

# CONTRA COSTA LAWYER

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## All "Atwitter" with the Internet Juror: New Legislation Addresses the Wired Public

The Internet's instantaneous availability of information poses a direct threat to the integrity of the judicial process, and presents a king-sized bear trap to lawyers in voir dire. This article addresses the resources available for juror



### Inside



#### Inside: Editor's Column

Wow. I cannot believe it is December already. It seems like just yesterday that we were launching our new magazine format- a hybrid online/print publication with 6 print issues and 12 online editions. This year has been full of changes for the Contra Costa

### Spotlight



#### Realignment: What Is It, and Why Do I Care?

You may have heard politicians, newscasters, and government honchos talk about "realignment" and wondered what they are taking about. It sounds like something your chiropractor would do. This is different; it is much

# Contra Costa Lawyer Online

December 2011

Social Media



# Contra Costa Lawyer Online

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<http://cclawyer.cccba.org/>

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## Inside: Editor's Column

Thursday, December 1, 2011



Nicole Mills

Wow. I cannot believe it is December already. It seems like just yesterday that we were launching our new magazine format- a hybrid online/print publication with 6 print issues and 12 online editions. This year has been full of changes for the Contra Costa Lawyer and I hope that you are enjoying the new and improved magazine. Brining the Contra Costa Lawyer fully into the Technology Age has been both exciting and challenging and it has been a privilege to do so. On behalf of the whole Editorial Board, we are very proud of the online format, the improved print issues and the overall content of the magazine.

We thought that a fitting way to wrap up a year in which we, at the Contra Costa Lawyer, embraced technology and moved our content online would be to explore the legal issues raised by that same technology- in particular the implications of our expanding use of social media. The internet is

changing the way we live our lives – and not just during work hours. It has revolutionized the way people communicate with each other.

Facebook, in particular, has opened up the daily details of our lives to anyone we have “friended”- and in the process, it has changed the meaning of the word “friend.” A “friend” used to be someone you trusted and knew well. Online, however, a “friend” could be just about anyone- someone you met at a professional conference, someone whose children attend the same school as yours or someone you just met and barely know. Unless you have tightly controlled privacy settings, everything you post online is seen by people you know well and people you barely know- and sometimes by people you don’t know at all. As we continue to broadcast everything about ourselves, our sense of what is “private” is changing. Will this change our legal “expectation of privacy”? We put the question to you this month – click on “Coffee Talk<sup>1</sup>” to find out what people had to say!

When using social media, lawyers need to take special care not to run afoul of their ethical obligations. In her MCLE Self-Study article<sup>2</sup>, Carol Langford explores some of the ethical implications for lawyers when using Facebook, LinkedIn and Twitter. What can you do? What can’t you do? What should you NEVER do! A lot of it comes down to common sense and remember always to “Think before you Tweet!”

Karen Fleming-Ginn, Ph. D. takes a closer look at the “Internet Juror”<sup>3</sup> and the ways that social media is changing our judicial system. Specifically, how jurors’ use of social media- tweeting during trial, googling the parties, using the internet to research issues pertinent to the case- is changing the way our judicial system is working.

In her article “Discovery of Social Media – the Treasure Hunt”<sup>4</sup>, Audrey Gee evaluates social media as a discovery tool, while Myra Santos looks at the amount of personal information that we leave behind<sup>5</sup>, sometimes willingly via Facebook and sometimes not so willingly via files we thought were deleted. She also explores how we, as legal professionals, can find

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<sup>1</sup><http://cclawyer.cccba.org/?p=2842>

<sup>2</sup><http://cclawyer.cccba.org/?p=2889>

<sup>3</sup><http://cclawyer.cccba.org/?p=2998%20>

<sup>4</sup><http://cclawyer.cccba.org/?p=2970>

<sup>5</sup><http://cclawyer.cccba.org/?p=2954%20>



that information and utilize it for our clients (or how it can be utilized against our clients).

The Internet and social media particularly, provides a myriad of opportunities for marketing – and a host of possible pitfalls as well. Richard Korb explores these in his article, “Legal Issues When Marketing Your Business on the Internet”<sup>6</sup> while Rocky Laber offers blogging strategies for lawyers<sup>7</sup>. Finally, we are also featuring an article by SEO-guru Ken Matejka who offers tips on how to improve search engine rankings<sup>8</sup>, tailored to solos and small law firms.

We hope you enjoy this issue of the Contra Costa Lawyer and, on behalf of the Editorial Board, Happy Holidays!

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<sup>6</sup><http://cclawyer.cccba.org/?p=2940>

<sup>7</sup><http://cclawyer.cccba.org/?p=2962>

<sup>8</sup><http://cclawyer.cccba.org/?p=2946>

# All “Atwitter” with the Internet Juror: New Legislation Addresses the Wired Public

Thursday, December 1, 2011



Karen Fleming-Ginn, Ph. D.

The Internet’s instantaneous availability of information poses a direct threat to the integrity of the judicial process, and presents a king-sized bear trap to lawyers in voir dire. This article addresses the resources available for juror investigation, the pitfalls of employing social media in trial, and new legislation designed to dissuade jurors from Googling during trial.

## **Instantaneous Investigation of Jurors on the Internet**

Numerous websites provide lawyers with investigative tools to find out where jurors live, their likely income and employment, political leanings, even hobbies and buying practices.

## **Free Research Tools**

The site PIPL.com<sup>9</sup> provides a compilation of both free and pay-for-service information concerning just about anyone. It includes residential address and telephone information, Facebook<sup>10</sup> and LinkedIn<sup>11</sup> pages, possible photographs, even Amazon purchase preferences. It is a very powerful tool, and a gateway to other reference services.

LinkedIn provides a broad database of employment and employment history, as well as potential connections and relations. Typically, a LinkedIn profile provides only a small glimpse, with additional information only being available if the person agrees to be “linked” to you.

