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The Yelper and the Negative Review: the Developing Battle Over Nondisparagement Clauses

Vol. 3, No. 10

Noah C. Davis

Noah Davis of INPACTA PLLC (www.inpacta.com, info@inpacta.com) is a general practitioner who handles a substantial amount of litigation crossing a wide range of matters from commercial law and contracts to personal injury and family law. Noah Davis is licensed in the State of Washington Only, and admitted to all courts in the State of Washington, and the following courts: USDC for the W.D. of Washington, 9th Circuit Court of Appeals, United States Supreme Court, and United States Tax Court.

As we lawyers know, nondisparagement clauses are often included in settlement agreements much like a confidentiality provision. And, just like confidentiality provisions, nondisparagement clauses are generally enforceable in settlement agreements and interpreted under basic contract law requiring offer, acceptance, and consideration.

A great example of the enforceability of settlement agreements that contain confidentiality agreements is the Gulliver Schools¹ case out of Florida. There, Patrick Snay, the former headmaster of a private school, brought a claim for age discrimination. The case settled, and Snay was to be paid \$80,000. However, the settlement agreement included a confidentiality agreement. Before he received his settlement proceeds, Snay breached the confidentiality clause of the settlement agreement by informing his daughter that he had settled with the school. And how do we know that? Well, Snay's daughter was kind enough to post a snarky comment about the school on Facebook (which included a reference to Gulliver Schools paying for her trip to Europe and the parting shot: "Suck it.") When the school learned of the Facebook posting, it refused to pay. Although the trial court had ruled in favor of Snay (who had brought a motion to enforce), the Florida Court of Appeals agreed with the school and reversed. The Florida appellate court found that the bottom line was that the confidentiality clause was clear and unambiguous, it was breached, and disgorgement was the articulated remedy.² So goodbye \$80,000.

So I guess Gulliver Schools did suck it, sucking back the nice sum of \$80,000.

So what about confidentiality and nondisparagement clauses outside the world of settlement agreements? Well, the trend we're seeing with nondisparagement clauses is that they're moving from this sit down, lawyered up world of prenegotiated settlements to the world of nonnegotiated service contracts and even online purchases (containing often unread terms and conditions incorporating "no review" (i.e., no negative review) language.

So, what is a nondisparagement clause? It is language found in a contract (or on the terms and conditions of a website) that attempts to prevent the customer or receiver of the good or service from posting negative reviews about the service provider or vendor. Negative postings can be found on such sites as rip-off.com, yelp.com, tripadvisor.com, dine.com, or even amazon.com



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Nondisparagement agreements in the online or service provider setting have arisen in response to a couple of realities: (a) first, the power of the public, or power of the court of public opinion (especially the power of those who write bad reviews³); (b) and second, the reality that the companies and websites that host the reviews are simply not providing an adequate means of addressing negative reviews that merchants deem unfair or inaccurate. So merchants and service providers are being proactive.

Although there hasn't been a lot of litigation, I am seeing nondisparagement or "no review" clauses in service provider contracts, such as moving companies, locksmiths, dentists, and now even online providers of goods. But there are two recent cases involving nondisparagement agreements that have blown up and have made their way to court: *Palmer v. Kleargear* and *Lee v. Makhnevich & Aster Dental*.

The *Palmer v. Kleargear* lawsuit was filed in Utah federal court and is still pending. In that case, John Palmer ordered some trinkets through Kleargear, and, after there was a problem with the order (it sounds like John never received the shipment), John's wife Jen tried to contact Kleargear. She then posted a review on ripoffreport.com stating in essence that she couldn't reach anyone at Kleargear, that none of the extensions worked, and that the Palmers felt ripped off. That was in February 2009! Later, as in more than three years later, Kleargear sent a letter to the Palmers requiring that they take down the offending review and stating that they had violated the online nondisparagement clause contained in the Kleargear.com website's terms and conditions. The letter also informed them that the penalty for the breach was \$3,500. Amazingly, Kleargear had apparently not even inserted this clause into their terms and condition until *after* the Palmers had ordered their product. When the Palmers refused to pay, Kleargear sent the Palmers "account" to collections, which then reported the Palmers to the credit bureaus and damaged their credit standing. With the help of Public Citizen Law, the Palmers fought back and sued Kleargear (and the collection agency) in Utah federal court. But after talking tough, Kleargear was a no-show in the litigation. An order of default was entered against Kleargear for Kleargear simply failing to appear and answer the allegations of the complaint. Now a hearing to award damages to the Palmers will be held, and a judgment by default will soon be entered by Judge Dee Benson.

After Kleargear gets hit with a judgment, it'll be interesting to see what happens next. Will Kleargear try to contest enforcement and jurisdiction in its homebase(s) of Texas or Michigan, or will they ignore the judgment or even file bankruptcy?⁴ We shall see!

In the second case, *Robert Allen Lee v. Stacy Makhnevich and Aster Dental*, which was filed in the United States District Court for the Southern District of New York,⁵ we find Dentist Makhnevich with a particularly ornery contractual provision that prevented disparagement of her practice under, at least in part, the Federal Copyright Act. She apparently utilized the Copyright Act in her contacts with patients because it afforded her more remedies and protection than state defamation laws (because Yelp and other online posting sites were protected by the safe harbor provisions of the DMCA⁶). After Mr. Lee gave his dentist a one star review, the dentist contacted the posting sites to have them remove the review and then threatened Mr. Lee with daily fines (under the Copyright Act).⁷ Mr. Lee took matters a step farther and sued the dentist and her practice to seek a declaration from the court invalidating this over-the-top nondisparagement clause so that he wouldn't have to live in fear of his dentist root-cannalling his future financial livelihood.

In response, the dentist and her practice tried to dismiss the case, arguing that the court didn't have jurisdiction and that the case wasn't ripe (i.e., she hadn't actually "sued" her patient, so how could there be a case or controversy). The court disagreed and found that the dentists' threats of fines from her lawyer were enough to make this a real case and dispute, and the court did have jurisdiction to adjudicate the plaintiff's claims on all fronts.

Since then, amazingly, Stacy the dentist has apparently disappeared. So her (and Aster Dental's) lawyer filed a motion to withdraw, which was eventually granted on September 9, 2013. Since then, it appears that there is no new activity in the case, though the case appears to still be open and active. Thus, it's probably only a matter of time before a motion for summary judgment is filed and granted.

And so the battle continues, and with more businesses including these nondisparagement agreements (to try to protect their names, honor, and ratings) and more people writing (and relying on) reviews, we are likely to see this area of law develop.

But because lawsuits are so expensive (unless taken pro bono by such entities as Public Citizen Law),

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the road of least resistance and least economic inlay (when consumers are faced with a letter intimating fines and litigation if a posting is not removed) will likely be to concede and remove the offending postings. But if push comes to shove, and these cases end up in court, it will be very interesting to see how the courts treat these provisions because they are often not negotiated, not paid for (i.e. no independent consideration), form no material part of the contract for the consumer/purchase, and in some cases are not even known to exist!

Until then, well, we should all practice a little Latinus “caveat emptor/buyer beware” and some common sense—if your service provider requires that you sign a nondisparagement agreement at the time you enter into a services agreement, then don’t sign and don’t use that service provider. If they’re so worried about the negative review and won’t stand by their work, then you should be concerned about using them. Why not find a competitor who is willing to stand by its work and its products?

Endnotes

1. Patrick Snay v. Gulliver Schools, Inc. (Fl. Ct App. 3rd Dist.) www.3dca.flcourts.org/Opinions/3D13-1952.rh.pdf.
2. Of course, if disgorgement was not set forth as the remedy, there may have been quite a fight over what the actual damages to Gulliver Schools would have been and how much money that would be entitled to get back (if any). Because they hadn’t yet paid, it made the case streamlined and stands for some pretty strong precedent (at least on facts like these).
3. Whom we know are probably more apt to write something than those people that had “ok” or mildly positive experiences.
4. Though this judgment is not likely to be that big, we of course we don’t know what Kleargear’s financial status is.
5. No. 11-civ-8665.
6. See 17 U.S.C. § 512, Digital Millennium Copyright Act, Titles 17 and Title 28, U.S.C.
7. For other not-so-flattering reviews of this dentist, see <http://www.yelp.com/biz/stacy-makhnevich-dds-new-york>.

