How to Master the New Rules of Social Media Marketing

By Terrie S. Wheeler

With changing algorithms in Google, LinkedIn, Facebook, and YouTube, lawyers need to rethink their social media strategy to generate maximum impact.
Sponsors

LawPay

LawPay

LawPay

MyCase

LawPay

Technology

PRACTICE TECHNOLOGY

TAPAs: Disaster Planning

By Jeffrey Allen and Ashley Hallene

PRACTICE TECHNOLOGY

Product Note: Mixcder E7

Active Noise-Canceling
Technological And Practice Advice to help you become more efficient and effective. This month: tips to safeguard your practice in the event of illness, incapacity, or disaster.

Bluetooth Headphones

By Nicole Black

If you travel often or work remotely from noisy environments like a coffee shop, these noise-canceling headphones might be for you.

PRACTICE TECHNOLOGY

Ask Techie

In this month’s installment of our technology Q&A column, our panel of experts answers your questions about how to speed up conflict checking, whether to upgrade to the new iPhone, and how to get your data to work for you (and not the other way around).

BIG DATA & CLOUD COMPUTING

Clarifying Cloud Computing: Blockchain’s Relation to Cloud Computing

By Al Harrison and Joseph Jacobson

Laws and court rules have not yet caught up to the anticipated changes involving Blockchain, much less the uses that will be developed.

Mindfulness 101: Work

Defining Moments,
Better, Not Harder, in Three Easy Steps
By Debi Galler

Learn how the practice of mindfulness can keep you productive and focused when you’re having “one of those days.”

Insights into the Lawyer’s Soul: Jeffrey Allen
By Melanie Bragg

This month we present excerpts from an interview with Jeffrey Allen, who urges you to “Try the unusual in your pursuit of excellence.”

Substantive Law

BUSINESS & CORPORATE

What Can Structured Negotiation Offer the Business Attorney? A Lot!
By Lainey Feingold

Learn about the strategy of structured negotiation and its application for business lawyers.

PROFESSIONAL LIABLITY

Alleged Failure to Monitor Discovery Leads to Malpractice Suit
By Onika K. Williams

A law firm was unable to shake this malpractice claim for not preventing spoliation.

TRUSTS & ESTATES

The Power of Trust Decanting, Part 2

MEDIATION

After 20 Years, Mediation Is Mainstream at the
By Michael J. Skeary

Is there a common law right to exercise the power of decanting, and what are decanting’s fiduciary and tax implications?

By E. Patrick McDermott, Stephen Ichniowski, Katherine S. Perez, and Jennifer Ortiz Prather

What began as a case-management tool is now an essential option.

CIVIL RIGHTS & CONSTITUTION

Health Care as a Human Right

By Mary Gerisch

The only remedy to our lack of access to health care is to stop confusing health insurance with health care.

GPSolo Division News

PROFESSIONAL DEVELOPMENT

Division Announcements

Division Announcements

PROFESSIONAL DEVELOPMENT

Division Meetings

Division Meetings
CONTINUING LEGAL EDUCATION

CLE

PROFESSIONAL DEVELOPMENT

Division Book Release

SoloSez Popular Threads

Professional Development

About GPSolo eReport

GPSolo eReport is a member benefit of the ABA Solo, Small Firm and General Practice Division. It is a monthly electronic newsletter that includes valuable practice tips, news, technology trends, and feature articles on substantive practice areas.

see more issues - VISIT ARCHIVE
Copyright Information

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher.

Learn more - COPYRIGHTS

Reprint Request

Find and article you want to share with a group? Lost track of an article you wrote? Visit our reprint center to find out how to obtain copies of the article you need.

reprints - REQUEST PERMISSION

Advertise with GPSolo

Please contact our advertising representative, M.J. Mrvica Associates, Inc., for more information and additional advertising opportunities.

Connect - M.J. MRVICA ASSOCIATES, INC.
Related Publications

GPSolo Magazine

visit - GPSOLO MAGAZINE
How to Master the New Rules of Social Media Marketing

By Terrie S. Wheeler

Well, I’ve got good news and bad news for you. The good news is that social media is still a great way to build your name recognition. The bad news? With changing algorithms in Google, LinkedIn, Facebook, and YouTube, lawyers like you will need to rethink your social media strategy to generate maximum impact. The bottom line is that updated algorithms on LinkedIn, Facebook, and Twitter have changed the reach of social media content, how that content is ranked, and the way in which content can be posted on social media.

To adapt to these changes, PSM (my legal marketing firm) has changed its overall approach and strategy for social media marketing for our legal industry clients, and I want to share our new strategy with you. First, today’s social media engagement requires a strong focus on unique and high-quality content, on engaging with your followers, and on establishing your firm as a thought leader. In practical terms, this means you will need to create more original content by adding video to your website, participating on Facebook Live, writing long-form posts, promoting blogs, and in other ways conveying your thought leadership. It is also very important to increase your personal engagement with others who like, share, or comment on your content.

By adjusting your strategy, you can work with instead of against the “New Rules” of social media. Ultimately, you want your social media strategy to enhance your firm’s voice and your brand to be “so great they can’t ignore you,” as Steve Martin famously said. This isn’t a strategy of chasing algorithms, but a strategy of helping you create
and publish incredible content that builds your business.

LinkedIn Changes: It’s All About the Points!

LinkedIn now assigns points to posts—these points determine if that post is seen on a newsfeed or as suggested content for users. The higher your points are per post, the better. The point breakdown:

- +15 points per video and long-form text post (up to 200 words)
- +13 points per video and short-form text post
- +12 points per video post (uploaded natively—not from YouTube or Vimeo)
- +10 points per long-form text post (> 3 lines)
- +8 points per short-form text post (< 3 lines + 5 points per article)
- +5 points per comment received
- +3 points per like received
- +2 points per share received

To summarize, original video that is posted directly to a LinkedIn profile will receive the most traction. When we discuss “uploaded natively,” we mean that you must first download the video from where it resides (your website or on a video site) and re-upload it from your hard drive directly to LinkedIn or Facebook. Additionally, long-form, original text posted directly from a LinkedIn profile, which has engagement
How to Master the New Rules of Social Media Marketing

(likes, repost, comments), will also receive a lot more traction.

The new goal to aspire to on LinkedIn involves providing a steady stream of original content including videos and articles that broadcast your firm’s voice, brand, and values. Your content must be timely and relevant, must always use photography, and must have interesting captions. This level of original content will provide opportunities for the firm and your staff to engage with content and followers, your audiences, and prospective clients.

Additionally, we recommend smaller individual posts from the team that are posted directly to individual pages. This will help build authority and opportunity for engagement.

LinkedIn Strategy under the “New Rules”

- 2–4 blog posts or original thought pieces per month that are authored by you or someone on your team and published on firm’s website, then posted directly to the firm’s LinkedIn page.

- 2–4 short-form videos per month that are 30 seconds or so in length and that include a teaser or promo for the blog post published to the firm’s social media pages and individual pages.

- 1–2 long-form videos every other month that expand on popular topics, FAQs, or educational information.

- 2–3 smaller 200–300 word thought leadership pieces posted directly on LinkedIn to the personal pages of the lawyers at your firm.

- Third-party content can still be scheduled 1–2 times a week, so if you find an interesting article or want to promote an upcoming event, you should feel free to do so.

Why Engagement Matters

Don’t be discouraged, but regular posting to LinkedIn isn’t enough. You need to engage! Here are some tips to consider:

- Calendar 10–15 minutes every day to like, comment, share, and follow your
Facebook: How Mark Zuckerberg Is Changing It Up

Facebook’s current algorithm updates limit the reach on posts that take visitors away from Facebook. Links that go to a company website or third-party website are not preferred and may not even be seen by your friends or followers. Facebook’s current goal is to get businesses to pay to boost their posts and to purchase Facebook ads. The algorithm is set up so that, in general, posts from businesses receive lower priority and therefore decreased reach versus content posted on personal pages. Pages with posts that don’t get much reaction will see the biggest drop in distribution (reach). Therefore, posts that get engagement—from likes, comments, and re-posts—are pushed up the distribution chain to the top of your contacts’ newsfeeds. This means that your content will be seen by more of your contacts.

Additionally, it is no longer possible to post to a personal Facebook page via any social media management tool (SMMT) such as Hootsuite, Buffer, or Sprout Social. However, it is still possible to post to a Facebook group or a company Facebook page using these tools. In the past we were able to use Hootsuite to efficiently distribute one post to all social media sites (Google+, LinkedIn, Twitter, Facebook) every day. Out with the old, in with the new!

Please remember that for many firms, there is far more engagement on lawyers’ contact’s posts.

- Don’t forget to also directly respond to people who have commented on your LinkedIn content—you also receive LinkedIn points for engaging with your own and others’ content.
personal pages than company pages. It is even more important now to engage your friends into following your company page. Posts on your company page can only be seen by those who have followed your firm, and all the best practices above will help your posts reach the maximum number of people.

Original content published on LinkedIn (blog posts, long-form posts, and video) can also be posted to Facebook. Ultimately, like LinkedIn, Facebook’s success as a digital marketing tool requires sustained and regular engagement (i.e., each like, repost, or comment helps content gain traction to appear higher on your contact’s newsfeeds).

**A New Facebook Strategy**

- Content should be posted directly to Facebook—not using an SMMT.
- Create posts with strong calls to action and reminders to encourage clients to follow your page and change their settings to see you first.
- Consider paying to boost posts—it can be very cost effective.

**Facebook Engagement**

During the 10–15 minutes you will schedule to “do” social media every day, take some of this time to repost, like, and comment on Facebook content.

**The Changing Face of Twitter**

It is no longer possible to post to multiple Twitter profiles at once from any SMMT. This means that only one company account can be used to schedule content at a time.
For most firms, this will not have a huge impact; however, it does mean that if the firm has various team members connected to an SMMT, then content can only be posted to one account.

Twitter is one of the best social media tools for large amounts of content. The volume of third-party content posted to Twitter can include 3–4 posts per week. Many lawyers who are actively engaged on Twitter post multiple times per day! Most of the lawyers we work with are not heavy Twitter users, and you don’t need to be to grow your law practice. Remember that original content and videos will be published to Twitter similarly to LinkedIn. The biggest difference is that Twitter can use an SMMT to streamline the process.

Twitter Engagement Tips:

- Take 5 minutes out of the 10–15 minutes you will allocate every day to repost, like, and comment on Twitter content.
- Consider using an SMMT to schedule third-party content 3–4 times a week. That way, you can create and schedule all your Tweets once per month for the upcoming month.

The Ethics of Social Media

Some states are more “evolved” on how the rules of professional responsibility transfer to social media activities. Always defer to your state’s rules; particularly if various opinions have been published that augment some of the common rules regarding communications concerning a lawyer’s services, advertising, direct contact with prospective clients, and communication of fields of practice and certification, as
well as rules related to client confidentiality.

If a client leaves a negative review about you on Avvo, LinkedIn, Facebook, Google, or any other website, you should not engage with that client if it would require divulging information specific to the client’s matter. My recommendation is to take the high road and respond (if you choose to) with, “I’m sorry you feel this way. I would be happy to address your concerns by scheduling a telephone call with you. The satisfaction of my clients is extremely important to me, and I am committed to working with you to resolve any outstanding issues.”

A Few More Tips

About Reviews

Reviews on LinkedIn, Facebook, and Google can be very powerful tools to help increase your search engine rankings. When you close a case or matter, if the client had a good experience with you and your firm, send your client a link to one or two sites asking for a review. Most clients are happy to do this for you. Always include an option for the client to leave a Google review. Reviews increase your credibility on each of the social media sites and on Google. The more Google reviews you have, the higher your firm will rank on Google.

A Note on #Hashtags

The dictionary defines a hashtag as a word or phrase preceded by the pound sign (#) and used to identify messages on a specific topic. Hashtags classify and categorize the topic of your post at the end of the post. Your readers can then choose to follow your
hashtags, and, in doing so, will receive your posts at the top of their newsfeeds. In general, you want to use hashtags that support your brand, for example, #Complexdivorce, #Protectingyourrights, #Divorceformen, #Businesslawyer, etc. You want your hashtags to be short and memorable, and you always should capitalize the first letter of your tag. Finally, you never should use punctuation or spaces in a hashtag. By using hashtags with your social media posts, you will first of all look cool, and you will also gain traction with those who follow you.

Photography Matters!

Each of your posts needs to include a royalty-free photograph or an original photo that you already own. Photographs engage viewers to your content. No one would consider using a PowerPoint presentation with absolutely no graphics in it. (At least I hope you wouldn’t!) The same is true with social media. Just one photograph that supports your content is worth a thousand words.

