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Certainly, you all have heard about Murphy and his law. In case any of you do not remember, Murphy’s Law states: “If anything can go wrong, it will.” When it comes to using technology, you need to recognize that Murphy’s Law certainly applies. The Boy Scouts have a motto that should be your guiding light in dealing with technology: “Be Prepared.” In the battle against problems predicted by Murphy’s Law, nothing beats having anticipated the problem and having prepared for it.

Functioning as a road warrior increases your exposure to Murphy’s Law and also makes it more difficult to deal with the problems it creates; on the road, you do not have all the resources of your office as readily available as when you are in the office. This concern, however, has diminished significantly in recent years owing to improvements in technology.

The technology-related problems you are most likely to encounter as a road warrior include:

1. You run out of power and have no electrical plugs available.
2. You forget to bring your charger (or you lose it).
3. You put one or more of your devices down and then forget to pick it up and leave it behind.
4. Someone steals (physically) one or more of your devices.
5. Someone hacks one of your devices to get information.
6. You have a hardware failure, or one of your devices gets physically damaged and no longer works.
7. Software corruption interferes with your ability to use your hardware.

Because we can easily anticipate any or all of these problems occurring, I will devote most of the remainder of this column to suggestions on how to prepare for them and how to deal with them.

**POWER**

Let’s start with the two items that address power. Although batteries have gotten better and battery life on a charge longer, all our devices have limits on how long they will run without needing a recharge. Unfortunately, we cannot count on most devices running out of power on schedule consistently, as the use to which we put our hardware dictates the rate of discharge of the battery. You can get external power sources (backup batteries) that work with virtually all battery-operated devices. I never go anywhere without a backup battery to boost the charge on my smartphone, iPad, and Kindle (which go with me virtually everywhere). I have several, with varying capacities, and I choose which I take based on where I am going, how long I will be gone, and what I take with me. When I travel, I sometimes carry more than one so that I will have a very small one to carry when I arrive as well as a larger one to use during long-distance travel or a prolonged meeting.

Having such a device solves the problem of not having a charger available or not having an electrical outlet. In a worst-case scenario, depending on what you are doing, you can prolong the battery life by turning off certain things that draw significant power, such as WiFi, cellular connections, and location services using GPS. You also can reduce the light output, darkening the screen a bit but prolonging battery life.

You might also want to carry a multiple-plug connector or power strip in case you have access to electrical outlets but simply not enough of them. I carry one when I travel and always take one with me to a trial.

Sometimes you can solve a problem by choosing a different type of device. For example, my primary document camera does not work off of a battery; it requires an electrical outlet. My backup document camera (which is much
smaller) plugs into the USB port on my laptop and draws power from the laptop. Most smartphones, e-readers, and tablets will work off generic chargers that accommodate the ubiquitous USB charging cable connector. As a result, you can carry a multiport charger that will handle several devices, use the charger from one device for another, or even borrow a charger on the go. Just remember that if you use a lower output on a device requiring a larger output, the device charges more slowly. By way of example, the iPhone uses a 1 amp charger and the iPad a 2.1 amp charger. If you charge an iPad with an iPhone charger, it will take much longer. If you charge an iPhone with an iPad charger, it will go faster.

You also can mitigate the problem by taking advantage of every opportunity you have to recharge your devices. The more power they have at any time, the longer they will last without a recharge from that point forward.

FORGOTTEN DEVICES
If you lose a device, try to recover it as quickly as possible. Many portable devices have apps that will assist you in that process. You should always install those apps and activate them on your portable devices that have them (iOS and Android devices both do). You now also can get Bluetooth finders for about $25 that you can keep with your device, set up with an app (iOS or Android), and use the Bluetooth to help you locate the device and even cause it to sound an alarm to enable you to locate it more easily. The Tile (thetileapp.com) is one such device.

Sometimes you will get lucky and recover your device. Sometimes you won’t, so be sure to protect yourself and your data by avoiding storing confidential data on your devices as much as possible and by password-protecting access to any confidential information you have on your device and access to the device itself. Many devices allow you to erase them remotely or to set them to erase themselves if the wrong password gets entered too many times. Both are good options to have in play.

STOLEN DEVICES
The chances that you will ever see a stolen piece of technology again are de minimus. Unless you catch the thief in the act, track him or her down, and get it back (which is not an advised form of conduct), you will likely never see it again. Accept this and get yourself a new device. Before you have your device stolen, however, follow the protective steps outlined in the preceding paragraph to limit your exposure to the loss of confidential data and to identity theft (yours).

HACKERS
The simple truth of the matter is that you cannot stop hackers, you can only make things more difficult for them. Try to keep confidential data off of your device as much as possible, use strong passwords (eight or more characters with a combination of upper- and lowercase alphabetical, numeric, and symbolic characters), and/or biometric access (fingerprints). If you stay off public networks, you make it somewhat more difficult. If you are on a public network, anyone else on the network has easier access to your data. If you carry a private and secure cellular hotspot with you, you reduce the opportunity. If you use a virtual private network (VPN) as well, you get better protection yet. For more on VPNs, see my Road Warrior column in the November/December 2015 issue, tinyurl.com/289zfef.) If you have little confidential information on your device, the target becomes smaller. If you have protected this data with encryption, it becomes that much safer from attack. In a worst-case scenario, if you learn of a data breach, you should promptly and in writing advise everyone affected (i.e., those whose confidential information was compromised).

HARDWARE FAILURE
Depending on the device in question, you have different options available. For smartphones and tablets you are pretty much stuck with the concept of contacting the manufacturer or the vendor and going through a repair process or replacement if it is not repairable. If you have a laptop with a traditional hard drive in it, most failures will relate to that hard drive. You can minimize the likelihood of this occurring by moving to flash memory the next time you get a laptop, but you also can help your cause by carrying an external disk with your critical software on it and an operating system, so that you can boot to it and run it through your laptop. You can either encrypt critical data and keep a copy on it or store your data in the cloud (encrypted) or both. If you have hardware failure other than a hard disk, you pretty much have to wait for the repair people to fix it or use a different laptop. Depending on the hardware and the problem, it can take
varying amounts of time to fix. In my experience Apple has the fastest service, and sometimes one of their “geniuses” can actually fix it while you wait.

SOFTWARE PROBLEMS
You can minimize the likelihood of encountering software problems by keeping your software up-to-date, cleaning unnecessary garbage off your device, regularly running a reliable diagnostic and repair program (particularly on a computer), and being careful about what you add to your device. You are ill-advised to jailbreak smartphones and/or tablets and add programs from sources other than the approved app store. You should have backups of your portable devices both on a hard disk and in the cloud. You can restore a smartphone or tablet to its original factory settings, but that will wipe out all your data, and you will need to reinstall it. Many tablets and smartphones can do this through the cloud (although it will take longer than by connection to a computer). If you are dealing with an app that keeps crashing on a smartphone or computer, try to solve the problem by deleting and reinstalling it.

If you are dealing with a computer, you generally can use diagnostic software provided by the operating system (OS) developer or by the computer manufacturer or both. Some third-party software has proven very reliable, and others can actually make things worse. The software you choose will very much depend on whether you use a Mac or a Windows computer and which iteration of the OS you use. You might want to try booting into safe mode, as that disconnects a number of software pieces extraneous to the core OS and helps you figure out the nature of the problem. If it boots to safe mode, it is likely not the system but something else that has gone awry. Additionally, the process of booting to safe mode can result in some self-healing by the operating system. It is always a good idea to have a copy of your diagnostic software and the OS on an external device to let you boot to that if necessary. I always travel with a bootable external drive that has everything I need to be operational so I can always move to that if all else fails. I recently converted from a traditional hard disk to flash memory, which speeds up the process. This backup can keep you going until you get the chance to reinstall the operating system and, if that does not solve the problem, erase the drive, reinstall the operating system, and then reinstall your programs and restore your data. FYI, if your backup has the same problem, your options reduce to erasing the drive, reinstalling the system, and rebuilding the drive by installing the software again. This actually might yield some benefits in terms of operation as you are unlikely to install older programs that you have stopped using and that now simply take up space and may interfere with the operation of your equipment.

ADOPT A “BELT-AND-SUSPENDERS” APPROACH TO TECHNOLOGY IN THE COURTROOM.

YOUR DAY IN COURT
Before I close this column, I have some suggestions for those of you who use technology in connection with trials. In court, you generally have much less flexibility than in situations where you do not have courtroom presentation issues. Courtroom presentation issues are bad enough in a court trial; they magnify in significance if you have a jury trial. When I use technology in trial (which I regularly do), my hardware package generally includes a laptop, one or two iPads, a projector, and a document camera. My rule with respect to preparedness for failures has led me to the practice of simply bringing extra hardware that I have previously set up identically to the hardware I plan on using at the trial. This way, if something fails for any reason, I don’t try to figure out why and I don’t try to fix it; I simply replace it on the spot with my backup hardware. Accordingly, I bring two laptops, three iPads, two document cameras, and two projectors with me to court.

My theory about this is that as a small firm attorney, I generally try cases alone, so I have to handle my own technology. My primary focus, however, has to be on the trial and my job as the trial attorney. Technology failures can prove very distracting; as I don’t want them to distract me, I simply replace the misbehaving technology on the spot and figure out what went wrong later. In truth, I rarely have had a problem with technology in court, and I have taken some ribbing for my “belt-and-suspenders” approach. But I have never missed a beat with technology in court. Speaking of belt and suspenders, if you really want to protect yourself, you should always bring an extra set of cables and connectors, as you never know when one might fail.

By the way, my ultimate backup plan for technology failures in trial is that I always come to court prepared to try the case “old school” (without technology) so that in case of a total collapse of technology, I can still do my job as the trial attorney. I take care of my hardware and check it out before the trial starts, which undoubtedly has something to do with my technology’s low failure rate in court. At least partially for this reason, I have never had to drop all my tech and move to an old-school trial.

MINDING MURPHY
As we have grown more and more dependent on the use of technology, convenience, self-preservation, and our ethical responsibilities as attorneys require that we anticipate potential problems and take steps to avoid them or mitigate their consequences.
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“G”round control to Major Tom/Your circuit’s dead/There’s something wrong/Can you hear me, Major Tom?/Can you hear me, Major Tom?” sang David Bowie in his futuristic anthem “Space Oddity.” Few things, I suggest, either in our law practices or lives compare to what Major Tom had to face when things went wrong for him—floating aimlessly in space for eternity like George Clooney in the more recent Academy Award–winning movie Gravity.

Things, however, in our work as well as our personal lives do go wrong. But do they have to? Really? And can we prepare for it?

THE REAL-LIFE MURPHY AND HIS LAW

When things go wrong, many cite Murphy’s Law as the reason. Murphy’s Law is the simple maxim, “If anything can go wrong, it will.” Many of us quote it all the time. But do you know the origin of this commonly accepted law and what it really means?

According to legend (and some extensive “Googling” by yours truly in researching for this column), this law originated in 1949 at Edwards Air Force Base, the famed flight test facility in California’s Mojave Desert (tinyurl.com/lmnh6xd). Captain Edward A. Murphy Jr. was an aerospace development engineer with a team conducting rocket sled tests to determine how humans could tolerate g-forces (a “g” is the force of gravity acting on a body at sea level) flying at high speeds and on rapid deceleration and impact. The Air Force wanted to find out how many g’s a pilot could tolerate in a crash. It was commonly thought at the time that this threshold was 18 g’s, above which the human body would disintegrate, and every military aircraft was designed based on that level. After World War II, some began to question the accuracy and acceptance of this statistic.

To determine the truth, a decelerator was constructed using a rocket-propelled sled set on railroad tracks with a sophisticated hydraulic braking system that became known as the “Gee Whiz.” Test dummies were initially used to test the effect of g-forces on the human body to assist in designing restraint systems for U.S. pilots in a crash. The project was headed by Colonel John Paul Stapp (MD, PhD), who, after learning of Chuck Yeager’s breaking of the sound barrier in an early rocket plane with few ill effects, removed the test dummy and instead began testing the rocket sled decelerator by strapping himself into the Gee Whiz’s harness and testing it, to his extreme risk and peril. The g-forces were measured by electronic strain gauges that were attached to Stapp’s harness to measure the forces exerted on them by his sudden braking. These gauges were installed and used pursuant to Murphy’s suggestion and proposal.

Nick T. Spark, in his article “Why Everything You Know about Murphy’s Law Is Wrong” (tinyurl.com/qpes), interviews David Hill Sr., who worked at Edwards on these rocket sled tests and worked with and knew Murphy as the guy who invented Murphy’s Law, describes what happened next as follows:

At one point an Air Force engineer named Captain Ed Murphy came out to Edwards. With him he brought four sensors, called strain gauges, which were intended to improve the accuracy of g-force measurements. The way Hill tells it one of [Murphy’s] assistants . . . installed the gauges on the Gee Whiz’s harness. Later Stapp made a sled run with the new sensors and they failed to work. It turned out that the gauges had been accidentally installed backwards, producing a zero reading. . . . It was a simple enough mistake, but Hill remembers that “Murphy was kind of miffed off. And that gave rise to his observation: ‘If there’s any way they can do it wrong, they will.’”

. . .

Murphy’s sour comment proceeded to make the rounds at the

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THE CHAIR'S CORNER

sled track. . . . The way the fat got chewed, Murphy’s words . . . were transformed into a finer, more demonstrative “if anything can go wrong, it will.” A legend had been hatched. But not yet born.

Just how did the Law get out into the world? Well, David Hill says, John Paul Stapp held his first-ever press conference at Edwards a few weeks after the incident. And he was attempting to explain his research in clinical terms when a reporter asked the obvious question: “How is it that no one has been severely injured—or worse—during your tests?” Stapp, who Hill says could be something of a showman, replied nonchalantly that, “we do all of our work in consideration of Murphy’s Law.” When the puzzled reporters asked for a clarification, Stapp defined the Law and stated, as Hill puts it, “the idea that you had to think through all possibilities before doing a test” so as to avoid disaster.

According to Hill, that was a defining moment. Whether Stapp realized it or not, Murphy’s Law neatly summed up the point of his experiments. They were, after all, dedicated to trying to find ways to prevent bad things—aircraft accidents—from becoming worse. As in fatal. But there was a more significant meaning that went to the very core of the mission of the engineer. From day one of the tests there had been an unacknowledged but standard experimental protocol. The test team constantly challenged each other to think up “what ifs” and to recognize the potential causes of disaster.

If you could predict all the possible things that could go wrong, the thinking went, you could also find a way to prevent catastrophe. And save John Stapp’s neck.

MURPHY’S LAW WAS NOT A PESSIMISTIC PHRASE, BUT RATHER A CALL FOR PREVENTIVE MEASURES.

If anything can go wrong, it will. It was a concept that seized the cumulative imagination at the press conference. So when articles about the Gee Whiz showed up in print, Murphy’s Law was often cited right along with Newton’s Second.

MURPHY’S LAW WAS NOT A PESSIMISTIC PHRASE, BUT RATHER A CALL FOR PREVENTIVE MEASURES.

MURPHY, THE 5 P’S, AND THE BOY SCOUTS

So there you have it. Who knew that Murphy’s Law was not a pejorative or pessimistic phrase, but rather a call for preventive measures—a call to think things through before a task so as to prevent things from going wrong. It is the precursor to my late father’s catchphrase (which I’m sure he “borrowed” from but never attributed to his time in the Marine Corps) that he drilled into me and my four siblings at an early age to always “Practice the 5 P’s”: Prior Planning Prevents Poor Performance. I, in turn, have passed this tidbit of wisdom to my three daughters who have it ingrained into their daily lives. To this day, whether it be at work, with the family, or at life in general, I try to remember to Practice the 5 P’s so as to ensure better results.

Both the Boy Scouts and Girl Scouts summed up this principle even more succinctly with their two-word motto: “Be Prepared.” Two simple words that can prevent so many bad things from happening. As a former Boy Scout, I strive to live up to this motto. You’d all be wise to heed such a simple concept as it can save much aggravation later.

Even Murphy regarded Stapp’s version as too pessimistic. “My original statement was to warn people to be sure that they cover all the bases, because if you haven’t, you’re in trouble,” he says. “It was never meant to be fatalistic” (tinyurl.com/hj9rv60).

Of course, the original Murphy’s Law has spawned countless offspring and corollaries, and I will leave you with a few of my favorites:

- The probability of being observed is directly proportional to the stupidity of one’s actions.
- The best golf shots happen when you are alone (and the worst when playing with someone you want to impress).
- The other line always moves faster.
GPSOLO NOMINATING COMMITTEE REPORT

The ABA Solo, Small Firm and General Practice Division’s 2015–2016 Nominating Committee consisted of the following members: Chair Rolf C. Schuetz Jr. of Fair Lawn, New Jersey, and members Alfreda Coward of Lauderdale, Florida; Alan O. Olson of Des Moines, Iowa; Scott LaBarre of Denver, Colorado; and Thomas Tully of Des Moines, Iowa. The Committee met in person in Boston, Massachusetts, on September 24, 25, and 26 at the Division’s 2015 Solo & Small Firm Summit. The Committee was charged with nominating a candidate for the office of Division Secretary and five candidates to serve as at-large members of the Division’s Council. The Committee received one application for the office of Secretary and 12 applications for at-large Council positions. All candidates had the opportunity to be interviewed in person or via telephone. The Committee has submitted the following slate of candidates for the 2016–2017 Bar Year:

SECRETARY
Richard A. DeMichele Jr. DeMichele, commonly known to all of us in the Division as “Rick,” comes from Haddon Heights, New Jersey, where he is a principal in the law firm of DeMichele & DeMichele, P.C. His practice is primarily civil with an emphasis on family law and personal injury, but he also handles criminal cases. DeMichele is a graduate of Rutgers University School of Engineering, obtaining the degree of bachelor of science degree in ceramic engineering. He is a graduate of Villanova School of Law. DeMichele is currently the municipal prosecutor for the Borough of Lawnside and the Township of Mullica. He is active in the ABA and the New Jersey State Bar Association, having served in positions and capacities too numerous to recount here. He has been either a moderator or speaker at numerous seminars in the State of New Jersey. Currently he is a member of the Ad Hoc Committee on Skills and Methods Course and the Ethics and Professionalism Subcommittee for the New Jersey Supreme Court. His vision for the Division is to expand on diversity and to make the Division the voice of the solo and small firm attorney.

COUNCIL MEMBERS-AT-LARGE
Ashley Hallene. Hallene, who resides in Katy, Texas, specializes in oil and gas contracts, asset acquisitions and dispositions, and general contract drafting. She is a graduate of the University of Houston with a bachelor of science in biology and attended law school at both South Texas College of Law and the University of Houston Law Center, where she obtained her law degree. Hallene is a member of various bar associations and affiliations, including the Houston Bar Association, Houston Young Lawyers Association, and Houston Association of Professional Landmen. As a member of the Division, she is the editor of technology and product reviews for the GPSolo eReport and is on the GPSolo magazine Editorial Board. She is also the co-chair of the Division’s Technology Committee and has actively worked on the development of the ABA Solo and Small Firm Resource Center.

Henry Hamilton. Hamilton, who resides in West Des Moines, Iowa, is currently an administrative law judge for the U.S. Social Security Administration. He was previously an administrative judge for the U.S. Equal Employment Opportunity Commission and was a magistrate judge in the State of Iowa. He is a graduate of Drake University, obtaining a bachelor of arts degree in journalism. He earned his juris doctor from Drake University Law School. He is or has been a member of the Iowa State Bar Association, the Milwaukee Young Lawyers Association, and the ABA. As part of the ABA, Hamilton was a past chair of the Young Lawyers Division’s Diversity Committee. Hamilton is planning to return to private practice after some 20 years of public service either as a magistrate or an administrative law judge.

Gregory L. Jones. Jones is a resident of Pineville, Louisiana. He has a bachelor of science degree in business administration (pre-law option) and received his juris doctor from Louisiana State University. Jones is currently the magistrate for two towns and one village in the State of Louisiana, namely, Chenevey, Pollock, and Forest Hill. He is or has been a member of the ABA and the Louisiana State Bar Association. He was awarded the Michaelle Pitard Wynne Professionalism Award by the Louisiana State Bar Association’s Young Lawyers Division. At the 2015 ABA Midyear Meeting in Houston, Texas, he was a speaker at the Young Lawyers Division’s Annual Fellows Debate. Currently Jones’ practice consists of local government and political subdivisions law, commercial and contract litigation, personal injury, and general practice areas, such as wills and successions.

Robert Livingston. Livingston is currently a resident of Council Bluffs, Iowa. He obtained a bachelor of science degree from Colorado State University, a master of science degree from Iowa State University, and a juris doctor from Drake University Law School. His current practice includes civil rights cases (both plaintiff and defendant), civil litigation (both plaintiff and defendant), and appellate practice. Livingston is or has been a member of the following bar associations: Pottawattamie County Bar Association, Southwest Iowa Bar Association, Iowa State Bar Association, Nebraska

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Christopher J. Stawski. Stawski is currently a resident of St. Francis, Wisconsin. He received a bachelor’s degree from the University of Wisconsin-Milwaukee and a juris doctor from Marquette University Law School. His current practice includes plaintiff’s personal injury, workers’ compensation, and general litigation. He is or has been a member of the State Bar of Wisconsin, where he served on the Board of Governors for approximately six years; the Milwaukee Young Lawyers Association, having served on the Board of Directors and two terms as president; the ABA, being a member of the Young Lawyers Division with the honor and privilege of serving on a number of committees and as the National Conferences chair and the liaison to the Section of Dispute Resolution; and the Wisconsin Association for Justice, serving as a trustee of the Wisconsin Civil Justice Education Foundation for more than ten years. Currently he serves on the Corporate Sponsors Committee of the ABA Solo, Small Firm and General Practice Division.
How to Deliver Bad
How to Deliver Bad News to Your Client

By Kathleen Balthrop Havener

Uh-oh. The subpoena wasn’t quashed—minor stumble; you’ll recover. Oh, no! Your opponent’s motion for summary judgment was granted—a serious setback. Yikes! You lost the appeal—you’re done. AAARRGGHH!

Your appeal was dismissed because you failed to conform to the rules—call your insurance carrier.

In any of the above situations, you must notify your client. In my estimation, the worst thing that can happen is that your client hears the news before you have let her know. Really. That’s the worst. Don’t let it happen. Just don’t.

My sister has a long-standing motto: “Tell the truth faster.” My sister is a poet, a writer, a sailor, an artist, a teacher, a coach, a cancer survivor, a wife, a mother, a grandmother, a mother-in-law, a sibling, a friend. Her motto applies in every circumstance of her life. About 15 years ago she taught it to me. A client once met my sister and, upon hearing her say it, quickly piped up, “Kathleen says that! It’s so great to know your lawyer stands by that rule.” My sister smiled sweetly and kindly refrained from saying, as she could have, “Of course she says that! I taught her that and a lot more that she knows.” My sister would have been justified.
Breaking bad news to a client is a delicate art. Especially when it’s early in the case or the news is a bad break but not “we’re finished,” one walks a tightrope explaining what has happened without either dashing the client’s hopes or downplaying the severity of the setback. When your client is not general counsel of a company but rather the injured party in a negligence case, your job is that much harder—you can’t rely on the lingua franca of the lawyer’s trade. You must explain the event and its impact on your case in a language the client understands. Let me assure you, the Moms and Pops of this world are not likely to have the foggiest idea what a motion in limine is or what some twist in the hearsay rule means.

