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Hey, you, Get off of my cloud!

By Jeffrey Allen

Although the substantive issues that you will deal with in various niche practices may differ, most, if not all, practices share a great many commonalities. Technology ranks high among the areas shared by most law practices. In today’s world, we have evolved to the point where we use multiple pieces of technology in our work and our personal lives. The nature of the technology we use dictates a need to share information among these devices.

As a practical matter, most of us already use the same information over more than one piece of technology. We use smartphones, tablets, laptops, and desktop computers. Many of us use multiple computers. No matter which piece of our technology we use, we want our information available to us. Accordingly, we need to have ways of synchronizing our data among our devices. We need to ensure the currency of our information and that we always have the most recent information on whatever device we happen to use at any particular time.

Down the sync

Although we can manually transfer information from one device to another, the process takes time and offers far less convenience than other means now available to us. The cloud and cloud services provide the easiest way to keep the information on our devices synchronized and current. Everything comes at a price, however. In exchange for the convenience of syncing through the cloud, we need to take stronger steps to protect the security of our data as we place it at greater risk by shipping it through cyberspace.

Those of you unwilling to accept the risks associated with using the cloud or undertake the steps required to protect your data in the cloud can, of course, continue to synchronize your data manually. Let me take a couple paragraphs to describe the process both for the benefit of those unfamiliar with it and to allow comparisons to the steps required to protect your data in the cloud. To manually sync your data across multiple computers, you need to duplicate the data in a transportable form. This means copying it to a DVD or CD or to a thumb drive or an external hard disk drive. Once you have duplicated it, you then must physically transport the duplicated data on whatever media you chose to use from one computer to another and copy it to each of the computers you want to keep in sync. When you copy the data, you need to make sure you replace the older data with the newer data. You can accomplish this by storing the data in one or more folders that you maintain across all the computers and then replacing the entire folder on each computer. This system works best if you consolidate all (or at least as many as possible) of the files into a single folder so you can transfer the data as quickly and easily as possible. Depending on the size of this folder, your transfer may take a few seconds, a few minutes, or perhaps more.

Backup software provides another option for you. You can use software that will compare the two folders and only update the files that have changed since you last synchronized them. As this method only involves copying a relatively smaller group of files, it works much more quickly.

The cloud, however, offers much...
better options for synchronizing your data across multiple devices. Many services now offer the ability to update data automatically on your devices. These services include iCloud (www.icloud.com), Dropbox (www.dropbox.com), and Box.net (www.box.net), to name just a few. Basically, all the services operate the same way. You set up an account with the service and access the service with each of the devices you want to sync. Once you have connected your devices to the same account, the service transfers a change of data on one device to all the other devices connected to it. If a device happens to be off-line at the time you make the change, it catches up the next time it gets online. The process works automatically, making it simple and easy for you to use. Many services, including all the ones identified above, have the ability to coordinate your information with computers, smartphones, and tablets.

Another option is to set yourself up to store all your documents in the cloud, making them accessible to you on all Internet-capable devices wherever you have an Internet connection. You can set your own cloud server up to provide this functionality with relative ease these days. Alternatively, you can purchase the services from a vendor.

The advantage of your own server is that you have complete control over the server. On the other hand, you do not have a service that maintains the server for you. Likely a service provider will have better security and data protection for its server than you can provide and, in all probability, better data protection through the use of redundant backups for the data, including geographical redundancy.

Many services have come online recently to provide this capability to you, along with the option of keeping documents on your own computer and backing them up in the cloud. These services continue to evolve and become more sophisticated, offering more and more features, including document organization and case management features especially geared for law practices. Within the last year Clio (www.goclio.com) expanded its capabilities to provide document management services, and Thomson Reuters (thomsonreuters.com) recently announced its own program, called Firm Central. Both are worth considering as service providers. Examining all the available programs that offer some or all of these features exceeds the scope of this article, but I will likely end up reviewing some of them in the relatively near future.

No matter which cloud system you select, you need to remember that, as an attorney, you have obligations to take reasonable precautions to protect your clients’ data and confidential information.

THE CLOUD AROUND THE SILVER LINING

Everyone knows about clouds having silver linings, but this is a two-way street. Just as every cloud has a silver lining, silver linings have their clouds. The cloud around cloud computing relates to data security and confidentiality. Whenever lawyers address issues of confidentiality and data security, they should also see ethical red flags. We all know that, as attorneys, we have the obligation to protect our clients’ confidential information and that much of the data we use professionally in working on our clients’ matters contains such confidential information. Accordingly, before shipping our data off to a cloud server, we have some due diligence to perform and some protective measures to incorporate into our activities. The ethical standards and requirements vary among the states. A number of states have published ethics opinions addressing this issue. The language of these opinions differs, but they generally agree on the concept that a lawyer may use a third-party service storing data in the cloud or other technology so long as the lawyer takes reasonable precautions to ensure the protection of the client’s confidential information and the security of the data. Another common thread in these opinions requires that the provider have a legally enforceable obligation to protect the confidentiality of the data. Several states also have published ethics opinions recognizing that attorneys have a continuing obligation to stay abreast of changes in technology respecting appropriate safeguards that the lawyer and the provider should use. (See Alabama Ethics Opinion 2010-02; California Formal Opinion No. 2010-179; Vermont Advisory Ethics Opinion 2010-6; and Washington Advisory Opinion 2215.)

Safely moving into the cloud requires the evaluation of potential providers. Unfortunately, we have no universal standards of acceptability to work with. You must evaluate the security and confidentiality of any cloud product in light of the applicable rules governing every state in which you have a license to practice law. If you practice in more than one state, you will need to comply with every state that has licensed you, so choose the most restrictive of the requirements imposed by those jurisdictions as your standard.

Service providers should clearly state their privacy policies in writing. You should learn what the provider’s policy
entails before placing your data in the provider’s hands. Also look into how the provider protects, shares, manipulates, and disposes of data you supply. Ideally, your potential providers will make this information easily available for you to access before you decide to use the provider’s services. If a provider does not make such information available to you on its website, you should write to the provider and ask for it. If a provider will not provide this information to you, be wary of the provider. You might wish to exclude from your consideration any provider that will not provide this information to you.

Most providers have agreements and disclosures they require you to accept in order to use their services. Although the agreements generally work to protect the provider from liability, they also contain information important to you. It may seem silly to write an article for attorneys and warn that they need to carefully review an agreement, but the fact remains that most users (including attorneys) simply sign off on such agreements without bothering to read them. Do not do that! Read the terms of service and the agreements carefully to make sure you know what you will get from the provider and what the provider may do. This information may bear directly on your ethical obligations to your clients respecting protection of their information.

A provider’s privacy policy generally outlines how the provider can (or cannot) use the data you enter into the application. You will want to know whether or not the provider will treat the information you enter as confidential. You will want to make sure that you—not the provider—retain ownership and control over the information you place on the server. You will want to make sure that the cloud computing provider can only access/view your data with your explicit consent (which you will only want to give when necessary to troubleshoot a technical issue that may interfere with your access to or use of your data).

The user’s retention of control over data may seem like a no-brainer requirement, but recently we have seen some high-profile cases of websites adopting far less restrictive privacy policies.

You also will want to examine the provider’s data availability strategy. If the provider does not have a reasonable plan to deal with technical difficulties on its servers, you may lose access to your data as a result of a hardware failure, a power failure, or a natural or man-made disaster. A provider should have redundant backup capabilities that keep duplicates available on other servers so that if one goes down, another can still supply your documents to you. Recognizing that a power failure or a disaster can affect an entire geographic region, the provider ideally will have the replacement servers located in more than one region. Properly operated, that switchover should take place immediately on the failure of the first server.

The servers you communicate with should have appropriate protection against hackers and other threats. While assessing a cloud-based provider’s server security poses many problems for the typical end user, several companies, such as McAfee (www.mcafee.com/us), offer the potential of regular security audits to providers to ensure server security. Look for evidence of a satisfactory result of a third-party security audit, from McAfee or another acceptable provider, before entrusting your data to a cloud-based provider. You will want your provider to have security audits on a regular basis; the world of technology changes rapidly, and your provider should take steps to maintain its security on a current basis, upgrading as necessary. Ideally, your provider will use secure sockets layer (SSL) technology, an industry standard that encrypts communications between your computer and the cloud-based server and protects them from interception. SSL allows for secure communications even over public networks, such as a public WiFi connection.

By using cloud computing, you outsource your server-level security and backup to a third-party service provider. The server represents an important part of the equation, but not all of it. You cannot neglect the security of your own devices in the analysis. Protection of confidentiality and data security always drops to the level of the weakest link in the chain. If you do not have adequate security respecting the device(s) you use to access the cloud-based information, you place the data at risk. Unfortunately, many inexperienced users overlook this requirement, thinking that by using a responsible cloud service provider they
have solved the security problem. No matter what your provider does, you need to ensure your computers use a competent firewall and have current copies of good anti-virus and malware protection. As hackers often look to exploit weaknesses in browsers and operating systems, you also will want to make sure that you install the latest security updates for your operating system and each web browser that you use.

To ensure data stored on your computer remains private even if the device is stolen, you should use encryption. You may want to consider installing TrueCrypt (www.truecrypt.org), a free tool that will encrypt the entire contents of your hard drive. If you work on Apple’s OS X platform, the system offers encryption of your hard drive as an optional protection.

Your mobile devices also play a role in the equation. In fact, mobile devices have assumed an increasingly important position in that equation. We have started to use our mobile devices more and more to access information stored in the cloud. Mobile devices often form the weakest link in the chain as smartphones and tablets may not have the same capabilities for protection of data as your computers. Moreover, the very nature of mobile devices makes them more susceptible to loss owing to inadvertence or theft. As a result, you may want to consider precluding the access of these devices to the most confidential of your data. Many mobile devices use operating software that will allow you to use another device or computer to wipe the device data off of a device that goes missing, whether owing to theft or inadvertent loss. You will want that capability on any mobile device that you allow to access your private information and your clients’ confidential information. If the program lets you automatically wipe the device after a number of failed efforts to access the device with the device’s password, you might want to consider taking advantage of that option. Doing so places you at risk of wiping your own device if you can’t get your password right within the set number of tries, but you can restore your own information relatively easily. Although restoring your data may cause you some inconvenience, this pales in comparison to the inconvenience you would suffer should a third party acquire access to your private information or your clients’ confidential information.

You should choose strong passwords or pass phrases for access to your data by any device. You should also employ the strongest reasonable and available passwords to access your devices. Not using a password or choosing a weak password can compromise the client/server security.

Choose a secure password or pass phrase for each website you use and for each of your devices. Many people like to use one or two passwords for everything to make it easier for them to remember the passwords. Try to avoid using the same password for more than one website. You can find programs that will generate secure passwords for you. PasswordSafe (available free at www.passwordsafe.com) generates and manages passwords for you. You can find such programs for computers, tablets, and smartphones. Pass phrases generally work better than simple passwords. Your password or pass phrase should employ alphabetic and numeric characters. Alphabetic characters should use both lower and upper case (assuming that the system you work with recognizes upper and lower case as different). If the system allows you to use symbolic characters, you should. Mixing symbols into the access process adds additional security. The algorithms used by password-cracking software make longer passwords more difficult and time consuming to crack. For this reason you might want to use a longer pass phrase. Generally, your hardware and the providers you choose will each have parameters for passwords/phrases with which you must comply when setting your password/phrase.

A completely random combination of characters of sufficient length offers a high level of security. It also poses a problem for most users owing to the difficulty of remembering the password. Because password protection denies access to the data unless you know the password, having a random collection of characters increases the risk that you will lose access to your own data. This is another reason why I recommend that you use a pass phrase. Whatever password/phrase you choose, you will need to find a safe place to record it to ensure that you do not lose access to your data. Do not post your password on or near the device. No password/phrase offers security or protection if you write it on a sticky note and paste it to your computer’s display. (Amazingly, I have actually seen this done in law offices I have visited.) A password-protected password management program on one or all of your devices facilitates the process of selecting, protecting, and using secure passwords/phrases.

**BOTTOM LINE**

Unless you use reasonable care and perform due diligence in connection with your activities in the cloud, you run serious risks of personal loss and ethical issues. If you exercise reasonable care and do your due diligence, you can safely and successfully use the capabilities of the cloud to make your personal and professional life easier and make yourself more efficient. ■
STARTING RIGHT AND GROWING STRONG WITH GPSOLO

By Jennifer A. Rymell

It is hard to believe that the Division just finished celebrating its 50th anniversary! The interesting part of our anniversary celebration was learning how the Division got started and how it has grown over the years. As Chair-Elect, I am thrilled about the opportunities to build on its past strengths while focusing on the future. The theme for the 2013–2014 Bar Year is “Starting Right and Growing Strong.” We will focus on identifying and providing tools for new lawyers embarking on a solo practice or seasoned attorneys transitioning to a solo practice to help them start their careers on the right path. The Division also will continue to provide an array of resources to help all members grow strong practices and networks.

NEw ANd ExPANDED INITIATIVES FOR 2013–2014

Almost half of the lawyers in the United States identify themselves as sole practitioners, and first-year lawyers are increasingly opening a solo practice rather than joining a law firm. Under these circumstances, many young lawyers do not have a mentor or any idea what the actual practice of law is really like. Even experienced lawyers pursuing a solo practice are often surprised by the business aspect of running a solo office.

To assist this growing segment of the legal profession, the Division will be implementing the Solo Strong initiative. The initiative will build on the portion of the Division’s website containing links to state bar association websites that have law practice management resources and solo and small firm sections. The Division will take this concept one step further by partnering with state bars and other ABA entities to identify and compile a comprehensive list of specific products, services, publications, and mentoring opportunities offered by state bars and the ABA to assist solo and small firm attorneys. This information will be posted as a link on the ABA Solo and Small Firm Resource Center (ambar.org/soloandsmallfirms).

Another exciting online resource is currently being expanded: the Forms Bank, also posted on the Resource Center. We have added approximately 30 new forms from publications on estate planning and advising small businesses, and we will continue to increase the amount of forms throughout the year. All forms are offered to our members at a discounted rate.

ONGOING BENEFITS

Although I am very excited about these new and expanded online resources, I also want to highlight some of our other member benefits that we will continue to offer. I encourage you to take advantage of some or all of these great opportunities.

National Solo & Small Firm Conference. This is one of the country’s premier conferences for solo and small firm practitioners to obtain CLE focusing on technology, practice management, trial skills, and substantive law topics. The conference also provides an unparalleled forum to network with other solo, small firm, and general practitioners throughout the United States.

Save the date for this year’s conference: October 3–5, 2013, in Lexington, Kentucky. Come join us in attending world-class CLE while enjoying the opening weekend at Keeneland Thoroughbred Racing Track and the beautiful fall foliage.

GPSolo referral LinkedIn group. Only GPSolo members can connect and obtain referrals through this social media group.

Virtual Brown Bags. This program offers an exclusive opportunity for members to attend free monthly teleconferences scheduled for one hour during lunch and focusing on a variety of topics. Prior brown bag topics have included “Are You Running Your Practice Like a Business?” and “Retirement Savings During Tough Economic Times,” just to name a few.

SoloSez. This Internet discussion forum boasts more than 3,000 solo and small firm subscribers, who discuss everything from tech tips and legal opinions to what to wear to court. The listserv has been called the “water cooler” for the sole practitioner.

Jennifer A. Rymell

Hon. Jennifer A. Rymell (jarymell@msn.com), the guest author of this month’s column, is Chair-Elect of the GPSolo Division. She is a Civil County Court at Law Judge in Texas.
Division publications and programs. During the course of the next bar year, the Division will publish more than half a dozen new books geared for the solo and small firm practitioner, along with several affordable CLE teleconferences. You will also continue to receive our award-winning GPSolo magazine six times a year, and the GPSolo e-Report delivered monthly right to your e-mail in-box, full of substantive law, tech tips, and practice management pointers.

Pro bono and public service. This is the third year that the Division has adopted KIND (Kinds in Need of Defense) as our national public service project. This project trains lawyers to represent unaccompanied children, many as young as three and four years old, who are currently representing themselves in immigration proceedings. We will hold our annual training at the fall meeting in Lexington, and you can also access the training materials through our website (www.americanbar.org/gpsolo). Additionally, at our meeting venues we will be participating in a financial literacy project in which we will teach at-risk high school students about budgeting, student loans, credit cards, and banking smart.

WORKING TOGETHER
It gives me great pleasure to serve as the Division’s Chair next year, and if you like what you see in this column, I invite you to look at all our resources by visiting our website (www.americanbar.org/gpsolo). None of the Division’s great work could be accomplished without dedicated volunteers and staff. I sincerely want to thank them for all they do for the Division and the profession. I also want to thank my fellow officers who enthusiastically support all the Division’s endeavors: Benes Z. Aldana, Laura V. Farber, Kathleen J. Hopkins, Amy Lin Meyerson, and Stephen B. Rosales.

The only way our Division can continue to flourish is as a team. I encourage you to start off your Bar Year right by volunteering for a committee or participating in Division activities either in person or online. With your interest and talents we can continue to grow strong networks and member benefits. Remember, we are in this together!
2013 SPRING LEADERSHIP MEETING

You still have time to register for the 2013 GPSolo Spring Leadership Meeting scheduled from May 23 to 25 in beautiful Anchorage, Alaska. This trip could potentially be a once-in-a-lifetime chance to obtain continuing legal education (CLE) credit and experience the great state of Alaska and all the beauty it has to offer. You may even want to consider staying a few days before and after the meeting to enjoy Alaska outside the meeting rooms. And remember: no sales tax.

The Division has reserved a number of rooms at the Hotel Captain Cook at a reduced rate, which are available on a first-come, first-served basis until Thursday, May 2, 2013, at 5:00 PM Central Time. To receive the special room rate of $160, please contact the hotel directly at 907/276-6000 or 800/843-1950 and identify yourself as an ABA GPSolo 2013 Spring Meeting attendee.

A schedule of events, hotel information, CLE, committee meetings, and networking opportunities may be found on the website at tinyurl.com/aor6qn.

We hope to see you in Alaska!

CALL FOR NOMINATIONS: 2013 SOLO AND SMALL FIRM AWARDS PROGRAM
A call for nominations is open for the Division’s annual Solo and Small Firm Awards. Each year, the Division honors outstanding solo and small firm practitioners, as well as bar leaders and bar associations. Recognition is given for the following:

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

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

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

Nominations are due by March 29, 2013. To apply for an award, visit our website at tinyurl.com/acga9jv.

CALL FOR APPLICATIONS: DIVERSITY AND YOUNG LAWYERS FELLOWSHIPS
We are pleased to announce the sponsorship of four Diversity fellowships in the Division during the 2013–2014 Bar Year. GPSolo is committed to increasing the participation of young lawyers in Division activities. This program will provide young lawyers the opportunity to become actively and integrally involved in the Division’s meetings and committees.

Applications and nominations for both Diversity and Young Lawyer fellowships must be received by April 30, 2013. Successful applicants will be notified in early June 2013. For more information about these fellowship programs, visit tinyurl.com/bzcf6mn.

ABA GPSOLO COMMITTEE LEADERSHIP APPOINTMENTS
It is that time of year again—time for
the Division’s Chair-Elect to appoint members to the numerous committees within our Division. The Division is the voice of solos, small firms, and general practitioners throughout the country. Our committees’ work is the lifeblood of the Division’s success. We are looking for individuals willing to step up and volunteer to provide leadership, content, product, and ideas that will assist the solo and small firm lawyer in your community and elsewhere.

If you are interested in getting involved, please visit the Division’s website at tinyurl.com/b9gd883 and complete the online application. In order to receive an appointment, you must be a member of the Division in good standing. There is no guarantee that you will receive your first appointment request. However, we will attempt to do whatever we can to fulfill your appointment and committee preferences. The application deadline is March 29, 2013.

Your GPSOLO Membership includes

Division Committees—expand your “business enterprise” by joining any of the 32 substantive committees focused on specific practice areas.

On-Demand Continuing Legal Education (CLE)—download three 90-minute on-demand programs from the recent National Solo & Small Firm Conference.

Virtual Brown Bag Sessions—attend our specifically designed 60-minute monthly webinar programs held midday on a variety of topics at your desk.

GPSolo Referral LinkedIn Group—connect and obtain referrals from this unique social media group regarding substantive areas of law and practice management.

GPSolo magazine—read our flagship bimonthly magazine, online or in print, covering top news and trends in legal developments for solo, small firm, and general practice lawyers.

GPSolo e-Report—enjoy our monthly e-newsletter, which provides valuable practice information, news, technology, trends, feature articles, and tips on substantive practice areas.

SoloSez™—chat with the online, global discussion community for lawyers with more than 3,000 subscribers who are highly engaged participants.

Special member discounts—obtain preferred prices on GPSolo books, downloadable forms, e-books, rental cars, services, supplies, travel, videos, and webinars to boost your bottom line.

Community Outreach—support Kids in Need of Defense (KIND), GPSolo’s Pro Bono Service Project, by assisting children who otherwise may be forced to represent themselves in court.

For more details, go to www.americanbar.org/gpsolo or call Deborah J. Hodges, membership and marketing associate, at 312/988-5641.
Building a Niche Practice

Go Small to Go Big

By Jeramie Fortenberry
It’s no secret that the legal marketplace is in turmoil. The combination of tight-fisted consumers, an oversupply of lawyers, and increased competition from nonlawyers has created the perfect storm in the legal market. In this competitive environment, lawyers must distinguish themselves from the competition in order to claim a bigger piece of the pie. One way to do this: Build a niche law practice.

WHAT IS A NICHLE LAW PRACTICE?
Put simply, a niche practice is a focused practice. Niche practitioners don’t try to be all things to all people. Instead, they focus their time, energy, and marketing efforts on a discrete segment of the legal market.

There are several ways to carve a niche out of the broader market. Some niche practices focus on practice areas, such as bankruptcy or personal injury law. Others focus on demographics, such as age, gender, occupation, income level, ethnic background, or marital status. Still others combine both practice area and demographic considerations—say, immigration law for athletes or estate planning for high-net-worth individuals. But in each case, the practice is focused on a distinct market segment.

Different attorneys have different approaches to specialization. There’s the generalist who takes everything that comes through the door (defend a dog-bite case on Monday, prepare a will on Tuesday), the ultra-specialist who does one thing only, and a range of practices that fall in between. How do you decide whether a niche practice is right for you?

BENEFITS OF A NICHLE PRACTICE
I believe that niche practices are a smart choice for most attorneys. Although there are a few potential downsides (discussed below), they are far outweighed by the benefits. Here are a few reasons why you should consider a niche practice.

A niche practice allows you to focus on the work you find most enjoyable. Law licenses are necessarily general. As a member of your state bar, there is a broad range of legal work that you could do and people whom you could serve. But not all practice areas are equally fulfilling, and not all people are ideal clients. Generalists can find themselves stuck doing work they don’t enjoy for people they don’t like.

A niche practice allows you to do the work you enjoy for the clients you like. You are in control. Decide on the work you like and/or the clients you want to serve, then develop a practice that fits the bill. As your practice grows, you can weed out the work that you don’t enjoy and build a more rewarding practice.

A niche practice can be more profitable than a general practice. There are two ways to make more money in your practice: Raise your profit per client or increase your new client volume. Being the go-to person in your niche can help you do both.

Niche practice can help raise your profit per client by demonstrating expertise. Many clients will pay a premium for a specialized skill set. If you are a recognized expert in your niche, you are more likely to land these high-paying clients.