In conclusion, social media is here to stay. We are at the mercy of the big players such as Google, Facebook, LinkedIn, and Twitter. These sites can change their algorithms on a whim to better meet their needs, leaving users to figure out the ever-changing landscape of social media effectiveness. The tips and suggestions above allow you to maximize your presence on social media to better meet your needs as a lawyer. Done well, social media is a powerful tool to help you build your name recognition and awareness in the marketplace. You just need to learn, understand, and apply the “New Rules” of social media to your law practice.
<table>
<thead>
<tr>
<th>ABA Resources</th>
<th>The ABA</th>
<th>Connect</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA Journal</td>
<td>About the ABA</td>
<td>Contact Us</td>
</tr>
<tr>
<td>ABA-Approved Law Schools</td>
<td>ABA Member Benefits</td>
<td>Contact Media Relations</td>
</tr>
<tr>
<td>Law School Accreditation</td>
<td>Office of the President</td>
<td>Web Staff Portal</td>
</tr>
<tr>
<td>Bar Services</td>
<td>ABA Newsroom</td>
<td>Website Feedback</td>
</tr>
<tr>
<td>Legal Resources for the Public</td>
<td>Join the ABA</td>
<td></td>
</tr>
<tr>
<td>ABA Career Center</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Model Rules for Professional</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Responsibility</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

Terms of Use

Code of Conduct

Privacy Policy

Your California Privacy Rights

Copyright & IP Policy

Advertising & Sponsorship
Okay, everyone reading this who still believes that they have immortality in their genes, will suffer no disabling illness, and will not fall victim to a terrorist’s attack may stop reading now. (You shouldn’t, but you may, as this likely will not resonate with you). As for the rest of you, pay close attention, as the tips in this column may one day save your practice (or your estate).

Sudden disabling medical events (such as an accident, a heart attack, or a stroke) often come with no warning, much like terrorist attacks. They sometimes affect younger people as well as older ones—more likely the younger ones will experience an accident or even a terrorist attack than a stroke or a heart attack, but life comes with no guarantees, and many younger people have had heart attacks, strokes, and other disabling medical conditions. For those of us who practice law and often have the lives and fortunes of our clients at stake, a terrorist attack or a disabling medical event affecting us can prove a very serious problem beyond the personal crisis it causes. If you should have an accident, a heart attack, a stroke, or have a similar disaster befall you, someone must pick up the pieces of your practice, either until you can return to your practice or, if you cannot return to your practice, permanently. Someone may also have to pick up the pieces of your personal life until you can return to their management.
That means someone needs to have access to your personal information, your business information, and your client information. If you have a spouse or functional equivalent, that person may have access to your personal financial information and may have the ability to step into the breach at that level. If not, you should make sure that they can access that information or select someone else to do so. Unless that person works in your firm, they likely will not have access to your business, client, and case information (and ethically they should not).

If you practice in a partnership or other similar group setting, one of the other attorneys in your operation may have access to that information and can step up and cover for you. If you practice by yourself, you need to have someone in the wings who can and will step up while you are disabled and potentially for as long as you are unavailable. Some states (for example, California) require sole practitioners to have identified someone to do this. Whether or not your state requires it, common sense demands it. Otherwise, deadlines go unmet and problems unsolved, potentially resulting in liability for you (or your estate) for damages to your clients. Even more important, morally, you would not want to see your clients damaged as a result of your disability.

Now that we have identified the problem, let’s talk about the plan to deal with it:

**Tip 1:** Identify someone with the ability and the willingness to step up and cover for you professionally (and also regarding your personal affairs). You may have different people do personal and professional. Lacking a better term, we will call each such person your surrogate. While it might go without saying, we think it best to say you should:

- Pick someone you trust completely.
- Pick someone with the requisite knowledge and experience to perform competently.
- Discuss the situation with each surrogate and confirm that they agree to do it for you if the need arises (you may end up with an agreement that you do it for each other).

**Tip 2:** Make a list of relevant information for your personal surrogate. That information should include:
Tip 3: Make a list of relevant information for your professional surrogate. That information should include:

- All relevant financial information respecting your practice, including all assets held by you in trust for others and financial obligations of your practice (what payments need to occur, when, and to whom).
- A current list of names and contact information for each of your clients (you also need to take care to keep this list current). We recommend that you have it in both electronic and hard-copy formats and that you store it securely, providing access information (location, unlock codes, keys, etc.) to your surrogate.
- A current list of names and contact information for each of your employees (again, it remains important that you keep the list current).
- Current information on your professional insurance (including malpractice coverage).
Tip 4: Advise those close to you who is to step up and help out if there is a problem so they can contact those people, if necessary. The people in your office should know who to call if something happens to you. If you are a sole practitioner, check with your state bar, as some states may require that you keep the bar advised of the identity of your surrogate.

Tip 5. Consider what documentation you should have in place and make sure you get it prepared and executed, providing copies to the appropriate people, including your surrogate(s). At a minimum, you should consider:

- Your personal will.
- Your medical power of attorney.
- Instructions to be followed upon your death.
- Any necessary powers of attorney to enable your surrogate to act on your behalf during your incapacity.

Hopefully, nothing said in this column came as a shock to any readers.
information comes under the heading of “important but basic”. That said, if we set the “over/under” of having all this in place at 50 percent, we would take the under every time, betting that far less than half of the attorneys who read this column will have already done everything we recommended before reading this column. Perhaps the more important question: What’s the over/under for compliance six months after reading this article?

Like they say on the police shows: “Be careful out there.” Take appropriate precautions to protect yourself against such a disastrous event. We don’t mean live in a bubble; we do mean, take care to limit your risk as much as possible by not needlessly exposing yourself to injury or illness. Remember, as Flannery O’Connor once noted: “The life you save may be your own”!
Do you travel often or occasionally work remotely from noisy environments like a coffee shop? Does that ambient noise in the background distract you to no end? Then noise-canceling headphones might be right up your alley.

These headphones effectively “cancel out” background noise by sensing external input
and generating a “fingerprint” of the sound, and then create a new wave that is 180 degrees out of phase with the waves associated with the background noise. They typically only work well when you’re in an area with lots of ambient noise, such as a noisy cafe or other locale, or are traveling on a plane or train. In other words, they only work well when there’s constant influx of loud, distracting noise—the exact scenario when you’d want relief from said noise.

I recently had the opportunity to test a complimentary pair of noise-canceling headphones, which were provided to me for review purposes: Mixcder E7 active noise-canceling Bluetooth headphones (mixcder.com).

These are attractive, sleek headphones, in black and silver, but they’re certainly not as unobtrusive as earbuds. The soft foam ear padding is comfortable and provides additional noise filtering. The headband is padded, too, and is adjustable, which allows you to customize the headphones to your liking.

These headphones have Bluetooth capabilities and thus wirelessly connect with your Bluetooth-enabled mobile device. They come with a hard carrying case to protect them, along with a charging cable and a 3.5 mm cable for use when you choose not to enable the Bluetooth connection.

An easy-to-read manual is provided, and setup was quick and simple. Connecting them to my iPhone via Bluetooth was easily accomplished. The built-in 400 mAh battery charged quickly and held a charge for more than a day.

The earpiece on one side of the headphones has a microphone that can be used for phone calls, and it can be turned on and off. Also on that same earpiece are volume control buttons. On the other earpiece there is a switch to turn the noise-canceling feature on and off.

The sound quality is quite good, and the Bluetooth reach is 33 feet. My husband and 14-year-old daughter told me that their preferred headphones had slightly better sound quality, and my husband advised that his Bluetooth headphones had a slightly greater reach. But for my needs, the sound quality and Bluetooth reach were more than sufficient.

I was particularly impressed by the noise-canceling features. I took them to my local mall to test them out and sat in a well-traveled thoroughfare. Prior to using them, it
didn’t seem to me that the mall was all that noisy—at least not in any noticeable way. Then I put them on without the noise-canceling feature enabled, and the ambient noise was muffled somewhat.

What a difference, however, after turning on the noise-canceling technology! The external sounds decreased markedly, and when I removed my headphones, the cacophony of the mall—something that I hadn’t really noticed previously—was readily evident. I much preferred my experience with the noise-canceling feature enabled.

Because I travel often for work, I’m definitely planning to take these headphones with me and am greatly looking forward to using them both at airports and on planes. I’m really excited to see if the headphones might help to reduce the chaotic aspects of travel, thus increasing the overall experience. Perhaps I’m giving the noise-canceling function too much credit, but, hey—a girl can dream, can’t she?

And last, but not least, you’re probably wondering if the price is right. These headphones ring in at the reasonable price of $59.99 on Amazon, so I’d say that it is. The bottom line: If you’ve never tried noise-canceling headphones and find the concept appealing, these headphones might be just what you’re looking for.
<table>
<thead>
<tr>
<th>ABA Journal</th>
<th>About the ABA</th>
<th>Contact Us</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA-Approved Law Schools</td>
<td>ABA Member Benefits</td>
<td>Contact Media Relations</td>
</tr>
<tr>
<td>Law School Accreditation</td>
<td>Office of the President</td>
<td>Web Staff Portal</td>
</tr>
<tr>
<td>Bar Services</td>
<td>ABA Newsroom</td>
<td>Website Feedback</td>
</tr>
<tr>
<td>Legal Resources for the Public</td>
<td>Join the ABA</td>
<td></td>
</tr>
<tr>
<td>ABA Career Center</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Model Rules for Professional Responsibility</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

<table>
<thead>
<tr>
<th>Terms of Use</th>
<th>Code of Conduct</th>
<th>Privacy Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Your California Privacy Rights</td>
<td>Copyright &amp; IP Policy</td>
<td>Advertising &amp; Sponsorship</td>
</tr>
</tbody>
</table>
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 how to speed up conflict checking, whether to upgrade to the new iPhone, and how to get your data to work for you (and not the other way around).

Q: How do I make my conflict checks take less time?

A: Tech can definitely help with this, but it’s not always easy. To make it work, you need a centralized, searchable database. Start by looking at either your intake system or your practice management system. This doesn’t need to be an expensive program. You can set up a free Google form with your intake questions, and it will auto-populate a spreadsheet with all the relevant information. You can even send the form to potential clients to fill out before the meeting. Next time a new client calls, you simply search for their name in the spreadsheet.

Things get more complicated if your firm has been around for a long time (and thus used different systems over the years) or if your work involves a lot of different parties. If this is the case, you may want to invest in a more advanced tool that can scan for data across all your firm’s information. For instance, in our office we use a program called Metajure. Metajure scans every document and e-mail across the entire firm and makes all the text searchable. When a new potential client calls, we just type their name (and the names of other parties) into Metajure as if it’s a Google search. If we have even a single e-mail or document in our system with any of those names,
Metajure will bring it to the surface, and we can quickly investigate the extent of the conflict.

Q. Should I upgrade to the new iPhone (Xs or Xs Max)?

A. In a word (actually two), probably not. I know it is difficult to say no to a new iPhone, but Apple has not given us much reason to spend $1,000 or more for a new iPhone this year. While the specs seem a bit better for the new phones and the upgraded RAM capacity of 500 GB has some appeal, the Xs does not offer enough more than the X to justify the cost of moving to it from the X. The major difference between the Xs and the Max is size. The Max is a significantly larger piece of equipment. It provides a much bigger display, but the question must be whether that extra size justifies the cost. Although I like larger-screen devices, I have found the size of the iPhone X ideal in terms of pocketability, holdability, and usability, and I have had no issue with viewability. Before the X, I had a 7 Plus, which was approximately the same size as the Xs Max. While the X and the Xs have displays more or less the size of the 7 Plus, the Max has an even larger display. Like the 10, it does it in a smaller unit due to the removal of the bezels that graced all iPhone models prior to the X.

The bottom line: In my opinion, the only reason to move from an X to an Xs is if you really need to have 500 GB of memory in your smartphone (which most people do not). If you have an issue with the smaller screen of the X/Xs and have seriously large hands, so that you can easily use the Max, then the size of the Max and the extra memory make sense. For most people, though, I would say save your money and wait for the XI (or whatever they call next year’s model). For those who do not have an iPhone X, I think the X/Xs/Xs Max are all significant upgrades to every other model of the iPhone (including the 8) and would recommend that you consider upgrading to something in the “X” line. If the cost of the Xs/Xs Max puts you off, the soon-to-be-released XR offers a nice, but less compelling (and less expensive) upgrade path.

Q: How can data work for me and not the other way around?