Just picture a situation: You receive the judge’s opinion on your opposition to the defendants’ motion for summary judgment. You immediately turn to the final page to learn that the motion is partly granted and partly denied. Not a complete victory, but something of your case survives. How do you break the news to your client in language that allows her to understand exactly what the court has ruled and how it impacts the case without pushing her to despair and without sugarcoating the truth?

**BE A TEACHER**

My first bit of advice is that you have to start preparing your client from the day you accept the case. Preparing to file the complaint, drafting discovery requests, responding to discovery, reviewing discovery responses (especially document productions), each is an opportunity to educate your client about how the system works and to explain the progress of a claim through the court system.

Recently I learned a lesson the hard way about including my client in every step of the judicial process and the cost of failing to do so. The matter in which I represent him is one that requires an expert witness to establish the breach of duty as an element of the claim. The case calendar was not issued until after a status conference on June 8. To my shock, my client’s expert export was due on July 6! I knew I could not use the expert I ordinarily would have turned to because of cost and because of the tight deadline. While I spoke briefly with my her expert report, he was not happy that I had unilaterally made the decision about whom to engage, and worse, agreed to spend his money without including him in all the lead-up to the choice and engagement of the expert witness.

I came mighty close to swallowing a multi-thousand-dollar expert’s bill and weeks of my own time for failing to make my client a part of the decision-making process from the start. It took some serious convincing to bring him around to the idea that I had chosen rightly. And the blame was entirely mine. Had I made the client part of the entire process, nothing that happened would have come as news to him at all. Instead, I had to explain all over again that we needed an expert witness and why; that I had already gone far enough down the path toward completing the report to render my unilateral decision essentially written in stone; and my client—because of my unilateral actions—already owed the expert a significant amount of money. It was a difficult and unpleasant conversation. And it could have been avoided if I had just included my client all along the way. We shouldn’t allow ourselves to become so rushed that, even though we know the right way to do something, we fail always to do that thing the right way. Our hurried lives sometimes cause us to cut the wrong corners. This almost always results in having to spend more time down the road.

**PREPARE YOUR CLIENT FOR ALTERNATIVE OUTCOMES**

When pursuing or defending a lawsuit, always make sure the client understands what you are doing and why. Even more important, explain to the client all the possible outcomes of the step you’re taking. Some people might not want to go this far, but I go through the various outcomes from the best case to the worst. I try to answer questions clearly and simply. I use analogies. Most of my clients would tell you that I begin these discussions the same way every time and it always makes me smile: “My Alabama-born football-loving daddy always said, ‘Three things can result from a forward pass and two of them are bad.’ It sometimes feels the same for any move a
It’s part of your job
Unexpected and unfortunate outcomes happen in our profession. They come with the job. None of us is always on the winning side. Things don’t always work out exactly as we hope they will. From an unsatisfactory evidentiary ruling in a negligence case to losing a landmark case in the U.S. Supreme Court, we all face setbacks. We all have to tell our clients that, despite our best efforts, things didn’t come out our way. Dissembling, minimizing, and second-guessing are as ineffective as they are distasteful. You have to take it on the chin. Your client can take it, too. Sit down. Take your time. Breathe deeply. And tell the bald truth, as clearly and as soon as you possibly can. The time for dissecting, rehashing, and second-guessing comes later. As soon as you know that things have taken a bad turn, your client should know it, too. Don’t sugarcoat it and don’t turn it into a catastrophe if it isn’t one. It just is what it is, whether or not it’s just. Tell the truth faster.

The time for discussing next steps and “where do we go from here?” is not immediate. Among other things, if it’s anything less than the end of your case, you may very well figure out how to use it to your own advantage. The decision to appeal shouldn’t be immediate, either. Appeals cost money, and judgments are commonly upheld—your client should never throw good money after bad. Figuring out where to go after the setback has occurred is something to put off until everyone has had 24 hours to think about it and sleep on it, if possible.

But as for breaking bad news to your client—sooner is always better than later. Your clients will learn some things about you that are important: You’re not afraid; you won’t mislead them; your reputation for honesty and forthright communication is more important to you than your win/loss column. And you will learn something about bad news, about yourself, and about your client, too: Once the task is accomplished, it’s over. The power that bad news has over you is diminished once you’ve shared it. You don’t have to spend another moment dreading delivering news that’s already disclosed. And your relationship with your client will be different forever after. You will have come through combat together, and survived. Two things I hope you will have learned by the time you reach this sentence: First, telling the truth sooner is always the best course. And second, my sister is always right.

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How to Dump Dog of a
A (not so) long time ago, in a town far, far away (Princeton, New Jersey, to be specific), a young-at-heart and highly motivated attorney left the sheltered life of a law firm and struck out on his own, seeking fame and riches. Like most who went before him, he knew that attracting paying clients was the key to the aforesaid riches, if not necessarily the fame. So this attorney networked like crazy, gave talks on legal subjects before many groups, “did lunch” so many times his tailor was on speed dial, blogged frequently, and created a website that Google loved. In short, he developed a presence that quickly began to attract potential clients and developed a reputation that caused other attorneys to make referrals to him. A law practice was formed.

Fast forward a few years. The still young-at-heart (but now older and grayer) attorney had many clients. He was busy all the time, including nights and weekends. To everyone but his accountant, the practice appeared thriving and successful. The attorney had attracted a degree of fame—but the riches still eluded him.

One day his accountant, after conducting his regular review and reconciling the trust account, sat down with the attorney to explain why. Although the attorney had many clients, some were not profitable. The attorney was spending a lot of time on these clients’ matters but much was unbillable; of the time that was billable, he was not collecting sufficient fees. The accountant, echoing the words of Jay G Foonberg in his classic book How to Get and Keep Good Clients (ABA, 3d ed., 2008), told the attorney to “dump these dogs.” Continuing, he said: “Dogs just want you to feed and walk them but don’t earn their keep. A dog will never generate enough fees to make up for all of the time you spend on him.” Strong words, indeed, but the attorney immediately recognized the wisdom of what his accountant was saying.

Now the attorney, being a professional and quite aware of the ABA Model Rules of Professional Conduct, knew that he could not simply discard clients. Rather, he had to protect their interests by either completing their matters as quickly as possible, transitioning them to other attorneys, or just terminating the representation if that was feasible. From this understanding was born the attorney’s strategy for dumping the dogs and avoiding new ones.

WHAT IS A DOG AND WHERE DO THESE CLIENTS COME FROM?

With apologies to canines everywhere, a “dog” is a client that cannot or will not pay its own way. By pay, I do not mean only generate financial rewards; payment can be in the form of psychological satisfaction (e.g., supporting a cause) rather than money. However, most engagements are entered into for money, and unfortunately, your landlord, employees, vendors, and family members need money on a regular basis. Hence, even if you are on the side of the angels, you need to make sure that someone is paying the bills.

A dog can be a new client or an old client; the chief characteristic is that she just sucks up your resources to the detriment of your other clients and/or your fiscal health. At first, the dog may present an interesting matter, intellectually challenging and potentially financially rewarding. But once you get into it,
Dealing with Your Dog

The first step to resolve the problem is to recognize that you have a dog and not just a difficult situation with an otherwise good case or client. Every attorney with more than a little experience knows that there are road bumps in every case, no matter what you do. Further, even the best client may have an occasional cash-flow problem and be unable to pay an invoice in a timely manner. That being said, sometimes you simply have a dog on your hands.

Some of the typical warning signs (growls?) that you may have a dog are:

- The client procrastinates and/or does not follow through on commitments, particularly in providing documents or facts that you need.
- The client frequently has issues with payment of invoices (e.g., the client does not pay on time, does not pay the full invoice, or frequently ignores your invoices, claiming they were not received).
- The client second-guesses your strategy and/or micromanages your work, often citing his own “Internet research.” (A variation of this is the client who says, “My sister-in-law is an attorney, and she told me . . .”)
- The client needs excessive and frequent handholding, often demonstrated by incessant calls for seemingly insignificant reasons. These calls take your time, but when the client receives your month-end invoice, she complains that you should not charge her for 12 minutes when she is sure the call did not last for more than ten minutes (it actually took 20 minutes, but you wanted to give her a break).
- The client objects when you say that you cannot work on his matter right now as you have a brief due in four hours, but will get to it just as soon as you can (and there are no immediate deadlines in his case).
- The client fails to return your calls or e-mails during the week but attempts to contact you on weekends and gets angry that you did not respond until Monday morning.
- Before you label the client a dog, try some remedial measures to see if the mutt can be turned into a purebred. Remedial measures include education, communication, delegation, and renegotiation.

Delegation begins with the initial intake meeting and continues throughout the engagement. As your client is not an attorney, he probably does not know that transaction documents always go through multiple revisions, there is no such thing as a “simple will,” motions require answers and briefs, the other side has a right to discovery, and judges have their own priorities that do not necessarily match the client’s. Legal matters take time (yours) and cost money (theirs). Often, a little education on the realities of the legal system can improve the client’s behavior.

Communication is an ongoing process, and whole books have been written on how to best communicate with clients, when and what to communicate, and perhaps equally important, what not to communicate. Whether you prefer e-mails, telephone calls, memos, or face-to-face meetings, your pooch wants to know what is going on and why. (Please, no texts! Texting is overused to the point of being abused, and it is virtually impossible to convey in a meaningful fashion the important facts or discuss complex issues in an SMS world.) Numerous surveys have shown that a failure to regularly communicate is one of the top-three reasons people rate an attorney poorly and don’t pay the invoice. Nothing turns a lap dog into a snarling beast faster than to receive an invoice for legal services at the end of the month after not having heard from the attorney for weeks.

Delegation is perhaps the least used but potentially most effective means both to educate and communicate with a client, particularly one who is complaining about the legal fees or a lack of attention. Although you may be loath to cede any task to a client for fear of a mistake or loss of control, depending on the nature of the matter there may be many things that a client can do that do not require your time at your billing rate. Discuss these tasks with your client, explain the need for a quick turnaround (i.e., procrastination only harms her interests), and show her how much money she would save by investing some sweat equity into the process.

Renegotiation of fees and limitation of the scope of the engagement should also be considered. During the initial discussions, you probably described what you will be doing for your client. Your written engagement letter should clearly spell out what you will do . . . and not do. (You do have an engagement letter, correct? If not, see ABA Model Rule of Professional Conduct [RPC] 1.2 and 1.5 as well as your local rules.) Your letter
should also contain a statement saying that you reserve the right to raise your rate under certain circumstances, such as on a calendar basis or if the scope materially changes. Your understanding of the scope may not coincide with your client’s understanding, however. Periodically, you may have to revisit the scope, and if the understandings significantly diverge, bring them back together. For example, your client retained you to negotiate a lease on his behalf for a commercial space but then asks you also to review his child’s apartment lease because “a lease is a lease,” and if you are doing one, it will not take you much time to do the other. Right? See Education and Communication, above. (See also Comment 4 to RPC 1.3.) You also can exercise the fee increase clause in your engagement letter as a little more money in your pocket may improve your ability to deal with your dog.

Most of the time, the mutt can change and become, if not a show dog, at least a reasonable companion. But sometimes that dog will just have to be taken to the pound.

DUMPING THE DOG

Assuming that you cannot quickly finish up the matter (and hopefully collect your fees), it may be necessary to terminate the representation while the client still requires legal representation. How you withdraw from the engagement is critical. RPC 1.16, particularly Comments 7, 8, and 9, provide guidance. The comments are clear, but as always, it is in the execution that dogs can turn and bite you.

In representations involving non-criminal matters (leave of the court must be secured to terminate representation in a criminal matter), the primary issues you will need to address before and during the termination of representation are:

1. timing of termination;
2. protecting the client’s interests through the termination process; and
3. winding up the representation.

Protecting the client’s interests during the withdrawal process is arguably the most important but also the most uncertain issue. This can include finishing tasks that can reasonably be completed prior to termination or alerting the client to tasks that need to be addressed and the date by which they must be accomplished. It also can include securing alternative counsel for your client, such as by making a referral to another attorney. (Your mutt may turn into the other attorney’s prize client. You never know.)

The timing is frequently dictated by the nature of the matter and, when litigation is involved, the local court rules. While your client can terminate you at his or her convenience, you must consider all the facts of the situation when terminating the representation. For example, it is considered bad form (and potential malpractice) to drop the client in the middle of negotiations for a major acquisition or just after the discovery end date. Similarly, if it is three weeks before trial, the court may require you to remain in the case if leaving would prejudice the client’s interests, inconvenience the court, or unfairly raise the costs to the other side.

Winding up activities should include preparing a detailed memo to the file discussing the significant issues that remain in the case, critical dates (e.g., the discovery end date, the expiration of the mortgage rate lock, running of the statute of limitations, etc.), and action steps for the client and/or replacement counsel. If you are referring the matter to another attorney, you will need the client’s permission to discuss the details of the case, and your closure process should include a memo of what you discussed, with whom, and the next steps. You also will need to prepare a detailed “close-out” letter to the client, which should include a discussion of the remaining issues and critical dates.

Finally, you should carefully consider whether to make an effort to collect outstanding fees, particularly if the reason for termination is that the client has not paid invoices. Much has been written advising attorneys not to pursue clients for unpaid fees, based on the premise that fee collection activities are the surest means of triggering a malpractice claim. On the other hand, telling a client that you are terminating the engagement and intend to pursue the unpaid fees can result in both

AVOIDING DOG BITES

Although every attorney in private practice will eventually own a dog, there are some steps you can take to minimize your exposure to fleas:

1. Know what you do well and can do profitably so that you can better evaluate a case (and client) before you agree to the engagement.
2. If the potential client came to you as the third or fourth attorney on the matter, carefully consider why this is the case. What is the reason the potential client terminated the other attorneys (or was dropped by them)?
3. Does the client expect you to bankroll the matter? While you may be willing to take a case on a contingency basis, the client should have some skin in the game. If she cannot or will not cover the expenses, you should carefully evaluate the person’s real commitment to and confidence in her own case.
4. If you decide to take on a matter that you have not handled before in order to get the experience, understand that the client should not have to pay for your learning opportunity. In other words, suck it up and realize that the matter likely will not be profitable. Your financial loss is simply the price of tuition and not a sign that you have a dog to deal with.

Likely, the vast majority of clients and cases will bring you both psychic and financial satisfaction. Dogs are actually rare, and many can be trained through education, communication, and delegation. If not, there is always renegotiation. But if all else fails, head for the pound.

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What should you do if you start up your computer and all you get is an error message? I'll get into the specifics of handling this dreaded situation in just a bit, but first I ask that you do a couple things right now, before you finish reading this article.

First, go get a piece of paper and write down your key passwords on them. Next, tear out the pages containing this article from the rest of the magazine. Yes, that's right, just tear them out. Pages 20 to 23. Use a scissors if it will make you feel better. Now, staple them together with the paper containing your key passwords and decide where you can safely store them after you’re finished reading.

Why am I asking you to destroy a perfectly good issue of GPSolo magazine? For your own peace of mind. Like having jumper cables already in the car or fresh batteries on hand during a power outage, you’ll feel more assured that you can manage an unexpected computer problem if know these instructions are waiting for you, stored in a safe place. You will be ready to start your recovery right away.
WHY THIS IS IMPORTANT FOR YOU
More than likely, your files are backed up in your office, in the cloud, or both. That is great; however, these backups may give you a false sense of security. They may not be complete, up-to-date, or even working. And you may be unaware of how much time and hassle it takes to get your system back to where it is right now, working as you like it.

Even if you are not particularly tech-savvy, you may be able to speed up the recovery process or even apply an easy fix yourself. But you have to make sure you don’t do anything to make things worse.

This article can help you get started on the recovery process whether you do it yourself or call in a professional. The focus will be on Microsoft Windows PCs, though coping with Mac failures involves similar steps.

WHAT TO DO AFTER A COMPUTER CRASH
First, take a deep breath. The prospect of losing everything that you’ve saved on your computer can be unnerving.

Second, don’t make any rash moves. Don’t try to restart or power up your computer just yet. After taking a deep breath, begin the process of investigating what happened and what is the safest, fastest way to recover. It could be easier than you think, or it could turn into a big hassle, depending on what you do next.

Third, think about your existing backups. You may now be entirely dependent on them. Make sure they are safe!

DIY OR CALL A PRO?
You may want to try fixing the problem yourself. Read through this article before taking any action. The factors to weigh here are your time and money and the safety of your files.

If you can accurately determine that the problem is simple and can be easily fixed, you might save time and money by fixing it yourself. However, if you are still able to do billable work while your computer is down, hiring a computer pro likely will be less expensive.

If you need to get back up and running as fast as possible (particularly if you can’t do any billable work until the problem is fixed), call a professional. If none is immediately available, then try some basic troubleshooting while you are waiting.

Let’s see what you can do on your own with reasonable safety.

DID YOUR HARD DRIVE CRASH?
Computer crashes can be divided into software failures and mechanical failures. The time, expense, and type of fix can vary widely for each kind of failure.

How can you tell what kind of failure took place? Think about what happened before the crash. What sounds came from the computer? You can listen to different sounds that bad hard drives make at the DriveSavers website (tinyurl.com/pv2gjyt).

Really bad sounds include clicking, clunking, grinding, or whirring. These sounds may come from the read/write heads damaging the hard drive platters. If you heard one of these sounds, power off your computer if it is on and don’t try to start it up. These sounds or the complete absence of any sound or vibration can signal a serious mechanical failure.

Even if your computer sounds fine, you still could have a physical problem with the drive. Differentiating between software and silent mechanical failures can be difficult. They both can produce error messages like:
- Invalid system disk
- Boot failure
- Hard disk error
- NT boot loader missing
- Missing operating system

These error messages could signal a small issue like a non-bootable USB drive connected to the computer or a loose drive cable connection. Yet the same messages might result from a dead hard drive.

Recovery follows very different paths for each type of failure. Recovering from a software issue could be relatively easy using the built-in features in Microsoft Windows. Dealing with a mechanical crash takes more time.

MECHANICAL HARD DRIVE FAILURES
The most common cause of a hard drive crash is simply age. After spinning off and on for three to five years, any one of a number of mechanical parts can wear out or break in a disk drive. (If you have a solid state drive, or SSD, it has no moving parts and is less likely to fail mechanically.)

Often you will get some warning signs of an impending mechanical failure. The computer may perform slowly or erratically. When starting up, the computer may take longer than normal before the computer desktop appears on your monitor.

By far the fastest, most complete way to recover from a mechanical failure requires that you have a drive image backup. (For instructions on creating a drive image backup, see my article “New Backup Options to Protect Your Work” in GPSolo’s July/August 2013 issue, tinyurl.com/o3meq46.) If you have such an image, the recovery steps are:
1. Replace the failed drive with a new one of equal or larger capacity.
2. Restore the contents of the drive using drive image backup software.
3. If necessary, restore recent files—one that were saved or modified after the last drive image backup—from a continuous or a very recent cloud or local backup.

If you have ordinary, file-by-file backups, the recovery process steps are:
1. Replace the drive.
2. Reinstall and update Microsoft Windows and hardware drivers.
3. Reinstall and update all your programs.
4. Reset all your software settings.
5. Restore your files.

The recovery process could be especially long and expensive if your backups are incomplete, out-of-date, or bad. At worst you might experience weeks of delays, pay a four-figure price for data recovery, and still not get everything back.

DID A VIRUS ATTACK YOUR COMPUTER?
If your computer did not show any of the characteristic noises or erratic performance signaling a mechanical drive failure, some detective work is needed. Consider what happened right before your computer stopped working or what might have happened the last time you used the computer.
Was your computer behaving strangely? Did it reboot for no apparent reason? Did you see any strange screens, icons, or mouse behavior? Had you opened any e-mail attachments that might have been dubious? These and other occurrences may signal that your computer has been infected by a virus.

Immediately disconnect from the Internet if you suspect a virus. You might think that your computer is just frozen with some error message on the screen. Yet a virus could be at work trying to upload information to criminals or infect other computers or drives on a network to which you’re connected.

If your computer connects to the Internet through a network cable, disconnect the cable from the side or back of your computer. If you use a WiFi connection to an access point or hot spot, turn off the radio on your computer using the mechanical radio switch that you may have on the front edge, side, or back of your computer.

If you are somewhat technically inclined and have a good backup, you might decide to eliminate the virus yourself. Presumably you have antivirus software already on your computer. Run a scan to see if it turns up any problems. Check your computer with MalwareBytes (malwarebytes.org), an excellent, free program that can catch things your antivirus software might have missed.

This may be a good time to bring in a computer pro because many are highly experienced in finding and removing malware. They probably can eliminate computer infections much faster and more thoroughly than you can.

PROTECT YOUR EXISTING BACKUPS
Whatever the nature of your computer failure, you may have to resort to restoring from a backup. For this reason, your backups have now become especially valuable.

Take steps to protect your backups before starting the restoration. It is a good idea to have a complete duplicate of your most recent backup in another physical location. This protects you from losing everything to a fire, storm, power surge, or break-in where your original backup drive is located. Whether your recovery takes a day, a few days, a week, or longer, your files are safe.

If you have backed up the files on your computer to a cloud service, you can begin downloading all of these backed-up files from the cloud to another computer. This step serves two purposes. First, you may need these files after you get your broken computer up and running. Second, you will again have copies of your irreplaceable files in two different geographic locations: the cloud and a local external hard drive.

RECOVERING FROM SOFTWARE FAILURES
Assuming that you’ve ruled out mechanical problems and viruses, restarting your computer is a good next step. First, disconnect any USB drives from the computer. They could cause a drive error message.

Pressing the F8 key (often above the 9 and 0 keys on your keyboard) every second while your computer is starting up may take you into safe mode. Your brand of computer might require pressing a different key. If your computer starts up fully in safe mode, at least you know that your hard drive is all right. If you have important files on your computer that are not backed up, now you can either copy them or back them up to an external drive for safekeeping.

Microsoft Windows has two built-in recovery options. Using a restore point you may be able to restore your operating system and programs to an earlier point in time. Your computer also has a Windows recovery option or possibly a proprietary recovery feature specific to your brand of computer. The recovery option can restore your computer to its factory condition, but it won’t include any programs that were added afterward or any settings changes that you have made. You are much better off if you have a recent drive image backup. It can restore your computer to exactly the way it was at the time of the backup. For this to work, you may need to have a recovery disk or flash drive that was created as one of the steps in setting up the drive image backups.

WHAT NOT TO DO
You may feel exasperated at being prevented from getting at important materials and information that you have saved on your computer. This state of mind can lead you to try to fix the problem immediately—which can be risky. Depending on the problem, you actually can make things worse.

A natural response might be to repeatedly attempt to restart the computer or remove the drive from the computer. You might even be tempted to give the computer a few thumps with your hand in an effort to get something unstuck.

Don’t.

Until you are confident that your backups are in perfect condition and that you can get all your files back from one or more backup sources, it pays to be conservative with the solutions you try.

THREE SCENARIOS
Often it is not immediately apparent what is preventing you from starting up your computer. That’s frustrating. It is like being unable to open the door to your physical office and not knowing what is happening on the other side of the door.

Let’s look at three common scenarios you may be facing:

First, a problem with your Windows operating system is analogous to losing all the power to your office and being locked out. All your stuff is still in your workspace, but you can’t get in and nothing works. If you are facing this scenario with a Windows operating system problem, you may have a quick fix. The Windows restore process is akin
to unlocking your door and getting the power to come back on.

Second, a software failure or virus attack is like the first scenario, but, in addition, the entire office space has been ransacked and everything in it is broken. Pieces are scattered everywhere. If you have a full drive image backup, recovering from a software failure or virus attack could take as little as an hour or two. Restoring from your image backup not only brings back your operating system but also restores all your programs, settings, and files. This is like having a cleanup crew clear out your devastated office space and, as if by magic, put everything back exactly where it was before.

