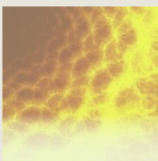


## Not Your Father's Estate Plan

Estate planning attorneys commonly hear war stories from clients who served as the successor trustee of their parents' estate. Some stories are more memorable than others.



### Inside



#### Inside: What's Hot?

"WHAT'S HOT" is not an expression generally associated with attorneys, with the possible exceptions

provided by Drop Dead Diva, Boston Legal and Law and Order. Jerry Springer doesn't count, even though he is an attorney. I have the

### Spotlight



#### What's Hot? Synchronized Video Transcripts

What is synchronized video? It is an effective trial presentation tool where the videotaped deposition is

synchronized with the court reporter's transcript enabling a word or phrase search. This allows you

# Contra Costa Lawyer Online

August 2011

The "What's Hot?" Issue



# Contra Costa Lawyer Online

CC Lawyer

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The original blog can be found at  
<http://cclawyer.cccba.org/>

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Manufactured by  on August 1, 2011

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## Inside: What's Hot?

Monday, August 1, 2011



Oliver Bray

“WHAT’S HOT” is not an expression generally associated with attorneys, with the possible exceptions provided by Drop Dead Diva<sup>1</sup>, Boston Legal<sup>2</sup> and Law and Order<sup>3</sup>. Jerry Springer doesn’t count, even though he is an attorney. I have the honor this month of being guest editor for the August online issue of this fine publication. While I normally confine myself to the universe of conservatorships, trust and estate litigation and administration, there are always “hot” topics in all areas of law.

**Craig Nevin** provides the first sizzling example of what’s hot in the Mechanics’ Lien statutes. Drafting this must have melted Craig’s pocket protector. Seriously, Mechanics’ Lien laws are nearly as procedural as actions under the Probate Code, so a heads-up by Craig to the statutory changes is truly a “hot” topic.

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<sup>1</sup>[http://en.wikipedia.org/wiki/Drop\\_Dead\\_Diva](http://en.wikipedia.org/wiki/Drop_Dead_Diva)

<sup>2</sup>[http://en.wikipedia.org/wiki/Boston\\_Legal](http://en.wikipedia.org/wiki/Boston_Legal)

<sup>3</sup>[http://en.wikipedia.org/wiki/Law\\_%26\\_Order](http://en.wikipedia.org/wiki/Law_%26_Order)

**Elva Harding** presents the next hot topic of “Unleashing the Value of Your Law Practice Ethically” and provides us with this month’s first MCLE self-study. Selling or buying a law practice and the ethical considerations thereof are always of interest. Of course, there actually has to be someone willing to buy a law practice to make this really work. I’m sure buyers are out there. Hello? I’m in the book. Having administered the estates of deceased practitioners, I can appreciate the detail involved, as clearly explained in Elva’s article.

**Rhonda Shelton Kraeber** provides the next hot topic in tort liability presenting a recent and relatively rare victory for California employers and their vicarious liability. Rhonda presents a concise analysis of *Diaz v. Carcamo*<sup>4</sup> and discusses the history of tort liability in California. Interesting and “hot”! Read it!

**Stephanie West** provides us with trust distribution provisions and a Beneficiary Controlled Trust in her submission entitled “Not Your Father’s Estate Plan.” While one finds it always difficult to consider any estate planning information “hot,” with the changing nature of society and the unfortunate financial predicaments heirs and beneficiaries seem to amass, Stephanie’s article is truly timely and a must read.

The heat continues with **Randy Wilson**’s article on how attorneys can use LinkedIn effectively and ethically. Randy provides a view to LinkedIn use, how to best utilize it for business development, and ethical considerations. With the ever-evolving world of social media and the continuing desire to effectively market our firms, Randy’s article is a must-read.

Mixing up the topics a little more, the next article in line is a blog from **Michael LaMay** (disclosure: he’s in my office) on the trials and tribulations of an elder abuse lawyer. While the editors (including me) modified some of the blog comments and Twitter-like abbreviations (this *is* a family publication), Mike provides us with the seriously “hot” topic of elder financial abuse and the need for reforming regulation of caregivers.

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<sup>4</sup><http://scocal.stanford.edu/opinion/diaz-v-carcamo-33983>



**Wendy Graves** turns up the flame on Synchronized Video Transcripts. Since I've done maybe three depositions in my life (okay, a few more than that), and none that were videoed, I wasn't aware of the logistical issues and expense involved with video depositions. But then I actually read the piece and SVT really is a cool ("hot") innovation. Check it out. Remember, reporters want us to speak slowly, clearly, and one at a time.

Last, but certainly not least, is **Bruce Campbell's** article on IT security for law firms. IT security is always a "hot" topic, especially now because of computing in the "Cloud" and Rupert Murdoch's minions "investigating" in innovative ways. A quick read and to the point.

My thanks to the folks behind the curtain of Contra Costa Lawyer<sup>5</sup> for allowing me the opportunity to guest edit this edition. My special thanks to the authors who contributed to this month's magazine.

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**Oliver Bray** is an attorney with Bray & Bray<sup>6</sup> in Martinez and is a certified specialist in estate planning, trust and probate law. He is a Director of the Contra Costa County Bar Association and is also a Co-Chair of the Conservatorship/Guardianship/Probate/Trust Section. His firm specializes in probate, trust, estate and conservatorship litigation and administration.

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<sup>5</sup><http://www.contracostalawyer.org>

<sup>6</sup><http://www.brayandbraylaw.com/>

# California Mechanics' Lien Law: Recent Statutory Changes and Looking Ahead

Monday, August 1, 2011



Craig Nevin

Introduction The Mechanics Lien law in California was first established in 1872. The intent of the Legislature was to allow mechanics, persons furnishing materials, artisans, and laborers of every class, if necessary, to secure a lien against the property upon which they had bestowed labor or furnished material – for the value of such. Nothing less than the California Constitution directed the Legislature to provide for the speedy and efficient enforcement of such liens. (California Constitution, Article XIV §3<sup>7</sup>.)

Accordingly, the Legislature enacted a statutory system to implement the enforcement of Mechanics' Liens. The Mechanics' Lien system is the only creditors' remedy stemming from a constitutional mandate (*Connolly Development, Inc. v. Superior Court*<sup>8</sup> (1976) 17 Cal.3<sup>rd</sup>

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<sup>7</sup>[http://www.leginfo.ca.gov/.const/.article\\_14](http://www.leginfo.ca.gov/.const/.article_14)

<sup>8</sup><http://law.justia.com/cases/california/cal3d/17/803.html>

803, 810; *Solit v. Tokai Bank, Ltd. New York Branch*<sup>9</sup> (1999) 68 Cal. App.4<sup>th</sup> 1435, 1443; *Mechanical Wholesale Corp. v. Fuji Bank, Ltd.*<sup>10</sup> (1996) 42 Cal. App.4<sup>th</sup> 1647, 1655.)

“In enacting the Mechanic’s Lien statutes, the Legislature intended ‘to prevent unjust enrichment of a property owner as the expense of a laborer or material supplier.’ [Burton v. Sosinsky<sup>11</sup> (1988) 203 Cal. App.3d 562, 568.]” (*T. O. IX, LLC vs. Superior Court*<sup>12</sup> (*Asphalt Professionals, Inc.*) (2008) 165 Cal. App.4<sup>th</sup> 140, 146.) Currently, California’s Mechanics’ Lien statutes are found at Civil Code §§ 3082 to 3268<sup>13</sup>.

In addition to the unique constitutional command establishing Mechanics’ Liens, “...courts have uniformly classified the Mechanics’ Lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen.” (*Connolly*<sup>14</sup>, supra, at 826-827.) Generally, doubts about Mechanics’ Liens and the statutes’ meaning are to be resolved in favor of the contractor or laborer. (*Solit*<sup>15</sup>, supra, at 1442.)

On the other hand, “[w]hile the essential purpose of the Mechanic’s Lien statutes is to protect those who have performed labor or furnished material towards the improvement of the property of another, inherent in this concept is a recognition also of the rights of the owner of the benefited property. It has been stated that the lien laws are for the protection of property owners as well as lien claimants and that our laws relating to Mechanic’s Lien result from the desire of the Legislature to adjust the respective rights of lien claimants with those of the owners of property improved by their labor and material.” (*Borchers Bros. v. Buckeye Incubator Co.*<sup>16</sup> (1963) 59 Cal.2<sup>nd</sup> 234,

<sup>9</sup><http://caselaw.findlaw.com/ca-court-of-appeal/1224656.html>

<sup>10</sup><http://law.justia.com/cases/california/caapp4th/42/1647.html>

<sup>11</sup><http://law.justia.com/cases/california/calapp3d/203/562.html>

<sup>12</sup>[http://www.leagle.com/xmlResult.aspx?page=2&xmlDoc=In%20CAC0 ↵  
%2020080724037.xml&docbase=CSLWAR3-2007-CURR&SizeDisp=7](http://www.leagle.com/xmlResult.aspx?page=2&xmlDoc=In%20CAC0%2020080724037.xml&docbase=CSLWAR3-2007-CURR&SizeDisp=7)

<sup>13</sup><http://law.onecle.com/california/civil/sec-3082-3106.html>

<sup>14</sup><http://law.justia.com/cases/california/cal3d/17/803.html>

<sup>15</sup><http://caselaw.findlaw.com/ca-court-of-appeal/1224656.html>

<sup>16</sup>[http://scocal.stanford.edu/opinion/borchers-bros-v-buckeye- ↵  
incubator-co-29886](http://scocal.stanford.edu/opinion/borchers-bros-v-buckeye-incubator-co-29886)

239, where the California Supreme Court approved the language of *Alta Building Material Co. v. Cameron*<sup>17</sup> (1962) 202 Cal. App.2<sup>nd</sup> 299, 303-305.)

Of course, it is impossible in this short article to review all of the various requirements of an enforceable Mechanics' Lien. However, the following will provide you with the background of as well as the changes to the lien statutes which were effective January 1, 2011. As of that date, enforcement of a Mechanic's Lien changed in two ways.

January 1, 2011 Statutory Changes Previously, there was no requirement that a Mechanics' Lien be served on the property owner. As a result, property owners and lenders had complained that until they receive the foreclosure lawsuit (and subsequently, a *lis pendens*) they were often entirely unaware that a Mechanics' Lien had even been recorded on their property. To address the concern, California Civil Code § 3084<sup>18</sup> was amended.