Once you have a street address, Zillow.com<sup>12</sup> can provide you with insight as to the prevailing real estate prices in the neighborhood. This can establish a fairly good indicator of the likely income range of the person who lives in a particular neighborhood.

If anyone has made a contribution to a political campaign, information concerning the donor’s occupation and likely political leanings are available on numerous websites, such as OpenSecrets.org<sup>13</sup> and MapLight.org<sup>14</sup>. You can also find out the party affiliation and voter eligibility status through the County Elections Division if you have a birth date and an address of a person.

For likely estimates of salaries for a particular profession, Glassdoor.com<sup>15</sup> provides salaries posted anonymously by employees.

### **Paid Research Tools**

There are numerous paid research tools available on the Internet. Two prominent services are Accurint.com<sup>16</sup> and Merldata.com<sup>17</sup>. Both services provide a fairly reliable means of identifying addresses and telephone numbers. In addition, professional and other types of licenses are available. In general, these pay sites provide more targeted information that

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<sup>9</sup><http://pipl.com/>

<sup>10</sup><http://www.facebook.com>

<sup>11</sup><http://www.linkedin.com>

<sup>12</sup><http://www.zillow.com/>

<sup>13</sup><http://www.opensecrets.org/>

<sup>14</sup><http://maplight.org/>

<sup>15</sup><http://www.glassdoor.com/index.htm>

<sup>16</sup><http://www accurint.com/>

<sup>17</sup><http://www.merldata.com/>

can provide a good starting point for other research. There are also sites such as KnowX.com and ZabaSearch.com which can quickly find public records at little or no cost. A combination of all of these sites can typically garner a lot of information about a person easily, whether accurate, helpful, or not.

### **The Impact of Social Media on Trials**

Most people under the age of 40 have embraced social media as a means to broadcast information to friends and total strangers about the minute and intimate details of their lives. Social media tends to be very fickle and dynamic in terms of its usefulness. For example, MySpace.com<sup>18</sup> used to be very popular and is now all but useless. Facebook<sup>19</sup> is becoming less of a useful tool because of the privacy restrictions that most users employ to limit access, but there is always the occasional Facebook user who keeps quite a bit of information public. Twitter is very trendy, but appears to appeal to a fairly narrow segment of the population. By the way, to learn someone's twitter account, websites like Listorious.com<sup>20</sup> and WeFollow.com<sup>21</sup> provide immediate links to those who have registered.

As a jury consultant, the availability of information about prospective jurors from social networking sites initially seemed like it would greatly simplify the task of rooting out the potential prejudices of prospective jurors. However, applying these tools to the voir dire process has proved to be a challenge.

A significant limitation on the information that is publicly available is one of reliability. It is not uncommon for people to have an Internet persona that does not reflect real life. Anyone who has spent time on Match.com<sup>22</sup> or similar Internet dating sites can attest to how different people are from how they present themselves. Another thorny issue is whether to actually use information gleaned from the Internet in the questioning of jurors.

As with any new technology or opportunity, there is a limit that is not yet clearly defined, in terms of how far we can go to delve into the lives of

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<sup>18</sup><http://www.myspace.com/>

<sup>19</sup><http://www.facebook.com/>

<sup>20</sup><http://listorious.com/>

<sup>21</sup><http://wefollow.com/>

<sup>22</sup><http://www.Match.com>

prospective jurors. Some judges find it distasteful to do internet research on panelists. This predilection will likely be discussed as part of judges' initial script...but so far, it is not in the norm. If jurors make it known that they only want their posts viewed by registered users, then that should be considered private and off-limits. Don't communicate in any way with prospective jurors, either anonymously or using your screen name. Remain keenly aware that the public persona jurors put forth may be quite different than their actual personalities. The details about music preferences, political leanings, spare-time activities can be interesting but are not a substitute for views, attitudes, beliefs, biases and prejudices. It can be very seductive to attempt to create a profile of a person based on this external data, but before eloping with speculation, use this information as interesting background material and cement the assumptions with follow-up questions in court. Prospective jurors can become uncomfortable if they feel they have been researched outside of the confines of a questionnaire, so carefully couch questions so they are not alerted to the fact that you read through all of their Facebook and Twitter posts.

Social media can also have an impact upon a trial as it progresses, particularly one that has had pre-trial publicity. In high profile trials, a daily analysis of social media sites and blogs can provide a strong dose of public opinion, but its value can be difficult to assess. Depending on the public's sources of information, social media sites can provide similar feedback to what a shadow jury can provide. Regardless of the veracity of people's reactions, it is important to take the pulse of people who are at least paying attention to the trial. This type of information can help identify holes in a particular case, or assess the need to change course.

The internet can be invaluable in learning about not only jurors, but witnesses alike. M. E. Greenberg, President of Greenberg & Associates Investigative Services in Sacramento said, "Basically, I always use Facebook.com and Ancestry.com on all my cases. If the client is under 40, I can glean reams of contacts and witness history, from looking at both the client's account as well as their cohorts. I use Ancestry.com to trace relatives. Many of my clients in death penalty trials do not know their relatives and use this new information to look for their Facebook accounts."

Some people prefer to have a very limited or non-existent online presence. One expert witness, Psychologist Dr. Gretchen White, said, "The

last thing I want is to be cross-examined on the witness stand about my personal or professional life from LinkedIn.com or Facebook.” This is understandable and important to think about as an expert or a lawyer deciding whether to have someone testify at trial. Lawyers, as well, should consider their online profile as being readily accessible by jurors and opposing counsel in the course of a trial.

