Building a Practice: Five Steps to Get Your Solo Firm Up and Running

By Jeena R. Belil

Helpful advice on every aspect of running your practice, from opening doors through planning for retirement. This month: the most important lessons the author learned when setting up her solo practice.
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Chatbots for Justice! Is That a Thing?

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By Julie Houth

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Is the Bankruptcy Court a Court?

By Michael Enright

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Your client’s case looks simple. Both spouses are W-2 wage earners. But look further—they might also participate in complex executive compensation plans.

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Building a Practice: Five Steps to Get Your Solo Firm Up and Running

By Jeena R. Belil

This past September, I celebrated a milestone: I entered my second decade as a solo practitioner. While getting ready to host a soiree to mark the occasion, I had a chance to reflect on the first ten years of my journey.

In 2007 I was managing counsel for a small insurance company. I had 27 people, including attorneys and support staff, reporting to me. At that point, my name was on approximately ten thousand legal files all over the State of New York. By early September, my entire department was laid off as a result of a reduction in force. Luckily, I was provided a severance package. I just had to decide the best course moving forward. Going to work for another insurance company would have been my path of least resistance, but I thought that it might be the perfect time to go solo in order to create a better life for myself. Here are five things I did to get my practice up and running.

1. **I spent time learning how to run a business.** One complaint I have about law schools is that they really don’t prepare future lawyers to be business owners. I had to sit down and do a lot of my own research into everything it takes to run a practice. I had learned people management and had workflow processes nailed down, but I needed to understand finances/budgeting, marketing, client relations, and short- and long-range planning. This involved speaking to existing business owners, spending a
lot of time in front of the computer educating myself, and joining solo/small firm Listservs such as the ABA’s own SoloSez.

2. **I created a business plan.** Ask any business owner, and he or she will tell you that the most important thing you can do before opening your doors is to create a business plan. A business plan is a flexible blueprint of your goals and how you will achieve them. It does not need to be anything elaborate; however, there are some basics you need to cover, such as a short summary of what you envision your practice to look like, your ideal client, your budget, your physical space, necessities to run your practice, and who, if anyone, you will require to support you. For instance, my original business plan, which I wrote down in a marble notebook, included my vision (working on behalf of victims of negligence on Long Island and the five boroughs of New York City as well as their doctors in collecting payment from no-fault insurance carriers), physical space (home office), supplies I needed to purchase, and a few ideas about how I would market. Keep in mind that a business plan is not set in stone and should be reviewed and updated at least once a year. My basic business plan hasn’t changed much, but it has afforded me the flexibility to withstand the roller coaster that is solo practice.

3. **I decided to practice what I already knew how to do.** All right, perhaps plaintiff’s personal injury and no-fault litigation is not the sexiest of practice areas, but I had 14 years of experience working on both sides of the “v.”, representing accident victims as well as insurance carriers. While I took classes in everything from bankruptcy to immigration to estate planning in the months after the layoff, I realized that I could quickly capitalize on my experience inside the insurance business and I could offer that unique perspective to my injured clients. Along the way, I did take a few clients that did not fit within my ideal client description, and while I was able to represent them well, they took my focus off my original plan; therefore, I had to decide to turn some business away even when it was tempting to sign it on.

4. **I made sure my finances were in order.** I am fortunate enough to have a husband who makes a good living as a medical malpractice defense attorney. However, knowing that we had a mortgage and taxes on Long
Looking back on my first decade in solo practice, I am proud of my small but successful law firm. I am able to provide personalized and slightly casual client service, which was definitely what I envisioned in my original business plan. Starting a solo career is not easy, but it can be done with a little research and a lot of planning. There are many lawyers ready and willing to assist and support you through your journey, including me. All you need to do is make the decision and not be afraid to ask questions. Best of luck!

Island to pay, we knew that we would have to reign in our spending temporarily and cut discretionary spending. Just before I was let go, I received proceeds from a small settlement that I used to start up the firm. Even with that little windfall plus my severance, I started my firm in my house with spit and glue rather than spending thousands on commercial office space. I spent as little money as I could, only investing in a new computer, Westlaw subscription, website, business cards, and office supplies. As my business grew, my expenses increased; however, know that you do not need to spend significant amounts of money to start a practice. Just plan wisely.

I learned how to market and advertise. Understanding how to attract potential clients is probably the most vexing aspect of starting your own practice. Just look at a week’s worth of posts on SoloSez or solo attorney pages on Facebook, and you’ll see that the most popular questions a new solo asks are “How do I get clients?” and “What do you do to market yourself?” Having clients find you, especially in saturated areas such as Long Island, is extremely challenging. I made mistakes at first, like putting ads in the Yellow Pages, but I learned quickly from others and from the new thing called social media, which was just getting off the ground a decade ago. After 11 years, I can honestly say that when it comes to law firms, word of mouth is still the best form of marketing, but I do take advantage of platforms such as Facebook and Instagram in creative yet ethical ways.

Looking back on my first decade in solo practice, I am proud of my small but successful law firm. I am able to provide personalized and slightly casual client service, which was definitely what I envisioned in my original business plan.
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Welcome to the latest installment of our monthly Q&A column, where a panel of experts answers your questions about using technology in your law practice.

This month we answer readers’ questions about the best places to save money on technology, whether you should upgrade to a solid-state drive, and how to export entire Outlook subfolders to PDF.

Q: A lot of tech is very expensive. What are the best places to save money while still taking advantage of modern tech tools?

A: I’m a firm believer that anytime you bring a new piece of tech into your office, you need to measure and monitor your return on investment (ROI). Even “free” tools have training and utilization costs. Sometimes you will find that very expensive tools provide an ROI that easily justifies the cost. That said, in my experience there are a few areas in which free tools offer more than enough utility for the majority of practitioners:

1. **Legal research.** Every state bar association in the country offers either Fastcase or Casemaker free to its members. In addition to those, Google Scholar offers free access to a searchable database of all case law, including unpublished opinions decided after 2013. Google Scholar may not have all the features of Westlaw, but it is free and functional.

2. **Intra-office communication.** If you’re not a fan of e-mail, intra-office communication can be a nightmare. Thankfully, there is a burgeoning marketplace of office messaging tools. I use Slack in my office. Although...
Slack does have paid versions with increased storage and features, your average solo or small firm attorney will find that the free version offers all the features you need.

3 Social media. In surveys of solo and small firm attorneys, marketing and business development is commonly cited as the number-one pain point. It’s expensive, confusing, and essential. Social media can offer a relief from that. It’s free, effective, and most of us already know how to do it. For those who want to spend a little money, paid advertising on social media is a great way to expand your message for a low cost.

4 Anything with free and paid options. As a general rule, if you are analyzing a piece of tech that has free and paid versions, always start with the free version. Often, we think we need as many features as possible, but rarely is this true. Nine times out of ten when you pay for an upgrade, you end up using only the free features.

Q: Should I replace the standard disk drive in my computer with a solid-state drive?

A: Yes! Upgrading to a solid-state drive (SSD) has three big advantages:

1 You will waste less time waiting for your computer to start up and for programs to work.

2 Your SSD will be much more reliable.

3 In a laptop, your SSD will be much more durable.

The prices for SSDs have plummeted this year. A good 500 GB drive goes for around $80, and a 1 TB (1,000 GB) drive for around $130. If most or all your files are likely on a server, you don’t need a big SSD on your computer. On a laptop, give yourself room to grow. In either case, buy a drive that is bigger than your old one.

Choose a drive from a brand with a good reputation, such as Samsung, Crucial, or Western Digital. You probably don’t need the latest generation. New, ultra-fast technologies for SSDs are available—M.2 and PCI-e (NVMe)—but likely would require a new computer.
Replacing the drive yourself or having a techie friend do it might be fast or slow depending how tricky it is to open your computer and get at the drive. A local store such as Micro Center or Staples will charge $40 to $60 to swap in a new SSD that you buy from them.

Moving Windows and all your programs and files can be straightforward by using a USB enclosure and drive-cloning transfer software that may be included with the SSD. If not, easy-to-use Macrium Reflect Free will clone drives and is now licensed for business use. CloneZilla is geeky cloning software that is open source (free).

Get ready for exceeding your old speed limits with your new SSD!

Q: I would like to export or print every e-mail within an Outlook inbox subfolder to PDF files. Is this possible to do as a bulk operation?

A: Yes, you can do this as a bulk operation or on an e-mail by e-mail basis. This can be helpful at the end of a matter or case when you want to store all the relevant e-mails as standard electronic files along with the other documents for the matter.

Products such as Nuance Power PDF Advanced and Acrobat DC allow you to convert Outlook e-mails to PDF. You can choose to export one or more e-mails or an entire Outlook folder either with or without its subfolders. Depending on the product you use, attachments to those e-mails will be included in the conversion, but, depending on the settings selected when doing the conversion, attachments can either remain in their native format or also be converted to PDF. So, if you select the setting that keeps attachments in their native format, then the MS Word attachment to the e-mail will remain an MS Word file once the e-mail has been converted to PDF. Click on the link to the attachment in the PDF, and it will launch MS Word and open the attachment. However, if you need all the attachments and e-mails to be in one file (no links) so you can Bates stamp and print them out, you most likely will need to convert all attachments to PDF.

Using Nuance Power PDF Advanced, here is one way to archive an entire folder and its subfolders to a PDF package (Acrobat calls these Portfolios):

1. Select the Outlook folder you want to archive to PDF by clicking it.

2. Go to the Nuance PDF tab to open the PDF Tools section of the Ribbon.
2. Click Settings to open the Settings dialog.

3. The Settings Dialog opens to the “Mail Archiving Settings” tab. Select “Store E-mails as PDF Package” under Archive Method.

4. Select how you want the e-mails to be ordered in the PDF package by using the “Order by:” drop down list. Your options include From, To, Sent, etc.

5. If you also want to archive subfolders, select Archive Subfolders.

6. Click OK to save and close the Settings dialog.

7. Click Archive Folder to begin converting the previously selected Outlook folder (and any subfolders) to a PDF package.

8. From the Save As dialog, select where you want to save your PDF package and enter a name for it. Click Save to begin.

9. Go to the location where you saved your PDF package and open it.

10. Your PDF package includes a bookmark page that tells you what folder was archived, the number of items archived, whether the attachments are attached to the e-mails, and the date the archive was created.

11. Once satisfied that you have accurately converted all e-mails and subfolders to PDF, you can then delete the Outlook folder and subfolders.

By using a PDF package, each e-mail is created as a separate document within the PDF package and you can sort and search them. You also have the option of creating separate PDF files rather than a PDF package that combines all e-mails into a single PDF file. Attachments can still be found attached to the e-mail and kept in their native format.

Acrobat DC has similar capabilities, as do other PDF creation packages. To learn how to do this in your product, search your product’s Help file for instructions on creating or converting Outlook e-mail to PDF.

What’s YOUR Question?
If you have a technology question, please forward it to Managing Editor Rob Salkin (robert.salkin@americanbar.org) at your earliest convenience. Our response team selects the questions for response and publication. Our regular response team includes Jeffrey Allen, Wells H. Anderson, Jordan L. Couch, Ashley Hallene, Al Harrison, and Patrick Palace. We publish submitted questions anonymously, just in case you do not want someone else to know you asked the question.

Please send in your questions today!

Next Article > > >
There is a simple problem providing access to justice (A2J) to people who cannot afford the market rates for lawyers: Lawyers cost too much. Conversely, there is a simple solution: provide legal advice and services at a rate anybody can afford, maybe even free. There it is. Boom! Problem identified and solution nailed. You’re welcome.

Now for the more substantive heavy lifting. How do we deliver legal services at an affordable rate? Well, “we” as lawyers not are so good at this. But “we” as disembodied chatbots? Amazing at it.

For those of you who may not have used chatbots, they are computer programs designed to mimic human conversation. They create an artificially generated response based on the input from an actual person, using dialogue-based text. In other words, a chatbot is the thing you may think is a person on your screen that you are talking with.

I know that some people may suggest that this is just the kind of artificial intelligence (AI) lawyer robot that could enslave lawyers and create a superior race of emotionless overlords. Well . . . maybe in a new Netflix sci-fi series, but in the real world chatbots can and do provide legal information to consumers 24/7, 365 days a year. They don’t sleep, which means that they can help more people, more quickly, more consistently, more accurately, and more timely. Did I mention that most chatbot services are free?
But are chatbots better than lawyers? Short answer: No, but they can do things lawyers can’t afford to do and solve problems too small for any firm. Tom Martin, the CEO of LawDroid, a company that creates chatbots and other advanced tech tools, recently wrote that, when asked ‘What’s most important when communicating with a company?,’ 68 percent of consumers responded that ‘Reaching desired outcome’ was paramount, followed by ‘ease of experience’ (48 percent), ‘speed’ (44 percent), and ‘convenient time’ (39 percent).” In fact, according to Martin, “69 percent of consumers would consider talking to a chatbot over a human being because a chatbot can provide an instantaneous answer.”

So, if a chatbot can help consumers find the way to get the legal outcome they need, make the user experience consumer friendly, and do it quickly, 24/7, then why not create an army of chatbots to bridge the A2J gap? Fortunately, we are not alone in this logic.

Meet Joshua Browder. Browder is famous for being the then-18-year-old creator of a parking ticket chatbot to fight parking tickets. The original DoNotPay app, which launched in the UK and then in New York, has been used by more than 175,000 consumers and saved users more than $5 million in violation fees. It was free. Still is.