A: This is a tough question, and the specifics will really vary depending on what you want out of your data and what data you are tracking. For background I will say that I am a huge data nerd, and I use a lot of data in my own law practice. The process of good data use begins with a question: What do I want to get from my data? Do you
want to estimate the value of a new case? Track your firm’s growth over time? The answer to this question will determine the data you need to track and, thus, how you should track it. If you’re unsure of what data you should track, there are a lot of good books to get you started. Small Law Firm KPIs: How to Measure Your Way to Greater Profits and The Business of Legal: The Data-Driven Law Practice (both by Mary Juetten) are great intros to law firm data use and collection.

Once you’ve identified your questions and the data you will need to track, the next challenge is how. Data collection and presentation can be so time consuming that it loses all value, so automation is key. Odds are that all the data you want to track is already being collected somewhere (in your e-mails, your accountings, etc). The trick is getting all of it into one centralized location. If you are using cloud-based products, this will be a challenge. The first step if you are using cloud-based products is to see if you can link them directly. If not, you can use tools such as Zapier or If This Then That to connect your various programs to a spreadsheet and automatically store your data in a useable format. For instance, in our office every time a new matter is opened in Clio (our practice management software), a record containing all the client and matter information is automatically sent to a Google spreadsheet. If you come across a data point that you simply can’t automate, look to see if there are other alternatives you could be tracking.

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!
Clarifying Cloud Computing: Blockchain’s Relation to Cloud Computing

By Al Harrison and Joseph Jacobson

This article, another in the continuing series on cloud computing, addresses blockchain technology as a special element of cloud computing. Cloud computing is any computing or storage away from your office or computers under your direct control.

In past articles we’ve raised legal issues associated with cloud computing, including:

1. Jurisdiction for breach of contract suits, if the contract does not specify a choice of law and venue.

2. Applicability of state laws for remedies for data breaches and data notification laws, which vary by state and by whether a cause of action may be instituted by an individual or whether the remedy is exclusive to the state.

These issues are more complicated and unresolved in addressing blockchain transactions. Because the answers are not yet resolved, you should be aware of the technology as you may be called on to make decisions on these subjects. For example, in researching the introduction of blockchain evidence at trial, we did not find cases where a court examined the introduction of blockchain transactions under federal or any state’s evidentiary rules.

What Is a Blockchain?
A blockchain is a distributed ledger. This means that the ledger can exist in more than one place at a time, and each version is considered an original ledger. The blockchain system works on the basis of independent computers performing the same calculations and then comparing the results. Each computer performing these verifying calculations is called a node.

Transactions are compiled into blocks of the same size (i.e., in terms of numbers of bytes). The block is then “hashed,” that is, converted into a string of text or a series of numbers by a mathematical formula. These hashes are not encryption because they do not allow for conversion from the hash to the original text. Hashes are generally shorter than the original text.

When most, but not all of the computers agree on the hash value of the block, then the block is complete and added to the chain. If there is a disagreement in the hash value of the block, then the block is added only when the critical number of nodes agree on the hash value. Once a block is added to the chain, the transactions that comprise the block cannot be changed.

Think of a transaction on a block like a deed filed in the county records. If there is an error, such as a misspelling of a name, the deed that was previously filed cannot be corrected. Instead, a new document is created identifying the error and the correction, and it is filed as part of the chain of title. This correction deed will have a new filing number. In the same way, transactions cannot be changed once they are accepted in a block. There can be a correcting transaction, and that new correction can be found in a new block of transactions.

The ledgers are synchronized and are based upon several computers (the number may vary from less than ten to more than 1,000,000) communicating with each other on a peer-to-peer network. These computers (nodes) are all running the same software and communicate without the assistance of an administrator. The computers are constantly comparing their answers with other computers on the network, and decide among themselves by agreement which blocks (and therefore the transactions that comprise the blocks) are valid.

Walmart and Sam’s Club initiated a requirement that its suppliers use IBM blockchain technology for tracking its produce back to the farm. This enables Walmart to speed up response in case of product recalls.

---


Your clients, particularly if any are suppliers, will be examining how they can integrate blockchain tracking into their current operations. They will need help in understanding the legal ramifications of these agreements.

How Are Blockchains Related to Corporations and Other Business Entities?

Delaware passed legislation allowing corporate records to be kept on electronic networks or databases, which was specifically worded to include blockchains.

This language attempts to enable corporate records to be created and held on blockchain. Corporations could avoid paper stock or debenture certificates, and instead rely on electronic certificates that are much easier to process. Annual reports and other communications with shareholders can also be communicated to shareholders without paper and postage.

Other states may wish to adopt this type of legislation. Texas and Arizona legislatures are considering this type of legislation but have noted that the ease of communications that corporations are trying to achieve may be prevented by the federal E-Sign statute and each state’s respective version of UETA (the Uniform Electronic Transaction Act developed by the National Conference of Commissioners for Uniform State Laws).

E-Sign and compliant state statutes must allow the consumer to withdraw consent at any time. Prior to consenting to an electronic transaction, the consumer must be provided with notice of the consumer’s right to withdraw consent to have the record provided in electronic form. If there are consequences to the action, then the consumer must be provided with these consequences prior to consent.

So, conceivably, a blockchain, which requires the use of electronic signatures and is governed by E-Sign and the applicable state’s UETA law, must enable an opt-out. This opt-out then means that some of a corporation’s shareholders will be communicating using paper and some using blockchain. E-Sign and UETA could be described as blockchain killers because there is no paper alternative to the transactions as they occur for consumers; yet, each transaction must entail a mutual opt-in.

Already, legislation has been introduced that will create an exception to E-Sign’s applicability to blockchains and smart contracts.
Conclusion

Blockchains are already in use, and the computations that enable blockchains to be effective are “in the cloud.”

Major retailers see blockchains as a means to track food sources. Vendors see blockchains as a means to decrease accounts payable processing.

States see blockchain-enabling statues as a means to attract corporations that will seek lower-cost administrative fees, and electronic delivery of documents to shareholders could save businesses a great amount of money.

The efficiency and low cost of administration of transactions on blockchain may impact transfer agents and investment banks. Transfer agents may no longer be needed as the corporation would keep its own stock records and those records would be updated continually. The need and economics of keeping stocks in an account at a brokerage firm may change if transactions occur on a blockchain.

The uses are dramatic and across all of society. Laws and court rules have not yet caught up to the anticipated changes, much less the uses that will be developed.

Notes

1. Kim N. Pham, partner and blockchain leader at IBM, gave an example of a company instituting blockchain tracking of goods, delivery, and invoicing in transactions with its customers and reducing its collection time from more than 40 days to nine days. Blockchain in Shared Services Conference, June 28, 2018, Southlake, Texas.


4. Delaware Senate Bill 69, 149th General Assembly, Section 1, “Amendments . . . and related provisions are intended to provide specific statutory authority for Delaware
corporations to use networks of electronic databases (examples of which are described currently as ‘distributed ledgers’ or a ‘blockchain’) for the creation and maintenance of corporate records, including the corporations stock ledger.”

5. Electronic Signatures in Global and National Commerce, also known as ESign or E-Sign, 15 U.S. Code Chapter 96, §§ 7001-7006.


*The text of this article has been altered to clarify the nature of distributed ledgers.*
October 23, 2018  PRACTICE MANAGEMENT

Mindfulness 101: Work Better, Not Harder, in Three Easy Steps

By Debi Galler

Share this:

Ever have “one of those days”? You have a big brief or contract or presentation due today, and you just can’t focus. Your mind has a mind of its own, and it is thinking about everything and anything but the task at hand. On top of that you have had a million work-related interruptions. You absolutely want to scream or pull your hair out.

Well, I just had one of those days—every lawyer, every person does. They happen. There is no escaping them. Even as a mindfulness practitioner, I still, on occasion, have them. Mindfulness is not so much about not having stressful days (it comes with the territory of being a lawyer) as it is about being better at dealing with them.

A recent study indicates that the average American worker wastes more than two hours per eight-hour work day, not counting lunch and breaks. A portion of that wasted time is from “spacing out”—in other words, not being on task, not being focused.

As lawyers, we are paid to be on task, focused, productive. So, what can you do when you are having “one of those days”? Here are three easy steps to get yourself back on task:
Take a five- or ten-minute walk, and as you walk pick something to focus on. Perhaps it is your breath, or how your feet strike the ground, or the sights and sounds of where you are walking. When your mind wanders (and it will, particularly when it is acting like a toddler on a sugar rush), gently bring your mind back to focus on that which you have chosen to focus on during your walk—your breath, your feet, the scenery.

On your return, you will likely find yourself a bit calmer, more able to focus on the task at hand. As you journey down the mindfulness path, you may still have “one of those days” on occasion, but I think you will find they occur less often and with less severity. And now you have one more tool to help you focus.

Next Article > > >

Authors
Defining Moments, Insights into the Lawyer’s Soul: Jeffrey Allen

By Melanie Bragg

This month’s column showcases our GPSolo magazine and GPSolo eReport Editor-in-Chief, Jeffrey Allen. As many know, he has been a tireless volunteer for the ABA and the GPSolo Division. He has exemplified this standard presented in his interview and LEAD Line: **Try the unusual in your pursuit of excellence.**

Here are excerpts from our unfiltered conversation, where we learn about the defining moment that shaped Jeff’s life, starting with the death of his father when Jeff was 11 years old.

**MB: Tell me a little bit about your background and the influences that shaped your life.**
JA: I was born in Chicago, and we lived in the south side, which was, at that time, a Jewish ghetto. When I was about six, we moved to California to a town called Fresno, which is an agricultural community in the central San Joaquin Valley area of California. Fresno was the agribusiness center. It was the 1950s and 60s, so you had basically the evolution of the individual rights that were coming out in the civil way. Liberty movements, race relations, and integration in the South were all occurring simultaneously.

I went to public school my entire life. My father died four days after my 11th birthday, and my mother went back to school. She had dropped out of school when she married my father. She went back to school and got her college degree and became a teacher.

When my father died, that was a traumatic experience, but my father knew he was going to die. He had had rheumatic fever, and he got it for the second time when he was in the U.S. Army Air Forces in World War II. It was misdiagnosed, and by the time they figured out what he had, there was permanent damage done to his heart. He died in 1959. My father knew he wasn’t going to be around as my sisters and I grew up. He left instructions to be followed on his death, which included a statement that has haunted me ever since, and I believe he was smart enough that he meant it. He wrote in a sealed letter, which was kept with his will, that there was not to be a eulogy for him because “the lives of his children would be his eulogy.” That sentence is something that stuck with me because I felt like I was not only responsible for my own life, but I was responsible for the record of my father’s.

MB: Do you have the letter?

JA: I don’t have it. My mother may have it. It was not a letter to me. It was title instructions to be followed upon his death, and it was folded inside of his will.

MB: Tell me about the profound impact that has had on you.

JA: Everything that I have done in my life, I thought about in those terms. I was the oldest child of three. When I got in high school I was injured and spent a bunch of time in a cast. I couldn’t do much in the way of physical activity and took up competitive speaking. I joined the debate team and found out I was exceptionally
good at it. As a result of that, I decided maybe I should be a lawyer instead of a

**MB: What made you know about lawyers, and what exposure did you have to
lawyers?**

**JA:** I watched *Perry Mason* on television. When I started out law school, I started
out with what I call a “Perry Mason Complex.” But by the time I graduated law
school, I had done enough work with criminal law and I never wanted to see it
again.

**MB: While you were in college, did you know you were going to law school?**

**JA:** I made the decision in high school as a result of the success I had with debate
that I was going to be a lawyer, and I never looked back. I always planned from
that point forward on being a lawyer. The only two things I ever wanted to be were
a doctor and a lawyer. And I switched in high school.

**MB: What mentors did you have in law school?**

**JA:** I would say the best instructor I ever had in my life was a professor by the
name of Jesse Choper. The second-best was a high school instructor, Allan Amen.
Jesse has been teaching for 40 some-odd years. Brilliant man.

**MB: Where?**

**JA:** At Boalt, U.C. Berkeley’s law school. He was a very brilliant professor. He
played a classroom using the Socratic Method the way a conductor conducts an
orchestra. He learned his students; he knew what to expect from them, and he knew
how to pull out the comment that he wanted by calling on the student that he knew
would have it. I never saw the Socratic Method conducted better than he conducted
it.

**MB: Did he help you learn to pinpoint people’s skills?**

**JA:** He helped me in terms of learning a much higher level of legal analytical skill.
He also helped me in terms of the fact that, aside from being a lawyer, I also teach college, and the two people on whom I model my teaching work are Jessie Choper and my high school instructor Allan Amen. They were far and away the two best I have ever had.