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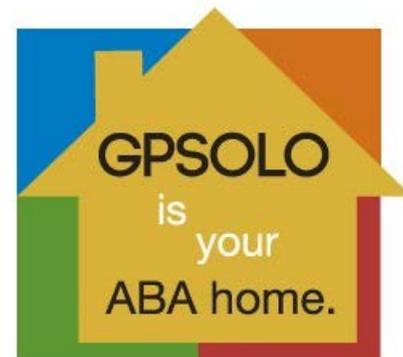
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How Lawyers Can Assist Foster Children Aging Out of System

Vol. 3, No. 10

Vicky Levin Eskin

Most parents do whatever they can to prepare their children for adulthood and the real world. Parents provide food, clothing, and shelter. They also provide advice and guidance on how to become a successful adult. Parents provide life experiences that help shape a child's view of the world, development of relationships, and general life skills.

When children spend their youth in the foster care system, it can be difficult for them to receive necessary guidance and life experiences. As a result, they enter adult life lacking tools required to succeed. In fact, many children have mixed feelings about turning 18 and aging out of the system.

A study released by Jim Casey Youth Opportunities Initiative in May 2013 (<http://jimcaseyyouth.org/>) clearly shows that children aging out of foster care do not have the necessary skills for adult life. On average, taxpayers are on the hook for \$300,000 per youth over the individual's lifetime for public assistance. So what can an attorney do to help the youth aging out of foster care?

In many states such as Florida, youths have the option to extend foster care services beyond the age of 18. Doing so provides extra assistance to them to help them gain more life experiences and generate life skills necessary to become a successful adult. Extension of services means that someone will accompany the 18-year-old student to school meetings to assist with obtaining school services and a diploma. The youth will obtain assistance with applying for government benefits such as Social Security benefits (which change when the child turns 18), food stamps, and Medicaid. Often, the young person has no idea how to make a dentist appointment, how to obtain a driver's license, or how to access other government and medical providers. And they have no idea who to ask to help them find assistance.

Many 20 to 30 year olds today have actually returned to live with their parents as a result of the economic downturn. Unfortunately, foster children do not have the same luxury. Programs to assist the aged-out foster care child provide the needed assistance with rent, food, and job services. However, so very much more is needed.

Financial education programs are vital to help youth cultivate proper money management habits. Workforce development programs can also provide crucial education to prepare youth for gainful employment. Attorneys are in a unique place to provide additional support to youth aging out of foster care. Just as these youth lack the connection to a stable family to provide financial, educational, and nutritional support, they also lack the connection to advocates who will fight for them.

Attorneys can assist in finding additional resources to help the youth by finding answers to a barrage

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of questions: Is the youth handicapped? Is the youth eligible for any government assistance? Can the child receive economic recovery for any injury? Are there any assets such as probate, trusts, or other assets that might benefit the youth? Answering these, and many other, questions can potentially provide additional monetary support so the youth is not sent out into the real world without any training wheels to assist. By using your knowledge and training as an attorney, you can provide much needed aid to young people who need all the help they can get.

Kids aging out of the foster care system may often appear to be streetwise, but they are targets for unscrupulous individuals in the community who will befriend and cajole young people out of what little assets they possess, seek to move into their limited housing space, and (in short) use young people who don't have strong support systems to call out to when they are in peril. Attorneys can not only volunteer their time to local advocacy groups but they can also lobby local and state governments to set up programs such as mentoring youths, providing economic incentives to stay in school; providing entry-level job positions with patience for those who have little to no job experience; and developing programs to teach young people to shop wisely, handle budgets, and set up savings accounts.

Like other at-risk individuals, young foster care graduates will often seem to fail or slip off set guidelines and schedules, and they need ongoing advocacy to keep their options open. Without a foster mother or group home supervisor, the new "adult" may become depressed and stop attending school, thereby losing not only a chance at a high school diploma or GED, but also financial support to further their education. Without a constant adult in their lives to encourage and assist the young person, he or she will end up with low or no education, no job outlook, no home, and basically no hope for a normal adult life.

Whatever you do, you will be helping a young person as a mentor and as a guide into adulthood and will hopefully be breaking the cycle of foster care life for children of foster care. The reality is that often the young person doesn't even know what kind of legal hurdles he or she may encounter, but you can become the lifeline to help with traffic tickets, child support, personal injury, credit problems, and a host of other areas. You won't regret it, and you'll be making a difference.



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Enforcement of Support Awards in Matrimonial Actions: The Need for Uniformity

Vol. 3, No. 10

Prof. Raymond A. Catanzano

Prof. Catanzano, in addition to being a professor of law in New York, maintains a law practice located in Old Westbury, New York, with a concentration in the area of family law. He also earned an LL.M. degree in International Law from the London School of Economics in London, England. He is the chair of the GPSolo Family Law Committee.

Congratulations! You've just won a major case in which the court has rendered a decision giving your client a large support award. Both you and your client are ecstatic over the award and the magnitude of the same. Then your client asks you that all important question: *What do we do now?*

The initial reaction of many an unwary practitioner would be to provide a simplistic response that at first blush would appear to be very logical and perceptive, namely: we'll serve a copy of the order containing the support award upon the other spouse (partner) and wait briefly for the periodic monies to begin arriving. It is only after a period of time elapses and those periodic payments fail to arrive (or cease to continue to arrive) that the extent and complexity of the dilemma begins to be realized; and that unsettling sense of panic is first experienced. Then, after considering the viable alternatives that exist, it is concluded that the appropriate approach is to initiate an enforcement proceeding in order to compel the noncompliant spouse (partner) to honor the financial commitment the court has previously directed.

Unfortunately, however, upon crossing the threshold into this important venue, a world of inconsistency and unpredictability is visited and experienced.

Enforcement proceedings obviously provide for a wide variety of sanctions, which vary from a stern warning from the court, to an order directing payment of the support award to a court endorsed agency,¹ to the sequestration of property,² to an income deduction order,³ to a judgment for arrears in support,⁴ and to the interception of income tax refunds. Also available for implementation is an order suspending a party's professional license, driving privileges, and motor vehicle registration. The most drastic sanction, however, is an order directing the imprisonment of the noncompliant party for contempt.⁵ Yet, as effective as such an order may be, it is not a remedy that is recognized or utilized by all states.⁶ Further, even where an order of support is issued by a state court, it is frequently not recognized by sister states for enforcement purposes.

It is clearly recognized that the remedy of contempt is an extreme remedy that should be applied only in limited but justified circumstances. In that regard, however, it is frequently the only remedy that is compelling in nature and successful in its intended goal. Further, and all too often, due to the drastic consequences associated with the incarceration of the recalcitrant spouse (partner), courts are reluctant to impose this remedy even when warranted. The result is that the arrears in support continue to accrue; and the defaulting party experiences an unbridled sense of freedom in the belief

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that he (she) can continue to ignore the order of the court without any repercussions being suffered. The impact upon the victim of this pernicious and insidious course of conduct can be devastating. The consequences of noncompliance with the court order for support are further compounded when the defaulting party becomes transient and ventures beyond the boundaries of the state in which the order was issued.

The State of New York has previously recognized the severity of this legal malignancy and convened a task force to investigate the nature and extent of this tragic practice on the part of noncompliant parties. The report of the commission recommended what was obviously needed: namely, stricter enforcement of matrimonial orders. However, little, if anything, has been done since the time of that report to implement its findings. The consequence has been that discretionary enforcement of court orders continues to exist; and that discretion has been exercised in an indiscriminate and inconsistent manner.

The frustrated victim and family members continue to suffer untold financial hardship. The noncompliant party continues to enjoy the fruits of noncompliance and the benefit of unfettered freedom.

It is respectfully submitted that concrete, affirmative, and meaningful action must be taken to remedy the pervasive injustice caused by the intentional disregard and avoidance of court-issued support orders. This action must be taken and implemented without any further delay. A firm approach is needed. Consistency in the application of appropriate guidelines is required. Cooperative uniformity in the enforcement of support orders between the states is essential; and in that regard, it is suggested that action be undertaken immediately to develop, establish, and implement a *uniform* law to be adopted by the states across our great nation that will address all of the issues necessary to effectively create certainty, predictability, and reliability in the interstate enforcement of support orders by means of contempt proceedings. The noncompliant party must be held accountable for the wrongful conduct wherever that party may be.

It is further submitted, however, that in establishing appropriate guidelines, care should and must be taken to ensure that it is only the party who *intentionally, willfully, and knowingly* violates the obligation to provide support is subjected to the rigors of a finding of contempt with its associated consequence of incarceration. In that regard, it is submitted that the practice of imputing income to a noncomplying party for purposes of the contempt proceeding should be sparingly utilized. The imputation of income is inconsistent with a finding of intentional and willful conduct except in rare circumstances. The imputation of income in contempt proceedings provides fertile grounds for the potential of unjust and inappropriate findings. The sanction to be imposed must fit the offense. The offense should not be judicially adjusted to accommodate the sanction.