DoNotPay has grown with time and substantial success. It remains a free chatbot that offers AI-powered legal counsel, and now it is also accessible on mobile phones. Its scope has been broadened to provide legal services for problems too small for lawyers but needed by consumers. According to the app, DoNotPay can be used to “sue anyone by pressing a button,” but its focus is on niche legal pain points between consumers and government bureaucracies and consumers and corporate red tape that costs consumers needlessly and unjustly. Browder’s chatbot now helps consumers fight volatile airline prices, data breaches, late package deliveries, and unfair bank fees.

The DoNotPay chatbot is one of many A2J chatbots currently online and going online across the country. There are many more, but here are a couple I think are pretty cool:
Visabot (now part of DoNotPay) has reportedly helped more than 50,000 users so far to obtain their residence permits for the United States.

SoloSuit is a Utah chatbot that helps consumers with their debt.

Larissa Divorce Chatbot by LawDroid lets users ask a variety of questions about divorce.

The popularity of chatbots has spawned a new generation of lawyers and soon-to-be lawyers to create A2J chatbots. Chad Au, for example, is a student in the William S. Richardson School of Law at the University of Hawai‘i at Mānoa. He participated in the 2017 Access to Justice Tech Fellows Program and developed a chatbot for the Legal Aid Society of Hawai‘i’s website to help consumers access legal answers and resources faster and more easily with a Q and A protocol. Au’s chatbot was made possible by the Access to Justice Tech Fellows Program, which is funded by the national Legal Services Corporation (LSC). The LSC provides up to $4,000 for a ten-week summer fellowship for law students. Fortunately, this program is not unique.

Legal service programs are increasing utilizing chatbots. With the success of like programs, growing amounts of grant money have been allocated to build chatbots where they are most needed.

For example, in the last two years money has been allocated by the LSC to a number of chatbot initiatives now being built in Florida, Kansas, Illinois, Montana, Cleveland, and more.

- In 2017 Community Legal Services of Mid-Florida received $160,888 to add AI to their online client intake process so that users with more complex legal issues are flagged for services by legal staff.

- The Kansas Legal Services received $159,110 to develop five instructional videos to guide self-represented litigants and add a “live-chat” feature within automated legal forms.

- In 2018 the Legal Assistance Foundation in Illinois received a $266,000 Technology Initiative Grant to add AI to better meet the needs of
individuals seeking civil legal assistance.

- The **Montana Legal Services Association** received $278,714 to improve the quality and availability of civil legal services to low-income Montanans and to create AI-powered legal tools through a new online pro bono legal advice platform, [AskKarla.org](http://AskKarla.org).

- The **West Tennessee Legal Services** and Tennessee Alliance for Legal Services received $229,191 to enhance the statewide portal, [HELP4TN.org](http://HELP4TN.org), by developing a chatbot that interacts online with users to guide them through the process of finding legal resources and delivering legal forms based on user-provided information.

So, are chatbots “the answer” to bridge the A2J gap? No, but they are an obvious workhorse that can do so much, for free or fee, easily, without using any lawyer’s time. That’s the kind of leverage we have been waiting for. And, for those of you thinking that a chatbot might be a great tool for your website to attract clients, vet claims, provide resources, explain rights and remedies, and more, the answer is “Duh!” Indeed, the scope and power of chatbots is just starting to be realized for A2J uses, for use in small and solo firms, public interest firms, government applications, and large corporations. So, next time you are online, take a minute to say “Hello” to our new little problem-solving friends.

Next Article > > >
This month’s TAPAs column focuses on backing up your information. If you do not back up regularly, you should start doing so immediately. Not doing so could put you out of business or, at least, make it very hard to continue in business for a while. If you do not know if you have a reliable backup system in place, you should test it immediately. If you wait until disaster strikes, you will have waited too long; you cannot back up your information or your system after you have lost it to hardware failure, software corruption, or the intervention of malware or a hacker.

Tip 1: Get a Good Back Up System

You have many to choose from. The choices work differently depending on whether you seek to back up a single computer or a network full of computers. Due to the limitations of the space afforded to this column, we will focus on backing up your computer(s) and not multiple computers used by others. If you need to back up many computers networked together, we recommend that you seek the assistance of an IT consultant if you do not have a fairly sophisticated understanding of the process as it is far more complex. If you use the Mac OS, the built-in Time Machine software does everything you need and works at least as well as anything else we have found. If you use Windows, we like Carbonite. Recent iterations of Windows have built-in back up features, but they do not work as easily as Carbonite. FYI, Carbonite also works on Mac computers, so if you have computers using both the Mac OS and Windows, you might want to use Carbonite.
Carbonite for both for simplicity’s sake. If you want extra security, you can use more than one system concurrently. For example, we use both the Mac OS’s Time Machine and Carbonite for backing up Mac computers.

Tip 2. Your Backup System Should Work Automatically

You should not have to remember to back up your computer. The computer should do it by itself without any human intervention after you set it up.

Tip 3. Your Backup System Should Allow You to Recover the Entire System or Specific Files, Depending on the Need

If your computer hard drive fails, you will want to restore everything to the replacement hard drive. If you inadvertently delete a file, you will want to have the ability to just get that file.

Tip 4. Make Multiple Backups and Stagger the System’s Use of Them

If you only have one backup and it is in your office and you lose access to the office due to fire, flood, earthquake, a terrorist act, or whatever, you effectively have no backup. If you have multiple backup copies and stagger the system’s use of them, you reduce the risk that contamination of your drive with malware infects your backup (you may lose some, but hopefully not all). We use external hard disks for most of our backup work, but we also use the cloud (see Tip 5, below).

Tip 5. Store at Least One Backup in Another Location

If you have several backup copies of your computer with staggered times and they all sit on your computer desk, you risk finding yourself without a backup when you need it. Make sure to store at least one backup in another location. The cloud has proven an excellent venue for this purpose as you can access the information wherever you have an Internet connection. The one disadvantage of using the cloud is that it works much more slowly than backing up to a physical hard drive. While that may change in time (Internet access speeds continue to increase), it is a fact of
present-day life. Nevertheless, you should take advantage of the opportunity, as it may end up saving you one day. Besides, the only time you will notice it is when you have to download and replace your entire system. It should not be an issue for single file replacement. We also like the idea of a physical backup in a separate location. One possibility is a small portable hard disk (they now come in pocketable multi-terabyte versions at quite reasonable prices). We have used that technique for some time, creating a physical backup that we do not update except once every few weeks. This does leave the last couple of weeks information at risk, but it also provides additional protection against all your backups becoming infected by a single malware attack.

**Tip 6. Test Your Backups Before You Need Them**

The only way to ensure that your backup system works is to test it. This has the double benefit of ensuring that (1) you know how to use it, and (2) it actually works. If you test it and confirm it works before you have an emergency, you should sleep better at night. If you test it before you need it and find a glitch, you can fix it and be in good order when an emergency occurs. If you wait until the emergency to find out it does not work, you are pretty much up the proverbial creek without the proverbial paddle. In the bad old days, people used to back up computer drives to tape systems. Back then, testing your backup imposed a very time-consuming burden most charitably described as a pain in the *gluteus maximus*. As a result, many (most) did not test their systems. When disaster hit, many found that the systems did not work. These days, backup usually occurs to an external hard disk or flash drive or to the Internet. Testing it for single file restoration takes little time or effort. Restoring the entire system will take more time, but not all that much effort. A word of caution, however: Do not restore from your backup to your current computer drive, as that will erase the contents on the drive, and if there is a glitch, cause you problems. The best approach is to get a separate external hard disk, create a boot disk on it, and boot into it and then restore to it. That protects your current computer drive and its contents.
TAPAs Backup for Security’s Sake
Clarifying Cloud Computing: Foreign Governments’ Technology Policies Impact Your Client’s Data and Your Liability

By Al Harrison and Joseph Jacobson

This article, another in the continuing series on cloud computing, discusses how foreign government policies and contracts may impact your client’s and your data.

Foreign Government Policies and Contracts May Influence Your Cloud Storage and Cloud Use Agreements

A foreign country could establish a policy that will impact the data that is stored and collected about your clients or you. You’ll want to be aware of these issues as you advise your clients on their contracting with a cloud service provider (CSP). Additionally, your client may use cloud services as a platform for ordering items or communicating with potential and existing customers. If communication occurs through social media, then foreign government policies may require planning for your client’s use of media.

Let’s examine a few examples taken from real life to see what you may have missed while you were not attuned to looking for this information.

Apple and Other Companies Are Like a Square Dancer, Following Orders on When to
Change and with Whom to Partner

In February 2018 Apple announced it would move its Chinese users’ iCloud accounts and their encryption keys to the China-based server company Guizhou-Cloud Big Data (owned by the Guizhou province government). Text messages, e-mails, and other data stored in the iCloud system will be physically housed in China, along with the cryptographic keys required to unlock an iCloud account. There was no information as to whether copies of this data would also be allowed to be stored outside of China, but the law suggests that to have copies elsewhere would violate China’s privacy rules.1

At that time, human rights activists were concerned that major international companies were sacrificing the privacy and individual protection of its customers to gain access to the Chinese market.2 Ronald Deibert,3 professor of political science and director of the Citizen Lab at the University of Toronto, concluded that China would no longer have to go through either U.S. law or an international legal procedure to access the cryptographic keys (previously stored outside of China) to investigate individuals.4, 5

In July 2018, five months after data was first stored in China, China Telecom took over the iCloud data from Guizhou-Cloud Big Data. Now the data is directly held by a Chinese-owned company.6 The Chinese government now has access to a Chinese individual’s accounts without having to go through the U.S. legal system; compliance with the Chinese legal system is all that is required.

The Chinese government has a history of accessing private information through cloud services. Yahoo, Inc., provided the Chinese government with information identifying Chinese journalist Shi Tao in 2004 and pro-democracy dissident Wang Xiaoning in 2002. Both were charged with subversion of state power and were sentenced to ten years in prison. Their families filed a lawsuit against Yahoo, where the parties reached a confidential settlement in 2007.7

From mid-2013 to mid-2017 Apple received 176 requests for customer account information from the Chinese government but denied all the requests.8

There is no indication that Apple will be able to keep records about Chinese government access to individual accounts or that the Chinese government will disclose any of this information.

If the reader anticipates that traditional notions of capitalism will influence the policies the Chinese government will exercise, then you may want to consider that Jack Ma (Ma Yun), head of Alibaba, has been identified as a member of the Communist Party of China (CPC).9 Alibaba has been valued at $400 Billion, and Ma’s personal wealth has been estimated to be $35 Billion. Ma stated that companies such as Facebook should expect to follow Chinese rules in order to have access to Chinese markets.
There is some discussion that members of the CPC are required to place the CPC first in all major decisions. While there is no specific example that can be said to reflect that Ma ever had a conflict with the CPC and the company’s goals or shareholders’ goals, other observers note that Ma’s affiliation with the CPC was not announced in Alibaba’s stock offering brochure in 2014.

Amazon Similarly Sold Assets, While IBM Sold Its Data Center Expertise

Faced with the same rules as Apple, Amazon decided to sell its hardware from its public cloud business in China. While retaining its intellectual property, Amazon sold its public Cloud services for $301.2 Million to its then-partner Beijing Sinnet Technology Co Ltd.

IBM designed, built, and has “overseen” the Range International Data Centre in Langfang, China. When complete, the facility will have the same amount of space as the Pentagon, 6.3 million square feet. This facility is now owned by the Chinese government. At one time IBM referenced this structure as though it would be an IBM-owned facility. IBM’s Cloud Catalog, which identifies services and facilities across the world, returns the search “China” with only “Analytics, Weather Company Data”; “Internet of Things, Weather Company Data”; and “Web and Mobile, Weather Company Data.” This suggests that no networks holding personal information from other facilities and services in the world would be stored within China’s borders. On its service availability chart, “IBM Cloud Docs” does not make any reference to facilities located in China. IBM’s map only lists one facility, which is in Beijing, China, and states “IBM Cloud Services only available in China.”

Conclusion

The U.S. and China have very different approaches to privacy, which have already effectuated significant business practice changes by international companies. Artificial intelligence (AI) requires tremendous computing power and, similarly, relies on enormous data. As AI and machine learning programming acquire and rely on more data, the accuracy and reliability of the results will proportionally improve. Baidu, Alibaba, and Tencent (often referred to collectively as BAT) are Chinese large cloud providers and, significantly, are visionaries that have assumed the lead regarding AI applications. Beware that your client’s data and your law firm data could also be used by your CSP to practice its AI or machine learning—if the data weren’t encrypted.

If technical support to your clients or to your law firm were rendered by a provider that has unequivocally accepted government restrictions limiting or impinging on human rights or fundamental democratic principles, then challenges are apt to be raised on the basis of insensitivity. Indeed, recall that many companies ceased or limited operations in South Africa so long as apartheid was imposed upon the populace. Likewise, this same consequence could be thrust upon your CSP.
Whether U.S.-based or situated abroad, most CSPs have contractual language permitting examination of unencrypted end user data for any purpose. Interestingly, an “end user” is contemplated as any entity to whom the CSP can sell virtually anything. Hence, you ought to strive to limit your CSP to locations where the data is stored regionally, thereby excluding countries and venues where there are inadequate safeguards to prevent undue government intrusion on confidential information and clients’ trade secrets.

Nevertheless, it should be evident that the preferable way to protect confidential information and trade secrets is to take the crucial extra step of encrypting data. Notwithstanding personally being convinced of not only the necessity of encryption, but also its relative ease of use, you should anticipate being confronted with client challenges and resistance. May you prevail and have a positive experience seeking to introduce encryption logistics to your firm and to your clientele alike!