As of January 1, 2011, a Mechanics' Lien claimant – in addition to the current lien requirements *and* Preliminary 20-Day Notice requirements – is also required to provide a “NOTICE OF MECHANICS' LIEN” and **the new form of lien must be served on the property owner contemporaneously with the recording of the lien.** In other words, now lien claimants: (a) must serve a copy of the Mechanics' Lien on the property owner; (b) must include with the Mechanics' Lien the “NOTICE OF MECHANICS LIEN”; and (c) must include a Proof of Service Affidavit along with and when they serve the Mechanic's Lien and the “NOTICE OF MECHANICS LIEN”.

The new “NOTICE OF MECHANICS LIEN” must contain the following statement (in at least 10-point boldface type), with the last sentence in capital letters (excepting the Internet Web site address of the Contractors' State License Board, which must be printed in lowercase letters):

**“NOTICE OF MECHANIC'S LIEN ATTENTION!**

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<sup>17</sup><http://law.justia.com/cases/california/calapp2d/202/299.html>

<sup>18</sup><http://law.onecle.com/california/civil/3084.html>

Upon the recording of the enclosed MECHANIC'S LIEN with the county recorder's office of the county where the property is located, your property is subject to the filing of a legal action seeking a court-ordered foreclosure sale of the real property on which the lien has been recorded. That legal action must be filed with the court no later than 90 days after the date the mechanic's lien is recorded. The party identified in the mechanic's lien may have provided labor or materials for improvements to your property and may not have been paid for these items. You are receiving this notice because it is a required step in filing a mechanic's lien foreclosure action against your property. The foreclosure action will seek a sale of your property in order to pay for unpaid labor, materials, or improvements provided to your property. This may affect your ability to borrow against, refinance, or sell the property until the mechanic's lien is released.

**BECAUSE THE LIEN AFFECTS YOUR PROPERTY, YOU MAY WISH TO SPEAK WITH YOUR CONTRACTOR IMMEDIATELY, OR CONTACT AN ATTORNEY, OR FOR MORE INFORMATION ON MECHANIC'S LIENS GO TO THE CONTRACTORS' STATE LICENSE BOARD WEB SITE AT [www.cslb.ca.gov](http://www.cslb.ca.gov).**

With respect to the Proof of Service Affidavit (quoting from Civil Code § 3084<sup>19</sup>, as of January 1, 2011):

“(c) (1) The mechanic's lien and the Notice of Mechanic's Lien described in this section shall be served on the owner or reputed owner. Service shall be made as follows:

(A) For an owner or reputed owner to be notified who resides in or outside this state, by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing, postage prepaid, addressed to the owner or reputed owner at the owner's or reputed owner's residence or place of business address or at the address shown by the building

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<sup>19</sup><http://law.onecle.com/california/civil/3084.html>

permit on file with the authority issuing a building permit for the work, or as otherwise provided in subdivision (j) of Section 3097.

(B) If the owner or reputed owner cannot be served by this method, then the notice may be given by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing, postage prepaid, addressed to the construction lender or to the original contractor.

(2) Service by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing, postage prepaid, is complete at the time of the deposit of that first-class certified or registered mail.”

As might be expected, a new subdivision (d) of section 3084 provides: “Failure to service the mechanic’s lien, including the Notice of Mechanic’s Lien, as prescribed by this section, shall cause the mechanic’s lien to be unenforceable as a matter of law.”

Another revision to the Mechanics’ Lien statutes, effective January 1, 2011, relates to what a lien claimant must do after a lawsuit to foreclose on the Mechanics’ Lien is filed. Prior to January 1, 2011, after the filing of the lawsuit to foreclose on a Mechanics’ Lien, the Plaintiff *could and in practice should have* recorded a notice of pendency of the proceedings (a *lis pendens*) in the County where the property is located. This is because the statutory system provided that a purchaser or encumbrancer of the property would be deemed to have notice of the lawsuit only after recording a *lis pendens*. As of January 1, 2011, after the filing of a lawsuit to foreclose on a Mechanics’ Lien, a Plaintiff *must* record a *lis pendens* in the County where the property is located within 20 days of filing the of the Mechanics’ Lien foreclosure action.

Looking Ahead: July 1, 2011 Statutory Changes Some consider the requirement, effective January 1, 2011, of serving a Mechanics’ Lien on the property owner—along with the new “NOTICE OF MECHANICS LIEN” a substantial change. Some may not.

However, effective July 1, 2012, even more comprehensive changes to California’s Mechanics’ Lien statutes will become effective. (SB

190.<sup>20</sup>) Although the Assembly Judiciary Committee comments that SB 190<sup>21</sup> makes “few substantive provisions [which] appear to be modest, thoughtful and harmonizing”, the act moves and restructures the Mechanics’ Lien statutes, along with Stop Notice, Payment Bond and Prompt Payment statutes, *in toto*. The Assembly Judiciary Committee synopsis of SB 190<sup>22</sup> also states the bill will: “. . . reorganize, clarify and re-codify these statutes. . . modernize terminology and eliminate inconsistencies in language. . . place provisions that apply exclusively to private or public work in separate titles, and place jointly applicable provisions in a common third title.” Some “highlights” follow.

- Effective July 1, 2012, Civil Code §§ 3082 to 3268 will be deleted and Civil Code §§ 8000-9566 will become effective.
- The preliminary 20-Day Notice required for private works will be different from the form of preliminary 20-Day Notice required for public works. A “Stop notice” will be referred to as a “stop payment notice” and a 20-day preliminary notice will be referred to as a “preliminary notice.”
- Moreover, an “original contractor” will become a “direct contractor”. Civil Code § 8084. This category will include a lien claimant that is not licensed as a “general contractor”—such as a licensed subcontractor—that has a direct contractual relationship with the project owner. Pursuant to § 8200 (c)(2), as of July 1, 2012, a “direct contractor” will be required to serve a Preliminary 20-Day Notice to the construction lender or reputed construction lender, if any. Moreover, a “general contractor” will also be required to serve a preliminary 20-Day Notice, at least to the construction lender on a private work—and construction lenders will have to be identified on direct contracts.

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<sup>20</sup>[http://info.sen.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_190&sess=CUR&house=B&site=sen](http://info.sen.ca.gov/cgi-bin/postquery?bill_number=sb_190&sess=CUR&house=B&site=sen) ←

<sup>21</sup>[http://info.sen.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_190&sess=CUR&house=B&site=sen](http://info.sen.ca.gov/cgi-bin/postquery?bill_number=sb_190&sess=CUR&house=B&site=sen) ←

<sup>22</sup>[http://info.sen.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_190&sess=CUR&house=B&site=sen](http://info.sen.ca.gov/cgi-bin/postquery?bill_number=sb_190&sess=CUR&house=B&site=sen) ←

- The design professionals' lien statute (currently Civil Code § 3081.1, et seq.) will be repealed: Those provisions will be incorporated into the new Mechanics' Lien statutes; and, Licensed Landscape Architects will be added to the definition of a "design professional" and therefore will have enforceable lien rights.
- "Completion" of a work of improvement has always triggered the commencement of the time-period within which a lien claimant must record their Mechanics' Lien. The lien statutes (and case law) provide owners with a basis to assert a "constructive completion" (currently Civil Code § 3086). This doctrine has always been a source of a considerable amount of litigation. As of July 1, 2012, "completion" will continue to include occupation or use of the work of improvement by the owner, accompanied by a cessation of labor. On the other hand, bare "acceptance by the owner" is eliminated as an equivalent of completion.
- Additionally, an owner will be entitled to record a Notice of Completion for a portion of a private work of improvement if that portion of work is governed by a separate contract; and where there are multiple direct contractors, an owner will be entitled to record separate Notices of Completion with respect to the scope of work under each direct contract. (The Notices of Completion will have to be recorded within fifteen days—instead of the ten day period allowed under existing law.)

The Assembly Judiciary Committee synopsis of SB 190 indicates that the July 2012 changes were meant to be "modest" and to "make provisions...easier to use..." On the other hand, the above are just some of the changes that will occur. Fortunately, we have until July 2012 to prepare.

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**Craig Nevin** has provided litigation and transactional counsel to property owners and developers, financial institutions and governmental agencies, and to contractors and subcontractors for almost 25 years. Mr. Nevin is currently on the Board of Senior Legal Services of Contra Costa County and The Law Center – two of the county's major providers of pro-bono legal services. He is a Past President of the CCCBA Real Estate Law Section, former Adjunct Professor of



Real Estate at JFK University school of Law, and from 2002 to 2009 served as Special Master to the Courts of San Francisco, Alameda and Contra Costa Counties.

## Unleashing the Value of Your Law Practice Ethically

Monday, August 1, 2011

Earn **one hour of Legal Ethics MCLE credit** by reading the article below and answering the questions of the Self-Study MCLE test<sup>23</sup>. Send your answers, along with a check for \$20, to the address on the test form.

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Elva Harding



Prior to 1989, California's attorneys were not permitted to sell the good will they built in their law practices [1]<sup>24</sup>. But since California

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<sup>23</sup><http://cclawyer.cccbba.org/wp-content/uploads/2011/07/MCLE-selftest-HARDING.pdf> ↩

<sup>24</sup>#\_ftn1

became the first state in the nation to allow the sale of law practices, solo practitioners have been in a position to profit from their legal and business acumen. Just as you thoughtfully prepared to hang your shingle and build your successful practice, the most successful lawyers will thoughtfully plan for the day they close up shop.

While the sale of a law practice may be similar to the sale of many other businesses, the Rules of Professional Conduct (“Rules”) provide the ethical framework for the transaction. (For valuation and contract issues see the State Bar of California’s ”Guidelines for Closing or Selling a Law Practice<sup>25</sup>” [2]<sup>26</sup>; see also ”Closing a Law Practice<sup>27</sup>” on the CCCBA website.) The Rules work best where the attorney has considered them in advance, even if the potential sale is years away, and put policies and procedures in place that will facilitate a transfer.

Rule 2-300<sup>28</sup> provides that “all or substantially all of the law practice of a member, living or deceased, including goodwill, may be sold to another member or law firm”. With few exceptions, the Rules do not permit the sale of a portion of a practice. If the selling attorney has a close relationship with one or two clients such that a new attorney could not realistically assume responsibility for the client, the selling attorney may retain those few clients. Additionally, when clients decline to hire the new attorney or where the transfer would result in a conflict of interest or other violation of Rules 3-300<sup>29</sup> and 3-310<sup>30</sup>, the selling attorney may retain those clients [3]<sup>31</sup>.

Outlined below are the conditions under which a law practice may be sold.