The time is now. The need is immediate. The states must take the initiative to address the uniform enforcement of support orders in matrimonial proceedings especially in the borderless parameters of the mobile society that currently exists. The ill-intentioned noncompliant offender must no longer be permitted to roam free. The wrongdoer must be held accountable for the wrongful conduct wherever and whenever he (or she) is found. Justice must prevail.

Endnotes

1. New York Social Services Law § 111-g; Texas Statutes § 152.1752.
2. Texas CP. Code Ann. § 31.002; New York Domestic Relations Law § 241; Holtzman v. Holtzman, 401 F. Supp. 520 (1975).
3. Illinois Statute § 13.1; New York Civil Practice Law and Rules § 5242.
4. New York Civil Practice Law and Rules § 5210; New York Domestic Relations Law § 244; Cohn v. Cohn, 208 A.D.2d 885 (1994).
5. New York Family Court Act § 454; New York Domestic Relations Law § 245; Texas CP Code Ann. § 31.002(c); California Code of Civil Procedure § 128; California Penal Code § 166.
6. See 24 Am. Jur. 2d, Divorce and Separation, § 798.



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How to Handle the Criminal/Traffic Case

Vol. 3, No. 10

Kenneth Vercammen

*Kenneth Vercammen is an Edison, Middlesex County, New Jersey, trial attorney. He is the author of the ABA GPSolo Division Book **Criminal Law Forms**, available from ABA Publishing. (Please see below for ordering information.) Mr. Vercammen has published 125 articles in national publications on criminal, traffic, DWI, probate, estate planning, and litigation topics. He often lectures to trial lawyers of the American Bar Association, New Jersey State Bar Association, and Middlesex County Bar Association. Kenneth Vercammen was the New Jersey State Bar Municipal Court Attorney of the Year and past president of the Middlesex County Municipal Prosecutor's Association. He is the past chair of the New Jersey State Bar Association Municipal Court Section and is the co-chair of the ABA Criminal Law Committee of the Solo, Small Firm and General Practice Division. He serves as the editor of the popular legal websites www.njlaws.com and www.BeNotGuilty.com. Kenneth Vercammen was included in the 2014 "Super Lawyers" list published by Thomson Reuters.*

From *Criminal Law Forms*

Getting Known to Potential Clients

Prior to the invention of the Internet, potential clients came to your office by three primary ways—prior clients who referred their friends, current clients who got caught again, and the Yellow Pages. The Internet has replaced the Yellow Pages.

While walking out of the courtroom, we give every client a yellow "Fish Card," which provides the following information:

Advice on Arrest for a Criminal Violation

1. Tell the police officer or detective that you wish to talk to your lawyer. Repeat this request to every officer who speaks to you.
2. Identify yourself, if asked. If the incident is related to a motor vehicle, produce your license, registration, and insurance card.
3. Beyond identifying yourself, give no other information. Answer NO to other questions. SIGN NOTHING. If you are asked any other questions, reply politely, "I would rather not discuss it."
4. Call your lawyer at the first opportunity.

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NOTE: If you are arrested for drunk driving in New Jersey, you must give breath samples before you call your lawyer.

Remember: Even a fish would not get caught if it kept its mouth closed.

OJ remained silent and went out playing golf the next day.

Often the attorney is sitting with the client at initial interview, and the client explains what he or she said to police—a confession. The client then tries to say the arrest is illegal because he or she was not read the Miranda warnings. We explain that an arresting officer’s failure to read Miranda does not void an arrest: it just keeps out what was said after the arrest. I then give the person the yellow Fish Card and tell him next time to say nothing.

After appearing in traffic court, I walk the client to the violations window to pay the fine. I explain how much we saved him by getting the tickets dismissed. Then I give clients the Fish Cards and say, “Call me when you get your next one.” They say there will not be a next one. I say, “You weren’t planning on a first one either, but we’re both here.” We always ask new clients how they were referred. Occasionally someone has one of our yellow Fish Cards.

General Telephone Calls to the Law Office

You should not provide legal advice over the telephone. Callers will not hire you. Instead, they will use your advice to negotiate on their own. Our office does, however, often advise potential clients of some of the mandatory penalties and jail terms that the court could impose. This makes people realize the seriousness of the charge. Our office schedules a consultation and directs them to bring in a copy of the complaint, all their papers in connection with their case, accident report, and any documents they received from the Motor Vehicle Commission. Oftentimes our office instructs them to write a confidential narrative if it is a case that is fact-specific or involves a great deal of detail, such as an assault case.

Answering the Phone to Determine if Current Client, Potential Client, or Insane Person

Phones should be answered by the second ring.

1. Answer the phone—“Welcome to _____’s Law Office. How can I help you?”
2. Ask caller: “What file is this regarding? Who is our client? How can we help you?”

Write down everything they say.

If the caller does not want to discuss what the matter was in reference to, and there is another office attorney available, have him or her speak with the caller. Otherwise, take a detailed message and advise the caller that someone will call him or her back.

Never, ever say “Managing attorney is too busy to talk or schedule appointment.” Say “He is in court at _____” or “He is working on a brief that must be filed in the Superior Court today.”

Potential new clients should be asked:

1. Who referred them to our office (e.g., prior client, another attorney, Google, YouTube, newspaper advertisement, union, etc.). If they give you a person’s name, ask them if this person is a prior client or an attorney. Advise them that we like to send a “thank you for referral” letter.
2. The type of matter they are calling about, e.g., criminal, traffic, car accident, probate, personal injury, etc. Use letter-size scrap paper to write down this information.

For all new and/or potential clients, a referral source is required, especially if the referral is from a prior client. Write down the name of the prior client: e.g., **JOHN DOE prior client, JANE DOE, Esq.** If they give a name, ask if that is a prior client, an attorney, or how they know us. You can send a

thank you letter for the referral.

800-285-2221.

Scheduling Appointments for Criminal/Traffic Ticket/Municipal Court Potential Client Callers

To schedule appointments, have the appointment calendar in front of you to see what days and times the Managing Attorney has available. When a section is blocked, this means that no appointments should be scheduled for those times.

All appointments scheduled must also be marked in the Appointment Calendar. Enter the first and last name of client or potential client. Please put your initials next to the appointment you are scheduling and the type of matter they are coming to the office for—e.g., **Mary Doe, DWI**.

If your law office uses a computer for appointments, add to your calendar immediately. You should try to schedule appointments on the hour—10:00, 11:00, etc. However, if client requests an appointment on the half hour—say, 10:30—then it can be scheduled. The latest appointment to be scheduled for the Managing Attorney is 5 p.m. (4:45 on Fridays). For clients who specifically need a late-night appointment, check the appointment calendar to see when the Managing Attorney has an evening court appointment and schedule it to be held in the night court reception area. **Do not schedule Saturday appointments.** The Managing Attorney has law seminars and running events.

1. **If Criminal/Municipal Court–related Appointment, use the Criminal/Traffic Ticket Intake Callers Form** and do not write up a separate telephone message [Form 1]. Try to get them in the same day. Don't ask, "When is it convenient?" Instead tell them, "We have an available appointment today at _____. If not, how about tomorrow at 10:30 a.m.?" Try to sell the office and how you can help them. Clients should also be instructed to bring all paperwork and information connected to their matter to the office at the time of their appointment.

Complete addresses to the office should be provided, since sometimes online sites have old or incorrect addresses. If a client has email access, email the directions.

2. **Email, fax, or mail them an appointment letter.** After you get their email or fax number, advise them that we will fax directions. If they do not have a fax and there is not enough time to send them an appointment letter, tell them that directions to the Edison office are also on our website. They should fill out the Criminal/Traffic Interview Form [Form 1] and bring it to their appointment.

When sending the email, be sure to send the interview form both as an attachment and in the body of the text. If they do not have an email address, get their fax number. Fax them the Criminal/Traffic Appointment letter and Municipal Court Interview Form. There is no need for a separate fax cover sheet. Write the person's fax number next to his or her name on the appointment letter.

If they do not have a fax number and the appointment is more than three days away, get their address. Mail them the Criminal/Traffic Appointment letter, Municipal Court Interview Form. On the caller form write "faxed appointment letter" or "mailed appointment letter" or "did not send appointment letter." Also, tell them that directions can be found on your website. If you confirm this appointment by fax or writing, you will get fewer "no-shows." There is no need to make a copy of the mailed letter. Just mark the Criminal/Traffic/Intake Form "Questionnaire emailed, faxed, or mailed," and the date.