### **New Legislation Curtailing Jurors’ Use of Internet During Trial**

On August 5<sup>th</sup>, 2011, Governor Brown signed California Assembly Bill 141 into law. AB 141 solidifies rules prohibiting the use of social media, search engines and electronic devices by prospective jurors to discuss or conduct internet research on cases or parties. The new bill, which will become effective January, 2012, forbids jurors from using electronic or wireless devices to contact court officials. Current laws require the Court to admonish jurors about discussing the case. The new bill:

[W]ould require the court, when admonishing the jury against conversation, research, or dissemination of information pursuant to these provisions, to clearly explain, as part of the admonishment, that the prohibition applies to all forms of electronic and wireless communication. The bill would require the officer in charge of a jury to prevent any form of electronic or wireless communication.

Jurors who disobey the new bill will be placed in contempt of court.

The new Assembly Bill is a good start, but it will be most interesting to see if jury verdicts are overturned by internet communications that peripherally or directly relate to seated jurors during the time of jury service.

### **Judicial Solutions to Juror Googling**

Many judges have taken up their own approaches to the problem of juror “Googling.” Many judges take the initiative of admonishing jurors that while seated as a juror, ANY type of outside research is juror misconduct and will not replace or augment evidence presented in the courtroom. Inquiry during voir dire of a juror’s use of the Internet may soon become a required part of any questioning.

Some judges are having jurors provide a written commitment not to use the Internet during trial. I recently selected a jury in Alameda County and we

had a 2-page questionnaire. On the top of the first page, underneath the lines for name and city of residence, I stuck in a question similar to the verbal admonishment typically given by the judge stating that jurors would not be able to use Google, Twitter, Facebook, MySpace or any other social media. Then, they were asked whether they would be able to abide by that admonishment with boxes provided to check “Yes” or “No”. A total of 6 jurors out of 60 checked the box that they would not be able to abide by that – four of which were later excused for cause based solely on that issue and how they responded to the Court. Our trial team was lucky in that case. Three out of the four jurors excused were unlikely to be favorable for our case, saving us from losing any of our precious preemptory challenges on them.

This kind of written admonishment can take several forms. Even if a questionnaire is not used, jurors can be asked to refrain from any type of extracurricular research and then sign a piece of paper under penalty of perjury. Judge Shira Scheindlin of the District Court in Manhattan used the following pledge to get jurors to promise in writing that they will not conduct any internet research:

#### JUROR PLEDGE

I agree to follow all of the Court’s preliminary instructions, including the Court’s specific instructions relating to Internet use and communications with others about the case. I agree that during the duration of this trial, I will not conduct any research into any of the issues or parties involved in this trial. I will not communicate with anyone about the issues or parties in this trial, and I will not permit anyone to communicate with me. I further agree that I will report any violations of the Court’s instructions immediately.

Signed under penalty of perjury.

Signature:\_\_\_\_\_

I have found that it is helpful if the Court explains why such an admonishment is necessary. When jurors understand that what is available on the information superhighway is often not true or accurate, or there are legal reasons why some information is allowed as evidence and some is not, it can ease jurors’ temptations to sleuth. Also, the Court can try to get the

jurors to appreciate that if they were a party in a lawsuit that was going to a jury, they would not want jurors to find their “evidence” on the Internet.

### **Concluding Thoughts**

Internet resources provide a competitive advantage for those litigating against large, well- funded opponents. It is no longer necessary to expend thousands of dollars to investigate basic juror backgrounds, but lawyers need to treat the information obtained with great care, lest a juror become hostile from discovering his or her private lives have been uncovered.

Those savings have also come at the cost of making information about all trial participants available to even casual web surfers. Lawyers should consider whether the Internet reputation of a particular witness may affect the credibility attached to that witness.

The true challenge presented by the Internet is educating jurors concerning the unfairness of having jurors obtain information outside of a trial that may be of questionable validity. Legislative and judicially crafted remedies are unlikely to result in jurors taking a hiatus from their iPads during the course of a trial. Trial lawyers should work with the Courts to get the message across that our system of justice can work only when evidence considered by a jury is limited to the facts presented in the courtroom, and not the chat-room.

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## **Discovery of Social Media – The Treasure Hunt**

Thursday, December 1, 2011

Facebook lists 800 million active users who visited the site in the last month, according to its “About” page. Rumor has it that Twitter has somewhere in the neighborhood of 200 million registered users or 230 million tweets



per day<sup>23</sup>. Think of it. A veritable treasure trove for discovery: Photos of a personal injury plaintiff salsa dancing a week after the car accident. An unavailable witness tweeting that he is in town. A supposedly bankrupt defendant posting details about his newly purchased boat. Facebook, Twitter, MySpace, LinkedIn, Habbo, Orkut, Badoo, Qzone – the list of social media sites are rich with possible impeachment evidence.



Photo of Paris Hilton at time of arrest with purse that contained cocaine

While a criminal case, the incident with Paris Hilton booked on cocaine charges is a good example of impeachment evidence. The police pulled Paris over and found cocaine in her purse. Paris denied the purse was hers<sup>24</sup>, but was undone by her prior Tweet when she bought the purse<sup>25</sup>.

If the witness is not a celebrity on TMZ<sup>26</sup> (and you can pull information straight off the internet), the most direct way to obtain social media information is to ask witnesses to provide it to you. Document requests may

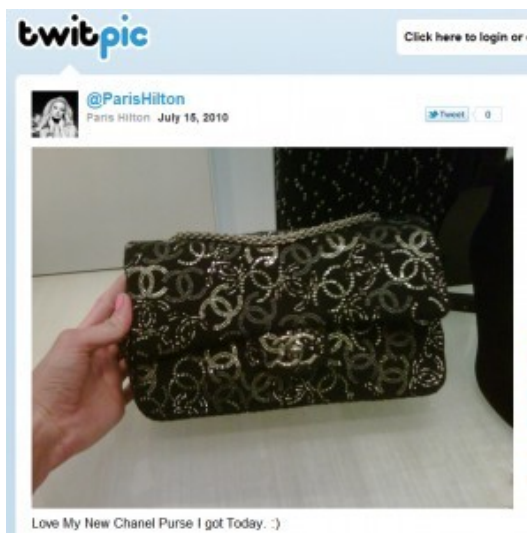
<sup>23</sup>[http://www.huffingtonpost.com/2011/09/08/twitter-stats\\_n\\_954121.html](http://www.huffingtonpost.com/2011/09/08/twitter-stats_n_954121.html) ↩