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<sup>25</sup>[http://www.calbar.ca.gov/LinkClick.aspx?fileticket=Tf1yhS8a2Mg%3D &tabid=233](http://www.calbar.ca.gov/LinkClick.aspx?fileticket=Tf1yhS8a2Mg%3D&tabid=233)

<sup>26</sup>#\_ftn2

<sup>27</sup><http://www.cccba.org/attorney/assistance-services/closing-practice.php>

<sup>28</sup><http://rules.calbar.ca.gov/RulesofProfessionalConduct/CurrentRules/Rule2300.aspx>

<sup>29</sup><http://rules.calbar.ca.gov/RulesofProfessionalConduct/CurrentRules/Rule3300.aspx>

<sup>30</sup><http://rules.calbar.ca.gov/RulesofProfessionalConduct/CurrentRules/Rule3310.aspx>

<sup>31</sup>#\_ftn3

Financing The purchase may not be financed on the backs of the seller's clients. The purchasing attorney must honor the seller's fee agreements with current clients and may not increase fees as a result of the sale [4]<sup>32</sup>. However, the purchasing attorney may increase fees to returning clients, provided that the fees do not exceed the fees she charges her own clients [5]<sup>33</sup>.

Client Confidentiality The purchasing attorney will want to diligently investigate the practice. However, the selling attorney must take care not to disclose any confidential client information to the purchasing attorney. Although Rule 2-300(E)<sup>34</sup> simply states that the selling attorney must not reveal confidences to non-members, the selling attorney must be mindful of Rule 3-100<sup>35</sup> and Bus. & Prof. Code §6068(e)(1)<sup>36</sup> which require her to maintain client confidences unless she receives consent from her clients. As an initial step to aid marketability of the practice, the well-prepared seller will offer the buyer certain non-confidential reports including a brief list of the types of cases handled, the fee structure and perhaps the number of each type of case. She will also be able to provide the firm's financial reports to support the value of her book of business and practice.

Notice to Clients Once the parties have decided to proceed with the sale, written notice must be sent to current clients, and should be sent to former clients if their files are to be transferred to the purchaser, at their last known address, at least 90 days in advance of the transfer. The notice should request the client's written consent to the transfer. The letter must inform the clients that the practice is being sold to the purchasing attorney and that the client has the right to retain a lawyer of her choosing. It must also explain that pursuant to Rule 3-700<sup>37</sup>, the client may take possession of the client's file. Of course, the communication must comply with the Rules regarding advertising

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<sup>32</sup>#\_ftn4

<sup>33</sup>#\_ftn5

<sup>34</sup><http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule2300.aspx> ←

<sup>35</sup><http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3100.aspx> ←

<sup>36</sup><http://law.onecle.com/california/business/6068.html>

<sup>37</sup><http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3700.aspx> ←

and solicitation [6]<sup>38</sup> and attorney client fee arrangements. If the client does not respond to the letter within 90 days of mailing the notice, it is presumed that the client consents to the transfer until the client otherwise notifies the attorney [7]<sup>39</sup>.

Conflicts Prior to closing the sale, the purchasing attorney should conduct a conflict check to make sure that no conflicts existing with the seller's clients [8]<sup>40</sup>. If a limited number of conflicts arise, those clients may be retained by the selling attorney or, depending on the situation, it may be possible for the client to consent to a properly disclosed conflict [9]<sup>41</sup>.

Transfer of Files and Property At the completion of the sale, the files and property of those clients who have consented to the new representation should be transferred to the purchasing attorney along with any client funds held in trust. Both attorneys should take care to make sure they properly account for funds in and out of their trust accounts [10]<sup>42</sup>. The files and property of non-consenting clients, however, should be treated as a terminated engagement and returned to the former client [11]<sup>43</sup>.

Substitution of Attorney Finally, the purchasing attorney must take appropriate steps to enter a substitution of attorney for any open cases [12]<sup>44</sup>.

Sale of a Practice by the Estate of a Deceased Attorney Ideally, the transfer of the practice is well-planned and the selling attorney has agreed to continue servicing her clients at least long enough to complete the notice process and preferably long enough to ensure a seamless transition. But what if the selling attorney is deceased (or the seller has a conservator or representative) and has not authorized an attorney to act on her behalf in such an event? The practice may

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<sup>38</sup>#\_ftn6

<sup>39</sup>#\_ftn7

<sup>40</sup>#\_ftn8

<sup>41</sup>#\_ftn9

<sup>42</sup>#\_ftn10

<sup>43</sup>#\_ftn11

<sup>44</sup>#\_ftn12

still be sold pursuant to Rule 2-300(B)(1)<sup>45</sup> and Bus. & Prof. Code §6180 et seq.<sup>46</sup>

Cessation of a Law Practice Even while the Rule 2-300<sup>47</sup> notice is pending, it is important that the deceased attorney's personal representative, or even a purchasing attorney, take additional steps to protect her clients' interests and the value of the practice. Bus & Prof. Code 6180 et seq<sup>48</sup>. regulates the cessation of a law practice and provides tools to protect the deceased attorney's clients and the estate. While it is beyond the scope of this article, certain components are essential to a successful sale.

Petitioning the Court for Appointment An interested party (or clients and others) may petition the county court where the deceased most recently practiced or resided to assume jurisdiction of the law practice [13]<sup>49</sup>. Upon a finding that the deceased has left open matters and that the clients' interests may be prejudiced if the court does not act, the court may take jurisdiction and then appoint an attorney to, among other things: create a plan for disposition of the deceased attorney's practice in order to protect its value as an asset of the estate [14]<sup>50</sup> and examine the files and records of the law practice and obtain information regarding pending matters [15]<sup>51</sup>. Although the Court appointed attorney may not be entitled to compensation for her work reviewing files under the court order [16]<sup>52</sup>, she is protected from liability for acts or omissions occurring in the execution of the court's order [17]<sup>53</sup>. While cumbersome, this process allows the estate and perhaps the purchasing attorney to protect the interests of the deceased attorney's clients and maintain the practice in the event no other succession plans have been made.

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<sup>45</sup><http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule2300.aspx> ↩

<sup>46</sup><http://codes.lp.findlaw.com/cacode/BPC/1/d3/4/11/s6180>

<sup>47</sup><http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule2300.aspx> ↩

<sup>48</sup><http://codes.lp.findlaw.com/cacode/BPC/1/d3/4/11/s6180>

<sup>49</sup>#\_ftn13

<sup>50</sup>#\_ftn14

<sup>51</sup>#\_ftn15

<sup>52</sup>#\_ftn16

<sup>53</sup>#\_ftn17

Notice of Cessation The personal representative or the attorney having custody and control of the deceased's files is required to send a notice of cessation of law practice to clients, opposing counsel, courts and agencies where the deceased had open matters, her malpractice insurance carrier and others [18]<sup>54</sup>. Depending on the transition, the purchasing attorney may have custody of the files and be the best person to send this notice. Keep in mind, this notice is distinct from the Rule 2-300<sup>55</sup> notice.

Notice of Sale of Practice Under the Rules, if the seller is deceased and no attorney has been appointed to act for her pursuant to Bus. & Prof. Code §6180.5<sup>56</sup>, the purchasing attorney is responsible for sending the Rule 2-300<sup>57</sup> notice of the sale of the practice. The notice is similar to the sale notice discussed at the beginning of this article, except that it must state that the purchasing attorney may act on behalf of the client in the event the client's rights would be prejudiced by a failure to act within the 90 days or prior to receipt of client's written consent [19]<sup>58</sup>.

An established law practice is a valuable asset that can be sold for great profit if the transition is planned for and managed properly. With some planning, compliance with the Rules of Professional Conduct should not be burdensome and should enable an attorney to maximize the return on a mature practice.

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**Download the MCLE Self-Study test form here:<sup>59</sup> Earn one hour of Legal Ethics MCLE credit by reading the article above and answering the questions of the Self-Study MCLE test<sup>60</sup>. Send your answers, along with a check for \$20, to**

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<sup>54</sup>#\_ftn18

<sup>55</sup><http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule2300.aspx> ↩

<sup>56</sup><http://law.onecle.com/california/business/6180.5.html>

<sup>57</sup><http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule2300.aspx> ↩

<sup>58</sup>#\_ftn19

<sup>59</sup><http://cclawyer.cccba.org/wp-content/uploads/2011/07/MCLE-selftest-HARDING.pdf> ↩

<sup>60</sup><http://cclawyer.cccba.org/wp-content/uploads/2011/07/MCLE-selftest-HARDING.pdf> ↩

**the address on the test form.**

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**Elva Harding** is a Walnut Creek-based attorney specializing in real estate and business law. Elva's clients include investment firms, property managers and entrepreneurs. She particularly enjoys acting as trusted advisor to her small and family-owned business clients. Prior to starting her legal career, Elva was an asset manager for a national private equity real estate firm. You can reach her at (925) 215-4577.

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- [1] *Geffen v. Moss* (1975) 53 CA3d 215, 226-227.
- [2] Foonberg, Jay (2002-03). *Guidelines for Closing or Selling a Law Practice*. Retrieved July 13, 2011. <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=Tf1yhS8a2Mg\%3D\&tabid=233> \ [3]
- [3] Cal. Rules of Professional Conduct, rule 2-300, Comments.
- [4] *Id.*, rule 2-300(A); Bus. & Prof. Code §§6147 & 6148.
- [5] Cal. Rules of Professional Conduct, rule 2-300, Comments.
- [6] *Id.* rule 1-400(D).
- [7] *Id.* rule 2-300(B)(2).
- [8] *Id.* rules 2-300(D), 3-300 and 3-310.
- [9] *Id.* rules 3-300 and 3-310.
- [10] *Id.* rule 4-100.
- [11] Cal. Rules of Professional Conduct, rules 3-700 and 4-100.
- [12] *Id.* rule 2-300(C).
- [13] Bus. & Prof. Code §6180.2.
- [14] *Id.* § 6185(a)(7).
- [15] *Id.* §6180.5.
- [16] *Id.* §6180.12.
- [17] *Id.* §6180.11
- [18] *Id.* §6180.1
- [19] Cal. Rules of Professional Conduct, rule 2-300(B)(1).

## **“Hot” Off the Press from the Courts – Another Victory for Employers**

Monday, August 1, 2011



Rhonda Shelton Kraeber

California employers have enjoyed some relatively rare victories in recent months. Most recently, in June 2011, the California Supreme Court – in a unanimous decision no less – sided with employers on an issue involving employer liability for employee actions at work. In so doing, the Court also provided a helpful primer on the history and rationale behind tort liability / comparative fault system.

In *Diaz v. Carcamo*<sup>61</sup>, Docket No. S181627, filed June 23, 2011, the California Supreme Court ruled that when an employer admits vicarious liability for the negligent act of its employee, the plaintiff is precluded from also pursuing a negligent entrustment claim against the employer.