Sometimes more profit per client is not an option. In some practice areas, for example, the demand may be elastic or fees may be capped. In these situations, you will need to ramp up your client volume before you can make more money. You have a better chance of getting more clients if you are known for specialized expertise.

Profitability is often a function of efficiency. If fees are fixed, the attorney who can do the same work with the least time or overhead will have the highest profit. Attorneys who work within a niche usually become very efficient at what they do. General practitioners, by contrast, are likely to spend more time on a matter than a specialist would. This can result in either overcharging the client or writing off time. These inefficiencies are avoided in a niche practice.

Attorneys with niche practices are also better able to weed out bad leads and focus on clients that will be more profitable. Because they know their niche, they know what matters are and are not a good fit for their firm. The ability to spot bad clients or cases before agreeing to representation can prevent much hassle and wasted time.

A niche practice is an easier sell than a general practice. Being able to clearly and succinctly summarize your firm’s value proposition is the key to effective marketing. It differentiates you from your competition and gives your ideal client a reason to choose your services.

The more general your practice, the harder it is to develop a value proposition that will set you apart from your competition. You
A niche practice can be more volatile than a general practice. Niche practices are less insulated from market risk than general practices. A change in law or market conditions can swing the supply-demand pendulum in the wrong direction. Niche practices can deteriorate quickly when the market changes, such as when the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 decreased short-term demand for bankruptcy attorneys.

By contrast, general practices are less prone to market risk. If demand drops in a particular market, the remaining practice areas will keep the ship above water while riding out the storm. Of course, less volatility has its own downside. General practices are less volatile precisely because they are less focused, and an unfocused practice can be a hard sell.

A niche practice can be less interesting than a general practice. Some attorneys thrive on the diversity that comes from a general practice. To effectively serve a broad range of clients, the attorney must keep learning. Each week is a new adventure. This intellectual stimulation keeps life interesting for general practitioners.

Whether this is a good thing depends on your perspective. Some would argue that a general practice sacrifices depth for breadth, requires too steep of a learning curve, and carries more malpractice risk. There’s no question that it is harder for the general practitioner to develop deep expertise in a specific niche.

A niche practice may not be economically feasible in your geographic area. Some attorneys are simply not in a market that will support a narrow niche. If you want to develop a niche practice directly to them and their needs. Ironically, it also hasn’t turned off the single guys from reaching out to me for their estate planning needs. Go figure!"

**HOW TO CHOOSE YOUR NICHE**

Choosing a niche is about matching your interests and expertise with a segment of the market. Before you launch your niche practice, you will need to think strategically about (a) whether the niche is the right fit for your personal qualifications and interests and (b) whether the niche is economically viable in your specific geographic market. This analysis will require both self-evaluation and market research. Here’s a four-step process to get you started.

**Step one: Identify your professional strengths and weaknesses.** To competently and efficiently meet the needs of clients in your niche, you need specialized expertise. It makes sense, then, to choose a niche that matches your strengths.

Attorney Susan Cartier Liebel, founder and CEO of Solo Practice University (solopracticeuniversity.com), believes that prior experience is more important for some niches than others. “If your niche is a specific type of personal injury like Vibrio vulnificus food poisoning cases, then you need significant experience in personal injury law and an established practice before you can practice this exclusively,” says Cartier Liebel. “However, if your niche is divorce law for Hispanic members of the armed forces stationed in Virginia, then it is a demographic niche and success is determined by targeted marketing. This type of niche can be started as soon as one is comfortable with the basics of dissolutions in Virginia.”

Although you can always acquire expertise if you don’t already have it, you should think about choosing an area in which you have at least some experience. This is important not only to effectively serve your clients, but also to be sure that you enjoy working in the niche before taking the leap.

You should also take a hard look at your weaknesses. If you plan to start a practice focusing on the needs of Cuban immigrant-owned businesses in Miami
but can’t speak Spanish, you might want to reevaluate your practice area. If you hate working in high-emotion contexts, a divorce practice might not be for you. An honest evaluation of your weaknesses can save you from choosing a niche that isn’t a good fit.

**Step two: Identify any personal factors that help you speak to your niche.** When it comes to choosing a niche, life experience can be as important as professional expertise. Some attorneys build niche practices around meeting the needs of people with similar experience, life stage, hobbies, interests, sexual orientation, or religion. At a personal level, a niche practice based on shared interests or values can be intrinsically enjoyable.

Marks started My Pink Lawyer after a six-year hiatus to focus on mentoring and coaching women. Given the life experience that she shares with her target market, her choice of niche was only natural. “It’s been my experience that women in particular often feel intimidated by the legal process and attorneys,” says Marks. “As a woman and mother myself, I can relate to other women and moms and the estate planning and guardianship concerns they have for their families.”

**Step three: Identify your ideal clients.** To market a niche practice, you need to be able to speak to your target audience. And to do that, you need to be able to clearly identify that audience.

Marks’s marketing efforts are closely tied to her niche focus. “Once you understand who your target market is for your clients, it’s very easy to discern where to devote your marketing efforts,” says Marks. “Since my target market is women between the average ages of 30 and 55, I reach out to them on social media and women’s magazines and forums. I don’t spend a dime on any paid advertising in those publications, chances are that they are paying for advertising in those publications, chances are that they are seeing at least some results.”

**Step four: Conduct market research for all potential niche practices you have identified.** Once you’ve compiled a list of potential niche practices, it’s time to begin market research. Is there enough demand in your geographic market to support your niche practice? How much competition will you be facing? What competitive advantages distinguish you from your competition? The answer to these questions will help you evaluate whether your niche practice is likely to succeed.

Start by defining your geographic market. Where can you reasonably expect to find and serve your clients? If you practice in an area that requires frequent court appearances, for example, your geographic market may be limited to an easy driving distance from your office. On the other hand, if you practice in an area that transcends state borders and doesn’t require court appearances, your practice area might include the entire nation.

Once you have honed in on your geographic practice area, you need to determine whether there is sufficient demand in that market. If you have already practiced in that market, you may be able to draw from your own experience. Otherwise, you will need to look at what others are doing. For example, you might:

- Read the Yellow Pages or search online for competitors that are offering similar services to your target market. If they can do it, you can do it, too.
- Use a keyword tool like the free Google AdWords (adwords.google.com) to find out how many people are searching for the services you provide in your geographic area. A healthy search volume usually indicates solid demand.

**Look for a moderate level of competition—it reaffirms the need for your services.**

- Read magazines or blogs that are targeted to your ideal clients in your geographic area. If people are paying for advertising in those publications, chances are that they are seeing at least some results.

If you determine that there is a demand for your services in your geographic market, take a closer look at the competition. Ideally, you will find a moderate level of competition—enough to reaffirm the need for your services, but not an oversupply of lawyers. If you see no sign of competition, it could mean that there is low demand or that you are the first to discover that niche in your market.

**Small Choices, Big Rewards**

Once you’ve identified a few potential niches and analyzed them in light of your market, there’s a good chance that you will find that a niche practice is within reach. Building that practice will place you ahead of the curve and give you a more profitable and rewarding practice.

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Intellectual property has traditionally been considered a niche or boutique practice area, but intellectual property has undergone so much growth in scope and complexity over the past several decades that the terms “niche” and “boutique” seem inappropriately limiting. In the day-to-day practice, lawyers in this field may prosecute several trademark applications, file an action seeking a preliminary injunction, join forces with law enforcement to crack down on counterfeit merchandise and prosecute counterfeiters, or interact with clients and other counsel to negotiate any number of agreements and transactions. The breadth of the practice often feels more “general” than “niche.” Nevertheless, it is an invigorating practice area that permits an attorney not only to obtain expertise in a multifaceted area of the law, but also to interact with a broad set of areas and challenges that are more often associated with general practice.

DEVELOPING, MAINTAINING, AND PROTECTING INTELLECTUAL PROPERTY RIGHTS

One of the most stimulating aspects of an intellectual property practice is the opportunity to interact with a broad array of clients who are seeking to breathe life into a new concept or product, take their concept or product from initial stages of research and development to full-scale production and distribution, or protect their concept or product from infringing competitors or nefarious counterfeiters. Just as clients come in all different shapes, sizes, and budgets, they also come at vastly different stages of conceptualization, development, production, and commercialization. Some clients come with little more than a wish and a dream or the bare bones of a product or concept written on paper (I have seen napkins, too), while others come with developed prototypes and comprehensive marketing plans, and they may already be well into various stages of financing and capitalization. Regardless of where on the spectrum our clients stand, our role is to understand their goals and objectives and advise them on appropriate, cost-effective approaches tailored to fit their specific situation.

We recommend that a client retain an intellectual property attorney at the earliest possible stage. Unfortunately, a number of clients wait, not realizing that their actions—or inaction—can forever affect the validity or even the value of intellectual property rights they are able to obtain. Hiring an intellectual property attorney at the earliest possible stage helps ensure that all possible intellectual property rights associated with a product or concept are protected and appropriate decisions are made that will not adversely affect these rights.

In initial meetings with a client concerning a particular product or concept, it is crucial to understand not only the concept or product but also the client’s objectives, goals, finances, and resources. The overall strategy depends on understanding the interplay of these elements. For example, we must determine the necessity and feasibility of securing intellectual property protection domestically, internationally, or both. The question of whether to obtain protection in particular countries, not just the United States, involves a variety of factors, including where the product is manufactured or service provided, where it will be distributed and sold or the service rendered, and whether it will be available in bricks-and-mortar retailers or online. All these factors must be considered in line with the client’s budget for intellectual property acquisition and subsequent maintenance and protection.

In these initial phases, we examine all facets of potentially available intellectual property
A substantial portion of our day-to-day practice is devoted to combating infringers.

1. Identifying and clearing proposed trademarks and filing applications to register them before the U.S. Patent and Trademark Office (USPTO);
2. Identifying patentable elements and filing an application to obtain a patent before the USPTO;
3. Identifying elements potentially subject to copyright protection and filing applications for registration with the U.S. Copyright Office; and
4. Identifying and taking steps to preserve and protect “trade secrets” and other confidential or proprietary information.

In addition, during the initial phases and as the concept or product moves forward, we help the client to identify potential revenue streams. One of the most crucial areas that an intellectual property owner should explore is licensing. Licensing is when the intellectual property owner grants another party the right to use the intellectual property in exchange for a fee (also known as a royalty). Without a license, the other party would be an infringer. The particular form of licensing employed will hinge on the property involved (e.g., software licensing or technology licensing or character licensing or sports licensing). Where the license involves a high-profile brand of characters, it is referred to as “merchandising,” which includes licensing in the context of celebrities, entertainment, music, and sports. In the past several decades, the licensing industry has grown considerably. Part and parcel of our day-to-day practice is advising licensors and licensees on all aspects of the licensing relationship.

Once the property has been identified, we assist the client in beginning to develop and implement recommended strategies to protect and preserve the validity and value of the client’s intellectual property rights. These strategies take many forms, but often include, at a minimum, vigilant monitoring of unauthorized uses of the client’s intellectual property, enforcement actions such as litigation, and, in some cases, working with law enforcement to file criminal charges against counterfeiters.

INTELLECTUAL PROPERTY ENFORCEMENT AND LITIGATION

Intellectual property litigation generally involves the infringement of trademark, copyright, patent, or trade secrets rights, or the threat of infringement of these rights. Awareness of actual infringement or of the threat of infringement can occur in a remarkable number of different ways. For example, customers may notify a manufacturer of an infringing product, a company executive may see counterfeit products sold on street corners while strolling through a city, or an Internet search might reveal unauthorized uses of a trademark or the sale of counterfeit goods. A substantial portion of our day-to-day practice is devoted to developing and implementing strategies to effectively monitor, discover, and prosecute—either civilly or criminally—potential infringers.

When infringement or the threat of infringement is discovered, we develop a strategy to address the issue on a cost-efficient but effective basis. Part of the process is completion of an analysis of whether the infringement occurs internationally or in the United States. If internationally, the analysis includes consideration of the mechanisms that are available to redress the infringement or threat of infringement in the foreign country. Although certain circumstances sometimes warrant the immediate filing of an action in court, once potential infringers are identified, the next step is to put them on notice. This is traditionally accomplished through a “cease and desist” letter. “Cease and desist” letters, while still widely used as a means to initially contact a potential infringer, can be problematic because a potential infringer may choose to file a preemptive declaratory judgment action instead of responding to the letter. This can result in a substantial disadvantage to intellectual property owners if they either did not want to take the matter to litigation or if the potential infringer files the action in a forum that is not desirable to the property owner (e.g., a property owner in New York sends a cease and desist letter to a potential infringer in California, and the potential infringer files a declaratory judgment action in California).

With the proliferation of the Internet and global e-commerce, it has become increasingly difficult to positively identify infringers and counterfeiters and to take effective enforcement actions against them. The Internet makes it possible for counterfeiters and infringers to easily conceal their identities and evade detection and prosecution. This poses a substantial problem to intellectual property owners and attorneys. We have to spend a significant amount of time and devote considerable resources to investigate and identify online counterfeiters and infringers. However, even while investigating an objectionable situation and identifying the responsible party, it is possible to mitigate some of the attendant damages. For example, if the infringement involves copyright-protected material on the Internet, the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512 sets forth a specific procedure to put Internet service providers on notice of the infringement and to require them to remove the material. With respect to domain names, the Uniform Dispute Resolution Policy
A property dispute, particularly in the area of intellectual property, can be effective under certain circumstances — although it is not always less costly than litigation.

In some cases, prior to filing a civil action in court, particularly with respect to counterfeit goods, we work with law enforcement authorities and prosecutors to coordinate an investigation and criminal prosecution of individuals or entities engaged in the illegal conduct. We do this because relying on civil litigation alone is often not an effective strategy. Counterfeiters are likely “fly-by-night” operators that are ready to pick up their illegal operations and move on when you begin to close in on them. Additionally, they often are able to conceal the fruits of their illegal activities, making it difficult to enforce judgments against them. In our practice, the coordination of criminal and civil actions has been remarkably effective in reducing the impact and extent of counterfeit activities.

BREAKING INTO INTELLECTUAL PROPERTY

In view of the wide range of issues and areas addressed by an intellectual property attorney on any given day, it is imperative for attorneys seeking to enter the practice of intellectual property law to understand that establishing an understanding of the core principals and foundations of intellectual property law is important. The following is a list of topics, ideas, and resources to help you get started:

- Attend CLE courses and seminars on intellectual property law. There are a wide variety available.
- Explore the USPTO website (www.uspto.gov). The website contains a wealth of information and resources.
- Develop a relationship with intellectual property owners and understand their goals, objectives, and industries.
- Stay up-to-date with intellectual property laws and issues. My law firm maintains a blog at www.gandb.com/blog that features developments, tips, and pointers.
- Cultivate a passion to help clients protect, develop, and preserve their intellectual property rights.

Intellectual property law is a rapidly changing practice area that is affected by laws and regulations promulgated by agencies in myriad jurisdictions around the world. If you want to practice in this field, it is immensely important to continually strive to keep pace with changes in the relevant rules, regulations, and laws.

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Through my involvement in leadership of the ABA Forum on the Entertainment and Sports Industries and my own practice as an entertainment lawyer for live entertainment performances, I have been able to observe firsthand the variety of issues that such practitioners face on a daily basis. At a time when specialization in the legal profession is the rule, lawyers whose day-to-day practice is advising parties in these industries must be multidisciplinarians. They must be problem solvers with skill sets that cover a broad range of topics and endeavors, ranging from intellectual property to criminal law, from estate planning to rights of publicity. The present-day, multifaceted business models of artists and athletes demand such professional flexibility. Today, artists and athletes have diverse activities and revenue platforms requiring familiarity with a wide range of business and legal issues. In addition, the past decade has seen monumental shifts in the business paradigms of these industries, and practitioners must remain on top of the emerging developments that have resulted from these changes.
For example, in the music/live performance space, the shifts in the dynamics and economics of the “record business” are well known. Online piracy and dramatic generational changes in the buying habits of consumers have led to double-digit percentage reductions in sales of physical products; while online purchases of music have increased, the profits margins are thinner and have hardly picked up the slack.

Up-and-coming artists can no longer look forward to advances on recording deals as such deals are less and less common. Baby bands produce their own CDs and downloads, selling product at gigs and on the Internet to generate volumes of sales; the more product sales a new band can show, the larger the attraction to independent record labels and others. In addition, the development of recording software that allows an artist to record a CD in a spare room in his or her house has led to the demise of venerable record studios as the demand for studio space has weakened.

The roles of various parties in the music business were for decades very clear: Managers developed artist careers; business managers kept track of the money; record labels made album deals, produced albums, and licensed music; merchandising companies developed and sold merchandise; music publishers administered publishing; promoters and venue operators produced and presented live entertainment; and ticketing companies provided ticket advertising, sales, and distribution for live entertainment. However, several major developments in the business and technology paradigms have occurred that have blurred these traditional lines.

The so-called “360-degree deal” has become the standard for managers and labels and indeed for the behemoths Ticketmaster and Live Nation, now merged, and AEG, their prime competitor. Under the 360-degree model, one entity handles all aspects of an artists’ career and endeavors, including recording, merchandising, live performances, music licensing, endorsements, publishing, Internet and fan club, and other entertainment endeavors. Some pundits say that recorded music will become a loss leader to induce fans to attend live performances; others believe we will move to a 100 percent subscription model with music stored in the cloud, but whichever is the case, live performances have become the hub of the artist’s music business, and all artists and their advisors are well served to understand the live entertainment business and its varied issues.

The traditional “music lawyer” who was principally involved in finding a “record deal” for an artist has seen the practice change dramatically, and that same lawyer has developed a much more complex skill set for advising his or her clients. As a performer’s career develops, his or her “music business” may take on various elements including songwriting, recording music, live performances, merchandising, public appearances, and licensing music for television, film, and live dramatic works. The advisor to musical artists has to be knowledgeable of all the related areas of revenue generation, such as licensing, publishing, broadcasting, and merchandising.

So, too, in the sports industries, whether on the team side or the player side, practitioners must be prepared to advise on diverse topics and legal issues. Sports teams are deeply embedded in stadium and arena deals, broadcast deals, merchandising, online content, licensing, advertising, and publicity rights; an athlete’s career development can include, in addition to team play, endorsements, sponsorships, and public appearances.

The day-to-day role of the entertainment and sports practitioner will today call on numerous areas of law:

**Intellectual property.** The entertainment and sports practitioner must have a working knowledge of intellectual property issues: copyright, trademark, trade dress, and publicity rights. Branding the artist and/or athlete is at the core of the business strategy. Thus on a day-to-day basis, the legal advisor is concerned about creation of protectable names, logos, slogans, and artistic expression and protecting the same through registration and rights enforcement.

**Publicity.** Every deal that an artist or athlete engages in touches on publicity rights and the exploitation thereof. Practitioners in the sports and entertainment world have to be able to identify contract terms that bear on a grant or reservation of rights of publicity and the related right of privacy. Accordingly, for example, in a public appearance contract, the promoter may want a right to use name, likeness, and image in connection with the marketing, promotion, and/or advertising of the event, while the artist/athlete will want to ensure that such grant of rights is limited to actual promotional activities and not to the endorsement of any product.

**Clearance of rights of third parties.** Music rights issues have always been traditionally complex, but with the advent of the digital era, the entertainment practitioner is called on to negotiate and draft complex transaction documents that give protection to songwriters and artists, or, if representing a producer or other consumer of intellectual property, provide adequate representations and warranties and limitations on liability to ensure that third parties will not make claim to the final work product. Needless to say,
Deals take all sorts of shapes, sizes, and parameters, but at the heart of each is the monetization of what the artist/athlete has for sale, the exploitation of a body of artistic work or the performance by and/or endorsement by an athlete. Entertainment and sports lawyers are in many respects primarily licensing lawyers and have to be sensitive to the myriad issues that come up in such licensing deals.

Risk allocation, indemnity, and insurance. As the saying goes, “anything can happen” whenever you bring large numbers of people together in one place. Every sports and entertainment performance deal involves allocation of risks, express indemnity, and insurance. The practitioner must be knowledgeable of available insurance products, concepts of the “named” insured versus “additional insured,” the appropriate limitations on indemnity, and the variety of applicable state laws (pure comparative negligence versus hybrid contributory fault jurisdictions).

Real estate. Live performance contracts demand a working knowledge of leases and licenses for use in the negotiation of a venue agreement. Such venue agreements not only bear on insurance, indemnity, and risk allocation but also noise ordinances, traffic issues, public entity licensing and permits, and environmental law—ordinances can require a “green” concert or zero waste through implementation of recycling of food products, paper, plastic, metal, etc.

Investments and fiduciary responsibility. The careers of successful entertainers and athletes will bring on the need for investment counsel and advice; the practitioner who advises them must be familiar with the issues that arise in such arrangements, including the suitability of the investments.

Litigation. Disputes arise, and the sports and entertainment practitioner is often the quarterback of the litigation team and called upon to make financial and strategic decisions including the choice of litigation counsel (big firm versus small firm, specialist versus general trial lawyer) and strategic decisions that affect the litigation budget. Throughout the litigation, the general practice entertainment and sports lawyer is a fact finder, a go-between with the client, and a sounding board for theories and procedural strategy, so a working knowledge of litigation and its many procedural and substantive strategic contours is essential.

Conclusion. Practitioners who handle the legal contracting and counseling for artists and athletes and related entities have to be well-versed in multiple disciplines. Each of the issues noted above could be the topic of an entire article or course, and thus this article should only be seen as an overview to highlight the varied practice of the entertainment and sports lawyer in day-to-day matters. The practice continues to be professionally challenging and ever changing with the shifts in technology and business.

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More than 100 million Americans love and rely on animal companions—and are willing to pay for services calculated at bettering the lives of those animals. The veterinary profession has acknowledged that among those inclined to regard animals as close family members, demand for veterinary care remains price-insensitive (e.g., a person willing to spend $1,000 on a surgery for an ailing cat will likely spend twice or three times that sum without choosing euthanasia or forgoing the procedure). This commitment toward providing medical care of nonhuman family members transfers to legal care as well.
For the past 14 years I have evaluated more than 3,000 animal law cases, litigated and consulted on animal cases exclusively, tried or arbitrated two dozen, taken more than 100 depositions, argued hundreds of dispositive motions, and lodged close to three dozen appeals, with matters in bankruptcy, federal district, and state courts of limited and general jurisdiction. I have found financial success, spiritual affirmation, emotional satisfaction, intellectual stimulation, and respect among my colleagues by taking the following types of cases, any of which can supplement—or consume—your practice.

OVERVIEW OF ANIMAL CASES

Dogs behaving badly. A dog bites in four-dimensional legal space: civil, criminal, administrative, and temporal. If a dog bites a person or animal, the dog (and dog owner-guardian) will probably face (a) civil suit or demand for compensation; (b) criminal charge related to the negligence of guests and business invitees or trespassers (e.g., a painter fails to close the gate to the fenced yard, allowing the dog to escape; a delivery truck runs over the dog while coming up the drive-way; a duct cleaning company uses chemical attractant that acts like mustard gas when imbibed by cats; a friend who volunteers at a wildlife sanctuary tracks in parvovirus and other zoonoses after having failed to properly sanitize her clothing); (c) administrative determination of the dog as dangerous or vicious, imposing restraints on control or outright seizure and euthanasia; (d) civil infraction imposing a fine but also staging the dog as a predicate offense for subsequent civil, administrative, or criminal action. You can represent the interests of the bitee, the biter, or the biter’s owner, harborman, keeper, or possessor of the land where the dog bit, providing a matrix of interlocking legal issues in need of maneuvering with the help of an animal lawyer.