**MB: How do you feel about teaching?**

**JA:** I love teaching. I’ve taught all my life. If the world was a different place, I might have been a teacher as a career as opposed to a lawyer. I come from a long line of teachers. My grandfather was a teacher; my mother was a teacher; my mother’s sister was a teacher; my wife is a teacher; my wife’s sister is a teacher; and I’ve taught my entire adult life. I like the idea of taking information that I have and sharing it with a new generation of people who are going to go out and educate another generation. I’ve taught at the university level for a number of years, but I also taught soccer as a coach, and I taught classes for soccer coaches. I would teach a class of soccer coaches that may have been 30 or 40 soccer coaches, and they would each go out and have a team, so I am now influencing 300 soccer players in a year—from one class.

**MB: When was your first teaching job?**

**JA:** In high school I was a math tutor.

**MB: And then in college?**

**JA:** In college, as a senior, I had a job as a reader, a grader basically, in a political science class, and the guy who was teaching the class had his master’s degree. He was a Ph.D. candidate in political science. A guy by the name of Sam Kernel, I believe. Sam’s focus was Congress and the presidency. He and I were having coffee one day and talking about the class, and I said to him, “Sam I don’t want to upset you, but I’ve heard a rumor that there is a third branch of government.” He looked at me and said, “Yeah?” I said, “Yeah, it’s called the judiciary. I was looking over the curriculum and I don’t see it mentioned anywhere.” He scratched his head and said, “Okay, I’ll tell you what. Pick a week.” And I asked, “For what?” He said, “Because you’re going to teach about the judiciary.” So as a senior at Berkeley, I taught my very first class in PSL1—which held 450 students—and I
taught for one week out of the quarter about the judiciary. It worked, so I got to do it the second and third quarter, also.

**MB:** Tell me about your interest in the law when you got out. What kind of law did you practice, did you go with a firm, did you go on your own?

**JA:** As I said, I started law school with a Perry Mason Complex. I wanted to go do criminal defense work. My very first semester of law school, I had a criminal law professor by the name of Phillip Johnson, for whom I actually did some research work. Basically, Phil had done work as a district attorney before he became a law school professor. He spent some time trying to convince me that I could do more good as a right-thinking D.A. than I could as a defense attorney because I would have the discretion to resolve things in a way that made sense. As it turned out, because of a lot of other things that I did in college and law school, I burned out on criminal law before I ever got out of law school. When I got out of law school, I had changed my perspective and I simply wanted to be a litigator. I wanted to be a trial lawyer.

**MB:** How would your dad feel?

**JA:** What I do is a reflection not only on me but also on my father.

**MB:** Did you instill that in your children?

**JA:** No, because I didn’t die. If he had just simply said that to me and lived to be a ripe old age, it would not have had the impact that it did. He had to die to punctuate that for me. His death put an exclamation point on it, underscored it, and put it in boldface print in large type.

**MB:** Do you think it made you a better person in some ways, or did it rein you in, or expand you?

**JA:** All of that. I always tried to do my best because I felt that I should, but it wasn’t just for me. It was for me, and it was also because of my father.

**MB:** Kind of a life purpose?
JA: That’s probably a fair way to put it. That was probably my first what you would call “defining moment.”

MB: Have there been any times that stick out in your mind where you thought, “Yep, did good on this one.”

JA: I won’t say there hasn’t been a day that I haven’t thought about it, but there probably hasn’t been a week in my life that I haven’t thought about it.

MB: Did it sort of become a moral compass in a way?

JA: Not just a moral compass, it was a work ethic compass, too. Maybe I’m giving him more credit than he was due, I don’t know. My assumption has always been that he did it intentionally; that he had the foresight to figure out he was not going to be there, and this might be a way that he could be there and influence me. It was at least worth a try. So, he took the shot, and he hit a bull’s-eye. Everywhere. It did not make any difference what it was. Whatever it was I was doing, it was how my father would be defined. He chose to define his life by what my sisters and I did.

MB: You always maintained that high standard, right?

JA: That crystallized it for me. I always tried to maintain a higher standard than standard practice.

MB: What would you tell young lawyers who are starting out in practice?

JA: Try the unusual in your pursuit of excellence.

Please contact me with any feedback. I would love to hear from you at melanie@bragglawpc.com.
What Can Structured Negotiation Offer the Business Attorney? A Lot!

By Lainey Feingold

Have you ever paid an expert bill and cringed? Have you ever dreamed of brushing aside the procedures that bog down litigation, and instead quickly get to the real issues that brought your client to court? Have you ever represented a party who had a legal claim and wanted to preserve its relationship with the party it was forced to sue?

If you answered “yes” to any of these questions, Structured Negotiation is a dispute-resolution process that might be able to help.

What Is Structured Negotiation?

Structured Negotiation is a dispute-resolution method that happens without a lawsuit on file. It is a strategy to resolve legal claims that focuses on solution and encourages relationships between parties—and their counsel. Structured Negotiation trades the stress, conflict, and expense of litigation for direct and cost-effective communication and problem solving.
Structured Negotiation avoids the negative publicity that can accompany litigation and replaces expert battles with respected joint experts. It substitutes round-table discussions for contentious depositions, and it gives clients a seat at the table and a meaningful role in resolving claims.

With roots in the disability-rights movement, Structured Negotiation has potential application to many types of civil claims handled daily by business lawyers.

How Did Structured Negotiation Develop?

Structured Negotiation grew out of the blind community’s quest for financial privacy and access to financial technology. In 1995 my co-counsel and I wrote letters to Bank of America, Citibank, and Wells Fargo on behalf of three groups of blind clients and an advocacy organization. The issue was ATMs: not a single one in the United States talked, which meant that not a single blind person could use one.

We wrote those letters as an alternative to filing lawsuits under the Americans with Disabilities Act. We offered to negotiate with each financial institution about the development of “talking ATMs” and other services and technology for blind customers. Four years later we had negotiated comprehensive settlement agreements with each bank that produced some of the earliest talking ATMs in the world, compensated our clients, and provided for our attorney’s fees as allowed by civil rights laws. No lawsuit needed.

Joint press releases, beginning in the fall of 1999, heaped praise on each institution and resulted in an avalanche of positive press. Strong monitoring language and a commitment by our negotiating partners resulted in smooth implementation of each agreement.

Buried in the Bank of America 2000 press release was reference to the bank’s agreement to develop and design its online banking platform so that blind people could bank independently on the web. It was the first settlement in the country to address the disability community’s need for accessible websites. (Seventeen years later, on June 12, 2017, a blind shopper of the Winn-Dixie grocery chain won the very first web accessibility trial under the ADA.)

We used a mediator to help us in each of those early cases, but never had to file a lawsuit. The banks saved untold amounts of money, and relationships were built that
continue to this day. Had it just been luck? Or had we stumbled on a way to practice law that avoided conflict, saved money, focused on solution, and preserved relationships?

The 18 years since those first agreements have proven that it was not just luck. As my colleagues and I named the process “Structured Negotiation” and began to use it across the country, some of the largest organizations in the United States said “yes” to a new a dispute-resolution process.

Walmart, Anthem, Inc., Major League Baseball, Target, E*Trade, Charles Schwab, and others have worked with my clients in Structured Negotiation to resolve claims under the ADA and related laws. Structured Negotiation with the City and County of San Francisco, the City of Denver, and Houston’s transit agency demonstrate the method’s usefulness in claims against government entities. A Structured Negotiation settlement with the American Cancer Society shows how the process can benefit nonprofit organizations.

These cases involved the civil rights of disabled people to access information and technology in the 21st century. Many of them were about web (and later mobile) accessibility. Today, digital access is a hot-button issue, with a significant number of new court filings and judicial rulings monthly. Structured Negotiation has been helping some of America’s largest companies make their digital content available to everyone since that early Bank of America commitment in 2000. No lawsuits, bad publicity, or run-away costs required.

Why Structured?

In 1999, after the early successes with Wells Fargo and Citibank, we named the process Structured Negotiation to emphasize that it was a robust alternative to filing a lawsuit. We knew our early negotiations had been successful because they had a structure, and for the past two decades the elements of that structure have been refined through practice. Those elements are listed here. Elaboration of each element, with stories from cases, can be found in my book about the strategy, *Structured Negotiation, A Winning Alternative to Lawsuits*.

- A **conscious decision** by clients and their attorneys to pursue claims resolution without filing a lawsuit.
- An **opening letter** that invites participation. The language change is deliberate: the first correspondence is not a *demand* letter in the traditional sense. It can (and often should) even say something nice about the recipient while calmly describing the legal and factual basis of the claims.

- A **period of uncertainty** when all counsel begin communications about both the claims and the dispute-resolution process, and would-be defendants determine whether to participate. This period includes both waiting for a response and evaluating a response that might be laden with legal jargon and still leave room for negotiation. Without skillful handling of this element, a Structured Negotiation can fall apart before it begins!

- A **ground rules document** signed by all parties that identifies negotiating topics, preserves confidentiality, protects statutory rights to damages and attorney’s fees, and tolls applicable statutes of limitations.

- A period of **information sharing** involving written documents, meetings (live, virtual, and/or by phone), and site visits when needed. Meetings take a “show don’t tell” approach with a constant subtext of forming and maintaining relationships. They allow clients to have a meaningful seat at the table and are the cornerstone of the most successful Structured Negotiations.

- **Sharing expertise** (most often via joint experts and client participation) in a manner that avoids expert battles and run-away costs and values client contributions.

- Taking **baby steps** toward resolution. Pilot programs, interim measures, and partial agreements before final resolution have been key to many successful negotiations.

- Recognizing and dismantling **fear** through honest conversation and effective listening practices.

- **Drafting the settlement**, a process that begins cautiously and with joint acknowledgment that the time is right to formalize commitments.

- **Negotiating about money**, an aspect of Structured Negotiation to be undertaken with particular care because it is easy to slip into traditional adversarial lawyering when the subject is money.
Use of a mediator when appropriate to guide parties around points of conflict. Although used in all three of the first cases, as I learned to be a better negotiator I found I needed third-party help less frequently. Structured negotiation has been referred to by one of my big-firm negotiating partners as “mediation without the mediator.” Most often direct communication in a collaborative environment is all that is needed to get to the finish line, but parties should not be afraid to use a mediator when third-party help might be useful.

Settlement monitoring, a task made easier by positive relationships developed during the process. Skillful and direct communication among parties and counsel typically make court enforcement unnecessary even when implementation does not go as planned.

Media strategy that avoids negative press releases in favor of jointly issued positive statements.

Use of collaborative language. Structured negotiation avoids terms that detract from an environment of problem solving. Why call someone a “defendant” if you do not want them to defend past practices? Why say “opposing counsel” if you do not want opposition?

Development and maintenance of the Structured Negotiation mindset. This might be the most important element of all and maybe the trickiest for most lawyers. Without patience and trust, operating in the absence of the safety net of a filed case can lead to frustration and failure. Grounded optimism, equanimity, and empathy give Structured Negotiation participants needed tools when the going gets tough. In my experience, when appreciation and friendliness infuse interactions, parties can more quickly reach resolution.

Can Business Lawyers Use Structured Negotiation?

Although I have never been a business lawyer, I pose the question: Why not?

What is the downside of trying a dispute-resolution method that saves tremendous amounts of money? If Structured Negotiation proves ineffective, the litigation route is still available. In my book I quote a litigation partner in a national law firm: “I found Structured Negotiation to be fairer to my client..."
than litigation. I like the process because it gives my client the opportunity to
do the right thing and avoids costly litigation. And if the negotiation does not
succeed, my client has not waived the right to engage in an aggressive,
strategic defense.”

- What is the downside of seeing if relationships can be preserved while
  working out disputes?
- Is your case likely to settle “at the end?” Why not at least *try* to settle early?
- Would you rather give up control and prove to a judge that your client is right,
or put aside legal differences and get to the heart of the matter?

It is critically important to preserve the litigation system in the United States, and
many times filing a lawsuit is the best and most effective tool for our clients; however,
when all you have is a hammer, everything looks like a nail. A filed lawsuit is a
hammer. Structured Negotiation is another tool in the tool box.

I hope that business lawyers will find Structured Negotiation a tool worth exploring in
appropriate cases. Along with other early dispute-resolution strategies such as pre-suit
mediation, Structured Negotiation can speak to a host of client needs. It can offer a
winning alternative with a 20-year track record to a public craving litigation
alternatives that are cost-effective and preserve relationships. It holds the promise of a
strategy that avoids conflict and minimizes stress, encourages trust over fear, and even
kindness over anger.