<sup>24</sup><http://gawker.com/5628938/does-paris-hiltons-twitter-prove-the-cocaine-filled-purse-was-hers> ↩

<sup>25</sup><http://twitpic.com/25lgvr>

<sup>26</sup>[http://photos.tmz.com/galleries/paris\\_arrest\\_photos#id=77473&tab=most\\_recent](http://photos.tmz.com/galleries/paris_arrest_photos#id=77473&tab=most_recent) ↩

contain demands for downloads of photos and posts on social media pages and webmail, while special interrogatories may ask for identification of witnesses' social media sites, user names and passwords, and access to social media accounts.



Paris' earlier Tweet – "Love My New Chanel Purse I got Today" – raised credibility issues about her later denial when she told the police officer that the purse belonged to her friend, not her.

Social media users, however, do not have access to native format and can only produce a screen shot or a print-out of the requested information. Also, witnesses may sanitize their social media pages and delete all incriminating photos or other useful evidence once they know litigation is afoot. In these situations, you may be tempted to obtain the information directly from Facebook or other social media sites, to shortcut the process and also head off any tampering allegations.

## **Roadblocks**

### **The Federal Stored Communications Act**

Before you subpoena Facebook or other social media sites, you should keep in mind the Federal Stored Communications Act, often referred to as the “SCA,” which generally prohibits a person or entity providing an “electronic communication service” to the public from “knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service.” It further prohibits a person or entity providing “remote computing service” to the public “from knowingly divulg[ing] to any person or entity the contents of any communication which is carried or maintained on that service.” 18 U. S. C. 2702(a)(2). Disclosure in violation of the SCA can expose the record holder to civil liability. *Theofel v. Farey-Jones*<sup>27</sup>, 359 F.3d 1066 (9<sup>th</sup> Cir. 2004). The SCA applies to private information, i.e., information that is not readily accessible by the public. The SCA has several exceptions, most notably, that it does not apply to criminal or administrative subpoenas. 18 USC 2703(b)(2) & 2703.

In practical terms, this means that subpoenas to Facebook and their ilk may possibly be quashed. Take the case of *Crispin v. Audignier*, 717 F. Supp. 2d 965 (C. D. Cal. 2010) where the Court partially quashed subpoenas issued to Facebook, MySpace and other social media sites. There, Mr. Crispin sued Audignier, a clothing maker, alleging copyright infringement for use of his artistic works that went beyond the granted oral license. Defendants subpoenaed Facebook (and other social media sites) seeking communications and wall posts from Mr. Crispin concerning his art. Plaintiff moved to quash the subpoenas under the SCA. The magistrate judge rejected motion to quash reasoning that Facebook and MySpace were not electronic communications services because the websites’ messaging services are used solely for public display and did not meet the SCA definition. The U. S. District Court disagreed and noted that the SCA applied since the social media sites qualified as both Electronic Communication Services for their message delivery services and also as Remote Computing Services because they offered message storage services.

The Court found the communications at issue, both the webmail and email, were inherently private because they were not readily accessible to the public and quashed the subpoenas for those messages. The Court required a new evidentiary hearing to determine the privacy settings on Facebook and

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<sup>27</sup><http://caselaw.findlaw.com/us-9th-circuit/1419886.html>

MySpace accounts and made no finding about the general discoverability of the public wall posting and comments.

Other cases have permitted subpoenas to social media sites, despite the SCA. In *Ledbetter v WalMart Stores Inc.*, the Colorado District Court denied the plaintiffs' motion for a protective order for their Facebook, MySpace and Meetup.com pages. Plaintiffs sought damages for personal injuries when the electrical system they were working on shorted out. One of the plaintiffs' wives brought a claim for loss of consortium. The court determined that the plaintiffs had placed their personal physical and mental states at issue and permitted the subpoenas. 2009 Dist. LEXIS 126859 at 4-5 (D. Colo. Apr. 21, 2009).

### **Right to Privacy**

In addition to the SCA, privacy concerns may also be the source of objections, but whether they survive is an undecided question in California. Other states' cases offer their own line of reasoning on privacy issues, which may or may not be in line with California's Constitutional right of privacy. Cal. Const. Art. 1, § 1.

In *Romano v Steele*, 907 N. Y. S2d 650 (2010) a New York trial court held that the private portions of a personal injury plaintiffs' Facebook and MySpace pages were discoverable. The court reasoned that neither Facebook nor MySpace policies guaranteed complete privacy, therefore there could be no legitimate reasonable expectation of privacy in the private portions of current and historical pages of those websites. There, the Court found that the public portions of the plaintiff's social media sites contained material that was contrary to her claims and deposition testimony and that there was a reasonable likelihood that the private portions of her sites might contain evidence that the plaintiff traveled and was happy (when plaintiff had claimed she was housebound and miserable). The Court ordered the plaintiff to give defendant direct access to log in and view her Facebook and MySpace accounts and have access to all records, including archived and deleted records.

Similarly, the Pennsylvania case of *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist.& Cnty. Dec. LEXIS 270 (Pa. County Ct. Sept. 9, 2010), involved a broad discovery statute which provided that unless there is a specific privilege that applied to withhold discovery, information must

be produced. The defendant had heard that the personal injury plaintiff had been on a fishing trip and to prove that the injuries were not as serious as the plaintiff as making them out to be, defendant moved to compel plaintiff's user name, log-in names, and passwords. The plaintiff asked the Court to recognize that communications shared among one's private friends on a social network was confidential and protected from disclosure. The Court reviewed the Facebook privacy policies, which said that your posts may show up on your friends' posts, and warned users that you may be then at the whim of your friends' privacy settings. The Court found no privacy interest in a Facebook password and no corresponding Facebook privilege. The Court directed plaintiff to not delete his posts or alter existing information on this Facebook or MySpace account.