Careless Drivers: If someone indicates they were in an accident, schedule an appointment, but also recommend they try to obtain the police report and any tickets.

Current Clients Who Come In with Appointment to Discuss Their Pending Cases or Welcomed Visitors

Inform the Managing Attorney that the client or person has arrived, and write the client's name, date, and time of appointment on full-size scrap paper. Give the Managing Attorney something in writing for every prior and potential client so he or she does not forget that someone is waiting.

If the Managing Attorney is on the phone, tell him by writing client's name on full-size scrap paper at top.

Appointment Letter (Municipal Court/Superior Court Traffic/Criminal Cases) [Form 3] Criminal and Traffic Appointment E-mail [Form 3]

Thank you for scheduling a consultation to discuss your municipal court matter. Please print and complete the attached Criminal and Traffic Interview Form prior to your appointment, which is scheduled for _____.

Everything you tell us is confidential. Under the New Jersey Court Rules, an attorney can negotiate with the municipal court prosecutor to attempt to reduce points, obtain dismissal of some tickets, and avoid some suspension or jail. By reducing points and penalties, you can minimize increases in your car insurance and surcharges.

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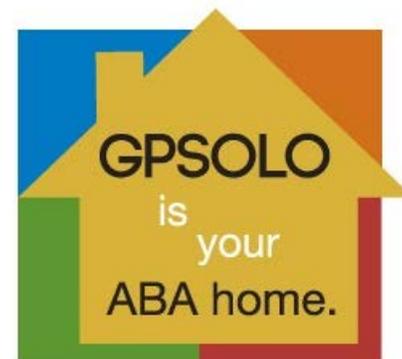
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You should bring:

1. Copies of the actual complaint or tickets. We need the actual complaint/tickets since they have the police officer's badge number, time and specific location of offense, and signature line. A computer printout is not enough for the attorney to provide advice. If you cannot locate your copy of the complaint or tickets, these are available at the court, since all complaints are a matter of public record under Court Rule 1:38. Call the court to request a photocopy of the complaint, not a computer printout.
2. Any hearing notice from the court.
3. If there was an accident, the accident report.
4. Police reports in criminal cases, if available, so you can see what police wrote about you. (Note: Many police departments will not provide reports to you. They will provide them only to an attorney you retained.)
5. Any notices or papers from MVC/DMV.
6. Every other paper you have in connection with your case.

Our clients can now pay fees by check, Visa, MasterCard, American Express, Discovery, cash, or money order. Once we are retained, we will prepare a letter of representation to the court, prosecutor, and you. We typically request payment at the interview and do not provide payment plans.

We have many requests for appointments, and our schedule is very full. Therefore, we ask that you make every effort to keep your appointment. If you are unable to make your appointment, please notify us in advance. Once retained, we will represent your interests vigorously. If you have any questions, please call us immediately.

Please be on time.

What to Do After Appointments Are Scheduled

All appointments scheduled must have an unopened file folder, and these procedures should be followed:

1. Create an unopened file folder. Use a large yellow Post It note sticker and write the last name only, unless it is a common last name—e.g., Smith, Patel, etc., then include first name and the town or adversary, and on the second line, write the offense/matter, e.g., **Mary Smith, Edison, DWI**.
2. Write it horizontal (left to right) so it is visible when the file is closed.
3. If the appointment is for the same day and not on the Managing Attorney's scheduled copy, then put the yellow Post It Note sticker on the outside, e.g., **Today, March 1, 4:30**.

Our office will not accept personal checks if a court date is within 48 hours.

If people call ahead to advise they are coming in to pay and their court date is within 48 hours, tell them you need a money order or cash. If they just show up, ask if their check will be good. Take the check, then call the bank to confirm the check will clear.

Can't Come In—Traffic/Criminal

If they can't or don't want to come in, write down their information on the Criminal/Traffic Ticket Intake Callers Form. Get their email address and email them the Municipal Court Questionnaire. Ask what questions they have and write them down on the Municipal Court intake form. Advise them that someone will call them back. Write on form "Person does not want to make appointment!" Call back and try to get credit card number over the phone. If criminal, advise that they must come in with a legible copy of all complaints. The complaint contains the police officer badge number and other important details.

Don't fill out a separate telephone message form.

If they live out of the area, schedule a telephone consult. In traffic matters, recommend that potential clients email or fax over tickets, hearing notice, and other relevant documents. If someone lives out of state in speeding ticket cases, prepare a Defense by Affidavit and appear on their behalf.

With a Defense by Affidavit, they will not have to appear. These potential clients should email or fax over their tickets ASAP, and consult can be over the phone for tickets. You will not have to make copies when they arrive.

Prior Client Calls

1. Look on Complete Client List or on computer. Write down the file number after you write "prior client" and pull old file. If potential client is a spouse or close family member, write down prior client file number and pull the file.
2. Pull out old file. If destroyed, write "Destroyed." (These are files more than eight years old.) Set

up an unopened folder if file is destroyed.

3. In your calendar, write "open file," so your staff is not looking in the Unopened File Folder.

Attorney Talking with Potential Clients Over the Phone—Additional Information

1. Fill out Criminal/Traffic intake form. Try to schedule an appointment. If they are not in the New Jersey area and it is a traffic ticket that does not require a court appearance, you can interview the client over phone, quote them the fee, and obtain their mailing address.
2. Phone call, but no appointment. If you interview or even speak to someone over the phone but no appointment is scheduled, fill out a telephone intake form and get their email address. Send them an email as a matter of course.
3. Retaining client over the phone—credit card. Tell them to fax or email summonses, court notices, accident reports, and police reports if they have not already done so.
 1. Obtain credit card number, expiration, and type of card.
 2. If credit card, run through credit card machine.
 3. Staple receipt copy to copy of retainer and put in staff bin.
 4. Staple client credit card to their retainer and put in staff bin. It is mailed to client with copy of Discovery/Letter of Representation and Criminal/Traffic Retainer.
 5. If retained, prepare Letter of Representation/Discovery Letter ASAP.

Prepare short memo to Managing Attorney at bottom of first page of interview sheet. Print your first and last name.

Nonappointment Calls into the Office Handled by Per Diem Attorney

Most callers don't need to speak with the Managing Attorney. If the Managing Attorney is on another line, ask callers if they wish to hold for a moment. If a person is holding, write on letter-size scrap paper the caller's full name, the line he is on, and what the call is in regard to, and put it on the Managing Attorney's desk. If the caller doesn't want to hold, handwrite a detailed message, including cell number with area code. Repeat the phone number to them for accuracy.

Make sure callers are asked who referred them to our office, the name of the case, and/or the type of matter. Note the date and time of call.

If the call involves criminal and traffic court matters, make sure to obtain the court date (whether it is from a ticket or a court notice), court location, and the charges for which the tickets were issued.

Let the caller know the Managing Attorney will be given the message.

Leave all messages in message holder on front desk.

Cases We Handle

The back of our business card indicates some of the matters we handle. It is best to schedule an appointment; then, if Managing Attorney does not want to handle, he can contact the person by phone. We can try to refer a matter to another attorney.

Cases We Don't Handle

Don't schedule an appointment if person is a "nut" or if it concerns a matter you don't handle.

If you know another attorney who can handle the matter (divorce, bankruptcy, immigration), get the caller's name, phone number, town, and county where the person lives and where the matter is taking place. Tell the person, "Someone will call back today. Right now the attorney is in court." A list of names, phone numbers, and fax numbers of referral attorneys should be created.

If Managing Attorney tells staff to do so, staff can quickly find an attorney for the person using the Superpages.com online. Go to Attorney, then Type of Matter, Town, State (limit by two miles to remove out-of-area attorneys). Write down attorney's name, phone number, and fax number.

After giving the caller the attorney's name and phone number, fax a referral to the other attorney [Form 4].

If busy, staff can quickly give them the phone number of the lawyer's referral.

For far-away minor traffic incidents and nuts, recommend they check the Yellow Pages for a lawyer near them.

Prior Clients with Cases We Do Not Handle (e.g., landlord issues, small claims cases under

\$10,000). Get their phone number and advise that someone will try to call between 10:30 a.m. and 8:30 p.m. or the next day.

If Managing Attorney is out of office: Say "Mr./Mrs. _____ is in court now," and let the caller know what court (or trial, etc.). "I will be glad to take a message." Take a detailed message following the instructions in No. 3 above. Advise the caller that the Managing Attorney always calls in for messages and the message left will be relayed. **Never abandon the caller** or have the caller think she must wait indefinitely for a return call. Be pleasant to everyone who calls.