Plaintiff Dawn Diaz was severely and permanently injured when the vehicle she was driving on southbound Highway 101 in Ventura County was struck by a truck driven by defendant Jose Carcamo, an employee

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<sup>61</sup><http://scocal.stanford.edu/opinion/diaz-v-carcamo-33983>



of Sugar Transport of the Northwest, LLC. The Carcamo/Sugar Transport truck had come across the center divider after it had been struck by a vehicle driven by defendant Karen Tagliaferri. Diaz sued Carcamo, Sugar Transport, and Tagliaferri, alleging 1) negligent driving by Carcamo and Tagliaferri; and 2) vicarious liability for employee Carcamo's negligent driving and direct liability for its own negligent hiring and retention by Sugar Transport.

Before closing argument, Sugar Transport stipulated with plaintiff to vicarious liability for employee-driver Carcamo's negligence, if any. Over Sugar Transport's objections, the trial court admitted evidence of Carcamo's driving and employment history (which included two prior accidents – one occurring only 16 days before the Diaz accident – Carcamo's illegal immigration status, use of a “phony” Social Security number, lies on his employment application, and negative information garnered from reference checks).

The jury awarded over \$17.5 million in economic damages and \$5 million in non-economic damages, finding Carcamo and Tagliaferri had both driven negligently and that Sugar Transport had been negligent in hiring and retaining Carcamo as a driver. The Court of Appeal affirmed. Because of a conflict with prior decisions [*Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal. App.4th 853 and *Armenta v. Churchill* (1954) 42 Cal.2d 448], the California Supreme Court granted the petition for review of defendants Sugar Transport and Carcamo.

In reviewing the history of tort liability, the Court noted that when *Armenta* was decided in 1954, the California courts imposed tort liability on an “all-or-nothing” basis; that is, if the plaintiff contributed in any measure to his/her own injury, recovery was barred. Similarly, once an employer admitted vicarious liability for an employee's tortuous conduct within the scope of employment, it didn't matter whether it was submitted to the jury on a negligent entrustment claim and/or on a negligence claim against the employee. Either way, the employer would be liable for 100% of a plaintiff's damages, or else not liable at all.

The “all-or-nothing” system was replaced with the comparative fault system in 1975. Under comparative fault, a plaintiff's negligence

merely reduced the damages awarded in proportion to the amount of negligence attributable to plaintiff, and damages among tortfeasors were now apportioned on a comparative negligence basis.

Finally, in 1986, California voters adopted Prop. 51 (as codified by Civil Code Sec. 1431.2<sup>62</sup>) that limited the scope of joint liability amongst tortfeasors. More specifically, in cases based upon principles of comparative fault, each defendant is liable for all of the plaintiff's economic damages, but only his/her/its proportionate share of the non-economic damages. Thus, non-economic damages are to be apportioned amongst the universe of tortfeasors, including non-joined defendants.

One group of defendants excluded from allocations of fault under Prop. 51 are employers who face only vicarious liability under the respondeat superior doctrine for torts committed by its employees in the scope of employment. In such cases, the universe of tortfeasors does not include the employer; rather, the employer's share of liability corresponds to the share of fault allocated to the employee.

In reaffirming its holding in *Armenta*, the Court expressly disagreed with the plaintiff's argument that an employer can potentially be held responsible for two shares of fault; one based on the employee's negligent driving in the scope of employment (vicarious employer liability) and one based on the employer's own negligence in hiring or retaining (direct employer liability). The Court reasoned that assigning to the employer a share of fault greater than that assigned to the employee whose negligent driving was a cause of the accident would be an inequitable apportionment of loss.

In a noteworthy footnote, however, the Court allowed that it could conceive of instances in which the employer may be liable for its own negligence independent of its employee's acts. The example given was if an employer provides a driver with a defective vehicle. However, when, as in *Diaz*, the plaintiff's theory of employer liability was based solely on a negligent hiring/retention, the admission of vicarious liability precluded a separate claim for direct negligence on the part of the employer.

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<sup>62</sup><http://law.onecle.com/california/civil/1431.2.html>

Thus, to recap, when an employer admits to various liability for the negligent act (if any) of its employee, the plaintiff is precluded from also bringing a negligent hiring/retention/entrustment claim against the employer.

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**Rhonda Shelton Kraeber**<sup>63</sup> has practiced in all areas of employment law, including wrongful termination and discrimination and harassment litigation, since 1991. Formerly with Shapiro Buchman Provine, Rhonda counsels employers and employees on all aspects of the employer-employee relationship, including compliance with the many state and federal laws that apply in the employment context, and drafts, reviews, and negotiates all types of employment-related agreements such as severance agreements, employment contracts, and confidentiality agreements. Rhonda has also practiced general commercial litigation, including real estate disputes, contract issues, and corporate control disputes, and is licensed to practice in both California and Oregon.

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<sup>63</sup><http://www.alvisfrantzlaw.com/>

# Not Your Father's Estate Plan

Monday, August 1, 2011



Stefanie West

Estate planning attorneys commonly hear war stories from clients who served as the successor trustee of their parents' estate. Some stories are more memorable than others.

Last year, a client was recounting her experience as trustee and beneficiary of her father's estate. Dad's trust divided the estate equally amongst the children. One of her siblings, while a "nice person," never really grew up. The sibling had creditor problems, could not hold down a job, divorced a few times and had recently filed for bankruptcy. This was not an unusual story.

Unfortunately, her hands were tied as the trustee. Dad's trust required her to distribute each beneficiary's assets "outright and free of trust." There were no provisions to withhold distributions. Just as she had suspected, the inheritance evaporated the moment she wrote the distribution check. The bankruptcy judge immediately attached the funds and the inheritance disappeared.

I had heard variations of this story but this was the first time I had met a family who personally experienced this. As a planner, it was very frustrating to know this could have been prevented. Dad's hard-earned money could have been sheltered from his child's creditors if the trust was structured differently.

I have heard many clients' fears about leaving money to family members who rack up debt, are in litigious occupations or in a rocky marriage. Far from being grumpy curmudgeons, these clients have legitimate concerns. According to the American Bankruptcy Institute<sup>64</sup>, more than 1.5 million people filed for personal bankruptcy in 2010, up 9 percent from 2009. According to the U. S. Department of Health and Human Services<sup>65</sup>, the mean medical malpractice amount for physicians in 2006 was \$311,965. More than fifty-percent of marriages in the U. S. still end in divorce.

Estate planning has evolved to address these issues and the changing nature of society.

Classic trust distribution provisions typically provide either an outright distribution or a structured trust. A structured trust pays the beneficiary a portion of assets at specified ages until the trust is depleted. While outright and structured distributions are easy to administer (and for the client to understand), funds can be taken by the beneficiary's creditors once trust funds are distributed directly to the heir.

By contrast, if the trust provides that the heir's inheritance shall be distributed to a Beneficiary Controlled Trust, funds are not distributed outright. Funds remain in trust and are administered by the beneficiary as trustee. Assuming that the heir is savvy enough to keep the assets in trust, these funds are beyond the reach of creditors and divorcing spouses.

As the Trustee, the beneficiary may remove funds from his or her own trust. However, once trust funds are removed, they lose the "protective wrapper" and can be exposed to creditors. To maximize asset protection if a creditor problem develops, the beneficiary should resign

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<sup>64</sup><http://www.abiworld.org//AM/Template.cfm?Section=Home>

<sup>65</sup><http://www.hhs.gov/>

as trustee. A third-party trustee who is not related or subordinate to the beneficiary under IRC § 672(c)<sup>66</sup> should then be appointed.

I always ask clients whether they would like to have trust funds distributed outright or remain in trust after their death. Even some clients whose heirs have sterling credit and are excellent savers prefer beneficiary controlled trusts. Some clients are persuaded by the asset protection features. Others believe that segregating assets from the beneficiary's own estate creates a greater awareness that the inheritance was a result of another's hard work and efforts.

There is no one-size-fits-all for clients and beneficiary controlled trusts are not for everybody. I have some clients who believe that they are too complicated or are turned off because of the additional expense of an ongoing administration. Others reject the idea of a beneficiary controlled trust because, in their mind, an heir with creditor problems deserves to lose his or her inheritance.

My client, the Trustee who could not save her sibling's inheritance from bankruptcy creditors, chose a beneficiary controlled trust for her own estate. Fortunately, in the twenty years since her father drafted his living trust, estate planning techniques have evolved to offer additional choices that may better suit our client's needs.

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**Stefanie West** is an estate planning attorney in San Ramon and lives with her husband Jim in Lafayette.

## The Law and LinkedIn – Why you should invest in your LinkedIn Profile

Monday, August 1, 2011

Earn **one hour of Legal Ethics MCLE credit** by reading the article below and answering the questions of the Self-Study MCLE

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<sup>66</sup>[http://www.taxalmanac.org/index.php/Internal\\_Revenue\\_Code:Sec.\\_672.\\_Definitions\\_and\\_rules](http://www.taxalmanac.org/index.php/Internal_Revenue_Code:Sec._672._Definitions_and_rules) ←

test<sup>67</sup>. Send your answers, along with a check for \$20, to the address on the test form.

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Attorneys have always had their information available in the public sphere, whether in a bar association directory or the Yellow Pages. But the times are changing. The current reality is that online directories are becoming an invaluable part of an attorney's business development plan. In fact, a LinkedIn profile<sup>68</sup> is as ubiquitous as a Yellow Page listings used to be. These days, the message is clear: if you aren't visible online, then you run the risk of losing both business and credibility.



Why Be Part of an Online Directory? The question is really why *wouldn't* you be? Not having one is like not having a website; people might start to wonder if you are legitimate or if you are simply behind the technological times. This isn't an image you want to project out to the public.

These days, the message is clear: if you aren't visible online, then you run the risk of losing both business and credibility.

Taking this idea one step further, the rules of professional responsibility require that you remain competent. Increasingly, part of competence implies the ability to use available technology in order to best serve your clients: Rule 3-110<sup>69</sup> of the California Rules of Professional Conduct has been construed to require attorneys to attain

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<sup>67</sup><http://cclawyer.cccba.org/wp-content/uploads/2011/07/MCLE-selftest-WILSON-3.pdf> ↩

<sup>68</sup>[http://www.linkedin.com/groups/Contra-Costa-County-Bar-Association-3675763?home=&gid=3675763&trk=anet\\_ug\\_hm&goback=%2Egmp\\_3675763](http://www.linkedin.com/groups/Contra-Costa-County-Bar-Association-3675763?home=&gid=3675763&trk=anet_ug_hm&goback=%2Egmp_3675763) ↩

<sup>69</sup><http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3110.aspx> ↩

a basic level of technological competence when handling confidential client information. If an attorney has no web presence, clients may make assumptions about that attorney's technical, and even legal, competence.