Unfortunately, if you have only file backups, your recovery process is like having a delivery company come and drop off a big collection of boxes containing a computer, monitor, software downloads, desk and chair, lights, file cabinet, and another set of boxes containing all your client files. Then it is up to you, or someone you hire, to painstakingly unpack everything, put it all where it goes, connect the cables and cords, and replace the contents into your desk drawers and file cabinet. This may take days or more than a week, and things still won’t necessarily be how you had them before, but at least you have your stuff back.

Lastly, a mechanical hard drive failure is analogous to discovering that your physical office space has disappeared. There’s simply an empty floor with nothing on it—no door, no walls, outlets, windows—nothing. In this scenario everything needs to be rebuilt. You or someone else has to remove your hard drive, buy a new empty drive, and install it. You may face a delay of days in getting a compatible drive and the drivers needed for it to work in your computer. Then you still have to go through all the steps and delays of the previous scenario to get your operating system, programs, and client files installed and working.

**DATA RECOVERY COMPANIES**

If you are struck by serious software corruption or a mechanical drive failure and do not have a good, recent backup, you will need to work with a data recovery company to salvage the files from your hard drive.

The following are some of the better companies.

My Hard Drive Died claims to have succeeded with recoveries 96 percent of the time (myharddrivied.com). At current prices, they will diagnose your drive and provide a list of the folders and files they can recover for $50. To proceed with recovery is $750. Scott Moulton, the principal, trains others in the science of data recovery and also does computer forensic work for litigators and law enforcement.

**Gillware Data Recovery (gillware.com)** offers a free evaluation and inbound shipping of your drive. After reviewing their list of recoverable files, you pay an average of $700 if you wish to proceed. The cost depends on the size of the drive and whether it is encrypted or has been exposed to flood or fire.

Kroll Ontrack (krollontrack.com/datarecovery), originally a Minnesota company, bills itself as a world leader in the field. They charge about $100 for evaluation and an average of nearly $1,500 for recovery. It takes them a few days to deliver a list of recoverable files and then a few more days after approval to deliver a hard drive with the recovered files.

**DriveSavers (drivesavers.com)** bills itself as the industry leader in data recovery and customer service. They have certified technicians who are experts in multiple encryption recovery techniques. They offer three service levels with varying rates and turnaround times that vary from seven days to one day or less.

**CONCLUSION**

We all hope we never have to deal with a computer crisis. At the same time, we know that hard drives crash, software fails, and viruses attack.

Be prepared. Take care of yourself and your practice with a solid backup plan. Your backups will be ready to actually save the day if you experience a computer crash. Unfamiliar, ominous sounds or messages coming from your computer will still be unnerving; however, your path to recovery will be less stressful and more smoothly managed.

Wells H. Anderson, J.D. (info@activeonlineinc.com, 888/922-1120), works with solos and small law firms across North America. His company, Active Online Inc. (activeonlineinc.com), prevents costly downtime and loss of data by providing ultra-secure backup systems and defenses against Internet threats.

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What to Do When Your Data Is Breached

By Sharon D. Nelson, David G. Ries, and John W. Simek

When, not if. “This mantra among cybersecurity experts recognizes the ever-increasing incidence of data breaches. In an address at a major information security conference in 2012, then-director of the Federal Bureau of Investigation (FBI) Robert Mueller put it this way: “I am convinced that there are only two types of companies: those that have been hacked and those that will be. And even they are converging into one category: companies that have been hacked and will be hacked again.”

Mueller’s observation is true for attorneys and law firms as well as Fortune 500 companies. There have now been numerous reports of law firm data breaches. The FBI has reported that it is seeing hundreds of law firms being increasingly targeted by hackers. Law firm breaches have ranged from simple (like those resulting from a lost or stolen laptop or mobile device) to highly sophisticated (like the deep penetration of a law firm network, with access to everything, for a year or more).

Lawyers and law firms are beginning to recognize this new reality, but all too often they expose themselves to unnecessary risk simply because they don’t have a data breach response plan. Attorneys have ethical and common law duties to employ competent and reasonable measures to safeguard information relating to clients. Many attorneys also have contractual and regulatory requirements for security. Attorneys also have ethical and common law duties to notify clients if client data has been breached.

Compliance with these duties includes implementing and maintaining comprehensive information security programs, including incident response plans, for law practices of all sizes, from solos to the largest firms. The security programs and response plans should be appropriately scaled to the size of the firm and the sensitivity of the information.

THE OLD MANTRA: KEEP THE BARBARIANS AT BAY

In a more innocent time, we really thought we could keep the barbarians outside the walls that guard our data. The analogy was protecting the network like a fortress, with strong perimeter defenses, sometimes compared to walls and moats. Alas, those days are gone.

For years, the emphasis was on keeping villains—cybercriminals, state-sponsored agents, business espionage spies, and hackers—out. We went from fairly simple antivirus software and firewalls to more sophisticated antivirus software and firewalls, and, finally, to enterprise anti-malware security suites, next-generation security appliances, and other strong technical defenses.

The defensive tools have gotten more sophisticated and more effective. Sadly, what we have learned is that all the would-be intruders were not only matching the good guys step for step, they were outpacing them.

It took a surprisingly long time for everyone to “get it”—but in the end, the security community realized that if the bad guys are smart enough and target a particular entity, they are likely to be able to successfully scale the walls we built to keep them out. And with that realization, “detect and respond” became the new watchwords in cybersecurity.

Mind you, we are still trying to keep the bad guys out—that is our first line of defense. But now that we know that our first line of defense is too often a Maginot Line for sophisticated attackers, we have moved forward in our thinking.

Although detection and incident response have been necessary parts of comprehensive information security for years, they previously had taken a back seat to protection. Their increasing importance is now being recognized. Gartner, a leading technology consulting firm, has predicted that by 2020, 75 percent of enterprises’ information security budgets will be allocated for rapid detection-and-response approaches, up from less than 10 percent in 2012.

THE NEW MANTRA: IDENTIFY, PROTECT, DETECT, RESPOND, RECOVER

The increasing recognition of the importance of detection and response has been evolving for a number of years. It is a core part of the National Institute of Standards and Technology’s Framework for Improving Critical Infrastructure Cybersecurity, Version 1.0, that was released in February 2014 (tinyurl.com/msgse).

Although the framework is aimed at security of critical infrastructure, it is based on generally accepted security principles that can apply to all kinds of businesses and enterprises, including law firms. It provides a structure that organizations, regulators, and customers can use to create, guide, assess, or improve comprehensive cybersecurity programs. The framework, “created through public-private collaboration,
provides a common language to address and manage cyber risk in a cost-effective way based on business needs, without placing additional regulatory requirements on businesses.”

The framework allows organizations—regardless of size, degree of cyber risk, or cybersecurity sophistication—to apply the principles and best practices of risk management to improve the security and resilience of critical infrastructure (as well as other information systems). It is called “Version 1.0” because it is supposed to be a “living” document that will be updated to reflect new technology and new threats—and to incorporate “lessons learned.”

The core of the framework, its magic words, are “identify, protect, detect, respond, and recover,” which should shape any law firm’s cybersecurity program. “Identify and protect” was where we started in the early days of cybersecurity—and while those words are still important, “detect and respond” have surged forward as a new focus—along with, of course, recovering from security breaches, no easy task. It is especially tough if you don’t know you’ve been breached—and the average victim has been breached for seven months or more before the breach is discovered!

INCIDENT RESPONSE PLANS

The core of the respond function is advance planning. This means attorneys and law firms need a plan, usually called an incident response plan (IRP), which often is focused on data breaches, but “incidents” can refer to ransomware, attempted hacks, an insider accessing data without authorization, or a lost or stolen laptop or mobile device.

Most large firms now have these plans in place, but many smaller firms do not. More and more, clients and insurance companies are asking to review law firms’ IRPs. In the face of ever-escalating data breaches, now is a good time to develop and implement a plan or to update an existing one. After all, football teams don’t get the playbook on game day.

The problem with all plans is that they may not survive first contact with the enemy. That’s okay. Far worse is having no plan at all and reacting in panic with no structure to guide your actions. The first hour that a security consultant or law enforcement officer spends with a business or law firm after the discovery of a data breach is very unpleasant. Kevin Mandia, the founder of Mandiant (fireeye.com/services.html), a leading security firm, has called it “the upchuck hour.” It is not a happy time.

Don’t rely on a template IRP. No two law firms are identical, and all have different business processes, network infrastructures, and types of data. Although templates may serve as a starting point, an IRP must be customized to fit the firm—the smaller the firm, the shorter the plan is likely to be. For a solo practice, it may just be a series of checklists, with who to call for what. Books and standards have been written about IRPs. (See “Further Resources” above for a few of our favorites.)

Qualified professionals also can be consulted for more details. The following is a condensed and, we hope, digestible overview.

THE ELEMENTS OF AN IRP

- **Internal personnel.** Identify the internal personnel responsible for each of the functions listed in the IRP. Identify them by position titles rather than by name because people come and go. A broad-based team is required for a firm of any size: management, IT, information security, human resources, compliance, marketing, etc. Have a conference call bridge line identified in case a breach happens at night or on a weekend, and include home/cell phone numbers and personal as well as work e-mail addresses. This list will need to be updated regularly as people join or leave the firm.

- **Data breach lawyer.** Identify the contact information for an experienced data breach lawyer—many large firms now have departments that focus on security and data breach response, and some smaller firms have a focus on the area. Don’t convince yourself that you can handle this without an attorney who is experienced in data breaches. Your data breach lawyer (if you selected a good one) will be an invaluable quarterback for your IRP team—and he or she may be able to preserve under attorney-client privilege much of the information related to the breach investigation.

- **Insurance policy.** Identify the location of your insurance policy (which darn well better cover data breaches). You need to make sure you are covered before you start, and list the insurer’s contact information because you are going to need to call your insurer as soon as you are aware of a possible breach.

- **Law enforcement.** Identify the contact information for law enforcement (perhaps your local FBI office), often the first folks called in.

FURTHER RESOURCES


FURTHER RESOURCES


Intrusion and data loss logs. If you have intrusion detection or data loss prevention software, logs from them should be preserved and provided to your investigators immediately. If you don’t, you may want to think about implementing such software.

Your bank. Identify the contact information for your bank in case your banking credentials have been compromised.

Public relations consultant (optional but often useful). Identify the contact information for a good public relations firm. If you are not required to make the breach public, you may not need one, but if it does go public, you may need to do some quick damage control.

Your insurance coverage may provide for this, in which case the insurance company will put you in contact with the appropriate firm.

Clients and third parties. How will you handle any contact with clients and third parties, remembering that you may wish not to “reveal all” (if notice is not required) and yet need to achieve some level of transparency? Be forewarned that this is a difficult balance. You will feel like the victim of a data breach, but your clients will feel as though you have breached their trust in you. A data breach that becomes public can cause a mass exodus of clients, so work through your notification planning with great care. Be wary of speaking too soon before facts are fully vetted—it is a common mistake to try limiting the damage only to end up increasing it as the scope of the breach turns out to be far greater or different than first known.

Employees. How will you handle informing employees about the incident? How will you ensure that the law firm speaks with one voice and that employees do not spread information about the breach in person or online? How will your social media cover the breach, if at all?

Data breach notification law. If you have a data breach notification law in your state (and almost all do), put it right in the plan along with compliance guidelines. You may be required to contact your state attorney general. These laws vary widely, so be familiar with your own state law. Also, determine whether other states’ breach notice laws may apply owing to residences of employees or clients, location of remote offices, etc. Make sure that the relevant data breach regulations are referenced in the plan and attached to it.

Other legal obligations. Identify any impacted data that is covered by other legal obligations such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA) or client contractual requirements, and comply with notice requirements.

Training on the plan. Conduct training on the plan. Make sure that everyone understands the plan and their role under it.

Testing the plan. Testing can range from a quick walk-through of hypothetical incidents to a full tabletop exercise. Include contacts with external resources to make sure that everything is up-to-date. This will help to make everyone familiar with the plan and to identify areas that should be revised.

Review of policies. Does the breach require that IT and information security controls and policies be updated or changed? Does what you learned from the breach require that the IRP itself be revised? The IRP should mandate at least an annual review even without an incident.

FINAL WORDS: PREPARE NOW!
The new paradigm in security is that businesses (including law firms) should prepare for when they will suffer a data breach, not for if they may suffer a breach. This requires security programs that include detection, response, and recovery, along with identification and protection of data and information assets. Successful response requires an effective incident response plan. Attorneys who are prepared for a breach are more likely to survive and limit damage. Those who are unprepared are likely to spend more money, lose more time, and suffer more client and public relations problems.

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Have you ever heard the term “cash is king”? This refers to the importance of cash flow in the overall fiscal health of a business. For solo and small law firms, cash flow is the lifeblood of running the firm. Positive cash flow allows you to:

- have psychological peace of mind;
- focus on practicing law and operating efficiently;
- obtain discounts from vendors and gain purchasing power;
- be in a position of strength when settling outstanding invoices due;
- earn excellent credit ratings from financial institutions to establish lines of credit; and
- create flexibility in making business decisions.

Cash flow management in solo and small law firms can be particularly challenging. You need to account for the time lag between cash going out and cash coming in. This requires planning, attention to detail, financial and management discipline, and strong internal policies and procedures for billing and collection.

Most lawyers just want to practice law. While in law school, they never thought they would have to be the CEO of their own practice, requiring them to undertake accounting and administrative tasks. But, guess what? You are running a business. And now it looks like your cash flow is in drought.
WHAT CREATES THE DROUGHT?
It doesn’t take much in a professional service business to hit a cash flow drought. The following are a few factors that may contribute to cash flow drying up:

- poor billing practices (e.g., significant time lag before a client is invoiced);
- out-of-pocket costs (e.g., client advances) that are due before being invoiced and collected from the client;
- firm overhead (e.g., rent and insurance) that is due monthly while payroll may be due every week or every other week;
- poor internal structure and lack of discipline for accumulating time and getting invoices out in a timely fashion;
- no structure for collection of outstanding invoices;
- no policy or enforcement for retainers and replenishment of retainers;
- repayment of loans or lease commitment payments; and
- acquisition of equipment or other assets.

The solution to cash flow problems is to be proactive—prevent the drought from occurring.

There are common themes seen when a cash flow drought is experienced: poor firm culture, lack of discipline, poor organizational skills, little structure, and no consistency in applying policies.

STRATEGIES YOU CAN IMPLEMENT
The solution to cash flow problems is to be proactive. There are several strategies you can implement to prevent the drought from occurring and enable you to accumulate that rainy-day fund.

Firm culture. How do you want your staff, clients, and professional network to perceive your firm? Establishing a strong firm culture that emphasizes the importance and value of client service, along with the significance of timely billing and collections, will enable your firm to deliver first-rate service to clients and ensure staff has a clear understanding of firm goals. Top management sets the tone; you need to lead by example.

Discipline. Deadlines must be established and enforced. Sure, there are exceptions, but they should be few and far between.

Consistency in billing and collections. Inconsistent billing practices, long delays on accounts receivable, and languishing WIP (work in process, i.e., work that has been completed but not billed) can wreak havoc on a firm’s finances. Billing and collection policies help keep cash flow positive.

Business plan. A business plan identifies strategic initiatives the firm intends to implement to reach the partners’ goals. A well-conceived business plan offers a road map for the future.

Budget. Prepare a monthly budget to guide you on what revenue you need to bill and what cash flow you need to generate. The budget should project costs and income. The assumption underlying the budget should be carefully developed and understood. If you have a sense of how much cash you need each month to survive, the sense of urgency to bill and collect is far greater. Many attorneys believe that revenue budgets are meaningless because lawyers never know where tomorrow’s business comes from. The reality is that revenue can be budgeted by analyzing your firm’s larger clients and reviewing the type of services produced over the last several years. From this exercise, trends and client needs can be detected, which can be translated into assumptions and revenue estimates. If a firm does nothing more than ask for an estimate of billings, it will be able to establish a database for revenue estimates. In the absence of sound revenue budgets, management decisions for the following year (e.g., hiring decisions) may be made with potentially adverse results, either on the up- or downside of the firm’s business cycle.

Policies regarding advance payments. Require that clients pay a fee up front. By doing so, your clients demonstrate their commitment to the matter. For clients where annual work is performed, the prior year’s work must be paid in full before the current year’s work starts.

Controlling client advances. This can be complicated because these advances can put a drain on the firm’s cash. Here are some things to consider:

- Try to have your client pay directly for as many advance costs as possible.
- Insist on retainers or at least deposits to cover estimated advances.
- Bill client advances immediately.
- Create a predetermined minimum amount you are willing to advance.

Partner compensation or distribution. Never have the firm borrow for partner compensation or partner distribution.

Time entry practice. A cutoff date should be established to close out the monthly time posting. By establishing a cutoff date, everyone in the organization works together to post time and create timely billing.

Billing practice. Bill regularly and timely. Send bills at the same time each month and be consistent. It is important to establish deadlines for printing the billing worksheets, writing up the invoice, proofing the invoice, and mailing the invoice. There is no rule for when to bill. It can be done daily, weekly, monthly, or by case or matter. Consider advance billing and retainers. Don’t wait until your retainer is exhausted before securing additional funds from the client.

Review of unbilled time. Firms concerned about cash flow should review all unbilled time and make certain that all
files have been properly billed.

**Mailing invoices.** Set a time deadline for mailing the bills. Consider electronic mailing of bills (this saves time and postage). Some clients today require e-billing. Please make sure your billing system meets the e-billing requirements.

**Collection practices.** Regular contact and follow-up is vitally important. If payment is due within 30 days, don’t wait 90 days or more to call. Collections issues do not age well, so it is best to handle these matters while they are current. Improve collections by doing the following:

- Put someone in charge of the process and collection calls. Know what you will do first, second, and third when the check doesn’t arrive on the due date. Establish procedures to follow up automatically with clients for unpaid amounts. Clients typically pay first those vendors that stay on top of their outstanding invoices. The squeaky wheel always gets the attention.
- Consider extra measures for larger bills or slow-paying customers. Consider calling to confirm receipt of the invoice and to review any questions. Consider calling again several days before the invoice due date to handle any questions and, more importantly, gain clarity on whether timely collection will be a problem.
- If you have doubts about your clients’ ability to pay, take action. Put them on a payment plan, place a lien on their property, or help them obtain a loan from a bank.
- In addition to accepting checks, accept payment by credit card or electronic payments.
- Send clients an electronic bill that allows them to pay online, or obtain the client’s consent to charge his or her credit card within a specified period of time after the bill is sent if no objection is lodged.

**WHAT TO DO NOW?**

Okay, so I’ve told you about the benefits of positive cash flow, the common problems that create cash flow droughts, and what strategies you can implement to prevent the drought from occurring, but you’re in a drought right now. What are some things you need to do right away?

- Get organized and create a budget and worksheet for cash flow in and out.
- Depending on the situation, you may want to create a weekly cash flow worksheet.

**CONCLUSION**

Developing a good cash flow strategy is key to maximizing your cash flow. Make sure your firm has enough liquidity on the days that ongoing payments come due, which means some basic budgeting is in order. This kind of management can best be accomplished by taking control of cash flow. Remember you’re the CEO of your firm, and running a profitable company requires being conscious of all the costs of doing business. Implementing a cash flow management strategy will inevitably boost your firm’s long-term success.

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What to Do When Your Billing Process Stinks

By Arita Damroze

When things go wrong with your firm’s billing operations, your response will likely be one of these:

- “No problem. We can handle it.”
- “This is a problem, but with a little help, we can recover quickly.”
- “This is a serious problem. It will take weeks to recover.”

Problems with the billing process are inevitable in all law firms. Your staff, systems, and software can fail. The purpose of this article is to provide some tips that, if followed, will enable your firm to better handle the unexpected. The article presents six common occurrences that interrupt or slow down a firm’s billing process. Each event contains hypothetical situations illustrating different levels of preparedness and responses to the event.

**STAFF TURNOVER**

The sudden loss of key billing staff will set a firm’s billing process back days, weeks, or even months depending on the firm’s approach to preparedness for such an event. The three scenarios below describe how a firm may handle the loss of the firm’s key billing person.

**Firm A.** The firm’s billing administrator abruptly leaves the firm and cannot be reached. No problem. The firm has other staff trained on the firm’s billing and accounting software. With the help of the firm’s billing procedures manual and bill status log, the backup billing administrator can handle the bills until a new key billing administrator is hired. The outgoing billing administrator has kept the billing procedures manual current with step-by-step instructions for producing the firm’s bills, including how to log in to the system and whom to contact for help, if needed. The firm has maintained a status log for each billing cycle showing where each billable matter stands in the current billing cycle (e.g., draft bill under review, on hold, final bill mailed or e-mailed, etc.). Whatever the circumstances that caused the loss, Firm A can get its bills out on time.

**Firm B.** The firm’s billing administrator abruptly leaves the firm and cannot be reached, and no one has a clue about the billing system. A billing procedures manual doesn’t exist, but the firm has file copies of bills, deposit records, and a current accounts receivable report. However, because the outgoing billing administrator kept things locked down, no one has the login credentials for the billing software, not even the firm’s IT consultant. And, if they did have access, they would have to struggle to figure out how to produce bills because no one has been trained to serve as a backup billing administrator. This is a problem, but the firm has a support plan with the billing software company. The company can help the firm log in to the program and put the firm in touch with a consultant who can analyze the data and train new staff. The firm moves quickly to hire and train new staff. It will take some time, but with help, the firm can still get bills out, although a little behind schedule.

**Firm C.** The firm’s billing administrator abruptly leaves the firm and is nowhere to be found. No one has a clue about the billing system, there is no billing procedures manual, and there are no copies of bills. Before exiting, the billing administrator locked all users out of the system. No one can log in to the software, and the firm has no vendor support plan. There is a stack of recent bills on the billing administrator’s desk but not for all the clients. It’s not clear where the rest are: Already mailed? Not run yet? Who knows? The bank account shows recent deposits, but it is unclear whether they were entered into the billing system. The most recent deposit slips...
on the billing administrator’s desk are from two months ago, difficult to read, and unaccompanied by copies of checks. The firm had a work-from-home arrangement with the billing administrator, and some of the records may be off-site. It will take considerable time to recover from this situation. The firm may have to contact the billing administrator’s family or associates in an attempt to retrieve the missing records. The firm may even have the uncomfortable task of contacting its clients concerning the status of their bills.

Even the easiest-to-use billing systems require training.

Clearly, Firm A is best prepared to handle the loss of key billing staff. Organized systems don’t just fall into place automatically. Without detailed, well-maintained written procedures, things will go wrong, and the billing process will be delayed. And when the process is finished, the firm may be uncertain that it was done correctly. Firms like Firm A also send most of their bills via e-mail. E-mails have a sent status, and optionally a read receipt. The top legal billing systems feature a built-in e-mail bills function.

Firm B can get its bills out, but it is back to square one, constructing a new version of the procedures that the outgoing administrator kept in her head. This time the firm will put the procedure in writing and make it available to everyone. Learn. Document. Share.

Billing will be delayed for months at Firm C as it tries to find the former billing administrator, engage help from the software vendor to gain access to the software, and engage a consultant to analyze the data.

**SYSTEM PROBLEMS**

System problems may occur from time to time. These scenarios illustrate the best and worst approaches to handling them:

**Firm A.** The billing software displays an unusual message when starting up. Your billing administrator consults the product’s online knowledge base for an explanation. He’s not comfortable following the prescribed steps to correct the message, so he calls the firm’s software consultant for advice. They work together to resolve the issue in a matter of minutes.