Special request: Please share with us anecdotes of your experiences while addressing encryption and related issues—both internally to your firm and externally to your clients.

Endotes


4. Sherisse Pham, supra note 2.


7. Associated Press in Beijing, Shi Tao: China frees journalist jailed over Yahoo emails, The Guardian.com,
8. Nellis & Cadell, supra note 5.


14. Global locations for your global business, IBM.com, https://console.bluemix.net/docs/resources/services_region.html?cm_mc_uid=89794543267615444923075&cm_mc_sid_50200000=1067367154449230759&cm_mc_sid_52640000=99949611544492307573#services_region.


Next Article >> > >
December 18, 2018  PRACTICE MANAGEMENT

Defining Moments, Insights into the Lawyer’s Soul: Leadership Tips for a Great 2019!

By Melanie Bragg

Share this:

December is the time of year where everything speeds up, and although we want to relax and enjoy the season, we also want to finish cases and projects and get ready for the new year ahead. Many of us will reflect on the year and think about what we have done right, what we need to work on next year, and the things we have no control over, such as a health problem or the death of a loved one that occurred during the year.

Many times, people are ready to close out the year and move on to the next with nary a thought about acknowledging what they did right this year and all the successes they enjoyed but might not remember. I suggest you make a quick list of wins for the year; it might be eye-opening. It’s best to really focus and appreciate ourselves for what we have done right before we move on to goal setting for the upcoming year.

Acknowledge Your Wins

What are your wins for 2018? What kind of year was it? Did you build your business in new ways? Did you shed old ideas in favor of new ways of doing things?
I am excited about 2018 because I made some significant improvements in the way I practice law at Bragg Law PC, all of which have made my work life so much easier. I added Lexicata, an intake process, to my Clio program, and I added LawPay. Clients can now submit forms with data on them, and they are auto-populated into my law practice management system. They can also pay me via credit card from their smartphones. I have upped my game in terms of the reviews I request and receive from clients as well as incentivized employees about the intake process. After acknowledging myself for these many improvements in this area of my life, I am now ready to set goals for next year.

After spending some time acknowledging yourself for what you have done right in 2018—not beating yourself up like so many will do—it is time to create your vision or update your vision before you set goals for the new year.

Create or Update Your Vision

*Make sure that you have your “vision” in mind each year. Has it changed from the previous year? What do you want to bring with you, and what can be left behind?*

Jack Canfield talks about this in Chapter 3 of his best-selling book *The Success Principles:*

Your vision is a detailed description of where you want to get to. It describes in detail what your destination looks like and feels like. To create a balanced and successful life, your vision needs to include the following seven areas: work and career, finances, recreation and free time, health and fitness, relationships, personal goals, and contribution to the larger community. At this stage of the journey, it is not necessary to know exactly how you are going to get there. All that is important is that you figure out where there is. If you get clear on the what, the how will be taken care of.

Part of knowing your vision for a law firm is as follows:

📚 What is your firm’s Mission Statement?
And here’s another great tool to help you update your vision: Michael Hyatt’s LifeScore Assessment, an online survey that will help you identify where you stand based on ten domains of life: physical, vocational, avocational, emotional, financial, spiritual, parental, marital, social, and intellectual. (Thanks to Michael Hyatt for permission to use this material.)

**Set Your Goals**

*Write your goals down! Written goals are a critical part of success in any endeavor.*

I highly suggest instilling some “process” to our goal setting so we:

1. begin each new year with the true sense of fulfillment that we have accomplished the bulk our goals from the previous year;

2. know that we have handled the adversity placed before us in the best and most positive way we could at the time; and

3. ensure that we are positioned for the next year with purpose and efficiency to be able to enjoy our daily lives, as well as make the world a better place by delivering the best legal services to our clients and getting them the optimal results.

Written goals remind your subconscious to help you achieve your desires. You may not look at them all year, but your subconscious will know and keep you on track. If, however, you do look at them regularly and focus your intention on them, it will
become easier to accomplish them. Because as you know, what you focus on magnifies.

Goals need to be concrete and specific and have a definite beginning and end time for achievement. A nebulous goal that depends on outside factors other than your own actions is unlikely to be accomplished. And make sure each goal will stretch you. In fact, create a “breakthrough” goal. Is there something that has been hounding you for years, and if you could just accomplish it, your life would be so much easier? If so, just put it into words, focus on it, and see it manifest.

**Focus on what you want, not what you don’t want.**

I can think of a breakthrough goal that after all these years of practicing law I would love to master: to bill clients systematically and regularly on a monthly basis. I have always had a dislike of billing—can anyone relate? It is the hardest part of this job for me. This year, I have made some improvements in the billing and collection process, but it isn’t where I want it to be yet. Smaller bites at the apple are easier for clients to handle, and I am committed to streamlining this part of my practice in 2019 to make it less stressful.

Break your goals down into projects, and make them doable projects. Keep the schedule for achievement to a reasonable amount of time. Thirty days is a good guideline. Small successes along the way always make the journey better. Join legal organizations and be around people—accountability partners—who help you reach your goals.

How will you achieve the goals you set?

By having a set of affirmations that put them in focus and help create the mind-set you need to achieve your goals.

**Create Affirmations**

*An affirmation is a powerful, positive statement that affirms your being in the state of having already accomplished the goal.*
Use affirmations to:

1. Replace negative self-talk;
2. Change your limiting beliefs;
3. Program your subconscious mind;
4. Intensify the law of attraction;
5. Greatly accelerate your success.

Guidelines for creating an effective affirmation:

1. Start with the words “I AM”;
2. Use the present tense;
3. State it in the positive;
4. Keep it brief;
5. Include an action word ending with “ing”;
6. Include at least one dynamic emotion or feeling word;
7. Make affirmations for yourself, not others.

**Adopt an Attitude of Gratitude**

*Gratitude is a powerful tool to use in accelerating your progress on your goals.*

The secret sauce for the year that you hopefully already know and incorporate into your life all day is gratitude. The conscious practice of gratitude in all forms will radically shift your life in positive ways.

And as you move through 2019 and engage in the marketing that solo and small firm attorneys must do, just remember:
Have a great and prosperous 2019, my GPSolo eReport readers! It is an honor to be able to share my thoughts and ideas with you. Please contact me with any feedback. I would love to hear from you at melanie@bragglawpc.com.

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Mindfulness 101: How to Achieve “Success”—Mindfully

By Debi Galler

The tips in this month’s column are designed to help you succeed in climbing the ladder to “success,” whatever that may mean to you—whether it is growing your own business, including demonstrating interest and initiative; being principled and civil; or building relationships and consensus.

Perhaps the most effective and efficient way to achieve the foregoing, and not lose yourself in the process, is to do so mindfully, in a manner where you are not on automatic pilot, lost in thoughts that you take too literally and personally. Mindfulness lets you live in the present moment rather than the past or future, and accept rather than avoid what you don’t like.

As with any journey, you first need to know your starting point. As noted by Jon Kabat-Zinn in his book Wherever You Go, There You Are, if we don’t know where we are standing at this moment, a knowing that comes directly from the cultivation of mindfulness, we may go only in circles, despite all our efforts and expectations.

So, on your journey “to the top,” you must first develop an understanding of where you are standing at this moment, in the real world, and not as you, perhaps blindly, perceive it to be.

Next, you must find a way to deal with adversity. Whenever we are faced with
difficulty, and the road to “success” is fraught with difficulty, it is only natural to try to push it away, by trying either to “solve” it, ignore it, or bury it under a pile of distractions. It is certainly very easy in the hectic life of a lawyer to get lost amid the distractions. Instead, we can accept the adversity. Acceptance in the mindfulness practice is not giving up or giving in; rather, acceptance means to understand, to allow the mind to embrace the true, deep understanding of how things really are. Acceptance is a pause, a breath of allowing, of letting be, of clearly seeing things as they are, not as we wish or imagine them to be. Acceptance gives us the opportunity to step away, just for a moment, so we react in a manner that will further our goals, rather than responding reflexively, which may take us off our path.

On your journey “to success,” first you must develop an understanding of where you are standing, with a clarity of mind that comes from a mindfulness practice. Next, accept difficulties along the way by accepting how things are, not how you imagine them to be, and allow yourself a pause to respond, rather than reacting automatically. And how do you get there? Moment by moment, and breath by breath.
With 2019 looming large on the horizon, you are likely thinking about how to garner the motivation and focus to generate high-quality clients and referral sources next year. In addition to spending time with friends and family, many of my clients like to take the last couple of weeks in December to reflect on what went well last year, what didn’t go well, and, overall, to refine their goals for next year. I know. It would be nice to have an army of marketing people like your big-law colleagues to help you create a solid marketing plan for next year. Just remember: You are a brave soul who has chosen the life of an entrepreneurial lawyer over life in a big law firm (or working for the government or as an in-house lawyer). As we begin planning for 2019, let’s step back and look at what motivates lawyers to practice alone or in a small firm.
Why Small Firm and Solo Practice is Awesome

You call the shots. You are not mired in politics day in and day out. You make the decisions that will drive your practice forward by focusing on what works.

Cost containment. Your friends who practice in larger firms buy into an overhead allocation they have little control over. The overhead includes shared resources such as office space, secretaries, paralegals, conference rooms, copy services, human resources, accounting, marketing, IT, and myriad other areas. When you own a practice of your own, you have complete control of what you spend. No votes, no extra services you don’t use. You control your budget 100 percent. In most large firms, the “33 percent, 33 percent, 33 percent” rule prevails. For every dollar you bring in, one-third each goes to overhead, partner profits, and, your salary. That’s right. In big firms you will generally be paid about one-third of what you bring in.

Clients you love. When you practice as a solo or in a small firm, you have a choice to make regarding your clients. Do you want to work with them? Do they respect and value your expertise? Will they be responsive and stay engaged in the process? When you meet with a client for the first time, it is really your choice—not theirs—if you choose to work with them. Many of the “worst” clients you have worked with likely dripped with red flags before they signed your retainer agreement. As the Grand Poohbah of your practice, you choose who you want to work with. The more selective you are, the more you will enjoy your work.

Bring your dog to work day. That’s right, this can be every day for you, because you are the boss! You can dress the way you want and set your own hours. You can work from your office, from a coffee shop, or from home if you choose. You can
hire employees or independent contractors to help you deliver services to your clients. You can use your personal flair to attract the clients and referral sources you enjoy most. The choice is yours.

Get Ready to Grow in 2019

Now that you are revved up and happy to be in control of your own destiny, let’s look at how next year can be your best year ever. Many of the ideas below will not be new to you. In fact, it’s the tried-and-true strategies that generally work best. It’s about getting back to basics versus following the next new, shiny scheme promising a steady stream of new clients. Think about this. You need to choose how to create your marketing plan versus letting another company’s e-mail marketing campaign dictate what “works.” As you review the steady stream of unsolicited e-mails you receive, please be very wary of those guaranteeing quick results, the highest rankings, X number of leads generated each week, and other empty promises. If you want success in 2019, you must make the choice on what will work best for you. Consider the following—the tried-and-true best practices that should be in your marketing mix next year.

There is no “easy button,” so let’s get down to brass tacks. As you sit in front of the fireplace or plan a bit of reflective downtime, consider the following activities that, if done with thoughtful reflection and focus on your future, will generate results. These results will include better relationships with existing contacts, a steady stream of new business, increased name recognition, and a targeted approach to your communications. These are not the newest, coolest, greatest, sexiest things out there—just the things that have worked best.

Your discovery or due diligence. Before you get serious about committing
yourself to action in 2019, you need to follow the process you use with your own clients. You wouldn’t dream of offering advice to clients without conducting an analysis of their legal issue. Right? You need to do the same thing for yourself including:

- **Client review.** Who were your best clients of 2018, and what did they have in common? Why did they make your A-list? Who do you wish you hadn’t worked with, and why?

- **Referral sources.** When you look at your favorite clients, who referred them to you? How did they find you? Was it through your efforts online or through your base of referral sources? You need to know how your best clients found you in 2018 so you can double down on your efforts in those areas.

- **Revenue review.** Where did you make your money? Did you have a few cases that garnered high fees, or is your practice volume-based, where you need a lot of clients to earn a living?

- **Profitability review.** If you subtract direct client expenses and your time, which clients were most profitable? Which were not?

Create client-focused pages on your website. Think about the types of clients you serve. Develop content for your website around those client groups, not just around the services you offer. You likely wouldn’t pick a surgeon because she lists “heart transplant” on her list of services. Clients want to see that you have done exactly what they need. Consider pulling all the experience you have representing executives, business owners, doctors, athletes, auto dealerships, entertainers, machine shops, dairy farmers, inventors, device manufacturers—you get the picture—into one page on your website that is built just for them. Here, your best prospects can review a summary of your work in their industry, read relevant blog posts you have written, watch videos they would be interested in, review your experience specific to them, see testimonials from happy clients, and contact you to discuss their legal matter. For more, read an article I wrote recently on *Laser-Focused Targeting: The Key to Your Success.*

Conduct search engine optimization (SEO). Recently, I was in a client meeting...
where it was reported that more than 15 calls had come in over the past week as a direct result of clients finding the firm on Google. This firm focuses on working with physicians, and because of its strong SEO, one call was from a neurosurgeon, one from a cardiologist, and another from an anesthesiologist. They all turned into active cases! All because their website content has been optimized to reach a specific audience—physicians. How is your SEO? Do a search for the key words and phrases you would like to be found under, such as “lawyer for physicians,” or “camping lawyer,” or “lawyer for inventors,” or “medical device lawyer.” Generally, your prospective clients will not go beyond the first page of Google search results. If you are not on the first page—top half of the screen—you may as well be on page thirty. Also, look at where your competitors come up using the same search terms. SEO is complicated and not something most law firms choose to tackle on their own. We have a blog post that discusses How to Do SEO Without Breaking the Bank.