Veterinarians behaving badly. Animals, like people, may die in the presence of a health-care provider. These situations often leave veterinarians holding the bag. Sometimes, though, they ask for it. Most calls for perceived malpractice go nowhere. Others excite further inquiry with the aid of a forensic expert who takes a hard look at the allegations and medical records. When merited, claims proceed by complaint to the veterinary licensing board and/or a demand for compensation. Opportunities for the animal law practitioner include doing the legwork to build a disciplinary case against a wayward vet and organizing the evidence in a convincing manner that concludes with a legal analysis of the code violations believed to exist.

Family tug-of-war. Families break apart, and when they do, one or more individuals may be deprived of contact with nonhuman family members. Sometimes the custody battle takes place between married spouses or domestic partners. Other times, those in a committed intimate relationship (aka meretricious relationship) seek legal advice.

Planes, trains, automobiles, mean people, and products hurting animals. Animals, like people, are exposed to daily risks to life in limb:

- the consumption of tainted food or dangerous medications;
- the failure of appliances, devices, and products (e.g., a defective leash or collar or a faulty invisible fence);
- the negligence of guests and business invitees or trespassers (e.g., a painter fails to close the gate to the fenced yard, allowing the dog to escape; a delivery truck runs over the dog while coming up the drive-way; a duct cleaning company uses chemical attractant that acts like mustard gas when imbibed by cats; a friend who volunteers at a wildlife sanctuary tracks in parvovirus and other zoonoses after having failed to properly sanitize her clothing);
- accidents while perambulating (e.g., getting hit by a negligent driver or shocked by an energized manhole while being walked down a sidewalk, or walking onto railroad tracks through unfenced openings in an off-leash dog park adjacent to line);
- accidents while flying (e.g., cargo bay depressurization and heat prostration for brachycephalic breeds); or simply
- being the target of an irate neighbor (e.g., literally by being shot or figuratively by being tempted to eat poison).

Service animal access. Disabled Americans rely on nonhumans in housing, at work, in transit, and when visiting places of public accommodation.
Some face eviction unless they surrender their animals. Others endure ridicule, hostility, and denial of services (thereby infringing on certain rights to which nondisabled individuals are accustomed). A hot topic currently involves the legality of restrictions placed on service or emotional-support “pit bull”-type dogs, forcing a collision between breed-specific legislation and federal disability protections.

Miscellany. Lastly one finds a grab bag of cases, collectively referred to under the heading “impact litigation” or “cause lawyering,” grappling with issues such as:

- Wrongful denial of a dog adoption owing to retaliation for whistle-blowing or racial discrimination;
- Public records law challenge to force private animal control contractors to disclose euthanasia logs and other information;
- Petitions to seek leave on behalf of a private party to file a criminal misdemeanor charge of animal cruelty;
- Taxpayer suits to challenge the religious exemption contained in the state humane slaughter act, the customary animal husbandry and veterinary practice exemptions found in the animal cruelty act, and disparate treatment of cats and dogs as found in municipal stray hold and euthanasia codes;
- Negotiating access for protestors;
- Criminal defense for those who emancipate or rescue animals from deplorable conditions;
- Drafting adoption contracts for rescues and enforcing repossession clauses that may include liquidated damages for declaws, ear crops, tail docks, and refusal to spay or neuter; and
- Petitions for rule making to end cruel euthanasia technique by animal control entities and to compel state agencies to comply with their statutory mandates regarding animal welfare, such as requiring police officer training to accurately perceive canine threats and deploy non- or less-lethal methods to neutralize bona fide ones.

Animal lawyers also handle estate planning/trusts; puppy lemon law cases, equine law disputes, and insurance claims for animals under modalities of harm and losses; and cases stemming from federal animal and environmental protection laws such as the Endangered Species Act, Animal Welfare Act, Marine Mammal Protection Act, Clean Water Act, and Clean Air Act.

ADVICE FOR NEW PRACTITIONERS

Are you looking to supplement your practice to include animal law—or make it the exclusive focus of your firm?

Below is my top-11 list for those considering the field (animal law is simply too all-encompassing to limit it to the top ten).

1. Location, location, location. Although the human-animal bond remains a common denominator most everywhere in our diverse country—rural or urban, Red or Blue—sustaining an animal law practice requires a critical mass of clients. Further, full-time animal lawyering can quickly reach a market saturation point.

Seek to headquarter your firm in the largest metropolitan area of the state in which you choose to practice, or be prepared to span distance through virtual technologies such remote officing, always-on WiFi accessibility, e-faxes, and toll-free numbers to compensate for lack of in-person availability.

Ultimately, you will probably have to commit to the entire state, or regions of the state that may be accessed within a few hours’ travel. Expanding your reach too far, however, may visit upon you the fate of Romulus Augustulus and the Roman Empire as a whole.

2. Let their fingers do the walking. I used to recommend advertising in the Yellow Pages, but paper has become passe. Digital presence on Avvo.com, in search engines, and through web page development are nonnegotiable.

3. Make a name for yourself—in the bar. If you have not done so already, create professional institutional memory by founding a state or municipal bar association animal law section or committee. In the process of soliciting members and petitioning for section creation, you will increase face time with bar leaders and plant seeds for referrals. Then, once the committee or section is formed, install yourself as an executive committee member and get to work!

4. Make a name for yourself—in the school. If no course exists, offer yourself as an adjunct professor of animal law at the law school(s) in your area. In addition to creating an academic institutional memory, you will be establishing “street/court cred,” giving back to future generations of students (and animals), and keeping your finger on the pulse of animal law jurisprudence. But do not stop at law schools. Offer a seminar at community college paralegal, criminal justice, veterinary assistant, and technician programs, or offer entire courses on jurisprudence for DVM, MA, and PhD candidates.

5. Pen that prose. Make a splash in the state bar bulletin or magazine by authoring an article on animal law and invite readers to join the new section or committee you are forming. Cross-pollinate by illuminating the interstices of animal and non-animal law. Consider writing for the periodicals of nonlegal professionals and groups, such as animal

Sustaining an animal law practice requires a critical mass of clients in your area.
control officers, shelters, veterinarians, groomers, walkers, and trainers.

6. Speak the truth. Get on the speaker circuit. Literally dozens of legal issues pertaining to animals exist, with more emerging as attorneys and judges turn their attention to the “unsolved mysteries” that afflict our area of practice. Sometimes being invited (or inviting yourself—but do so with finesse!) to a club, class, committee, agency, or organization will provide the opportunity to perceive of cutting-edge issues worthy of research and discussion, whether proactively or in response to incisive questions from your audience.

7. Keep enemies closer. When you have mustered adequate resources and knowledge, sell or donate your services to the “usual suspects,” such as itchy-fingered cops, disorganized euthanasia technicians, ill-mannered veterinarians, store proprietors clueless about the Americans with Disabilities Act, and overzealous animal control officers. In so doing, you will build bridges, increase the standard of care, and educate those who unnecessarily increase liability exposure. Most importantly, you will protect animals.

8. Share the intellectual wealth. Write for law reviews, either by preparing a formal article or practitioner’s note. Then, when you have been published, shop it around to various CLE departments for oral presentation and update. Doing so will expand your reputation beyond your state’s boundaries and provide invaluable guidance to colleagues facing identical challenges. In the process, you will also advance the state of jurisprudence.

9. Embrace the epithet. Face it, we animal lawyers are an endearingly quirky bunch. Exasperated counsel and cranky jurists may facetiously dismiss your passion and intellect by succumbing to the temptation to disparage and confound. Resist such unprofessional conduct by calmly and politely informing the court of your or others’ successes, giving due regard to the modernizing pleas for reconsideration of the no-longer-conventional wisdom and that the common law encourages, indeed demands, such thoughtful efforts. The key to succeeding in animal law practice is to vigilantly and unapologetically live your creed. Indeed, when you wear the proverbial scarlet letter on your brief-case, certain formalities are excused, assumptions made (not all bad), and it becomes easier to forge ahead without any recrimination. The reason is simple. Historically, when those in power affixed words intended to be derogatory upon those not in power, one way the powerless overcame the name-calling was to re-appropriate the term for self-identification. Become the wild-eyed radical, the “pit bull” litigator, the one who thinks outside the box so frequently that traditional boundaries blur and resistance becomes futile. Doing so means you never have to act chagrined as you ply your trade. After all, they cannot expect you to be anyone other than who you are. Dogs will be dogs, and animal lawyers will be animal lawyers.

10. Be appealing. Comport yourself in a way that attracts clientele, yes. But I mean gain audience of the appellate courts. Part of creating a viable animal law practice involves priming the jurisprudential pump so that case values and outcome predictability will rise. By clarifying the case law, you will (a) make a name for yourself (hopefully good, so pick cases carefully!) and (b) set precedents that will help other litigants and your colleagues and, most importantly, the animals. Your pen slices a path through the legal wilderness. Tread softly but carry a big machete, and if at first you cannot hack a path through to justice, keep whacking away, find new passages, and work with other animal lawyers to engineer an argument that will carry the day.

11. Charge for your services. Yes, you love animals. So do your clients. So what? Although money cannot buy you love, you cannot live on love alone. If clients want you to work for free because you have devoted your career to helping animals, then tell them to hire someone else. You will only be able to stay in business and, therefore, fulfill your mission, by billing and collecting. If you charge next to nothing, what does that say about your talent or the seriousness of the area in which you practice? Are animals and their causes worth nothing? If not, then why should you, advocating for them, make nothing? Offer an hourly rate, hybrid hourly/contingency, capped hourly minimum/contingency maximum, or some other fair arrangement.

**Moments of Clarity**

If asked to share the moments in my life where perfect clarity and joyful endeavor align, I would describe a bay in western Washington into which I routinely cold-plunged, wading out to waist depth. Once, from the corner of my eye, I sensed almost imperceptible movement disrupting the smoothness of the water. Adrift what must have seemed like miles from shore was a completely unexpected creature clinging to flotsam, water droplets beading on his wings, his legs and antennae curled into a ball, and the current slowly pulling him out to certain death in the sound—a *malacosoma constrictum*, or a Pacific tent caterpillar moth (a much-scorned defoliator of deciduous trees). Cupping my palms around him, I withdrew from the bay and set him down on a dry log. Slowly his antennae poked at the air, his legs got under him, and the beautiful wings started to vibrate—a
happy, preflight systems check before he took to the safety of the sky.

Since the *malacosoma* experience, I have found like satisfaction in rescuing beach spiders carried away by the tide, relocating yellow jacket nests from places my family frequents, trapping flies with jar and paper and releasing them outside, and escorting slugs from our gardens to areas that will not affect our food supply (and then only in the salt-free embrace of a leaf, instead of toxic bare-handed approach). I do this without casualty to myself or the subject of my compassion. I do so in spite of the inevitable eye-rolling and harrumphing of those less evolved and who fail to approach life in more principled, humane, karmic, and respectful fashion, refusing to stretch Thomas Hobbes’ social compact theory (see his comments in *Leviathan* on the prudent beast) to encompass all species great and small. And being sanguinely vegan for 13 years illustrates this commitment, no less solemn than taking a marital vow.

These same impulses that motivate rescue of the voiceless, sacrifices made while rendering aid to the derelict, and rejuvenation that follows the consummated endeavor—exemplified above—translate to the practice of animal law save one fundamental difference: scale matters. As lawyers, we have the ability and privilege to turn each individual plight into a precedential miracle, what I call the *malacosoma* principle in honor of the little moth who saved me.

Adam P. Karp of Animal Law Offices (www.animal-lawyer.com) founded animal law sections of the Washington and Idaho State Bar Associations, taught animal law at the University of Washington and Seattle University, and received the ABA/TIPS Excellence in the Advancement of Animal Law Award in 2012.

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The term “gaming law” touches many areas of practice. Among the many applications, there are poker clubs, charitable bingo, sweepstakes, essay contests, casinos, dog racing, horse racing, sports betting, raffles, Internet gaming, and lotteries. Guidelines on gaming law are chiefly at the state or tribal jurisdictional level, leading to a wide variation in permissible practices and pitfalls for each jurisdiction. Aside from the jurisdictional patchwork, a federal level of oversight covers some interstate activities such as nationwide sweepstakes, interstate Internet-based gaming operations, and Indian gaming. Federal agencies including the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) have particular registration requirements for some operations that may be otherwise unregulated.

Given the number of states and tribes with some form of authorized gaming, there are more than 170 separate jurisdictions with some form of authorized gaming within the United States alone. Within a particular state or jurisdiction, more than a dozen governmental entities may be connected with gaming enterprises, including the state attorney general, lottery agency, casino agency, horse racing agency, and local authorities. Leaving aside the question of regulation, enforcement can be a blurry area that requires good communication with state and local law enforcement officials, particularly for smaller-scale activities such as social poker or charitable raffles.

Gambling consists of three elements: chance, consideration, and a prize. States define chance in substantially different ways, meaning that what constitutes illegal gambling in one state with a strict definition of chance will be legal in another state with a more lenient definition of chance. For example, legislature and courts in different states disagree on whether a game of poker is a game of skill rather than a game of chance, and therefore on whether participants’ wagers on poker are permissible where other forms of gaming are banned.
HOW TO GET IN ON THE GAME

- Join relevant industry groups and attend their conferences.
- Learn about a niche of gaming law in your jurisdiction that affects businesses that are not primarily gaming operations, such as sweepstakes or non-gaming vendors who are required to register in order to do business with licensed gaming operators.
- Explore the dynamics of the particular practice area. For example, vendors, operators, and employees often require different counsel. Find out who represents which type of clients.
- Develop a relationship with the regulators and a familiarity with the body of law for a particular agency. Attend agency meetings and hearings.
- Blog about developments in gaming in your jurisdiction or about practice pointers before a particular agency in your jurisdiction.
- Conduct seminars for non-gaming businesses and for general practice attorneys regarding gaming topics. Target gaming operations with seminars (e.g., charitable gaming boot camp or poker club boot camp).

TYPES OF GAMING OPERATIONS

“Gaming” can include a wide variety of activities. The most common are discussed below.

Amusement gaming generally exists in conjunction with other entertainment and is characterized by for-profit arcade games or not-for-profit social games. This type of gaming is sometimes unregulated but is sometimes banned outright. Amusement gaming operators may offer claw machines, skee ball, pinball machines, and whack-a-mole type games for cash or merchandise prizes. Amusement gaming also covers some legal gray areas such as March Madness office betting tournaments, and social poker, which are not conducted for the operator’s profit but are also not conducted by a qualified charity.

Charitable gaming is available as a fund-raiser for some nonprofits in some jurisdictions. Charitable gaming may include raffles, traditional bingo, instant bingo (“pull-tabs”), and other forms of gaming. Some form of charitable gaming is authorized for the District of Columbia and all states except for Hawaii and Utah.

Contests are games that depend on skill rather than on chance. Some examples of contests include essay writing contests, photography contests, and athletic contests such as sharpshooting or arm wrestling. Contests where an entry fee is required are permitted in some form in nearly all states. Some states have particular categories of authorized contests. Some forms of contests or skill games may be seen as disguised gambling and therefore banned. Jurisdictions also vary on whether participants wagering on the outcome of a contest (i.e., a wager by a participant that she can beat someone at a game of chess) is permissible.

Horse and dog racing (pari-mutuels) are authorized in some states. Some race tracks are also authorized to offer other gaming operations such as video lottery terminals (VLTs) or table games. States can authorize wagering on simulcast races broadcast from other states as well.

Indian gaming is a well-established industry in 28 states. Under the 1988 Indian Gaming Regulatory Act, federally recognized tribes are permitted to operate Class II gaming, including traditional bingo, instant bingo, and some card games on tribal land without obtaining authorization from the state. Tribes must enter into a compact with the state in order to conduct Class III, or casino, gaming.

Internet gaming is likely the hottest emerging topic in the gaming industry. A December 2011 reversal in position from the U.S. Department of Justice has paved the way for states to authorize intrastate Internet gaming. Many online gaming operators are already active in Europe where Internet gaming is permissible. Some U.S. land-based gaming operators are partnering with Internet gaming operators to offer free play as a marketing tool. Several states are now selling lottery tickets online in intrastate transactions. Other states are moving forward with legislation authorizing intrastate Internet gaming. As with online lottery ticket sales, states may negotiate interstate compacts to create a larger pool of available online players for player-to-player games such as poker.

Lotteries are a common form of state-licensed gaming in about 40 states. Depending on the jurisdiction, the lottery agency may authorize paper lottery tickets for drawings and for instant prizes as well as electronic video lottery terminals. As noted above, one emerging topic is the online sale of lottery tickets. Some states have already authorized the online sale of tickets, and many other states with lotteries are promulgating regulations to introduce online lottery sales. It is likely that states will enter into interstate compacts to create lottery programs mimicking interstate lottery paper ticket games Mega Millions and Powerball.

Sports betting is one of the most restricted forms of gaming owing to federal prohibition. Currently only about five states have authorized some form of sports betting, and some of these authorizations have been challenged by sports leagues such as the National Football League.

State-licensed casinos, slot parlors, and card rooms are typified by Las Vegas-style casinos. This industry is the most heavily regulated in gaming law. Licenses are required for casino operators, gaming vendors, and employees. In some jurisdictions, non-gaming vendors are also required to obtain a license, meaning that non-gaming companies such as construction contractors or food suppliers must be licensed in order to do business with a casino.

Sweepstakes parlors or Internet sweepstakes terminals are an emerging market in some jurisdictions. These operations are generally small, with fewer than 50 terminals in a parlor or several terminals in a convenience store or bar. Sweepstakes promotions are permitted in some form in all states. Some states have prize limits or registration and bond
requirements for sweepstakes. Courts have typically held that sweepstakes promotions with an appropriate alternative means of entry do not constitute gambling because there is no consideration for the chance to win a prize.

LEARNING THE LAW
The first step in involvement with gaming practice is to obtain a comprehensive understanding of existing and developing laws and rules in one’s particular jurisdiction. Permissible gaming varies widely on a state-by-state basis and requires a full understanding of federal, state, and local legislation and regulation. In states with licensed forms of gaming, there are administrative proceedings to appeal license revocations or denials. Lawyers can represent individuals or businesses in license hearings.

Even within one jurisdiction, the volume of legislation and regulation varies widely depending on the type of gaming. The web of regulatory agencies and compliance requirements runs the gamut from comprehensive to nearly nonexistent, with everything in between, including gray areas of legality. State agencies typically regulate the state’s lottery, horse and dog racing, and other legalized gaming. The state’s attorney general often has oversight for charitable gaming. The FTC and some state agencies have requirements for sweepstakes. The National Indian Gaming Commission, Department of the Interior, and sovereign Native American tribes are responsible for the framework under which tribes operate gaming operations on Indian land. Online skill-based contests may fall within regulations by governmental entities and also must comply with the websites used to promote the contests, such as Facebook’s code of conduct.

Possible clients range from individuals facing license discipline proceedings to casino operators running full resort hotels that offer gaming as one of their amenities to non-gaming businesses seeking advice on promotions. Gaming issues arise tangentially in many instances. For example, I handled a dispute between the holder of a winning lottery ticket and his coworkers with whom he pooled his lottery ticket chances. My firm has represented several online skill game wagering enterprises. Gaming employees and agents often require licenses, which lead to administrative hearings on license renewals and revocations. Many cold calls come from entrepreneurs who want to turn their poker prowess into an online poker website or a poker club with a physical location. Gaming law requires a nationwide practice for some areas because many clients are multi-jurisdictional. For example, some businesses supply casinos in multiple jurisdictions and must be licensed as a supplier in each jurisdiction. At the other end of the spectrum, some practice areas, such as sweepstakes parlors or independent poker clubs, are entirely local and based on one jurisdiction’s laws.

FORMING CONTACTS
After gaining basic understanding of the permissible and impermissible gaming operation in the jurisdiction, the next step is to attend conferences, trade shows, and industry events to meet the regulators, operators, and vendors involved in the area. There are a number of industry publications. In part because of the jurisdiction-by-jurisdiction nature of gaming law, there are constantly new developments and new legislation and regulation requirements for the industry. The recent recession and budget crunches have fueled heavy expansion in state-licensed gaming and tribal gaming, leading to a number of emerging jurisdictions offering forms of gaming new to that area. Internet gaming is another booming area in nearly all jurisdictions that already have authorized forms of gaming.

STAYING AHEAD
As with all other practice areas, I have found that creative solutions to business ideas are in higher demand than dire prohibitions. Clients are highly entrepreneurial; finding a way to say yes to a client will engender loyalty and referrals. The creative solutions must still pass legal muster, of course. Regulatory authorities, local authorities, and courts are often split or unclear on whether operations at the forefront of the gaming industry in a particular jurisdiction are acceptable. The gaming industry is often on the forefront of uncharted territory and many currents, including political forces and shifts in permitted activity in adjacent jurisdictions, are constantly reshaping the horizon of acceptable business practice.

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A DAY IN THE LIFE

- Attend commission hearings and meetings.
- Attend legislative hearings for pending amendments to gaming-related law.
- Track pending court cases on developing areas such as sweepstakes parlors or constitutional challenges to gaming expansion.
- Respond to client inquiries—analyze changing legislation, regulation, case law, and agency rulings to determine how to accomplish a client’s goal.
- Draft terms and conditions for skill game wagering website.
- Analyze media restrictions for advertisement of gaming operations.
- Meet with entrepreneur who wants to open a poker club.
- Review lease documents for gaming equipment.
- Represent clients in licensing process before state agencies.
- Work with agencies to determine extent of public record laws as applied to gaming license applications.
- E-mail status updates on law to clients and blog about legislative and regulatory developments.
- Related fields that come up frequently: liquor law, zoning issues, employment law, charitable registration requirements, contract review.
Immigration Law
By Margaret Wong

When approached to author this article, I jumped at the chance to write about a subject near and dear to my heart: helping foreign nationals seek a place in the United States where their work ethic and expertise can contribute to the growth of this country and where opportunities to grow and prosper abound.

As a specialist in immigration law, my days are long and 18-hour days are not unusual. Still, I find immense satisfaction knowing how many people I have helped and families I have saved from separation when a family member’s immigration status was knowingly or unknowingly revoked.
TWO TYPES OF IMMIGRATION LAW

There are two types of immigration law practitioners. The first works with corporate legal and human resources departments to get work permits for their employees; the other represents foreign nationals on removal, exclusion, deportation, green cards, work visas, H-1Bs, E visas, and “fixing” aliens who fall out of status.

In corporate cases, immigration lawyers must understand what general counsel's and human resources department heads want. As cutting budgets is always a major issue, the lawyer must always know what is within their budgets. So when a lawyer is advising them on which visa type to choose, the TN visa handily wins; it involves no wait and the filing fees are so much cheaper. When a lawyer is representing employees, however, the better advice would be the H-1B visa—not only does the employer have to pay the legal and filing fees for this visa, of a child as leverage. The beneficiary wife automatically falls out of status in the event that there is a divorce and she cannot protect her own offspring.