If person says they are returning Managing Attorney's call: ask which file they are calling about and when Managing Attorney called. Ask if Managing Attorney called directly or someone else in the office called. Ask if they know why Managing Attorney called or if they have any information to relay.

Calls to confirm that faxes were received: If someone wants to confirm that a fax was received, ask for the date the fax was sent, their phone number, and name. Advise that if your office did not receive the fax, you will call them back. Otherwise, they should assume you received it.

If someone calls to confirm a letter: ask for their name, phone number, and the date of the letter. If you did not get it, call them back. Otherwise, they should assume it was received.

Calls to Potential Clients the Day of Their Appointment to Confirm

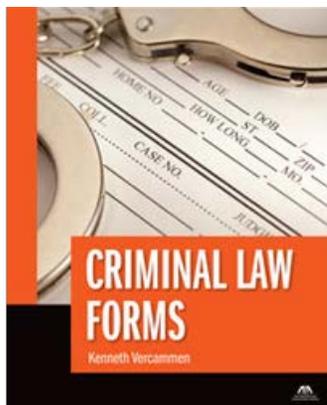
Sometimes we call a potential client and leave the following message: "This is the Law Office of _____. We emailed you our interview form. Please fill out and bring to your appointment today with all your papers."

Do not ask if they received our email. However, if they advise that they did not receive the email, get their correct email and resend. In the message, advise that there is no need for them to call back if they received the email and filled it out, unless you need to reschedule the appointment.

What to Do When Potential Clients Come In for Appointments

When you hear the front door open, open the reception door for the person and look in the Calendar Book for the person's name. Get up and greet clients as they walk in. "Good afternoon. Are you Mr./Ms. _____?"

Use client's name in conversation when speaking with them. For example, to get clients to fill out our interview sheets, say, "Mr./Ms. _____, please fill out our confidential interview sheet." Be pleasant to everyone.



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Six Steps to Minimizing Gender and Minority Bias

Vol. 3, No. 10

Sheryl L. Axelrod

Sheryl L. Axelrod (saxelrod@theaxelrodfirm.com), President of The Axelrod Firm PC (www.theaxelrodfirm.com), a NAMWOLF law firm in Philadelphia, provides strategic, results-driven advice and representation to companies concerning their general and product liability, employment, commercial, and appellate litigation matters. While only 5% of lawyers are recognized by their peers as Super Lawyers, Ms. Axelrod was not only recognized as a Super Lawyer but rated one of the Top 50 Women Super Lawyers in Pennsylvania for the past two years in a row and selected a 2013 Top Rated Lawyer in Labor & Employment by American Lawyer Media and Martindale-Hubbell.

Women and minorities face unconscious bias at every rung up the workplace ladder. Few make it to the top.

As Malcolm Gladwell notes in his book *Blink*, 58% of Fortune 500 CEOs are not just white and male, but white, male, and 6' or taller. That's well over half the CEOs of the 500 largest companies in the country, whereas in the country, only about 14.5% of men (less than 1/7th of all men) are that tall.

The notion that white, tall men are more capable than other people is obviously absurd. People have unconscious preconceptions about what leaders look like, and, as a result, far more tall white men are made CEOs than women, men of color, and shorter white men. In fact, in the United States, only 3.9% of adult men are 6'2" or taller—less than 1 in 25. However, according to Gladwell, 30% of Fortune 500 CEOs are—nearly 1 for every 3 such CEOs.

[Click here to read a good summary of a study revealing gender bias among Yale scientists.](#) This is a quotation from the article:

[A] new study in *Proceedings of the National Academy of Sciences* offers evidence of bias among scientists—male and female scientists alike—against female students. The study was based on evaluations by scientists of hypothetical student applications for a lab manager position, with the application materials identical in every way, except that half of the pool received applications with a male name and the other half received applications with a female name. The faculty members surveyed—127 professors in biology, chemistry or physics—were told that their analyses of the applications would be used to help the students. And they were asked to evaluate the students' competence and "hireability" and to consider how large a salary they would recommend and how much mentoring they would offer the student if hired.

The scientists evaluating these applications (which were identical in every way except the gender of the "submitter") rated the male student more competent, more likely to be hired, deserving of a better salary, and worth spending more time mentoring. The

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gaps were significant.

Female scientists were as likely as male scientists to evaluate the students this way. We unfortunately all have some measure of unconscious bias.

In "Managing our Unconscious Biases," Roley Davis wrote in *HRmoz*:

Research has now emerged from the University of Wisconsin which has shown that giving people better cognitive strategies not only reduces unconscious bias, but that the bias levels continue to fall after intervention.

Davis writes that we should:

1. Test our unconscious bias using an Implicit Association Test. While Davis mentions Hogrefe's pricey Implicitly® test, [great testing is available for free at Harvard's Project Implicit](#).
2. Delay making key decisions about people until we have the time to challenge them. We should ask ourselves: is our unconscious bias playing a role in our decision making? Is the person we're considering truly the best fit for the job?
3. Avoid making key decisions when we're tired, stressed, or emotionally drained. In such moments, we are least able to check for possible unconscious bias.
4. Try justifying our decisions—to others or to ourselves in a mirror. We're more biased when we know our decisions probably won't get challenged, so try challenging them.
5. Not beat ourselves up over the fact we have biases. Everyone does. Feeling guilty can make it harder to manage these biases. Rather than feeling guilty, we should accept that we have biases and work to minimize them; and
6. Get to know people who are different, have different backgrounds, and bring different perspectives. They'll enrich our lives. Plus, the more we see people as individuals, the less likely we'll be to view them through our biases.

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The Virtual Truth: Four Tips for Creating and Maintaining an Efficient and Productive Virtual Law Firm Team

Vol. 3, No. 10

Stacey L. Romberg

This article is the third of four installments, designed to provide insight into operating a virtual law firm. Stacey L. Romberg is a Seattle attorney focusing on business law, estate planning, and probate. For further information, please see Stacey's website at <http://www.staceyromberg.com>.

- **What unique issues should a virtual law firm expect to address in meeting its staffing needs?**
- **How can remote staff most effectively communicate as a team?**

Since opening my virtual law firm in 1999, I've found that, more than any other component of running a small business, developing an effective virtual team has proved challenging. After many mistakes and hard-learned lessons, along with some sleepless nights and occasional painful dramas, my current remote team consistently achieves high marks. Each person fulfills a defined function on our team and contributes positively to the team's collaboration, work flow, and perhaps most importantly, strong sense of collegiality and commitment despite the lack of daily in-person communication.

My remote team currently consists of an office administrator, administrative assistant, paralegal, and two of counsel attorneys. I am the only full-time member of the team (and, as anyone who manages a small law firm knows, the term "full-time" generally extends well beyond a standard 40-hour work week!). My office administrator and administrative assistant job share one full-time administrative position. My paralegal and one of counsel attorney work half time, and the second of counsel attorney works one quarter time. Each member of my team chooses her own unique work schedule based on her individual life circumstances, including additional work commitments, family commitments, personal interests, and time spent giving back to the community. Although previously I've had male team members and worked with team members from out-of-state, my current team is all female and local to the Seattle area.

Tip #1: Recognize the Uniqueness of the Virtual Model

To illustrate the nuances of staffing a virtual business, let me present two imaginary workers: Joe Average and Vanda Virtual.

Joe Average, a worker in a brick-and-mortar law firm, typically arrives at his nine-to-five job each Monday morning wearing an appropriate business-casual outfit. Joe greets the receptionist, several attorneys, and his secretary on his way to the break room to pour his daily cup of coffee. They

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exchange humorous stories about their weekend activities, and also discuss several significant work issues that they'll be facing over the coming week. During the day, Joe personally interacts with his coworkers numerous times on both a personal and professional level, including attending several in-person meetings and enjoying lunch with a colleague. He leaves his office at approximately five o'clock, dreading his one-hour commute but looking forward to dinner with his family and a good night's rest.

Vanda Virtual, a worker in a virtual law office, enjoys her work and loves her second job as the lead singer for the Seattle band Meat Market Surfers. She spends about 20 hours a week with the band including rehearsals, road trips, and late-night gigs. Each Monday morning, Vanda usually wakes up at about 10 a.m. She eats breakfast, exercises, showers, and then by 1 p.m. is ready to go to work. Wearing ripped jeans and a gray T-shirt, Vanda opens the door to the spare bedroom that serves as her office, and settles in for a six-hour workday. By 7 p.m., Vanda needs to sign off so she can make it to the band's evening rehearsal.