Create new website content and blogs. The key to top search engine rankings is to keep adding new content to your website. If the key words you want to be found under do not exist on your website, clients won’t find you. Produce a steady stream of new content, including case studies, representative experience, new client-focused pages, audience-specific blog posts, articles you have published, and presentations you give. View your website as a living, breathing organism that needs to be tended to and cared for on a consistent basis—constantly feed it with new content. For more, watch our video How Do I Know If My Website Needs Updating?

Only send targeted e-communications. Generally, the only type of communications we use today are e-mail communications sent to extremely targeted groups of prospective clients and referral sources. General firm e-newsletters are passé. Your clients don’t have time to read anything that is not specific and relevant to them. Therefore, the key to effective communications is to segment your database into groups of clients, contacts, and referral sources so you can send smaller groups information that is interesting and informative. For more, read our blog post on Effective Communications Strategies for Lawyers.

Add videos to your website. This year, many of our clients worked with us to create videos for their websites. In addition, videos can be used on social media and
featured in targeted communications. If you choose to add video to your website, make sure you also use a service like rev.com to produce full-text transcripts of each video. Internet search bots cannot scan videos, but they can certainly index text. In addition, make sure your video team knows how to fully optimize each video on your website and on YouTube or Vimeo to generate the strongest SEO results. For more, read our blog post on How to Create Interesting and Informative Videos for Your Website.

**Actively participate on social media.** While the algorithms seem to change with the weather, social media is here to stay. In my last column, I wrote about the “New Rules” of social media. We recommend that lawyers spend most of their social time on LinkedIn, posting long-form posts (no longer than 200 words) that are accompanied by a unique image. Use royalty-free sites to find images and focus on your personal engagement. If you maintain a LinkedIn page for your law firm, go to that page and share posts with your personal LinkedIn network. Then, engage with your network. Like, share, and comment on others’ posts. Post something timely and relevant at least once per week. Read the article I wrote in October for the GPSolo eReport on How to Master the New Rules of Social Media.

Celebrate Your Entrepreneurialism!

Think about how your clients find you. Most often, it’s through referrals and word of mouth. Don’t fall prey to e-mail solicitations promising a steady stream of high-quality referrals. Don’t spend your hard-earned money on paid directory listings and advertising on legal referral sites. Advertising can be very expensive and is not targeted. Generally, clients don’t hire you because they stumble on an ad you paid for. Make sure your receptionist tracks how new callers found the firm (if you don’t have a receptionist, remember to ask this question yourself), and continue to
invest in what’s working for you.

Finally, don’t let new “shiny object” ideas distract you from staying focused on your target audiences and prevent you from taking action. Remember the wise words of Walt Disney, “The way to get started is to quit talking and begin doing.”

Next Article > > >
Expectations of an Immigration Hearing: How to Prepare, Part 1

By Julie Houth

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The need for immigration lawyers has grown exponentially, especially with the continuous change in immigration laws. Although the terms immigration and deportation are often in the news, many people are unaware of the legal procedures that are associated with U.S. immigration laws. This article intends to provide a guide for the process and the expectations of an immigration hearing and how to prepare for it, whether in the capacity of an attorney or for someone required to interact with the Immigration Court. This article is part one of an ongoing series and also provides perspective from current immigration attorneys in the field located in various areas of the country. Part two of this series will appear in the next issue of the GPSolo eReport.

Immigration Court Procedures

Immigration Court, formally known as the Executive Office for Immigration Review (EOIR), has strict procedures for scheduling, appearing, and making requests of the judge or trial. Attorneys or pro se individuals will need to interact with the EOIR in several situations that include receiving a Notice to Appear.

Notice to Appear (NTA)

A Notice to Appear (NTA) is a document that indicates the initiation of removal proceedings against an individual. An NTA can be received through mail or in person from an immigration officer. The Immigration Court that will be conducting the removal hearing must also be served the NTA. If an individual receives an NTA, he or she must appear in court on the specified date or a future date to be determined by the EOIR.

At least ten days must elapse between service of the NTA and the first scheduled court hearing by law. This ten-day notice requirement can be waived and usually occurs when the individual is held in the custody of immigration officials. Individuals could be detained because Immigration and Customs Enforcement (ICE) has refused to issue a bond for a release or the individual cannot afford to pay the bond. Attorney Joshua Daley Paulin of the Law Office of Joshua Daley Paulin in Framingham, Massachusetts, says that in a situation where a client is detained, “I’d likely first see them after they’re detained, so I’d
look into the possibility of bond and then what relief may be available.” Many immigration attorneys have witnessed a lack of representation with individuals that must interact with the EOIR. Paulin further says, “I see it more in detained settings as represented respondents are called first in the Boston EOIR on the non-detained calendar.” Attorney Nallely Abad of Velasquez Immigration Law Group in Las Vegas, Nevada, further adds, “If they are not bond eligible, the process is very quick and usually not favorable to the client.” Therefore, it is very important to understand the details of an NTA and what subsequent actions need to be taken to ensure compliance and that relief rights are preserved.

Contents of an NTA. The NTA lists general information such as the individual’s name, alien registration number, date of birth, and address on file. This information should be reviewed to ensure accuracy. If there is any information that is incorrect, those errors should be corrected with the court to prevent a misunderstanding.

The NTA also lists three different statements:

1. You are an arriving alien.
2. You are an alien present in the U.S., who has not been admitted or paroled.
3. You have been admitted to the U.S., but are removable for the reasons stated below.

Only one box should be checked out of the three statements. If the incorrect box is checked, the individual will need to provide evidence in court to show there has been a misclassification.

The NTA will then list factual allegations and charges of removability. The factual allegations form the basis for removal. The charges of removability provide the legal reasons why the U.S. government believes deportation is appropriate. The bottom of the NTA should list the date, time, and location of an individual’s initial Master Calendar Hearing. If that information is not listed, a separate Notice of Hearing should be mailed. If an individual fails to attend the hearing, that individual may be ordered to be removed due to the failure to appear, and rights to apply for relief from removal will no longer be available. Although the document is usually one to two pages, Abad says, “It is key to review this document with your client. There are certain forms of relief that are available just from that first section on the NTA. This document is very important to have, and if you do not get a copy from your client, who was served with it, you need to make sure to request it from the court.”

Change of venue. The NTA will state the location of the Immigration Court where the individual must appear; however, not all individuals can appear at that location for different reasons. “The requirements begin with submitting a change of address EOIR-33IC on behalf of the client,” says Abad. Paulin says that it is possible to change the venue of the Immigration Court “by means of a motion to change venue.” In this motion, it should include the date and time of the next scheduled hearing. In addition, the individual must respond to all allegations listed on the NTA and designate a country to return if the case is denied or if it is not contested by a defense theory. This request should also include the type of relief sought from the EOIR. Lastly, the individual is required to provide an explanation why a different location is preferred. In Abad’s experience, “The client must be living in a different jurisdiction in order for the court to consider the change of venue.” Note that the EOIR is not required to grant a request to change venue, but can change the venue as a matter of discretion after looking at factors of the case. These factors include whether the case has been rescheduled previously and whether the person has a viable
Legal Resources and Future Topic for Discussion

There are several local nonprofits that offer pro bono or low-cost services, such as the Legal Aid Society immigration clinics located across the country. Unfortunately, many individuals cannot afford legal services and cannot wait for the agencies to get back to them. Therefore, they go to court alone without any knowledge of the law or process, according to Abad. As a result, she says, “Some of those individuals have some form of relief that they are not aware of and end up with a deport order.” No one should face immigration proceedings alone and thus should seek legal help. The next article of this series will discuss how to prepare for a Master Calendar Hearing and Removal Hearing.

Next Article > > >
Employers Cannot Use Salary History to Pay Women Less Than Men

By Onika K. Williams

Pay Disparity Based on Prior Salary Leads to Lawsuit

The conflict in Rizo began when Aileen Rizo, a math consultant for the Fresno County Office of Education, learned that she received a lower starting salary than comparable male employees for doing the same work. In response to Rizo’s internal complaint about the pay disparity, the county stated that all salaries were determined by taking a new hire’s prior salary and adding 5 percent. The county claimed that female management employees over the past 25 years had higher starting salaries than their
male counterparts, which Rizo disputed.

Rizo then sued Jim Yovino in his official capacity as the superintendent of the Fresno County Office of Education in the U.S. District Court for the Eastern District of California for, among other claims, violating the Equal Pay Act. The act includes four statutory exceptions that operate as affirmative defenses to discrimination claims: (i) a seniority system; (ii) a merit system; (iii) a system that measures earnings by quantity and quality of production; or (iv) a differential based on any factor other than sex. The county moved for summary judgment, asserting that use of Rizo’s prior salary was permitted under the “factor other than sex” exception.

The district court denied summary judgment, finding that a pay structure based exclusively on prior wages perpetuates a discriminatory wage disparity between men and women. Recognizing its ruling conflicted with controlling Ninth Circuit precedent in *Kouba v. Allstate Insurance Co.*, which held such a pay structure to be permissible, the district court certified the legal question of whether an employer subject to the Equal Pay Act may rely on prior salary alone when setting an employee’s starting salary.

**Prior Decision on use of Prior Salary Overruled**

On appeal to the Ninth Circuit, a three-judge panel vacated the denial of summary judgment and remanded to the district court. Relying on *Kouba*, the Ninth Circuit initially held that use of prior salary was a proper defense under the Equal Pay Act’s “factor other than sex” exception.

An en banc panel subsequently reversed the smaller panel’s decision and overturned *Kouba*, observing that an employer’s reliance on past wages perpetuated the very discrimination that the Equal Pay Act was enacted to eradicate. Though the Ninth Circuit judges were unanimous in that result, they did not agree on the rationale.

The majority reasoned that the “any factor other than sex” exception applied only to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance. Relying on principles of statutory interpretation and legislative history, the majority observed that three of the act’s exceptions are reserved for systems based on seniority, merit, and productivity, which in turn relate to an employee’s job qualifications, performance, or experience. Application of the catchall “any factor other than sex” defense should therefore also be
confined to circumstances similarly based on the employee’s skills. The majority further explained that the catchall exception could not justify use of prior salary because when the act was enacted in 1963, prior salaries would have reflected a discriminatory marketplace.

In so holding, the majority also relied on decisions from the United States Courts of Appeals for the Second and Eleventh Circuits. For example, in

*Aldrich v. Randolph Central School District*, the Second Circuit held that an employer could justify a wage differential based on the catchall exception only if the employer could establish that the difference related to job performance. Similarly, in

*Glenn v. General Motors Corp.*, the Eleventh Circuit concluded that the “factor other than sex” exception applied when the disparity results from unique characteristics of the same job or from an individual’s experience, training, or ability.

**Potential Problems with Banning Consideration of Prior Pay**

By contrast, the concurring opinion authored by Judge McKeown and joined by Judge Murguia stated that the majority went too far in holding that any consideration of prior pay is impermissible under the Equal Pay Act. Likewise, a second concurrence penned by Judge Callahan and joined by Judge Tallman opined that by disallowing consideration of prior salary, the majority’s holding ignored business realities and could potentially hinder the goal of equal pay for equal work. In the third and final concurrence, Judge Watford would have held that past pay can constitute a defense under the “factor other than sex” exception, but only if the employee’s past pay is not itself a reflection of sex discrimination.

**Proceed with Caution**

ABA leaders agree that employers should be cautious in requesting prior salary history following the Rizo ruling. “The trend in a growing number of states and cities is to prohibit employers from asking for salary history on the theory that use of salary history in setting pay levels tends to perpetuate pay discrimination against women,” observes Robin E. Shea, Winston-Salem, NC, member of the ABA Section of Labor & Employment Law. Practitioners should endeavor to quickly comply with the new ruling, advises Shea. “Any employer in the Ninth Circuit, or one of the jurisdictions that has a state or local ban on salary history questions, should not ask for salary history, period,” she cautions. “But even if the employer is not in one of those
jurisdictions, I would advise them to be very careful in asking for that information and in using it once obtained,” Shea adds.

Practitioners and employers should review all hiring practices and procedures that may involve requesting prior salary, according to Section of Litigation leaders. “The documents used in the recruiting and hiring process should be reviewed to eliminate any reference to prior salary. Managers and others involved in hiring should be trained to avoid any inquiry about or consideration of prior salary and trained regarding the appropriate factors that they can consider instead,” advises Trish Higgins, Sacramento, CA, chair of the Wage and Hour Subcommittee of the Section’s Employment & Labor Relations Law Committee.

Will Interpretation of the “Factor other than Sex” Prong Head to the U.S. Supreme Court?

ABA leaders are split as to whether this decision will have the intended effect of promoting equal pay. Some leaders believe that this decision will result in employers taking a more deliberative approach to salary determination. “This decision should force employers to do more homework as it relates to appropriate salaries in the labor market for the set of skills and positions that they are trying to fill. No longer can an employer rely on a simple formula or consider only prior salary in making decisions,” says Jeremy J. Guinta, Los Angeles, CA, chair of the Administrative Subcommittee of the Section’s Employment & Labor Relations Law Committee.