THE CHANGING IMMIGRATION LANDSCAPE

Before the American Revolution, open immigration policies brought immigrants from England, France, Germany, and Holland to America. Slaves from Africa, forcibly brought to the colonies, also played a great part in the growth of our nation. The flow of immigration did not slow until the coming of restrictive immigration legislation and policies starting in the late 19th and early 20th centuries: The Chinese Exclusion Act of 1882, the “Gentleman’s Agreement” of 1907, and the Quota Act of 1921, to name a few, all had the intention of limiting or excluding particular groups from immigrating to the United States.

Such legislation continues to be passed when the economy turns sour and jobs become scarce. In such times, anti-immigrant sentiments grow, resulting in legislation such as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). IIRIRA was a sweeping piece of immigration reform that focused on the quick removal of undocumented immigrants and non-citizens, regardless of reason. In 2010 and 2011 alone, 164 anti-immigration laws were passed by state legislatures, making it much more difficult for law-abiding, tax-paying non-citizens to gain legal status and continue to contribute to the economy of this great country.

To be able to help my clients in this increasingly difficult landscape, it is vital that I am up-to-date with the ever-changing laws and public sentiment. For as long as I can remember, every Friday afternoon my assistant prints out all the AILA, Westlaw, and immigration blog updates and puts them in my bag to bring home. I religiously read them every Saturday and Sunday morning. In addition, I have to read up on current affairs of the world at large because crises at any given time and place can affect the judgments of legislators and officials who control the fate of my clients.

A DAY IN THE LIFE

I do not know of any successful professional—be it a chef, a lawyer, or a doctor—who does not work hard. I get to work every morning at 5:30 AM, and I rarely get home before 7:30 PM. (And that is if I do not have social obligations or dinner meetings to attend.) My daily routine starts with answering all the written communications from my assistants and attorneys before they come in to work at 8 AM, and then answering e-mails from clients from all over the world. After that, my phone call regimen begins, and as I am put on hold, I use those brief moments to review case files, take notes, and plan strategies until the first client arrives.

Our client appointments start at 9:00 AM, and I like to do the consultations personally because the intake process controls the success of the case. With three floors and nine consultation rooms in my office, I get my daily exercise running between these rooms and climbing up and down the stairs via my “secret” back staircase to avoid any interruptions from staff and clients alike.

Today’s clients are much more sophisticated in their understanding of the immigration process because of the availability of information on the Internet. However, knowledge without experience can be dangerous. Hidden traps abound, and misinformation can trigger deportation. Court proceedings and procedures to fix them can be costly, and negative consequences are almost always guaranteed.

As much as I hate to admit, we generally intake only about 25 percent of the cases that we interview. Many of the rest only require forms to be filled out, so we...
advise against paying for such a simple act. We decline other cases because we know them to be lost causes no matter how hard we might try. It would be unethical for us to take a client's money knowing there is no way we can win. Still, it is heartbreaking to listen to their stories while knowing that my hands are tied by the law. Sometimes, for example, children call and ask me why the government is taking away one or both of their parents. Then there are cases that clash with my moral beliefs, or when there are ethical concerns; these I politely refuse. Even though we are lawyers for hire, there are certain lines I will not cross. No amount of money is worth it.

KEYS TO SUCCESS
When clients bring their children along for the consultation, I cannot help but impress upon them the importance of education and their integration into American society. I see so many immigrants unwilling to cross the language barrier, staying instead in their own comfortable and familiar ethnic neighborhoods and so missing out on many opportunities to advance in life. I am lucky to have come from a literary family where both my parents had the foresight to send all four of their children to America to further our education, even though they could hardly afford it at the time. My mother, who was born in 1920, attended university in China and was one of the first female reporters there. My father, a news magazine publisher, could not stress enough the power of words. Both instilled in us a sense of responsibility for the betterment of home, society, country, and mankind. Therefore, I feel I owe it to my clients and their children to pass along the advice my parents gave me that got me to where I am today.

I am often asked how I manage to run a business with so much traveling and long hours and still have time for a family. My answer is always the same: It takes a village to raise a family. On the home front, I am blessed with a close-knit family where all of us sisters and in-laws, parents, and children live within two miles from each other (except for my brother’s family, which lives farther away), and we all get along extremely well, a rarity in today’s society. We get together every Wednesday for dinner. We talk about the same things, and as we are Chinese, no gathering is complete without food, food, and more food. Because we are such a large family, there is always someone to call on for whatever and whenever needs arise. It never ceases to amaze me how we still look forward to our Wednesday dinner when we have been doing this for more than 30 years. People say: “Behind every successful man, there is a woman.” I say: “Behind every successful person, there is a family.”

On the business front, I am blessed with a loyal, hardworking, and dedicated staff. After my consultations and when the contracts are signed, the hard work of gathering information and official documents from clients begins. The myriad paperwork required by our government can be mind-boggling for the uninitiated. The time limits, the language barriers, and the rigid rules and procedures all contribute to a high-stress environment. My staff handles these and many, many other difficult situations with perfect aplomb.

Although wisdom, experience, and good lawyers are essential to running a successful immigration law firm, I firmly believe that the most important ingredient is passion for the immigrants who knock on our door. Whether they are billionaire businessmen, chefs, housekeepers, or rape victims from war-torn countries, their needs are our priority. My clients are not just case numbers but living, breathing people who look to us for their future. It is a heavy burden to bear, but the positive outcomes can be enormously gratifying and rewarding.

Margaret Wong (wong@imwong.com) is the principal of Margaret W. Wong & Assoc. Co., LPA, an international immigration law firm with offices in multiple states. She is also Adjunct Professor of Immigration Law at Case Western Reserve University in Cleveland, Ohio.

Join us in picturesque Anchorage, Alaska, for the ABA GPSolo Spring Leadership Meeting from May 23 to 25, 2013!

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So how did I come to be an oil and gas lawyer in Austin, Texas? I didn’t take an oil and gas course at the University of Texas Law School. I grew up in a small town in the Texas Panhandle, in one of the few counties in Texas that has never had a producing oil well. I began my career, after a year’s clerkship, at a small law firm in Dallas specializing in securities law.
Then my best friend from high school, who had recently moved back to his home in Austin to take a job at Graves, Dougherty, Hearon, Moody, and Garwood, a firm that in 1980 was one of the four or five established local firms (and I think the best) in the community, convinced his firm to offer me a job. I was assigned to the real estate section of the firm, but shortly thereafter an associate who was working in oil and gas law left the firm, and I was asked to pitch in. I had done a little oil and gas work with my former Dallas firm, so I agreed.

My mentor at Graves Dougherty, Ben Vaughan, had an established practice representing land and mineral owners—an unusual niche for a specialty. Most landowners in Texas use their family’s general-practice attorney when they want help negotiating an oil and gas lease. Attorneys in rural Texas generally know something about land and mineral law and are familiar with oil and gas leases. Landowner-based mineral practice was not common in urban areas, especially not in Austin, far from the oil fields of South, West, and East Texas. But Ben introduced me to his clients, taught me the fundamentals, and got me started on what has now been a 35-year practice.

In the process, I have seen the oil and gas business in Texas through several boom-and-bust cycles, and as anyone who reads the papers knows, we are now in one of the most robust revivals of the industry in the last 100 years. Ten years ago, I assumed that I would have to find another area of practice to finish my working career. Today I’m busier than ever. It appears that the latest exploration boom will outlast my working life and I’ll have plenty of work to pass on to those coming after me. During slowdowns in the industry, I have relied on my partners to help me find other work to fill out my day, and I am grateful for the support they have given me and the freedom they have allowed me to practice the law that I love.

Representing landowners is not for everyone. They are an independent bunch. I spend much of my time with them explaining the basics of oil and gas law and listening to complaints about how operators are treating their land. But land and mineral owners greatly appreciate good legal advice and service, and I value the personal relationships created over the years. They bring me a variety of interesting problems: How does our family manage to keep our mineral holdings intact and work together to maximize their value? What did my grandmother intend when she divided the royalty among her children in her will? How do I get the operator to clean up groundwater contamination on my ranch? How do I know if I’m being paid royalties correctly? How much should I expect to be paid for a pipeline easement?

The vastly improved and more complex technology that has ushered in the most recent revival of oil and gas exploration in our country has brought with it new questions and challenges. From a legal perspective, horizontal wells have required rethinking provisions in oil and gas leases and other basic oil and gas instruments that have served the industry well for more than a century. Long-established regulatory structures built around vertical well technologies are being revised. Hydraulic fracturing has raised concerns about environmental contamination and depletion of water resources. Horizontal drilling has facilitated exploration and production in urban settings, raising new issues about municipal regulatory authority, air pollution, and pipeline safety. All these developments keep me busy learning and thinking about new ways to better serve our clients.

Three years ago, just at the beginning of the explosion of new drilling activity, I took the plunge and started the Oil and Gas Lawyer Blog (www.oilandgaslawyerblog.com). I was not (and am not) a denizen of social media, and I had not spent much time surfing the web for legal writings. But by chance a paper I wrote for an association of mineral owners was posted on the web, and I began receiving calls from people who found it, asking for help in negotiating oil and gas leases. I decided I should look into this web phenomenon more closely. I determined to write a blog focused on legal issues of interest to land and mineral owners. I considered the project a way to generate new business, a discipline to help me keep up with new developments, and an avenue to fulfill my nascent urge to write. After some research I found that there were few good legal blogs approaching my specialty from the landowners’ perspective, and I thought I could fill a niche not yet occupied by others. My blog has turned out to be a great success. I enjoy the writing, it has generated significant new business, and I find that it has increased my profile in the bar and the industry. I receive calls from people across the country who have read something I wrote and occasional calls from reporters working on an industry-related story and seeking background information or advice.

During my tenure at Graves Dougherty, our firm has grown (along with Austin) from 18 to 67 attorneys. Like the oil and gas industry, we have gone through booms and busts, and we have survived. Without my colleagues’ support, I would not have been able to develop my practice and specialty and do what I love—to quote our founding partner J. Chrys Dougherty, to practice law in the “grand manner.”

John B. McFarland (jmcfarland@gdhm.com) is a shareholder with Graves Dougherty Hearon & Moody, practicing oil and gas law in Austin, Texas. He blogs at www.oilandgaslawyerblog.com.
Looking for more ways to maximize your membership?

**TIP #1**

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Check the website under “Committees” at [http://www.americanbar.org/groups/gpsolo/committees.html](http://www.americanbar.org/groups/gpsolo/committees.html) for the list of committees, their descriptions, members, events, chairs, and to join immediately. If you have any questions, contact us at 312/988-5648.

Look for more tips in coming issues.
A practice focused on election law is multifarious by nature: Many cases are brought in the heat of an election and require a quick response to evolving facts by a candidate’s or a political party’s lawyer; other election-related cases can take years to resolve.

**IN THE HEAT OF AN ELECTION**

Lawyers curious about the type of issues that can arise during an election need look no further back than the 2012 presidential contest. Serious issues arose then regarding long lines at the polling places. Depending on the jurisdiction, these lines resulted from such causes as complex ballots, an insufficient number of voting machines, breakdowns in voting machines, inadequate voting privacy booths, problems with voter registration records, the lack of trained election officials, and new voter identification rules. In several instances, election lawyers were called upon to sue the election boards, requesting more machines, ballots, and resources.

In these circumstances, lawyers used to seek to keep the polls open after the official closing time. This method became problematic following the 2000 election. In 2000, the polling hours were extended in one particular jurisdiction, but the appellate court quickly overturned the trial court’s decision. *Missouri ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000). The Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666 (2002) (HAVA), passed partially in response to the problems that arose during the 2000 general election, provides that any votes cast after the official polling closing time by persons not in line at that time could only be cast as “provisional ballots.” HAVA thus created an uncertainty as to whether such ballots would be counted—a prospect no lawyer wants to confront in a close election.
OVER THE LONG HAUL

In contrast to litigation requiring immediate resolution, attorneys working in the field of election law can see litigation that stretches on for years. Long-running litigation can arise from such issues as redistricting, the Voting Rights Act, 42 U.S.C. § 1973, and, recently, challenges to state voter identification laws.

One such case was Crawford v. Marion County Election Bd., 553 U.S. 181 (2008). In Crawford, Justices John Paul Stevens and David Souter engaged in a lively debate regarding the state’s and the in statewide as well as state legislative races. The work requires an understanding of the state election laws, the political process, and the varying ways that regular, absentee, and provisional ballots may be counted. In any recount, issues arise as to the accuracy of the counting devices. After the 2000 election, America adopted a series of reforms in the way that votes are counted. These types of devices are now in general use: optical scan machines, which scan the voter’s selection similar to the way that LSAT scores are tabulated; direct recording electronic devices (DREs), which use touch screens; and DREs that add a paper trail for audit/recount purposes. Although much has been written about the possibility of voting machines being hacked or otherwise compromised, in our practice, we have not seen confirmed evidence of a “hacked” machine. We have seen instances where DRE machines have been poorly programmed and, for example, have not allowed voting over an arbitrary number of votes cast, and poorly designed ballots that confuse voters into not voting for certain offices (this problem arose in Florida in the 2006 elections).

Optical scan machines are not infallible either—they can break down in the middle of voting, causing long lines at the polls. Human error can play a role as well. If a county registrar fails to order expected turnout, chaos can erupt when photocopied ballots cannot be fed through the machines, as happened in Bridgeport, Connecticut, during the 2010 general election. Twelve out of 25 city precincts ran out of paper ballots in the early afternoon on Election Day, leading to a legal challenge by the Democratic Party and an emergency court order to extend voting hours at those 12 locations. The hand count of thousands of photocopied ballots continued around the clock for days after the election, with the fate of several races hanging on the final vote results. That election did not result in a recount of any particular race, but the legality of the photocopied ballots, as well as any ballots cast during extended voting hours, could easily have been grounds for a recount or an election contest.

INITIATIVES AND REFERENDA

The ballot initiative and referendum process is also a consistent source of litigation. In 2012 alone, the voters of the State of Maryland were asked to decide on no fewer than seven constitutional amendments and referenda on the statewide election ballot, to say nothing of the numerous additional county- and city-level ordinances, charter amendments, and bond issues that appeared on the ballots of various jurisdictions.

The process of placing issues before the voters in an election is complex and detailed. Numerous issues of state, and in some circumstances local, law can arise as a part of this process, many of which find their way into court before they are resolved. Possible legal challenges to a petition’s sufficiency may include whether the question itself is phrased accurately and without bias; whether the petition for a referendum or initiative contains the requisite number of signatures; whether any signatures are fraudulent or lack sufficient information to provide positive verification; whether the petition circulators acted in accordance with the law and included the proper affidavits attesting to the validity of the signatures they witnessed, and whether the question may legally be put before the voters at all (a concept called referability—for example, the Maryland Constitution prohibits appropriations measures from being the subject of a referendum, and many other states follow this convention as well).

Legal challenges to initiatives and referenda can arise at any time before an election and may require an extremely

Attorneys in the field of election law can see litigation that stretches on for years.
fast turnaround within the judicial system. This was the case for the 2012 election ballot in Maryland, in which the petition to place the state’s newly drawn congressional redistricting map on the election ballot was challenged in late July 2012, mere weeks before the deadline for the State Board of Elections to begin printing ballots for overseas voters in accordance with federal law. See Dennis Whitley III, et al., v. Maryland State Board of Elections, et al., No. 133-2011 (Md. filed Aug. 13, 2012). The case was quickly briefed and argued at the Circuit Court level, and the case made its way to Maryland’s highest court, the Court of Appeals, barely three weeks later, allowing for a decision in time for the ballots to be printed.

CAMPAIGN FINANCE

Campaign finance is yet another area of election law that can be a fertile source of cases. For example, one of the authors of this article (Elizabeth F. Getman) was part of the legal team that challenged a provision of the Bipartisan Campaign Reform Act of 2002 known as the “Millionaires’ Amendment,” in the case Davis v. Federal Election Commission, 554 U.S. 724 (2008). The law allowed federal candidates to raise funds under increased contribution limits if they faced opponents who self-financed their own campaigns above a certain threshold. Many subsequent campaign finance cases have built on the reasoning set forth in Davis, affecting legal arguments made in support of independent political spending as well as eroding legal justification for public financing schemes.

BEYOND LITIGATION

Election law is not all about litigation, however—it’s a practice that runs the entire gamut of legal issues and requires practitioners to stay on their toes and research unfamiliar areas of law on a daily basis. On any given day, a political client might need legal advice regarding the hiring or firing of an employee, the terms of the lease for a campaign office, or the reporting obligations for lobbying activities. A nonprofit organization might have a question about procedures for its upcoming board meeting or how to report its activities on its annual financial report to the Internal Revenue Service. A political organization could inquire about running television ads for a contested race for governor in Missouri or Oregon or Texas, what campaign finance disclosure reporting is required, or whether the communication can be coordinated with a candidate. A political consultant may desire to start a new business in order to capitalize on experience gained on the campaign trail—and she will also want to trademark her new company logo.

The recent court decisions of Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), and Speechnow.org v. Federal Election Commission, 599 F.3d 686 (D.C. Cir. 2010), have added new challenges and opportunities to an election law practice. These cases have created the new political powerhouse, the “SuperPAC,” and have created more opportunities for corporate clients to participate in elections. In addition, these cases have created new outlets for nonprofit organizations to participate in political campaigns. Thus, election law practitioners must now be as proficient in nonprofit tax law as they are in election or campaign finance law.

HANDLING POLITICAL CLIENTS

Political clients often require legal advice at a moment’s notice, which leaves little time for hesitation or second-guessing. Numerous issues can arise on which the law is murky or is not directly on point, but a client may need an answer quickly and there is no time to request an advisory opinion: Television and radio ads must be reviewed and approved moments before they are sent to media buyers for placement; campaign mail must be vetted so that it can start hitting mailboxes today; political contributions must be approved so that they can be made before the end of the reporting period, which is tomorrow; a breaking story in the press may require immediate damage control, which means dropping everything on that day’s to-do list and addressing the instant crisis. An election lawyer must always be aware that his or her decisions on these matters could become front-page news the following morning.

On a day-to-day basis, an election law practice is quite different from a traditional legal practice. Much of the practice is more akin to a counseling relationship than a litigation or transactional relationship. Diplomacy in delicate situations is a must, and many decisions may be made on political, rather than legal, grounds. In addition, the practice will require significant client access outside of normal working hours—it is not unheard of to review campaign mailers or press releases on a mobile phone during dinner or right before bedtime. Being in the trenches with political clients can be exciting and rewarding, if incredibly stressful. For someone who enjoys politics and wants to be a lawyer, there is no better job in the world.

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Of all the areas of specialty practice in the legal profession, few have as great a variety of component parts as aviation law. From marquee crash litigation to mundane tax issues, the worldwide scope of this field encompasses the broad categories of general, commercial, and military aviation. The major agencies most frequently impacting the practitioner are the Federal Aviation Administration (FAA) and the National Transportation Safety Board (NTSB), together with the International Civil Aviation Organization (ICAO).

Most of my aviation practice involves enforcement actions by the FAA seeking to suspend or revoke a client’s pilot’s license for violations of the Federal Aviation Regulations (FARs).

The FAA’s main facilities are in Washington, D.C., and Oklahoma City, Oklahoma. The agency’s various field offices, each named a Flight Standards District Office (FISDO, pronounced “Fiz-doe”), are in various geographic regions across the country. The FISDOs employ aviation inspectors who oversee general and commercial aviation activities in their respective jurisdictions.
In the typical case, once a potential violation is detected (by inspection or as a result of a complaint from outside the agency), the FISDO inspector will author a letter of investigation (LOI) to the pilot, mechanic, or company implicated to solicit the recipient’s version of events. A response to such inquiry is optional, and I often advise clients of my Three Rules for that occasion: Sit down, shut up, and don’t talk.

If the investigation leads to a conclusion that the potential violation cannot be established or is insignificant, the inspector has the option of dismissing the matter or issuing a warning. If the investigation leads to a determination that enforcement action is warranted, the inspector makes a referral—essentially for “prosecution”—to the Office of Regional Counsel. These nine regional offices are staffed by attorneys (most of whom have pilot qualifications as well), and their intake of the referral is normally the first contact with the events at issue. The counsel assigned can reject the referral, designate the violation for disposition by civil penalty (a monetary fine), or proceed to a Notice of Proposed Certificate Action. That final step is the procedural equivalent of an indictment and will include the FAA’s proposed penalty in terms of the length of a license suspension or an outright revocation.

The FAA has a procedure, rarely invoked, for emergency revocation of licenses as a sanction option. In an emergency revocation case, the license is suspended forthwith at the start of the proceedings and remains in that status until the conclusion of the case. Absent an “emergency” claim, the airman or mechanic’s license remains in good standing throughout the process.

Once a Notice of Proposed Certificate Action is issued, the case proceeds along specific sequential steps. An Informal Conference will be held to negotiate any possible agreed disposition to conclude the Notice of Proposed Certificate Action at that stage.

Absent agreement from such plea bargaining efforts, the case proceeds to a hearing (substantially in compliance with the Federal Rules of Civil Procedure) before a single administrative law judge (ALJ). The ALJs are supplied by the NTSB and currently number four, with two based in Washington, one in Dallas, and one in Denver. Adverse outcomes from these administrative law proceedings are appealable to the NTSB and can thereafter be reviewed in the federal court system.

The circumstances leading to enforcement efforts often qualify for a “You can’t make this up” reaction, and I will share some “day-in-my-life” examples, below. The safari begins, however, with a case having nothing to do with enforcement. It qualifies as an example of aviation law, took about two hours from start to finish, and is one of my career favorites.

THE HIGH AND THE MIGHTY
I had just arrived at my office when I was contacted by a pilot for a major airline. He resided in New Hampshire and was calling on behalf of himself and other flight crew members, also residents of New Hampshire, employed by his airline. Of note was the fact that because of their seniority, they flew international or cross-country domestic routes.

Although this group resided in New Hampshire, which has no state income tax, they were all “duty-based” at Logan airport in Boston, Massachusetts. In practical terms this meant they started and terminated their work at Logan regardless of flight durations or destinations. That description of this arrangement had inspired the Massachusetts Department of Revenue (DOR) to conclude that they were subject to Massachusetts state income tax because they worked in Massachusetts notwithstanding their undisputed non-resident status. The DOR’s theory was that they were considered to be working a full day in Massachusetts even if only for a single takeoff or landing.

The DOR in turn notified their employer’s payroll office in Connecticut to commence withholding for Massachusetts state income tax; without question or hesitation, the payroll office complied. The captain’s call to me followed the group’s next paycheck, which reflected the Massachusetts state withholding deduction.

I disclaimed to the captain that I knew little about tax law but offered to research the point and forward the matter to a tax expert if no answer was readily apparent. Within 15 minutes, 49 U.S.C. § 1512 (now 49 U.S.C. § 40116) informed me that states were specifically prohibited from imposing any income taxes on interstate air carrier employees unless more than 50 percent of their total scheduled flight time for the year was within that state.

The noteworthy and aggravating point of this example is that statute had been enacted ten years before the DOR undertook this unilateral action against my client’s airline and all other airlines with non-resident employees duty-based at Logan. The average fourth-grader could be expected to compute that the typical West Coast or international airline trip to and from Massachusetts could not come close to half of the crew’s annual scheduled flight time being in or over Massachusetts, and the federal statute specifically prohibited the DOR’s rationale.