In all likelihood, if Joe Average worked in a virtual environment, he would feel isolated and miss the daily routine and personal interaction with his colleagues. And, in all probability, if Vanda Virtual worked in a traditional brick-and-mortar job, she would feel confined due to her long commute, set hours, professional dress requirements, and the fact that her lifestyle significantly contrasts with that of her coworkers.

Of course, in real life, the lines between Joe Average and Vanda Virtual tend to be blurred and often difficult to discern. In order to develop an effective virtual team, you need to recognize that a virtual workplace contrasts *dramatically* with a brick-and-mortar office. Many candidates who may seem ideal on paper will simply wither and die in a virtual environment. Others will blossom. As a law firm owner, in addition to spending the time to ensure that potential team members possess the requisite skill sets, you need to spend an equal amount of time determining, to the best of your ability, whether the applicant can successfully transition to and thrive within a virtual environment.

Tip #2: Make the Talent Pool Work in Your Favor

The second of counsel attorney to join my team, Sherry Bosse Lueders, boasts a highly competitive resume including having attended superior schools, earned top grades, and successfully completed her clerkship with a highly respected King County Superior Court judge. Sherry participates significantly in various bar groups and stands committed to providing pro bono services. Sherry also enjoys her role as parent of her two-year-old son and found that the strenuous billable requirements and the need for physical presence (a.k.a. "face time") imposed by most Seattle brick-and-mortar law firms stifled her ability to fully engage as a parent. Recognizing the dearth of part-time law jobs in Seattle, Sherry took the initiative of starting her own law firm and spent a year gaining additional legal skills and business acumen prior to becoming a part of my team.

Every member of my team offers a different version of the same story. Each is a highly talented and attractive candidate—the type of person that most brick-and-mortar law firms would covet. However, for various reasons, including but not limited to parenting responsibilities, each team member thrives best in a virtual environment because of the opportunities afforded to achieve professional success while realizing other meaningful personal goals. By allowing people to work virtually, and according them flexibility in choosing a part-time work schedule, a virtual law firm often has its pick of the region's top talents.

Tip #3: Create Communication Structures

Once your virtual team is in place, how does it become a "team"? Because by definition you will not personally meet with them on a daily basis to discuss work, you will need to establish communication structures that will enable your team to collaborate effectively within a virtual environment. My office has established the following channels of communication:

- Each day, when either of my of counsel attorneys begins her work, we briefly communicate via Time Matters Messenger, an instant chat tool, about the day's work priorities.
- Each Monday afternoon, the three attorneys in my office participate in a half-hour teleconference to discuss the client files.
- Each Wednesday morning, I personally meet with the office administrator for a 15-minute "exchange." We briefly discuss the upcoming needs of the office, and then she brings documents for my signature, picks up various items that need to be mailed, scanned in, sorted

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out, etc.

- Each Friday, I send out a team email outlining the week's successes and opportunities for improvement. The email also informs the team of various deadlines for the following week. This weekly email keeps my team informed, in a holistic sense, about firm activities.
- Each quarter, I speak with each team member individually, either in person or by telephone, to provide feedback on work performance and to listen to their perspectives regarding workload, schedules, and ideas for enhancing the firm as well as their own sense of professional fulfillment.

Tip #4: Promote In-Person Team Building

Because my team members all reside in the Seattle area, we meet as a group several times a year to personally connect and share a meal. In addition, I truly appreciate having my team members and their spouses attend the annual auction for the nonprofit Tennis Outreach Programs in support of my work on its board of directors. These in-person activities create a sense of camaraderie and trust, and help us to work together positively and collaboratively.

In creating and maintaining a virtual office team, you should expect to work a little harder and apply much more creativity than you would in setting up an office staff for a brick-and-mortar law firm, but you can also expect to reap the rewards of cherry-picking highly talented workers and seeing those individuals thrive within the flexibility and independence offered by your firm.

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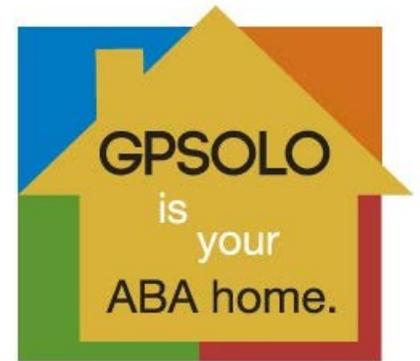
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To Groupon or Not to Groupon: For Lawyers, It's Best Not

Vol. 3, No. 10

Megan Zavieh

Megan Zavieh is a state bar defense attorney and general ethics counselor admitted to practice in California, New York, New Jersey, and Georgia. She runs a virtual law practice at [zaviehlaw.com](#) in which she represents attorneys facing ethics charges, counsels lawyers on issues of law practice, risk management, and early resolution of client conflicts, and speaks on ethics issues at seminars and webinars. Megan blogs at [CaliforniaStateBarDefense.com](#) and is a regular contributor on ethics topics at [Lawyerist.com](#) and [AttorneyatWork.com](#). She currently serves on the Executive Committee of the Solo and Small Firm Section of the California State Bar.

Most of us have used a Groupon-type site to obtain a discount on restaurants, car washes, children's parties, or some other product or service. As consumers, we appreciate the deals the sites provide, and as lawyers marketing our services to the general public, we see the great marketing exposure of these sites. The potential to convert discounted service clients to longer-term engagements and referral sources is phenomenal.

Before leaping to advertise your discounted services, though, be sure to see what the ethics regulators are saying about it. The ABA says to use extreme caution, while some jurisdictions such as Alabama are saying absolutely not. Know your own state's opinion, and if it hasn't been directly addressed, read the ABA guidance carefully to see where you can easily go wrong. An ethics violation could quickly eat up any profit the marketing campaign brings.

The Deals and Services

Groupon, Amazon Local, Restaurant.com, and similar marketing sites operate in roughly the same way—consumers purchase a voucher through the website for a product or service, and that product or service is provided by a third-party business for the sum paid to the site. (Here we speak of Groupon to refer to any of these types of sites.) From where the consumer sits, they pay their smaller amount to the site, get their service paid for, and walk away happy. For the merchant, it is a little more complicated.

Some vouchers act as coupons. The merchant offers a discounted price for the coupon purchased on the site. For instance, the consumer may pay Groupon \$25 for a voucher worth 50% off of a lawyer's regular hourly rate for a certain number of hours. Other vouchers are actually prepayment for services. For instance, the consumer would pay Groupon \$500 for five hours of legal services to be provided by the advertising lawyer.

In theory there are infinite variations of vouchers that could be offered, limited only by the imagination of the merchant and the site. The coupon and prepayment variations are the most

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common and are the focus of the ABA's recent discussion.

Potential Ethical Pitfalls

There are many ways advertising through Groupon might run afoul of the ethics rules. Here are some of the regulators' biggest concerns.

- *Fee-Splitting With Non-Lawyers:* All states prohibit fee sharing between lawyers and nonlawyers. When Groupon charges a fee for advertising and calculates it as a percentage of the consumer's cost for the service, it looks like fee-splitting if the consumer is prepaying legal fees. Several states (with Maryland, North Carolina, and South Carolina among them) have affirmatively said that this is not fee-splitting because the lawyer is just paying for advertising, while other states (including [Alabama](#), Arizona, Indiana, and Pennsylvania) have come out the other way. [The ABA says it isn't fee-splitting as long as the percentage is reasonable](#), hinting that most such arrangements would be considered reasonable.
- *Attorney Advertising Rules:* Every state has its own, albeit similar, regime of advertising rules. All attorney advertising must be truthful, not mislead, contain certain disclaimers, and describe the services being offered. For a lawyer advertising on Groupon, the ad goes out to the public in a number of media, including websites, mobile apps, and emails. As a merchant offering the deal, the lawyer must exercise a certain amount of control over what specific information is included in each advertisement. Ethics rules hold the attorney, not Groupon, responsible for compliance. The ABA expressed its view that lawyers can manage compliance through Groupon advertising, though not all states (again, look to Alabama) agree.
- *Formation of Attorney-Client Relationship:* In a typical advertising scenario, there is little question that simply viewing an ad does not create an attorney-client relationship between the viewer and the advertising lawyer. When the viewer becomes a purchaser of prepaid legal services prior to any contact with the lawyer, it is less clear. The ABA says that there is not yet an attorney-client relationship prior to contact, and stresses that hurdles such as conflicts checks have yet to be cleared.
- *Identity of Client:* Another issue the ABA raises is the transferability of the Groupon. If the purchaser is not the ultimate intended client of the lawyer, it complicates other issues such as trust accounting (see below). Transferability of the voucher must be addressed in the advertisement.
- *Type and Scope of Engagement:* Attorneys must appropriately limit the services to which the voucher can be applied to areas of the attorney's competence and address what happens if the attorney or firm needs more time than the prepaid hours to competently perform the services.
- *Trust Accounting:* The ABA withheld a final verdict on whether the prepaid legal services vouchers are permissible, and the biggest holdup is handling the fees received from Groupon. If they are indeed prepaid legal fees, the full amount should be placed in the attorney's trust account until earned, and recorded as belonging to a specific client. However, merchants typically don't know the identity of purchasers when they receive funds from Groupon, the advertising fee has already been deducted, and the purchaser may not be the ultimate client. There is not an attorney-client relationship yet, and theoretically the voucher might never be redeemed and, thus, the fees never earned. These issues are far simpler with the coupon arrangement, where no prepaid fees are involved. The ABA says the lawyer has to make arrangements with the marketing site that allow compliance with the applicable accounting rules in his jurisdiction. Other regulators say no such compliance is possible (again, see Alabama, for instance).