**Firm B.** The billing software has been displaying an unusual message for weeks, but the billing administrator clicks “OK” each time, and the program continues to work. Because it’s working, he doesn’t want to take the time to investigate. He has too many things to do.

**Firm C.** The billing software displays an unusual message, and every time the billing administrator tries to run a bill, the program locks up. So, he decides to restore the data from last night’s backup. After the restore, the message is gone and the bills are running. A month later, the billing administrator attempts to run the bills, but there are no time entries to bill. On investigation he discovers that when he restored the backup, he created a new database but the timekeepers were still entering time into the original database. He now has the challenge of joining the two databases.

When approaching system problems, first acknowledge that something is wrong. If your software has been displaying an unusual message for weeks, something is wrong. Don’t ignore it. Call the vendor’s support line and stick with them until the problem is resolved. Alternatively, contact a consultant certified on your software who can help to resolve the problem. Always get help before making critical changes to your data, such as restoring from a backup.

**THE TRAINING GAP**

Even the easiest-to-use billing systems require training. You may figure out how to print a bill without training, but what happens next is not always obvious. Consider these scenarios:

**Firm A.** The firm’s hourly rates are changing next month. The billing administrator has gathered all the pertinent information and has entered the new rates into the system to take effect on the first of the month. When the first of the month comes, all the draft bills contain the correct hourly billing rates.

**Firm B.** The firm’s rates have changed, but several draft bills contain the old rates. The billing administrator checks her notes from the training session and figures out what went wrong, makes a change to the rate tables, and reruns the draft bills.

**Firm C.** The firm’s rates have changed and the billing administrator isn’t sure how to make entries default to the correct new rate. He spends hours editing entries one at a time to reflect the new rate. After editing the entries, he runs the draft bills and discovers that several bills contain time that was already billed last month.

I can’t tell you how many firms I’ve encountered where the billing administrator has been on the job months or even years and says “I haven’t had any training on this system.” I must admit that I, too, use software such as Facebook and iTunes on which I haven’t had full training, but a law’s firm software is different. Full training on the firm’s billing system is key to preventing problems that slow down the billing process.

**CHANGES IN CLIENT REQUIREMENTS**

Are you able to quickly handle changes to your clients’ billing requirements? Consider these scenarios:

**Firm A.** The client says that in 30 days all bills must be submitted electronically. The billing administrator has taken the training webinar provided by the bill auditing vendor but is not sure how to
create an electronic bill with the billing software. She browses the software vendor’s knowledge base and finds step-by-step instructions for this process and prepares a trial electronic bill. With the help of the bill auditing support line, she uploads a trial bill and makes tweaks in the software needed to create an acceptable electronic bill.

**Firm B.** The client says that in 30 days all bills must be submitted electronically. The billing administrator is just returning from vacation and doesn’t have time for training and configuring the electronic billing herself, so she contacts the firm’s billing software consultant, who configures the program for handling the e-bills and runs and submits the first month’s electronic bills. After the billing administrator has caught up from the post-vacation backlog, she has a training session with the consultant and takes care of the next cycle of electronic bills herself.

**Firm C.** The client says that in 30 days all bills must be submitted electronically. The billing administrator contacts the software vendor regarding how to configure the program to create electronic bills and discovers that the firm needs to upgrade its years-old version in order to get help with this. The firm does not want to incur the expense of the upgrade, so the billing administrator enters each bill manually on the bill auditing website, copying and pasting descriptions for each entry from the billing program.

In its reluctance to upgrade its software, Firm C has added hours to the billing process each month. Firms A and B have made a one-time investment in the time and training needed to meet the client’s requirement. Without delving too deeply into the particulars of electronic billing, even in firms like Firm A, this requirement will increase the time it takes to complete the billing process because it adds another layer of tasks to the process. Submission, validation, acceptance by the automated review, and acceptance by the live reviewer (including correction, resubmission, and possibly appeal) are some of the hoops firms must jump through to get electronic bills approved for payment.

**DISTRACTIONS**
The task of billing your clients, as any other, requires attentiveness. Do not ask your billing administrator to work on other tasks during the billing cycle. Take time to proofread your bills before they are sent out. Again, consider these scenarios:

**Firm A.** The billing administrator works in a quiet area and is left alone when working on billing tasks. He has no other jobs at the firm other than billing-related tasks.

**Firm B.** The billing administrator may be interrupted at any time to put on his paralegal hat and draft a legal document. He had hoped to complete editing and finalizing bills by the end of the week, but paralegal work took precedence.

**Firm C.** The billing administrator frequently stops work on billing to answer his cell phone or talk to the secretary sharing the same work area. Last month he put a bill in an envelope addressed to the wrong client.

In a busy office, it is tough to stick with a single task, start to finish, before moving to another. If you don’t give your billing administrator the time to focus on billing, the bills (and payments) will be late. If you cannot carve out sufficient time for billing, consider outsourcing this task. Firm C needs to set some rules workplace rules and, for any bills that can’t be sent by e-mail, use window envelopes.

**TIMEKEEPER DELAYS**
Even the best billing software cannot guarantee timely use. If the timekeepers don’t enter their time promptly, the bills will be late. Automatic time capture programs can help to capture what has been done, but timekeepers must diligently review, assign, and send that information to the billing software.

**Firm A.** All timekeepers enter their time contemporaneously using billing software.

**Firm B.** Most timekeepers enter their time contemporaneously using the firm’s billing software, but one uses handwritten time sheets. These time sheets are completed daily but transcribed weekly.

**Firm C.** Some timekeepers spend a lot of time at the end of the month reviewing files and calendars to construct time entries that they didn’t enter into the billing system as they were working.

There is no excuse with today’s technology not to enter time contemporaneously. A firm like Firm A equips timekeepers with web-based time entry so that they can record their time anywhere. Firm B may get bills out on time, but it will take more time to bill because of the transcription of handwritten sheets. Firm C’s billing process is held up waiting for timekeepers to construct and enter their time after the fact. Not only will Firm C’s bills be late, they will be inaccurate because the time will be estimated rather than actual.

**CONCLUSION**
If you don’t have a billing procedures document, start one now. It’s as simple as having your billing administrator write down everything he or she does, in detail, from the beginning through the end of the billing cycle. Have someone who does not normally run bills use the billing procedures manual and try running the bills to test its effectiveness. Keep your systems and support plans up-to-date. Help your clients by billing them regularly, consistently, and accurately.

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How to Organize That Disaster Zone You Call an Office

By Benjamin K. Sanchez

Years ago, as a young attorney, I had a mentorship meeting scheduled with an experienced, brilliant attorney who was a mentor to many. As I reviewed the questions I wanted to ask prior to the meeting, I couldn’t help but wonder just how grand and beautiful his office was going to be. I wanted to learn so much and was excited to see how a legal stalwart operated in his office. When I arrived and was being escorted to his office, I couldn’t help but be nervous about the magnificence I was about to enter. When I was shown into the office, I was shocked and in disbelief. It was one of the most cluttered offices I had ever seen! That was my first taste of what I soon would learn to be a common practice in our profession.
Looking back on that meeting, I realize just how young and naive I was at the time. Now in my 18th year of practice, I regularly meet people in my conference room rather than my office so as to avoid my own embarrassment. In fact, although I have a couch in my office on the far wall, away from my desk for my own personal reading, de-stressing, and even napping space, I have no place for anyone to sit and talk with me in my office. I purposely avoid the dilemma of whether or not I should invite people into my office by simply not creating an environment for them to sit with me. Now this doesn’t mean that my office is constantly a mess, but rather it fluctuates between clean and clutter, organization and disorganization, healthy and un­healthy. I avoid the day-to-day dilemma of deciding whether to bring someone into my office by simply having a general policy of meeting in the conference room regardless of the nature of the meeting.

We can produce good work in a messy environment, but not our best work.

PERCEPTION OF CLUTTER
We often are led to believe that a cluttered environment is a reflection of a cluttered mind. Yet, we’ve all experienced someone (whether it’s someone else or ourselves) who apparently knows exactly where everything is in what seems to be a sea of chaos. Besides, logical, organized thoughts and writing hardly translate into a clutter-free environment. Some of the best lawyers I know have some of the worst offices I’ve ever seen. This is not to say that a messy office should be a badge of honor, either.

Ultimately, while some may believe that our environment has no effect on our final work product, I beg to differ. It’s not that we can’t produce good work in such an environment, but it’s not conducive to producing our best work. I believe the perception of messy people having messy minds exists not because we think such people are dumb, but rather because we inherently know in our subconscious that our best work is probably not found in such environments. Why? Focus is the answer. It’s hard to focus on the task at hand when we have a million reminders of other tasks to do. For those of you with cluttered offices, don’t you sometimes get your laptop and move to another area (in or out of the office) to accomplish a specific writing task so that you can just concentrate on it? I know I do. My conference room and my couch at home have become my writing areas for my articles, columns, and blog posts.

Suffice it to say, while there isn’t a true correlation between clutter and bad work product, the work product of our staff (for those who like to delegate their office clutter to their staff). We don’t know where to begin if we decide to undertake the process of getting clutter-free and organized. This process is not as hard as it seems, so do away with the thoughts that are holding you back. Let’s begin!

The first thing to do is figure out what’s working and what isn’t in your current environment. Not everything in your office is inefficient or slowing you down. Figure out what actually saves you time or helps you during your work, and think about incorporating these things into your final organization scheme. By the same token, write down everything that frustrates you about your environment, from positioning of pen, paper, phone, to your movement between your desk and those resources you use most often, and finally to the flow of paper in and out of your office. Once you have your frustration list, you begin to develop a sense of what needs to change in your office.

Another measurement technique to use, borrowed from Julie Morgenstern’s best-selling book Organizing from the Inside Out, is to put a sticky note on every item in your office and mark each of them every time you use this item in a month. This will give you a sense of what you really need within immediate reach and what you can put away for occasional use.

Now that you have identified the sources of your clutter, what motivates you to get uncluttered, and what works and what doesn’t in your office (realize that this process can take a while, so don’t skip over these important steps simply because you’re not actually organizing yet), you can get started organizing your office.

SETTING UP STATIONS
The secret to most modern professional organizers who write books and/or have their own shows on television is setting up stations to help with the de-cluttering process. Although most professionals seem to do everything at their desk and thus consider their desk area just one big work zone, the truth is that you could have different stations to accomplish different tasks built throughout your
office. Even at your desk, you can develop separate areas around your desk for different tasks.

One of my personal tips for attorneys is to give yourself room. What do I mean by this? Well, in this age of efficiency and going paperless, many attorneys try to condense their work area to a computer desk (whether sitting or standing) that barely has enough room for the computer and potentially a cell phone and one book. That may be fine for your typing zone, but it won’t suffice for your total work area. You should have an L-shaped work surface at the bare minimum and a U-shaped desk area if possible. The key is not to use the extra work surface simply as storage for your clutter, but rather to set up different task zones in the different parts of your work surface and consistently use these zones for those tasks.

DE-CLUTTERING

Once you have set up zones and stations for different tasks, don’t be stingy with the time it will take to truly de-clutter. Whether it’s a few hours each day over a week, or all weekend, give yourself the time to truly go through the de-cluttering process. What’s the point of starting this process if you don’t give yourself time to finish it?

Organizers have different acronyms to help with the de-cluttering process. Personally, I like Morgenstern’s S.P.A.C.E. acronym, which stands for Sort, Purge, Assign a home, Containerize, and Equalize.

SORT

Now, everything seems nice and easy thus far, right? That’s because there has not been much physical work, just some thinking here and there. Unfortunately, sorting is where most people get stuck and upset with the organization process. We’d rather assign someone else to do this. Although you certainly can engage the help of your staff or a professional to assist you, sorting really needs you and your input, so it’s best to be ready, well rested, and energized for this task.

The sorting process needs your input because you know best what everything means and thus can address it easily the first time you see it. It does no good for someone else to sort if all this person will do is put everything into a question pile for you to address later. So get some plastic containers or baskets and label them. Start with whatever is in front of you and sort. The key is not to get sidetracked by accomplishing the task of putting your things into their permanent home at this stage. For example, don’t put your code book back on the shelf or in the library. Don’t scan your mail at this stage. Don’t put away office supplies just yet. Rather, simply put everything in a respective bin that represents a location or task.

Think “S.P.A.C.E.”:
Sort, Purge, Assign a home, Containerize, and Equalize.

When I go through this process, I have a few bins and do the following. I have bins that represent case-related papers, invoices and bills, magazines and newspapers, supplies, books, and miscellaneous. Everything then is put into the bins according to what they are or where they go. For those of you with staff, you may want a bin for your assistant or associate. The key to this step is to complete it. Nothing is more frustrating than to start the process only to get distracted and then come into work with what seems to be an even more disorganized office because you still have papers and items everywhere—along with the added bonus of bins full of yet more things. Give yourself the freedom to sort until you have clean, clear work surfaces in every part of your office.

PURGE

Now comes the fun part: purging. Get rid of the duplicate, broken, and unused items. Instead of fretting about the possibility you may need something in the future, focus on the benefits of getting rid of these things, such as having more space to work in and less to clean. Motivate yourself to toss, sell, or donate things during the purging process. Have a box or two for your local charity and another box or two for things you’d rather sell than donate.

Be forewarned, however: Don’t let the idea of selling items bog you down into keeping items unnecessarily. We all think we will sell something on eBay, Amazon, or Craigslist, when, in fact, these items just end up sitting around collecting dust. Best to donate them and get them out of your space than hope you’ll get money for them someday. If you can sell items easily, then go for it. If not, then donate instead.

Again, each step of the S.P.A.C.E. process involves physical action, but each step can be thwarted by a mental roadblock. Purging is often difficult for us. We think we may need something in the future even though we don’t need it now. Something has just enough sentimental value to make us want to hold onto it, but not enough for it to have serious meaning. (How many of us have conference swag in our office that we could easily get rid of?) We’re too cheap to buy a replacement and thus think we’ll fix something that’s broken. All of these are roadblocks to purging. Purging is a good step to have someone else assist us because this person can be truly objective about some of the things we are slow to purge.

In my own organizing, I find purging most difficult and actually don’t like anyone helping me during this process because I am afraid they will get rid of something I wanted to keep. I have had to learn not to delegate the purging process to someone, but rather have that person assist me in the purging process. This way I still have control over the process but I have help in doing it.

ASSIGN A HOME

The next task is to assign a home to everything you keep. This means not only that everything you permanently keep should have a permanent home, but also that every task you engage in should have a designated space for tackling it.

Your office tools should have a consistent home in your work space,
not only for efficiency but so that you
don’t have to use brain power to re­
member where they are. I have a printer
on top of a half-height file cabinet. My
stapler has a home on the left side of
the printer, and my tape dispenser
has a home on the right side. You may
wonder why the stapler is not on my
desk or front and center. That’s because
during the pre-S.P.A.C.E. process, I re­
alized that I rarely use my stapler these
days. I have a paperless office and sim­
ply don’t make use of office tools for
paper that much, so there is no reason
for me to have the stapler in my line of
sight at all times.

I have a pen container and sticky-note
holder close to my phone because I often
find myself writing a quick note when I
am on the phone. Pro-tip: Don’t keep
the sticky notes that you write. Within
24 hours, transfer whatever information
is on the note to a more permanent home
and throw away the note.

For those of you with multiple com­
puters, such as a desktop and a laptop,
you really should evaluate what you do
with each. Is your laptop there just for
the occasional task or is it really a work­
horse alongside your desktop monitor?
If you use your laptop simply for extra
monitor space, then think about getting
an extra monitor for your desktop com­
puter and putting the laptop away. If you
use your laptop for a specific task that is
not done every day, then put your laptop
away and pull it out only when working
on that particular task (and put it away
again when the task is done).

As for me, I use a laptop for two spe­
cific purposes: to continue my primary
legal work when I am not in my office
and to write my articles, columns, and
blog posts. This means I don’t write these
things on my desktop. Because I am not
writing an article, column, or blog post
every day, either, I don’t keep my laptop
out. My laptop is stored in its computer
case, ready to take with me anytime with­
out fuss.

CONTAINERIZE
We all have items on our desk that tend to
clutter it up, but we really don’t want to
put them away. So how do we deal with
them? Containers! Miscellaneous items
should have a home that is not just on
the surface of your desk. Remember, the
goal is to de-clutter, and objects without
a home base tend to become clutter.

Whether you have larger boxes for
an office closet or smaller containers to
organize and accent your office, pick
containers that are both sturdy and
easy to move. Your organization system
should be one that is flexible and easy to
rearrange (see the next step, equalize). If
your containers are too hard to move or
easily fall apart, they won’t help you and
won’t be used. Put some investment and
thought into your containers and where
to place them.

Many of us will
get organized but
not stay organized.
Don’t become
discouraged.
Just go through
the process again.

In my office, again because I don’t
use a lot of paper in my daily practice, I
tend to keep items that go with paper in
places not on my immediate desk surface.
I’ve already explained where my stapler
and tape dispenser go. How many of us
have trays or containers for paper clips,
binder clips, and rubber bands? I would
imagine most of us do. In my office, be­
cause I rarely use these but I still want
some access to them when necessary, I
put them in a drawer organizer rather
than in containers that go on top of my
desk surface. My assistant, on the other
hand, uses these items more frequently
while opening and sorting mail, so I have
containers on top of my assistant’s desk
that allow these items to be easily acces­
sible. Remember, one size does not fit all.

EQUALIZE
The last step in the S.P.A.C.E. or­
ganization process is to equalize. Oftentimes,
we ignore this step because we just want
to force ourselves to use the process we
already set up. I call equalizing the re­
view stage of the organization process.
Just as we draft and review and edit, or­
ganization is not done on the first try.

As we begin to use the work zones
and containers we have developed, we
realize that the actual flow may need
tweaking. It’s important to be open to
the idea of moving containers or chang­
ing your zones to best fit your needs,
while keeping in mind the principles
of organization. The key is not only to
give yourself permission to change the
system, but also to be organized about
the change itself. Calendar some time at
the beginning of each month to evaluate
your system and decide if it is working
or needs major changes. Sometimes it’s
not a matter of organizing wrong in the
beginning, but rather that your roles,
jobs, and needs change over time, and
thus your office environment needs
tweaking to address these changes.

As you get comfortable in your newly
organized, clutter-free office, you can
move the evaluation process to every
quarter, but no longer than that between
organization reviews. You’d be amazed
at how much things change over three
months. Sometimes we take on roles and
projects that we don’t realize affect our
organization needs unless we actually
take the time to evaluate. So, equalize
by evaluating and tweaking.

KEEP IT GOING
Let me end by saying that we’re not
perfect. Many of us will get organized
but not stay organized. Don’t become
discouraged. Rather, just go through
the S.P.A.C.E. process again, as often as you
need to. When you realize you are in the
middle of clutter again, give yourself a
present and get organized. For many, it’s
a lifelong struggle. For me, I still meet
people in my conference room!

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How to Handle a Problem Employee

By Cedric Ashley and Tonya Woodland-Ashley

The “problem employee” can run the gamut from underperformers to performers who have personal problems to employees who sow seeds of discord among staff, to name a few. The most effective way to deal with problem employees is not to hire them in the first place. However, not all problem employees are hiring mistakes. Many are good employees who for some reason run into problems later. Working with a problem employee can be one of the most difficult and stressful challenges a leader can face. Below are five tips to help lawyers deal with this challenge.

COMMUNICATE CLEARLY TO IDENTIFY THE PROBLEM

Communication, or the lack thereof, is the root of many problems and conflicts both in and out of the workplace. Whenever two or more human beings are interacting with one another, you have the makings of a relationship. Whether marital, business, neighbor, or employee, relationships exist, and they must be managed and navigated.

A key to managing and navigating these relationships is communication. Lack of communication can be a contributor to the reason an employee has become a problem, or it can be a barrier to determining the actual problem. Conversely, timely, transparent communication can assist in finding the root cause of the problem and in developing solutions for success. It is far too easy to put one’s head in the ground and avoid addressing the issue. However, avoidance does not serve the interests of your firm or your employee.

In trying to discover what is causing the employee’s problem, a coach-focused approach to questioning that addresses why, what, and when can go a long way to help. Here is an example conversation:

Jim (firm owner): Paul, lately you have not been producing detailed and timely deposition analyses like you usually do. Why do you think that is the case?

Paul (employee): Yes, I realize that I have not really been performing the way I usually do. Lately I have just not been able to get my work
done. It seems like there are more deposition transcripts coming in, and all of the partners want their analyses right away. I just can’t get ahead. And with those two cases coming up for trial, that’s an entirely different story.

Jim: Paul, I appreciate your candor. Let me say that we value all the work you do and we want to make sure that you continue to excel at the firm. What can we do to help you continue to be a top performer?

Paul: Thanks, Jim. That offer is really helpful. I think if I compiled a list of deposition analyses that I’m working on and a list of those that I have not started, the partners will see what I’m facing, and maybe they can let me know which depositions are a priority.

Jim: That sounds like the start of a great plan. I knew that if we talked this through we could come up with a solution. When can you get the list to me so I can share with the partners?

Clearly all situations will not be resolved as easily or quickly. However, regardless of the complexity of the problem, an interventional coach-centric conversation based on why (the cause), what (the proposed solution), and when (a concrete, agreed-upon deliverable date) can begin the process of turning a problem around.

CREATE AN EMPLOYEE SUCCESS PLAN
Once you have clearly identified the issue that is causing the employee to become a problem (and assuming that you have determined not to terminate), the employer and employee should mutually develop a written plan that will provide a path to improved employee success. One critical component to include in such a plan is performance indicators — clear, objective criteria that will allow employees to understand the “how.” The “what” involves the employee’s job description; the “how” involves clear direction on the manner in which the performance is carried out. Continuing with the example discussed above, Paul should understand the expected delivery time frame of the
The employee success plan should include timely and substantive feedback to the employee. This includes supportive praise where appropriate. When an employee is doing a good job, it should be acknowledged. Finally, document, document, document. It is essential to document everything throughout the process. As a standard practice, performance reviews of all employees should be completed regularly and should be as detailed as possible to capture their performance fairly and accurately.

**PROVIDE RESOURCES FOR THE EMPLOYEE TO ENSURE SUCCESS**

To further assist the employee in succeeding, the employer should provide professional resources to assist in the development of the employee. This can include providing a coach to assist employees in improving their performance. Although hired for the purpose of improving performance, a good coach may discover other obstacles, barriers, or blocks that are preventing the employee from performing at expected levels. So if it turns out the coaching sessions are focusing on a personal relationship that the employee is struggling with, it should not matter to you. First, you will never know because the coach (yes, whom you are paying for) should not reveal any information to you from the coaching session. More importantly, if assisting the employee to find a solution to a personal problem improves the employee’s performance, then the coaching engagement has been successful.

Training also should be a part of the employee success plan. When you invest in your employees, you invest in your business. Of course lawyers have all the answers and believe that “if you just do it this way,” everything will be fine. Sounds good, but that’s about all it gets you. Although lawyers must be knowledgeable about many topics to serve the needs of their clients, lawyers are not experts at everything. For employees to properly develop, they will need training. Depending on the employee’s position, courses may be available at a county or community college; the Society for Human Resource Management (shrm.com) may offer workshops; or your bar association may offer CLE courses related to law office management.

Another plan component to consider is the use of assessments. Employee assessments run the gamut from personality-type assessments such as Myers-Briggs Type Indicator, behavior type indicators such as DISC, and instruments that assess emotional intelligence (EQ) such as the Emotional and Social Competency Inventory (ESCI). All these instruments can be extremely useful for employees to gain greater self-awareness of their mental function preferences, hard-wired strengths and weaknesses, blind spots, areas for self-development, and triggers of stress. The various assessments and instruments measure different things and may be used separately or in tandem.