Confronted with the statute, by the end of the day the DOR started the process of refunding the withheld state income taxes to the various payroll departments, which added them in subsequent paychecks. If complete client vindication ever happened faster, I can’t remember it.
ENFORCEMENT THAT WAS AND WASN’T

The types of issues that surface in enforcement cases range the spectrum. Some from my memory are uneventful (a Concorde pilot client who landed without incident but, alas, also without minimum fuel requirements), while other examples are remembered in the eventful category: Fuel exhaustion (small aircraft) resulting in night ditching in the Erie Canal; landing (large aircraft) without final clearance in a heavy Colorado snow storm with snow removal equipment on the runway; fuel imbalance in the wings causing a seaplane to roll and crash on takeoff (the second time it happened to this celebrity pilot).

Spot Landing. One favorite case from the “eventful” category involved a client who worked as a fish spotter for fishing boats in the Cape Cod area during the summer and in Florida and the Bahamas during the winter. Let’s say that he contacted me in the late morning of our mythical day in the life.

Fish spotters fly small, slow planes, usually far from land, carrying the pilot, radios capable of communication with fishing boats, and all the gas that the plane’s factory-installed and after-market auxiliary tanks can accommodate. These planes and pilots have many hours of flight time endurance because the longer they can stay on the job, the more profitable the day. My fish spotter client in this episode (and his Piper Cub) was an experienced pilot, but he did not have an instrument rating (a qualification to an FAA pilot’s license that permits flight when you can’t see the wing tips). Having in mind their work is to fly in weather where they can spot fish, an instrument rating is not needed or required as long as the visibility is three miles and the ceiling is 1,000 feet.

The client called me from Long Island, New York, surrounded by aviation inspectors and local police. It developed that, as the seasons were changing, he was repositioning the plane from New England to Florida and had left Cape Cod the previous afternoon. During the flight the weather deteriorated to a blanket of fog along the East Coast, and the time came when a landing decision had to be made. By then it was completely dark. The client could not contemplate a successful instrument landing because he was not equipped or qualified to do so, and he chose not to declare an emergency out of fear of the FAA’s inevitable violation claim of the FAR’s minimum weather conditions and the endless paperwork that would follow. Flying low and slow above the fog layer, he noticed a light pattern that gave him some encouragement and completed a successful landing notwithstanding the lack of any useful visibility—in the parking lot of a high school.

The client had the hope and expectation of taking off at sunrise without anyone’s notice, but conditions did not improve before school employees and students started arriving that morning.

In the subsequent litigation, the FAA sought to revoke the pilot’s license for violations of operating recklessly and in weather conditions that were well below minimums. There was no property damage or personal injury, so at the end of the process a plea bargain was agreed to at the Informal Conference level that called for the suspension of the pilot’s license for six months as opposed to its revocation. Because the pilot was a fish spotter, it was also negotiated to have the suspension served between seasons over the span of two years so his loss of opportunities for work was minimum. This favorable outcome was achieved in some measure because the prosecuting attorney for the FAA, from a Regional Counsel’s Office at John F. Kennedy International Airport, thought that my client’s flying ability in accomplishing that landing without damage to persons or property was as amazing as any he had ever seen.

Smells like gas. Another favorite case involved a client who called me in the early afternoon of our representative day. He had decided to fly his light twin-engine aircraft (a Piper Seneca) from his home base in Chicago to Tel Aviv but had no previous experience crossing the Atlantic Ocean. He decided, wisely, to hire a contract ferry pilot with experience in such matters, and arrangements were made to pick up this individual in Massachusetts as the trip to Israel was underway. Other preparations for this odyssey included the installation of auxiliary long-range fuel tanks by an aviation firm in Illinois. These tanks were installed in place of the aircraft’s rear seats and would provide sufficient additional fuel to take much of the anxiety out of an ocean crossing. Known as “ferry tanks,” they are installed on a temporary basis and are routinely used for trans-Atlantic or trans-Pacific aircraft deliveries.

Arrangements and preparations completed, the client departed Illinois without incident for what would be his first trip to the East Coast. En route, he selected the ferry tanks to confirm they were operational. All went well until the client landed at the wrong airport in Massachusetts to pick up the ferry pilot, who was waiting at an airport about 25 miles away. The client mistakenly landed at a small private airfield with no fuel or mechanical services, and once his confusion was set straight by telephone calls, the client made preparations for the short flight to the correct airport. That’s when he noticed the smell of gas from the many
gallons that had leaked onto the floor of the aircraft from the ruptured ferry tanks.

So now what to do? He was at a field with no services but understood that the very airport where the ferry pilot awaited had maintenance facilities sufficient to deal with the problem. The ferry tanks originally contained some 200 gallons of now-leaking fuel, and if he couldn’t get that repaired quickly, his travel timetable would be seriously disturbed. At this juncture, some 30 gallons of highly volatile aviation fuel were awash on the floor of the cabin.

Did I mention my dual-citizenship client (U.S. and Israeli) looked Middle Eastern in complexion? It was about this time that his arrival at the privately owned airport was noticed by one of the owners. When that individual finished processing the observations of an uninsured aircraft, piloted by a man with the client’s complexion and overloaded with leaking fuel, he called everybody but the Book-of-the-Month Club to report a likely “9/11 II” in progress.

In the responding herd of automobiles were two FAA inspectors who remained after all other law enforcement agencies had departed. The pilot was admonished not to fly the aircraft until the fuel leaks had been resolved, and he assured the inspectors he would not do so, notwithstanding the unbearable inconvenience that compliance would cause in the circumstances.

Comforted by the client’s cooperative attitude, the inspectors appeared to leave the area but hid behind a hangar to watch and listen for what they expected to happen next. And it did. When the aircraft landed at the “correct” airport, it was grounded by the FAA and the pilot charged by local police for operating to endanger.

The subsequent criminal litigation in court and the FAA’s “careless and reckless” violation enforcement action did not go well for the client. But at least the ending did not include a fireball.

Quiet here in the cockpit—too quiet. In the process of transitioning to owning his first twin-engine aircraft (a Piper Navajo), my next client called in the late afternoon of our day in the life. He had taken all the appropriate instruction and studied the POH (Pilot’s Operating Handbook) to the point of exhaustion. Unlike his previous experience with single-engine aircraft and two tanks, one in each wing, this aircraft’s fuel system consisted of four fuel tanks.

One “inboard” tank was in each wing together with one “outboard” tank. The POH specified that the inboard tanks were to be selected for takeoff and landing, and that the outboard tanks were to be used only in a cruise—straight and level—configuration.

The client’s first solo flight in the aircraft was to Cleveland for a business trip. Upon his return flight two days later the weather in Cleveland was horrible, but halfway to Massachusetts he was in the clear and relaxed on autopilot for the remainder of the journey. As required, he had departed Cleveland using the inboard tanks, then switched to the outboard tanks once he had reached cruising altitude.

Descending for landing at his destination airport in eastern Massachusetts, he was advised by the airport traffic control tower that because of his speed in the descent he was overtaking another landing aircraft. To increase the spacing, the tower requested he make a 360-degree turn before continuing the descent. The client commenced the turn—and seconds later both his engines quit at an altitude of about 1,500 feet.

Leveling the wings, the client saw a stretch of an interstate highway three miles from the airport and established a glide that resulted in a twilight landing, in rush hour no less, on the four northbound lanes of the interstate. There were no damages to persons or vehicles on the highway, and none to the aircraft or pilot.

The Massachusetts State Police soon arrived and closed the highway, causing what was later described as an 18-mile traffic backup. Then it got interesting. Once it was determined that the engines stopped because the fuel tanks had not been switched to inboard from outboard, and sufficient fuel remained in the inboard tanks, the state police reconsidered their initial demand that the aircraft have its wings removed and be trucked from the scene. The state police were next persuaded to contact the FAA to determine their interest and suggestions. The FAA’s position was that if there was no injury to persons or property the agency had no interest in the disposition of the aircraft and it was up to the police to handle it as they determined. With some begging and persuasion, the police agreed to let the aircraft take off and fly back to its intended destination.

Thanks to some fast talking, an engaged client, and a rational decision by our state police, everything was back to normal very quickly, efficiently, and cheaply. The FAA’s expected investigation of the pilot never took place.

**HAPPY LANDINGS**

Thus ends our flyby foray above the vineyards of the law. As I prefer to end final arguments at trials (glancing at the clock), let me close by saying, “I see by the rules of this court my time is up. I thank you for yours.”

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Metadata headlines have made a resurgence in recent months. One headline read, “General Petraeus Brought Down by Metadata.” And, of course, there was the article about the software king turned fugitive, John McAfee, whose location in Central America was easily pinpointed after he sent pictures of himself while on the lam.
Although metadata is now a common word in our vocabulary, it is arguably overhyped. Metadata was branded with a scarlet letter primarily because we all heard about people inadvertently leaving tracked changes or comments in their documents. Or, according to a judge with whom I had a conversation over lunch, because the issue garnered so much attention that the courts (and bar associations) were forced to issue rulings without fully understanding the subject.

Metadata is an electronic fingerprint that can be presented as evidence.

Ultimately, metadata is not bad—it’s just misunderstood. Metadata is absolutely essential in making a file operable; without it, we would not know where on our computer a file is stored, its filename, or other necessary information.

Metadata can be found in all software applications, and although this article focuses on Microsoft Office products, it’s found in WordPerfect, PDF, and image and video files that you create with a GPS-enabled device such as a smartphone, just to name a few.

WHAT IS ELECTRONIC METADATA?
You’ve probably at one time or another heard the definition of metadata: “data about data.” Could anything be more vague or generic? Well, I’ll let you in on a dirty little secret. Back in the early days of working with metadata when I didn’t really understand it to the degree I do today, I fell back on using that definition, too. No shame in that—it is factual. But it’s an incomplete explanation.

Metadata is information stored on your computer, your network, or in documents and other types of files. Sometimes it is buried so deep that you need a forensics tool to uncover it. Other times finding metadata can be as simple as looking at the file properties to see system- and user-generated data about when the file was created, last accessed, if it was printed, the amount of time spent editing it, and, in some cases, what document management system or template package was used with it. Metadata is an electronic fingerprint that can be presented as evidence. It can embarrass a document author or unearth secret e-mail correspondence. In rare instances it has been used to catch serial killers. More often, it has been the catalyst for change and improvements in technology.

YOUR PERSONAL METADATA
One of the easiest types of metadata to understand is user-added metadata—for example, those pesky tracked changes and comments that have made headlines and caused extensive embarrassment. To see it for yourself, just create a new document and type in a paragraph of text (or copy the text from an existing document). Now turn on tracked changes. To do this in Word 2007 and later versions, just select the Review tab and click the Track Changes button. Now make some changes to the text: a few additions and deletions, maybe some formatting changes.

All your changes are readily apparent—additions underlined, deletions struck through, etc.—so you might be wondering where’s the potential for danger. But what if you modify how your edits are displayed on the screen? To do this, go back to the Review tab and select Final from the Display for Review dropdown list. This option displays the document content as if all changes had been accepted (meaning you will no longer see what you had marked for deletion).

Alternatively, you can change the Display for Review option to Original, which displays the original document as if no changes had been made (meaning you will no longer see any text you had added). Now imagine sending this document to someone who is unaware of the display change and who decides to send the file to someone outside your organization “as is.” All your hidden edits—the metadata—are just waiting to be found by the recipient.

If you really want a sense of the dangers this can create for unwary lawyers, try adding a Comment that reads, “The client is asking for five million but will settle for as low as two.” Believe it or not, someone actually typed this Comment into a document and then sent the document outside the firm to opposing counsel.

Such comments and tracked changes also contain an additional piece of metadata that can lead to problems: user name. In Microsoft Word, it’s possible to change the author name associated with tracked edits. Want to try it out? Go back to your sample document and choose File>Options>General (or, in Word 2003 or earlier, choose Tools>Options>General). Now change the user name to that of your co-worker. Recipients of this document now will see that the tracked changes were suggested by your colleague. Or opposing counsel. Or Barack Obama. Or anyone else you choose. Obviously, I am not recommending this, but I want to emphasize the possible danger.

Tracked changes are just one area where user-generated metadata can hide. And keep in mind that each new version of software may add new dangers. One example is the new “collapse headings” setting in Word 2013. You can actually collapse or expand headings, which can obfuscate the text under that section heading. Fortunately, Microsoft has a setting that forces these headings to expand when the file is opened; however, you must have activated this feature before sending the file. Click File and choose Options. Select Advanced in the left pane, and in the Show Document Content section check the option to Expand all headings when opening a document.
You need to familiarize yourself with the unique challenges that each release of a new version of software presents before sharing any files created with the program.

**APPLICATION OR FILE-LEVEL METADATA**

Metadata that is added by the application is called application metadata. More often than not, this information travels with the file but may not always be displayed on the screen. Let me give you some examples.

Unless you’ve set a group policy so this information is not collected, the dates when a file was created, accessed, printed, and modified are automatically tracked and accessible to anyone who views the file. The same goes for the amount of time spent editing a document. These pieces of metadata are called “file properties.” And you don’t need any special software tools to view them. To see how it’s done, go to your sample document again and choose File>Info (or, in Word 2003 or earlier, choose File>Properties). The file properties will appear on the right side of the screen. If you use a document management system, you might not have access to the file properties—in which case, you can’t see what others are seeing when you send a file to them. But the information is there.

**SYSTEM METADATA**

If you’re a litigator, you’ll want to be aware of the metadata in the Windows Registry. The Registry is important and extensive. Countless entries exist there about what files you’ve accessed and even viewed from the Internet and what software is currently or has ever been installed. Some of the information is viewable, but other values are encrypted. (Craig Ball wrote an excellent, comprehensive article on metadata from a litigator’s perspective entitled “Metadata2011.pdf,” which is available from www.craigball.com.)

You could take the time to familiarize yourself with the Windows Registry or, better yet, work with someone who understands it. I advise working with a high-end Registry specialist; if the registry is edited improperly, it could render your computer inoperable.

**PROTECTING YOURSELF**

The first step in protecting yourself from the dangers of metadata is being aware that this type of information exists. You need to expend extra care when working with confidential files that will be sent to external parties. You should also invest in software to remove metadata from your files. This software is typically under $100, so it’s definitely affordable. There are a number of products that are available, such as Workshare Protect (www.workshare.com) and my own company’s Metadata Assistant (which was the first such product on the market; www.payneconsulting.com). For even more options, use an Internet search engine to look for metadata removal software. You should evaluate the products listed to find the one that’s right for you. Also, once you purchase a product, check back with the company to see if there are any new versions available. As new metadata types are added, these products are updated.

Using the program you chose, clean the metadata from the native file (such as Word, Excel, PowerPoint, etc.). Then convert the file to PDF. Although PDF files have some metadata, there is significantly less. You can view PDF properties from Adobe Acrobat by choosing File>Document Properties. Two pieces of metadata relevant to lawyers are PDF Producer and PDF Version. The PDF Producer field allows you to see which scanner in an organization was used to convert a file, allowing you to track who accessed the scanner at the time the file was made.

If you use an iPhone or a portable device that has location services and GPS document, I was able to see through the redaction marks to the underlying data. Keep in mind that modern scanners make redaction much more of a challenge.

I also recommend staying current on your local bar association rules for working with metadata. Remember that if a file is likely to become part of litigation, you’ll need to take precautions in order to avoid spoliation. The discovery process may also dictate whether or not metadata needs to remain in files supplied for document production.

The important thing to remember is that metadata is not a dirty word. Metadata is a necessary part of every file and computer system. It provides benefits, but along with the benefits there are risks involved. Ultimately, it’s your responsibility to know those risks and how to protect yourself from accidental disclosure of confidential information.

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Almost every discussion of reasons to buy an iPad includes at the top of the list the abundance of resourceful applications. There are more than 250,000 applications for the iPad currently available in Apple’s App Store, resulting in an almost endless list of reasons for using one in your practice. Below are just a few of the apps I think will make your workday easier and more efficient.
There are limitless possibilities for apps to help you in a variety of practice settings.

silver-and-red button in the center and the words “Tap and dictate.” Tapping the screen starts the recording process. Normally with Dragon software you would spend some time after installation training the application to recognize your speech. Dragon Dictation does not require any initial training. It is surprisingly accurate from the moment it is installed. If a word is transcribed incorrectly, simply double tap the word on the screen and Dragon will ask if you wish to delete that word. You can double tap and drag your finger over a series of words if you wish to delete whole sentences.

iJuror (Scott Falbo; $19.99). This app for litigators allows attorneys to record juror information, group responses, assess the importance of responses, rank jurors, and produce a report to review your findings. iJuror allows you to color-code the jurors for an easy visual reference: green for the jurors you like, red for the ones you don’t, and yellow for any you are uncertain about. You can select each juror and add notes such as age, gender, ethnicity, and marital status. You can drag jurors to a basket on the screen to indicate whether they are your strike, opposing counsel’s strike, or removal for cause. You can use the same drag feature to seat the final jury once it has been assigned. iJuror does limit the categories of information you can take notes on; you can add notes manually in the note field, but that takes almost as long as writing it on an old-fashioned sticky note. If you prefer a sticky-note system on the iPad, Scott Falbo also has developed iJuror Stickies ($4.99) to simulate this more traditional method.

iTrackMail (Daniel Amitay; free). This handy little app tracks when an e-mail you send is opened by the recipient. Once you install the app, simply open it and create a message. You will be prompted to enter subject of your message. Then go about typing your e-mail and send it as you normally would. You will notice in the body of the e-mail, between the field where you type your message and your signature block (if you have one), are three lines which read:

- Write your email above here as usual.
- This is a tracking image. Do not delete.
- This image will automatically change.

The recipient does not see this part of the message; instead, there is a line between the body of your message and your signature block which reads, “This email sent by iTrackMail.” An upgrade to the pro version ($4.99) makes the image invisible, so you will no longer see this text. Because the tracker is an image, if your recipients’ e-mail does not automatically load images, they will have to choose to download images before the receipt will be sent. Unfortunately, at this time the app does not allow you to attach documents to your e-mail. Hopefully, future versions will integrate with Dropbox (see below) or a similar cloud storage provider so you can forward documents with the tracker attached.

TrialPad (Lit Software LLC; $89.99). This admirable case organizer and trial presentation software is as mighty as most desktop presentation software. TrialPad allows attorneys to easily access documents, play videos, and annotate or zoom in on evidence during a trial. You can highlight, redact, or add exhibit stickers to documents and create reports of all your evidence with the exhibit numbers. You can import documents via Dropbox, e-mail, iTunes, Photos, or from a variety of other iPad apps. If you find a particular exhibit is intriguing or persuading to your jury, you can designate it as a key documents with your annotations and callouts saved. Then call up your key documents as needed during closing argument.

Dropbox (Dropbox, Inc.; free). Dropbox is a very user-friendly file-sharing program for synchronizing your desktop and portable devices. The app is tied to your Dropbox account, which allows users up to 2 GB of storage for free. Need more space? Dropbox offers multiple tiers of storage space, including 100 GB ($9.99 monthly or $99.99 annually), 200 GB ($19.99 monthly or $199 annually), or 500 GB ($49.99 monthly or $499 annually). Lawyers should be aware that Dropbox does not allow users to encrypt files before sharing, and doing so will violate their terms of service. So, although this service is very handy for sharing and collaborating on documents, it is not recommended for storing privileged and confidential client information.

Circus Ponies NoteBook (Circus Ponies Software, Inc.; $29.99). This handy note-management system is loaded with a variety of features. You can use it to record meetings and lectures and automatically sync them to your notes. The notebook feature allows you to set up dividers to create sections and subsections, and then fill the pages with your notes, PDFs, web research, spreadsheets, and anything else. You can create electronic trial notebooks for your days in court, ending the days of carrying around boxes...
full of binders, transcripts, and file folders. Notebook also has a handy multindex feature, which indexes every word in the note, along with attributes such as the date the note was changed, what keywords you assigned to it, or any attachments it may include.

**Bento 4 for iPad** (FileMaker, Inc.; $9.99). Bento is a powerful organizational tool for any small business owner, especially solo and small firm lawyers. The program allows users to easily create databases for tracking cases, checkbook registers, trust accounts, mileage, etc. You can build a library database for your forms with notes on how each should be used. If you use Bento on a Mac computer, you can synchronize databases between the iPad and your computer. The program comes with several built-in project templates and easy access to the Bento Template Exchange with professionally designed and user-submitted templates.

**PDF Expert** (Readdle; $9.99). PDF Expert lets you mark up PDF files from your iPad. You can import documents from your e-mail, Dropbox, iCloud, Google Docs, or through a variety of other iPad applications. You can search text, highlight, underline, and strike through as you peruse your PDF files. It also allows you to add bookmarks, freehand drawings, and sticky-note style comments to the documents. You can fill in PDF forms and easily apply signatures to your PDF files. The user interface allows you to move between multiple PDF documents using the tabs along the bottom of the screen.

**LogMeIn** (LogMeIn, Inc.; free). This mobile remote desktop application grants lawyers access to files on their desktop anywhere they can find an Internet connection. LogMeIn is available on the iPhone as well, but the larger screen size of the iPad, combined with the utility of this app, makes the iPad a viable laptop replacement when working away from the office. LogMeIn can synchronize with Dropbox, Google Docs, Box.net, and Microsoft SkyDrive so you can easily access files you have stored in the clouds.

**Notes Plus** (Viet Tran; $7.99). This great note-taking app does a beautiful job of creating the pen-and-legal-pad experience on your iPad. It allows lawyers to use a stylus, or even their fingertips, to write notes just as you would on a legal pad. You can use the integrated iPad keyboard if you want to type notes as well. You can later export individual pages or entire notebooks as PDF files through e-mail or Dropbox. The application adds to this process by allowing you to record voice notes embedded within your written notes, even recording when you switch between applications. Unfortunately, you cannot e-mail the audio files at this time. Hopefully, this feature will be available in future updates.

**Keynote** (Apple; $9.99). This visually stunning presentation app allows you to view and edit both Keynote ’09 and Microsoft PowerPoint presentations. You can import the files through e-mail, the web, iCloud, a WebDAV service, or iTunes. You can quickly create beautiful presentations from your iPad. It synchronizes via iCloud, allowing all your devices to stay up-to-date. You can export the presentation to Keynote or PowerPoint or as a PDF file.

**TranscriptPad** (Lit Software, LLC; $49.99). This application is brought to you by the same developers as TrialPad, mentioned earlier. It allows attorneys to review and annotate deposition transcripts. You can open any .txt file directly from an e-mail message, or you can import a file from Dropbox. The application allows you to associate the file with an existing matter or create a new matter. At this point, you are ready to start reviewing your deposition. Don’t feel like scrolling? TranscriptPad can scroll through the text for you at an adjustable speed, like a teleprompter.

Yes, there’s an app for that. In the end, there are limitless possibilities for apps to help you in a variety of practice settings. This list is just a sampling of the ways you can take advantage of the technology now available at your fingertips.

Ashley Hallene (ahallene@hallenelaw.com) is a sole practitioner in Houston, Texas, specializing in oil and gas law, title examination, and oil and gas leasing.
S earching for additional resources to help you break into a new niche? Take a look at the ABA publications and CLE packages 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 www.shopaba.org.

ENTERTAINMENT LAW FOR THE GENERAL PRACTITIONER
By X.M. Frascogna Jr., Shawnassey B. Howell, and H. Lee Hetherington (ABA Solo, Small Firm and General Practice Division; Forum on the Entertainment and Sports Industries; 2011; PC 5150447; $79.95; GPSolo member price $65.95)
This book discusses the law that governs the entertainment industry and provides a solid base of understanding copyright law, trademarks, music publishing and royalties, live performances, online entertainment, and client consultation.