Next Article > > >
What Can Structured Negotiation Offer the Business Attorney? A Lot!
Alleged Failure to Monitor Discovery Leads to Malpractice Suit

By Onika K. Williams

Reprinted with permission from Litigation News, August 7, 2018. ©2018 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

An attorney’s failure to institute a litigation hold or monitor a client’s compliance with that hold may constitute malpractice, according to at least one federal district court. In Industrial Quick Search, Inc. v. Miller, Rosado & Algois, LLP, the U.S. District Court for the Southern District of New York rejected a law firm’s defense against claims that its lawyers were not involved enough in the discovery process; the court thus found the firm liable for $2.5 million in damages related to spoliation sanctions levied on a former client. ABA Section of Litigation leaders see the case as a reminder of the importance of determining a client’s understanding of the discovery process and preservation obligations.

Default Judgment Leads to Malpractice Suit

The conflict in Industrial Quick Search began when a court entered a default judgment against Industrial Quick Search (IQS), finding that IQS had misappropriated and plagiarized copyrighted materials from another company, Thomas Publishing, to create a web-based directory. The judgment was a sanction for deliberately destroying
documents central to the website’s design. As a result, IQS paid Thomas Publishing $2.5 million to settle the dispute. IQS then brought a malpractice suit against its attorneys in the U. S. District Court for the Southern District of New York, asserting that but for its attorneys’ negligence, the default judgment would have not been entered and IQS would not have had to settle the underlying suit.

Both parties sought summary judgment. The court denied IQS’s motion in its entirety. It granted portions of the defendants’ cross motion, limiting the scope of IQS’s claims, but upheld IQS’s malpractice claim regarding failure to issue a litigation hold and failure to properly oversee the discovery process. Defendants then moved for reconsideration of this order, which the court denied.

Counsel’s Alleged Failure to Provide Discovery Advice

QS alleged its former law firm was negligent because it failed to issue a litigation hold and failed to properly oversee IQS’s compliance with its discovery obligations. IQS contended that it repeatedly requested legal advice from its then-counsel about how to prepare and respond to discovery requests in the copyright infringement suit. According to IQS, its lawyers did not provide the requested advice because they were working on another legal matter. IQS also claimed that its former counsel did not establish standard document production procedures such as discovery logs or Bates stamping. As a result, IQS, in the absence of its then-counsel, served approximately 30,000 un-inventoried documents on Thomas Publishing.

Additionally, IQS removed files it believed were not responsive to the discovery requests and destroyed them prior to production. Many of these documents had responsive information on one side, but had been reused for printing on the other side and consequently contained personal, financial, and other confidential information. Rather than redacting the confidential information, IQS removed and destroyed the entire documents. IQS claims it sent an inquiry to its then-counsel about whether the destruction of documents was proper, but did not receive any response.

Thomas Publishing learned of the spoliation issue during depositions and sought recourse with the court, which after a hearing determined IQS had intentionally destroyed documents at issue and that the destroyed documents were likely critical to determining the scope of IQS’s copyright infringement. As a result, default judgment against IQS was appropriate.
Failure to Properly Advise Regarding Discovery May Constitute Malpractice

The former law firm argued that: (1) it was not negligent because it had no duty to advise IQS of their obligation to preserve documents; and (2) even though it had no duty to advise IQS to preserve documents, it issued an “oral litigation hold” at the parties’ initial meeting during the copyright action. IQS denies an oral hold was ever issued.

The court sided with IQS, holding that although counsel is not always responsible for a client’s destruction of documents, it does have an obligation to take reasonable steps to ensure the client preserves relevant information. The court denied both parties’ summary judgment motions regarding the litigation hold and discovery oversight, and subsequently rejected the defendants’ motion for reconsideration of that order. As a result, the defendant attorneys were still subject to liability for failing to issue a proper litigation hold and failing to properly oversee the discovery process, including document retention and production by IQS.

Best Practices to Avoid Discovery-Related Malpractice Claims

Section of Litigation leaders agree that written attorney-client communication regarding discovery obligations is important. A “best practice would be to communicate in writing with client concerning litigation holds, scope of holds, document retention policies and ongoing ‘supervision’ of discovery process internally with client(s),” advises Robert J. Will, St. Louis, MO, cochair of the Section’s Pretrial Practice & Discovery Committee.

“Today, many law firms offer standard litigation hold letters that can be modified for use by clients to ensure compliance with the rules and decisions applicable in both state and federal courts,” adds Kenneth M. Klemm, New Orleans, LA, who also serves as cochair of the Section’s Pretrial Practice & Discovery Committee. “[F]or a client not familiar with the litigation process, it becomes even more important to be clear in the advice given to a client about the duty to preserve information and about responding to discovery requests,” warns Klemm. In fact, written documentation of discovery advice in this case could have changed the outcome of Industrial Quick Search, he posits.

Will agrees. “Had there been written documentation of what the defendants described
as an ‘oral litigation hold’ communication referenced in the case, there might have been no disputed material fact issue precluding summary judgment in favor of the lawyer/law firm defendants on liability,” he observes.
Alleged Failure to Monitor Discovery Leads to Malpractice Suit
Common Law

With nearly half of the states not having decanting statutes, the question arises as to whether there is a common law right for a trustee to exercise the power of decanting in those states. The Restatement (Second) of Property: Donative Transfers (the “Second Restatement”) and the Restatement (Third) of Property: Wills & Other Donative Transfers (the “Third Restatement”) lend support for the concept of decanting. There is also case law in certain states specifically recognizing the power, including Florida and Massachusetts. The Florida and Massachusetts decisions viewed the power of a trustee to appoint in trust as a special power of appointment, which, by extension, absent a contrary intent by the grantor, translates into a power to decant within the original trust instrument. While
decanting may be allowed under common law in some states, like Massachusetts, unless the state has enacted a detailed statute, like the state of New York discussed above, the trustee will lack clear guidance as to the scope of the power, including any procedure for exercising the power, which may cause the trustee to seek guidance from the court (as was the case in the Florida and Massachusetts decisions). This section of the article will examine the Second and Third Restatements and case law decided in Florida and Massachusetts.

Restatement of Property

Although not referred to as the power of decanting, the concept for the power can be found in both the Second and Third Restatements, which provide that, unless the trust instrument creating the power provides otherwise, a trustee’s power to make discretionary distributions constitutes a special power of appointment, which enables the trustee to make distributions in trust for permissible distributees and create powers of appointment in these distributees over the trust property. Thus, if a trustee is able to transfer full legal title to trust property to a beneficiary, it follows, by extension, that the trustee should be empowered to transfer less than full legal title by distributing the property further in trust, which translates to the power to decant.

Florida Case Law. The power to decant existed under Florida common law long before its decanting statute was enacted in 2007. One of the first cases to consider decanting, and one of the most often cited, is *Phipps v. Palm Beach Trust Co.*, 196 So. 299 (Fla. 1940). In *Phipps*, the grantor created a trust for the benefit of her children and their descendants. The grantor named her husband and a trust company as co-trustees. The trust provided that the husband, “in his sole and absolute discretion,” could distribute the trust corpus to any and all of the beneficiaries. Subsequently, the grantor’s husband directed the corporate trustee to transfer the trust property to a second trust, which had slightly different terms. The corporate trustee petitioned the court for a determination as to whether the grantor’s husband possessed the power to appoint the trust property in further trust. The court ruled in favor of the husband, and the corporate trustee appealed. The Florida Supreme Court determined that, because the husband could only distribute the trust corpus to the grantor’s descendants, he possessed a special power of appointment, not a general power. The corporate trustee asserted that the husband could not
appoint the trust property to a second trust because the trust did not expressly authorize him to do so. The court found that the grantor had “clothed him [her husband] with the absolute power to administer and dispose of the trust estate to any one of the named beneficiaries to the exclusion of others.” Consequently, the court held that the trust granted the husband with the power to distribute the trust property to a second trust, so long as one or more of the grantor’s descendants were named as beneficiaries.

Massachusetts Case Law. In Morse v. Kraft, 992 N.E.2d 1021 (Mass. 2013), the Massachusetts Supreme Judicial Court (SJC) validated the power of decanting. In Morse, the grantors created a trust with four sub-trusts for each of their four minor sons. The trust authorized a disinterested trustee to make distributions to each of the sons from their respective trusts, and the sons were not permitted to participate in any distribution decisions. The trustee, who was advancing in age and preparing to retire, sought to transfer all of the property in the original sub-trusts to new sub-trusts, so that the sons, who were now in their forties, could serve as trustees and manage the assets within their respective trusts. Given that the trust did not expressly authorize the trustee to decant, and Massachusetts had not (and has not) enacted a decanting statute, and concerns over whether the transfer of the trust property from the original sub-trusts (established in 1982) to the new sub-trusts (established in 2012), or distributions from the new sub-trusts, would trigger the generation-skipping transfer tax, the trustee petitioned the SJC, seeking a declaration that the trust language permitted him to decant without court approval or the consent of the sons. The SJC agreed. Relying on similar trust language in Phipps and decisions in other jurisdictions, because the trust gave the trustee broad discretionary powers to make an outright distribution to, or for the benefit of, the sons, the SJC held that such discretion included the power to distribute to a new trust, so long it was in the sons’ best interests. In reaching its decision, the SJC considered not only the terms of the trust, but also the affidavits of the grantor, the drafter, and the trustee, who all supported an intent to decant. The SJC, however, refused to recognize an inherent power to decant and also cautioned that, in the absence of legislation expressly authorizing the power, if a grantor wants a trustee to have the power to decant, the power should be clearly stated in the trust instrument.

Subsequently, the SJC, in Ferri v. Powell-Ferri, 72 N.E.3d 541 (Mass. 2017), once
again addressed the propriety of decanting. This time, unlike in *Morse*, the issue was addressed after the trustees already had decanted the trust assets from the original trust to the new trust. In *Ferri*, the grantor established an irrevocable trust in Massachusetts in 1981 for the sole benefit of his son. Under the terms of the trust, upon reaching various ages, the son had the power to withdraw certain percentages of the trust corpus. In 1995, the son married his wife. Fifteen years later, in 2010, the son’s wife initiated a divorce action against the son in Connecticut. After the divorce action was filed, the trustees of the trust decanted the trust assets to a new trust without advising, or obtaining the consent of, the son. At the time of the decanting, the son had the right to withdraw 75 percent of the trust assets. It was clear that the decanting occurred as a result of the trustees’ concern that the wife could access the assets in the original trust through the divorce action, so the new trust eliminated the son’s withdrawal rights by affording the trustee complete authority over whether, and when, to make payments to the son, if at all, with the son having no power to demand payment from the trust. In 2011, the trustees of the original trust filed a declaratory judgment action against the wife in Connecticut state court, seeking a declaration that the trustees validly decanted the trust assets from the original trust to the new trust and that the wife had no interest in the new trust. Ultimately, the Connecticut Supreme Court certified questions to the SJC, including whether, under the governing Massachusetts law, the original trust instrument authorized decanting. The SJC concluded that it did, noting that the original trust instrument, which did not explicitly authorize decanting, had more expansive trustee discretion than the broad discretion the court previously recognized in *Morse*. Accordingly, the grantor’s intention to permit decanting would seemingly follow. As Chief Justice Ralph Gants made clear in his concurring opinion, however, the SJC did not address whether Massachusetts law would allow trustees, from a public policy standpoint, to decant from a non-spendthrift trust to a new spendthrift trust for the sole purpose of removing trust assets from the marital property of a beneficiary and his or her spouse in a divorce proceeding.

**Fiduciary Duty and Tax Implications**

**Fiduciary Duty Implications**

A trustee owes fiduciary duties to beneficiaries of a trust, including: (1) the duty to
be generally prudent; (2) the duty to carry out the terms of the trust; (3) the duty to be loyal to the trust and its beneficiaries; (4) the duty to give personal attention to trust affairs; and (5) the duty to account to trust beneficiaries. The trustee, in considering decanting, needs to be concerned with the effect that the exercise of the power will have on the trustee’s fiduciary duties. One duty that can have particular significance when a trustee elects to decant is the duty of loyalty. Pursuant to this duty, the trustee must act solely in the best interests of the beneficiaries and remain fair and impartial with respect to their collective interests. Decanting to make purely administrative modifications to the original trust should not adversely affect the trustee’s duty of loyalty. A trustee, however, may breach the duty of loyalty by decanting to permit self-dealing, such as to obtain increased compensation. The New Hampshire and New York decanting statutes discussed above contain specific provisions that prevent the trustee from decanting to benefit the trustee.

In addition, if the decanting will result in a preference of one beneficiary over another or a shift in the interests of one or more beneficiaries, the trustee could be accused of breaching the duty of loyalty and acting arbitrarily. Because of the exposure to liability, a trustee may be reluctant to decant if there is concern that the trust beneficiaries later will question the exercise of the power. In an effort to avoid liability, the trustee may attempt to obtain a release and indemnification from the beneficiaries, an indemnification from the grantor, or court approval. As discussed further below, implementing one or more of these options to protect against liability could have adverse tax ramifications. Notwithstanding the liability concerns, however, a trustee may be able to derive some degree of comfort in the fact that courts will generally defer to a trustee’s discretion, absent an abuse of discretion or bad faith, when acting pursuant to a discretionary authority (a higher standard) granted under a trust instrument.

