Wolf* (2004) 32 Cal.4th 453.) Many clients get third-hand advice about fee forfeiture and back off when confronted with the reality.

Other times, you have to offer a concession, or it is practical to do so. (See business decision vs. religious epiphany, above). Other times, it is more prudent or actually necessary to hold firm to your position.

LKS: We used to joke in my previous law firm that the real negotiations did not begin until the settlement was collected.

Don't Make Rookie Errors While Dealing with Toxic Clients While lawyers should always document their files, it becomes very important to do so at this juncture. Your actions may be scrutinized, so don't stay stupid things. Especially in print.

Stay on message and use neutral terms. For example:

I am entitled to a reasonable fee for my services and will enforce my rights.

or

I am going to ask the court to let me withdraw. I will file my motion next Friday if you have not obtained new counsel.

Remember: you still have to protect client rights while getting out of a case. So you can't let deadlines pass, even if the toxic client is resisting your efforts and not paying. Similarly, you cannot make any agreement that the client will not make a State Bar complaint, or withdraw one, or not cooperate, as part of a civil settlement. You cannot threaten the client with criminal prosecution, bad publicity, or release of client secrets. And no, you can't "sort of imply" these things.

Don't swap insults, try to one-up the client, or otherwise demonstrate that you can be a bigger jerk than the client. If your conduct is reviewed by a third party (State Bar, malpractice lawyer, fee arb panel), you want to look better than the complaining person. If you have to defend yourself at the State Bar, or in any other forum, you want to look professional. Nobody likes a screamer or a name caller.

LKS: We have sometimes heard State Bar personnel complain about the complainant, compliment the attorney, then follow by closure of an investigation that, maybe, could have gone forward if the roles had been switched.

Angry, self righteous letters, rarely do you any good. Dispassionate ones generally do. Long, self-serving file notes always look suspicious.

JF: I recently represented a person in a State Bar settlement conference, in which the judge's first comment was, why didn't he fire the client early on?

Conclusion The readers of this article represent injured consumers in an adversary system. Most of our clients appreciate what we do and how we do it. Some do not, and we should be aware of that latter group of people. The writers preach the gospel of "business decision." That is, the more you can regard these sorts of people as bad business,

and the less self-righteous you are about the situation, the more likely you are to make sensible decisions about what to do.

Toxic clients are likely to lodge State Bar complaints, file fee arbitration for refund of fees, and shop the file around for a legal malpractice suit. In the more extreme cases, they will complain to the D. A., picket your office, or set up an attack website. Thus, the sooner you identify this sort of client, the sooner you can take preventative action.

Post Script We wrote the last draft of this article while in the middle of representing an attorney who was the victim of a toxic client, who in turn was part of a group of otherwise nontoxic clients. He had to file several motions in the main case, just to deal with the problems caused by one client. He has been through a one-week malpractice trial.

Everything he did in both cases is now being challenged in a State Bar trial that will take 10 to 15 days to complete. Even if he is fully vindicated, the time and costs are enormous. And that is before the aggravation and sleepless nights second-guessing more than ten years' worth of decisions.

Jerome Fishkin and Lindsay Kohut Slatter specialize in Attorney Professional Responsibility and Conduct. In addition to State Bar defense, they testify as expert witnesses, advise attorneys on ethics and law practice management, and assist in the fun stuff – contempt hearings, disqualification motions, sanction attempts.

Mr. Fishkin was a general practitioner in the 1970s, then was employed by The State Bar from 1978 to 1992. He was the senior prosecutor of disciplinary cases when he left the State Bar. His trial experience includes both jury and court matters, ranging from half-day prove ups to a 26-day trial, as well as appellate matters.

Ms. Slatter began a general practice in the 1970's that soon became the plaintiffs' law firm of Slatter, Slatter & Kiesel. She began representing attorneys at the State Bar in 1989 and began specializing in attorney conduct cases in 1993. Jerry and Lindsay established

their partnership in 2006 and practice law in Walnut Creek. www.FishkinLaw.com

Getting Out Alive

Friday, April 1, 2011

CC Lawyer

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Every once in a while, we have to withdraw from a case in progress. We all have “dog” cases, and the sooner we get out of them, the better. We also know that this action can easily bring client retribution: a malpractice suit, State Bar complaint, and certainly a suit for fee refund. Thus, we have to take protective action while simultaneously protecting our client’s interests.