A FOREVER HOME FOR FIDO: ANIMAL CUSTODY ISSUES IN ADOPTIONS, DIVORCES, AND DISASTERS (ONLINE COURSE)
By Yolanda Eisenstein, Barbara J. Gislason, Adam P. Karp, and Randy Turner (ABA Center for Professional Development, Solo, Small Firm and General Practice Division, Tort Trial and Insurance Practice Section; 2012; PC CET12FHFOLC; $129; ABA member price $109; GPSolo member price $89; credit hours: 1.5; also available on CD-ROM and MP3)
Although many people consider their companion animals a part of the family, animals remain property under the law. This fact creates a number of unique legal challenges for lawyers and judges when ownership and custody disputes arise.

THE LABOR AND EMPLOYMENT LAWYER’S JOB: A SURVIVAL GUIDE
By Dipanwita Deb Amar (ABA Solo, Small Firm and General Practice Division; 2007; PC 5150307; $59.95; GPSolo member price $44.95)
This guide gives basic direction on assignments that new labor and employment lawyers are likely to receive. It also provides tips for honing in on the precise questions that need to be asked and devising a framework for addressing them.

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; PC 5150441; $125; GPSolo member price $99.95)
Solo and small firm lawyers often get caught in the crossfire of practicing law and managing a business at the same time. This book helps you learn to master the key elements of running a small firm—from finance, to marketing, to anticipating clients’ needs.

AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS, SECOND EDITION
By Benjamin E. Griffith (ABA Government and Public Sector Lawyers Division, Section of Administrative Law and Regulatory Practice, Section of Individual Rights and Responsibilities, Standing Committee on Election Law; 2012; PC 5330220; $109.95)
Updated and expanded to include the most current issues in this area, this guide provides key information and important perspectives on election law questions that the courts are currently addressing or about to address.

ANDROID APPS IN ONE HOUR FOR LAWYERS
By Daniel J. Siegel (ABA Law Practice Management Section; 2013; PC 5110754; $39.95)
Finding the best apps often can be an overwhelming, confusing, and frustrating process. This handbook provides the “best of the best” Android apps that are essential for any law practice.

AVIATION LITIGATION: RECENT DECISIONS AND THEIR FINANCIAL, OPERATIONAL AND PRACTICAL IMPACT (ONLINE COURSE)
By Roy Goldberg, Robert W. Kneisley, Scott P. Lewis, Amy Ruggeri, J. Denny Shupe, and Robert S. Span (ABA Forum on Air and Space Law, Center for Professional Development, Section of Litigation, Section of Public Utility, Communications and Transportation Law; 2013; PC CET12AVLOLC; $129; ABA member price $109; credit hours: 1.5; also available on CD-ROM and MP3)
Highly experienced and knowledgeable industry lawyers discuss significant new developments in aviation litigation, including cases and laws involving airports, federal preemption of court claims, aviation security, and products liability.

CAREERS IN ANIMAL LAW
By Yolanda Eisenstein (ABA Law Practice Management Section, Law Student Division; 2011; PC 5110723; $54.95)
This book will help you gain an overview of the field from a practicing animal lawyer and professor of animal law, learn career tips from a series of animal-lawyer profiles, and understand evolving trends in legislation, litigation, and academia that will change the face of animal law in the decades to come.
IMMIGRATION LAW: A GUIDE TO LAWS AND REGULATIONS
By Marc R. Generazio (ABA Book Publishing; 2011; PC 1620459; $74.95; ABA member price $59.95)
This comprehensive guide to the complex U.S. immigration system is essential for lawyers working in the immigration field.

THE IMMIGRATION LAW SOURCEBOOK, 2013 EDITION
(ABA Book Publishing; 2013; PC 1620529; $249.95; ABA member price $199.95)
This sourcebook is your complete guide to U.S. immigration source material, including all the relevant acts, titles, and rules.

IPAD APPS IN ONE HOUR FOR LAWYERS
By Tom Mighell (ABA Law Practice Management Section; 2012; PC 5110739; $34.95)
Finding the best apps often can be an overwhelming, confusing, and frustrating process. This handbook provides the “best of the best” apps that are essential for any law practice.

LOCKED DOWN: INFORMATION SECURITY FOR LAWYERS
By Sharon D. Nelson, David G. Ries, and John W. Simek (ABA Law Practice Management Section; 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.

17TH ANNUAL NATIONAL INSTITUTE ON THE GAMING LAW MINEFIELD
(ABA Center for Professional Development, Criminal Justice Section; 2013; PC CEN13GLMCOR; $225; ABA member price $205)
The program discusses revolutionary legal, regulator, and ethical issues confronting both commercial and Native American gaming, including global anti-corruption initiatives and Internet gaming. This National Institute softbound coursebook comes with a searchable CD-ROM of the material.

STARTING AN IP LAW PRACTICE: CRITICAL QUESTIONS TO ASK YOURSELF
By Ann M. Mueting (ABA Section of Intellectual Property Law; 2012; PC 5370202; $54.95)
So you think you want to start your own intellectual property law firm. This guide helps you ask the right questions, evaluate your options, and decide what is best for you as you embark on the adventure of developing your new niche.

GPSOLO DIVISION LINKS
“Animal Law,” GPSolo, July/August 2009: tinyurl.com/aewj2hd
Gaming Law Committee: tinyurl.com/agfd39v
“Immigration Law: A Primer,” GPSolo April/May 2011: tinyurl.com/asu6wyw
Immigration Law Committee: tinyurl.com/bhid4zh
Intellectual Property Law Committee: tinyurl.com/ayydlr2
“Military Law,” GPSolo, January/February 2005: tinyurl.com/aabr6p
Military Lawyers Committee: tinyurl.com/ak6k9ug
“Protecting Intellectual Property,” GPSolo, April/May 2000: tinyurl.com/bxze6h9
Resource page for starting and running a law firm: tinyurl.com/clwojlp
“Small Firm, Big World,” GPSolo, April/May 2011: tinyurl.com/by5kuwo
Solo/Small Firm Forms Library: tinyurl.com/attkcqd
Sponsors page: tinyurl.com/bzlt7p

POPULAR THREADS ON SOLOSEZ
“What should I specialize in?” tinyurl.com/aa6tjhg

OTHER LINKS FROM THE ABA
ABA Center for Professional Responsibility: www.americanbar.org/groups/professional_responsibility.html
ABA Commission on Immigration: tinyurl.com/83k32qx
ABA Forum on Air and Space Law: www.americanbar.org/groups/air_space.html
ABA Forum on the Entertainment and Sports Industries: ambar.org/entertainmentsports
ABA Section of Environment, Energy, and Resources, Oil and Gas Committee: tinyurl.com/ae2p4c8
ABA Section of Intellectual Property Law: www.americanbar.org/iplaw
ABA Section of Tort, Trial and Insurance Law, Animal Law Committee: tinyurl.com/b5dpdxl
ABA Solo and Small Firm Resource Center: ambar.org/soloandsmallfirms
ABA Standing Committee on Election Law: tinyurl.com/agma3we

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A NEW LAWYER’S FIRST DEPOSITION

By James E. Stewart

The hard work has finally paid off. Our new lawyer has been assigned to prepare a witness for deposition and to defend the deposition. And he alone is responsible. The following topics are what I would discuss with that new lawyer.

Preparation. Start by asking yourself this question: What is the case about? Sort through the blizzard of documents, e-mails, legal memos, witness interviews, and motions. What happened to cause the lawsuit, why did the plaintiff sue, how does she plan to present her case, and how do you plan to defend the case?

Once you’ve done that, focus on your witness. What documents is the witness likely to be seeing and why? Make a list and start collecting your work copies. What have other witnesses said about this witness? Have you or a paralegal extracted all such testimony or documents?

Are you sure the witness is your client? If the witness is an employee of your firm’s corporate client, then your communications with him are very likely protected because he is an agent of the corporate client. If the employee witness is a codefendant and the firm is representing both the defendant employer and the defendant employee, the considerations are somewhat more complicated. If your witness is in fact a defendant, go find out if a written advance waiver of privilege is in place. If the witness is not your client, do keep in mind that everything you say to him is fair game for discovery.

Where are the problems in the case? If you don’t think there are any, look again. Sometimes the problems may be lurking in unexpected places. E-mails are a prime example. There are almost always one or more e-mails that are problematic from a substantive perspective or simply from their tone. Employment files and evaluations are another fertile ground for problems.

Once you’ve thought through these issues, make your outline for the prep session. (Not notes — an outline.) If you don’t, you’ll probably forget something, and it might even be important.

Have you given your witness plenty of notice of the deposition and the prep session and made sure he knows approximately how long you think each will last?

Did you plan the prep session for the day before or morning of the deposition?

Ask yourself, “How does it hurt to have the witness simply answer this question?”

This is almost never a good idea.

Sit down with your witness. First and foremost, alleviate stress for the witness. Explain the adversary’s theory of the case, your side’s theory of the case, and where the witness fits in all this. Explain what is going to happen at the deposition because the witness probably has no idea. Start with where it will be, what time it is scheduled to begin, and where you will meet ahead of time. Describe the likely room, who will be there, and what each person will be doing.

Ask the witness whether he has anything he wants to talk about before you get started on the more detailed discussion of the preparation. This is where you may discover what the witness is worried about.

Ask the witness what he remembers about the facts of the case. That’s right — before you give the witness the list of deposition dos and don’ts and before you wade into the intricacies of the documents, ask the witness a simple question: “What do you remember about all of this?” It gives you a chance to find out what should be discussed in more detail and what does not need more discussion.

Substance of the deposition. This almost always involves documents. But what documents do you review with the witness? A deposition question about what documents the witness reviewed seems to cause more acrimony between counsel than it deserves. Can the opposing counsel legitimately inquire as to what documents the witness has reviewed to prepare for the deposition? Worrying about this issue and the ensuing arguments on the record — all at the beginning of the deposition — strikes me as a time waster. Your question to yourself should be, “How does it hurt to have the witness simply answer this question?” If answering the question does not hurt, then why make an issue? Otherwise, starting the deposition off with an argument between counsel probably serves no purpose.

Dos and don’ts. And what about all the dos and don’ts you want to be sure the witness knows? There is a veritable mountain of literature on the subject of depositions and lists of dos and don’ts. It would be hard for you to keep them all straight and almost impossible for a witness hearing all this for the first time...
to do so. Why not discuss only a few of the most important with the witness? Here is my short list of advice to give a witness:

- Tell the truth; doing anything else will inevitably lead to disaster.
- Answer the question that is asked—honestly, directly, and concisely.
- It is perfectly permissible not to remember something if in fact you do not.
- Becoming angry, sarcastic, or humorous is almost never a good idea.
- If you do not understand a question, it is perfectly acceptable to say so.
- Stay at a pace that is comfortable for you. Pause and think before answering. Ask for a break when necessary.
- Be prepared to have prior answers summarized (sometimes not quite accurately) in another question.
- You might be asked hypothetical questions. Again, be prepared.

I also have a short list of do’s and don’ts for lawyers themselves when preparing witnesses:

- Don’t destroy the witness’s confidence with a brutal cross-examination.
- Don’t assume you must play the role of your adversary—if someone else would do the job better, make the change.
- Don’t succumb to the temptation of suggestive coaching in role play.
- Don’t role play with non-clients—this is never a good idea.
- Do relieve some stress for your witness.
- Do get a feel for how the witness is likely to handle the actual deposition.
- Do go over what you think are rough spots.
- Do review the way documents are marked and used, along with some objections.

Finally, determine whether there is anything in the witness’s background that you should talk about. It’s an uncomfortable discussion, but it will be a whole lot more uncomfortable if your adversary does it for the first time.

**The deposition.** The deposition itself creates its own tensions. If things get out of hand, what do you do? If this is a federal court case, review Federal Rule of Civil Procedure 30(d)(3). If you are convinced that the examining attorney’s conduct is so far out of bounds that you can convince a judge that the deposition is being conducted in “bad faith or in a manner that unreasonably annoys, embarrasses or oppresses” the witness, you can suspend the deposition while you file a motion to terminate or limit the deposition. Before doing this, be sure you know something about your district judge or magistrate judge. If I were going to suspend a deposition, I would be sure that the conduct is well beyond that of a hostile cross-exam. Finally, I would not suspend a deposition without at least attempting to get the judge on the telephone.

What objections are you going to make? It used to be that speaking objections were common. There was also what I thought of as “creative” objections. These sorts of objections had the regrettable effect of turning a deposition into a jousting match between lawyers as much as a search for discoverable information. The federal rules and many state rules were designed largely to put an end to this behavior. Carefully read Federal Rule of Civil Procedure 30(c)(2). Remember it, and follow it in your objections. If you do, you’re going to protect your witness while not contributing to the deposition becoming a lawyers’ show rather than the witness’s show.
DEFENDING A CRIMINAL CASE FROM THE GROUND TO THE CLOUD

By Daniel K. Gelb

Electronic discovery, known as “e-discovery,” entails the preservation, harvesting, reviewing, and pretrial exchange of electronically stored information (ESI). Unlike civil litigation, criminal rules of procedure—at least at the federal level—have yet to explicitly accommodate ESI. This article proposes a map to help criminal defenders effectively advocate ESI-related issues.

Preindictment identification of relevant sources of ESI. Preindictment representation requires an understanding of ethical obligations and the tools used by the government that should be a trigger for counsel at the start of any case. Criminal defense attorneys must know the various types of ESI, how they are created, and if the data resides locally—or remotely in the “cloud.” Failing to properly handle ESI in the preindictment phase, given its volatility and dynamic attributes, will likely lead to greater problems. One may be a question of effective assistance of counsel; others may be waiver of a statutory privacy right or legal privilege (e.g., counsel must avoid waiving an “act of production” privilege concerning ESI, which may be inherently testimonial upon production).

ESI and mobile communications, social networking sites, and the cloud. An aggressively developing category of e-discovery involves ESI stored in the cloud (i.e., what may be termed “c-discovery”). Remotely hosted data entails its own strategic methodology independent of data residing locally.

Evidence is typically obtained by the government prior to indictment—especially at the federal level. As with hard-copy evidence, Fed. R. Crim. P. 16 does not compel production of ESI outside the prosecution’s case-in-chief. A glaring procedural imbalance exists regarding a defendant’s ability to access data in order to make a showing of necessity under Brady v. Maryland, 373 U.S. 83 (1963), and related precedent concerning exculpatory evidence.

A criminal defendant is not automatically entitled to ESI maintained by the government. Notably, Fed. R. Crim. P. 16(a)(2) can place the accused in a precarious position where ESI relevant to the defense may or may not exist depending on forensic analysis. ESI on its face may not be exculpatory in nature, yet analysis of its attributes could show otherwise. Common examples arise in the context of mobile technology (e.g., forensics surrounding cell phone usage, texting, e-mail, etc.). The government has an unfair advantage when pursuing ESI protected by the Stored Communications Act (SCA), which by statute the defendant cannot pursue. The Communications Assistance for Law Enforcement Act (CALEA) provides access to ESI that service providers (e.g., cell phone carriers, social media platforms, e-mail providers, etc.) are required to make available to the government—a luxury criminal defendants do not enjoy.

Because all ESI harvested by the prosecution is not presumptively accessible, defendants face the challenge of showing a court why analysis of the latent attributes of ESI can contain exculpatory evidence. The prosecution’s obligations under Brady are rooted in common law rather than any specific constitutional right the accused has to conduct discovery. Therefore, defendants are at the mercy of judicial discretion under Fed. R. Crim. P. 16 and more often than not confront challenges to accessing ESI through a Fed. R. Crim. P. 17 subpoena. This is especially the case where the ESI is protected by aspects of the SCA, the Wiretap Statute, and/or the Electronic Communications Privacy Act (ECPA). Although Rule 17 provides for access to “data,” the reality is that access to ESI for preliminary analysis may be required prior to making a showing of exculpating value. This task is a difficult one inasmuch as Rules 16 and 17 are arguably not designed to be favorable to defendants.

Identifying constitutional challenges and moving to suppress ESI. Counsel must determine whether ESI was properly seized or if a common law or statutory violation exists supporting an argument for suppression. The Wiretap Statute, ECPA, SCA/CALEA, Patriot Act, and Pen/Trap Statute provide avenues for the government to seize ESI. Absent a
procedural or legal impropriety (e.g., improper search warrant), ESI recovered will likely be found compliant with the Fourth Amendment’s Warrant Clause. Moreover, wiretap violations may result in civil liability; however, they do not result in a per se suppression of the evidence. Although ESI may be admissible at trial, defendants are not prevented from arguing against the weight of the data and the integrity of its evidentiary value.

ESI is emerging as the foundation of modern criminal prosecution. Under the CALEA, the government may support its case with evidence from cell phone providers. Recent case law also has provided for lawful seizures of data from the phone itself (e.g., call logs and contacts). A digital forensics expert should be consulted to determine whether applicable standard operating procedures were followed by the government. Exponential use of social media and feature-packed smartphones make it crucial for defenders to be conversant and current with technology to effectively analyze, and if necessary challenge, the prosecution’s reliance on ESI.

Introducing and excluding ESI at trial and preserving the record. Similar to hard-copy evidence, ESI must be relevant under F.R.E. 104(b) and authenticated with a proper foundation in order to be admissible. Counsel should employ the foundational predicates under F.R.E. 901(a) to support a finding that the electronic evidence is what it purports to be. Because confrontational rights provided by the Sixth Amendment are implicated, a chain-of-custody analysis of the subject ESI is essential. Counsel should inquire into the identities of all parties that handled the ESI to determine whether the government can properly admit it at trial, and if not, that the record is preserved by timely objecting.

Impeaching the government’s expert at the pretrial and trial phases may require a defendant’s own expert who is independently qualified to testify. To avoid a Daubert challenge, a digital forensics expert must be qualified to testify. Certain prerequisites for a defense expert will likely include current certification on the latest forensic software applications and prior testimonial experience on ESI-related issues. Counsel must be familiar with those forensic applications that have been found reliable by the digital forensics industry. Some jurisdictions may require a digital forensics expert to maintain a private investigative license.

Motions to suppress, in limine and trial objections are important for preserving the record should an appeal become necessary. Therefore, it is advisable to maintain a checklist of evidentiary objects (including one tailored to ESI) both during trial preparation and at trial to determine whether or not the subject ESI conforms to evidentiary precedent. In addition to a testifying expert, counsel may wish to have a consulting expert on electronic evidence assist at trial should the circumstances so demand. As technology becomes more advanced—and accessible—so do digital forensics best practices. Therefore, defenders must continually stay ahead of the curve in order to effectively make Daubert challenges where appropriate.

Conclusion. Knowing how to pursue and/or challenge ESI in a given case could be the difference between conviction and acquittal. Whether the issues concerning ESI are procedural, statutory, or constitutional, failing to identify them may adversely impact a defense, raising a claim for ineffective assistance of counsel. Therefore, today’s criminal defense attorney must know how to discover, handle, and advocate either for or against the ESI at issue.

ABA CRIMINAL JUSTICE SECTION

This article is an abridged and edited version of one that originally appeared on page 28 of Criminal Justice, Summer 2012 (27:2). 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.

WEBSITE: www.americanbar.org/crimjust

PERIODICALS: Criminal Justice, quarterly magazine; Criminal Justice Newsletter, three times per year; Juvenile Justice Newsletter, three times per year (electronic); White Collar Crime Newsletter, three times per year (electronic).

STRONGER RESTRICTIONS ON FOREIGN PLAINTIFFS IN U.S. COURTS

By Richard D. Bernstein, James C. Dugan, and Lindsay M. Addison

In recent litigation involving foreign plaintiffs and foreign conduct, U.S. courts have shown increasing concern that they not become, in the words of Justice Antonin Scalia, “the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.” This applies even when the defendant is a U.S. corporation or has a U.S. subsidiary. Two lines of cases illustrate this trend. The first line springs from the landmark U.S. Supreme Court decision *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2886 (2010), in which the court firmly established the primacy of the presumption against extraterritorial application of U.S. securities laws. This presumption has also recently been extended to other federal statutes and state statutes, such as federal and state RICO statutes. And while Congress prospectively gave certain government entities the ability to pursue certain federal securities claims based on foreign conduct or effects in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, it did not extend this new provision to private plaintiffs or other statutes.

The other line of troublesome cases for a foreign plaintiff is recent precedent dismissing claims based on the doctrine of forum non conveniens. Although distinct, this second line of cases shares the concern that U.S. courts not become the forum of choice for foreign plaintiffs seeking redress for injuries suffered abroad. *Morrison and the presumption against extraterritoriality. Morrison*

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involved plaintiffs who were three purchasers of ordinary shares (common stock) issued by National Australia Bank (NAB) and alleged that NAB violated section 10(b) of the Securities Exchange Act of 1934. NAB was an Australian bank with American Depositary Receipts traded on the New York Stock Exchange and ordinary shares listed on several foreign exchanges. The plaintiffs were seeking to represent a putative class of foreign investors. According to the complaint, NAB’s U.S. subsidiary HomeSide Lending, Inc., a Florida-based mortgage service company, used fraudulent accounting, causing it to overstate the value of certain assets on its balance sheets. In September 2001 NAB announced that “it would write off $1.75 billion due to problems at HomeSide.” When this came to light, NAB’s stock price collapsed. Significantly, the lead plaintiffs were Australian investors who had purchased NAB stock abroad, and NAB’s nearly 1.5 billion ordinary shares were not traded on any U.S. stock exchange.

Overturning decades of established precedent, the Supreme Court rejected the “conduct and effects” test through which the U.S. Court of Appeals for the Second Circuit and other circuit courts had assessed the extraterritorial application of section 10(b). Instead, the Court breathed new life into the presumption against extraterritoriality that has long been a canon of statutory construction, holding it dispositive that the text of section 10(b) contains no language supporting its application to foreign purchases or sales of securities.

*Post-Morrison limits to federal securities liability provisions. Courts following *Morrison* have essentially limited the application of section 10(b) to securities bought or sold on a U.S. exchange or otherwise purchased or sold within the United States. The holding that the purchase of shares on a foreign exchange does not give rise to securities claims in the United States equally applies to shares purchased through broker-dealers. Broker-dealers have a duty of “best execution” to their clients. Accordingly, when a U.S. customer places an order with a broker-dealer, the best execution price may be found on a non-U.S. exchange. When evaluating claims of U.S. shareholders, it is important to determine whether their broker-dealers executed the relevant trades on a foreign exchange, therefore barring the shareholders from asserting claims under *Morrison* and its progeny. Such a determination regarding the location of the execution would also be important in assessing plaintiffs’ class
action claims because it would affect the size of the class and who may be a class representative.

Dodd-Frank and extraterritoriality for government agencies. The Dodd-Frank Act was enacted in 2010 to improve accountability and transparency in the U.S. financial system. Shortly after the Supreme Court’s decision in Morrison, section 929P amended certain statutes to reinstate the “conduct and effects” test and to provide federal courts with subject-matter jurisdiction in securities actions brought by the U.S. Securities and Exchange Commission (SEC) or the U.S. Department of Justice (DOJ). Section 929P does not give such rights to private litigants.