Others believe the decision may close the wage gap to some extent but could potentially harm those it intended to help. “I do think the Ninth Circuit’s holding that salary history is ‘inherently discriminatory’ goes too far and could even have an adverse effect on women in some circumstances. I think it would make more sense to allow employers to request and consider salary history as long as the information is not used in a discriminatory manner,” opines Shea.

Leaders believe that the Ninth Circuit’s interpretation of the catchall prong causes a circuit split, which means the U.S. Supreme Court may ultimately decide the issue. “The Rizo decision is squarely at odds with the Seventh Circuit’s ruling in Wernsing v. Department of Human Services that salary history, even standing alone, is a ‘factor other than sex’ under the EPA, and also the rulings of several circuits that salary history may be a ‘factor other than sex’ if considered along with other factors,”
explains Higgins. “Given this circuit split, Rizo is a likely candidate for Supreme Court review,” she predicts.

Resources


_Glenn v. Gen. Motors Corp._, 841 F.2d 1567 (11th Cir. 1988).

_Wernsing v. Dep’t of Human Servs., State of Illinois_, 427 F.3d 466 (7th Cir. 2005).


Stephanie Francis Ward, “Pay Up: Female lawyers are working for income fairness—by suing their firms,” _ABA J._ (Sept. 2017).
Employers Cannot Use Salary History to Pay Women Less Than Men
Is the Bankruptcy Court a Court?

By Michael Enright

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The Court of Appeals for the Third Circuit recently affirmed the denial of a request to transfer an adversary proceeding, after the Bankruptcy Court and the District Court held that the Bankruptcy Court was not a "court" within the meaning of 28 U.S.C. Section 610 for purposes of the statute cited as the basis for the transfer request. Trosio v. Erickson, et al. (In re IMMC Corp.), No 18-1177 (3d Cir. Nov. 28, 2018). The Debtor filed a Ch. 11 case and the confirmed plan appointed a liquidating trustee. The trustee subsequently filed an adversary proceeding in the Bankruptcy Court against the former officers and directors of the Debtor for breach of their fiduciary duties in pursuing a risky litigation strategy in a suit against a competitor, and overcompensating themselves. After the Bankruptcy Court held that it lacked jurisdiction to hear the claims and concluded that this non-core proceeding was not sufficiently "related to" the Ch. 11 case, the trustee requested that the adversary proceeding be transferred to the District Court for the Eastern District of Pennsylvania, pursuant to 28 U.S.C. Section 1631. But Section 1631 applies only to civil actions filed in "a court as defined in Section 610 of this title," and any mention of bankruptcy courts in 28 U.S.C. Section 610 was deleted from the statute in 1984. Under the circumstances, the Bankruptcy Court concluded that it had no authority to transfer the case under Section 1631. The trustee then sought to withdraw the reference, but the
District Court denied the request, and subsequently affirmed on the same grounds holding: bankruptcy courts are not "courts" under the plain language of Section 610. The Third Circuit affirmed the District Court, but used different reasoning. The Third Circuit noted that the District Court specifically ruled that because the claims were neither core nor "related to" the Ch. 11 case, the District Court had not referred the case to the Bankruptcy Court in the first place. Because the matter was never referred to it, the Bankruptcy Court had no authority over the matter under *Northern Pipeline*, and a transfer under Section 1631 could not cure this lack of "constitutional jurisdiction." The Third Circuit's opinion took care to note that its ruling does not call into question the validity of transfers under Bankruptcy Rules 1014 or 7087, because those rules are based upon other statutory authority. This decision will further inform practice, as well as ongoing scholarly debate in the aftermath of *Stern v. Marshall*, as well as the legacy of *Northern Pipeline*, particularly in regard to the distinction it outlines between "statutory jurisdiction" and "constitutional jurisdiction." On December 12, 2018, the Trustee filed a request with the Third Circuit requesting a rehearing *en banc.*
Beyond Salary and Bonus: The Where, What, and How of Complex Executive Compensation from a Divorce Perspective

By Sandra R. Klevan

You think it’s a fairly simple case. Both spouses are W-2 wage earners; there are no closely held businesses to value, no rental properties, no unusual investments. The parties have a marital home, a vacation home, and a substantial amount of liquidity in bank and brokerage accounts. Simple, right?

Not so fast. The wage earners could also participate in executive compensation plans that could impact the marital estate and/or the income available to pay support. Where do you look to find and identify the details of the plans? What are the different types of plans out there? How do you classify, value, and distribute the plans? This article will help you answer the where, what, and how of executive
compensation plans to help you navigate through what can be rough seas.

WHERE

Where do you look to find and identify the details of the executive compensation plans?

All divorces cases begin with discovery. Knowing what to include in the interrogatories and the initial discovery request (IDR) to unveil the existence of executive compensation plans is critical. Interrogatories should pose questions about the existence of the plans. The following is a list of some key items to include in a discovery request to further ensure that you unveil all executive compensation and benefits and all their details.

- Individual income tax returns
- IRS Forms W-2, 1099, and K-1
- Pay stubs
- Personal financial statements
- Agreements, plan documents, summary plan descriptions, and summaries of material modifications of employment, compensation, retirement, deferred compensation, stock purchase, stock options, employee benefit, and other plan agreements and documents
- Grant letters
- Employee handbook and, policy manuals
- Company financial statements and annual reports
- Board of directors’ minutes

If the party’s employer is public, some of the above information might be available in the public domain. You can do your own investigation by researching the employer’s proxy statement, also known as Securities and Exchange Commission
Boxes 11 through 13 of Form W-2 are especially useful, as is the employee’s pay stub/earnings statement. Note how much information can be obtained from an earnings statement like the one provided below on page 14. This employee participates in a restricted stock plan and a nonqualified option plan and gets an annual and quarterly bonus. She also defers a percentage of her salary and bonus in a deferred compensation plan and further participates in a 401(k) plan. Finally, there is evidence that there is an employee stock purchase plan (ESPP) in place.

**WHAT**

What types of executive compensation plans are there?

Just about all executives in medium to large companies receive compensation in the form of base salary and bonus. Beyond these forms of compensation, many executives also receive other, more complex forms of remuneration. In order to understand various types of plans, it is first important to be able to distinguish between qualified and nonqualified plans. A qualified plan is one that must follow IRS and ERISA regulations. The most common types of qualified plans are profit-sharing plans (including 401(k) plans), defined benefit plans, and money-purchase pension plans. Employee stock purchase plans can also be qualified plans.

**Short-Term Compensation Plans**

Salary and bonus are the most common and simplest form of short-term compensation. Other types of short-term plans include ESPPs and deferred compensation plans.

An ESPP is usually characterized as a short-term plan. It is a company-run program in which participating employees can purchase company shares at a discounted price. Employees contribute to the plan through payroll deductions that build up between the offering date and the purchase date. These plans are often qualified plans. Under a qualified ESPP, payroll deductions used to purchase the shares are taxed at ordinary income tax rates. Upon sale of the stock, the discount is taxed at
ordinary income tax rates and the remaining gain is taxed at capital gains rates. If the ESPP is nonqualified, the entire gain is taxed at ordinary income tax rates when sold.

The most common types of deferred compensation plans include 401(k) qualified plans and 409A nonqualified plans. Examples of 409A nonqualified plans include supplemental executive retirement plans (SERPs), supplemental 401(k) plans, and other excess benefits plans. For federal tax purposes, all of these plans are nontaxable until the funds are redeemed, at which time they are fully taxable at ordinary rates.

While one should be aware of the existence of these types of plans in a marital dissolution setting, there are fewer issues in valuing, dividing, and distributing these types of plans than there are in the more complicated, long-term, often nonqualified plans.

**Common Long-Term Compensation Plans: Options, RSUs, Performance Awards, and SARs**

Stock options and restricted stock units (RSUs) are the most widely used form of long-term compensation.

A stock option provides the owner the choice or option to buy stock at a discounted or stated price (the exercise or strike price) within a certain period of time (i.e., through the expiration date). When the stock is purchased, the option is said to be “exercised.” One would only exercise an option when the stock is expected to be “in the money,” that is, when the fair market value of the stock is greater than the exercise price. The intrinsic value or spread is the difference between the current fair market value of the stock and the exercise price.

Stock option plans come in many shapes and sizes. They can be granted under a qualified or statutory plan in the form of incentive stock options or ESPP options. All other stock option plans are nonqualified. Qualified plans are much more strictly regulated, and they receive tax treatment that is different from that accorded nonqualified stock option plans.
Generally, stock option grants to employees are for past performance; however, the options vest over time, meaning that they cannot be exercised until the end of the vesting or holding period. Vesting periods usually range from three to five years.

RSU plans are typically nonqualified and offer outright stock grants, with no purchase price. Like stock options, they also have a vesting or restriction period of three to five years, during which time the stock cannot be sold. Often the same employee will have both stock options and RSUs. Nonqualified stock options and RSUs are not taxed upon grant. Stock options are taxed at ordinary income tax rates on the spread at the exercise date. RSUs are taxed at ordinary income tax rates based on the stock price at the vesting date. Often, RSU plans will withhold the tax from the stock distribution by reducing the number of shares distributed. Similarly, upon exercise of the stock options, the plan may reduce the stock distributed by the tax and the exercise price. This is referred to as a “cashless exercise.”

Performance share awards (PSAs) are also grants of company stock, but the number of units/shares ultimately awarded is based on future companywide performance targets. So, for example, an executive would be granted a target PSA of 500 shares on January 1, 2017, based on company performance during 2019. After the end of 2019, the award would be adjusted upward or downward based on the evaluation of the prescribed performance criteria during 2019.

Another fairly commonly used tool is stock appreciation rights (SARs). With a SARs plan, the employee shares in the appreciation of the value of the company stock from the grant date, but not in the historical share value. The award can be settled in cash or in an equivalent-value stock grant.

**Other Types of Compensation**

Other types of long-term executive compensation plans that we often see include profits interests, phantom stock plans, and other similar company performance-based awards. A profits interest is an interest that gives the employee the right to receive a percentage of future profits, but not any current capital. Phantom stock plan awards are based on the company’s performance, which is often measured by the increase in value of the company’s stock without the executive’s actual ownership in the stock.
In private equity, venture capital, and real estate investment firms, a large part of the remuneration paid to the key executives, usually general partners, is typically paid in a carried interest and promote structure. Under these payment schemes, the general partners who generally own a very small percentage of the investment fund itself are paid a disproportionate share of the profits of the fund after the limited partners are repaid their invested capital and a predetermined preferred return.

Other types of executive compensation to be aware of are forgivable loans, retention bonuses, change of control bonuses, and severance.

HOW

How do I treat the executive compensation plans in my particular divorce case?

With the knowledge you have gained with regard to the “where” and “what” of executive compensation plans and perhaps assistance from an expert, you have now identified what plans your client’s spouse participates in; when each of the awards was granted; when they vest; how the value of the award will be calculated upon vesting; the current intrinsic value, if applicable; how and when they are taxed; and other information about the plans. The toughest question remains: How should each grant or award be treated in the subject divorce proceeding? This section will address issues as to whether the awards are marital or nonmarital and whether each should be treated as income or an asset. It will further address division and distribution.

Marital or Nonmarital?

A knee jerk reaction to the question of whether an element of executive compensation is marital or not would be: “It is marital if it was ‘earned’ during the marriage.” The answer is seemingly simple. However, when getting into the details, it might become less clear. While most short-term compensation arrangements such as salary, bonus, deferred compensation, and the like are pretty clearly earned prior to when they are granted, it is less clear for many long-term plans. As discussed above, most long-term plans have vesting provisions and/or are based at least in part on the future performance of the company and/or the employee. While most states do follow the “earned during the marriage”
proposition, the definition of “earned” seems to vary. The differences, in part, often have to do with vesting.

For example, in Pennsylvania, there is pretty clear case law that indicates that if an award is granted prior to the cutoff date and is for prior services, the total award should be marital property, despite the future payout being subject to vesting. See MacAleer v. MacAleer, 725 A.2d 829 (Pa. Super. 1999); Fisher v. Fisher, 769 A.2d 1165 (Pa. 2001). Other states, like New York and New Jersey, have case law that supports the theory that if the employee must continue to work to monetize the award, it is not “earned” until it vests, and, therefore, the use of a coverture fraction in determining the marital value of the award is appropriate. See DeJesus v. DeJesus, 90 N.Y.2d 643 (1997); Marx v. Marx, 265 N.J. Super. 418 (1993).

The coverture fraction allocates the award as marital and nonmarital based on the vesting schedule, with the numerator being the time period from the date the award was granted to the cutoff date and the denominator being the period from the date of grant to the vesting date. As an example, if a tranche, or portion, of 300 RSUs was granted twelve months before the cutoff date and has a three-year (thirty-six-month) vesting schedule, the coverture fraction will be 12/36. One-third or 100 of the RSUs would be marital. Awards are often divided in tranches that vest at different times, so each tranche would have its own coverture.

Colorado case law (see In re Marriage of Balanson, 25 P.3d 28 (Colo. 2001)) indicates that awards granted “in consideration for future services of the employee, where such services have not yet been completed, do not constitute marital property.” Generally, in that state, when it is determined that the award is “for future services,” the full award is out of the marital estate and no coverture is used.

Because the award documents are rarely clear as to whether the award is for past or future services, there is often disagreement between the parties as to when the award was earned. Where these awards are significant to the marital estate, this disagreement often leads to litigation.