Most importantly, you should engage a qualified professional to: (1) assist you in determining which instrument is the best fit and most appropriate to use; (2) administer the assessment; and (3) debrief the employee on the results. Avoid “free” assessments that you find on the Internet. The lack of value in these instruments is demonstrated by their cost.

**PULL THE PLUG: TERMINATE WHEN NECESSARY**

Unfortunately, there will be some occasions where termination will be necessary. No one relishes having to do this. However, when the employer-employee relationship is no longer viable, termination is the best option. Prolonging the relationship only further stunts the employee’s development and causes the employer to remain focused on a distraction unrelated to the business priorities of the law firm. When deciding to terminate, take the high road. Your firm’s reputation is of utmost importance. Make every effort to conduct a proper and thorough exit interview. Short of very unusual circumstances, do not contest the employee’s claim for unemployment insurance benefits. Be fair in providing the employee with whatever vacation time or paid time off is available, even if you are not required to offer that benefit. Avoid the “SEAL Team Six” type of security escort off the premises. Afford the departing employee some level of dignity and respect. Why? Because it is all about your firm’s reputation. Your reputation is extremely important to maintaining good client relationships and to attracting and retaining high-performing staff.

**LEARN FROM THE EXPERIENCE AND MOVE FORWARD**

Finally, you should learn from the experience. To what degree did your leadership style, or your need for leadership development, contribute to the performance

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problem of the employee? This post-termination period is a great opportunity for some self-reflection. Attorneys can be, well, know-it-all-bossy-super-in-control-arrogant-do-it-my-way professionals. Additionally, most attorneys do not have any formal training in managing or leading people in the workplace. So take a moment to ascertain what you could have done better to develop the performance of that employee. If your answer is nothing, keep asking. If you still don’t have an answer, go to lunch with the best trial attorney you know and let that attorney explore the issue through cross-examination.

You also should avail yourself of the assessments and instruments discussed above. If you are leading people, you surely need to become more self-aware of who you are and how you present yourself in the workplace. Likewise, sometimes we cannot see what we “are,” which prevents us from seeing what we can “become.” You can become a better, more inspiring leader of people. To get there, consider engaging a coach to help you unleash the dynamic leader that is within you.

The post-termination period will also be an ideal time to reassess the vacant position. How critical is the position? Does the position need to be filled? Does the position need restructuring or redefining? Can reassigning the responsibilities among existing staffers achieve the objectives of the position? If you choose reassignment as a solution, make sure you provide proper training, an updated job description, and appropriate compensation for the employee(s) taking on the new responsibilities.

When it comes to hiring a replacement, you should be extremely deliberate and thoughtful about the process. Take the appropriate time to find the right candidate, not the first candidate. Do not rush the process. If you are uncertain whether you can be dispassionate and objective in the candidate search process, consider turning the responsibilities over to a human resources (HR) professional. There are plenty of HR consultants and HR graduate students who can fulfill this task.

CONCLUSION
The best way to deal with problem employees is too avoid hiring them. Once you have hired an employee, make every effort to communicate clearly and frequently regarding performance expectations. When a problem does arise, intervene quickly to discover the root cause. After discovering the cause, develop a plan to assist the employee in achieving success. Be sure to provide the resources the employee needs to succeed. When it is clear that termination is necessary, do it in a swift, fair, and respectful manner. Prolonging the process serves no purpose and benefits no one. Finally, learn the lessons and move forward. You should not become a prisoner of the past.

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Successful networking is important to sole practitioners, aspiring partners, and job seekers. It is particularly important for solos because our livelihood depends on our ability to bring in business. When I started my own practice, I went to a lot of networking events. I would meet as many people as humanly possible, leave with a stack full of business cards, and send countless follow-up e-mails. Yet, there were times when I would end up empty-handed with nothing to show for all the networking I had done. I knew I needed help, so I started talking to other attorneys, particularly sole practitioners. I soon realized that many attorneys struggle with networking, but it was not for the lack of effort. Rather, the problem was a deficiency in planning, focus, or follow-up.

**FAIL TO PLAN, PLAN TO FAIL**

Do you have a networking plan? Without a plan, you may be wandering aimlessly and not using your time wisely. Spending a little bit of time to create a plan allows you to be efficient so you are choosing only those opportunities that will lead directly to the results you want.

If you do not already have a plan, here are some questions to ask yourself to get started:

1. **What is your goal?** What is a successful networking result? Set a measurable goal that you want to obtain. Whether it is a dollar amount or number of new clients, setting a measurable goal will allow you to break it down into specific actions and tasks. It also will allow you to assess if you are on track to reach the result you want or if you need to adjust what you are doing to get back on track.

2. **Who do you need to network with to get the result you are striving for?** Think about the ideal individuals you are seeking. Do they have a specific job title? Where do they spend their time? Who do they interact with every day? Be as detailed as possible when creating an image of your ideal individual. Understanding whom you are seeking will help you formulate specific questions to ask when you are networking so you can quickly figure out if this person is someone you want to follow up with.

3. **Where will you go to network with these individuals?** Although opportunities can happen anywhere, there are events and locations that will provide a greater chance of finding them. No, I am not suggesting that you go chasing down ambulances. However, I won’t stop you if you want to spend the big bucks to put up a billboard near the most accident-prone intersection in your neighborhood. While not all of us have money to spend on a billboard, we can all instill smart networking practices by being selective and attending events that will provide a greater return for our efforts. You want to connect with people who need what you are offering. This is where understanding whom you are looking for can help you. If you know whom you are looking for, then you will be able to figure out where they like to spend their time. And they won’t necessarily be at an event specifically labeled as a networking event. It could be a trade show, workshop, or anywhere your ideal individuals tend to congregate.

Once you create a plan, write it down. A study conducted by Dr. Gail Matthews from...
Focus is key. You need to network smarter, not harder.

You should also constantly be working to improve your plan. Ideally, fulfilling each action step should result in the accomplishment of your goals. However, if you find that something isn’t working, then scrap it. Don’t be afraid to try something new or find a creative way to network. Use your plan like a guideline, rather than strict rules to adhere to.

QUALITY OVER QUANTITY

Whether you’re a general practitioner or a specialist, focus is key when it comes to networking. There are attorneys who will hand out business cards to everyone in the room and repeat their carefully crafted elevator speech over and over again. They’re essentially a walking advertisement, which can be off-putting, like a pushy salesman. These lawyers also believe that if they repeat their message enough times, it will reach their audience. Unfortunately, this type of networking depends on quantity over quality interactions, which can result in networking fatigue. It also leaves things to chance and gives you no control over the success of your networking. Even if you give out millions of business cards, you cannot control whether an individual will keep your card, let alone use it to call you and seek your business.

You need to network smarter, not harder. One way is to pick a focus, whether it’s a niche practice area or a specific type of clientele. Melody Kramer, an attorney at Legal Greenhouse, advises attorneys to “pick a niche of what you are doing and focus your networking and marketing. Pick something. You’re not bound to it for life.” If you are a general practitioner, pick one or two areas to focus on and create a plan that is tailored to this practice area.

Your goal should not be to attend as many networking events as possible. Not every networking opportunity will be the right fit for you. Picking a focus allows you to determine which one will provide the greatest chance of meeting the people you are trying to connect with. And when you find them, you should not be spewing some marketing script at them. Have a genuine conversation and connect with them on a personal level.

FOLLOW-UP IS KEY

If you have a hard time following up, you are not alone. Even the most seasoned networker will drop the ball once in a while when it comes to following up with a new contact. I’ve definitely let a few good contacts fall through the cracks because I waited too long to follow up with them. Here are some tips for following up:

1. Take advantage of technology. You can use calendar notifications, e-mail marketing services, and customer relationship management (CRM) software to remind you to follow up. I like to use my Google Calendar (google.com) to set up reminders to send follow-up e-mails. If you have permission, you also can send scheduled e-newsletters to your contacts using MailChimp (mailchimp.com) or Constant Contact (constantcontact.com). There’s also quite a bit of CRM software out there for small businesses, such as Salesforce (salesforce.com), Infusionsoft (infusionsoft.com), and Insightly (insightly.com).

2. Group your new contacts. Is your contact a potential client, referral source, or someone you just enjoyed talking with? Grouping your contacts will allow you to tailor your messages to them and determine how frequently to contact them. You also can prioritize whom you contact first so you can make sure you don’t let go of a potential client.

3. Continue to follow up. Often you will need to cultivate the relationship before a contact becomes a new client or referral source. Set aside time in your schedule to follow up with old and new contacts. Make it a habit to keep in touch.

If you choose to take away only one suggestion from this article, make sure it is the importance of following up. It doesn’t matter if you have the most thought-out plan, attend a networking event every day, or meet everyone at the networking event. Without follow-up, all your networking efforts will be in vain.

HAVE A SYSTEM

Once you find what’s been working in your networking plan, create a system. As you use this system, make adjustments to determine what works best. For instance, you can create a system for following up with a potential client. Wenzel shared, “It took me a long time to create a step-by-step on following up. I think I would have taken more advantage of the contacts I made out and about.”

You can set how often you’d keep in touch, what type of message you would send, and what method of communication you would use. And you can make changes to your system as you learn
what has helped turn that potential client into an actual client.

Having a system also allows you to simplify the way you network. You don’t have to reinvent the wheel constantly. Part of my system is to follow up with all contacts within 24 hours of meeting them. If I go to a large event, I may have to send multiple e-mails. I don’t like sending a generic message, so I have an e-mail template that I use and tailor the message to each new contact. This not only saves me time, but it makes it more likely for me to follow up with them.

A system should make your life easier. And just like your plan, it should be updated constantly and changed as you go.

CONTINUE TO MAKE CHANGES AND IMPROVE

It has been said, “Insanity is doing the same thing over and over again and expecting different results.” You cannot talk to the same people, attend the same events, or keep up the same networking habits and expect different results. If you are not getting the results you are looking for, step back and reevaluate what you are doing. Whether it is your plan, focus, or follow-through, continue to make changes and fine-tune it.

To help make improvements, I recommend reading networking and sales books, especially those written for service professionals. If there are attorneys you admire, contact them and see if they wouldn’t mind sharing some of their tips and tricks. And if you really need hand-holding, hire professional help. There are strategists and consultants out there who eat, sleep, and breathe networking.

Finally, remember that networking takes time and hard work. Networking efforts rarely result in immediate gratification. In the social media age, it’s easy to make a superficial connection, like adding someone to LinkedIn, but it takes times to cultivate a true connection. And always be professional and genuine to everyone you meet. You never know whom they might know.

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What to Do about Your Hapless Social Media Presence

By Scott MacMullan
Are you having trouble understanding how to use social media to help your practice? It might help to break down the phrase “social media” itself:

- **Social**: For our purposes, this means seeking or enjoying the companionship of others.
- **Media**: For our purposes, this refers, first, to the various platforms where you consume information, and second, to the traditional “news media.”

So the key to using social media effectively is to seek or enjoy the companionship of others on platforms where you can consume information and where the news can also be found. (The “news media” part is crucial.)

Your mere presence on a social media platform isn’t enough. You need to engage on that platform. Passively being “on” a social media platform is like going to a networking cocktail hour and just sipping a Seven and Seven against the wall, twiddling your thumbs. To get any results, you have to insert yourself into conversations. You have to look around the room and find people you want to talk to. The same applies in the world of social media. Have you ever been “LinkedIn requested” by a salesperson? That salesperson likely did her homework on you through LinkedIn research and decided that it would be wise to engage with you. As an attorney, you can do the same thing.

**“LISTENING” ON SOCIAL MEDIA**

How exactly do you go about listening to and researching your potential clients on social media? Below are suggestions for staying engaged on some of the most popular platforms: Twitter, Periscope, Blab, Vine, Facebook, and LinkedIn.

**Twitter.** Twitter (twitter.com) is one of the truly social media platforms because the vast majority of people on it make their accounts public. Therefore, it is possible for you to listen to and reach out to almost anyone on the network.

The first way to listen on this platform is via Twitter search. Twitter search is like Google search. People put a lot of weight on the use of hashtags to find people and to be found on social media, but the fact is that Twitter search will find any word whether it is hashtagged or not. The value of the hashtag is that it signals to others in the conversation to use the hashtag so there is some uniformity and a way to track the conversation.

To listen on Twitter I also like to look for what my geographic area is doing. I practice in Annapolis, Maryland, so I simply search for the term “Annapolis.” This allows me to keep abreast and share with my local network what else of note is going on. And I make sure to comment and engage with people on the content that I enjoy. Because I live near these people, these Twitter conversations have led to real-life coffee meetings, referral sources, and friendships.

Another good way to listen in on Twitter is to follow helpful “influencers.” For example, I not only follow ABA President Paulette Brown on Twitter, I also receive notifications when she tweets something so I can respond or chime in. This is a very effective way for me to get to know President Paulette Brown! (She is very active and engaging on Twitter—you should follow her @brown4lawyers.)

Twitter lists enable you to organize the groups of people you are following. Unless the people you are following on Twitter become obnoxious and vulgar, there really is no reason to drop followers. You can simply mute them, which means you will not see what they are posting on your timeline. Then when you want to see them again, you can use your Twitter lists to pull them up. For example, when I’m interested in keeping up with my “ABA Peeps,” I just go to that list—or to my “Annapolis” group or my “criminal defense” group.

My new favorite way to use Twitter is to respond to people’s (potential clients’) tweets to me via Twitter video. This personalizes the message. Consider giving someone a video message in lieu of a handwritten note. The video message is personable like a note, and it shows you are on the cutting edge of technology.

Twitter connects to apps such as Periscope and Blab. You can use these platforms to bulk up your engagement with clients, potential clients, and client referral sources.
Periscope. Periscope (periscope.tv) is a livestreaming video app that “lets you see the world from the eyes of somebody else.” Lawyers can use it to host their own legal-oriented show and further engage with their particular client base. Periscope videos can be saved, so lawyers who make a periscope video can subsequently post it to their law firm’s YouTube channel or website to further promote their firm.

Be yourself on social media. Automating your posts shows you are being fake.

Blab. The Blab application (blab.im) is a way lawyers can “watch live conversations.” The platform looks like the set for the game show Hollywood Squares, with a group instant-message board on the bottom. Lawyers can host shows, answer questions, build relevant followings, and become an authoritative voice in their niche through the use of this powerful video platform.

Vine. Vine (vine.co) is a six-second looping video app. You can edit short movies in a program such as iMovie and then post them on Vine or directly on Twitter. Can you sell your practice in a six-second video? People’s attention span is said to be about nine seconds now, so at least you know you will have their attention for six seconds.

Facebook. Despite being the biggest “social media” network, Facebook (facebook.com) is less social than Twitter. Let me explain. Because Facebook became so big, the network has changed its algorithm so that we don’t see everything that is posted from our friends in our newsfeeds. We only see what Facebook thinks is relevant to us. Often, we don’t see Facebook posts automatically in real time; as a result, we miss out on that immediate back-and-forth conversation. My work-around for this problem? Make sure you are “following” your friends whom you want to see in your time line. So it is a two-step process: First, you must be friends with someone to interact with them generally, and second, you must actively follow them to make sure that their posts show up in your time line right away.

You also can follow the conversation via the Facebook search box and use hashtags. Hashtags are just ways to index and flag your post as similar to other posts.

Here’s a good way to interact on Facebook: If someone posts something, you could “congratulate,” “like,” or “comment” on that post, and then also start a dialogue with that person via Facebook’s direct messenger app.

Facebook groups are replacing town halls and city squares. These forums are great ways to engage with your local community or with your particular industry or ideal clients. Create and join Facebook groups and start commenting on posts. Once you have made a reputation for yourself, direct-message a person and meet for real-world coffee—or, perhaps, “the new coffee”: Skype video.

Facebook “likes” on law firm pages hold less weight than ever before because Facebook now shows fewer and fewer posts from businesses on pages people like. We are in a “pay-to-play” world now. Facebook has hypertexting marketing opportunities, including targeting Facebook posts/ads to specific groups and demographics. This is a very cost-effective way to market to specific people you want to get in front of. Whether you want to market your law firm to a CEO or to a regular Joe, Facebook can get your message in front of them. Facebook advertising is like parking-lot flyers on steroids: In a parking lot, you know pretty much where people are located (or at least where their car is located that day); in Facebook advertising, you know where people are located and what kind of person is driving that car.

LinkedIn. The power of LinkedIn (linkedin.com) lies in its groups and the engagement in these groups. One of my favorites groups to use is the “Annapolis” LinkedIn group. (There are many Annapolis-related groups.) Another relevant one might be the ABA GPSolo Division’s LinkedIn group. As an attorney, it may be wise to get a professionally made photo.

LinkedIn is the perfect platform for lawyers to stay in touch with their contacts. When contacts get a new job, be sure not only to congratulate them via LinkedIn but also to send them a personalized e-mail congratulating them.

One little-known feature of LinkedIn is that, once you are friends with someone on LinkedIn, you also can access their e-mail address. You can export your LinkedIn contacts list.

SOCIAL MEDIA ETIQUETTE

On social media, be yourself—your authentic self. Automating your posts shows you are being fake. This might be a controversial comment, but it is true. If you automate your posts, you could schedule something like this: “Scott MacMullan Law, LLC, hopes you and your family are having as good of a day as we are!” But what if you were to automate this and it went out right after some national tragedy occurred, like another 9-11. Yikes. The power and influence of social media is not in the posts themselves, it is in the responses to others’ posts.

So be yourself. The same etiquette rules apply on social media as they do everywhere else. Don’t be pushy in person, and don’t be pushy over social media.

SCHEDULING POSTS

Many consultants will push a social media calendar or a social media schedule on you. I would suggest they do this because it fits their agenda. Remember,
the power in social media lies in genuine interactions with potential clients, not in using it as a billboard for your firm. It’s social media, not robot media.

An effective and genuine way to leverage your contacts from social media is to use online platforms and systems like Contactually (contactually.com), which systematizes your follow-up with clients, potential clients, and referral sources for your practice.

MEETUP
Meetup is a great site for lawyers to network online for off-line relationships. According to the website (meetup.com), “Meetup makes it easy for anyone to organize a local group or find one of the thousands already meeting up face-to-face.” Meetups are really popular. Sometimes the groups are your target niche, sometimes they are not. (I haven’t yet found a Meetup group called, “People Who Are About to Get Arrested and Can Pay for an Attorney.”) Find your target niche or target customer through a Meetup group, engage with group members online through the site’s social aspects, and then engage with members off-line. It is easy to stay in touch with people after the meetups.

CONCLUSION
I hope this article has given you some ideas on how to leverage social media to help develop your law practice. Like in-person business development, social media takes time. Try to devote a small portion of your day to social media. Pick a couple of the above platforms and spend some time, money, and effort on them. You will see results. Engage with traditional media about your practice area on social media, and you can further leverage social media to get a presence in traditional media sources. Social media is how people are communicating these days, and it is only getting bigger. Be focused in your business development approach, and you will find that social media is a wonderful way to develop your business and reputation. Now get social!

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What to Do When Your Tax Were Botched

By Ryan Jarus
To be successful today, professionals must be prepared for many challenges. While the rewards of owning a successful solo law practice or small firm are great, the path is wrought with pitfalls to be avoided. After successfully navigating through the challenges of business development, client service, practice management, and fee collection, many professionals may find themselves caught “behind the ball” when it comes to tax planning. Often this is not for lack of will but rather a lack of understanding of all the various types of taxes imposed on sole practitioners and small firms alike.

All successful businesses must anticipate major expenses in order to manage cash flow. The unfortunate reality for many professionals is that taxes are their single largest expense. Rent, software, insurance, utilities, and other overhead expenses are generally easy to account for as the bills show up every month. However, with our self-reporting tax system, all businesses must take a proactive approach to regularly calculating and planning for payment of self-employment and payroll tax as well as workers’ compensation insurance for employees. Do these all sound familiar? Hopefully they do, but if not let’s take a look at each item and discuss what to expect.

UNDERPAYMENT OF SELF-EMPLOYMENT TAX

Self-employment tax is probably the single largest surprise to the newly self-employed. Everyone plans for income tax, but many new practitioners are surprised to learn they will be required to pay self-employment tax. For 2015, the self-employment tax (Social Security and Medicare) stands at 15.3 percent on net earnings from self-employment of up to $118,500 ($117,000 for 2014, as it adjusts annually). Self-employment earnings above the $118,500 threshold are only subject to Medicare tax of 2.9 percent. An additional 0.9 percent Medicare tax (total rate of 3.8 percent) will be due on self-employment income in excess of $250,000 for joint returns; $125,000 for married taxpayers filing separate returns; and $200,000 in all other cases. Self-employment tax is paid in addition to income tax, but you can deduct half your self-employment tax as an adjustment to income, which helps offset some of the added tax. This is a tax on net self-employment income, so the 15.3 percent will apply to the income after all deductible business expenses.
Like income tax, self-employment tax should be paid throughout the year through estimated tax payments as it is part of the tax liability on Form 1040. Although an entire article could be written on requirements for estimated taxes and penalties, it can be distilled down to the following requirement to achieve “safe harbor” status:

- $150,000 or less of the prior year’s adjusted gross income: Pay in estimated tax of 100 percent of the prior year’s tax liability
- Greater than $150,000 of the prior year’s adjusted gross income: Pay in estimated tax of 110 percent of the prior year’s tax liability

Taxpayers who do not make estimated tax payments will be subject to penalties and interest. Generally, taxpayers should make estimated tax payments in four equal amounts to avoid penalties. However, if income is received unevenly during the year, the taxpayer may be able to vary the amounts of the payments to avoid or lower the penalty by using the annualized installment method. Reference Internal Revenue Service (IRS) Form 2210 for calculation of an estimated tax penalty. Also note an extension of time to file is not an extension of time to pay. Taxpayers are required to pay the liability by the original due date of the return. One should think of the extension as a period of time granted to calculate the exact tax liability, but the big picture should be more or less determined using a sound tax projection by the original due date.

Also important to note is the fact that contributions to self-employed SEP (simplified employee pension), SIMPLE (savings incentive match plan for employees), and qualified plans must be deducted on page 1 of Form 1040. Although self-employment income is used to calculate the maximum contribution to such plans, the contribution itself will generally not reduce the self-employment tax.

UNDERPAYMENT OF EMPLOYEE PAYROLL WITHHOLDING

Bottom line: Do not fail to remit your employees’ payroll withholding. Often this happens unknowingly by new business owners who are attempting to process payroll on their own. Modern payroll technology has led to several very affordable processing options such as Gusto (gusto.com; formerly ZenPayroll), ADP (adp.com), and Paychex (paychex.com). These services allow taxes to be drafted automatically from a business checking account and remitted to the taxing authorities. For those who go it alone and run payroll and remit taxes themselves, attention to detail and filing deadlines is key.

Of course, there are also those who “borrow” from employees’ withholdings. It should be made especially clear that this activity should be avoided at all costs. If only one piece of knowledge is taken away from this article, it should be the advice never to hold onto your employees’ withholding past the date it is due. I guess you could say the IRS cannot borrow from you, but rather send in as much as possible as soon as possible. It also should be noted that our counterparts working within the IRS are quite helpful and can be contacted if there are any questions about outstanding liabilities from past returns. If payroll tax returns have not been filed, and the liability has not been established, you cannot hide. Expect to receive filed returns based on information from prior quarters. If the liabilities from returns filed by the taxing authorities are not paid, expect the same penalties that would occur if the business owner had filed the returns and not paid the liability.