The SEC recently released a report titled the “Cross-Border Scope of the Private Right of Action Under Section 10(b).” The report addresses the Supreme Court’s holding in Morrison and post-Morrison developments. In addition, it reviews arguments for and against the transactional test and the “conduct and effects” test. Pointedly, the SEC did not make any recommendations. Instead, it discussed several options that Congress might consider, including leaving section 10(b) unchanged and, in effect, codifying Morrison. Also among the options discussed by the SEC was the “[c]odification of conduct and effects tests for Section 10(b) private actions similar to the test enacted for Commission and DOJ enforcement actions.” However, out of concern that the “conduct and effects” test could sweep too broadly, the SEC cited approvingly an additional element requiring “the plaintiff to demonstrate that the plaintiff’s injury resulted directly from conduct within the United States.”

Morrison and federal and state RICO statutes. Morrison’s impact is already being felt beyond the federal securities laws, most notably with respect to the federal RICO statute. In Norex Petroleum Ltd. v. Access Industries, Inc., 631 F.3d 29 (2d Cir. 2010), for example, the plaintiff alleged that the defendants had participated in a widespread racketeering and money-laundering scheme for the purpose of seizing control of most of the Russian oil industry, and, as a result of this scheme, the plaintiff’s majority interest in Yugraneft, a Russian oil company, was stolen from it. Although the operative complaint alleged some conduct in the United States in furtherance of the alleged scheme, the Second Circuit, following Morrison, affirmed dismissal because “RICO is silent as to any extraterritorial application” and therefore did not apply where a foreign plaintiff sought redress for injuries allegedly sustained abroad.

The forum non conveniens doctrine. Like Morrison and its progeny, the doctrine of forum non conveniens militates in favor of dismissal in many cases where foreign plaintiffs seek redress in U.S. courts for alleged injuries incurred abroad. Dismissal for forum non conveniens only requires that the foreign court offer the plaintiff some compensatory remedy, not as generous a remedy as would be available in the United States.

Recently, courts have applied the forum non conveniens doctrine to dismiss claims brought by investors in offshore feeder funds that invested with notorious Ponzi schemer Bernard Madoff.

The future for foreign plaintiffs in U.S. courts. As more corporate entities have multinational operations, more foreign plaintiffs are suing in the United States. But in an age of limited resources, U.S. courts are increasingly reluctant to exercise jurisdiction over disputes involving foreign litigants and foreign injuries, even where there are some U.S. connections to the dispute.
EMPLOYERS BEWARE: RICO AND IMMIGRATION ENFORCEMENT

By Louise N. Smith

The Racketeer Influenced and Corrupt Organizations Act (RICO) was enacted as part of the Organized Crime Control Act of 1970 to eradicate organized crime in the United States. In 1996 Congress amended the list of “racketeering activity” to include any act that violates section 274 of the Immigration and Nationality Act (entitled “Bringing in and harboring certain aliens”), provided that the act is done for financial gain.

This article explores the feasibility of civil RICO claims as a tool for immigration enforcement in the workplace.

RICO requirements. A civil RICO claim is twofold: (1) plaintiffs must prove a substantive violation, and (2) plaintiffs must have standing to sue. To establish standing, plaintiffs must sufficiently allege injury to business or property “by reason of” a substantive violation under section 1962(c). In addition to requiring proximate cause, the Supreme Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 269 (1992), read a direct-injury (but for causation) requirement into the “by reason of” language. Hence, an injury arising from the defendant’s harm to a third party fails “but for” causation. Conversely, proximate cause is established when the defendant’s misconduct is merely a “substantial” and “foreseeable” factor in the plaintiff’s injury and the causal link is “logical and not speculative.” Thus, plaintiffs who fail to sufficiently allege both proximate and direct causation fail to meet the standing requirements under section 1962(c).

Pleading standards. Rule 8(a)(2) of the Federal Rules of Civil Procedure merely

requires a “short and plain statement of the claim showing that the pleader is entitled to relief.” In *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court held that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” However, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court retired the “no set of facts” rule in favor of a plausibility standard. Two years later

in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009), the Court reaffirmed the plausibility standard. Thus, in a post-*Twombly/Iqbal* world, civil RICO claims are measured by the plausibility standard.

Civil RICO after *Twombly* and *Iqbal*. Given the short time frame since *Twombly* and *Iqbal*, there are very few civil RICO cases in the immigration context, and only two cases examine the plausibility standard with respect to pleading a substantive RICO violation.

In *Edwards v. Prime, Inc.*, 602 F.3d 1276 (11th Cir. 2010), former employees alleged that Prime violated various provisions of section 274 of the Immigration and Nationality Act (INA) by knowingly providing illegal aliens with the names and Social Security Numbers of former employees who were U.S. citizens and paying illegal aliens in cash. The district court dismissed the complaint pursuant to Rule 12(b)(6) on the grounds that the plaintiffs had failed to allege a pattern of racketeering activity. However, the Eleventh Circuit reversed. The complaint alleged that Prime “repeatedly violated and continues to violate § 1324(a)(3)(A),” which makes it a federal crime to knowingly hire at least ten individuals during a 12-month period with actual knowledge that the individuals are illegal aliens. The Eleventh Circuit held that the complaint “comes close to stating a claim” (by alleging that Prime hired persons who were known by management as “unauthorized” and “ineligible” to work), but “without some further factual enhancement it stops short of the line between possibility and plausibility.”

Plaintiffs alleged that Prime violated section 1324(a)(1)(A)(iv), which makes it a federal crime to encourage or induce an illegal alien to come, enter, or reside in the United States by providing illegal aliens with the names and Social Security Numbers of U.S. citizens. The Eleventh Circuit found that the plaintiffs were “entitled to get past the Rule 12(b) (6) stage” with respect to this predicate act.

Plaintiffs also alleged that Prime violated section 1324(a)(1)(A)(iii), which makes it a crime for any person to conceal, harbor, or shield an illegal alien from detection, or attempt to conceal, harbor,
or shield an illegal alien from detection. The Eleventh Circuit looked to the “statutory evolution” of section 1324(a)(1)(A) (iii), which included a statutory amendment that deleted “employment shall not be deemed to constitute harboring.” This change led the Second Circuit to conclude that the statute “no longer excluded employment from the prohibition against harboring.” Here, the plaintiffs not only alleged that Prime hired illegal aliens but also paid them in cash and provided them with the names and Social Security Numbers of U.S. citizens. The Eleventh Circuit found these facts sufficient to allege a violation.

In Nichols v. Mahoney, 608 F. Supp. 2d 526 (S.D.N.Y. 2009), former employees alleged that EMC Contracting and its owner knowingly hired illegal aliens and, as a result, depressed their wages. The defendants moved to dismiss, but the district court granted the plaintiffs’ leave to amend. After evaluating both the original and proposed amended complaints in light of the Twombly plausibility standard, the district court dismissed the plaintiffs’ RICO claims with prejudice. The plaintiffs’ original complaint alleged that the defendants engaged in a “pattern of racketeering activity” by knowingly hiring numerous illegal aliens in violation of section 1324(a)(3)(A). However, in order to plead a violation of this statute, the plaintiffs had to allege that the defendants had “actual knowledge” that the illegal aliens they hired were “brought into” the country unlawfully. Because the plaintiffs did not allege the “brought into” element, they did not properly plead a substantive RICO violation.

Moreover, the plaintiffs failed to correct this defect in their proposed amended complaint, which alleged that: (1) “as many as 14 percent of all workers in the construction industry are illegal aliens,” and (2) it was “common knowledge” that the persons hired were illegal aliens. Such “bald assertions” fell well short of Twombly’s plausibility standard.

Moving forward. The Edwards and Nichols decisions provide several lessons on properly pleading plausibility. It is no longer enough to allege that the defendant employer knowingly hired illegal aliens with actual knowledge that they were smuggled into the country. In addition, plaintiffs must allege facts showing how the defendant knew that the illegal aliens it hired had been smuggled into the country (e.g., the defendant had paid “recruiters” to bring them across the border).

The same holds true with respect to pleading direct and proximate cause. Now, plaintiffs must go a step further by asserting facts showing that the plaintiffs were directly and proximately harmed by the defendants’ misconduct. Although the courts are clear that plaintiffs are not expected to show that causation is probable (this is the standard reserved for trial), plaintiffs are expected to show that their theory of causation is more than possible.

Given the difficulties of properly pleading causation in a pre-Twombly/Iqbal world, plaintiffs may have to go above and beyond to withstand dismissal on the pleadings. Indeed, some commentators advise plaintiffs to allege factual details “that not only cover all elements of the claim, but also tend to disprove obvious alternative explanations for the wrongful conduct.” However, pleading plausibility does not require plaintiffs to show that it is more likely than not that the defendant’s misconduct caused their injury. Rather, plaintiffs must simply provide enough facts to make their theory of causation plausible. Thus, plaintiffs should not have to disprove alternative theories of causation in order to overcome a judgment on the pleadings.
SOVEREIGN DEBT IN SUB-SAHARAN AFRICA

By Jon H. Sylvester

The phrase “sovereign debt crisis” has been in the news a lot recently, primarily because of the precarious fiscal situation of Greece and fear of dire consequences for the Eurozone and even the global economy if the Greek government defaults. Although the differences are many, for some of us the Greek crisis called to mind another sovereign financial crisis that began more than 30 years ago and still has not been entirely resolved—at least so far as the nations of sub-Saharan Africa (SSA) are concerned.

Long before there was a Greek debt crisis, there was a “Third World” debt crisis. Most analysts trace its origins to historic turbulence in the international oil markets during the early and mid-1970s, which resulted in a steep increase in oil prices. This dramatic escalation in oil prices was especially difficult for the many less developed countries (LDCs) that were not oil producers. More importantly, it flooded the international financial system with excess oil profits in need of reinvestment.

Thus, the sharp increase in borrowing by LDC governments resulted more from an oversupply of lendable funds than from a sudden spike in demand on the borrowers’ side. Most LDCs would have realized greater benefits from foreign direct investment. Instead, many borrowed excessively, and too little of what was borrowed went to projects contributing to sustained economic growth.

By the end of the 1980s, the combined external indebtedness of the LDCs of Latin America, Southeast Asia, and sub-Saharan Africa was estimated at nearly $1.3 trillion. From the start, however, the situation in SSA was uniquely perilous. High on the list of reasons is SSA’s colonial history, which had resulted in many marginally functional governments operating in artificially created and sometimes barely tenable states. At the time, 16 of the world’s 25 poorest countries were in Africa. What has happened in the past three decades?

The International Bank for Reconstruction and Development (World Bank) recently reported that for the first time since 1981, less than half the population of SSA is living below the adjusted poverty line of $1.25 per day. Unfortunately, it is also true that poverty in SSA remains higher than in any other region of the world. Rates of infant mortality and maternal mortality at birth are also high. Life expectancy is low, averaging in the 40s and 50s in many countries, as are rates of primary school completion and access to clean drinking water.

None of this is new. But to what extent is SSA’s external debt a factor? What remedial efforts have been tried, and what is being done now?

Past and current efforts to address the debt crisis in SSA. Over the decades, there have been many proposals and efforts to address the problem. Central to the current effort are two initiatives and a framework. In 1996 the World Bank and the International Monetary Fund (IMF) launched the Heavily Indebted Poor Countries (HIPC) Initiative. In 1999 the initiative was enhanced significantly because the IMF and the World Bank had concluded that unsustainably high external debt had become a key constraint on development in about half of the world’s 80 poorest countries. In 2006 HIPC was supplemented by the Multilateral Debt Relief Initiative (MDRI). Both now operate against the backdrop of the joint World Bank/IMF Debt Sustainability Framework (DSF), officially described as an “analytical framework used for assessing debt sustainability and allocating resources . . . given the changing macroeconomic landscape facing low-income countries.”

The program involves two steps. First, very poor countries facing unsustainable external debt burdens get interim relief if they make sufficient progress implementing policies approved by the IMF and World Bank, thereby reaching the “decision point” and entering the program. Second, the “completion point” is reached when a country establishes a “track record of good performance” regarding specified governmental and fiscal reforms and demonstrates that the savings from debt relief are directed significantly to programs that benefit the poor.

Countries that reach the completion point are eligible for forgiveness of
100 percent of qualifying debt owed to the World Bank, the IMF, and the African Development Bank. This covers the majority of the debt owed by SSA governments. Thirty-three of the 40 countries involved in the HIPC/MDRI program are in Africa.

As of July 2011, the World Bank reported that 32 of the 40 countries eligible for the program had reached the completion point and earned irrevocable debt relief.

On average, debt service payments for these HIPCs have declined from 3.1 percent of gross domestic product in 2001 to 0.8 percent of GDP in 2010. During the same period, the same countries have increased their spending on poverty-reducing programs such as health, rural infrastructure, and education from an average of 6.2 percent of GDP to an average of 9.7 percent. According to IMF projections, the debt burden of these HIPCs will be reduced by about 90 percent after they receive all the benefits of the HIPC Initiative and the MDRI.

Critics of the current initiatives. Critics of the HIPC Initiative and the MDRI include nongovernmental organizations, individual activists, advocacy groups, academics, and even a former head of the World Bank. Their criticisms range from technical suggestions for improving the programs to accusations that the entire IMF/World Bank enterprise is intended to transfer wealth from the world’s poor countries to the rich countries that control these institutions and to, in effect, perpetuate colonialism or at least keep poor countries “in their place” politically.

Many critics continue to advocate total, unconditional cancellation of the debt. The World Bank and the IMF, however, have emphatically rejected the idea of unconditional debt cancellation. Their reasons include the following: (1) it would come at the expense of other IMF and World Bank borrowers, including those non-HIPCs that are home to 80 percent of the developing world’s poor; (2) it would cripple the regional development banks because new development aid depends significantly on the repayment of previous loans; and (3) it would undermine the confidence of existing and potential investors whose funds are essential to the long-term development needs of poor countries.

Some critics contend that the most heavily indebted LDCs have participated because they saw no real alternatives. It is not clear how this is a criticism of the programs—even though it is probably true. But for at least some participating countries, this lack of alternatives may not always be the case. The 2001 IMF/World Bank position paper opposing cancellation of the debt concluded that “the debt reduction under the HIPC Initiative should be seen as a one-time action . . . toward enabling the HIPCs to . . . become able to gain access to private international capital[.]”

This brings us back to Greece, which got into trouble by borrowing heavily in international capital markets to fund government budget and current account deficits. Probably in part because its membership in the Eurozone implied a stability not borne out by the facts, Greece was able to borrow large sums at low rates. By 2010 Greece was borrowing to cover maturing debt. The resultant reliance on international borrowing left Greece highly vulnerable to credit rating downgrades or subtler shifts in investor confidence.

Conclusion. Greece’s current economic crisis may foreshadow the future facing any country that borrows too heavily in the private international capital markets. It would be an ironic measure of success if some of these countries turn out to be in sub-Saharan Africa.
LIABILITY FOR DEFENDANT’S ATTORNEY FEES

By Trevor Roe

Recent copyright infringement litigation involving major parties such as the television show South Park and the rock group Green Day has resulted in substantial awards of attorney fees for the defendants. In the case involving Green Day, the plaintiff, an independent artist, was ordered to pay nearly $200,000 in fees and costs to the defendants. Similarly, in the case involving South Park, a viral video copyright owner was ordered to pay more than $30,000. Despite these large awards, the plaintiffs in these cases did not act frivolously or capriciously in bringing these actions.

The necessity of informing clients of potential cost in litigating an action is now compounded by the likelihood of paying the defendant’s attorney fees. This possible liability also affects the value of the potential case. Lawyers must be sensitive to these considerations in order to protect both themselves and the client.

Recent case law. In Seltzer v. Green Day, Inc., No. CV 10-2103 PSG, 2011 WL 5834626, at *2 (C.D. Cal. Nov. 17, 2011), the plaintiff’s dramatic image entitled Scream Icon was used briefly in a video backdrop during live performances by the rock group Green Day. The defendant’s set designer altered the color, background, and contrast of Scream Icon, as well as inserting a red spray-painted cross over the image. The court found that the band’s alteration and display of the image was a fair use. In ruling on the defendant’s motion for attorney fees, the court focused on the need “to advance considerations of compensation and deterrence” and whether the defense “furthered the goals of the Copyright Act.” Despite the plaintiff’s reasonable belief that one of his exclusive rights in his copyrighted work was infringed, the fact that the defendant was willing to preserve its use of the image, which was equally entitled to protection, was important to the furtherance of the copyright system.

There was no declaration of bad faith by the plaintiff at any point by the court.

The court, however, did believe that the plaintiff was unreasonable to not interpret the defendant’s use of Scream Icon as highly transformative. The court’s statements indicate that the plaintiff’s action hindered the creativity of the defendant—in contradiction to the fundamental purpose of copyright—and the defendant was entitled to an award of nearly $200,000 in attorney fees.

In Brownmark Films LLC v. Comedy Partners, No. 10-CV-1013, 2011 WL 6002961, at *7 (E.D. Wis. Nov. 30, 2011), defendant Comedy Partners created a parody of the plaintiff’s music video entitled “What What (In the Butt).” The defendant’s television program South Park included a 58-second music video using the musical composition and similar imagery from the plaintiff’s own music video. The music video was contained within the storyline of an episode of the South Park series. The court found that the defendant’s use of the musical composition and imagery was protected as fair use.

Upon reviewing the defendant’s motion for attorney fees, the court noted that “the presumption in favor of awarding fees to a prevailing defendant is ‘very strong.’” The court did not believe that the plaintiff acted in bad faith, but rather unreasonably failed to evaluate the defendant’s case and possible defense. The court noted the plaintiff’s decision to wait two years to file suit, its threats to sue the defendant, the defendant’s rebuffs of such threats, and the goal of deterrence in its decision to award the defendant its attorney fees. The court also stated that free speech was a concern it wanted to protect, in the same manner that the Seltzer court believed the promotion of useful arts in the public good was necessary for its award of attorney fees. Brownmark was ordered to pay the defendant’s attorney fees totaling more than $30,000.

Duty to inform the client. The American Bar Association’s Model Rules of Professional Conduct (ABA Model Rules) require an attorney to explain matters as “reasonably necessary to permit the client to make informed decisions regarding the representation” (Model Rule 1.4(b)). Further, this means a lawyer “should explain the general strategy
and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense” (comment to Model Rule 1.4(b)).

In light of the holdings in Brownmark and Seltzer, attorneys are facing an even more pressing burden to inform the client of the possibility of an award of attorney fees to the opposing party—possibly thousands of dollars or more. This consideration is extremely important for small plaintiffs, such as those in Brownmark and Seltzer.

A strategy for the litigation also needs to be discussed. The Brownmark court stated that unreasonableness of a plaintiff, and basis for liability, could stem from a failure to reasonably consider the defendant’s possible defenses. Litigators must therefore first evaluate whether the defendant’s actions could constitute a valid defense. This may require a greater analysis than previously needed but is necessary to fulfill the attorney’s ethical obligation. The lawyer then needs to inform the client of the possible defense and the likelihood of an attorney fees award in the event of a negative result.

Valuing the case. Case value also must be a consideration when deciding whether to bring a copyright infringement action. In light of the Seltzer and Brownmark cases, a plaintiff must recognize not only a possibility of failure, but also a liability in terms of costs to the defendant.

For example, if a plaintiff’s case has a potential value of $100,000 and a 25 percent chance exists of losing the case, the plaintiff’s expected value from the case is reduced to $75,000. The possibility of the defendant’s attorney fees being awarded further reduces this value. As the likelihood of losing rises directly with the plaintiff’s costs, the case value will eventually reach a point at which the expected value is not worth the expense in bringing the action. This should weigh considerably into the attorney’s consultation with the client and the choice whether to bring the action.

It is important to note that both the Seltzer and Brownmark courts looked at the ability of each plaintiff to pay the defendant’s fees and costs. The Seltzer court considered “whether the chilling effect of attorney fees may be too great or impose an inequitable burden on an impecunious plaintiff.” Despite this statement, the court ordered the plaintiff—an independent artist of no great means—to pay approximately $200,000 in fees and costs. The Brownmark court was much more willing to acknowledge the plaintiff’s inability to pay the fees of corporate giants such as MTV Networks and Viacom. Although the defendant requested more than $46,000 in fees, the court reduced this amount to less than $31,000. Additionally, the court requested Brownmark to submit documentation of its assets and ability to pay, in order to assess whether the final fee determination would be reduced even further.

The court’s discretion in such awards leads to unpredictability when an attorney is valuing a case. Litigators should not expect a reduction in fees submitted by a successful defendant but must prepare and inform the client sufficiently as to the possibility and whether to proceed.

Conclusion. Awards of defendant’s attorney fees in copyright infringement cases are becoming more common than ever. Plaintiff’s actions, no matter how reasonable, still leave open the possibility of a large fee award. Therefore, plaintiff’s lawyers must be prepared when meeting with a client, evaluating any infringement action beforehand, including the defendant’s possible defenses. This will allow the litigator to properly value the case and inform the plaintiff of possible liability and strategy prior to entering into a representation relationship. These actions may also help to prevent a malpractice action in the future.
You have nothing to fear. Our goal is to provide some basic procedures for protecting your clients’ and your data. You’ll merely read about the perils others have experienced. Some anecdotes are from our own experience. We haven’t made every possible mistake (yet), so we’ve tried to learn from others.

Your use of technology is a personal responsibility. You do not have an option on using technology in your practice. The American Bar Association Commission on Ethics 20/20 (tinyurl.com/3op6tx3) found technology affected “nearly every aspect” of legal work, including how we store confidential information, communicate with clients, conduct discovery, engage in research, and market legal services. Laws require non-professional businesses to be aware of encryption and confidentiality procedures. Attorneys should be no less competent than their clients and be aware of and utilize technology to further the legal profession’s goals.

Ethics provisions in most jurisdictions do not mandate an absolute requirement for encryption for data storage or transmission. Yet, some jurisdictions recognize the value of encrypting business records and provide safe harbor against civil penalties if valuable information is encrypted. (For example, Tex. Bus. & Com. Code § 521.002 defines “sensitive personal information” that must be protected if unencrypted as a person’s name, address, etc. If encrypted, no liability attaches to loss of data.) Many lawyers may not consider their professional practices a “business,” but that is a miscalculation.

Each lawyer must examine his or her own state’s law and legal ethical requirements before adopting a particular operational procedure.

Web-based e-mail. You’re no doubt conducting business using e-mail. Some web-based e-mail accounts free to the public may not have terms of service appropriate for a law practice. You must be careful, and the easy option is not always the best. Your e-mail account is a target, not necessarily for spying, although that is an opportunity, but for creating chaos within your personal and professional life. A cyber attack that spams your contacts with a message saying that you are injured and being held captive in a London hotel can be successful — your contacts will send money. (For more, see Rosalind Gardner’s “Email Scam: Urgent Request from a ‘Friend,’ Net Profits Today, January 14, 2013, tinyurl.com/a2pafd, and, most famously, Matt Honan’s account of “How Apple and Amazon Security Flaws Led to My Epic Hacking,” Wired, August 8, 2012, tinyurl.com/c2ao8ur.)

These web-based accounts may not have or allow you access to backups, if existing, in a crisis. Means exist to transfer contact lists and e-mails to your local computer using e-mail clients, but this topic is beyond this article.

Backups, backups, and more backups. You can never have too many backups. Your work files and administration files from your own business are mission critical. If the file you last had visible on your monitor disappeared, what would happen? How would you respond?

In the past, storage media was expensive. Today, storage is one of the cheapest technologies available. A 1 TB drive costs less than $70. A drive that size may back up a solo practitioner’s entire office and have room to spare.