Why LinkedIn? Many people ask me which is more important: LinkedIn<sup>70</sup>, Facebook<sup>71</sup>, or Twitter<sup>72</sup>. I always tell attorneys that if they had to choose only one social media platform, they should choose LinkedIn. While its true that many professionals use Facebook and Twitter, these platforms are also for personal use. LinkedIn, on the other hand, is built specifically for professionals to show themselves in the most positive light.

LinkedIn is attractive to lawyers specifically. If you take some time to look around LinkedIn, you'll notice that CPAs, lawyers, consultants, and finance and real estate professionals are highly represented. That's where you want to be, and the caliber of people you want to connect with.

That's not to say that you shouldn't spend time on other social networking sites. You should. But I highly recommend using LinkedIn as your hub for professional social networking. By focusing on LinkedIn, you can have a central starting point, using other platforms as off-shoots.



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<sup>70</sup>[http://www.linkedin.com/groups/Contra-Costa-County-Bar-Association-3675763?home=&gid=3675763&trk=anet\\_ug\\_hm&goback=&Egmp\\_3675763](http://www.linkedin.com/groups/Contra-Costa-County-Bar-Association-3675763?home=&gid=3675763&trk=anet_ug_hm&goback=&Egmp_3675763)

<sup>71</sup><http://www.facebook.com/CCCBA>

<sup>72</sup><http://twitter.com/CCCBA>



The Benefits The Yellow Pages deliver basic information. This is surely important if someone wants to get in touch, or learn about your background. But an online directory offers a broader view. It gives potential clients and referral partners something more objective than a standard bio and your contact information. On a LinkedIn profile, a person can see how you are connected to other attorneys, referral partners, organizations, and your community.

The most successful attorneys are actively involved in all of these groups, and letting others know about your involvement adds to your credibility. And when you include articles, blogs, or status updates on your profile, this reinforces the message that you are engaged with the issues that you practice.



How to Maximize Your Profile It's easy to whittle hours away on a social networking site like LinkedIn. But a strategic, targeted approach will get you where you want to go, faster.

**Here are the most effective ways attorneys can use LinkedIn:**

1. **To follow up.** After you go to a networking event, use LinkedIn to stay in touch. Send a personal note that references how you met and ask them to connect.
2. **To promote your skills and associations.** Are you an estate planner? Use your profile to talk about skills, associations, and groups related to estate planning to demonstrate your involvement in your professional community.
3. **To increase your visibility.** Periodically include status updates to increase your visibility. Again, be strategic: Think about how often you'd like to update, and then put it in your calendar as an action item. Effective status updates include a

news article you want to comment on, a speaking engagement, news from the bar association, or a topic that is valuable to your network.

4. **To connect social media platforms.** Make sure that you connect your social media. This means posting online profiles, publications, Facebook updates, and tweets to your LinkedIn profile. There are two ways to do this: you can have an outbound link that takes you to these platforms. Or you can set up LinkedIn to connect with other social media platforms so that when you post a status update, it automatically becomes a tweet or a Facebook post. With certain platforms like WordPress, you can also stream your blog to your LinkedIn profile.
5. **To become known as an expert.** LinkedIn's Answer feature helps promote you as an expert. Try asking a question to generate a response. Or find your specific area of interest and answer the existing questions. The more positive the response, the higher your ranking. Another way to showcase your expertise is through the Martindale application, which allows you to promote your Martindale peer and client ratings with a logo and summary on your profile.
6. **To publish and promote content.** It's savvy to have original content that displays your expertise. JD Supra sponsors a legal update feature specifically for attorneys. Through this feature, you can get your material published, allowing people to sign up and search on topics of interest. (These articles are available both on the JD Supra platform and under Legal Updates on LinkedIn.) Another option for getting your content read is LinkedIn's Slideshare Application, which allows you to re-purpose presentations you've given.

LinkedIn and Legal Ethics Social networking and online marketing have unleashed a totally new world when it comes to legal ethics. However, the legal system — and in particular bar associations that govern attorney ethics — have been slow to understand that significant issues exist around social media, figure out what they are, and provide attorneys with legal guidance on how to deal with them.



In this veritable legal Wild West, here are a few issues that can arise and how to handle them within the law's ethical guidelines.

**Ethical question:** Should I fill in the “specialties” field? Under your summary in LinkedIn, there is a subheading that allows you to name your specialties. For attorneys this is a problem, because of ABA rules about claiming a legal specialty.

**Answer:** To avoid any problems, mention your specialties in your summary, while leaving the designated area for specialties blank.

**Ethical question:** Can my clients write me a recommendation? Both California and ABA rule requires that if a client gives a testimonial on your behalf, you are required to include a disclaimer that says the testimonial does not guarantee a successful outcome. The problem is that LinkedIn doesn't have a place to include your disclaimer.

**Answer:** One possible scenario is having the client write the disclaimer. But for attorneys, for whom the foremost ethical responsibility is confidentiality, this isn't always the best idea. Even if a client is willing and able to give a recommendation, the client should be aware of the consequences of being identified as a client. As attorneys, we assume the burden of that responsibility. That's why even if the client is willing to write a recommendation accompanied by a disclaimer, it isn't always the best course of action. The safest bet, in my opinion, is not having recommendations at all.

**Ethical question:** Can I make clients public? LinkedIn is an opt-in or opt-all out platform, where you'll need to decide if you will have everyone transparent or everything hidden. This causes a dilemma for attorneys, who might want their network and referral partners transparent, but not their clients.

**Answer:** Unfortunately, there isn't an ideal solution on how to handle this: as it stands, you'll need to either lose out on the referral

benefits of LinkedIn and make everything private, or have your clients sign a document that indicates they've agreed to the publication of our relationship. However, if you feel that it isn't in their best interest, the onus is still on you to reject the connection.

**Ethical Question:** What kind of information can I make public?

**Answer:** Because confidentiality is of paramount importance to attorneys, this makes some of the features of LinkedIn problematic. It's good to err on the side of caution when it comes to client confidentiality. It's not that you have to shut down your social networking. But good judgment is always the cornerstone of your decisions. Just because there is no *official* rule saying that you can't thank a client by name on your LinkedIn status for a referral, for instance, this choice still shows bad judgment as they may not want the information made public.

**The Future Looks Linked** Things move fast in the world of social media. Today, it damages your credibility to have no LinkedIn profile. But in a year or two, it might be damaging to have only a minimal profile.



I see a future where LinkedIn adapts to the needs of professionals, helping each industry work within the ethical rules of their trade. I'm also hoping that LinkedIn will make it easier to choose individual people for either public or private viewing, making it friendlier for attorneys who want the ability to choose. And with the proliferation of video, I predict that LinkedIn will use that medium to its advantage.

And remember, LinkedIn isn't the only one that will change with the times. As social media evolves, attorneys should evolve with it.

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Download the MCLE Self-Study test form here:<sup>73</sup> Earn one hour of Legal Ethics MCLE credit by reading the article above and answering the questions of the Self-Study MCLE test.<sup>74</sup> Send your answers, along with a check for \$20, to the address on the test form.

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**Randy Wilson** is the co-founder of DSD Law Site Solutions<sup>75</sup> and founding member of the Business Advisory Resource (B. A. R.) Group<sup>76</sup>

## Wait, What?! The Trials and Tribulations of an Elder Abuse Lawyer

Monday, August 1, 2011

A blog by Michael LaMay, Esq. This article in this month's "hot" online issue marks my somewhat dubious entry into the blogosphere. The idea of this blog is to attempt to provide some current information, anecdotes, thoughts, opinions, etc., concerning elder abuse issues. My practice increasingly involves elder financial abuse, as a litigator, court-appointed guardian ad litem and counsel for conservatees. It is appalling to see what is happening every day to many elder, disabled clients and their families.

2011 MetLife Study of Elder Financial Abuse . . . According to the June 2011 MetLife Study of Elder Financial Abuse<sup>77</sup>, "The annual financial loss by victims of elder financial abuse is estimated to be at least \$2.9 billion dollars, a 12% increase from the \$2.6 billion estimated in 2008." The Study concludes that, "Despite growing

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<sup>73</sup><http://cclawyer.cccba.org/wp-content/uploads/2011/07/MCLE-selftest-WILSON-3.pdf> ↩

<sup>74</sup><http://cclawyer.cccba.org/wp-content/uploads/2011/07/MCLE-selftest-WILSON-3.pdf> ↩

<sup>75</sup><http://www.dsdlawsitesolutions.com/>

<sup>76</sup><http://thebargroup.org/>

<sup>77</sup><http://www.metlife.com/mmi/research/elder-financial-abuse.html#keyfindings> ↩

public awareness from a parade of high-profile financial abuse victims, it remains **underreported, under-recognized, and under-prosecuted.**” (Emphasis added. Download the full study here<sup>78</sup> [pdf]). By the way, recent high-profile victims include Mickey Rooney and Norman – Spirit in the Sky – Greenbaum. While the Study is informative, it is just another “study” and it appears that the problem is much worse than statistics show and will only become worse with the onslaught of the elder population explosion...

No Caregiver Regulation in California – Except in Napa County ... Speaking of studies, an interesting April, 2011 report by the California Senate Office of Oversight and Outcomes ”Caregiver Roulette<sup>79</sup>”, reveals that **California is one of the small minority of states that does not regulate home caregivers.** Currently, there is no statewide law requiring criminal background checks on caregivers. It is particularly disconcerting that the in-home care industry in California is not subject to the same oversight as day care centers or long-term care facilities such as nursing homes.

In litigating elder financial abuse cases against caregivers it’s often striking how many of these cases could have been prevented. Caregivers run the gamut from caregivers on Craigslist (some of whom turn out have extensive criminal backgrounds) to professional caregivers vetted and supervised by a quality agency. Starting with the estate planning stage, clients and their families can be advised of proactive measures that can be taken to prevent exploitation by unscrupulous caregivers, such as writing into estate planning documents provisions for geriatric care management/plans. Agents under Power of Attorneys and conservators can be advised of red flags for potential abuse by caregivers and preventative or corrective measures that can be taken, including obtaining geriatric care assessment evaluations for impaired elders.

I never thought of Napa being a groundbreaking legislative county in California – except maybe as to wine – until now. Napa, as of July 1,

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<sup>78</sup><http://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf> ←

<sup>79</sup>[http://sooo.senate.ca.gov/sites/sooo.senate.ca.gov/files/2385\\_caregiver%20roulette.pdf](http://sooo.senate.ca.gov/sites/sooo.senate.ca.gov/files/2385_caregiver%20roulette.pdf) ←

2011, became the first and **only** county in the state to require all in-home caregivers to be certified, including being screened for criminal background. The Napa ordinance requires all caregivers, including individuals who don't work for agencies, to get a permit. The ordinance also includes relatives of the client who are providing care for compensation or consideration. Applicants are required to submit paperwork to the Napa-Solano Area Agency on Aging, which contracts with a private background screener to do criminal and other checks. (Link: [https://napacaregivers.org/caregiver\\_info.ordinance.php](https://napacaregivers.org/caregiver_info.ordinance.php)).