With the exception of the rare cases where the IRS provides an exemption, electronic funds transfer (EFT) must be used for all federal tax deposits. This is another great reason to use a payroll service as it will handle the EFT and leave you, the business owner, with more time to focus on your core business. The deadlines that must be met for avoidance of failure to deposit penalties are difficult to navigate as the schedule changes depending on the tax liability. The taxpayer’s deposit schedule is generally calculated using a one-year lookback period ending on the last day of the sixth month of the preceding year. Monthly deposits will be required by the IRS and state taxing authorities will pin you with “willful neglect,” and a penalty equal to a percentage of the amount of the underpayment is imposed for failing to make required tax deposits with the respective government agencies by the appropriate date. Here is an overview of the penalties:

- 2 percent if the amount of the underpayment is deposited within five days after the due date;
- 5 percent if the amount of the underpayment is deposited between six days and 15 days after the due date; and
- 10 percent if the amount of the underpayment is deposited 16 days or more after the due date.
- 15 percent also can apply in certain cases.

The best advice that can be given to taxpayers who are behind on their deposits is catch up. Do not let the problem fester, but rather send in as much as possible as soon as possible. It also should be noted that our counterparts working within the IRS are quite helpful and can be contacted if there are any questions about outstanding liabilities from past returns. If payroll tax returns have not been filed, and the liability has not been established, you cannot hide. Expect to receive filed returns based on information from prior quarters. If the liabilities from returns filed by the taxing authorities are not paid, expect the same penalties that would occur if the business owner had filed the returns and not paid the liability.

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15th day of the following month if the taxes reported in the look-back period did not exceed $50,000. If the taxes did exceed $50,000, the taxpayer is required to make semi-weekly deposits. If the taxpayer has collected $100,000 or more of employment taxes on any given day, the $50,000 rules go out the window and the taxes are due by the close of the next business day via EFT. It also can be noted that smaller employers with a deposit liability of $2,500 or less for a return period may bypass the EFT deposits and remit the employment taxes with the tax return as a convenience to the taxpayer.

For most, the deposit schedule seems to be confusing and leads us back again to our recommendation that a professional payroll service be used. It provides peace of mind, convenience, and, most of all, time savings.

UNDERPAYMENT OF WORKERS’ COMPENSATION

Workers’ compensation is regulated on a state-by-state basis, and most states require employers to obtain coverage for their employees. Typically, owners are excluded, so sole practitioners will generally avoid coverage requirements. An insurance broker should be consulted whenever the first employee is hired. A common pitfall in transitioning from sole practitioner to staffed firm is failure to procure workers’ compensation insurance. In many cases, payroll processing services will not take responsibility for procuring the policy but leave the responsibility to the business owner.

The cost of not having workers’ compensation insurance can be high, especially if there is an incident. In many states, operating without a policy is a criminal offense. Fines and jail time for failure to procure a workers’ compensation policy should not be risked. The potential liability is large, given an employer will generally be liable for paying bills stemming from a job-related injury or illness. Attorneys will understand the liability better than most other business owners.

Note the cost of a policy for clerical office employees will be quite reasonable. Rates will vary by state, but in many states a policy can be had for somewhere in the range of 1 percent of gross wages—a small cost when compared to the unfavorable alternative of facing a claim without coverage.

As a new employer, you may be thinking that this workers’ compensation thing is pretty easy to handle and it’s just like any other insurance policy. If you believe that, don’t skip past this section! Many new employers do not realize that there will be an audit following the end of the policy’s term, which is generally 12 months. Even if there was not a claim, the employer should expect an audit, which consists of a review of the actual payroll versus the projected payroll when the policy was underwritten. Because you are working so hard to increase the billings within your practice, the payroll may have exceeded the projection when the carrier provided the stub for the down payment on the policy. If the actual payroll is higher than projection, the classification code for the employee and the modification (MOD) rate will be applied to gross wages above the estimate, and the additional workers’ compensation premium will be due immediately. Small, rapidly growing firms can be caught off guard by the “surprise premium” at the end of the policy period, and estimates should be used to track the projected liability for the premium. Consult your insurance broker throughout the year when your practice is expanding for help estimating the added cost of the premium resulting from an audit.

There is a way to avoid large premium payments resulting from an audit: a pay-as-you-go plan. Most good insurance brokers will recommend this type of plan when they work with a high-growth client. A high-growth practice will benefit by paying in varying amounts of premium throughout the year. A practice with a pay-as-you-go plan will report gross wages by employee classification each month, and the carrier’s template will provide the exact amount of premium due. If proper reporting is done, the business can expect little to no difference in premium due after the audit versus the premium paid during the year. Many business owners prefer such a policy for cash flow planning. The alternative for periods of increasing payroll is to know your rate for each employee classification and your MOD rate and then set aside the additional premiums throughout the year prior to your workers’ compensation audit.

CONCLUSION

In closing, let’s review a few important points. It’s a good idea to make estimated tax payments. In the long run, the savings on penalties, interest, and the cost of your time will likely exceed the cost of staying compliant. If you now know you’re behind on tax payments or do not have workers’ compensation insurance, do not fear (but also do not sweep the problem under the rug). The best way to approach the problem is head on. Use your certified public accountant, payroll processing company, and insurance broker as resources to stay compliant. If you do not have these members of your team in place, search for quality providers in your area. Do not be afraid to speak with the IRS about outstanding liabilities as they are friendly people who will be happy to help you over the phone.

Staying compliant is also a service to your employees, who will help support you and your practice’s growth for years to come.

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HOW TO STRAIGHTEN OUT YOUR JUMBLED FINANCIAL RECORDS
t was once explained to me that there is no rocket science to law firm finances. It is as simple as getting the work in, getting the work out, getting the bills out, and getting the cash in. So then why is there a whole issue of GPSolo dedicated to the theme “What to Do When Things Go Wrong”?

The simplest and most direct reason is that attorneys make the mistake of not giving the firm’s record keeping sufficient priority. As in many other types of small businesses, failure to use proper bookkeeping software is a prime contributor to paperwork snafus. Attorneys in this area of their practice need to avoid the trap of being penny wise and dollar foolish — using a screwdriver as a hammer is rarely effective. It is critical that the software selected has been developed for some of the nuances of a professional services practice, particularly trust accounting.

The second most frequent contributor to attorneys getting offside with financial and trust accounting is the failure to hire a bookkeeper with the knowledge and skills necessary to complete their books quickly and accurately. Whether the practice can afford an internal or only an external bookkeeper, this bookkeeper needs to be versed in the software that has been chosen to support the practice.

**TRUST ACCOUNTING MISTAKES**

Of the two accountings — trust and financial — trust is the most critical to an attorney’s professional life. There is no challenging the fact that mismanagement of trust accounts continues to be a top reason why attorneys get into disciplinary situations with their state bars every year.

As not all the state bars have identical trust regulations, the mistakes addressed below will be somewhat generic in nature but still relevant to all readers.

The number-one mistake attorneys make is not to have spent the time with their bookkeepers to develop trust accounting policies and procedures with the proper systems and controls in place to comply with the applicable trust regulations.

In 2015 Rick Kabra, CEO of CosmoLex Cloud, published a list that captures many of the more common mistakes that sole practitioners and small firms make with their trust (tinyurl.com/pj25aaz). The list below is adapted from his suggestions.

1. **Manual systems.** Solos and small firms often lack the robust (and expensive) IT systems of big firms, not to mention well-trained, dedicated IT staff. But ad hoc, manual systems pose their own problems. Human error is all too common when manually recording trust transactions.

2. **Commingled trust funds.** Not only can the manual recording of transactions lead to simple accounting errors, it also can give rise to the potentially more dangerous commingling of trust funds with business operating funds and billings. Law firms are required to keep these funds separate; mingling them is a serious violation.

3. **Trust ledger overdrafts.** This mistake is common, but it’s a natural consequence of the other errors listed here.

4. **Lack of controls and data protection.** Once again, manual systems lead to more than simple accounting errors — they can increase the threat of data loss and data theft. The lack of automation also removes the opportunity to automate checks that the firm is meeting all trust requirements.
5. **Unaddressed account anomalies.** You can’t simply ignore trust account anomalies such as uncleared funds and hope they straighten themselves out on their own. Firms must regularly review their trust activities and follow up on problems.

6. **Sloppy bank reconciliation.** The lack of dedicated staff and systems can also lead to sloppiness with bank reconciliation. Reconciliation must be done monthly. And if possible, someone other than the regular reviewer should take a peek from time to time.

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**Don’t ignore trust fund anomalies and hope they straighten themselves out on their own.**

The quickest and most effective way to deal with these problems is to call upon a certified public accountant (CPA) firm to conduct a trust account audit. The benefits of such an approach include:

- Identification of the problems that contributed to the trust accounting problems;
- Identification of the steps that need to be implemented by the attorneys to avoid a repeat of the problems in the future;
- Assurances of a starting point where the trust accounts are in balance;
- A timely and full resolution to the problem; and
- An independent report providing external assurances to the bar that the trust accounts are now in order.

Seeking external assistance results in an outlay of cash, but it is cash well spent, especially given that the alternative is to lose revenue-producing time while struggling to work through the complex trust account issues.

**FINANCIAL ACCOUNTING MISTAKES**

Although not as potentially devastating as trust accounting mistakes, errors in financial accounts also can have dire consequences. After all, a lawyer’s understanding of the firm’s finances serve as the basis for all business decisions going forward. Below is a list of the most common causes of bookkeeping errors for solos and small firms.

1. **Error of principle in accounting:** correct amount, wrong type of account (e.g., recording of partner’s capital contribution as a loan; recording personal expenses as business expenses).

2. **Error of omission:** entry missed from accounting records (e.g., forgetting to post a check; failure to record an expense incurred).

3. **Error of commission:** correct amount and type of account, wrong account (e.g., posting the correct total payroll expense to health benefits).

4. **Compensating error:** two or more errors balance each other out (e.g., a new computer purchase for $1,000 is entered as an expense at the same time a $1,000 expense item for maintenance of the carpets is entered as a fixed asset).

5. **Error of original entry:** correct accounts, wrong amounts (e.g., transposition error where a number is transposed in the initial entry, like 49 is posted as 94; if the error found is divisible by nine, you have a transposition error; if the error is divisible by two, it can mean that a credit got entered as a debit or vice versa).

6. **Complete reversal of entries:** correct amount and account, entries reversed (e.g., a deposit is booked as a credit to the bank account and a debit to the accounts receivables). Errors are going to happen. However, there are preventive measures you can employ both to minimize the risk of occurrence of these errors and to aid early detection in the event they do occur:

- Separate bank accounts for personal, business, and trust.
- Use bank accounts with month’s end cutoff.
- Keep daily records rather than saving up to month’s end or longer.
- Reconcile all accounts (bank, accounts receivable, accounts payable, partners’ draws, payroll, etc.) monthly.
- Back up the accounting system monthly.
- Leave a trail of any adjustments made to records.
- Set up a filing system that both you and the bookkeeper understand.
- Obtain a receipt for everything no matter how small.
- Develop a monthly checklist for the bookkeeper to review at monthly meetings.
- Use an independent accounting firm to review your books and records annually with you. (You wouldn’t ask a doctor to act as a legal advisor, so why ask an attorney to act as an accountant?)

While there are a few shortcuts for resolving errors like transposed numbers or reversed recordings, it is critical that attorneys do not compound the error by getting behind in their record keeping while trying to resolve the issue. To this end, it is not uncommon to utilize a suspense-clearing account. This account allows you to reclassify the amount in order to finish the reconciliation or analysis that you are working on. The clearing account will have a running balance until you investigate and resolve the specific problems you used the account for.
Good budgeting helps “less be more” when it comes to monthly financial reporting. Unfortunately, many accounting software packages and bookkeepers generate reports that are both bulky and convoluted—and thus doomed to be ignored from the outset. The aim should be financial reports that are succinct and that flag the specific items you want and need to follow up on with your bookkeeper.

At the outset, sit down with your accountant/bookkeeper and determine what information will enable the effective financial monitoring of the practice. A suggested framework could include:

- **time frames:** current month; current year to date; same month prior year; and prior year to date;
- **categories of data:** actual and budget data for current month and current year to date; actual for same month prior year and prior year to date; and
- **types of accounting data to be reported (not limited to):**
  - billings;
  - effective hourly rate (billings divided by the hours taken out of unbilled inventory);
  - hours worked (obvious assumption here—can divide by time-keeper type if applicable);
  - cash collected (expressed as an amount per day);
  - total expenses;
  - net income;
  - total accounts receivable;
  - total unbilled fees;
  - total accounts payable;
  - bank balance; and
  - operating loan balance.

**CONCLUSION**

It is impractical to think that errors won’t occur in your accounting records. But if attorneys apply common sense and the same degree of judgment that their clients pay for, they can detect such errors quickly enough to deal with them in a timely and effective manner. Creating accurate records isn’t rocket science. The key is open and direct communication with your bookkeeper/accountant.

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What to Do When Your Client Files an Ethics Complaint

By Dianna M. Anelli and Mary Andreoni
As lawyers, we all know that the day may come when a client decides to file an ethics complaint against us. This knowledge hardly lessens the shock when that day arrives, however. What should we do next? To help answer this question, we have enlisted the help of two qualified practitioners—one an attorney focusing her practice on disciplinary defense, the other an ethics education counsel for a state disciplinary commission—to walk you through the process of responding to an ethics complaint.

**MOUNTING YOUR DEFENSE**

By Dianna M. Anelli

It is always a bit disconcerting (this is an understatement) when a client files a disciplinary complaint against you, especially when you believe you did a good job for the client. Usually, however, you have some idea that an inquiry is in the offing. And, let’s face it: We have all taken that one client even though every bone in our body told us that it is a bad idea. So now there is an inquiry from your licensing authority. What do you do?

Don’t panic. First, realize you are not alone. Clients file grievances against their attorneys every day. If you practice long enough, chances are this situation will arise at least once. Calm down, and do not panic. All the same, taking the position that the matter is frivolous and unworthy of time and resources is also a mistake. You must respond to the inquiry.

Prepare a response. Usually there will be a response due date. Make sure you log this date into your calendar or case management system. Under most states’ procedures, the response time line can be extended with the investigating authority’s permission. So keep in contact with the investigator and, by all means, stay on good terms with him or her. Understand that the disciplinary authority acts very much like a prosecutor. Thus, whether to prosecute or not is within his or her sound discretion. Now is also a good time to call your malpractice carrier to place them on notice.

Not surprisingly, you will be highly motivated to get the grievance dismissed as soon as possible. So how does one accomplish this? Begin by reading the grievance thoroughly. You will likely have to read it more than once. If you can, try to step into your client’s shoes to see what it is that the client thinks you have done wrong. Review the file and see if there is any merit to the client’s complaint. Just because there may be some merit to some of the client’s complaints does not mean a violation of the ethics rules has occurred. In this regard, it may be wise to enlist the help of another attorney. Understand that, as the defendant, your view of the situation is not unbiased. The objective opinion of another individual can add immeasurably to the quality of your response.

Your response likely will take several drafts. If the response refers to a document, include it as an exhibit. The response should directly address the conduct that the client believes was wrongful. In so doing, consider the sage advice of Detective Joe Friday in the television show *Dragnet*: “Just the facts, ma’am.” Your opinion matters little. Diatribes, cocky remarks, defensiveness, and dismissiveness will garner no points with the investigator. A reasoned, objective response, however, will. The idea is to make the investigation as easy for the investigator to complete as possible. This approach is similar to the one litigation attorneys take when writing memoranda and briefs to the court. If there is a document that helps, even if it is already in the file, attach it. This way, the investigator need not search for it. In the end, ask for dismissal of the grievance.

It is always best to prepare the response several days prior to the response deadline date. A good approach is to put the response aside for a day or so. Then, prior to sending, review the response again. Often, one is surprised by the tone the writing may convey, even though not evident in the first preparation of the response. If you have ever had a person in authority say to you, “Do not take that tone with me,” you will quickly understand that tone is important. Unfortunately, one of the great disadvantages to the written word is that tone may be misinterpreted. A second reading of the response after putting the matter aside
for a day or so is the best way to diminish the possibility of unintended tone.

Retain counsel. Importantly, your best opportunity to get the grievance dismissed is at this very first response stage. Accordingly, consider retaining disciplinary defense counsel. Many attorneys balk at the idea of expending resources to hire someone to do a job they themselves can do. Legitimate as such a position seems, disciplinary defense counsel will be able quickly to get to the crux of the behavior the disciplinary authorities thought was worthy of investigation. Retaining someone familiar with the disciplinary rules, case law, and procedure is important. Disciplinary investigations and prosecutions are quasi-criminal in nature. They share the characteristics of both criminal law and civil law. Disciplinary defense counsel has a complete understanding of the interplay between these two areas in a disciplinary matter. Many insurance carriers allow attorneys to choose their own disciplinary defense counsel rather than using counsel the insurance company uses to defend in negligence actions.

Wait it out. Once the response is submitted to the disciplinary authorities, there is nothing to do but wait. Although one always hopes for a quick decision, it does not always work out that way. Investigations, like civil litigation, are on a time track. The ones that must be decided because the time limit is nearing are the ones that the disciplinary authorities will work on. When your case reaches this point, a decision will occur. Sometimes this seems like an exceedingly long time. Taking the attitude that no news is good news can help in alleviating the anxiety of awaiting a decision.

Once the dismissal arrives, understandably, you will heave a big sigh of relief.

If, rather than a dismissal letter, you get a letter indicating that the investigator has received your response but has just one or two additional questions, you seriously may want to consider hiring disciplinary defense counsel if you have not already done so. This letter is a signal either that you missed a matter on which the disciplinary authorities were focusing or that there is a real ethics problem with your representation of your client. Either way, you will want an independent third party to work out whatever can be worked out with the disciplinary authorities and discover exactly what they believe you did wrong.

Conclusion. There is no doubt that a disciplinary investigation causes stress and concern. However, the vast majority of attorneys get through them without incident. Chances are good that you will, too. It is only in a handful of cases that actual prosecution ensues.

Take a deep breath. A grievance does not mean a finding of professional misconduct.

ADVICE FROM A PROSECUTOR
By Mary Andreoni
Like most lawyer discipline agencies throughout the country, the Illinois Attorney Registration & Disciplinary Commission (ARDC, where I serve as ethics education counsel) undertakes to investigate any complaint that has even marginal validity, not just the most serious charges. This policy is, in part, the result of the fact that the legal profession is largely self-regulating. The ARDC annually docket approximately 6,000 grievances. Although this appears to be a large number (about 4 percent of the bar), the ARDC docket everything that is filed with it as a grievance regardless of the ultimate merits of the allegations.

Most grievances result from poor client communication practices. Nearly 75 percent of grievances involve problems with the attorney-client relationship and fall into one of three areas:

1. The client doesn’t know what is going on in his or her legal matter (failure to communicate).

2. The client doesn’t understand what is going on (neglect).

3. The client doesn’t agree with how much the representation costs (dispute over fees).

Not surprisingly, the most frequent areas of complaint are in the consumer-oriented areas of law—domestic relations, tort, real estate, and criminal defense. Clients in these practice areas typically do not deal with lawyers or the legal system on a regular basis and therefore may have unrealistic expectations.

Every grievance filed with the ARDC is reviewed, and most are investigated by asking the lawyer for a response to the allegations. Roughly 95 percent of all grievances are closed without the filing of a formal disciplinary complaint. An investigation will be closed if it reveals that the lawyer did not engage in unethical conduct, if there is insufficient evidence to sustain a formal complaint of misconduct, or if the lawyer’s conduct is a minor violation of the ethics rules that does not actually or potentially harm the public or undermine the courts and the legal profession. While most grievances will be closed, the fact remains that in many of these cases clients have come to distrust their lawyers, and this distrust tends to erode the public confidence in the legal profession and the court system.

Although every investigation differs, there are certain patterns seen in the grievances submitted against lawyers by clients; the comments and guidelines below reflect these patterns.

Common questions when receiving a grievance. Do I still represent the client? The fact that the complaint was filed by a client against the lawyer does not automatically require a lawyer to withdraw from representing the client. On the other hand, the particulars of a given complaint may mandate or at least strongly argue for withdrawal. In Illinois, for example, lawyers in such cases should be careful to follow the requirements of Illinois Rule of Professional Conduct (ILRPC) 1.16 concerning notice to the client, accomplishing withdrawal to avoid prejudice to the client’s rights, securing permission of the
tribunal when an appearance has been filed, and refunding any unearned portion of a fee paid prior to the withdrawal.

Should I retain counsel to handle a response? The answer depends both on the nature of the inquiry and the comfort level of the lawyer who is the subject of the inquiry. If a lawyer knows an inquiry involves something serious, he or she should retain counsel at the earliest possible opportunity. Examples of potentially serious problems include:

1. where a cause of action is lost, a default judgment entered against a client, or an appeal dismissed because of the lawyer’s failure to take appropriate action;
2. business transactions with clients without appropriate disclosures or independent representation for the client;
3. the entry of a criminal conviction of the lawyer for a misdemeanor or felony;
4. accusations of mishandling funds;
5. accusations of dishonest conduct, including false statements to a court, client, or some other party, or fraudulent or deceitful conduct that does not involve the practice of law; or
6. fee matters involving allegations of billing fraud, cases where a lawyer has taken a contingency fee where there was no element of risk to the recovery, and cases where the lawyer has taken fees beyond what was allowed by statute or court order.

Even in cases that are unlikely to result in disciplinary charges, many lawyers are well served by securing representation or, at a minimum, asking a trusted colleague to review the response before it is submitted.

Am I violating attorney-client privilege by responding? ILRPC 1.6(b)(5) allows a lawyer to reveal client confidences necessary to defend the lawyer against an accusation of wrongful conduct in a civil, criminal, disciplinary, or other proceeding. (Check with the rules in your jurisdiction.) The lawyer should keep in mind that such self-defense exceptions to the privilege rule should not be seen as an invitation to engage in character assassination of a client. By the same token, the attorney-client privilege cannot be used as an excuse for not turning over information sought in a disciplinary investigation.

Can I settle with my client? Lawyers sometimes make the mistake of trying to settle the underlying controversy with the client without appropriate disclosures and/or with the improper request that the client agree to withdraw the disciplinary complaint. ILRPC 1.8(h) prohibits a lawyer from settling a civil claim against the lawyer by an unrepresented client or former client without first advising the person in writing that independent representation is appropriate. Also, ILRPC 8.4(h) prohibits a lawyer from entering into an agreement purporting to limit a client’s or former client’s pursuit of a disciplinary complaint against the lawyer. Violating these rules in the midst of attempting to defend a disciplinary inquiry can add to a lawyer’s disciplinary problems.

Responding to a grievance. Don’t ignore the request for a response. First, take a deep breath. A grievance does not mean a finding of professional misconduct. Respond promptly and answer the questions raised by disciplinary counsel. If you don’t understand what information to provide or you need additional time to respond, contact disciplinary counsel. Hoping that a disciplinary inquiry will go away does not work and could result in bigger trouble as failure to cooperate in the investigative stages of a case is a separate ethical offense.

Provide a complete, accurate, and documented response. A good response will provide appropriate background information and legal context, while addressing as explicitly as feasible the complaints voiced by the client or other complainant, and include copies of critical documents and information on how to contact witnesses with knowledge of disputed facts. If a response is confusing or incomplete, disciplinary counsel will have to do additional independent analytical and investigative work, and resolution will take longer. Obfuscation that seems intentional can raise suspicions that expand and prolong the investigation. And most importantly, don’t lie. Lawyers who make the mistake of falsifying documents or misrepresenting facts in their responses risk formal discipline charges and probably some suspension, even if the underlying conduct they tried to hide was not itself serious.