Each regulator who comes out with an opinion on Groupon for lawyers stresses how difficult it is to successfully navigate the ethical landscape. It may be possible to do so in some states, particularly with a coupon offer, but after seeing all of the landmines out there, simply avoiding Groupon is surely the safer route.

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2014: The Year of the Cloud?

Vol. 3, No. 10

Loretta Ruppert

Loretta Ruppert is the Sr. Director with LexisNexis Firm Manager. Loretta brings experience as a previous business owner and legal technology consultant, a manager of professional services for a CPA firm, an accountant, and a subject matter expert for developing back-office software. Probably most relevant, she is a former law firm employee and user of law firm practice management and financial systems. Find her on Twitter @LorettaRuppert.

Is 2014 is the year of the cloud? If you're like me, you've heard that question more than a handful of times recently.

The answer seems to be a resounding yes. Sure there are still lawyers who fear the cloud and don't believe storing privileged client information is as safe as servers maintained on premise, but there's more evidence that shows today's small law firms and independent attorneys are ready to take the plunge and embrace the cloud.

The Proof Is in the Data

At LexisNexis, we recently published the [results of a survey](#) on the law cloud that gauged the perceptions of 279 independent attorneys. Here are some of the highlights:

- **Attorneys are warm to the cloud.** More than 50 percent of attorneys reported they were more likely to adopt cloud-based tools for their law firm business purposes.
- **Law firms are even warmer to the cloud.** Seventy-four percent of survey respondents reported law firms are more likely to use the cloud in 2014.
- **Gaining confidence in cloud security.** Forty-one percent of respondents reported feeling their confidential data is "safe," indicating that while security continues to be a main concern, some attorneys are feeling more confident about the cloud.
- **Ethics a significant barrier to adoption.** Ethics ranked the second highest, trailing only security concerns, among the top five barriers. Most concerns center on ownership and positive control over data stored in the cloud.
- **Mobility or freedom of access.** Lawyers in small law firms largely say the top benefits of the cloud are mobility and the ability to access data from anywhere (45.2%). Disaster recovery and backup followed in at a close second (40.5%). Every other response trailed by a wide margin in the single digits.
- **Will cloud eclipse premise?** Nearly forty percent of respondents reported cloud-based tools will trump premise-based tools in the next three-to-five years showing evidence that the cloud has reached a tipping point in the legal industry.

What's Driving Adoption?

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In a profession that is based on risk aversion, it's not surprising that it has taken a while for even the legal industry to warm up to the cloud. However, even the naysayers are beginning to see there are some real benefits to the cloud. There are several underlying trends driving adoption and which we categorize into four primary trends:

- 1. Faster roads.** Speed has traditionally been a major factor in performance of web-based solutions. The cloud isn't new; many technologists will recall the 1999-era term "applications service provider" or ASP. In essence, an ASP is a cloud-based service, but the speed and performance of web connections was too slow to support reliable performance of managing applications—say law firm practice management tools—in the cloud. Today the roads have much higher speed limits and we take bandwidth, including mobile bandwidth, for granted.
- 2. Mobility.** The reason BYOD is a topic of discussion is that mobile devices have become easier to use and affordable: everyone has mobile device. We shop with our mobile devices, we bank with our mobile devices—we can even hail a taxi with mobile devices. We can in part, run a practice from a mobile device; recall that independent attorneys said the single most valuable benefit of the cloud was "freedom and mobility of access." Attorneys increasingly need access to client information on the go—and it's increasingly becoming an expectation from customers.
- 3. Security concerns alleviated.** Certainly no system is fool proof, but businesses, including small law firms are becoming increasingly comfortable with the notion a dedicated vendor can provide a higher level of security than they can. As [The Droid Lawyer](#), Jeffrey Taylor wrote, "Personally, I'd rather have a company that's actively engaged in improving security, backing up my data, and offering me efficient ways to interact and use my information, than my haphazard pasting of security suites, backup solutions, and half-hearted systems updates."
- 4. Bar association approve ethics.** Ethics was ranked second in the survey and trailed only security concerns among the top five barriers. Several state bar associations have laid out reasonable ethical standards for the use of cloud services. As of the time of this writing, 14 state bar associations have published cloud ethics opinions. These are neatly arranged on the [American Bar Association's website](#).

Evaluating Cloud Providers

The indications are that cloud is poised for adoption in the legal industry in 2014, which leaves the question: how can we evaluate service providers?

A good place to start is by reading the terms of service (ToS) – [according to the 2013 ABA Technology Study](#) only 40 percent of attorneys reported reading the ToS before using a service. Within these terms you'll often find answers to four primary areas worth evaluating:

- **Functionality.** Functionality focuses on features, functions and integrations with other applications, such as email, that will enable an attorney to run their practices.
- **Data protection.** Data protection centers on assurances that any data you store is secure and is rigorously tested to maintain that protection.
- **Data ownership.** Some cloud-services, especially those that are free to use, claim rights to data stored in their service, even if that's only to monitor the metadata in order to profile prospective customers for additional services. The implications can come to head when and if an attorney decides to cancel a service—can they get their data out?
- **Availability.** A law firm needs any service it uses to work—and to work when they need it. Availability evaluations should center on service level guarantees.

Functionality Evaluation

The following questions are useful for thinking about the functionality your firm might require. Functionality requirements may vary from firm-to-firm—from standard calendar integrations to features that enable the firm to standardize and automate routine tasks for improved efficiency.

- Does the application offer secure mobile access across devices such as smartphones or tablets?
- Does it offer a secure client portal for collaborating with third-parties?
- Does it offer centralized calendar and task management?
- Does it offer centralized client and contact management?
- Does it offer centralized matter management?
- Does it include storage of files and documents, online, with no preset limit?

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Data Protection Evaluation

The following questions are useful for considering the data protection and assurance requirements—particularly those that meet the ethics standards of an attorney.

- What type of encryption is used to protect my data?
- What are their third party certifications and/or other industry certifications?
- How secure is their physical environment?
- How—and how often—do they test their systems?
- Do they monitor for intrusions in real time?
- Are their data centers U.S. based?

Data Ownership Evaluation

Data ownership is a critical issue for independent attorneys and law firms. Given the often confidential nature of an attorney's work, data ownership is simply nonnegotiable in choosing a service provider.

- What are their contract terms and conditions?
- What systems are in place to restore my data in case of disaster?
- What happens if I terminate my service?
- Who "owns" the data?
- Who has access to my data, besides me and my authorized staff?
- Does the vendor outsource any of their services to third parties providers, and if so, what are their credentials?
- Does their Terms of Service or Service Level Agreement address confidentiality?
- In what ways, if any, do they make use of my data (i.e. anonymously to track usage)?

Data Availability Evaluation

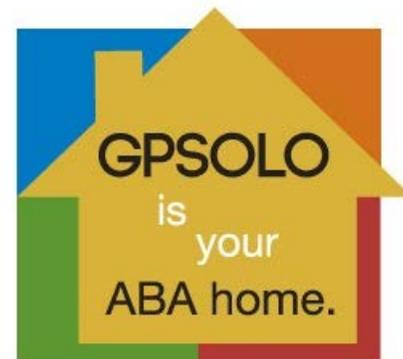
The results of choosing a cloud-service provider one week and spending the next uploading data and preparing to use it the following week would be disastrous if suddenly on week three the service suffered an outage. The following questions are aimed at service level agreements:

- What are their uptime guarantees?
- What financial penalties do they impose for late payments?
- Do they have backups of their own data?
- Do they offer a trial period?
- How many data centers do they have in total?
- If the vendor goes out of business, will I have access to the data and the software or source code?
- Do they have a data recovery plan of their own in place?
- Do they have a business continuity plan of their own in place?