It would seem to be a “no-brainer” that Contra Costa County, like Napa, should not wait for the possibility of a statewide law and pursue a similar ordinance. Certainly a statewide system would be best and at present the California Legislature is considering two regulation bills but, unlike Napa’s ordinance, they do not attempt to regulate independent workers who find care giving jobs on their own. I am looking into helping to push for a Contra County ordinance and encourage other local lawyers and professionals to join in such efforts. I will update my progress in future blogs...

Now That’s a Good Question

... At a recent meeting of the Estate Planning Council of Diablo Valley<sup>80</sup>, an audience member (I think it may have been a financial planner) posed a very astute question along the lines of “how is it that someone who’s caught robbing a grocery store gets prosecuted, but people who steal money from elders often get away with it?” Unfortunately at this time it’s more of a rhetorical question, but it really gets to the core of the problem with the current sad state of elder financial abuse. Theft is theft and stealing from a vulnerable elder is almost as reprehensible as it gets. Yet it seems to be open season for elder financial abuse predators, be they family members, friends, caregivers, financial institutions and advisors, scam artists, or – dare I say – attorneys. It’s such an equal opportunity crime that even elders are sometimes abusing other elders!

Locally, as throughout the state, the courts, District Attorney, Adult Protective Services and other agencies have only limited resources and

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<sup>80</sup><http://www.theassociationoffice.org/epcdv/>

continue to suffer from cuts after cuts in their funding. Often the only recourse for victims or their families is a civil lawsuit, but even then elder financial abuse litigation is very expensive and often judgments are difficult if not impossible to collect. However, occasionally, the abusers are caught early enough to seize control over property and assets so that they can be recovered by the elder or their family – the most gratifying part of being an elder abuse lawyer...

Wait, What?! ... Just the other day after leaving a hearing on an elder financial abuse case, the alleged abuser yelled out to me while walking outside the courthouse “I know where you live!” Well, the police, the court, etc. know where he lives and hopefully before too long he’ll either be behind bars or at least karma will catch up with him. I’m not Nostradamus, but strongly believe Karmageddon will someday come to predators of the elderly, disabled...

I plan to continue updating this blog on a regular basis, with a place for comments, questions, etc. The blog and/or a link to it will be on the Bray & Bray website<sup>81</sup>.

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**Michael LaMay**, an attorney with the Bray & Bray Law Offices in Martinez, specializes in elder abuse litigation, will & trust litigation, probate, conservatorships and estate planning, and serves on the Board of Directors of the Elder Law Section.

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<sup>81</sup><http://www.brayandbraylaw.com/>



# Interview with Gordon P. Erspamer

Monday, August 1, 2011



Gordon P. Erspamer

Gordon “Gordy” Erspamer, Senior Counsel with Morrison Foerster, has been fighting tirelessly for veterans’ rights. Gordy’s most recent victory, in front of the 9th Circuit Court of Appeals earlier this year, provides hope to veterans suffering from post-traumatic stress disorder. Describing problems at the VA as “egregious”, the court ordered the VA to overhaul its mental health system.

Prior to this, Gordy defended ‘atomic veterans’ (veterans suffering the consequences of radiation exposure during nuclear testing in the 1950s) and veterans subjected to secret government tests that occurred until the 1970s.

This is part 1 of the interview between Gordy Erspamer and Lisa Reep, Executive Director of the CCCBA. In it, Gordy also talks about the ‘deep-throat’ letters that helped him uncover the government’s deception and destruction of evidence.

Gordy is the recipient of numerous awards and honors, including the prestigious Pro Bono Publico award from the American Bar Association. Later this year, Gordy will also be honored with a Lifetime Achievement Award from The American Lawyer magazine in New York.

Enjoy:

**Congratulations on your recent victory for veteran's rights in front of the U. S. Court of Appeals for the 9<sup>th</sup> Circuit! In its ruling, the court ordered the Veteran's Administration to fix what it described as "egregious problems". Can you tell us a bit about the case and the Veteran's Administration's difficulties in providing timely access to care and benefits?**

**This wasn't the first time you fought for veteran's rights. In the past, you have also defended so-called "atomic veterans" and veterans subjected to secret government tests. How did you get involved working with veterans?**

**In 1986, the government was caught lying and destroying evidence. How did you overcome such challenges and how were you able to substantiate the claims of the veterans you represented?**

Stay tuned for part 2, to be published in an upcoming Contra Costa Lawyer edition...

# What's Hot? Synchronized Video Transcripts

Monday, August 1, 2011



Wendy Graves

**What is synchronized video?** It is an effective trial presentation tool where the videotaped deposition is synchronized with the court reporter's transcript enabling a word or phrase search. This allows you to easily make video clips for presentation at trial. The results the new technology can deliver are dramatic when an attorney is in the heat of trial. Video clips can be made in real-time and quickly shown to the jury. Impeachment can be immediate – and effective.

**What do attorneys do with synchronized video?** Some are using inexpensive programs such as TrialDirector<sup>82</sup> to load video into, easily make video clips, post exhibits, and store photos of the case. Most court reporting firms provide free software with the synchronized transcripts which a legal professional can use to quickly make the video clips in preparation for or during trial.

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<sup>82</sup><http://www.indatacorp.com/TrialDirector.html>

**Why is it important to have video media for trial?** More and more attorneys are finding that juries are expecting video because of the proliferation of it in daily life. As the adage goes, a picture is worth a thousand words.

Andrew Lloyd, Managing Director of Litigation Media Group<sup>83</sup> of San Jose, says, “This is another example of how effective utilization of technology in trial helps to tell a story that a jury understands, remembers and takes into the jury room with them. Today’s jury has an expectation of being captivated and engaged at a high level and using multimedia presentation in trial fulfills that need.”

Mr. Lloyd goes on to say, “Melding just the right amount of old-school trial skill with new-world multimedia presentation makes for a perfect mix in assisting the jury in their findings. Working closely with a talented trial lawyer, utilizing courtroom multimedia makes for a powerful combination that can be unbeatable. This generally provides for an excellent outcome, especially when others are not using it.”

This begs the question – what happens when the opposition is videotaping and giving an effective presentation with video clips, projected exhibits, and quick access to multimedia? Are you disadvantaged by not utilizing the same tools?

Cost can be a concern. Some attorneys have videotaped their own depositions, with the assistance of an employee. However, the format does not provide for synchronization. Others have successfully taken advantage of the newest electronic equipment and have a software-based solution for videotaping, with the unbiased court reporter providing and running the specialized equipment. This format is synchronized, saving 50% or more on videotaping charges. Law firms are rapidly discovering a new reporter-generated tool called Reporter Video Transcript (RVT). RVT combines the power of video testimony with a synchronized transcript.

### **How it Works...**

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<sup>83</sup><http://www.litigationmedia.com/>

The court reporter is truly the keeper of the record, capturing all details of the proceedings: visual, audio and the written word.

Clients find the Reporter Video Transcript tool very effective. They like the quick set-up/breakdown time, the significant cost savings, and its ease of use. One client, who had never owned a laptop, purchased one and installed trial litigation software. He learned it over the weekend and the following month was able to use the synchronized Reporter Video Transcript so effectively at trial that he impeached a witness on the spot and went on to win a \$700,000 jury verdict in a slip-and-fall case against a restaurant chain.

There have been many innovative products developed to aid attorneys in their litigation needs. This is a breakthrough for attorneys who want to incorporate 21<sup>st</sup> century technology into their trial presentation, increasing favorable outcomes.

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**Wendy Graves**, CSR, RPR, has been a California CSR since 1983 and a Hawaii CSR since 2007. Wendy founded Certified Reporting Services<sup>84</sup> in 2002 in Benicia and has recently moved her business to Martinez, near the Bar Association. As an early technology adopter, Wendy uses the latest in hardware, software and telecommunications to meet the reporting and transcript/exhibit management needs of the firms' clients. Wendy has served as a volunteer mediator with the Solano County Bar Association<sup>85</sup> and spent three years as the newsletter editor for the Deposition Reporters Association<sup>86</sup>. When her busy schedule permits, Wendy enjoys sailing and gardening.

## IT Security for Law Firms

Monday, August 1, 2011

Given the sensitivity and importance of the data that flows through a law firm's IT infrastructure, it's no wonder that IT Security is a hot

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<sup>84</sup><http://www.certifiedreportingservices.com/>

<sup>85</sup><http://www.solanobar.org/>

<sup>86</sup><http://www.caldra.org/>

topic. Threats to the security of your firm's data come from a myriad of vectors, both from outside your network and from within.

The stakes are high If your firm's data is compromised by a cyber-attack, the effects it can have on the business may be devastating. First of all, your firm's operations may be virtually shut down as you scramble to contain and mitigate the attack. Every minute your firm's administrators and attorneys can't do their normal work costs hundreds, if not thousands of dollars.

Your firm could be held liable if sensitive information is found to have been stolen or even accessed. Litigation is supposed to make money for your firm, not cost you money!

Perhaps the most insidious way that a security breach can affect your firm is damage to your firm's reputation. Law firms depend upon hard-won reputation to attract and keep clients, and if your firm is perceived to be anything less than completely in control of its information and processes, you will find that a tarnished reputation is difficult to remedy.

A process, not a project It is important to understand that IT Security is a process that must become a part of your firm's corporate culture to be successful. Some of the steps are pretty well known (a firewall, or anti-virus software, for example), but these steps will not be effective over time if they are not part of an overall security policy.

It is simply not possible to guarantee your network will never be compromised by an attack from outside or inside the network. The attack vectors are too numerous, and the security measures are always barely a step ahead of those who seek to defeat them. But if you cannot eliminate risk, you can mitigate it, and a well designed Security Policy will help to ensure that you are doing all you can, on a continuous basis, to protect your network.

The security policy will establish guidelines for various security settings that the network administrator will control, but it also defines certain behaviors for users on the network. No security policy will work unless every user on the network follows it, and it is perceived to have the blessing of the firm's top management. If the rank and file employees

see that the attorneys ignore the security policy, they will consider it unimportant and ignore it, too.

How to get started Before you can design or implement a security policy, you will need to establish a baseline, determining the level of security that is reasonable for your organization, and then determine what would have to be done to achieve (and keep) that level of security. Given the importance of network security, and the time, effort and expertise it takes to evaluate your network's security status, and then design and implement an appropriate security policy, it is wise to outsource some or all of this process. There are IT service firms that do this type of thing routinely and you will benefit from their experience.