There may be no significant difference between discovery of social media and discovery of other electronically stored information. In *EEOC v. Simply Storage Management* 2010 WL 3446105 (S. D. Ind. May 11, 2010), the defendant asked for photos, videos, postings and profiles from two sex harassment claimants' Facebook and MySpace accounts to discount their mental health damages. The EEOC objected to the request as harassing and embarrassing and that it improperly infringed on claimants' privacy. Defendant moved to compel. The court explained that discovery of social media simply "requires the application of basic discovery principals in a novel context." The Court rejected claimants' privacy arguments, stating that "a person's expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery."

California has not directly addressed the privacy in social media issue in a discovery context, but the California Court of Appeal has opined that there can be no reasonable expectation of privacy in a public MySpace post. In *Moreno v. Hanford Sentinel, Inc.*, 9 C. D. O. S. 4208 (2009) a college student from a small town wrote an unflattering ode in her MySpace journal. She later removed the post, but it had already been republished in the local newspaper. The community reaction was negative, forcing the student's family to move and close the family business. In shutting down the invasion of privacy claim, the Court determined that "no reasonable person would have an expectation of privacy regarding published material" on MySpace, as it was a "hugely popular" social networking site and her potential audience was large.

## Authentication and Credibility



Apple allegedly doctored another photo to try to make Samsung look guilty of design patent infringement.

The evidence gained from social media is still subject to all the standard tools to test the authentication, admissibility, and credibility of the evidence. Recently, Ashton Kutcher, the veritable king of Twitter, admitted that he did not personally answer or post all of his Tweets. A wall post may not truly reflect the reality of what happened that day. Photos of tagged witnesses may have been photoshopped or altered.

In a patent infringement case, Apple sued Samsung for allegedly copying the iPhone. Samsung shot back and alleged Apple submitted a photo-shopped image of a Samsung Galaxy S to support its preliminary injunction. The photo in question contains side-by-side comparison of the Galaxy and an iPhone 3G in which the smartphones appear the same size, despite the Galaxy's larger size.

### Tools for Preservation and Disclosure

What is the best way to preserve social media during discovery? There are services such as Iterasi and Smarsh which offer to capture, preserve and archive email and webpages from social media sites. The old fashioned way of printing off hard copies or saving to Adobe Acrobat static frozen images works as well.

Another discovery tool is to request that the opposing party complete and sign a form that authorizes Facebook to disclose information from the party's own pages.

## **Social Media as Part of Your Discovery Plan**

Social media sites can give you a personal, fascinating and informative glimpse into witnesses' lives and their ways of thinking. These sites are rich with information to be discovered and investigated, keeping in mind the limitations and roadblocks you may encounter along the way. Discovery plans should consider the costs and benefits of pursuing this information and be integrated into the overall trial plans. Further, these investigations should also highlight the importance of the discussions you have with your own client and their on-line activity. In all, you would be well served to investigate and use the benefits of social media to your client's advantage.

**Audrey Gee** is a founding partner of Brown Church & Gee, LLP, a business centered law firm that offers a fresh approach to legal services. Audrey brings over 16 years of experience to a practice that focuses on litigation and management side employment counseling and risk management. Audrey's litigation practice has included representation of multi-billion dollar companies in contract disputes, defending publicly traded homebuilders in complex multi-plaintiff construction claims, and handling a broad range of business, real estate, employment and intellectual property disputes. Audrey is the incoming President of the CCCBA for 2012.

## **Blogging: Raise Your Profile, Get Noticed**

Thursday, December 1, 2011

Among the factors in achieving a high page rank on search engine results pages are the age of the content and how frequently a website's content is refreshed. Now, if you're like the majority of legal professionals and looking to take care of your core activities – namely, billable work – it can sound like another task that may slip down the priority scale. However, it can be approached in a manageable, timely and efficient manner that will enhance to your ability to be found on Google, Yahoo, Bing and other search engines.

### **Fresh Content Important with Search Engine Optimization (SEO)**

Content is the number one factor in SEO. Using keywords and phrases that paint an accurate, sincere and honest picture of your business should be at the top of the list when creating website content. Incorporating those terms into page titles, headings, bullet points and links help define to millions of viewers who you are and what your practice is about – but the search engines are looking for more. In an effort to provide the greatest value to their visitors, the search engine robots examine websites that they think will provide the richest, most recent and most accurate information they can. Their algorithms are very sophisticated and have the ability, among other things, to determine how recently a site’s content was updated. That’s where blogging can come into the picture. “But I don’t have time to blog,” you might say, as you picture a stereotypical geek perched over a smoldering keyboard, fingers flying at 190 WPM. It can take far less time that you’d expect when you start gradually and with a plan.

### **Wordpress<sup>28</sup>Makes Blogging Easy**

When it comes to selecting a website building platform, I am a big proponent of Wordpress<sup>29</sup>. It is the world’s most widely used content management system, combining power, visibility and ease-of-use for website owners, authors and viewers. Blogging is inherent to Wordpress, it started off as a simple tool for bloggers and has evolved into a full-blown development environment for building websites that seamlessly integrate blogs. Without diving into the technical end, a Wordpress author has the ability to create blog posts of any length, as frequently as they want, virtually without limit. Frequent blogging is beneficial, but that doesn’t have to mean starting with a blank screen every time you want to publish a post. One strategy that makes it more manageable is to set aside time to create multiple posts and schedule their release in intervals, say over the course of a month. Wordpress allows an author to select a publishing date, and automatically release the content when that date rolls around. Over the course of time (and remember, search engine page rank doesn’t change overnight), the search engines will notice your site’s pattern of updated content, and gradually reward you with a higher page rank.