Keep your response professional. Avoid making accusatory or inflammatory statements about the client or complainant. Although it can be difficult to leave the venom out of the response, there are a number of reasons to try. Emotional attacks on the complainant or the disciplinary system rarely address the issues that need to be resolved to conclude the file, and, more often than not, tend to confuse the issues. Responses laced with venom toward the client are unprofessional and only tend to make the lawyer appear unprofessional to both disciplinary staff and the complainant, who will be sent a copy of the response.

Read your malpractice policy and consider contacting your carrier. Malpractice policies often provide coverage for responding to a disciplinary grievance. Regardless, promptly notify your carrier of the disciplinary investigation; otherwise, you risk losing coverage if a malpractice claim is later made.

Retain copies of all correspondence. Even if a grievance is ultimately closed, it is entirely possible for a complaining witness to make the same or similar complaint months or even years later. In Illinois, the ARDC generally retains copies of closed files for up to ten years after the closure (see Illinois Supreme Court Rule 778(b)). It is helpful to you and to disciplinary counsel if you retain copies of all correspondence sent or received by you.

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Searching for additional resources to help you out when things go wrong? Take a look at the ABA publications below and check out the helpful links to website resources hosted by the GPSolo Division and the ABA.

To order any of the products listed below, call the ABA Service Center at 800/285-2221 or visit our website at shopaba.org.

**BE A BETTER LAWYER: A SHORT GUIDE TO A LONG CAREER**
By Eleanor Southers (ABA Solo, Small Firm and General Practice Division; 2014; 5150473; $39.95; ABA member price $33.95; GPSolo member price $29.95)

This book will help you assess your legal career and pinpoint what you might want to change. It will then assist you in determining how to make those changes and plan for the uncertainties of the future.

**BEING PREPARED: A LAWYER’S GUIDE FOR DEALING WITH DISABILITY OR UNEXPECTED EVENTS**
By Lloyd D. Cohen and Debra Hart Cohen (ABA Solo, Small Firm and General Practice Division; 2008; 5150423; $104.95; GPSolo member price $89.95)

This essential workbook and guide will help you protect your law practice against casualty or other unexpected events.

**THE BUSINESS OF LAW, THIRD EDITION**
By Edward Poll (ABA Solo, Small Firm and General Practice Division; 2014; 5150466; $149.95; GPSolo member price $135.95)

This updated third edition outlines the fundamentals of running a successful law firm in practical, clear, and concise terms, simplifying the mystical process of operating a law practice so that anyone can be more effective with his or her clients and become more profitable.

**EFFECTIVELY STAFFING YOUR LAW FIRM**
By Jennifer J. Rose (ABA Solo, Small Firm and General Practice Division; 2009; 5150434; $89.95; GPSolo member price $75.95)

Although staff can help you bring in more profits and clients, ineffective supervision can cost you money. This book provides insight to help guide the many decisions that face a lawyer who is running a firm, whether solo or staffed.

**HOW TO CAPTURE AND KEEP CLIENTS: MARKETING STRATEGIES FOR LAWYERS, SECOND EDITION**
Edited by Jennifer J. Rose (ABA Solo, Small Firm and General Practice Division; 2015; 5150482; $79.95; GPSolo member price $67.95)

In this new second edition, the best and most innovative solo and small firm lawyers offer their secrets, approaches, and strategies to that age-old puzzle of growing your law firm.

**THE LAWYER’S GUIDE TO FINANCIAL PLANNING**
By Cynthia Sharp (ABA Solo, Small Firm and General Practice Division; 2014; 5150471; $69.95; ABA member price $62.95; GPSolo member price $55.95)

This essential resource for any lawyer committed to building and maintaining a strong and secure financial future outlines “need-to-know” information in clear and concise terms and presents an actionable plan that leads to financial success.

**MINDING YOUR OWN BUSINESS: THE SOLO AND SMALL FIRM LAWYER’S GUIDE TO A PROFITABLE PRACTICE**
By Ann M. Guinn (ABA Solo, Small Firm and General Practice Division; 2010; 5150441; $125; GPSolo member price $99.95)

This book helps you master the key elements of running a small firm, from finance, to marketing, to anticipating clients’ needs—all while practicing law at the same time.

**RUN YOUR FIRM LIKE A BUSINESS: AN OPERATIONS GUIDE FOR THE SOLO PRACTITIONER AND SMALL LAW FIRM**
By Frank T. Lockwood (ABA Solo, Small Firm and General Practice Division; 2013; 5150462; $79.95; GPSolo member price $65.95)

Stop avoiding the administrative part of the profession and start planning your business strategy as you would your case strategy. Revolutionary systems, how to design them, implement them, and stick to them are all outlined in this helpful guide.

**SMART MARKETING FOR THE SMALL FIRM LAWYER**
By Kenneth Vercammen (ABA Solo, Small Firm and General Practice Division; 2014; 5150468; $59.95; ABA member price $53.95; GPSolo member price $45.95)

This book thoroughly explores today’s marketing landscape and outlines its many facets for you in concise and easy-to-understand terms.

**TECHNOLOGY SOLUTIONS FOR TODAY’S LAWYER**
By Jeffrey Allen and Ashley Hallene (ABA Solo, Small Firm and General Practice Division; 2013; 5150463; $89.95; GPSolo member price $75.95)

Technology poses many challenges and opportunities for attorneys. This book provides detailed information in basic terms to help navigate the challenges lawyers face in keeping abreast of technology and using it as a strategic tool in their practice.
THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS
By Jill D. Rhodes and Vincent I. Polley (ABA Cybersecurity Legal Task Force; 2013; 3550023; $59.95; ABA member price $47.95)
This handbook offers practical information, guidance, and strategies to lawyers and their law firms on how to defend against cyber-threats; it also provides advice on how best to respond when breached.

ENCRYPTION MADE SIMPLE FOR LAWYERS
By David G. Ries, Sharon D. Nelson, and John W. Simek (ABA Law Practice Division; 2015; PC 5110792; $69.95)
This book covers everything you need to know about encryption, breaking down the myths of security and putting the power to protect sensitive data in your hands.

FLYING SOLO: A SURVIVAL GUIDE FOR THE SOLO AND SMALL FIRM LAWYER, FIFTH EDITION
By K. William Gibson (ABA Law Practice Division; 2014; 5110760; $99.95)
Revised and updated to meet the needs of today’s legal professionals, this fifth edition is a comprehensive guide to establishing and maintaining a successful solo law practice.

HOW TO GET AND KEEP GOOD CLIENTS, THIRD EDITION
By Jay G Foonberg (ABA Law Practice Division; 2009; 5110668; $179.95)
Here are time-proven tips and systems that you can use for long-range and immediate marketing success. This book is not theoretical. It gives you practical information you can put to use right away.

THE LAWYER’S GUIDE TO INCREASING REVENUE, SECOND EDITION
By Arthur G. Greene (ABA Law Practice Division; 2011; 5110728; $79.95)
Ensure your firm isn’t leaving dollars on the table. Here are practical tips and step-by-step plans for evaluating, tracking, and ultimately enhancing your firm’s revenue stream.

LOCKED DOWN: INFORMATION SECURITY FOR LAWYERS
By Sharon D. Nelson, David G. Ries, and John W. Simek (ABA Law Practice Division; 2012; PC 5110741; $79.95)
Written in clear, non-technical language that any lawyer can understand, this book explains the wide variety of information security risks facing law firms and how lawyers can best protect their data from these threats — within any budget.

MARKETING SUCCESS: HOW DID SHE DO THAT? WOMEN LAWYERS SHOW YOU HOW TO MOVE BEYOND TIPS TO IMPLEMENTATION
Edited by Dee A. Schiavelli and Afi S. Johnson-Parris (ABA Law Practice Division; 2015; 5110794; $49.95)
This book collects interviews with the top women rainmakers on how they succeeded using the most current approaches to marketing and business development.

PASSING THE TORCH WITHOUT GETTING BURNED: A GUIDE TO LAW FIRM RETIREMENT AND SUCCESSION PLANNING
By Peter A. Giuliani (ABA Law Practice Division; 2013; 5110762; $79.95)
This book offers a comprehensive examination of the key economic issues typically encountered by law firms when they consider how partners end their careers, as they inevitably must.

RESULTS-ORIENTED FINANCIAL MANAGEMENT: A STEP-BY-STEP GUIDE TO LAW FIRM PROFITABILITY, THIRD EDITION
By John G. Iezzi (ABA Law Practice Division; 2015; 5110797; $99.95)
Whether you’re a financial novice or veteran manager, this book will help you examine every facet of your financial affairs from cash flow and budget creation to billing and compensation.

THE 2015 SOLO AND SMALL FIRM LEGAL TECHNOLOGY GUIDE
By Sharon D. Nelson, John W. Simek, and Michael C. Maschke (ABA Law Practice Division; 2015; 5110793; $89.95)
This one-of-a-kind annual guide is written to help solo and small firm lawyers find the best technology for their dollar.

GPSOLO DIVISION LINKS
“Bumps in the Road for Young Lawyers,” GPSolo magazine, May/June 2015: tinyurl.com/p7a8j2u
Resource page for starting and running a law firm: tinyurl.com/clwojlp
Solo/Small Firm Forms Library: ambar.org/gsoloforms
Sponsors page: tinyurl.com/7bzft7p

OTHER LINKS FROM THE ABA
ABA Center for Professional Responsibility: americanbar.org/cpr
ABA Law Practice Division: lawpractice.org
ABA Solo and Small Firm Resource Center: ambar.org/soloandsmallfirms
THE SEVEN DEADLY SINS OF SUCCESSION PLANNING

By Peter A. Giuliani

The long-term success rate of closely held businesses is abysmal. More than 70 percent of family businesses either fail or are sold before the second generation can assume control. Only about 10 percent make it to third-generation status.

If you are a first-generation partner around age 60 or slightly younger, you may have a shot at implementing a successful equity transition plan. If you care about the survival of your firm and what it means to your clients, employees, and legacy, this article may help you start now to ensure a smooth transition.

Our first case study. Firm A was founded by three lawyers—Manny, Moe, and Curley—who broke away from a larger firm because they wanted to start fresh and do things their way. The three founders worked hard and served their clients well, and the firm prospered. Sharing profits equally, the founders ended up earning far more than their counterparts in larger firms. Internally, they ran their firm with cards held close to the vest. Firm financials were guarded carefully. Management was the prerogative of the founders, and even the junior partners had little or no influence in firm matters.

When Curley wanted to retire, Manny and Moe devised a plan to acquire Curley’s equity interest over four years, using a deferred premium compensation plan—that is, they “overpaid” her for four years in exchange for her ownership interest. This left Manny and Moe in sole ownership and control of the firm.

Some years passed and Manny and Moe considered their own retirements. They figured that the plan devised for Curley would work with their three junior partners. Unexpectedly, the junior partners balked. They agreed that the founders probably should get something for their ownership interests but had no basis for evaluating the proposal. Eventually, all three declined the offer, preferring to remain de facto employees.

The junior partners gradually left the firm. As they left, clients became aware that the firm was eroding and started shifting work to other firms. Eventually, the founders tried to merge the firm with a younger firm, but the younger firm declined.

Our second case study. Firm B’s story has a happier ending. After two years of working in Big Law, law school roommates Tom and Jerry returned to their hometown and opened a small tax and estate planning firm. Five years later, they hired three new lawyers, each of whom had experience with other firms. Eventually, business clients encouraged them to add two more lawyers on the corporate/transactional side. Tom and Jerry’s philosophy was to hire only the best lawyers and to refer out any work they could not staff appropriately.

While Tom and Jerry were the main attraction, they strongly promoted all the other lawyers in the firm. All lawyers in the firm met once a week to go over the business, schedule assignments, and collaborate on projects. This went on every week for the first ten years of the firm’s existence, after which time the firm had grown too large to have an “all-hands” meeting every Monday morning. Still, they continued to meet as a firm, and Tom and Jerry delegated practice management tasks to other partners.

Up until Tom and Jerry admitted their first non-founder equity partners, the firm operated as a “hands-off” general partnership. One of the second-generation partners saw that the firm would likely need to admit more partners to meet client demand. She suggested that the partners develop a comprehensive operating agreement. In this agreement, the partners established the economic terms governing death, disability, withdrawal, and retirement of partners. All partners participated. In the end, when it came time for Tom and Jerry to retire, their transition from equity partners to of counsel was seamless.

Lessons learned. There are at least seven seeds of destruction that, left unattended, can completely derail the orderly succession of a law firm. I have chosen to call them the Seven Deadly Sins of
Succession, and they are outlined below.

1. **Failure to create a culture of legacy, as opposed to a culture of individualism.** Tom and Jerry included all their lawyers in running the firm. Manny and Moe were more focused on maximizing the value of the firm for themselves. They ultimately destroyed the firm.

Lone-wolf cultures—based on individuality and short-term thinking—cannot succeed and will ultimately sow the seeds of decline and destruction. Legacy cultures most often lead to multi-generational success. Every major law firm in existence today started out as a small firm, put together by a few founders. They have survived and prospered because of the legacy cultures created by their founders.

2. **Failure to create and nurture the next generation of owners.** You cannot pass on a law firm if you do not build the succeeding generation. Second-generation partners must think and act like owners. They need to be involved in the firm and commit to building its future. They cannot do this in isolation. The only way they can appreciate the meaning of ownership is by participating and learning by example.

3. **Failure to address succession issues until it is too late.** By keeping things so close to the vest for so long, Manny and Moe had no time to develop a succession plan. Tom and Jerry were forced to address succession when their firm executed its first operating agreement. They planned for retirement long before they actually considered retirement.

4. **Failure to clarify the meaning of equity.** Firms that prepare carefully for succession of generations know that they need to instruct junior lawyers in the privileges and accompanying responsibilities associated with owning a share of the business. If the next generation has not been educated, mentored, and prepared to accept the mantle of partnership in the complete sense of the word, succession will fail in the long run.

5. **Failure to encourage entrepreneurship.** Successful founders of law firms are successful entrepreneurs. They understand how to take calculated risks and how to build and lead a team. The seed of destruction will take root if too many lawyers who lack entrepreneurial drive are admitted to partnership.

6. **Failure to “let go” and trust others.** Succession planning is mostly about passing on existing client relationships to others so that these client relationships have a higher chance of enduring. But sometimes partners closely guard these relationships because they are intensely personal—or simply out of fear.

Manny and Moe operated in a “protection” mode, controlling client relationships beyond the point at which clients would normally expect some transition plan to emerge. Founders who act in protection mode exhibit a lack of trust that will eventually torpedo any effort at succession planning. Tom and Jerry hired the best lawyers they could find and trusted them with their client relationships. Decades later, early-stage clients were still using the firm.

7. **Failure to educate the next generation about the finances and economic realities of the firm.** Manny and Moe kept a lot of information to themselves. When Manny and Moe finally opened up, they failed to anticipate how the ignorance of the junior lawyers would play out. Tom and Jerry ran an “open” shop. When it came time to offer partnership to the second generation, the junior lawyers already felt grateful to the founders for opening up opportunities. The weekly meetings also created a sense of shared enterprise and teamwork.

**Conclusion.** Firm founders need to recognize these seven deadly sins and do whatever they can to avoid them. Ignoring them will eventually imperil the law firm as a durable institution. ■
THE ABA’S PUZZLING CONFIDENTIALITY RULE

By Thomas E. Spahn

Lawyers who began practicing before 1983 became familiar with the confidentiality duty articulated in the 1969 ABA Model Code of Professional Responsibility—which nearly every state adopted. The ABA Model Code prohibited lawyers from revealing clients’ “confidence[s]” or “secret[s].” ABA Model Code DR 4-101(B). The former referred to “information protected by the attorney-client privilege under applicable law.” ABA Model Code DR 4-101(A). This evidentiary doctrine generally covers intimate communications between clients and their lawyers, made in confidence and maintained in confidence. The ABA Model Code defined the word “secret” as “information gained in the professional relationship that either [1] the client has requested to be held inviolate, or [2] the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” Id.

This formulation made great sense. Lawyers instinctively know not to disclose confidential communications with their clients. The evidentiary attorney-client privilege protection prevents third parties from discovering those communications, and this parallel confidentiality duty forbids lawyers from voluntarily disclosing them. Similarly, lawyers recognize that they must honor clients’ requests to keep information confidential, even if a request reflects some idiosyncratic notion. And no lawyer would ever think it permissible to voluntarily disclose client information if the disclosure would harm the client.

In 1983 the ABA dramatically abandoned this commonsense approach. Under ABA Model Rule of Professional Conduct 1.6(a), lawyers may not reveal any “information relating to the representation of a client,” unless the client consents to the disclosure or some other rule requires or allows it.

The 1983 ABA Model Rules formulation of lawyers’ confidentiality duty is essentially unworkable.

The 1983 ABA Model Rules formulation represents a remarkable and essentially unworkable expansion of lawyers’ confidentiality duty. This rule on its face prohibits lawyers from disclosing publicly, widely known, favorable information about their clients unless the clients consent. Lawyers theoretically violate this rule if they acknowledge to their spouse that they were in court that day on a case described in a front-page newspaper article that mentions the lawyer’s presence. A 2009 Nevada legal ethics opinion (LEO) admitted that a lawyer would violate the rule by “[p]honing a client when the client is not at home and leaving a message about the representation on the client’s answering machine.” Nevada LEO 41 (6/24/2009).

Not surprisingly, the ABA has had trouble defending this expansive confidentiality duty. In a 2012 ABA publication, one author cited what he said is a “benefit” of the ABA’s broad approach: “If lawyers spend less time talking about their cases and more time talking about subjects like politics, art or sports, Model Rule 1.6 might have the unintended consequence of making lawyers more interesting to their friends and relatives, and maybe even to one another.” Edward W. Feldman, “Be Careful What You Reveal: Model Rule of Professional Conduct 1.6,” Litigation, Summer/Fall 2012 (38:4). This is quite a rationale for a rule whose violation could bring professional punishment.

Ironically, the ABA’s 1983 confidentiality formulation also seems oddly underinclusive. The 1969 ABA Model Code prohibited lawyers from disclosing any “information gained in the professional relationship” if the disclosure would harm the client. But the ABA’s 1983 formulation limits the prohibition to “information relating to the representation of a client.” On its face, this more recent wording would not prevent lawyers from disclosing a client’s crude sexual comment about a co-worker or racist epithets about a waiter. Those communications fell within the 1969 ABA Model Code’s phrase “information gained in the professional relationship” but fall outside the 1983 ABA Model Rules’ phrase “information relating to the representation.
of a client.” Lawyers’ disclosure of such ugly client communications might violate some other ethics rule, but not the core confidentiality rule.

The states’ and even the ABA’s reactions have confirmed just how far the ABA went off track in 1983. While all or nearly all the states adopted the 1969 ABA Model Code formulation at the time, many states have rejected the 1983 ABA Model Rules approach. The District of Columbia, Georgia, Minnesota, New York, Virginia, and other states have kept the 1969 ABA Model Code confidentiality rule or a variation of it.

And even states that have adopted the 1983 ABA Model Rules terminology recognize that it cannot be enforced as written. In the 2009 Nevada legal ethics opinion mentioned above, the Nevada Bar explained that “the absolute wording of Rule 1.6 is not literally meant to make every disclosure of the most innocuous bit of client information an ethical violation.” Nevada LEO 41 (6/24/2009). The Nevada Bar suggested “that common sense should be a part of Rule 1.6 and the lawyer should not be disciplined for a harmless disclosure.” Id. Other states may not have been as blunt, but their disciplinary records show that lawyers normally will not face professional sanctions for disclosing client information if the disclosure did not harm the client.

Although the ABA has not revisited its core confidentiality rule, a 2012 revision implicitly highlighted the ABA’s recognition that it went too far in 1983. Ironically, the 1983 ABA confidentiality duty contained no exception for lawyers attempting to clear conflicts of interest either on a day-to-day basis or when hiring lawyers possessing protected client information from an earlier employment. Both of these processes almost necessarily require disclosure of some protected client information. The ABA still hasn’t dealt with the former context, but in 2012 the ABA adopted a provision allowing lawyers to disclose protected client information “to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm.” ABA Model Rule 1.6(b)(7).

The rule also contains a condition on such permissible disclosure: “only if the revealed information would not compromise the attorney–client privilege or otherwise prejudice the client.” Id. If this approach sounds familiar, it should. It echoes the 1969 ABA Model Code approach by prohibiting only those disclosures that involve privileged communications or that would harm the client. Thus, the 2012 ABA Model Rules amendment constitutes what might be called the revenge of the commonsense 1969 ABA Model Code confidentiality formulation.

As a practical matter, the ABA’s 1983 overreach normally does not affect lawyers in their real lives. This is because disciplinary authorities simply don’t enforce the confidentiality rule as it is written. But all lawyers should feel a bit embarrassed by our profession’s inability to articulate and agree on an enforceable definition of our confidentiality duty. After all, lawyers’ tremendously strong confidentiality duty sets us apart from many other professions. And lawyers play the primary societal role in drafting language to guide everyone’s conduct—from statutes to judicial decisions to private contracts. But the ABA and most states have been unable to draft a single enforceable sentence defining one of our profession’s core duties.
KNOW THY TRUST: ORCHESTRATING ASSETS IN DIVORCE CASES

By Deborah Rysso

All trusts are not created equal. But no matter what kind of trust it is, chances are good that it will need to be addressed and changed during the course of a divorce. Family law attorneys must pay particular attention to trusts that surface in a divorce case. At a minimum, they must recognize that a spouse should be removed as a fiduciary and that other potentially thorny situations need to be identified.

Structure of a trust. The person setting up a trust is known as the “grantor” (or “settlor” or “trustmaker”). In the trust document, the grantor identifies who will serve as “initial” and “successor” trustees. The trustee has a duty to follow the terms of the trust. The grantor also identifies lifetime and at-death beneficiaries, which are the people or organizations to receive distributions from the trust.

A trust is part of a “complete estate plan.” A complete estate plan includes all the common, frequently necessary documents such as a pour-over will, assignment of personal property, financial durable power of attorney, health care durable power of attorney, and deeds transferring real estate into the trust. These documents—in addition to the trust—may need to be changed during the divorce.

A client must change the estate plan during a divorce because, generally, the soon-to-be-ex-spouse is named to serve as a fiduciary and is a beneficiary. Often, divorcing spouses want these provisions removed. Even when spouses do not want to remove the spouse as a fiduciary and/or beneficiary, the documents should be updated to clarify that even though spouses are divorcing, they want to continue to include each other in their estate plans. This eliminates any ambiguity as to what the spouses’ intentions are post-divorce. Finally, couples with minor children should identify future guardians and/or conservators for the children in the event that parents predecease children or become unable to care for children younger than 18 years old.

Trusts created during a person’s lifetime often are called “living trusts.” Others are known as “testamentary” trusts and are formed via a last will and testament and, therefore, begin after death.

Trust funding. Individuals “fund” a trust by transferring assets into the name of the trust. Usually the attorney handles the drafting and recording of deeds into the trust, but the client is responsible (with the attorney’s guidance) for transferring other assets into the trust. Once transferred, the trust, rather than the individual, owns the assets, and the terms of the trust guide asset use.

One of the first tasks for a divorce attorney is to ascertain which assets are owned by the trust or which assets list the trust as beneficiary. If the trust is being amended or revoked, asset ownership and beneficiary designations must be adjusted accordingly. Further, depending on the terms of the trust, trust assets may or may not be available, which may affect the terms of the divorce judgment.