Additional complications can arise when an award is granted just after the cutoff. An argument can be made that a portion of it should be marital, as it was for
services prior to the date of separation or complaint. This argument would seem to be more palatable in states where the grant date determines if the award is marital than for those that employ a coverture. However, case law being lacking on the direct point, arguments can be made in favor of either treatment.

Further difficulties arise when awards are granted prior to cutoff but are adjusted after cutoff based on company and/or individual performance, as in the PSAs described previously. These awards are something of a hybrid; they are for both past and future services and the future award is unknown. As will be discussed later, creativity is often needed in determining a fair way to allocate, divide, and distribute such hybrid compensation awards.

Income Considerations

If an award is determined to be nonmarital either due to the coverture calculation or because it is deemed to be earned after cutoff, consideration should be given to including the award in the income available to pay alimony and/or child support. Caution must be advised: the same award or portion thereof should not be counted twice, or “double-dipped.”

One must also not lose sight of the fact that for longer-term alimony and child support calculations, consideration must be given to all forms of executive compensation that the payor spouse will or could earn based on what has historically been earned. A question can arise as to when the award becomes income. The answer is almost always: when the award can be monetized, which is generally when it vests or is available to the employee.

Problems can arise in this regard because there is discretion as to when stock options are exercised. Accordingly, it is common for vested but unexercised awards to be included in income available for support. Though the underlying stock or option can be monetized, if it in fact has not been monetized, one result may be an award for alimony or support that the obligor does not have the immediate liquidity to meet. Further, attention should be paid to the provision for income taxes, particularly in cases where shares were withheld for tax payments, as in the cashless exercise situation described above.
Division and Distribution of the Marital Award

Once it is determined what portions of the various awards are marital, a method of division and distribution must be contemplated. What percentage of the marital portion of the award is owed to the nontitled spouse involves a myriad of factors that are often state-specific and based on circumstances of the subject state. When the award is a hybrid of past and future performance, as in the PSA scenario described above, other factors come into the mix. A possible solution in this instance would be to award a declining percentage of the awards as they vest over time, to account for the titled spouse’s increasing future efforts.

Once division is decided, the next hurdle is how the asset will be distributed. One alternative is to value the assets currently and provide an offset with other assets to the nontitled spouse, as we normally see done with business interests. This method allows for a clean break and protects the nontitled spouse from circumstances in which the awards might not vest, such as termination of employment. However, there are also problems in doing this. Often, there is not enough liquidity or assets with enough value to accomplish an offset. Further, the assets are often difficult to value, especially when they are in private stock, stock options, PSAs, SARs, and the like. Because of this, in-kind distributions are often recommended. Unfortunately, the nonqualified plan instrument is rarely transferable.

When the instrument is nontransferable, a private agreement can be structured to establish the terms of the transfer. This can be in the form of a constructive trust, partnership agreement, or other agreement or vehicle. In New Jersey, this type of agreement is commonly referred to as a “Callahan trust.” The agreement or trust must be detailed as to assets included, vesting dates, distribution dates, percentages distributed, stock option exercise protocol, taxes, etc. It must also address events such as mergers, change of control, termination of employment, and death and disability that could impact the monetization of the award. The agreement might also include a release and authorization allowing the company to release information regarding the plans to the nontitled spouse.

Conclusion

Marital estates involving complex executive compensation can seem
overwhelming. However, with a thorough understanding as to *where* to look to identify the elements of the parties’ compensation and *what* different types of awards are out there and how each works, the attorney, client, and expert can make informed recommendations and decisions regarding *how* such assets should be divided and distributed for a fair resolution in marital dissolution cases.
Workers who have customarily been viewed as independent contractors may be employees under wage orders, entitled to certain minimum wages, benefits, and basic work conditions reserved for employees, according to the California Supreme Court. Holding that the onus is on an employer to disprove that a worker is an employee and not an independent contractor, the court stressed that its ruling provides predictability in a long uncertain area of law. While ABA Section of Litigation leaders agree that the decision provides rudder, they also think it will prompt businesses in the “gig economy” to redefine how they classify workers in the “usual course of [their] business.”

**Commonality of Claims Predominates, Making Class Certification Proper**

In *Dynamex Operations West, Inc. v. Lee, et al.*, the court considered whether, for
purposes of California wage orders, workers should be classified as employees or independent contractors. Two delivery drivers filed a class action complaint against their former employer, Dynamex Operations West, Inc., a nationwide package and delivery company. The class included persons who, in 2005, did delivery work exclusively on the defendant’s behalf. Prior to 2004, the defendant classified all of its California drivers as employees and compensated them according to the state’s wage and hour laws. In 2004, however, the defendant adopted a policy and contractual agreement with all of its drivers that reclassified them as independent contractors instead of employees.

In certifying the class, the trial court found that common legal and factual questions predominated over the proper classification of the drivers as employees or independent contractors under the applicable transportation wage order. The trial court also relied on three alternative definitions of “employ” and “employer” set forth in the wage order, and as explicated in the California Supreme Court’s ruling in *Martinez v. Combs*. *Martinez* set forth a disjunctive test as to the meaning of “to employ” under California wage orders, defining the term as meaning to “exercise control over the wages, hours, or working conditions” of a worker; to “suffer or permit to work”; or to “engage, thereby creating a common law employment relationship.”

The defendant filed a writ of mandate to the intermediate appellate court, the California Court of Appeal, challenging the trial court’s denial of its motion to decertify the class. The defendant argued that *Martinez*’s disjunctive definition of “to employ” applied only in a joint employer context, and, therefore, the trial court erred in finding that definition applicable in the defendant’s single employer context. Concluding that the *Martinez* test applies in the single employer context, the appellate court also rejected the defendant’s contention that the multifactor standard in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* was the only correct standard for distinguishing employees from independent contractors. Similar to *Martinez*, *Borello* set forth a disjunctive standard that courts weigh to determine whether a worker is an employee or independent contractor. Because the wage order definitions of “employer” and “to employ” discussed in *Martinez* were relevant to determining whether a worker is an employee or independent contractor, the appellate court affirmed the trial court’s certification order.
In affirming the Court of Appeal’s reading of the “suffer or permit to work” definition of “to employ” discussed in Martinez, the California Supreme Court observed that the former term should not be interpreted literally to encompass workers “who have traditionally been viewed as genuine independent contractors.” Genuine independent contractors include persons who are “customarily engaged in an independently established business,” including plumbers and electricians, the court observed. Further, the court explained that the “suffer or permit to work” standard refers to, as written, an employer that “has ‘suffered or permitted’ the worker to work in its business.” Definitions aside, according to one Section of Litigation leader, the Dynamex court clearly thought the lower courts appropriately certified a class.

“The ease with which the court affirmed class certification underscores the significance of the Dynamex decision,” concludes Robert J. Herrington, Los Angeles, CA, cochair of the Emerging Issues Subcommittee of the Section of Litigation’s Class Actions & Derivative Suits Committee. “The court spent just four paragraphs on the class certification issue, and although the court found that the trial court’s view of the ‘suffer or permit work’ standard was too broad, the court still concluded” that class certification was proper, Herrington observes. Indeed, the court quoted dicta to support its affirmation of class certification, noting “when plaintiffs in a class action rely on multiple legal theories, a trial court’s certification of a class is not an abuse of discretion if certification is proper under any of the theories.”

Evolution of the Common-Law “Control of the Details” Standard

The Dynamex court also explained the rationale animating the existing standards used to determine whether a worker is an employee or independent contractor. Citing dictum in NLRB v. Hearst Publications, a U.S. Supreme Court precedent, the Dynamex court traced the difficulty in distinguishing employees from independent contractors to the common law. At common law, the problem of classifying a worker as an employee or independent contractor arose in the tort context, to determine whether an employer would be vicariously liable for its worker’s conduct.
Critical to the common-law determination of an employer’s derivative liability was the “control of the details” test, where an employer’s right to “supervise and control the details of the worker’s actions” meant it could be found liable for injury caused another by its worker, the *Dynamex* court noted. This test gained traction among courts as the primary standard for ascertaining the existence of an employment relationship between a worker and an employer.

Amplifying the “control of the details” standard beyond its original tort context, the court decided *Borello*, which set forth a multifactor test to determine whether a worker was an employee or an independent contractor. *Borello* addressed whether farmworkers hired by a grower to harvest cucumbers under a “sharefarmer” agreement were independent contractors or employees for purposes of California’s workers' compensation statutes. Emphasizing the “remedial purpose” underlying the workers' compensation statutes, the *Borello* court concluded that the concept of employment is not “inherently limited by common law principles.”

Accordingly, the *Borello* court held that the “control of the details” standard should be considered in tandem with five disjunctive factors to determine whether a worker is an independent contractor or employee. Those five factors are (1) the worker’s opportunity for profit or loss; (2) the worker’s investment in equipment or material for the commissioned task; (3) whether the service rendered by the worker requires special skills; (4) the degree of permanence of the working relationship; and (5) whether the worker’s offered services are an integral part of the employer’s business. No single *Borello* factor is dispositive and all factors have equal weight. After weighing those factors, the *Borello* court concluded that the farmworkers were employees and not independent contractors.

The *Dynamex* court further observed that federal courts likewise used substantially similar criteria to the *Borello* factors in construing the existence of an employment relationship. For example, it noted that federal courts interpreting the meaning of the term “employee” in federal statutes often rely heavily on the “control of the details” standard as part of their multifactor analysis, citing the U.S. Supreme Court’s decision in *Nationwide Mutual Insurance Company v. Darden*.

The California Supreme Court also pointed to the parallels between the *Borello* standard and the “economic reality” test used by federal courts to
interpret the “suffer or permit to work” definition of “to employ” under the Fair Labor Standards Act (FLSA). The “economic reality” standard considers the five Borello factors, and to the extent a worker—as a matter of economic reality—is dependent on the employer and the employer “exercises control” over the worker, then the worker would be considered an employee.

**Court Adopts New “ABC Standard”**

Because the legislative history of the FLSA suggested that the drafters wanted the “broadest definition” of the “suffer or permit to work” definition of “to employ” to permit coverage for all workers under the FLSA, the *Dynamex* court concluded that a broad definition of the “suffer or permit to work” standard should also apply California wage and hour orders consistent with the remedial purposes underlying such orders.

To effectuate that broad reading, the *Dynamex* court fashioned a new, “ABC standard” to provide a “simple and clear” test. Significantly, the ABC standard presumes that a worker is an employee and places the burden on employers to disprove that a worker is an employee. Under the ABC standard, a worker is an employee—and not an independent contractor—unless the employer establishes the following three, conjunctive factors: (1) “that the worker is free from control and direction over performance of the work, both under the contract and in fact”; (2) that the service for which the worker is commissioned is “outside the usual course of the business for which the work is performed”; and (3) that the worker is “customarily engaged in an independently established” occupation. According to the *Dynamex* court, unlike the ambiguous “control of the details” standard, or the unpredictable multifactor analysis required under the *Borello* and “economic reality” tests, the ABC standard provides clarity and predictability.

“In developing this rigorous standard, the court was heavily influenced by the remedial purposes of the wage orders. The court repeatedly notes that the wage orders provide fundamental social welfare protections such as a minimum wage to allow workers to obtain a subsistence standard of living,” observes Trish M. Higgins, Sacramento, CA, chair of the Wage and Hour Subcommittee of the Section's Employment & Labor Relations Law Committee. “The court also wanted to avoid a multifactor standard—like the economic reality standard or
Independent Contractors Might Actually Be Employees

the *Borello* standard—which makes it difficult for businesses and workers to determine in advance how the worker should be classified,” Higgins added.

The predictability of the ABC standard should prod employers to consider the use of hitherto independent contractors in their businesses or else risks severe consequences, according to Kelly M. Matayoshi, San Francisco, CA, cochair of the Section's Employment & Labor Relations Law Committee. “*Dynamex* should cause employers to take a close look at regularly used independent contractors to see if they can meet the ABC test and presumption that workers are employees. The consequence of misclassifying an employee is high, and for employers who routinely use a large number of independent contractors to fulfill key parts of their business, damages could be crippling,” Matayoshi urges.

**Application of the “Usual Course of Business” Remains to Be Seen**

Although Section leaders agree the adoption of the ABC standard provides predictability to employers and workers as to who will be considered an employee or independent contractor, they predict application of the “usual course of business” element of the standard may prove difficult.

“As a plaintiff’s attorney, I am happy that the court has embraced a more employee-friendly standard that resonates with the objectives of the state’s protective legislation,” opines Cheyenne M. Chambers, Charlotte, NC, cochair of the Young Lawyers, Membership, and Diversity Subcommittee of the Section's Appellate Practice Committee. “It will be interesting to see how companies react to this ABC test, particularly the second element—my guess is that some companies will revisit their business models in an attempt to redefine which workplace tasks they consider as part of the their ‘usual course of business,’” Chambers adds.

“Future cases are sure to address the contours of this ‘usual course of business’ standard, particularly in the context of deciding class certification,” agrees Herrington. “For example, where the employer makes and distributes a product and is not in the delivery business like *Dynamex*, is delivery still within the usual course of business? Defense counsel will have the challenge of articulating how,
under this new standard, class certification is improper,” he surmises.