### **Blog Posts Can Be Brief**

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<sup>28</sup><http://wordpress.org/>

<sup>29</sup><http://wordpress.org/>



A blog post needn't be lengthy. For example, it can consist of a few sentences about an article you've read online, along with a link to that article. By doing so, you work toward satisfying another tenet of SEO link popularity. When search engines see links coming into and going out of your site, they potentially see you as a source of traffic. The higher quality of those inbound and outbound links will benefit your own visibility.

But what happens if you have a mild case of writer's block? Here is a simple strategy that can help kick off your blog and set your efforts in motion. Think of a top 10 list, get in touch with your inner Letterman if you think that is going to appeal to your audience, but more practically, think about 10 tips relative to your field that you don't mind sharing with the world. When constructing this list, think a little about who you perceive your audience to be and provide them with some common sense information upon which you may be able to build a client relationship somewhere down the road. An estate planning attorney may create a list of the top 10 reasons to establish a living trust. You can now consider each of those reasons as a short blog post and release them in serial form over the course of a month (or any interval you wish). Keep your writing clear and concise, and be sure to use words and phrases that you think people would enter into search engines to find your business.

Blog posts are also a way to engage in dialogs with your readers, but that does require more effort. Wordpress can be configured to provide a mechanism for readers to submit comments, but that in turn requires some level of moderation to prevent abuse or the submission of inappropriate materials. Additionally, while short blog posts have some benefits, longer blog posts have the potential for more keyword hooks, more links and more visibility. My standard advice is to start slowly and gradually work up to the next stage, but only after determining your own comfort level with the process.

**Rocky Laber** is a web designer and developer with experience in online visibility and marketing that dates back to 1994. He is a partner in DSD LawSite Solutions, reach him at [rlaber@dsdlawsitesolutions.com](mailto:rlaber@dsdlawsitesolutions.com)<sup>30</sup>.

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<sup>30</sup><mailto:rlaber@dsdlawsitesolutions.com>

# Computer Forensics: What Valuable Information Do You Leave Behind?

Thursday, December 1, 2011

## While on Facebook

It is probably safe to assume you have a Facebook profile, and let's say you just received a friend request from someone you know. Nice, but not so fast. Unless you have taken the time to review all of Facebook's privacy settings<sup>31</sup>, I would not accept the friend request just yet. Protect yourself first.

For instance, if your privacy settings make your profile and posts visible to "Friends of Friends", are you sure you know your friend's friends? Similarly, when you allow people to 'tag' you in pictures, you are leaving your personal information unprotected, because each link is basically a link to your Facebook profile. Other things to look out for include contact information you provide to friends – and, by extension the third-party applications they use on their profiles – as well as information that is automatically public. As Facebook points out "some things (like your name and profile picture) do not have sharing icons because they are always publicly available. As a general rule, you should assume that if you do not see a sharing icon, the information will be publicly available."<sup>32</sup>

The amount of personal information available on the internet is unbelievable. The worst part is, users don't realize this at all. On Facebook alone, users tend to advertise where they have been, where they are currently at and what they are planning to do – today or tomorrow. Their profile contains their contacts, personal interests, birthdate, and the infamous "What's on your mind" status. If an investigation is warranted, Facebook can be used as a "tool" to "profile" someone and track his or her whereabouts and activities. True, Facebook will require a subpoena before it turns over someone's profile but, yes, it can be done. Facebook does share<sup>33</sup>.

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<sup>31</sup><http://www.facebook.com/about/privacy/>

<sup>32</sup><http://www.facebook.com/about/privacy/your-info-on-fb#controlprofile> ↩

<sup>33</sup><http://druganddevicelaw.blogspot.com/2008/02/e-discovery-for-defendants.html> ↩

## **Temporary Internet Files**

It is also good to check your computer browser settings. This is where your (Internet Explorer) browser keeps track of where you have been on-line. You will be surprised by what you find by simply viewing your Temporary Internet Files. This directory even includes date and timestamps for when you visited websites. You may find this helpful or not – it depends on the situation. Should you want to clean up your internet trail, is deleting really deleting?

## **Deleting files – really?**

Getting rid of unwanted files is not as easy as you think it is. If you think that by hitting the delete key, data is gone forever, you are wrong. If you think that clicking on Empty Recycle Bin erases the files irretrievably, you are wrong again. How about if you go to the DOS prompt and issue a delete command? Will this do the trick? Nope, wrong again.

If you search online for “undelete files,” you will get more than 8 million hits on this topic. You will also find tons of software that will assist with undeleting files. They do work.

When a file is deleted from the recycling bin, depending on which operating system is installed on the computer, usually only the “pointer” to the location of the file on the hard drive is deleted or renamed. The actual data is intact until that particular space on the computer actually reused by another file. To restore the file an undelete application simply scans the free spaces on the drive. The undelete application will then recreate the pointer or index.

This is why it is important that, as soon as you realize the need to restore a deleted file, you should not add any data to your laptop or desktop so as to reduce the risk of overwriting your deleted files before you can retrieve them. Remember that the data is retrievable if it has not been over-written by another file. This is true on any type of storage, i.e., USB external drives, those cute little thumb drives and the super-tiny SD cards in cell phones or cameras.

So, as soon as a computer is declared as evidence, all processing on it must be stopped to preserve the current state of the laptop and a computer forensic examiner must be contacted to handle the examination of the hard

drive. The forensic examiner will scan the deleted files from a different computer or drive so as not to write over any free space on the evidence hard drive.

You may be tempted to purchase an undelete files application online and do this yourself. This is OK for personal use but my advice is to get a forensic examiner to do this if working with an evidence computer.