It is possible to do both. And there are ways to lessen the chances for retaliation while leaving your client – and your reputation – intact.

STEP ONE: Decide to Withdraw As recognized in the case law, the most typical reason we withdraw from a case is because we think it’s a loser. *Kirsch v. Durvea* (1978) 21 CaL.3d 303,311,146 C. R. 218. Another typical reason is because of a personality conflict with the client. Cases of the first sort waste everybody’s time. Both types of cases cause us grief. No matter how the latter type of case turns out, the client will bad mouth us and probably seek retribution anyhow.

A third type of case is the good case that is beyond our skill level to handle. In this age of specialization, it is nothing to be ashamed of. And it’s an ethical requirement to associate other counsel or withdraw. Rule 3-110(B), Rules of Professional Conduct (RPC). We

²⁴<http://cclawyer.cccba.org/wp-content/uploads/2011/03/Getting-Out-Alive-S-F-Attorney.pdf> ↵

do our clients a service when we tell them it is time to bring in a specialist. We encourage repeat business when we help find that specialist for them.

I believe that much client ill will stems from our breathing hot and cold in the last days or weeks before we finally withdraw. Our discomfort with the case is felt by the client even if not known consciously. The client would often prefer a clean break, rather than a false hope followed by a letdown.

The decision can be personally awkward for us as attorneys. It may be that the initial unease we felt at accepting the case has now transformed into a real clear problem. Or the new facts we have turned up have just demolished an excellent case. If the client is not paying our attorney fees due to financial troubles, our withdrawal comes across as kicking a person who is down.

Then there's our own greed. Lawyers stay in many cases too long because the case looks – or looked – good financially. We have the hope – often an illusion – that if we just hang in there, the big payoff will occur. Usually, though, it turns out to be a nasty payback. The consequences of staying in the case usually outweigh the consequences of getting out. So, make the decision to withdraw and don't look back.

STEP TWO: Determine that it is still possible to withdraw Rule 3-700(A)(2) of the State Bar Rules of Professional Conduct (RPC) states in part: "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client"

In litigated cases, withdrawal is always subject to the discretion of the court. It is usually foreseeable prejudice to withdraw on the eve of trial. *Vann v. Shilleh* (1975) 54 Cal. App.3d ;92, 196, 126 C. R. 401. Even with client consent, a withdrawal can be overruled by the court if the withdrawal would cause undue hardship on the legal system. *In Re Jackson* (1985), 170 Cal App. 3d 773, 216 C. R. 539.

Similarly it would be foreseeable prejudice to withdraw just before the statute of limitation expires, or just before a stock offering is made. The perspective must be from the client's viewpoint.

STEP THREE: Organize the file Attorneys who withdraw usually leave clients with messy files. It is better to straighten them out. The client benefits by having a clear file. You benefit by making the possibility of substitute counsel easier. As you organize the file, you will probably clarify and reinforce your own reasons for withdrawing. You may see clues in this case that will prevent a repeat problem in the next case.

Another excellent reason to organize the file is your own reputation. That file will be shopped around town to successor counsel and to plaintiff's malpractice attorneys. One of the few occasions that other attorneys see the inner sanctums of our work is when they review our most troublesome case files. At least the dog should be groomed when it goes out.

Having re-organized the file, copy it and number the pages for self protection. The client is entitled to the client file on request. RPC 3-700(0)(1). The attorney may keep a copy at the attorney's own expense. See the official comment to RPC 3-700. The file may not be held hostage for unpaid fees or costs. *Academy of California Optometrists v. Superior Court* (1975) 51 Cal. App.3d 940. The client may not be entitled to un-communicated work product, but the issue is unsettled. See *Rose v. State Bar* (1989) 49 Cal.3d 646,655, and *Weiss v. Marcus* (1975) 51 Cal. App.3d 590.