Whether you handle this in-house, or outsource part or all of the process of implementing the security policy, keep these guidelines in mind:

- Make sure you have good documentation of your network infrastructure (up-to-date network diagrams) and logs of what maintenance work and improvements you do to it. You cannot hope to control network security if you don't have a handle on your network to begin with!
- Make sure your security policy is well documented, too, for several reasons:
  - You will want to be able to have proof the policy was implemented
  - You will want to be able to quickly inform new employees of your firm's policies
  - The documentation will make re-assessment of the policy easier – see the next item
- Make sure that a periodic re-assessment of the policy is part of the security policy. Things change so fast in the IT world – and in the legal profession as well – it is wise to rethink your strategy on a quarterly, or semi-annual basis.

It would be nice if you could just buy a magic cure for network security, but it is just not possible. Networks have become too complex, and there are too many exploitable points of entry. Dealing with network security is just the trade-off for the convenience of being able to access so much data from so many places. There is no turning back now – the digital information age is here to stay, so you owe it to your clients and your practice to ensure you are doing the right things to protect your data and be able to document what you're doing.

Finding the right help If your firm already outsources some or part of the support of your technology infrastructure, and you are happy with their services, ask them about designing, implementing and maintaining a security policy for your firm.

If you want to shop around, a web search for IT Security Consulting will yield plenty of results. Browse the results and create a list of IT Security firms that appeal to you and contact them.

Consider these criteria as you evaluate them:

- **How fast did they respond to your inquiry?** Response time is very important, and any company that does not respond very quickly to an opportunity to do business should be crossed off your list
- **Are they well established?** You do not want to enter into a relationship with a provider that is not going to last. Ask how long they have been in business and learn what you can about their management structure.
- **Do they seem organized and professional?**
- **Are they the right size for you?** IT Support companies vary wildly in size, from one-person operations to nationwide services. Select a company that you think will have the resources to meet your needs, but also be able to give you the attention you will need.
- **Do they have an existing security practice?** Ask for references and make sure to call them. Ideally, the company you select should already supporting law firms similar to yours.



- Ask peers in other law firms who they use for IT Support or IT Security, or check with people in your office who have worked for other law firms to see who they used, and how they liked them.

A little time spent choosing the right provider is a great investment – find a provider who will relieve you or your administrator of the burden of taking care of your IT Security.

The bottom line is, your firm's success is built on serving your clients' needs, because they rely on your expertise in matters of law. Your firm's IT infrastructure, and its data, are tools to help you do just that. Have them cared for, protected, and maintained by experts.

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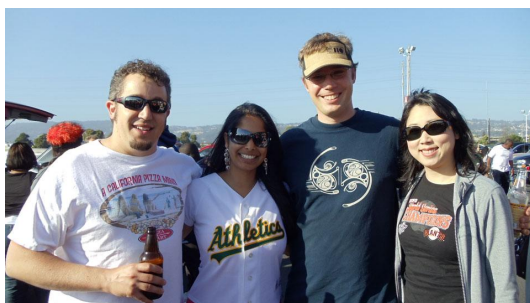
Bruce Campbell is the Vice President of Marketing for Clare Computer Solutions<sup>87</sup>, an IT Support and Consulting firm in Northern California.

## **Barristers have all the fun! [PHOTOS]**

Monday, August 1, 2011

This summer, the CCCBA Barristers & Young Lawyers mixed, mingled and tailgated with their peers from the Alameda County Bar Association. Here's the evidence:

Tailgate Party – SF Giants vs Oakland A's game, June 17, 2011




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<sup>87</sup><http://www.clarecomputer.com/>



See more photos on our Facebook page: Barristers' Night Out<sup>88</sup>  
Barristers and Law Student Mixer, July 14, 2011

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<sup>88</sup>[http://www.facebook.com/media/set/?set=a ↩  
.236870216344833.64178.156293777735811&1=309036f921&type=1](http://www.facebook.com/media/set/?set=a%20236870216344833.64178.156293777735811&1=309036f921&type=1)





# Contra Costa County Public Law Library: Open Letter to Our Friends & Colleagues

Monday, August 1, 2011

Dear members of the Contra Costa County Bar Association:

We are sending you this message to reacquaint you with the Contra Costa County Public Law Library System. We now serve you in three locations:

- **A. F. Bray Courts Building – First Floor<sup>89</sup>**

1020 Ward Street, Martinez, CA 94553  
(925) 646-2783

- **Richmond Courthouse – Second Floor<sup>90</sup>**

100 37th Street – Room 237, Richmond, CA 94805  
(510) 374-3019

- **Richard E. Arnason Justice Center<sup>91</sup>**

1000 Center Drive – Room 1045, Pittsburg, CA 94565  
(925) 252-2800

Contra Costa County Public Law Library is dedicated to providing legal information to the public, attorneys, paralegals, students, and court and government agency staff. The Law Library's motto is "**We are your source for legal information.**"

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<sup>89</sup><http://www.cccplib.org/location.htm>

<sup>90</sup><http://www.cccplib.org/location.htm>

<sup>91</sup><http://www.cccplib.org/location.htm>



Your county law library serves all members of the community equally, but we have a certain affinity for members of the Bar. Many of our materials are designed especially for your expert use. We are committed to providing the information and assistance you need to ensure access to justice for your clients. The law library is the place to obtain accurate, up-to-date legal information, along with assistance from trained and experienced information professionals. These services are basically free.

Our resources and services will save you time and money. Practically every area of law is represented either in the library's stacks, or on the library's computer system. All county, state and federal laws are easily referenced, and the collection includes both primary and secondary source materials. Patrons will also find legal treatises, periodicals and legal newspapers, a complete set of the Rutter Guides, and copious government documents. We also offer free use of online subscriptions including Westlaw, Lexis, Hein Online and Fastcase; and law librarians committed to assisting you with your legal research or law-related questions.

Our services include public access computers and printers, fax service, wireless access, photocopy equipment, and free parking.

Please take a moment to consider your legal research needs. We invite you to visit, and would love to hear your feedback on how we can continue to be *your source for legal information*.

Contact or visit the Contra Costa County Public Law Library (See contact information above) or visit us on the web at [cccpllib.org](http://cccpllib.org)<sup>92</sup>.

Sincerely,

Carey Rowan & Staff

## **“Crime after Crime” – Film Review**

Monday, August 1, 2011

“If only he had left me alone.” He didn’t and, as a result, it took 26 years, a dedicated team of pro bono attorneys, a documentary film team, a grassroots media campaign, not to mention the ‘Governator’, to free Deborah “Debbie” Peagler.

*He* was Debbie’s boyfriend who, after winning her heart, quickly became abusive and forced her into prostitution. Desperate to be left alone, Debbie asked for protection from two men – who ended up killing her abuser. Debbie was charged with first-degree murder and entered a guilty plea to avoid the possibility of the death penalty.

26 years later, “Crime after Crime” begins with a shot of Debbie Peagler at the Central Valley Women’s Prison in California – an ominous-looking institution from any angle. She looks serious, but surprisingly not hardened by her more than more than two decades behind bars.

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<sup>92</sup><http://www.cccpllib.org/>



Nadia Costa and Yoav Potash at a “Crime after Crime” screening sponsored by California Women Lead

The film picks up Debbie’s story just after California becomes the first state in the nation to pass a law that allows victims of abuse who are serving time in prison for killing their abusers a chance to have their cases reopened. Having learned about Debbie’s case from the California Habeas Project, Nadia Costa and Joshua Safran, two young lawyers from Walnut Creek, agreed to take on the case pro bono. The fact that Joshua and Nadia specialized in land use law did not hamper their determination.

What starts as a short-term pro bono project for 2 “baby lawyers” turns into a seven year struggle against the system of justice and, ultimately, time. The case becomes personal for Joshua and Nadia who each have their own reasons for sticking with the case. And stick with it they do.

Through inspired story-telling, Filmmaker Yoav Potash brings Debbie’s struggle to the big screen. With compassion and a brilliant



understanding of the facts, Potash weaves a story that compels viewers to care while challenging them to take action. The anguish is palpable as Potash shares the chilling statistic that “80% of the women in American prisons are survivors of some form of domestic violence, rape or abuse.”

While the film shines a glaring light on the injustice suffered by Debbie and countless other women, it is not without hope. The relentless efforts of Joshua and Nadia will not let the viewer give up on the system.

**Don't miss it – the film opens August 5<sup>th</sup>, 2011 at select Bay Area theaters:**

- **The Roxie**, San Francisco: [www.roxie.com](http://www.roxie.com); 415.863.1087
- **The Elmwood 3**, Berkeley: [www.rialtocinemas.com](http://www.rialtocinemas.com); 510.433.9730
- **The Rafael**, San Rafael: [www.cafilm.org/rfc](http://www.cafilm.org/rfc); 415.454.1222

For more information, visit [www.crimeaftercrime.com](http://www.crimeaftercrime.com)  
View the trailer:

# Who Says Lawyers Are Liable To Third Parties?

Monday, August 1, 2011



Carol Langford

Sometimes it's a good thing to become a trendsetter. However, being sued by someone you don't even know and then being held liable might not be a bandwagon you want to jump on. You know you owe duties to your client, but what about owing duties to people outside of the representation who are not even your clients? In the past, courts were hesitant to extend lawyer liability to third party non-clients. That mind set has changed over the years, subjecting more and more lawyers to liability.

Third party liability is not a new concept. From products liability cases involving automobile tires to tainted food, liability to the public can exist if someone makes a poor product and a consumer is injured. Where everything is being commoditized, an attorney's work is now treated the same. One of the first cases to discuss this was *Biakanja v.*

*Irving*<sup>93</sup> 49 Cal. 647 (1958). There, a notary public got into trouble when he failed to properly attest a will resulting in a heir receiving only a small fraction of property that should have went entirely to him. The court stated early on that third parties could sue an attorney (or non-attorney in this case) when the transaction was intended to affect the plaintiff, even when no privity exists, depending on public policy concerns and other factors. The court's decision in *Biakanja* was focused on correcting a moral wrong (the unlawful practice of law), but the standard was used later to hold lawyers liable for instruments that are improperly drafted in *Roberts v. Ball*<sup>94</sup> 57 Cal. App. 3d 104, 110 (1976). There, the court stated "an attorney may be liable for damage caused by his negligence to a person intended to be benefited by his performance, irrespective of any lack of privity of contract between the attorney and the party to be benefited by his performance..."

With any type of practice, lawyers must remember to be very careful about what they say and how it is said. With documents being digitalized and distributed to millions of people via the internet within a matter of seconds, you never know when someone other than your client will rely on your work. If your work wasn't up to par, you could be sued.