### **Securely wiping the contents of the hard drive media**

Now, if your real intention is to completely delete a file, then I suggest you search online, this time for “secure wipe” or “disk wipe”. You should get about 2 million results. Why do you need this? Secure wipe applications will go through every bit of free space and over-write each bit with a 0 (depending on the application) to ensure that all free space is written over and no data is recoverable. This is a must before donating your old computer -why? Yes, you are right this time. Simply reformatting your computer leaves your data behind, making it potentially accessible to strangers.

Happy computing!

**Myra O. Santos** is the Information Security Professional & Certified Computer Examiner for e5<sup>34</sup>. She is also a board member for The Law Center. The information contained is to ignite one’s curiosity regarding digital evidence and social media and is for educational purposes only.

## **Search Engine Optimization for the Solo Practitioner and Small Law Firms**

Thursday, December 1, 2011

### **The Importance of Google**

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<sup>34</sup><http://www.e5hex.com/>



It is widely known that Google's U. S. market share for searches is dominant (over 70% by some estimates), but what isn't as widely known is that for law-related searches, Google's market share is overwhelming (over 90% by some estimates). Even if a client finds a lawyer in a major directory, there's a strong likelihood that he or she found those directories through a Google search initially. Consequently, this article focuses primarily on optimization for the Google search engine.

Being on the first page of Google search results is very important for lawyers who are targeting middle-income clients. There are two ways to become more visible in Google: through Google's Sponsored Listings, and through *search engine optimization* (SEO). Lawyers should ideally do both, but this article will focus on SEO.

### **What is "Search Engine Optimization" or "SEO?"**

SEO refers to the steps you can take with your website and elsewhere on the Internet to make your website appear more relevant to Google and the other search engines.

One of the most powerful things you can do is to emphasize certain *keyword phrases* consistently on each page of your site, so that Google perceives your site as "relevant" to users searching with those terms. When Google perceives your website as more relevant for certain search terms, your website is ranked higher in Google's natural (non-sponsored) listings. The goal of these efforts is to be in the top half of the first page of Google's search results for the phrases that are most important to your law practice. The time and effort needed to raise your site's Google search ranking depends on the depth of your SEO, along with factors such as competition (how many other sites are trying just as hard to raise their own ranking).

When you're deciding which phrases and key words you want to use to optimize your website's searchability, it's worthwhile to find phrases that are specific and important to your law practice, but also general enough to match what a user would actually search for. For example, instead of trying to optimize your site for "lawyers," you may want to optimize your site for "San Francisco child custody lawyers."

## **The Two Sides of SEO**

There are two basic things you can do as part of any SEO effort: *On-Page SEO* and *Off-page SEO*.

*On-Page SEO* is essentially what was discussed earlier in this article: ensuring that the phrases you want to be found via Google are prevalent on as many of your site's pages as is appropriate.

For example: If you're a Walnut Creek family lawyer, and you have a page on your website about divorce services, you would want to select 2 or 3 phrases (i.e., "Walnut Creek divorce lawyer" or "Walnut Creek divorce attorney") that you'd emphasize as often as possible without damaging the professionalism of the content.

Google reportedly considers 200+ different factors when determining the relevance of a website for a specific search query. However, one of the aspects believed to be the most important in the ranking of websites is each page's "title tag". The title tag goes into the source code of your website, and will generally be what appears between the and tags. You'll want to ensure that your selected keyword phrases are included naturally in the title tags, so that not only will viewers know what the page is about, but Google will too.

Also, hyperlinks between the pages on your website will help Google "crawl" it. By having good keyword phrases within the text of the links, Google will better understand the subject matter of the pages to which the links connect. For example, imagine there is a hyperlink on your website which reads: "Click Here To Learn More About Our Experienced Family Lawyers" that links to your "About Us" page. If you have the hyperlink on either the whole sentence or just the 'click here' portion, that doesn't tell Google exactly what is being linked to and is a wasted opportunity to show Google some keyword phrases. The better choice would be to have the hyperlink on the words "Experienced Family Lawyers", so that Google

knows what the page you're linking to about (and will consider these terms more relevant for your site).

The second part of SEO is *off-page SEO*, which refers to things you do elsewhere on the web to make Google perceive your website to be relevant for the phrases that are most important to your practice. Generally, this is comprised of link-building, which is a deliberate act of getting other websites to link to your own. Over the course of the lifetime of your website, you should aim for between 250 to 750 links from other websites to yours.

So how do you get other sites to link to your website?

Links to your website can be obtained in a variety of ways. You can list your website on directories, exchange links with colleagues who are not in direct competition, post to blogs, set up accounts in social media sites like Twitter and Facebook, participate in networking sites like Linked-In, and publish content to press release sites. The more sites that link to yours, the more Google will assume that your site is growing in popularity, and is therefore more relevant.

## Conclusion

In closing, a few things should be noted. First, SEO can be very labor intensive and time consuming, and if you'd rather practice law than spend hours modifying your pages and bargaining for in-bound links, you should strongly consider outsourcing the project to a company that specializes in SEO for lawyers.

Second, these SEO efforts don't help your website overnight. It may be six to nine months before you start noticing any real gains in terms of ranking on Google's organic search results.

**Ken Matejka**, California attorney and CEO of LegalPPC, Inc.<sup>35</sup>— Internet Services for Solo Practitioners and Small Law Firms. If you have any questions about this article, please write to Ken at [ken@legalppc.com](mailto:ken@legalppc.com) or call him at (415) 742-2150

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<sup>35</sup><http://www.legalppc.com/>

# Legal Issues When Marketing Your Business On The Internet

Thursday, December 1, 2011

As the 21<sup>st</sup> century progresses, consumers are transitioning to the Internet as a means of accessing goods and businesses. The benefits of marketing your business online are numerous and include: targeting consumers outside your local area, marketing your products in a very accessible manner for potential customers and staying on par with competitors who offer products similar to your own.