STEP FOUR: Tell the client Having made the decision to withdraw, you must promptly notify the client *Pineda v, State Bar* (1989) 49 Cal.3d 753.

Rule One: Call first

It is the attorney's obligation to tell the client before filing a motion. *Kirsch v. Duryea* (1978) 21 Cal.3d 303, 311, 146 C. R. 218. By starting with the phone call, you treat the client in a more humane way. An impersonal "Dear John" letter is more likely to anger the recipient than a more personal phone call. An angry client is a vindictive client especially if the outcome is as poor as you believe it will be.

Some clients will be surprised. Most of them see it coming, kind of like a divorce. The phone call is a lot more personal than a letter. It

lets the client blow off steam. You can acknowledge and validate the client's anger and you will gain valuable insight on issues to address in the follow-up letter.

Rule Two: Write the letter

A phone call is not enough. You must actually write the client a letter. *In Re Hickey* (1990) 50 Cal 3d 571, 580. The letter must make it clear you are withdrawing. It is generally presumed that you must warn the client of any statute of limitations or absolute deadlines such as five years to trial. See *Hickey* at page 580 and *Kirsch* at page 307.

Encourage the client to seek new counsel. One attorney's problem is another's solution. In one office of mine, we used to swap dog cases. The receiving attorney often rose to the challenge. Also, if you tell the client the case has no merit, the client may dismiss the case. Later, the client may sue you and locate an expert who testifies that the case had merit. *Kirsch v. Durvea* (1978) 21 Cal. 3d 301, 146CR. 218. Who will the jury believe?

Rule Three: Use neutral terms

Few cases have no merit. Many are difficult to prove. Others have good liability with minimal damages. It is easy to acknowledge a personality conflict. There is no need to blame it all on the client's obtuse refusal to follow your sagacious advice.

Even if the client has quit paying fees, you don't have to be accusatory ("you have failed to live up to your side of the deal"). You can be more neutral ("your bill is now 90 days overdue"). The primary purpose of this neutrality is to defuse your client's anger. Another purpose is to look reasonable if you get sued. See *Estate of Falko* (1987) 188 Cal. App.3d 1004,233 CR. 807. The fractious attorney-client dispute, regardless of fault, is now on record. Certainly the trier of fact was not disposed to rule for the attorney, even if he was right.

At this point, you're not off the hook. You still have to represent the client until a new attorney substitutes in. *In Re Jackson* (1985) 170 Cal. App.3d 773, 781. Courts and opposing counsel must deal only with you, not your client Civ. Code 285; RPC 2-100(A). And you still have some power to act. *In Re Borson* (1974) 37 CalApp.3d 632.

STEP FIVE: Follow through

In non-litigation cases, you can send several letters to the client reiterating your decision. In extreme cases, send it registered/return receipt, or even have it “served” on the client.

In litigated cases, any withdrawal must be signed by the client or approved by the Court. CCP 284; RPC 3-700(A)(1). In any event, it is the attorney’s obligation to effect the withdrawal. *In Re Hickey* (1990) 50 Cal.3d 571,580. Certainly the attorney can’t remain silent and let the case die. *Davis v. State Bar* (1983) 33 Cal.3d 231, 238, 188 C. R. 441. The motion to withdraw should be couched in neutral terms if at all possible.

I am amazed at the amount of damaging, anti-client information some attorneys place in public declarations. This practice would appear to violate RPC 3-700(A)(2) prejudicing the client. The practice would appear to constitute a release of client secrets in violation of Bus. & Prof. Code Section 6068(e), and Rule 376(b) of the California Rules of Court (CRC). Courts cannot coerce release of confidential client information. *Leveresen v. Superior Court* (1983) 34 Cal.3d 530, 537,194 CR. 448. See also Evidence Code section 917. However, judges sometimes need to be reminded forcefully; Mr. Leversen had to take up a writ to enforce the principle.