Distinct from the applicability of the “usual course of business” element of the ABC standard, the uncertainty, identified by the *Dynamex* court in multifactor tests such as *Borello* and the “economic reality” standards, is inherently flawed, according to Matayoshi. “The disadvantages of the multifactor tests noted by the court include the lack of certainty in how to categorize workers,” Matayoshi observes. “This ambiguity is a double-edged sword for employers, who on one hand enjoy the freedom of creative work situations but bear increasing risk of misclassification without a clear standard. For attorneys advising their clients, the court makes it clearer for attorneys to provide guidance and advice to their clients, while at the same time making provision of creative solutions to employer problems more difficult. Attorneys should proactively reach out to their clients to advise them of this shift so the client can reevaluate and audit their independent contractors,” Matayoshi advises.

**Resources**

- United States Division of Labor, Wage & Hour Division, *Misclassification of Employees as Independent Contractors*.
- California Code of Regulations, Title 8, §11090.
Independent Contractors Might Actually Be Employees
Division Announcements

ABA GPSolo Election for 2019 Board of Governors Member-at-Large
Nomination Due December 20, 2018

Please be advised that the 2019 Board of Governors Election process is underway. This announcement will serve as a notice that GPSolo may appoint a member to rotate on the Board of Governors to serve the 2019–2022 term, which will begin at the conclusion of the 2019 Annual Meeting. The selection of the Division Member-at-Large shall be made by the Council with due regard for the eligibility requirements for the election to the Board of Governors. Any Division member seeking election as Division Member-at-Large shall so inform the Division Secretary, Stephen Curley, in writing by December 20, 2018, 5:00 P.M. Central Time, at gpsolo@americanbar.org. No special form of nomination is required, and self-nominations are acceptable. Please make note of the following:

1. The petition notice for this election is posted to the BOG webpage. Actual petitions and the Overview of the Role of the BOG may be requested from the ABA Policy Office by contacting Leticia Spencer or Kathryn Jones.

2. Petitions and supporting credentials (signatures, typewritten list of signatures, signed overview of the role of a member of the BOG, a bio, and a .jpg headshot) must be filed by December 28, 2018, 5:00 P.M. Central Time, in order to be eligible for nomination.

Thank you and please let Stephen Curley, GPSolo Secretary, know if you have any questions or need more information regarding the 2019 Board of Governors Election process.

GPSolo Periodicals Survey

CLICK HERE to take our brief, online survey.

Tell us about the types of articles you would like to see (or see more of) in GPSolo magazine and the GPSolo eReport, and which format you prefer: Print? Online? Download? All of the above? Help us create the periodicals that best serve you, our readers. All your answers will be treated confidentially.
Council Member-at-Large Vacancy

The 2018-2019 GPSolo Division Council will elect a new Council Member-at-Large at its ABA 2019 Midyear Meeting at Caesars Palace in Las Vegas, Nevada, on Saturday, January 26, 2019, to fill an unexpired four-year term through the conclusion of the ABA Annual Meeting in August 2020.

Nominations must be received by Division Secretary Stephen J. Curley by January 11, 2019, via e-mail to gpsolo@americanbar.org. No special form of nomination is required, and self-nominations are acceptable.

GPSolo Nominating Committee Report

The ABA Solo, Small Firm and General Practice Division’s 2018–2019 Nominating Committee consisted of the following members: Chair, Jennifer A. Rymell, Benes Z. Aldana, Henry Hamilton III, Thomas P. Tully, and Melody Wilkinson. The Committee met in person in Charleston, South Carolina, on October 25 and 26 at the 2018 YLD & GPSolo Fall Conference: Tradition Meets Innovation. The Committee was charged with nominating a candidate for the office of Division Secretary and five candidates to serve as Council Members-at-Large.

Special efforts were taken to ensure each candidate’s interview was conducted in a professional manner, identical in scope and objective. Each applicant was allotted 20 minutes for his or her interview. During the respective interviews, each candidate was afforded an opportunity to share any information the candidate wanted the Nominating Committee members to consider. In addition, Nominating Committee members were given an opportunity to make whatever inquiry they deemed appropriate of the candidates. At the conclusion of the interviews, the Nominating Committee considered all applicants. After extensive deliberations, the Nominating Committee voted on each position and, in accordance with Solo, Small Firm and General Practice Bylaw 7.3.1., has submitted the following slate of nominated candidates for Division Secretary and Division Council Members-at-Large for the Bar Year beginning at the 2019 ABA Annual Meeting in San Francisco, California.

Division Secretary

Scott C. LaBarre. LaBarre of Denver, Colorado, is a sole practitioner who practices in the areas of employment law, disability rights, and international copyright policy. He received his JD from the University of Minnesota and his BA from St. John’s University in Collegeville, Minnesota. Prior to launching his own firm in July 1998, LaBarre acted as the general counsel of the National Federation of the Blind of Colorado. He served in that capacity for five years. In October 2005 LaBarre was elected as the president of the National Federation of the Blind of Colorado and also serves as chair of the PAC committee that is responsible for the Federation’s largest national fundraiser. Currently, he is president of the National Association of Blind Lawyers and serves as vice chairman of the Board of Directors for the Colorado Center for the Blind. From 1996 to 2002 LaBarre served as president of the National Federation of the Blind of Denver. Due to his outstanding service with the National Federation of the Blind, he has been the recipient of the Dr. Jacob Bolotin Award for work on the Marrakesh Treaty and the Raymond W. McGeorge Award for outstanding service to the blind. Additionally, LaBarre has been very active in national, state, and local bar associations. He began his involvement with the American Bar Association in the early 1990s, holding several leadership positions in the
ABA Young Lawyers Division. He is a member of the American Bar Association Board of Governors, where he serves as Chair of their Member Services Committee. LaBarre has received presidential appointments to several ABA commissions as well, most notably as the chair of the American Bar Association’s Commission on Mental and Physical Disability Law. The Commission is charged with the important work of increasing opportunities for lawyers with disabilities in the profession. His work in the GPSolo Division has included serving two terms on the GPSolo Council, on the Membership Board, and on the Young Lawyers Committee, just to name a few. LaBarre’s state and local involvement included serving as a member of the Colorado Bar Association Board of Governors and treasurer and member of the Executive Council of the Denver Bar Association’s Young Lawyers Division.

**Council Members-at-Large**

**John Austin.** Austin of Raleigh, North Carolina, is a sole practitioner who focuses on commercial litigation, personal injury, labor and employment, and landlord/tenant law. He is a commissioner with the Housing Authority of the County of Wake and has served in that capacity since 2006. Additionally, through his work with the North Carolina State Bar, he serves on the Carolinas Council of Housing, Redevelopment and Code Officials as a code official and the Southeastern Regional Council of the National Association of Housing and Redevelopment. Austin received his BA in English from North Carolina State University and his JD from Campbell University School of Law. He is currently serving an unexpired term as a GPSolo Council Member-at-Large and has used his love for writing to contribute to many legal publications. Austin was the associate editor of the ABA Young Lawyers Division’s *Affiliate* magazine, held an appointed position on the ABA Standing Committee on Publishing Oversight, and is now a member of the GPSolo Division Book Publications Board and the North Carolina Bar Association Newsletter and Publications Committee.

**David H. Lefton.** Lefton of Cincinnati, Ohio, is a partner in the law firm of Barron Peck Bennie & Schlemmer, Co. LPA. Lefton’s main area of concentration is estate planning, trust administration, and probate. He helps individuals of all ages and families achieve their estate-planning goals. Lefton is a leader in the Ohio State Bar Association and the American Bar Association. He has served as the District 1 representative on the Ohio State Bar Council of Delegates and Board of Governors, as well as the section chair of the Solo, Small Firm and General Practice Council for District 1. With respect to Lefton’s ABA experience, he has received two presidential appointments to the Standing Committee on Group and Prepaid Legal Services and the Standing Committee on Continuing Legal Education. Lefton’s contributions to the GPSolo Division have been extensive, having served as Division Chair in 2016–2017. He has also served as chair of the Division’s Programs and Book Publications Boards. He is the current chair of the Division’s Member Services Board. Lefton’s work has been recognized in the Division with the Chair’s Award in 2007, the Service to Others Award in 2010, and four Star of the Quarter Awards.

**Deian McBryde.** McBryde of Albuquerque, New Mexico, is a sole practitioner specializing in family law. He received his BA and JD from the University of New Mexico. Prior to going back to school to obtain his law degree, McBryde was an entrepreneur and a professional musician. He was also a non-commissioned officer with the U.S. Air Force (USAF). During his time with the USAF he was honored with the John Levitow Honor Graduate Award for the USAF Non-Commissioned Officers Academy and the USAF Commendation Medal for Meritorious Service. McBryde is active in the New Mexico Bar Association as a member of their Family Law, Solo and Small Firm, and Diversity Committees, as well as the New Mexico Hispanic Bar Association. Due to the nature of his practice, McBryde has focused his ABA involvement with the Family Law
Section and the GPSolo Division. He currently serves as a member of the Legal Educators, Family Law, and Technology Committee for those ABA entities.

**Joan M. Swartz.** Swartz of Maplewood, Missouri, is the owner of a small firm in which she has a general business-related practice. She received her BA in history and political science as well as her JD from St. Louis University. Swartz is a frequent speaker and author on a variety of legal topics, including ethics. She has served as an Assistant Editor for the *SOLO* newsletter and a member of the Division’s Programs Board. Swartz has also served as a member of the GPSolo Litigation and Business Opportunities and Commercial Law Committees. In addition to her ABA activities, Swartz has been extremely involved with the Bar Association of Metropolitan St. Louis (BAMSL) and the St. Louis Bar Foundation. She has held every officer position, including president, of both those organizations. Currently, she is a member of the BAMSL Board of Governors and serves as that association’s elected representative to the ABA House of Delegates.

**Eileen Sullivan.** Sullivan of Phoenix, Arizona, is a sole practitioner specializing in criminal and family law. She obtained her BA from Arizona State University and her JD from the John Marshall School of Law. Sullivan’s involvement in the Division began in 2005 when she was selected as a Diversity Fellow. Since that time she has rarely missed a meeting and has participated as a member of over 15 different GPSolo committees and as a Council Member-at Large. Sullivan was honored in October 2017 with a GPSolo Difference Maker Award: Making a Difference Through Community Service. She received this award due to her service on the Maricopa Health Centers Governing Council, the Child Crisis Arizona Board of Directors External Affairs Committee, the Phoenix Conservatory of Music Board of Directors, and the Children’s Museum of Phoenix. In addition to her vast amount of community service and ABA work, Sullivan is active with the Arizona Women Lawyers Association and the Arizona Asian American Bar Association.

**Call for 2019 Solo and Small Firm Awards Nominations**

GPSolo is accepting nominations for the 2019 Solo and Small Firm Awards to celebrate the accomplishments and efforts of outstanding solo and small firm (two to nine attorneys) practitioners, as well as bar leaders and bar associations.


- **Solo and Small Firm Lifetime Achievement Award.** Recognizes solo and small firm attorneys who are widely accepted by their peers as having significant lifetime distinction, exceptional achievement, and distinction in an exemplary way. The winners will be viewed by other solo and small firm practitioners as epitomizing the ideals of the legal profession and of solo and small firm practitioners.

- **Solo and Small Firm Project Award.** Rewards bar leaders and associations for their successful implementation of a project or program specifically targeted to solo and small firm lawyers.

- **Solo and Small Firm Trainer Award.** Recognizes attorneys who have made significant contributions to educating lawyers or law students regarding the opportunities and challenges of a solo and small firm practice.

The winners will be honored on Friday, May 3, during the 2019 Litigation & GPSolo CLE Conference at the Marriott Marquis, New York, New York.
We look forward to receiving your nomination!

**Nominations are due no later than February 15, 2019.**

**Introducing a New Partnership with Zeamo**

Zeamo is the simplest way to find and access nearby gyms that meet your workout preferences without a membership or subscription. Simply choose your gym, download a pass, walk in, and work out. With locations across 50 major U.S. cities and international travel destinations, Zeamo makes it easy to exercise wherever you are in the world. Please click on the link for more information: [https://zeamo.com/registration/corporate/abagpsolo](https://zeamo.com/registration/corporate/abagpsolo). You will need to use Firefox, Chrome, or any other browser besides Internet Explorer to view it from your desktop.

**GPSolo Podcasts**

GPSolo's Brown Bag and Hot Off the Press podcasts are recorded as live teleconference calls and available as podcast recordings for GPSolo members at no additional cost! The Brown Bag Series features presentations on timely legal topics and is recorded on the second Wednesday of every month. The Hot Off the Press Series features a GPSolo book presented by the author and are recorded the third Wednesday of every other month.

Join us for our upcoming live podcasts or check out our [podcast library](https://zeamo.com/registration/corporate/abagpsolo).

**Brown Bag Series**

**Lead Like a Rock Star**

Date: Wednesday, January 9, 2019

Time: 12:00 P.M. – 1:00 P.M. Central

Dial-In Number: 877-732-7160

Conference ID: 609 5495

Description: Kristi Staab is an international speaker, author, trainer, and consultant who has been coaching and developing individuals, teams, and organizations to excellence in the areas of leadership, sales, and success for nearly 25 years—helping them be more, do more, and achieve more. Kristi will inspire you and show you how to break through to achieve your aspirations as both a recognized expert in your practice and as an author. She is sure to “put the rock in your role” as she shares how to be at the pinnacle of both personal and professional excellence. This podcast is a sneak peak of Kristi’s luncheon presentation scheduled at the ABA 2019 Midyear Meeting. Join us in Las Vegas to learn more about Leveraging Your ABA Author Experience! Click [here](https://zeamo.com/registration/corporate/abagpsolo) for more information about this meeting and GPSolo’s events.