The drafting of documents is a particularly problematic area. This is especially true with documents used in security offerings and in wills & trust matters. For example, in *FDIC v. O'Melveny & Myers*<sup>95</sup>, 969 F.2d 744 (1992) (reversed on other grounds), the court held that the lawyers who represented a bank had a duty to conduct a reasonable investigation to prevent misleading information from being put in their offering materials, because they knew the materials were going to be distributed as disclosure documents to public investors. Since the law firm breached their duty, the court held that the FDIC, who took receivership of the bank, had standing to bring a suit based on third party liability.

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<sup>93</sup><http://scocal.stanford.edu/opinion/biakanja-v-irving-29757>

<sup>94</sup>[http://scholar.google.com/scholar\\_case?case=2582848067743352815&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=2582848067743352815&hl=en&as_sdt=2&as_vis=1&oi=scholar)

<sup>95</sup><http://www.law.cornell.edu/supct/html/93-489.ZO.html>

The rationale for *O'Melveny* was later explained in *Loyd v. Webber*<sup>96</sup> 208 F.3d 755 (2000) where the court said that lawyers have a duty to conduct a reasonable investigation in security offerings because security offerings are a highly specialized field. Those documents by their very nature are technical and relied on by investors. But when the bankruptcy trustee in *Loyd* tried to argue lawyers have an automatic duty to make a reasonable investigation of their clients in bankruptcy cases the court disagreed. They stated that *O'Melveny* was dependent on the fact that a law firm was hired to produce documents which contained inadequate disclosures to the public about, inter alia, the financial soundness of their client.

These two cases tell me that lawyers who work in highly technical fields where the public relies on the attorney's work will be held liable because the public depends on the lawyer to make sure the documents are factually and legally correct before they hand over their money.

There have been similar rulings for wills & trust practitioners as well. In *Goodman v. Kennedy*<sup>97</sup> 18 Cal 3d 335, 342 (1976) the court found that an attorney may be liable to the intended beneficiaries of a deceased testator for the amount the intended beneficiary would have received from the testator's estate if the attorney had exercised due care in drafting the will in accordance with the testator's expressed wishes. However, wills & trust practitioners are not subject to infinite liability, as pointed out in *Lucas v. Hamm*<sup>98</sup> 56 Cal. 2d 583 (1961). This is particularly true when their advice is reasonable and on a questionable area of the law. The court in *Lucas* said "the attorney is not liable for every mistake he may make in his practice... or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertain[ed] by well-informed lawyers."

With any type of practice, lawyers must remember to be very careful about what they say and how it is said. With documents being digitalized and distributed to millions of people via the internet

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<sup>96</sup>[http://scholar.google.com/scholar\\_case?case=8227547843877098251&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=8227547843877098251&hl=en&as_sdt=2&as_vis=1&oi=scholar)

<sup>97</sup><http://scocal.stanford.edu/opinion/goodman-v-kennedy-27943>

<sup>98</sup><http://scocal.stanford.edu/opinion/lucas-v-hamm-29819>

within a matter of seconds, you never know when someone other than your client will rely on your work. If your work wasn't up to par, you could be sued.

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**Carol M. Langford** is an attorney in Walnut Creek specializing in ethics, attorney conduct and admissions matters. She is also an adjunct professor of professional responsibility at the University of California Berkeley, Boalt Hall School of Law.

## Bar Soap: August 2011

Monday, August 1, 2011



Bar Soap – a column by Matt Guichard

Feeling a bit confused and confounded with this new column? So, let's see: It's a bit gossip, some facts about people on the move, some jury verdicts, some court verdicts, some interesting settlements and perhaps some not so interesting comments from me. Do I have that right? And when I have enough jury verdict reports, I will get one of those columns to you.



Not sure if you saw the mention in our local newspaper of two local Bar Association members; **Nadia Costa** and **Joshua Safran**. Though the Habeas Project, they took on representation of a wrongfully incarcerated women. Their work, documented in the film “Crime After Crime”, was presented at the San Francisco International Film Festival.



Happy to see another one of our own, **Mark Ericsson** was named a Super Lawyer. For those of you who have been nominated as a Super Lawyer in your field, please let me know. It is a very nice honor and I am always happy to mention it. Congratulations, Mark! And now that we mentioned Mark and his firm Youngman & Ericsson, **Chastity A. Schults** has become a partner at that firm. Congratulations, Chastity!



Speaking of people on the move, **Hallert & Hallert** have relocated to 1331 North California Boulevard, Suite 200, in Walnut Creek. Lots of moves in the works. Wonder if it has anything to do with the commercial real estate market?

Steve Hallert reported that, during the move, he discovered some old fee schedules for filings in both Alameda County and Contra Costa County Courts. I plan to look at them and write about them in my next column. Sounds like the equivalent of 25 cent gas and 15 cents for a loaf of bread. The schedules are at the Bar Association – Ask to see them the next time you are there for a visit.



News of those striking out on their own include **Dirk Manoukian**. Dirk started his own shop and will be practicing out of the same space he has been in for some time. **Pamela Marraccini** has started her own practice. She has moved into the same space occupied by some other guy named Marraccini. **Craig Nevin** has opened the Law Office of Craig S. Nevin. He too has relocated to 1331 N. California Boulevard, Suite 200, in Walnut Creek. **William Diffenderfer** has relocated his practice to 2415 San Ramon Valley Boulevard, Suite 4337, in San Ramon.



**Paul Mulligan**, a senior inspector in the District Attorney's Office and a licensed California Lawyer has been named Chief of Inspectors in the Contra Costa District Attorney's Office. Now we just have to get him to join our local Bar Association. Speaking of the District Attorney's Office, Lisa Reep, Erika Portillo and I recently made a presentation at Mark Peterson's invitation to the attorneys in that office to join the organization. I have heard there have been a number of applications.



Although we are on our summer break from the **Robert G. McGrath American Inn of Court**, the new membership year starts in September. Get those applications in to the Inn. Again, several members of the District Attorney's Office have requested applications. The DA's office is, after all, the largest group of lawyers in our County, and we need to get Deputy District Attorneys into all our local legal organizations.



**Jay Chafetz** reported he obtained a verdict in a Contra Costa County Superior Court (Yea, a local verdict actually reported to me!). *Pryor vs. Saadzoi*, Case No C10-00387, was heard before the Honorable Judith Craddick in Department 9. Jay represented the Plaintiff and Christopher Patton of Oakland represented the Defendant. The matter involved a motor vehicle accident. Negligence was admitted. Causation and damages were contested as the Plaintiff waited three and a half months before seeking treatment, and he then went for extensive chiropractic treatment and some pain management. The last defense offer was \$2500. Plaintiff served a CCP 998 offer to settle in the amount of \$35,000. The verdict was \$40,000.

**Joe Morrill** of Danville reported on his verdict in Contra Costa Court. The case was entitled “In the Matter of The Lawton Trust, dated August 25, 1989.” The Honorable Joyce Cram presided. Case no. MSP09-00397. Plaintiff’s attorney was William Salzwedel of Thousand Oaks. Defense attorneys were Joseph Morrill, and Thomas R. Hayes of Monterey Park.



The matter was filed in Los Angeles County, but transferred by motion to Contra Costa County. In a nutshell the case involved the attempt by a daughter to invalidate an amendment to her mother’s trust which disinherited the daughter on the grounds of undue influence and fraud/deceit. Respondents contended the mother had the requisite testamentary capacity at all relevant times, the 2006 amendment was not the product of undue influence, and the respondent did not breach any duties owed.

After the evidence was submitted, the Court found the daughter failed to meet her burden of proof on any of her claims against the respondents. Respondents were awarded costs.





Speaking of failing to meet a burden; please give the editors of the Contra Costa Lawyer a break. The “Coffee Talk” topics are meant to be provocative and to elicit responses on all sides of an issue. Am I in trouble for that comment?

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— **Matthew P. Guichard** is a principal in Guichard, Teng & Portello, APC<sup>99</sup>. Please send case information to: 1800 Sutter Street, Suite 730, Concord, CA 94520 or contact him at 925.459.8440 or [mguichard@gtplawyers.com](mailto:mguichard@gtplawyers.com)<sup>100</sup>

## **What’s the most memorable new/ social media or email blunder you’ve experienced? (except Wiener-Gate)**

Monday, August 1, 2011

I was using Dragon, the voice recognition software to dictate an e-mail to a client. I will often sign informal e-mails with just an “S” for Steve, rather than a full and formal signature. You can imagine my horror when I dictated the initial ‘S’, hit send and watched my e-mail get dispatched with the word ASS on the signature line.

*Stephen Gizzi, Esq.*

*Managing Partner, Gizzi & Reep, LLP*

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As many people know, I have an unusual email address: [attorney@mac.com](mailto:attorney@mac.com)<sup>101</sup>. Because I have had that address since the day Jobs announced .mac email addresses, I have gotten some interesting

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<sup>99</sup><http://www.gtplawyers.com/>

<sup>100</sup><mailto:mguichard@gtplawyers.com>

<sup>101</sup><mailto:attorney@mac.com>

emails. The most memorable was from a senior Apple Executive who was in the process of leaving the company. They person had not yet left but rumors were flying on the internet that they were being terminated. I received a lengthy email from the person who sent it to me rather than their counsel. I started to read and realized it was the person negotiating strategy for a buyout from Apple for waiving their alleged grievances. I immediately emailed the person to tell them that they had sent the email to the wrong person. Within minutes I had a phone call from a very senior partner at a very large law firm panicked that I was an attorney representing Apple and that their entire case had just been accidentally disclosed. I assured him that I was not legal counsel for Apple nor had I ever been and that once I realized what I received, I had sent the reply to his client and deleted the email. Needless to say, he was very relieved.

*David S. Pearson*

*Law Offices of David S. Pearson*

## **August Classifieds**

Monday, August 1, 2011

Lafayette Private Office Suite Available! Creekside setting. Located in large law office complex. Suite is 2 large offices, storage room, separate bath (jogging trail close by) and separate kitchen. Package is \$2,000 per month. Amenities include: Access conference room, law library, free parking, copy machine, etc.

Located at 3445 Golden Gate Way. Please call Janelle at (925) 283-6816 for more details or to view.

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Probate Paralegal to Attorneys Joanne C. McCarthy. 2204 Concord Blvd. Concord, CA 94520. Call 925.689.9244.

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Conference Rooms for Rent Conference rooms for rent at the Contra Costa County Bar Association:

- Standard Conference Room, with small adjacent waiting area and exit, seats 10-12: \$150/ full day, \$75/ half day
- Full Mobile Room seats 20-30: \$200/ full day, \$100/ half day
- Subdivided Mobile Room seats 10: \$75/ full day, \$40/ half day
- Package Deal – Both Rooms: \$250/ full day, \$150/ half day
- Hourly Rate \$20

For more information, call Theresa Hurley at 925.370.2548