You need several backups, including an off-site backup. The authors can...
personally attest to the fact that law offices can and do catch fire and burn. The office manager in our case had taken a complete backup of the office files home with her the night of the fire, however, so the office files were saved. Conceptualizing a potential failure from fires, hurricanes, or tornadoes is the first step. Creating a checklist of backup responsibilities and performing random testing of the backups will sustain your office.

As a solo practitioner without administrative staff, one of the authors backs up his files to one disk every day; to another disk every three days; to yet another disk once a week; and to a fourth disk once a month. In addition to the local backups, he backs up to two different cloud providers every day. All these backups are done automatically without human intervention.

And be very careful if you outsource your backup responsibilities. We know of a web-hosting firm that contracted its backup functions to an independent third-party vendor. The firm found one day that all data on all servers had been accidentally erased. Because backups occurred nightly, the company thought only 24 hours of client web page changes and viewer registrations and transactions were at risk. But when the company attempted to restore, it discovered the previous backups for more than 20 days were blank. The company soon, and deservedly, was acquired in a fire sale.

A key component of any backup system is consistent testing to ensure the backup procedures are working at all levels, even to the point of completing a “restore.” Unless you have verified through the last step, you cannot be sure your recovery procedures will provide the required protection.

Backing up in the cloud: Risks and rewards. Backing up to the cloud is also highly recommended. Some attorneys consider file synchronization programs the same as file backups. Terms of service differences exist among the free and paid cloud service providers. Examine agreements to ensure that, if synchronization occurs after inadvertent deletion, the previously deleted information will be available and the files can be reconstructed. The presence of numerous cloud storage providers creates a competitive market with affordable options.

As attorneys, we’re always worried about confidentiality. However, all the major cloud providers encrypt files so that they are not available to outsiders. The main difference between the providers is that some of them, such as Dropbox (www.dropbox.com), encrypt the files themselves once they are on their servers. These providers have very strong security policies, and most major companies have extensive physical protection of servers holding your data. However, if they can encrypt a file, they can decrypt it. You can avoid this risk. You can encrypt the file with a program such as TrueCrypt (www.truecrypt.com) and then load that encrypted data to the cloud. This step makes the cloud less convenient—you now must download the encrypted file and decrypt it before it is useful. But it means the cloud provider cannot read your files under any circumstance.

Other cloud providers arrange encryption on your computer. The files are encrypted using a password that you generate before being sent to the cloud. Although you’re not relying solely on the cloud provider, responsibility for your encryption key rests solely with you. If you ever lose or forget the key, the file is gone forever. The provider has no way to decrypt the file. Companies such as iDrive (www.idrive.com) and LiveKive (www.avg.com/avg-livekive) provide this service.

Conclusion. File security for various types of information has become accepted for all businesses, and as attorneys, our professional standards are beginning to emphasize technological sophistication as an element of confidentiality. You have tools to increase protection for your e-mail accounts and can create off-line, usable backups.

You’ve now heard stories about a range of backup options and you’ve been provided links to stories sufficient to instigate a change in your business practices. You’ve been provided accessible tools and simple procedures for a general practice or solo practice attorney, or even an attorney in a small firm. You have sufficient information and tools to act independently and set your own procedures for the level of care you choose for using technology. These are first steps, and you may do more, but these steps are a good beginning without being overwhelming. Best of all, you have been given the chance to hear all the problems without having to experience them yourself.
Congratulations! You tired of your general practice, did some research, and decided to refocus on a niche practice limited to estate planning for Hittites.

Compared to a general practice, a niche practice will be more efficient, and therefore profitable. And it should be easier to demonstrate expertise in one area of law than in all of them.

Perhaps you intend to create a niche practice defined not by a type of practice, but rather by the nature of the work to be done or service to be provided. For instance, a practice limited to handling summary judgment motions, or administrative writs, or taking depositions and examining witnesses.

Corporate and transactional lawyers are used to providing unbundled services and performing discrete tasks. The concept is newer in the context of litigation, and it troubles some litigators because new procedures or technologies generate ethics issues. (Commentary to ABA Rule of Professional Conduct 1.1 provides that a lawyer “should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”)

So, if the duties of your practice are limited, aren’t, too, your ethical responsibilities? Not quite. In the words of Albert Einstein, “relativity applies to physics, not ethics.”

Limiting your practice may in fact broaden your ethical encumbrances. All regular professional conduct rules apply even where the attorney provides only limited representation. (Mich. Ethics Op. RI-347 (April 2010); Adam J. Espinosa, “Ethical Considerations When Providing Unbundled Legal Services,” The Colorado Lawyer, September 2011, tinyurl.com/bgw2htx)

But there are additional rules to be observed that pertain specifically to the provision of limited-scope representation or unbundled legal services.

California, for instance, defines “limited scope representation” as “a relationship between an attorney and a person seeking legal services in which they have agreed that the scope of legal services will be limited to specific tasks that the attorney will perform for the person.” (Compare that to the typical attorney fee agreement that requires the attorney to do whatever is necessary to accomplish a goal.) There are separate sets of rules for limited-scope representation in civil and family law cases, respectively.

Unbundling may have been first suggested by Forrest S. Mosten, who wrote “Unbundle Your Law Practice: How to Deliver Legal Services a la Carte for Improved Service and Profits” back in 2000. (See also Forrest S. Mosten, “Unbundling of Legal Services and the Family Lawyer,” Family Law Quarterly, Fall 1994 (28:3), tinyurl.com/b4vubkw.)

Among the issues Mosten discussed was states’ differing standards for disclosure of limited-scope representation. He pointed out that Colorado’s rule requiring disclosure gives the party “the Faustian choice of choice of either doing without the help to prevent the disclosure or getting the help and having the lawyer disclose to the court.” (The ABA Division of Legal Services lists various states’ ethics opinions on unbundling at tinyurl.com/bc4s6a4.)

The California rules specifically provide for two types of limited-scope representation in civil cases, with separate procedures for each: “noticed representation” and “undisclosed representation.” (See CA Rules of Court, Rule 3.35.)
The D.C. Rules of Professional Conduct do not require attorneys to identify themselves if they assist pro se litigants in preparing documents to be filed in court, but attorneys are advised to check the law in jurisdictions that impose disclosure requirements. (D.C. Ethics Opinion 330.)

Areas of particular concern to an unbundled law practice are misrepresentation, communicating with represented parties, competence, and communication. (Helen Hierschbiel, “The Ethics of Unbundling: How to Avoid the Land Mines of 'Discrete Task Representation,'” Oregon State Bar Bulletin, July 2007, tinyurl.com/amstol5.)

Lawyers owe fiduciary duties to make sure their clients understand the risks associated with limited representation. (See ABA Model Rule 1.2(c).) (Correspondingly, Comment [7] to Model Rule 1.2 indicates that limited scope of representation should be considered when determining whether a lawyer has the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.)

A lay client cannot give informed consent to an attorney’s limited representation without being fully advised of alternatives to further the client’s objectives. Accordingly, clients must be thoroughly informed about how limited representation will affect, or disaffect, their goals:

The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered. . . . However, even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client’s legal needs. The attorney need not represent the client on such matters. Nevertheless, the attorney should inform the client of the limitations of the attorney’s representation and of the possible need for other counsel. (Nichols v. Keller, 15 Cal. App. 4th 1672 (1993))

Also, be cautious about representing yourself as a “specialist.” Some jurisdictions certify lawyers as specialists in specific areas of law. Misrepresentation can occur in these jurisdictions if you refer to yourself as a specialist without holding the appropriate certification. If you are not certified as a specialist, consider having a practice “focusing” on or “emphasizing” a particular area of law.

If you maintain a virtual practice, or a practice of national scope, you must avoid unauthorized practice of law in areas where you are not licensed to practice. Also, be aware that some jurisdictions regulate lawyers’ physical and virtual offices. (See, e.g., Mich. Ethics Op. RI-355 (October 2012).)

Lastly, consider that the more limited the practice and the smaller the niche, the more likely that others, both lawyers and nonlawyers, will be involved in a given client’s representation. If your niche practice does involve nonlawyers, you have to watch out for new rules governing fee-splitting as well as referral fees.

Remember the words of singer Grace Slick: “Things change so fast, you can’t use 1971 ethics on someone born in 1971.”

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ADOBE ACROBAT XI

Reviewed by David L. Masters


In case you missed it, PDF is the standard for filing and exchanging documents in the legal setting. It’s the standard, in part, because PDF files can be read on virtually all devices (iPad or Android, Windows or Mac). In addition to near universal compatibility, PDF ensures that your work product will look right when printed by others or viewed on someone else’s screen. With Acrobat, you can easily secure PDF files to keep others from copying and editing the content. You can even prevent people from opening, printing, commenting on, or adding pages to your PDF files. Whether you want to protect work product (contracts, wills, etc.) or ensure the integrity of documents produced in litigation, Acrobat provides easy-to-employ security solutions.

Acrobat XI comes in two versions: Standard and Pro. Don’t confuse Acrobat (Pro or Standard) with Adobe Reader, the free PDF file viewer. Users of Reader are limited to viewing, searching, and printing PDF files. You need a full version of Acrobat (Standard or Pro) to create PDF files, scan paper to PDF, apply security, create forms, and more. Legal professionals should consider Pro rather than Standard. It comes down to features. You can see a feature comparison at www.adobe.com/products/acrobatpro/buying-guide.html.

The features that matter to lawyers and that are available only in Acrobat XI Pro include:

- Bates numbering;
- Redaction;
- Enabling PDF files so Adobe Reader users can add comments and digital signatures;
- Comparing PDF files; and
- Inserting audio and video content for direct playback.

A new (non-upgrade) purchase of Acrobat XI Standard costs $299; Acrobat XI Pro costs $449. You can upgrade from Acrobat 8, 9, or X to Acrobat XI Standard for $139 and to Acrobat XI Pro for $199. You can download a free fully functional version of Acrobat XI Pro to test-drive at Adobe.com.

FROM MENUS TO PANES

If you’re still using Acrobat 9 or an earlier version, then the upgrade to XI will be a big step. Adobe made big changes to the interface with the release of Acrobat X, and there’s no going back. Acrobat XI refines those changes and allows better customization. The “menus” that drove the interface in earlier versions of Acrobat (version 9 and earlier) are pared down to File, Edit, View, Window, and Help. In place of the menus, Acrobat XI has Task panes on the right side of the screen. Most of what were formerly menu commands are now organized into the Tools, Sign, and Comment task panes on the right side of the application window. Most tools are now organized in sets within these task panes. Click Tools, Sign, or Comment to display the respective task pane (click again to hide). You can customize which panels appear in the Tools and Comment panes; use the drop-down menu in the upper-right corner of the task pane, and click a panel (a check mark indicates that the panel is visible).

Tools task pane. This grouping contains many of the functions that were found on the Document menu in Acrobat 9 and earlier versions, such as Pages (Rotate, Replace, Extract, etc.) and Text Recognition (Optical Character Recognition). Forms, Protection (security, redaction, and metadata removal), and the Action Wizard (formerly batch processing) can also be found in the Tools task pane.

One of the new features of Acrobat XI shows up in the Tools pane: Content Editing. Now you can make significant text and graphic edits to PDF files. As you edit, text wraps correctly at the ends of lines. Formatting icons let you change paragraph alignment (left, right, center, full). You get similar control over images. Right-click on an image and the menu offers options to flip or rotate the image, plus an option to replace the image entirely. I’m not convinced that Acrobat is the choice for editing text and image content, but for those who want this ability, Acrobat XI offers the tools.

Comment task pane. This set of tools replaces the Comment & Markup choice on the Tools menu in earlier versions of Acrobat. Now all the annotation and drawing markup tools can be found in the Comment pane or added to the Quick Tools toolbar. The Sticky Note tool and drawing markup tools see
regular use in our office, so we keep them on the toolbar. As you would expect, the Comments List is part of the Comment task pane. If any comments (text boxes, call-outs, sticky notes, or drawing mark-ups) have been added to a PDF file, they will show up in the Comments List. We find the Comments List particularly helpful for organizing comments added to a PDF file by different users.

**Sign task pane.** Adobe has added tools to Acrobat XI designed to make it easy to sign a document by typing your name, drawing your signature, or using a signature stamp. Creating a signature stamp is quick and easy. You can then easily add your signature to any document or even send it for additional signatures using Adobe’s EchoSign electronic signature service.

EchoSign is a separate service ($14.99 per month) that lets you add signature and other fields to Office documents or PDF files, upload them to a cloud-based server, and send e-mail messages to the people who should sign them. For example, you can upload your fee agreement to EchoSign. A toolbar at the top of the document viewer lets you add signature and other fields. EchoSign will send an e-mail message to your prospective client that includes a link to the fee agreement.

Inside the browser, your prospective clients can type in their name, and the document will “sign” itself with a standardized script font— or your prospective client can sign the document using a mouse or with a fingertip on a touch-screen phone or tablet.

**CUSTOMIZATION**

The big changes to the Acrobat interface introduced in Acrobat X, while good, came at a cost. Now, for example, to add the Marquee Zoom tool to the toolbar, you pull down the View menu, select Show/Hide, select Toolbar Items, chose Select & Zoom, and select Marquee Zoom. The process of removing unwanted tools from the Page Navigation and Select & Zoom toolbars is equally cumbersome. However, with the release of XI, Adobe made it easier to customize the Quick Tools toolbar (the row of tool buttons below the menus and above the Page Navigation and Select & Zoom toolbars). Tools can be added to the toolbar three ways: (1) clicking on the Edit Current Tool Set button (looks like a gear); (2) right-clicking on a tool in one of the Task Panels and selecting Add to Quick Tools Toolbar; or (3) using the Customize Quick Tools (View > select Show/Hide > select Toolbar Items > Quick Tools).

With Acrobat XI you can create custom toolbars. This comes in handy if you prefer toolbars at the top of the work area to the tool sets in the Task panels on the right side of the work area. And, with the custom toolbars, you can limit the tools that are displayed. For example, you could create a Redaction toolbar that displays only three tools: Redaction Properties; Mark for Redaction; and Apply Redactions. There’s less clutter when you don’t display the tools that aren’t used.

**THE CREATE PDF BUTTON**

Acrobat XI ships with the “Create” button as the first item on the toolbar. The Create button includes all the functionality it had in the past and adds the functions that were formerly found on the drop-down menu of the Combine button. In Acrobat XI, the Create button offers not only the usual methods of creating a PDF file (from file, scanner, etc.) but also offers the option to combine multiple files into a single PDF or to create a PDF Portfolio. A PDF Portfolio contains multiple files assembled into an integrated PDF unit rather than a single PDF file. The files in a PDF Portfolio can be created in different applications. For example, a PDF Portfolio can include Microsoft Office files (Word, Excel, PowerPoint) and most image files (JPEG, TIF, PSD). The original files retain their individual identities but are assembled into one PDF Portfolio file. You can open, read, edit, and format each component file independently of the other component files in a PDF Portfolio. PDF Portfolios are not for everyone, however; Acrobat Standard and Adobe Reader users cannot create PDF Portfolios or edit the layout, colors, headers, and so on.

In my practice we combine multiple files into a single PDF rather than create PDF Portfolios. Combined files work well for assembling a pleading or motion and all the referenced exhibits or authorities, or for combining disparate documents for disclosure or production in discovery. In Acrobat XI, the user interface for combining multiple documents into a single PDF file is now by default fully graphical, meaning that it can display images of all the pages of the files that you combine so you get a full preview of the combined PDF before you create it. Even better, you can now drag and drop any individual page in any of the documents that you want to combine, making it easy to customize the finished output. If you don’t like the graphical interface, it’s easy to switch to the List View with the click of a button.

**OTHER HANDY TOOLS**

What if you don’t want one big PDF file? Acrobat XI has a Split Document tool that divides a file based on: (1) number of pages; (2) file size; or (3) top-level bookmarks. If you have a combined PDF file that weighs in at 5.5 MB, and the limit for electronic filing in your jurisdiction is 2 MB, it’s easy to split the file into...
ACROBAT XI FOR THE MAC  

Reviewed by Jeffrey Allen

This marks the third iteration of Adobe Acrobat for which David Masters and I have conspired to create a review addressing the program in general and also the Macintosh version. As has been our practice, Dave’s primary emphasis is a general discussion from a Windows-centric perspective, while I approach from a Mac-centric perspective. By way of background, I have run my office on Macs since 1985, so I have a bit of history with respect to that platform.

I will start with Dave’s conclusion. I agree completely with the proposition that Acrobat XI represents an incremental upgrade or, as I am fond of saying, it is evolutionary, rather than revolutionary. Nothing that you will find in Acrobat XI for Windows or the Mac will likely blow you away as a new and different form of the technology. Rather, you will notice that the program generally works better. Mostly I believe this reflects refinements and finesse in the development of some of the features, although this iteration does include some new and different features by comparison to earlier versions.

In contrast, Acrobat X represented a revolutionary change in the program. Acrobat X looked and felt significantly different than Acrobat 9 and worked markedly better. Acrobat XI looks substantially the same as Acrobat X and works a little bit better.

For many years, I have recommended that attorneys put Acrobat on every computer in their office. From my perspective, it comes under the heading of one of those programs you simply have to have, without regard to the nature of your practice. In truth, I cannot remember the last day I worked on a computer without opening Adobe Acrobat. Although Adobe invented the PDF format, other vendors have programs that will generate and manipulate PDF files. I use some of these programs (notably Apple’s Preview and Smile’s PDF Pen Pro) fairly regularly, but they do not replace the functionality of a full version of Acrobat Pro, so I look at them as supplemental.

As my focus is on the Macintosh side of things, I limit my discussion to Acrobat Pro. I do that because, although Adobe is one of the few companies that does its development in tandem on both the Mac and Windows platforms (by that I mean that the updated versions come out at the same time and the feature set is virtually identical), Adobe only makes one version of Acrobat for the Mac: Acrobat Pro. Adobe makes several versions of Acrobat for Windows, with Pro as the most complete. I like to joke that they do this because they recognize that folks smart enough to work on the Mac are too smart to buy a lesser version of Acrobat. Although there is undoubtedly some truth to that based on the fact that the Mac started out as the graphics computer of choice and Acrobat has a number of features useful to those invested in graphics, I suspect that the
The historic truth of the matter is that the Apple market represented too small a demographic to economically justify the multiple versions.

Those of you on the Mac platform should not feel left out by the fact that Adobe has only the Pro version on the Mac platform. Most of the features that make Acrobat a program of choice for attorneys exist only in the Pro version, so without regard to your platform, you will want to invest in the Pro version. The prices are the same for both the Mac and Windows versions of Acrobat XI Pro.

I use Acrobat in my office for a variety of purposes. My most significant uses relate to:

- Collaboration (owing to the ease of recording comments from multiple reviewers);
- Discovery (virtually all my document productions come and go in PDF format these days because of the ease of building extensive files, Bates stamping documents, bookmarking the files to mark separate documents within, and adding notes for my own use to documents when I review them);
- Trial work (I now do evidence books in Acrobat for myself and the judge and have even used Acrobat for trial presentation of documentary exhibits); and
- Delivery of documents (owing to the fact that the process of converting from Word to Acrobat removes virtually all the Word metadata from the document).

My use of Acrobat for discovery and trial requires that I make the PDF files searchable. One of the big changes in Acrobat X related to the efficiency and the effectiveness of its built-in optical character recognition (OCR) engine. In Acrobat 9 and earlier, the OCR engine worked with almost glacial speed. In Acrobat X, Adobe brought in a far more efficient OCR engine that worked dramatically faster and at least as accurately. I have not noticed any change in the effectiveness or efficiency of this feature in Acrobat XI. I endeavored to find out whether Adobe changed the OCR engine in Acrobat XI and was informed that XI uses the same engine as X, but I could not find out what engine Adobe used or whether the XI engine was the same version or an upgraded version. Suffice it to say that it works with reasonable speed and accuracy and no less efficiently than in Acrobat X.

If you do not yet have Acrobat Pro on your Mac (or your Windows computer for that matter), I strongly recommend that you get Acrobat XI, install it, learn it, and use it regularly. If you have Acrobat 9 or earlier on your computer, you definitely want to upgrade to Acrobat XI. I consider that a no-brainer—as the folks at Nike might say, "Just do it!" If you have Acrobat X on your computer, you will find the upgrade beneficial, but I don’t consider it critical. I have no problem recommending that you upgrade from X to XI (I did), but the world won’t end if you don’t. Finally, if you have Acrobat Pro on your computer and have not used it regularly, I encourage you learn it and use it.
THE INTERNATIONALLY MINDED LAWYER

By Giuseppe Lorenzo Rosa

In my 32 years of practice in Milan, Italy, with active involvement in domestic and international business law, I’ve sometimes wondered what my colleagues overseas may have been missing by limiting themselves to domestic practice only.

There are countries—such as those around the Mediterranean Basin—where the very location, geography, heritage, and culture produce a more internationally minded citizenry. On the other hand, there are countries—such as the United States, Russia, and China—where the size of territories involved and the use of a national language have led to a more domestic focus. Certainly, the United States, as the world’s leading economy, is internationally minded, but international legal practice is substantially confined to the East Coast and to such lighthouse centers out West as Los Angeles and San Francisco. Elsewhere, there are very few domestic attorneys doing international work.

Perhaps now is the time for you to buck that trend.

Reaching out to overseas contacts has never been so easy. For less than $1,000, a solo can be effectively and constantly connected to the world via a broadband Internet connection and basic computer hardware and software.

Of course, just because you can connect via technology to colleagues overseas doesn’t mean you are actually attuned to the demands of international legal business. As in all human endeavors, what you really need is knowledge.

You must get to know other legal systems—not through a cram course, but step-by-step, so that your knowledge is both a pragmatic tool and at the same time a goal. Many local bar association, such as the New York City Bar, run programs in which approaching other legal systems and tools is a pragmatic and certainly not academic effort. In the ABA there are numerous programs and committees that educate members about virtually any issue of public, private, or business law from a global perspective.

Top universities also have begun catering to professionals who cannot afford to spend time and money on master’s degree programs. During the past few years they have launched two- to four-week-long courses where a foreign legal system and language skills are reviewed and made available to the internationally minded.

Once you have the knowledge you need, how might you put it into practice and start generating international billable work in your solo or small firm? Here are a few scenarios to get you thinking:

- Overseas evidence is needed in a domestic litigation. Must voluntary foreign deponents travel to the United States? Would U.S.-style depositions be acceptable in a civil law country with an inquisitorial system for acquiring evidence? Must you follow the formal approach under the Hague Convention on Taking Evidence Abroad?
- A domestic company is thinking of expanding overseas. Will the increase in revenue be offset by the need to comply with foreign health and environmental regulations?
- A foreign entity is considering expanding here. Can U.S. franchising, agency, and distributorship contract provisions, regulatory implications, and practices be matched to existing intellectual property/trade secrets that the investor has long established in Europe or Asia?
- A foreign institutional investor wants advice about a class-action case in the wake of *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2886 (2010). Should the investor run U.S. pretrial discovery and then move to an overseas court where evidence so acquired would be allowed?

In all these examples, it is the knowledge of the legal practitioner—notwithstanding the firm’s location, size, or wealth—that makes the difference. Such clients seek an internationally minded attorney, a professional who can command the matter as effectively as possible, delivering quality service at reasonable fees. Maybe that professional is you.
At the end of the day...

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