**Tax Implications**

Before exercising the power to decant, a trustee should carefully consider the resulting tax consequences, if any. Below is a brief survey of some of the basic income, gift, estate, and generation-skipping transfer (GST) tax issues that can arise in connection with decanting.

*Income Tax.* Decanting should result in income tax consequences only if there is a
sale or exchange of property, and the exchange or sale results in the receipt of property significantly different from the property exchanged. The decanting from one domestic trust to another should not result in a sale or exchange of property for income tax purposes. If the entire trust corpus is transferred to another trust, the new trust seemingly would be the same trust as the original trust, which should result in the transfer being disregarded for income tax purposes. A transfer of trust assets from one grantor trust to another, which is taxed to the same grantor, should not create any income tax issues. Also, the conversion from a non-grantor trust to a grantor trust should not result in any income tax consequences. If a trust has assets with liabilities that exceed the basis, a decanting that converts a grantor trust to a non-grantor trust may result in the grantor recognizing gain to the extent the liabilities exceed the basis. It is possible that gain will be recognized when negative basis assets (where trust property is subjected to a liability that exceeds its basis) are decanted. Gain may also be recognized by a beneficiary if decanting changes the nature of the beneficiary’s interest in the trust and the beneficiary must consent to (or a court approve) the exercise of the power.

*Gift Tax.* When the trustee is a beneficiary, the trustee-beneficiary’s exercise of the decanting power can result in gift tax consequences. As such, a trustee who is a beneficiary should not exercise the power. In addition, a taxable gift could result from a decanting if a beneficiary’s consent is required or the beneficiary, in fact, consents to a decanting that results in a dilution or forfeiture of the beneficiary’s interest in the trust. If a beneficiary’s consent is not required in order to decant, and the beneficiary does not have a present right to receive property from the trust, there should be no gift tax issues resulting from the trustee’s exercise of the power. In addition, if a beneficiary has the same interest in the original trust and the new trust, there should no gift tax consequences, even if the beneficiary does not consent.

*Estate Tax.* From an estate tax perspective, a concern arises as to whether the mere utilization of a state-authorized decanting power might form the basis for a determination that the grantor retained a power to change or revoke when he or she created the “irrevocable trust,” thereby causing the trust assets to be included in his or her estate under IRC § 2038. Beneficiaries also will be subject to the risk of estate inclusion to the extent they had sufficient control over trust assets, so as to fall within IRC § 2036 or § 2038.
GST Tax. Trusts that became irrevocable on or before September 25, 1985 are exempt from GST tax (grandfathered status). A trustee needs to be concerned that decanting might be viewed as an addition or modification to such a trust, which causes it to lose its exempt status. The status will not be lost so long as the trust is not modified in a way that the vesting of the beneficiaries’ interests in the trust is extended beyond any life in being at the creation of the trust plus 21 years. The trustee’s exercise of a discretionary power to distribute trust property to a second trust will not result in a loss of grandfathered status if (1) the power is authorized under the terms of the trust instrument or (2) the power is authorized by state law that was in effect when the trust instrument became irrevocable. With respect to non-grandfathered trusts, where the grantor allocated GST exemption to the trust, the same safe harbors for exempt trusts referenced above should apply. In addition, if decanting does not alter a beneficiary’s interest in the trust at a lower generational level or extend the time for vesting, then the decanting should not result in a change to the inclusion ratio of the trust.

Conclusion

The power to decant, with its many purposes, can be a valuable tool for a trustee of an irrevocable trust. A trustee considering the use of the power needs to determine whether there is authority for the power and, if so, its scope. If the authority exists, the trustee must consider the fiduciary duty and tax implications before exercising the power.
When the United States Congress passed the Civil Rights Act of 1964, it sought to recognize the legislative efforts of the recently assassinated President John F. Kennedy and bring to a culmination long-standing efforts by civil-rights advocates to outlaw racial and other discrimination. The Civil Rights Act, an omnibus bill that aimed to address discrimination in voting, public accommodation, education, and employment, established the United States Equal Employment Opportunity Commission (EEOC), an organization that in the past 50 years has become so well established that today many people know it only by its initials.

The EEOC’s website offers a straightforward but ambitious mission statement: Prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace. In practice, this means that the EEOC is responsible for enforcing all federal laws that make it illegal to discriminate against a job applicant or an employee because of race, color, religion, sex (including pregnancy, gender identity, and sexual
orientation), national origin, age (after age 40), disability, or genetic information. Federal laws also prohibit discrimination against someone out of retaliation—because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The EEOC’s range is wide, covering most employers that have at least 15 employees (or, in the case of age discrimination, 20 employees). Most labor unions and employment agencies come under its umbrella.

Back in 1964, Congress expected that the EEOC could investigate and resolve all the meritorious cases brought before it. But as soon as 1965, when the commission really got started, its case inventory was 3,000; by the early 1990s, its backlog included more than 130,000 charges, the term used for complaints or cases within the EEOC’s enabling legislation. As new statutes added new cases, EEOC managers introduced various investigative tools to reduce the backlog, but everyone knew something much more comprehensive was needed.

In late 1994, EEOC Chairman Gilbert F. Casellas established several internal task forces to study the case-handling challenges. One recommended dividing charges into triage-type categories:

- **“A” charges**: those the EEOC staff considered likely to result in a finding of “reasonable cause” of a violation of the law;
- **“B” charges**: those with possible merit, with the final finding contingent on the results of the investigation; and
- **“C” charges**: those without merit on their face that should be dismissed outright.

Traditional investigation would assist in resolving the A charges, the task force suggested, but for the larger pool of B charges, a new mechanism would be needed. Following this suggestion, another task force explored the idea of expanding the use of dispute resolution, which had been piloted in four EEOC offices in the early 1990s, and in 1995 it concluded that mediation was indeed a viable alternative process for resolving charges. Shortly thereafter, the commission voted to commit the agency to mediation as a voluntary alternative. The EEOC’s mediation program was officially up and running.
The EEOC’s Mediation Policy Principles

The EEOC-adopted dispute resolution policy states that its program is governed by several core principles, all of which will be familiar to those in the dispute resolution field: voluntariness (participation at all stages is voluntary), neutrality (third-party neutrals assist in resolution at no cost to parties), confidentiality (within each individual session and inside the agency, through a “firewall” separating mediation activity from investigation and litigation), and enforceability (agreements can be enforceable through a model settlement agreement in which the EEOC is a party).

By the end of 1997, each of the EEOC’s 24 district offices and the Washington Field Office had a sustainable mediation program, a phenomenon that caught the attention of lawmakers. In a bipartisan effort, Congress voted to increase the EEOC’s 1999 budget by $37 million, with $13 million specifically allocated for the institutionalization of its mediation program.1 This allowed the EEOC to fully implement its dispute resolution/mediation program by April 1999, integrating this process along with its revised A/B/C charge-processing procedures, all of which evolved into the commission’s current model of charge resolution.

The EEOC’s roster of neutrals is comprised of mediators who have expertise in both equal employment opportunity matters and the EEOC’s process. Given that the mediation option is offered pre-investigation, the program has a facilitative, not evaluative, approach. The EEOC currently employs more than 80 full-time staff mediators, many of whom mediate three to four days a week in locations within commuting distance of their offices. In more remote areas and underserved regions, the commission relies on contractors or individuals who have agreed to provide the service on a pro bono basis. Contractors receive a flat fee of $800 per charge mediated, with all costs and expenses included in that fee. Funding for the contract program varies from year to year depending upon the agency’s budget level. (While the contract roster is currently closed, a request for proposals is anticipated in early fiscal year 2019; for more information, www.FedBizzOpps.gov.)

A Look at the Numbers

From 1999 through mid-2018, the agency conducted more than 214,000 mediations, resulting in more than 155,000 resolutions (a resolution rate of about 72%) and helped parties get more than $2.5 billion in monetary benefits.2
Each year the program averages 11,300 mediations, helps resolve about 8,150 charges, and obtains more than $130 million in monetary benefits (often accounting for more than 50% of the total benefits obtained through the administrative—i.e., nonlitigation—process annually). Cases are completed in an average of 94 days, less than one-third of the current investigative processing time. These statistics do not include “mini-wins,” cases in which the EEOC mediation sets the stage for later resolution, sometimes days or weeks later.

The benefits of the program stretch far and wide, well beyond the commission itself and the parties it serves: the program reduces state and federal caseloads because disputes are often multi-faceted, involving state courts and administrative agencies such as workers’ compensation boards, the Federal Labor Relations Authority (FLRA), the Department of Labor (DOL), and the National Labor Relations Board (NLRB).

The Scope of EEOC Mediations

Most EEOC cases involve questions of racial, disability, gender, or age discrimination in an employment setting, well within the limits of the commission’s mandate. Sometimes, however, disputants’ concerns fall outside the scope of laws that the EEOC enforces, including claims at the state level and other related workplace issues. While the EEOC cannot be a party to the settlement of such ancillary matters, the dispute resolution process does permit parties to enter separate bilateral agreements that may be referenced but not incorporated into the EEOC settlement.

When mediation first started being used widely at the EEOC, some observers initially expressed concerns that certain charges (such as sexual harassment and mental disability claims) would not be appropriate for mediation and should be routed only through the investigative process. Commission officials and academic studies reviewing the program, however, have concluded that when a carefully trained experienced mediator selects an appropriate location, determines exactly who should be present, and clearly outlines a tailor-made protocol for meetings, parties can have productive, professional, and safe discussions that can help people move toward resolution. For all disputes, wise counsel may use the EEOC mediation program for an early, free opportunity to resolve a dispute.

What Participants Say
In 2000, an independent university research team (led by E. Patrick McDermott, one of the coauthors of this article) evaluated the EEOC’s mediation program. Among the findings:

- An overwhelming majority of the participants (91% of charging parties and 96% of respondents) indicated that they would be willing to participate in the mediation program again if they were a party to an EEOC charge. Participants, regardless of their satisfaction with the outcome of mediation, overwhelmingly indicated their willingness to return to mediation.

- The participants expressed strong satisfaction with the information they received about mediation from the EEOC before the mediation session. They also felt very strongly that they understood the process after the mediator’s introduction.

- The vast majority of participants agreed that their mediation was scheduled promptly and that they had a full opportunity to present their views during the mediation.

- Participants were especially satisfied with the role and conduct of the mediators. They felt strongly that the mediators understood their needs, helped clarify those needs, and assisted them in developing options for resolving the charge. They felt even more strongly that the procedures used by the mediators were fair. The questions regarding the neutrality of the mediators elicited some of the strongest responses from the participants, who felt that the mediators were neutral throughout the process. As one might expect from those looking back on a process that doesn’t always give people exactly what they want, participants generally expressed stronger satisfaction with the process than with the case outcome.

- Participant satisfaction with the EEOC mediation program remained high even when the participant responses differed as to the nature of the charges (such as the statute involved or the substance of the dispute) and the characteristics of the mediation session (such as whether lawyers were involved or the differing mediator’s style, training, and methodology).

Overall, participant feedback regarding the EEOC mediation program indicated that the program is, by any measure, acceptable to those who participated in it.³
How the Program Helps Lawyers and Their Clients

Like most mediations, the EEOC’s dispute resolution process gives parties a chance to share information that may lead to the resolution of a dispute—one that can range from a misunderstanding to a serious violation of the law requiring significant damages.

EEOC mediation is also an effective opportunity for the savvy lawyer to assess the other party’s strength as a witness, understand the key issues of the dispute, and find out whether the lawyer’s client has accurately communicated the crux of the dispute and the potential exposure to the organization. This is not free discovery but rather free case assessment, with an opportunity to reduce exposure early.

Mediation can change a lawyer’s perspective, presenting new facts and surprising information. One coauthor of this article, E. Patrick McDermott, represented management for more than two decades before litigating plaintiffs’ cases for more than 20 years. He has seen cases litigated and settled at trial where payment of hundreds of thousands of dollars could have been settled at the EEOC for significantly less—with full party satisfaction. He also seen cases in which a pending EEOC claim was not resolved and subsequent litigation became a fertile ground for discovery of numerous other lawsuits.

Even for plaintiffs’ lawyers who believe in the merits of their clients’ cases, the reality is that most cases will settle at some point, rendering mediation an obvious choice to expedite this activity. While some cases may be fully litigated and ultimately disposed of at the summary judgment stage, an employer can expend significant resources just to get to that stage, and a negotiated resolution early in the case may be quicker, less expensive, and less burdensome for all concerned. Mediation may also help in instances where the client has an unrealistic view of the damages that could be awarded in the case. A skilled neutral can provide valuable assistance by making sure parties consider the real-life consequences of their decisions and actions.