Moving to the Cloud

The indications are quite clear that small law firms and independent attorneys poised to adopt the cloud despite reservations. As the industry trend evolves, so too must the conversation into the practical measures for evaluating cloud options.

As one respondent answered in response to an open-ended question asking how they would describe the cloud to peers, "As a fluffy white baby lamb. At least when the weather is nice." A rigorous evaluation prior selecting a vendor is a fair path to ensuring good weather during the year of the cloud.



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Some past Brown Bag Session topics included:

- Expanding Your Practice With Limited Scope Representation
- Senior Insolvency, Asset Protection, and Estate Planning
- Navigating the Legal Technology Minefield: What's New for 2014
- Group Legal Services: What's in It for You?
- More on How to Start and Build a Successful Law Practice
- Chapter 13 Bankruptcy: Is It Time to Add It to Your Bankruptcy Practice?
- More on How to Start and Build a Successful Law Practice
- Premiums to Profits: Attorneys as Title Agents
- Taking the Mystery and (Some) Misery Out of Starting and Developing a New Solo Practice
- The Servicemembers Civil Relief Act (SCRA): What Every Lawyer Needs to Know
- Cybersecurity and the Solo and Small Firm Lawyer

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small firm practitioners, as well as bar leaders and bar associations. Winners were honored during the 2014 Joint Spring Meeting on May 2 at the Aria Resort & Casino in Las Vegas, NV.



Front row, left to right: Larry Walker; Judge Nancy M. Saitta; Gregory J. Kamer. Back row, left to right: Kay H. Hodge (GPSolo Awards Committee Co-Chair); Sarah M. Moulder; Judge Jennifer A. Rymell (GPSolo Division Chair); J. Michelle Childs (GPSolo Awards Committee Co-Chair); Connie Akridge; Judge Eileen Kato (GPSolo Awards Committee Co-Chair).

Credit line: Sheryl Axelrod

Solo and Small Firm Lifetime Achievement Award Honoree

Larry Walker, Founding Partner

Walker Hulbert Gray & Moore, LLP, Perry, GA

Solo and Small Firm Project Award Honoree

Transitioning into Practice (TIP) (Mentoring Program) State Bar of Nevada, Las Vegas, NV

The award was accepted by Nevada Supreme Court Justice Nancy Saitta; Gregg Kamer, TIP Program Chair; and Connie Akridge, Past President, State Bar of Nevada.

Solo and Small Firm Trainer Award Honoree

"Small Law"—MC Law Seminar and Practicum

Mississippi College School of Law, Jackson, MS

Sheryl Johnson, Small Law, Director

The award was accepted by Sarah Moulder, GPSolo Law Student Committee Vice Chair.

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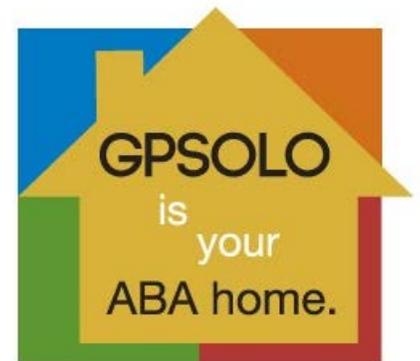
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Division Meetings

Vol. 3, No. 10

2014 ABA Annual Meeting

August 7–10, 2014

Sheraton Boston Hotel

Boston, MA

2014 GPSolo Fall Meeting and 9th Annual National Solo & Small Firm Conference

October 23–25, 2014

Hilton Palacio del Rio Hotel

San Antonio, TX

2015 GPSolo Spring Meeting

April 16–18, 2015

Moana Surfrider, A Westin Resort & Spa

Honolulu, HI

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CLE

Vol. 3, No. 10

Please visit the [Events & CLE](#) page on the Division's website for CLE teleconferences that GPSolo produces and cosponsors by clicking [here](#).

Upcoming GPSolo CLE

NFA Gun Trusts: Protecting Your Client's Firearms for the Future Under New and Pending Regulations

May 21, 2014

12:00 p.m.–1:30 p.m. Central

In recent years gun trusts have come to prominence in estate planning for gun collections and as a means to comply with federal laws on select firearms. The National Firearms Act (NFA) was passed in 1934 with amendments in 1968 and 1986, and Title 2 of the NFA regulates silencers, machine guns, and short-barreled rifles and shotguns, among other firearms, which compose a fast-growing segment of the gun market. The NFA has strict requirements and severe penalties making it crucial that those who draft these instruments understand the NFA regulatory scheme as well as state specific requirements.

To register for the teleconference, please [click here](#).

1031 Exchanges for the Agriculture Industry

May 29, 2014

1:00 p.m.–2:30 p.m. Central

This seminar will provide an overview of the evolution of Section 1031 of the Internal Revenue Code and regulations, basic 1031 exchange concepts and recurring problem areas in exchange transactions. The presentation will also include a discussion of reverse property exchanges and the special issues inherent in those transactions. The focus will be on property exchanges in the agricultural business sector and will conclude with a summary of the current treatment of Section 1031 exchanges as part of the pending Congressional and Administration Tax Reform proposals.

To register for the teleconference, please [click here](#).

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Member Highlights

Vol. 3, No. 10

Committee Highlight Family Law Committee

The Family Law Committee of the ABA Solo, Small Firm and General Practice Division would like to welcome you. As family law practitioners we offer a tremendous service to people facing challenges in their lives. I hope you consider joining this Committee, which gives us the opportunity to network and learn from each other.

We encourage you to become involved in the work of the committee, whether you take an active part in a project or a program or attend our conference calls and meetings. Please feel free to participate in our list serve and discussions. Any suggestions for links to resource materials and programs or topics for discussion would be helpful. We are currently engaged in several projects and programs that are stimulating, cutting-edge, and timely in nature; and we believe that you, as a member of the committee, will find them to be professionally gratifying and stimulating as well as being personally intriguing and motivational.

We look forward to working with you and providing the legal community with updates and insights into the practice of the committee. Your ideas or questions are important to making our committee a success.

Best wishes!

Raymond Catanzano (lawyerprof@cs.com) and Alan "Craig" Haston (chatson@hastonlaw.com), Co-Chairs, Family Law Committee

Tips for Members

Connect With Us: Join the GPSolo Public LinkedIn Page and the GPSolo LinkedIn Referral Group

GPSolo's Public [LinkedIn](#) Page connects more than 7,000 member lawyers together in a unique way to network. The LinkedIn Referral Group helps provide an opportunity to network, provide business to others, and answer questions regarding substantive areas of law and law practice management throughout the nation (and the world). This is a subgroup of the Public [LinkedIn](#) Page and is exclusively for paid members.

LinkedIn Referral Group Instructions

Create a LinkedIn account if you have not done so. Once you have an account, you can request membership into this referral group by following these steps:

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1. Sign into LinkedIn.
2. Visit the GPSolo Public [LinkedIn](#) page.
3. If you are not a member of the GPSolo group, please join by clicking the "Join" option.
4. Once you are a member, or if you are already one, you can click the "More . . ." link at the top of the group page.
5. Then click "Subgroups."
6. Then click "Join this subgroup" to the right of the page.

By following these steps, you are requesting membership in this exclusive member-only group.



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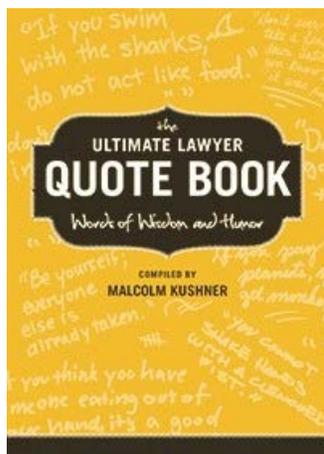
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Division Book Release

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SoloSez Popular Threads

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SoloSez is *the* Internet discussion forum for solos and small firm lawyers. As the ABA's most active email listserv, SoloSez features approximately 3,000 solo and small firm email subscribers discussing everything from tech tips and legal opinions to what to wear to court.

The popular threads for April 2014 are:

- [Cell Phone Upgrade Time – Help!](#)
- [Depositions](#)
- [Do You Tip Movers?](#)
- [Passwords and Death](#)
- [War on Footnotes?](#)

For Past Popular Threads, [click here](#).



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