Moderator: Melanie Bragg, Bragg Law PC, Houston, Texas, and Chair, ABA Solo, Small Firm and General Practice Division

Speaker: Kristi Staab, MBA, Chief Rock Star, Executive Coach, Henderson, Nevada
Hot Off the Press Series
From the Trenches III, Pretrial Strategies for Success
Wednesday, January 23, 2019
12:00 P.M. – 1:00 P.M. Central
Dial-In Number: 877-732-7160
Conference ID: 177 8766

Description: GPSolo speaks with Sawnie A. McEntire, who was the editor and one of the authors of the new edition of GPSolo’s book From the Trenches III: Pretrial Strategies for Success. This book provides important insights from experienced trial lawyers from across the country. This valuable resource is a general reference tool with solid insights for both beginning lawyers and seasoned trial veterans.

Moderator: Mackenzie Coplen, Okmulgee, Oklahoma, Vice Chair, GPSolo Book Publications Board

Speaker: Sawnie A. McEntire, Parsons McEntire McCleary PLLC, Dallas, Texas
Division Meetings

2019 ABA Midyear Meeting

January 24 – 26, 2019
Caesars Palace
Las Vegas, Nevada

GPSolo has some exciting events scheduled during the ABA 2019 Midyear Meeting. There is NO registration fee to attend the Midyear Meeting; however, a registration fee may be required to attend certain events. Additionally, you must register through the ABA in order to secure a hotel room at the ABA rate.

You can add these events on the Course Selection page under GPSolo when you register at www.ambar.org/midyear. If you have already registered, access the registration page with your badge number and select upgrade to add an event.

These fantastic programs will be held on Friday, January 25, 2019.

Innovate Your Practice for Success CLE Sessions: FREE!

GPSolo’s top new authors will provide unique insights on the some of the legal industry’s hottest topics. Register for each individual session or for all of them today! Are you still undecided? Preview these programs by listening to the author’s podcasts in our podcast library: www.ambar.org/podcast.

Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury
9:00 A.M. – 10:00 A.M.
Moderator: Alan O. Olson, Olson Law Office PC, Des Moines, Iowa
Speaker: Jeffrey T. Frederick, Ph.D., National Legal Research Group, Inc., Charlottesville, Virginia

**Images with Impact: Design and Use of Winning Trial Visuals**
10:15 A.M. – 11:15 A.M.
Speaker: Kerri L. Ruttenberg, Jones Day, Washington, D.C.

**Advising the Small Business: Forms and Advice for the Legal Practitioner, Third Edition**
1:45 P.M. – 2:45 P.M.
Speaker: Jean L Batman, Legal Venture Counsel, Inc, San Francisco, California

**The Business Guide to Law: Creating and Operating a Successful Law Firm**
3:00 P.M. – 4:00 P.M.
Speaker: Kerry M. Lavelle, Lavelle Law, Schaumburg, Illinois

**Leveraging Your ABA Author Experience: FREE!**

You’re invited to an ABA program specially created for ABA book authors and attendees who are thinking about writing a book and want a publishing insider’s view of the process. This program is brought to you by the ABA Solo, Small Firm and General Practice Division and the ABA Standing Committee on Publishing Oversight. This three-session program will help you:

- Leverage your author experience to enhance your practice.
- Learn from the experience and success of other ABA authors.
- Understand the book proposal and development process.
- Promote your book and learn what marketing services the ABA provides.

**Editors’ Advice**
9:00 A.M. – 10:00 A.M.

Speakers: Melanie Bragg, Bragg Law PC, Houston, Texas and Chair, ABA Solo, Small Firm and General Practice Division; Donna Gollmer, Director of
Authors’ Advice
10:15 A.M. – 11:00 A.M.

Moderator: Robert Paul, East Hampton, NY

Speakers: Elizabeth Kelley, Law Offices of Elizabeth Kelley, Spokane, WA; Maureen McBrien, Brick, Jones, McBrien & Hickey LLP, Newtown Upper Falls, MA; and Dr. Artika Tyner, University of St. Thomas, St. Paul, Minnesota

Marketing Advice
1:45 P.M. – 2:45 P.M.

Speakers: Jeffrey Frederick, Ph.D., ABA Author and Director, Jury Research Services, National Legal Research Group, Inc., Charlottesville, Virginia; Jill Nuppenau, Director of Marketing, American Bar Association, Chicago, Illinois; and Dean Pappas, Marketer, American Bar Association, Chicago, Illinois

In addition, this program includes a luncheon featuring Keynote Speaker Kristi Staab, MBA, Chief Rock Star, and Executive Coach.

Lead Like a Rock Star Luncheon with Keynote Speaker Kristi Staab, MBA, Chief Rock Star, Executive Coach
12:00 P.M. – 1:30 P.M.
Cost: $15 per person.

Kristi Staab is an international speaker, author, trainer, and consultant who has been coaching and developing individuals, teams, and organizations to excellence in the areas of leadership, sales, and success for nearly 25 years—helping them be more, do more, and achieve more. Kristi will inspire you and show you how to break through to achieve your aspirations as both an author and a recognized expert in your practice.

There are even more events to attend!
Keithe E. Nelson Military Memorial Luncheon with Keynote Speaker BG Malinda E. Dunn, USA (Ret.)
12:00 P.M. – 1:30 P.M.
Cost: $40 per person

Keynote speaker Malinda E. Dunn is the Executive Director of the American Inns of Court Foundation in Alexandria, Virginia. The American Inns of Court inspire the legal community to advance the rule of law by achieving the highest level of professionalism through example, education and mentoring.

How Artificial Intelligence (AI) and Analytics Can Change Your Practice Session and Margarita Reception
3:00 P.M. – 4:00 P.M.

*Sponsored by Thomson Reuters*

Join us for margaritas and light appetizers to learn from the Westlaw Product Management Team about how artificial intelligence (AI) and analytics are being applied to data in new ways that provide insights previously unavailable to enable legal teams to work much faster and more cost-effectively.

Women’s Initiative Network (WIN) Present and Powerful Speaker Series Wine and Cheese Reception: FREE!
4:00 P.M. – 5:30 P.M.

Presented with the ABA Law Practice Division

Keynote speaker Marianne Williamson is an internationally acclaimed author and lecturer. For the last 35 years, she has been one of America’s most well-known public voices, having been a popular guest on television programs such as *The Oprah Winfrey Show*, *Larry King Live*, *Good Morning America*, and *Real Time with Bill Maher*.

Joint GPSolo / LPD Leadership Dinner featuring Present & Powerful Speaker Marianne Williamson
6:30 P.M. – 8:00 P.M.
Old Homestead Steakhouse in Caesars Palace
Cost: $150 per person
Join us for an evening of fine dining at Old Homestead Steakhouse in Caesars Palace. Please be punctual because the entire party must be present to be seated. Space is limited, so tickets must be purchased in advance and not at the door.

2019 Litigation & GPSolo CLE Conference

Presented with ABA Section of Litigation
May 1 – 4, 2019
Marriott Marquis
New York, New York
December 18, 2018   GPSOLO DIVISION NEWS

CLE

Please visit the Events & CLE page on the Division’s website for CLE teleconferences that GPSolo produces and cosponsors.

Upcoming GPSolo CLE

National CLE Conference® – CLE and Ski

January 2 – 6, 2019
The Westin Snowmass Resort, 100 Elbert Lane
Snowmass Village, Colorado, 81615

Top-Notch Legal Education: 9 Areas of Substantive Law to Choose From:

- Bankruptcy
- Business and Tax Law Strategic Planning
- Civil Litigation
- Employee Benefits
- Environmental Law, Land Use, Energy and Litigation
- Family
- Health
- Intellectual Property
PLUS, Law Practice Management session options are back again this year!

All presentations are live and feature some of the best lawyers, judges, and experts from throughout the country. Our early-morning and late-afternoon schedule provides 16 to 19 hours of continuing legal education credit per program while at the same time allowing you ample time to enjoy Snowmass and Aspen.

Network with Other Lawyers

Breakfast and apres ski are more than just meals. They provide you an opportunity to meet and network with outstanding lawyers from across the country. Make new contacts and new friends!

Significant Savings!

We expect to bring more than 300 participants to Snowmass, including lawyers, spouses, children, and guests. The result is a significant savings for you on rooms, transportation, ski lift tickets, equipment rentals, and more.

Register Today!

Being Heard: Presentation Skills for Attorneys

Webinar
Date: January 23, 2019
Time: 1:00 PM – 2:00 P.M. Eastern
Credits: 1.50 General CLE Credit Hours

- A quick and timely program, this session will provide you with basic and advanced techniques, as well as insider knowledge that you need to improve your presentations, whether in or out of court. Faith Pincus, author of Being Heard: Presentation Skills for Attorneys, will consolidate the most helpful and effective tips of the trade in order for you to become a better public speaker.

Public speaking is a skill that can be learned, just like any other skill such as writing,
playing an instrument, a sport, or being a chef. This course offers a multitude of techniques that attorneys can use immediately to improve their presentation skills, including:

- Knowing your audience
- Creating your message
- Catchy introductions
- Memorable conclusions
- 5 delivery tips
- Oral argument tips

SPECIAL OFFER:

Registrants of this program will receive a 20 percent discount code off *Being Heard: Presentation Skills for Attorneys* by Faith Pincus. Offer Expires 2/24/2019.

Register Today!

**Evaluating Nursing Home Personal Injury Cases for Older Clients**

**Webinar**

Date: February 19, 2019  
Time: 2:00 P.M. – 3:30 P.M. Eastern  
Credits: 1.50 General CLE Credit Hours

This program will provide attorneys working with elderly and special needs clients with an understanding of these clients' rights in long-term-care facilities. Faculty will teach attorneys how to screen cases to determine if a referral to a nursing home abuse lawyer is appropriate.

As a result of taking this program, you'll be able to:

- Explain the nursing process used upon admission to a nursing home in order to
advocate for clients/loved ones in nursing homes and avoid unnecessary injury

- Identify federal and state regulations aimed to protect the elderly living in long-term-care facilities
- Recognize red flags in living and deceased clients that may require legal action
- Screen cases to determine if a consultation with a nursing home abuse lawyer is appropriate

Register Today!

Cybersecurity for Lawyers: How to Anticipate, Investigate, and Litigate a Data Breach

Webinar
Date: February 20, 2019
Time: 1:00 P.M. – 2:30 P.M. Eastern
Credits: 1.50 Ethics/Professionalism CLE Credit Hours

Learn how to protect corporate data, develop effective incident response plans, and put together the right team to respond to a cyber incident BEFORE you find out about a breach.

A panel of experienced cyber lawyers will take you through a hypothetical breach, discussing the steps you should take to:

- Protect corporate data prior to learning about a breach
- Develop effective incident response plans
- Make sure you have the right team to respond to a cyber incident

The panel will focus on what to do and not to do when conducting a cyber investigation, including how to make sure certain information is covered by attorney-client privilege, and that the privilege is not inadvertently waived.

Register Today!
ABA TECHSHOW 2019

February 27 – March 2, 2019
Hyatt Regency Chicago
Chicago, Illinois

**Bringing Lawyers & Technology Together**

ABA TECHSHOW has more than 31 years of experience bringing lawyers and technology together. Legal work today is dependent on technology to manage day-to-day activities, to practice more competently, and to service clients more effectively. ABA TECHSHOW teaches you how technology can work for you. Through the expansive EXPO Hall, CLEs, presentations, and workshops, you will be able to get your questions answered and learn from the top legal professionals and tech innovators, all under one roof. Regardless of your expertise level, there’s something for you at ABA TECHSHOW.

As a member of ABA Solo, Small Firm and General Practice Division, you can register for ABA TECHSHOW 2019 at a special reduced rate. This discount only applies to registrants who qualify for the Standard registration and will save you $150. You can register online and include the unique discount code **EP1915** at checkout to receive the discount.

Celebrate more than 31 years of legal technology and innovation. Network with legal technology experts from around the globe. Don’t forget to visit [www.techshow.com](http://www.techshow.com) for current information on ABA TECHSHOW 2019, the best place for bringing lawyers and technology together.
ABA TECHSHOW 2019: Register with discount code EP1915

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But no need to be spooked when you can have a comprehensive ID Theft Protection plan. ABA Members get 20% off the list price.

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Division Book Releases

The Commercial Property Insurance Policy Deskbook

The Commercial Property Insurance Policy Deskbook: How to Acquire a Commercial Property Policy and Present and Collect a First-Party Property Insurance Claim

*The Commercial Property Insurance Policy Deskbook* is an indispensable resource on acquiring a commercial property policy and presenting and collecting first-party property insurance claims.

From the Trenches III, Pretrial Strategies for Success
From the Trenches III: Pretrial Strategies for Success

*From the Trenches III, Pretrial Strategies for Success* provides important insights from experienced trial lawyers from across the country. This valuable resource is a general reference tool with solid insight for both beginning lawyers and seasoned trial veterans.

The Law and Liability of Small Aircraft

*The Law and Liability of Small Aircraft* contains a compelling representation of judicial decisions—divided between product liability lawsuits and those that deal with the regulatory scheme that oversees aviation—that present the typical dilemmas of the courts in this area of law.
SoloSez™ is the internet discussion forum for solos and small firm lawyers. As the ABA’s most active e-mail listserv, SoloSez™ features approximately 850 solo and small firm e-mail subscribers discussing everything from tech tips and legal opinions to what to wear to court.

For the latest Popular Threads visit the SoloSez web page.