Can the trust be changed? The first question to answer is whether the trust is revocable or irrevocable. These terms mean simply: Can the trust be changed or revoked, or does the trust prohibit change or revocation? The terms “revocable” and “irrevocable” do not delineate what type of trust is involved. Different types of trusts may either be revocable or irrevocable, but all revocable trusts are not the same and all irrevocable trusts are not the same.

This is a common point of confusion. People will often say, “She has an irrevocable trust.” This phrasing alone is insufficient to tell what type of trust she has, or more succinctly, how the trust functions. The most common type of trust is a revocable living trust, often called a “family trust.” However, there are many other types of trusts.

If the estate plan is revocable, and if your client wants to change it, he or she can and should do so. Simply draft a letter advising the other party or his or her counsel that documents have been revoked and clarify that the other party is no longer a fiduciary under
the particular documents. Your client should then proceed to draft and sign new documents. You may want to refer the client back to his or her estate planning attorney to ensure that this is done correctly and that the new estate plan reflects the terms of the divorce judgment.

If your client’s estate plan is irrevocable, then review with your client the effect of not being able to change the document. Frequently, irrevocable trusts set up by married couples are for the benefit of their children, and the parents are comfortable knowing that the trust will continue to benefit the children. If there is a compelling need for a change of trustee, petition the court for such a modification. Other irrevocable trusts may not be part of the divorce judgment and need careful scrutiny.

**Issues easily overlooked.** Quite often the client does not fully understand estate planning or details of the divorce and fails to complete his or her tasks pertaining to estate planning or the divorce judgment. Trusts are often left unfunded—meaning that the trust is drafted and signed, but assets to fund it never get transferred. This can happen with real estate, stocks and bonds, bank accounts, business assets, etc., and depending on the timing, can affect divorcing parties long after the divorce.

**Attempts to hide/shield trust assets.** Divorcing parties often have the desire or intention to hide or shield assets from their spouses. They sometimes get the idea that a trust might serve that purpose. This depends on the asset and state rules.

Attempting to use a trust to prevent a spouse from having a claim against it usually won’t work, especially if trust assets are marital or community property. Like any other attempt to hide an asset, this would likely be frowned upon by a judge and be considered a fraudulent transfer. A judge can usually modify terms of a trust so that even if the trust stipulates it is unavailable to the divorcing parties, the judge can make it available.

There are, however, occasions when transferring assets to a trust is permissible to prevent them from becoming marital property. In noncommunity-property states, setting up a trust to segregate inherited assets from marital assets ensures that those assets pass to the spouse’s family members rather than to the other spouse’s family members. This practice is common and not indicative of an attempt to act unscrupulously.

Assets transferred into a trust prior to marriage may be shielded from a claim against a divorcing spouse, depending on the terms of the trust and the laws of the state. Likewise, a beneficiary of an irrevocable trust usually can safeguard trust assets from a spouse’s claim. One caveat to remember is that regardless of the type of trust fund, a court may include income from the trust when calculating child and spousal support.

A divorce attorney for a spouse who has an irrevocable trust should carefully consider the terms of the trust when attempting to divide the marital estate. Irrevocable trusts can have limitations on access to the funds. So even though a division of the marital estate may appear fair on paper, the spouse with the trust may end up not having sufficient access to cash.

**Conclusion.** If a trust is confusing, ask an experienced trust lawyer for his or her opinion as to its effect on the divorce. Because trusts are written for different purposes, but these purposes are not explained in the documents themselves, a trust can be confusing when it veers beyond traditional templates. Trusts also can be poorly drafted. Asking another lawyer for his or her opinion may save you and your client from serious trouble down the road.

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**ABA SECTION OF FAMILY LAW**

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For more information or to obtain a copy of the periodical in which the full article appears, please call the ABA Service Center at 800/285-2221.

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LIFE INSURANCE LAPSE: POLICIES, PRACTICES, AND PROCEDURES

By Bryan D. Bolton and William T. Schemmel

Lapse of a life insurance policy often leads to litigation seeking either death benefits or reinstatement. Life insurance lapse generally refers to coverage ending for insufficient or nonpayment of premiums. Insufficient premiums can cause lapse of a life insurance policy when applicable monthly mortality, fees, and expenses exceed the policy’s cash value. Nonpayment of premiums can cause a life insurance policy to lapse when the policy has no cash value and the premiums are not timely paid.

Nearly without exception, lapse of a life insurance policy involves consideration of the grace period. A grace period is a statutory or contractual period of time, after nonpayment of premiums, when life insurance coverage remains in effect. If death occurs in the grace period, then benefits are paid net of the unpaid premiums. If sufficient premiums are not paid during the grace period to sustain the policy, then the life insurance ends.

After the lapse of life insurance, the insured can apply for reinstatement. Reinstatement typically requires submission of an application and involves putting the lapsed policy back in force on the same terms and conditions. Most policies impose a time limit on reinstatement requests and typically require proof of insurability “satisfactory to” the insurer. Reinstatement after death generally is not an option.

A common refrain in life insurance lapse cases is the contention that the grace period and/or premium notice were not received. An initial point to consider is whether such a notice is even required by statute or contract. If notice is required, then what must the insurer prove — notice sent or notice received? Insurer evidence of mailing is almost always important, but other communications with the insured can also play an important role.

The claim of non-receipt of notice may be complicated by death of the addressee, raising important evidentiary issues.

Life insurance contracts. Timely payment of premiums is an essential component of a life insurance contract. Lapse for nonpayment of premiums is the essential means through which insurers encourage policyholders to satisfy the prompt payment of premium obligations. Timely premium payments may be a condition precedent to liability.

A grace period extends the time for making a required premium payment and avoids the immediate loss of coverage. During the grace period, the policy continues in full force. If the insured dies during the grace period, the policy beneficiary may still recover the death benefit minus the unpaid premiums through the date of death. Thus, an important question may be how long is the grace period?

Most states, by statute, require life insurance policies to include a grace period. The majority of states have a standard grace period provision of 30 or 31 days or one month.

Even if a grace period is required, in a majority of states no grace period notice is required. This is consistent with the common law, which required no notice of policy termination. Some states changed the common law and require notice of cancellation or termination.

If a required termination notice is not given, some state statutes still allow termination for nonpayment of premiums, but only after passage of a statutorily prescribed time.

Failure to provide timely notice can extend the grace period. The policy essentially remains in force for an extended period of time without payment of premiums.

A grace period notice also may be required based on the policy language. The policy language is particularly important in determining the insurer’s obligations. If a policy requires an insurer to “send” a grace period notice, then the insurer’s business records coupled with a supporting affidavit should be sufficient to dispose of the case. If a policy requires the insurer to “provide” notice, then the court may require proof of receipt. The insurer, however, may be able to create a rebuttable presumption of receipt by establishing mailing of the notice to the insured.
The insurer typically has the burden of establishing mailing or receipt of any requisite notice. Assuming an automated notice generation and mailing system is employed by the insurer, computer records showing the printing and mailing dates of the notices should be obtained. A detailed declaration explaining the computer system and related records is usually very helpful.

The insurer’s burden may be complicated by the recipient’s contention that notice was never received. Any claim of non-receipt of notice may be further complicated by the death of the recipient. In order to create a dispute of fact, a proxy for a deceased individual claiming non-receipt of a notice must provide evidence that at the time the notice was sent this individual was responsible for handling the recipient’s mail, knew where important papers were kept by the recipient, and/or was familiar with the recipient’s habits and customs in dealing with such documents.

When a grace period notice is required by statute or by the terms of the policy, then notice is ordinarily considered a “condition precedent” to a lapse of life insurance coverage. If the required termination notice is not provided, then the policy remains in force. If a court determines a life insurance policy never terminated owing to lack of notice, then the policy remains in force subject to payment of all past due premiums.

Assuming any notice required was given and sufficient premiums are not paid before the end of the grace period, the policy lapses as of the date payment was initially due. The lapse date may become important in the context of determining whether the reinstatement was timely and/or the conditions applicable to any request for reinstatement.

Most life insurance policies contain no provision for premium notices. Similarly, most states impose no statutory requirement on life insurers to provide notice of premiums due. For this reason, any alleged failure to provide notice of premiums due should have no impact on the lapse of life insurance.

Some jurisdictions require a life insurer to provide a notice of premium due before a policy can lapse for non-payment of premiums. A life insurer, for example, may need to provide a written or printed premium notice mailed to the insured at least 15 days but no more than 45 days prior to the due date and before the grace period starts to run. An affidavit from the insurance company stating the notice, with requisite postage, was properly addressed and mailed may create a statutory presumption of proper notice. Even if a state statute fails to include a statutory presumption, an insurer should consider whether state common law includes a presumption of delivery from a properly addressed and posted notice.

Reinstatement. Most states require a life insurance policy to include a reinstatement provision. The duration of any statutory reinstatement requirement differs from state to state. The vast majority of states permit reinstatement within three years.

All statutory reinstatement provisions include the requirement that the insured submit evidence of insurability “satisfactory to the company” and pay all overdue premiums plus interest.

Remedies. Assuming the insured dies during the grace period, the death benefit is due less premiums owed through the date of death. If an insurer fails to provide the requisite notice, the policy remains in force at the time of the insured’s death and triggers payment of the death benefit minus the premiums due through death.
THE USE OF NUMBERS IN NEGOTIATION AND MEDIATION

By Jennifer K. Robbennolt

Numbers are useful for negotiators and neutrals in myriad ways—for crafting options, evaluating proposals, and generating persuasive arguments. But numbers also present challenges, potential problems so big that wise mediators and negotiators will think carefully about how to make the most of numbers’ promise without falling prey to their perils.

The promise of numbers. Numbers can be illuminating and compelling. Negotiators (and mediators) invariably make predictions about the likelihood of future outcomes, such as a court’s ruling on a motion, winning or losing in court, or consummation of a deal. These likelihoods are commonly expressed numerically in terms of probabilities. Potential outcomes, such as a damage award, the value of a deal, or the value of stock options, are also often quantified. And the expected value of a particular outcome is formulated as a mathematical function of its likelihood and magnitude.

Transaction costs such as lawyers’ fees, the dollar value of delays, or the costs associated with going to mediation are often put in numerical terms. Negotiations, deals, or settlements that unfold over time often involve numbers associated with time, including the time value of money, inflation, interest rates, and risk assessments.

Persuasion and problem solving may involve numerical arguments. Negotiators may seek objective quantitative information. They might consider an appraisal, some set of comparables, safety or environmental standards, engineering specifications, or data about replacement costs, “blue-book” values, market price, or depreciation. How many neutrals, after helping parties negotiate away most of their differences and edge close to agreement, have urged the parties to step back, look at the small numbers gap that divides them, and “split the difference”?

All these numbers can be useful decision-making tools. Getting hard data about a matter in dispute may reduce ambiguity and, potentially, the bargaining range. Focusing on numerical information may help negotiators resist common biases in judgment, such as overreliance on a general impression of how well an example fits a particular category or is part of a broader pattern. Numbers can create salient reference points that can facilitate settlement. Numbers might be used to “calibrate” the information that is being provided to the negotiator.

The perils of numbers. Dealing with numbers can be difficult for many negotiators and mediators because numbers are abstract representations and their meaning can differ by context. Even choosing which numbers to entertain can be fraught. Confirmation bias is a tendency to look for, pay attention to, and more readily accept information (including numbers) that confirms an existing belief or preference while disregarding information that is less congenial. And when the information is amendable to differing interpretations, it is likely to be interpreted differently by different parties to the negotiation in ways that are conducive to their respective positions and in ways that can even cause greater disagreement.

One of the most discussed ways in which numbers can distort decision making is how our numerical judgments can be influenced, or anchored, by other numbers that are at the front of our minds. Available numbers can provide benchmarks for our estimates even when they are irrelevant to the judgment or estimation task at hand. In negotiation, judgments can be influenced by initial offers or demands, negotiator aspirations or reservation prices, information about other cases, and constraints such as insurance policy limits or statutory damage caps.

Another commonly described distortion is the effect of framing a choice as a loss or a gain. People tend to be risk-averse toward moderate- to high-probability gains but risk-seeking toward moderate- to high-probability losses. Thus, the same numerical information, presented differently, can result
in strikingly different decisions.

People also have difficulty understanding the effects of inflation and compounding interest. The money illusion involves confusing dollars with buying power. In addition, bigness bias inclines us to focus our attention on big numbers to the neglect of smaller ones, even though small losses or gains can become substantial when they add up over time.

The precision of a number also has an effect on how it is perceived and used. For example, there is a tendency to perceive round numbers as being bigger than precise numbers of approximately the same magnitude. In addition, researchers have found that more precise first offers tend to be perceived as better reasoned and act as more “potent” anchors than do round numbers of similar size.

**Numeracy.** All this is complicated by the fact that people, even highly educated people, differ in their level of understanding of numbers. The construct known as numeracy. Highly numerate people understand and tend to use numbers and numerical concepts to facilitate decision making. Those higher in numeracy may get a richer “gist” from numerical information than those lower in numeracy, and they are more inclined to seek out numerical information, tend to think more critically about numbers and their validity, and are likely to draw more accurate affective meaning from numerical data.

In contrast, those who are less numerate experience less comfort with numbers, are more trusting of information in different frames or with anchor points or frames. For example, experimental data suggests that focusing on other numbers can moderate the anchoring effect of a first offer. Similarly, negotiators can consider numerical information in different frames or with different degrees of precision.

Mediators or other advisors also can help ensure that useful numbers are considered by negotiators and take steps to help make numbers manageable for negotiators, recognizing that individuals will come to the numbers with differing levels of numeracy. Drawing focus to the most important data, ordering or framing the data in useful ways, suggesting useful comparisons, tailoring complexity to the level of numeracy, and combining numbers with descriptive labels may reduce the cognitive demands of numerical information, aid comprehension, and facilitate the effective use of numbers. Asking questions about the sources, validity, and reliability of numbers, as well as the degree of uncertainty associated with them, can help negotiators realistically assess them.

Augmenting numerical information with appropriate visual representations of the data, including graphs or tables, can also be helpful, but it is important to pay attention to the ways different presentations can influence understanding.
POLISHING THE FUNDAMENTALS

By Benjamin K. Sanchez

Any regular reader of this column knows I am a big proponent of lifelong learning. Just because we lawyers finished law school doesn’t mean we are done with our education. In fact, bar associations and lawyer regulatory agencies require lawyers to attend a minimum number of continuing legal education hours every year in order to maintain their license. I suggest that you spend some of these hours away from learning substantive law and procedure and instead polish up on the fundamentals of our profession.

WRITING WELL

If you look on my bookshelves, you’ll see a fair number of books dedicated to writing—not only the art of writing but also the fundamentals of grammar and other basics. Maybe I am more of a writing nerd because my mother and stepfather are journalists by profession. Both were in the newspaper business for the majority of their careers. My mother was a copy editor for newspapers and then became a freelance copy editor for magazines. My stepfather began his career as a reporter and then became a news editor (he is currently the public relations director for a major hospital). Both also spent some time in a government press office. My stepfather began his career as a reporter and then became a news editor (he is currently the public relations director for a major hospital). Both also spent some time in a government press office. My stepfather was a mayor’s press secretary, and my mother worked in the press office of a governor. Needless to say, I had professionals grading my papers before I ever turned them in to teachers as I grew up. The written word was very important in our home!

When we are in school and “English” is a required course, it is easy to focus on the fundamentals of writing. When we are in law school, we all go through a first year of research and writing classes. Unfortunately, after law school, lawyers often stop learning how to improve their writing. They get into habits of writing that never change as they become more experienced attorneys. If a young lawyer is lucky, he gets some feedback from senior attorneys. For the most part, there is no further required learning of the basics. This probably explains the growth of interest in authors such as Bryan A. Garner (The Winning Brief, The Elements of Legal Style, and Legal Writing in Plain English) and Richard C. Wydick (Plain English for Lawyers). Lawyers learned how to write in plain English as children and then learned to write as lawyers in law school. Now the big push is to convince lawyers to write in plain English. As they say, what goes around comes around.

SPEAKING WELL

The second fundamental of being a lawyer is speaking; so you should continue to improve your speaking skills. You may think that speaking isn’t as necessary for transactional attorneys, but quite frankly you must speak a lot as an attorney. You have colleagues and superiors, as well as clients, witnesses, and opposing counsels. Whether you’re negotiating a company merger or advocating before a judge or jury, how well you speak will be a big factor in the ultimate outcome of the matter at hand.

How do you go about increasing your speaking ability? Here’s a clue: Speak! It’s really that simple. The problem comes in figuring out opportunities to speak. Did you know that Toastmasters International still exists? It’s been around since 1924, and there is likely a club near you (it has more than 15,000 clubs in 135 countries). By regularly giving and hearing speeches and gaining and giving feedback, members become better speakers and become more comfortable with speaking. Although it is not a lawyer-based organization, I know many lawyers in Toastmasters. Granted, Toastmasters is not the only speaking organization out there, but it certainly is the most well known.

If you are not comfortable with speaking to a group just yet, you can...
practice your oratory skills in the privacy of your home or office with just the video camera on any smartphone these days. There is no right way to speak, but certainly there are distracting mannerisms that you can learn to control. Audiences, whether they are in a corporate boardroom, a jury box, or a live speaking event, all want to listen to authentic speakers. The key is to practice and get good so that you are a polished speaker while still feeling authentic. When you practice by yourself, notice your mannerisms and try to control those that take away from your presentation while keeping those that make you authentic. People who talk with arm gestures will not suddenly be able to talk without them, and quite frankly they would feel less authentic if they did. If you have a lot of unnecessary pauses, say “and” or “like” too much, or have the universal irritating “um” or “uh” in your speech, then you definitely should practice to correct those. Speaking, like anything else, gets better with practice and repetition. The more you speak, the better you’ll become.

LEADING WELL

While it’s given that writing and speaking are the fundamentals of our stock and trade as lawyers, I often get a raised eyebrow from people when I talk about leadership. People don’t believe that leadership is a fundamental skill. Some believe that leaders are simply born—either you have the skill or you don’t. I disagree. You can learn to lead and become an effective leader, just as you can learn to write or speak. The bigger question is why leadership is a fundamental skill for lawyers.

As leadership expert John C. Maxwell says, “leadership is influence; nothing more, nothing less.” As attorneys, we are constantly trying to influence our audience, whether that audience be our co-workers, judges, juries, opposing counsels, clients, family, friends, community organizations, politicians, or even ourselves. What’s the point of writing or speaking when you have nothing to offer? Attorneys are naturally entrusted to lead. Our education and knowledge of the laws that govern our society make us a natural fit to be community and business leaders, but I also believe that we need to hone our leadership skills for ourselves. A sole practitioner or small firm owner who cannot lead herself will do her practice and firm harm, more so than an ineffective leader at a larger practice. The smaller the practice, the more important the designated leader becomes. So it behooves you to learn the leadership qualities that will have a tremendous impact in each role you have in life.

WE ALL SHOULD VOW TO BE LIFELONG STUDENTS.

There are various organizations that concentrate on leadership and success training. Personally, I chose the John Maxwell Team for my own training. John Maxwell is a former pastor who became a leadership guru and now regularly writes and speaks on leadership principles and trains leaders all around the world. He has published more than 70 books, which regularly make the New York Times’ best-seller list. Maxwell now trains new leaders in his philosophy and techniques and certifies others to speak, train, and coach others. I became John Maxwell Team–certified in August 2015, after having completed six months of training.

Maxwell is definitely not the only leadership expert out there. My friend and ABA leader Melanie D. Bragg has also gone through similar training. Her choice of leadership and success trainer is Jack Canfield, of Chicken Soup for the Soul fame. Canfield regularly teaches a “Breakthrough to Success” seminar and now has his own certification program entitled “Train the Trainer,” which Melanie is currently undertaking. Melanie has been teaching Canfield’s success principles since 2006 and will become certified in 2016. She acknowledges that learning leadership principles has helped her with her clients and in dispute resolutions, including but not limited to mediations.

Regardless of where you learn leadership and success principles, the important thing is to realize that leadership is as fundamental to a successful legal career as writing and speaking. Just as you should constantly strive to improve your writing and speaking skills, so should you learn and improve your leadership skills.

WHAT WILL YOU DO IN 2016?

We are in a natural cycle of renewal and dedication at the beginning of the year. We have infinite choices of New Year’s resolutions to make (a topic on which I have written in the past). This year, do yourself a favor and commit to a year of learning and improving the fundamentals of writing, speaking, and leading. I assure you that if you commit to a year, you’ll find you want to commit to a lifetime of learning. Although our formal academic education may have ended with law school, we all should vow to be lifelong students. Join me in this endeavor, and let the world be your classroom.
WHEN THINGS GO WRONG

By John R. Wachsmann

When things go wrong—don’t go wrong with them. —Hilary Hinton “Zig” Ziglar

There are myriad things that go wrong in a law firm. Some of these are controllable, but many are not. Here are a few: natural disaster, loss or death of an employee, grievance filed against an attorney, sickness of an attorney or staff member, theft, loss of an important case, not enough clients or money, client complaints, loss of an important client, server or computer crash, and phone system crash. I am sure you can think of others not listed. Fortunately, most of us have not experienced even a portion of these, but most of us have experienced a few.

Fear may motivate us to take action to prevent the effects of some of these, but others we probably just cannot properly prepare for. Still, we should bless our fear, as that motivates us into action.

For loss of an employee we can cross-train for mission-critical tasks. We can have business continuity plans for disasters. We can have IT professionals on call for computer and server problems. We can diversify the types of clients we take to minimize the effects of the loss of clients. We can have a disaster plan with multiple backups for computer concerns. Finally, we can say our prayers and count our blessings.

We should ask ourselves what is the essential core of our practice that must remain operational and plan accordingly. This requires some thought and analysis. Of course, good planning may minimize and perhaps eliminate some of these problems, but planning cannot prevent everything.

Years ago, I worked for a law firm that had tremendous turnover in staff and attorneys. When I started my own law firm, I did everything I could think of to prevent this problem. After all, it was stressful for those who remained and was disruptive for clients. I read and learned all I could about providing the type of work environment that would minimize turnover. I now have been blessed with long-serving staff, a few for more than 20 years. Nonetheless, despite my efforts and concentrated plans, the problem of turnover, although vastly better, still occurs. As I now take on the challenge of hiring a new attorney, with hopes of many years of continuity, I look for wisdom from others. Just as lawyers do not have a monopoly on things going wrong, neither do we have all the great thoughts and wisdom on what to do when it happens.

Wisdom and great thoughts can be discerned and gleaned from others who have contemplated these problems. I opened this column with a quote from author, salesman, and motivational speaker Zig Ziglar. Let me close with a few more:

■ “I always tell my employees, the busier it gets, the slower you should cook. When you run around like a crazy person, that’s when things go wrong.”
■ “Expect the best. Prepare for the worst. Capitalize on what comes.”
■ “It’s not the situation, but whether we react negatively or respond positively to the situation that is important.”
■ “Statistics suggest that when customers complain, business owners and managers ought to get excited about it. The complaining customer represents a huge opportunity for more business.”
■ “Sometimes adversity is what you need to face in order to become successful.”
■ “You don’t drown by falling into water. You only drown if you stay there.”
■ “Fortunately, problems are an everyday part of our life. Consider this: If there were no problems, most of us would be unemployed.”

The last quote is especially important for attorneys. Remember, many times we deal with clients when things have gone wrong for them.
WHERE YOU BELONG

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