Mediation is especially beneficial for pro se parties and respondents unfamiliar with the specialized advocacy and negotiation that employment litigation may require. A skilled, experienced mediator can ensure that parties inexperienced in EEO matters are provided a balanced and corresponding voice in the process.

Mediation often enables parties—and their lawyers—to diagnose the relative strengths and weaknesses of their underlying claims. While the program has officially adopted
the facilitative approach in conducting its sessions, the EEOC soon recognized that discussions concerning the merits of the charge almost invariably occur, and it now permits its mediators to guide the conversation and the parties through reality checks and probative questions, affording participants the platform to control the process and, more important, preserving their right to self-determination. Program designers recognize this delicate balance of controlling the process so that the mediator maintains neutrality through inquiries and guidance that support the parties’ self-evaluation. They also know that this requires a carefully measured, practiced finesse. Finally, the EEOC experience and related evaluation data show that mediation can help counsel shift from positional conduct based on their perception of the existing law to the root cause of the dispute. This assists counsel in fashioning creative agreements—many of them free from damage limitations and case law, with payment schedules and characterizations of damages that maximize parties’ positions under tax rules and other laws.

Lessons for Dispute Resolution Designers

The EEOC evaluation data and participants’ experiences underscore the importance of procedural variables, including the beliefs that the mediator was neutral, that the party had a full opportunity to present his or her story, that the mediation was held in a timely matter, and that the process was explained and understood. An acceptable, neutral way for parties to work out a dispute is central to the EEOC program’s success. Parties know they cannot compete to “win” at mediation; they also know that they can find satisfaction in a respectful process with a fair outcome.

While high settlement rates are important, they are not the *sine qua non* of a successful mediation or program. Success in mediation can be defined in many ways and may come long after the actual mediation sessions (See the article by Ava J. Abramowitz in this issue for an extensive discussion of “success” in mediation). Sometimes a mediation simply builds the foundation for a future resolution, as parties exchange new information and attempt to fashion solutions that may form a basis for settlement. If party satisfaction with the process is the best measure, the EEOC’s score is remarkable: as the 2000 university evaluation noted, 91% of the charging parties and 96% of the respondents said they would use this process again.

The EEOC has shown that it is possible to design and implement a large-scale ADR process within an administrative process operating under well-established statutory constructs. In short, mediation can be embedded into an existing agency culture. The
key is understanding the pre-existing culture of the agency or organization and its stakeholders, and this kind of understanding can come only from inside—and only with the long-term, strong support from organizational leaders. At the EEOC, support has come internally directly from the chair’s office and executive directors and externally from employer and employee groups with a stake in durable, workable solutions.

For observers such as legal practitioners, professional neutrals, scholars, and dispute design professionals, the EEOC program is proof that disputants like mediation, often want to mediate, and are usually satisfied with it. While experts may identify certain instances in which a claim should not have been mediated or a case ended in impasse because not all the appropriate decision-makers were involved, incidents that program administrators recognize and address, such critiques should not swallow the whole. Mediation works where there is careful program design and enduring commitment to that program’s success.

The EEOC’s program, which began with volunteer mediators and continues today with careful funding, is also proof that a successful program can be developed with minimal resources. It is also a reminder that controlling a process that happens behind closed doors is a challenge; while the program’s process is facilitative, some evaluation may occur and may be necessary.

Program designers who look at the EEOC experience will also see that as in other realms, even with targeted promotion, getting parties—and their lawyers—to the table early in their dispute is far from easy.

Future Issues and Challenges

The EEOC mediation program continues to wrestle with four challenges, many of them shared by other programs. First, how should mediator performance be evaluated? A valuable mediation can occur with or without immediate resolution. With this in mind, how can we quantify the performance of a particular mediator in a particular case? From a practical and research methodology perspective, effective evaluation is a difficult and expensive process fraught with ethical concerns related to the underlying confidential nature of the mediation process. Second, the fact that mediation saves public and private resources doesn’t always translate to support by policy-makers, and program advocates need to do a better job of identifying and marketing the business justification for mediation. Education and public awareness are constant challenges for
the EEOC, as they are for so many in this field. In mediation, as in dance, it takes two to tango, and the EEOC will not mediate if both parties do not agree to participate in the process. This surely results in many missed cases, and program personnel must focus on communicating the value of mediation to parties and counsel in ways that make them want to consider early settlement opportunities. Our final challenge involves recognizing and embracing change. Studying many systems, including the EEOC model, and understanding how they maintain their vitality, adopt new technologies, and continue to evolve are crucial.

From a holistic vantage point, any successful program must be self-aware, adapting and changing as times and parties require. If the EEOC’s mediation program is to remain vital and useful, managers must study what works, what doesn’t help, and what people want and need, including the use of new technology—and then put that learning into practice.

Note: The views expressed by the EEOC employees in this article are the employees’ own and do not necessarily represent the views of the EEOC.

Notes

1. A key factor in obtaining funding support from Congress was a joint letter to committee chairpersons from employer and worker advocacy groups, including the Equal Employment Advisory Council (EEAC), the Labor Association, the Women’s Defense Legal Fund, the National Employment Lawyers Association, the Employment Litigation Project of the Lawyers Committee for Civil Rights and Urban Affairs, and the Lawyers’ Committee for Civil Rights Under Law.

2. This figure does not account for other settlement caused by EEOC mediation but resolved later outside the EEOC’s aegis.

After 20 Years, Mediation Is Mainstream at the EEOC
Health Care as a Human Right

By Mary Gerisch

There are rights to which we are entitled, simply by virtue of our humanity. Human rights exist independent of our culture, religion, race, nationality, or economic status. Only by the free exercise of those rights can we enjoy a life of dignity. Among all the rights to which we are entitled, health care may be the most intersectional and crucial. The very frailty of our human lives demands that we protect this right as a public good. Universal health care is crucial to the ability of the most marginalized segments of any population to live lives of dignity. Without our health we—literally—do not live, let alone live with dignity.

In the United States, we cannot enjoy the right to health care. Our country has a system designed to deny, not support, the right to health. The United States does not really have a health care system; only a health insurance system. Our government champions human rights around the world, insisting that other countries protect human rights, even imposing sanctions for a failure to do so. They are not as robust in protecting rights at home.

Reprinted with permission from Human Rights (43:3), at 2-5. ©2018 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
The right to health care has long been recognized internationally. Ironically, the origins of this right are here in the United States. Health care was listed in the Second Bill of Rights drafted by Franklin Delano Roosevelt (FDR). Sadly, FDR’s death kept this Second Bill of Rights from being implemented. Eleanor Roosevelt, however, took his work to the United Nations (UN) where it was expanded and clarified. She became the drafting chairperson for the UN’s Universal Declaration of Human Rights (UDHR). That committee codified our human rights, including, at Article 25, the essential right to health. http://www.un.org/en/universal-declaration-human-rights. The United States, together with all other nations of the UN, adopted these international standards.

Since the adoption of the UDHR, every other industrialized country in the world—and many non-industrialized countries—have implemented universal health care systems. Such systems ensure that all persons within their borders enjoy their right to health care. In 1966, years after passage of the UDHR, the UN proposed another treaty including health care: the Covenant on Economic, Social and Cultural and Rights (CESCR), http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx. The CESCR further clarified, at Article 12, “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” “Health” in this context is understood as not just the right to be healthy and have health care, but as a right to control one’s own body, including reproduction.

Article 12 goes on to require that “states must protect this right by ensuring that everyone within their jurisdiction has access to the underlying determinants of health, such as clean water, sanitation, food, nutrition, and housing, and through a comprehensive system of health care, which is available to everyone without discrimination, and economically accessible to all.” This treaty was signed by all UN countries. It was ratified by all countries except three—Palau, Comoros, and the United States of America. All signatory nations to CESCR are subject to periodic review of progress on the human rights so protected. The UN High Commissioner of Human Rights also reviews progress on rights protected by the UDHR. In preparation for these reviews, the U.S. government submits a report, touting its successes in the area of human rights.

Shockingly, or maybe just realistically, the U.S. report to the UN in 2015 fails to even identify health as a human right. Instead, it refers to efforts on health “measures,” intentionally avoiding use of the word “right” relative to health. (UPR report of the U.S. government section H paragraphs 100 and 101.) A reading of that report
generates near disbelief among health advocates; “health measures” are not even remotely akin to “health rights.” But it was the only appropriate term to use. The only progress the United States had to report was the Affordable Care Act (ACA), a health insurance law, not a health care law. The United States could not admit to the UN that it had made no progress on so basic and fundamental a right as health.

What the government did not want to say is that contrary to assuring the right to health, it continues to violate the UDHR with a system that discriminates against minority groups, and/or all in poverty. This results in a “non-system” of health care. The UDHR does not condition health upon ability to pay, citizenship, or any other condition. The United States does. By codifying a system allowing huge corporate profits on health care as a commodity, our government has actually impaired, not improved, our right to health care. So maybe, and refreshingly, the United States was just being honest with the UN about its failure to ensure and protect the human right to health care.

This failure to protect the right to health is puzzling. From FDR’s drafting of the Second Bill of Rights to Dwight Eisenhower’s success in passing Medicare, our country’s leaders have attempted to assure our right to health. The crucial and intersectional nature of that right was recognized in the 1960s by Martin Luther King Jr. during the Poor People’s Campaign. He affirmed that: “Of all the forms of inequality, injustice in health care is the most shocking and inhumane.” Jan. 18, 2016 Chicago press conference held on March 25, 1966, in connection with the annual meeting of Medical Committee for Human Rights.

It is equally puzzling that our government has, and continues to, laud the passage of the Patient Protection and ACA as a way to guarantee the right to health care. It is true that there have been improvements in our country’s health statistics since the passage of the ACA. As a result of the ACA, many people, through Medicaid expansion, are now able to see a medical professional when needed. And prior to enactment of the ACA, the death rate for lack of health care was appalling: Three people in our country died every 30 minutes for lack of health care. Since the ACA, that death rate has gone down, but is still present. No matter how it is spun, health insurance is simply not health care.

Nowhere is that contrast clearer than in personal stories of suffering. After codification of cost barriers by the ACA, people were shocked; they had been convinced this law was a reform that would actually increase access to health care. While collecting stories, I spoke to Susan in Vermont. She is 27 years old and says: “I simply don’t
understand what happened. I was told that the ACA would let me get the health care I need. I pay my premium every month. Now that I’m really sick, I can’t go to work and have very little income. It turns out I can’t go see my doctor without paying because I haven’t yet spent $2,000 this year out of my own pocket—after paying all my premiums. So, even after paying premiums which are thousands of dollars, and paying the $2,000 deductible, I still have to bring money with me for a co-pay.”

Another heartbreaking failure of the ACA is told by Paul from Vermont. He relates the story of his wife’s death—another victim of the insurance system we call health care:

On Jan. 23, 2014, my wife Jeanette died of cancer. She was first diagnosed with thyroid cancer back in 2008. We were fortunate to have comprehensive health insurance at the time, and Jeanette responded well to treatment. Her cancer went into remission, and everything was great.

Then 15 months ago, Jeanette came down with a chronic cough. She went to the doctor and was told that she may have allergies. Looking for a second opinion, she went back to the oncologist who had treated her thyroid cancer and got X-rayed and tested. The news was terrible: Jeanette had advanced Stage 4 cancer that had spread to almost all of her internal organs.

We battled with our insurance company, Blue Cross Blue Shield, to get the chemotherapy pills Jeanette needed. They denied payment for the pills five times, saying that they needed to find the cheapest vendor. Finally, on the day Jeanette died, the pills arrived. They were tossed onto our deck and left sitting in 20-below-zero temperatures.

Losing my wife of 34 years is one of the most painful things I’ve ever experienced, but it was made much worse by the battles Jeanette and I had over insurance and by the lingering questions over whether Jeanette might have survived or lived more comfortably if she’d gotten the right test and treatments. After Jeanette died, I asked her doctor why they’d done no testing during her remission to detect any growth of cancer beyond her thyroid. I was informed that testing was “cost prohibitive” and may not provide conclusive results.

Paul’s and Susan’s stories are but two of literally thousands in which people die because our market-based system denies access to needed health care. And the worst part of these stories is that they were enrolled in insurance but could not get needed
health care. Our lives depend on the ability to access a nonexistent health care system.