The mere making of the motion already telegraphs to the world that you lack faith in the merits of your client’s case. *Kirsch v. Durvea* (1978) 21 CaL.3d 303, 311, 146 CR. 218. If at all possible, I would base the motion to withdraw on RPC 3 -700-(C)(1)(d), “. . . conduct (that) renders it unreasonably difficult for the member to carry out the employment effectively . . .” The declaration can assert that further detail would require release of client secrets and cite both Leversen and Kirsch. You can represent that as long as you and the client are not in adverse litigation, there is no need to release the information publicly.

Again, you have accomplished several goals. You have protected your client’s interests, the paramount attorney duty under Bus. & Prof. Code Section 6068(e). You have maintained your own integrity

in a difficult situation. You have warned the client that if there is retribution, your reasons for keeping those secrets are gone.

We cannot prejudice our clients, but we can protect ourselves. See Evid. Code Section 958. CRC 376 sets out specific requirements for notifying the client of the motion and for proving to the Court that you have done so. Don't overlook local rules either. Rule III-I of the "Law and Discovery Policy Manual" of the Los Angeles Superior Court has very stringent rules. On the other hand, compliance with them will avoid later accusations that you concealed any action from the client.

And As For Fees... The rules and case law treat contingency fee cases different from others. If you have already collected fees, you may keep what you have earned but you must repay the unearned fees. RPC 3-700(D)(2). No refund request is required by the client.

Your "minimum nonrefundable" fee may turn out to be an illusion. Study RPC 3- 700(D)(2) and the case law. Unless you were paid a "true" retainer (in plain English, a signing bonus) what you received was really a prepayment on fees. This prevailing practice is often won by attorneys in civil litigation, only to be lost in a State Bar ethics trial.

Generally speaking, when an attorney voluntarily withdraws from a contingency fee case, the right to any portion of the fee disappears. Unless the withdrawal is based on really egregious client misconduct, the California attorney is going to lose out on any contingent fee otherwise due. The case law is somewhat contradictory, full of dicta, and best read in chronological order. See *Pearlmutter v. Alexander* (1979) 97 Cal. App.3d Supp. 16; *Hensel v. Cohen* (1984) 155 Cal. App.3d 56}; *Estate of Falco* (1987) 188Cal. App.3d 1004.

Most attorneys will gladly give up the possible fee just to bail out of a bad situation. Those who don't usually get burned in court anyhow. So unless the ex-client picks the fight, cut your losses and move on.

Concluding Thoughts There may be 50 ways to leave your lover but there are far fewer ways to leave your client. There are a myriad of ethical risks. There is an immense civil exposure. Several local colleagues will pick over your dog of a case. So you might as well

break decisively and break cleanly. It may be a painful experience, but we can learn from it.

Jerome Fishkin and Lindsay Kohut Slatter specialize in Attorney Professional Responsibility and Conduct. In addition to State Bar defense, they testify as expert witnesses, advise attorneys on ethics and law practice management, and assist in the fun stuff – contempt hearings, disqualification motions, sanction attempts.

Mr. Fishkin was a general practitioner in the 1970s, then was employed by The State Bar from 1978 to 1992. He was the senior prosecutor of disciplinary cases when he left the State Bar. His trial experience includes both jury and court matters, ranging from half-day prove ups to a 26-day trial, as well as appellate matters.

Multitasking and Task Switching

Friday, April 1, 2011

CC Lawyer

From the website of the Brain, Cognition, and Action Laboratory, interesting insights into multi-tasking and task-switching – recommended by our Guest Editor:

Multitasking and Task Switching²⁵

Thinking About the Unthinkable: How to Guard Against Fraud and Embezzlement in Your Firm

Friday, April 1, 2011

CC Lawyer

From the American Bar Association's Law Practice Magazine, our Guest Editor suggests the following article for further reading:

²⁵[http://www.umich.edu/\\$sim\\$bcalab/multitasking.html](http://www.umich.edu/simbcalab/multitasking.html)

Thinking About the Unthinkable: How to Guard Against Fraud and Embezzlement in Your Firm²⁶

²⁶http://www.americanbar.org/publications/law_practice_home/ ↔
[law_practice_archive/lpm_magazine_articles_v35_is4_pg34.html](http://www.americanbar.org/publications/law_practice_archive/lpm_magazine_articles_v35_is4_pg34.html)