Far worse are the stories from those who cannot afford insurance premiums at all. There is a particularly large group of the poorest persons who find themselves in this situation. Perhaps in passing the ACA, the government envisioned those persons being covered by Medicaid, a federally funded state program. States, however, are left independent to accept or deny Medicaid funding based upon their own formulae. Many states have not expanded their Medicaid eligibility. People caught in that gap are those who are the poorest. They are not eligible for federal subsidies because they are too poor, and it was assumed they would be getting Medicaid. These people without insurance number at least 4.8 million adults who have no access to health care.

Premiums of $240 per month with additional out-of-pocket costs of more than $6,000 per year are common. Inability to pay these amounts systemically vitiates the right to health. Imposition of premiums, deductibles, and co-pays is also discriminatory. Some people are asked to pay more than others, simply because they are sick. Fees actually inhibit the responsible use of health care by putting up barriers to access care. Right to health denied.

Cost is not the only way in which our system renders the right to health null and void. Health access is also tied to employers’ control of employees’ health care under the ACA. Employees remain in jobs where they are underpaid or suffer abusive working conditions so that they can retain health insurance; insurance that may or may not get them health care, but which is better than nothing.

Additionally, those employees get health care only to the extent that their needs agree with their employers’ definition of health care. This is nowhere more evident than in the recent Supreme Court case *Burwell v. Hobby Lobby*, 573 U.S. ___ (2014), which allows employers to refuse employees’ coverage for reproductive health if inconsistent with the employer’s religious beliefs on reproductive rights. Clearly, a human right cannot be conditioned upon the religious beliefs of another person. To allow the exercise of one human right—in this case the company/owner’s religious beliefs—to deprive another’s human right—in this case the employee’s reproductive health care—completely defeats the crucial principles of interdependence and universality. Because our “system” is based on insurance rather than health, our Supreme Court was able to successfully void the right to health in its *Burwell* decision.

Despite the ACA and the *Burwell* decision, our right to health does exist. We must not be confused between health insurance and health care. Equating the two may be rooted
in American exceptionalism; our country has long deluded us into believing insurance, not health, is our right. Our government perpetuates this myth by measuring the success of health care reform by counting how many people are insured.

Any system that promotes only insurance cannot possibly meet human rights standards. For example, there can be no universal access if we have only insurance. We do not need access to the insurance office, but rather to the medical office. There can be no equity in a system that by its very nature profits on human suffering and denial of a fundamental right. After all, insurance companies only make money if they do not pay claims. In short, as long as we view health insurance and health care as synonymous, we will never be able to claim our human right to health. The worst part of this “non-health-system” is that our lives depend on the ability to access health care, not health insurance. A system that allows large corporations to profit from deprivation of this right is not a health care system.

We must name and claim our right to health. Only then can we tip the balance of power to demand our government institute a true and universal health care system. In a country with some of the best medical research, technology, and practitioners, people should not have to die for lack of health care. The real confusion lies in the treatment of health as a commodity. Health insurance is no more health care than fire insurance prevents fires in our homes. It is a financial arrangement that has nothing to do with the actual physical or mental health of our nation. Worse yet, it makes our right to health care contingent upon our financial abilities. Human rights are not commodities. The transition from a right to a commodity lies at the heart of a system that perverts a right into an opportunity for corporate profit at the expense of those who suffer the most. Health insurance companies make money by denying claims for care while still collecting premiums. That’s their business model. They lose money every time we actually use our insurance policy to get care. They have shareholders who expect to see big profits. To preserve those profits, insurance is available for those who can afford it, vitiating the actual right to health.

The real meaning of this right to health care requires that all of us, acting together as a community and society, take responsibility to ensure that each person can exercise this right. As individuals, we have a responsibility to contribute to making health care available to each of us. We have a right to the actual health care envisioned by FDR, Martin Luther King Jr., and the United Nations. We recall that Health and Human Services Secretary Kathleen Sibelius (speech on Martin Luther King Jr. Day 2013)
assured us: “We at the Department of Health and Human Services honor Martin Luther King Jr.’s call for justice, and recall how 47 years ago he framed health care as a basic human right. We are committed to reducing health disparities, and that means making sure all Americans have access to affordable, quality health care. There is nothing more fundamental to pursuing the American dream than good health.”

All of this history has nothing to do with insurance, but only with a basic human right to health care. We know that an insurance system will not work. We must stop confusing insurance and health care and demand universal health care. If we can actually name that right to health, perhaps we can also claim that right to health. We must bring our government’s robust defense of human rights home to protect and serve the people it represents. Band-aids won’t fix this mess, but a true health care system can and will. As humans, we must name and claim this right for ourselves and our future generations.
October 23, 2018  GPSOLO DIVISION NEWS

Division Announcements

Congratulations to the 2018 Difference Maker Awards Winners!

The 2018 Difference Makers Awards will be presented during the Inspiration and Innovation Luncheon with Keynote Speaker Jack Canfield on Friday, October 26, 2018, at the Francis Marion Hotel in Charleston, South Carolina.

The GPSolo Difference Makers Awards recognize extraordinary individuals who “make a difference” by breaking down barriers and through community service, pro bono work, and service to the profession.

Difference Makers

 J. Michelle Childs, Columbia, South Carolina

 Jean H. Toal, Columbia, South Carolina

This award honors a deserving individual who is an attorney or non-attorney and who has made a difference in the local community and lives in the local geographic area where the Division is meeting and where the Difference Makers Awards program is being held.

Making a Difference by Breaking Barriers

 I.S. Leevy Johnson, Columbia, South Carolina
This award honors an attorney living or deceased who broke barriers for gender, color, disabilities, or sexual orientation.

Making a Difference Through Community Service

Elizabeth S. Hilbun, Houston, Texas

This award honors an attorney living or deceased who made a significant lifetime contribution to the local community through community service (not necessarily through bar work or pro bono work per se).

Making a Difference Through Pro Bono Work Award

Andrea Loney, Columbia, South Carolina

This award honors an attorney, law firm, corporate legal department, government attorney office, or institution in the legal profession that has made an outstanding commitment to volunteer legal services for the poor and disadvantaged.

Making a Difference Through Service to the Profession

David D. Farr, Houston, Texas

This award honors an attorney, living or deceased, who made a significant contribution to the legal profession through service to the profession (i.e., frequent activities in bar associations, committees and services).

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. 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 is recorded the third Wednesday of every other month.

Join us for our upcoming live podcasts or check out our podcast libraries: Brown Bag Podcast Library and Hot Off the Press Podcast Library.

SAVE THE DATES

GPSolo podcasts are free for members. Register today!

**Brown Bag Series**
Wednesday, November 14, 2018
12:00 P.M. – 1:00 P.M. Central

Hot Off the Press Series

“**Mastering Voir Dire and Jury Selection**”
Wednesday, November 21, 2018
12:00 P.M. – 1:00 P.M. Central

Register Today!
<table>
<thead>
<tr>
<th>Law School Accreditation</th>
<th>Office of the President</th>
<th>Web Staff Portal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bar Services</td>
<td>ABA Newsroom</td>
<td>Website Feedback</td>
</tr>
<tr>
<td>Legal Resources for the Public</td>
<td>Join the ABA</td>
<td></td>
</tr>
<tr>
<td>ABA Career Center</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Model Rules for Professional Responsibility</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

<table>
<thead>
<tr>
<th>Terms of Use</th>
<th>Code of Conduct</th>
<th>Privacy Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Your California Privacy Rights</td>
<td>Copyright &amp; IP Policy</td>
<td>Advertising &amp; Sponsorship</td>
</tr>
</tbody>
</table>
Division Meetings

2019 ABA Midyear Meeting

January 24 – 27, 2019
Caesars Palace
Las Vegas, Nevada

Conference Highlights: Friday, January 25

2019 ABA Midyear Innovate Your Practice for Success—GPSolo Complimentary CLE Program

Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury
9:00 A.M. – 10:00 A.M.

Images with Impact: Design and Use of Winning Trial Visuals
10:15 A.M. – 11:15 A.M.

Advising the Small Business: Forms and Advice for the Legal Practitioner, Third Edition
1:45 P.M. – 2:45 P.M.

The Business Guide to Law: Creating and Operating a Successful Law Firm
3:00 P.M. – 4:00 P.M.
GP Solo Publishing Presents an Author’s Workshop
Leveraging the Author Experience

The Third Annual Present and Powerful Speaker Series: Keynote Speaker
Marianne Williamson
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.

Special Events
Note: Special events are not included in the meeting registration rate.

Keithe E. Nelson Military Memorial Luncheon
Date: Friday, January 25, 2019
Time: 12:00 P.M.
Location: Caesar’s Palace
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.

Friday Night Dinner
Date: Friday, January 25, 2019
Time: 6:30 P.M.

2019 Litigation & GPSolo CLE Conference

Presented with ABA Section of Litigation
May 1 – 4, 2019
Marriott Marquis
New York, New York
Please visit the Events & CLE page on the Division’s website for CLE teleconferences that GPSolo produces and cosponsors.

Upcoming GPSolo CLE

Common Mistakes 101: Avoiding Legal Malpractice

Webinar
Date: October 31, 2018
Time: 1:00 P.M. – 2:00 P.M. Eastern
Credits: 1.00 Ethics/Professionalism CLE Credit Hours

This program will focus on key tips litigators should remember for avoiding malpractice claims in their law practice.

Practicing law and representing clients is fraught with risk. Having a malpractice claim doesn’t always mean that the responsible attorney made a mistake in judgment. But simply put, in law practice, there is more opportunity for things to go wrong. Part of the solution is to take preventive measures to avoid roadblocks such as conflicts of interest and poor planning.

Join our seasoned panel of attorneys as they discuss:

- Failure to know/apply law
CLE 

○ Communication with clients

○ Client file/billing practices

○ Arrangements involving multiple attorneys

○ Conflict analysis

Register Today!

Protecting the Rights of Elderly Clients in Personal Injury Matters

Webinar
Date: October 31, 2018
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
The Post Murphy v. NCAA World of Sports Betting: What Lawyers Need to Know

Webinar
Date: November 8, 2018
Time: 1:00 P.M. – 2:30 P.M. Eastern
Credits: 1.50 General CLE Credit Hours

Learn what practitioners need to know about legalized sports betting.

The recent U.S. Supreme Court case *Murphy v. National Collegiate Athletic Association* allowed states to legalize sports betting. Sports betting is expected to be a billion-dollar industry and big business for media and data companies.

Join Andrew Brandt, a thought leader in sports law who has been in-house with the Green Bay Packers and is now a law professor at Villanova, and Lynne Kaufman, a practitioner in Atlantic City who works with leading casinos, for this program on how the sports betting landscape is changing rapidly.

The program will include a review of existing regulations, a discussion of recent developments in the gaming industry as it has prepared for this day, and a look at how online developments will impact sports betting.

Register Today!

Difficult People: Dealing with Opposing Counsel and Clients

Webinar
Date: November 14, 2018
Time: 1:00 P.M. – 2:30 P.M. Eastern
Credits: 1.50 General CLE Credit Hours

This session will explore ways to work with and overcome even the most obstinate opponents and restore some sanity to an otherwise chaotic profession.

The obstreperous attorney. The angry pro se litigant. The uncooperative client. A family law attorney’s job is hard enough without the added stress of dealing with difficult people.

Join our seasoned panel member as she discusses:

- Identifying and assessing clients that will be difficult to represent, based on observed visual, behavioral, and historical factors
- Managing expectations of a difficult client by evaluating their emotional state and organizing case preparation accordingly
- Identifying difficult opposing counsel and initiating courtroom and litigation strategies to neutralize their behavior

Register Today!

[PracticePanther Ad]
The Early-Career Guide for Attorneys: Starting and Building a Successful Career in Law

By Kerry M. Lavelle

*The Early-Career Guide for Attorneys: Starting and Building a Successful Career in Law* is an objective guide for the third-year law student and the new associate to be successful. By knowing in advance the challenges that you will face heading into your
first year of practice, you can ease the transition from law school to the practice of law and be on a path to success.

ISBN: 9781641052221
Product Code: 5150505
2018, 292 pages, paperback
SoloSez Popular Threads

SoloSez™ is *the* internet discussion forum for solos and small firm lawyers. As the ABA's most active e-mail listserv, SoloSez™ features approximately 1,500 solo and small firm e-mail subscribers discussing everything from tech tips and legal opinions to what to wear to court.

**Latest Popular Threads**

**August 2018**

- Billable Hours
- Boomerang for Gmail
- Charging for Wiring of Funds for International Clients
- Defendant’s Unreasonable Demands for Dismissal Prior to Negotiations
- Office 365 or Dropbox or…?


---

[This Time, Less is More. Maximize your time and money by attracting more high-value clients.](https://www.scorpion.com)