If you decide to market online, you must be aware of a number of legal issues. If a business owner violates any of the following, the Federal Trade Commission (FTC) may evaluate his or her case and take action.

## Sales Tax

According to the Internet Tax Freedom Act of 1998<sup>36</sup>, there are restrictions on the sales tax applied on products sold online. As an example, take a business originally established in California but which also has a physical office in Nevada. If a customer who also resides in California buys this business' product, California's sales tax policy applies to the purchase. If the buyer is a Nevadan, then Nevada's sales tax policy applies to the purchase because the business has a physical location in Nevada. Thus, if a customer purchases a good from a business that has an office in the same state, then a sales tax will apply to the purchase. However, if the business does not have a physical office in the same state as that of a customer's residence, then the business does not collect a tax on that customer's purchase. Note, under a 1992 U. S. Supreme Court ruling, retailers don't have to collect sales taxes in states where they lack a physical presence. However, state and local governments have been pushing Congress to overturn that decision and require all online retailers to charge sales taxes in all states. Several bills have been proposed in Congress; the most recent one was introduced Nov. 9, 2011 by a bipartisan group of 10 senators.

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<sup>36</sup><http://www.govtrack.us/congress/bill.xpd?bill=h105-3529&tab=summary> ←



Those who support overturning the Supreme Court ruling argue that the status quo gives online retailers an unfair advantage over brick-and-mortar retailers, and especially over small businesses. Opponents of such a law argue the opposite: that a tax on online commerce will hurt small businesses the most.

## **Copyright**

The internet allows for tremendously easy access to information and intellectual property. However, with this growth of access also comes the risk of copyright infringement. Realize that if you violate another person's copyrights, the FTC can prosecute you. For this reason, pay extra attention to the method by which you refer to others' material, as they can sue you if they have reason to believe that you have copied their work.

## **E-mail Marketing**

According to the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003<sup>37</sup>," there are strict regulation on how a business can market its products over email. This law allows marketers to send unsolicited e-mails to potential customers if the email meets the following conditions:

1. There are clear procedures from unsubscribing from the email, and the company honors requests to unsubscribe within 10 business days
2. The content presented in the emails is accurately described in the text and subject lines, and adult content is clearly labeled
3. The recipients' email addresses were not harvested from other spam groups or found through open relay (in which anyone on the internet can send email through it)

If your business is advertising in a fashion violating the following conditions, you have violated FTC regulations and could face serious fines. Rectify your marketing techniques to avoid any conflict with the government.

## **Data Security**

As a business operator, you are responsible for protecting any sensitive information customers provide you. The FTC maintains that companies must

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<sup>37</sup><http://uscode.house.gov/download/pls/15C103.txt>

practice reasonable measures in protecting clients' information. First, this means adhering to the policy you advertise to customers. Informing clients that you do not send any information to third parties, and then doing so is wrong. Second, this means disposing of sensitive information carefully to avoid third parties from finding it. Furthermore, one issue to bear in mind is hacking. Due to today's technology, hackers can slip through internet security and steal information. Use secure servers to protect not only your information but also others'.

### **General Tips**

The key point in this article is this: Be honest about your products and business. Do not use faulty means such as spamming harvested email addresses or tricking people through false messages about your products. Not only will these tactics deter potential clients from your business, but they could also lead to serious consequences from the Federal Trade Commission. Instead, focus on marketing your business in unique ways. Set up a Facebook page to attract customers. Collaborate with local business to advertise each other's work. In order to succeed, you must be willing to try unique means of reaching clients.

Expanding your small business to the internet may be the right choice for you. The benefits of doing so include increasing profits, advertising your product, and remaining competitive in your field. If you decide to work on the web, be aware of the laws applicable to your business.

This article was previously published on the Korb Law Group Business & Real Estate Law Blog<sup>38</sup>

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<sup>38</sup><http://korblaw.com/businessblog/2011/08/legal-issues-internet-market-business/> ↩

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## **Realignment: What Is It, and Why Do I Care?**

Thursday, December 1, 2011



Hon. John W. Kennedy

You may have heard politicians, newscasters, and government honchos talk about “realignment” and wondered what they are taking about. It sounds like something your chiropractor would do. This is different; it is much

less painful.

The realignment legislation, initially proposed by Governor Brown and enacted by the Legislature in Assembly Bill 109<sup>39</sup>, fundamentally shifts responsibility for housing and supervision of many convicted felons from state prison and the Parole Board to our county jails and Probation Office, respectively. If you practice any criminal law, you will want to educate yourself on the details so you can better represent your clients. If you do not practice criminal law, you may be interested in learning how this legislation affects our public safety, state and county budgets, and criminal justice agencies. If you are not interested, now would be a good time to check out theCoffee Talk<sup>40</sup> page.

The realignment legislation established in each county an Executive Committee to develop a Public Safety Realignment Implementation Plan. In Contra Costa, the Executive Committee is comprised of our Chief Probation Officer, Phil Kader (Chair), our Presiding Judge Diana Becton, our Director of Health Services Cynthia Belon, our Public Defender Robin Liptezky, our Sheriff-Coroner David Livingston, our District Attorney Mark Peterson, and a representative of local law enforcement, Richmond Police Chief Chris Magnus. The Legislature provided each county with funding for implementation of AB 109. Unfortunately, the funding formula was based on the number of defendants typically sentenced to state prison in each county. Because the Bay Area Counties historically have been “high efficiency” counties – that is, we send a relatively small portion of those convicted of felonies in our counties to state prison – we received a relatively small portion of the funding. Contra Costa County received \$4,593,231. The Executive Committee recommended and the Board of Supervisors adopted a budget allocating these funds among the participating agencies.

Under the realignment legislation, sentences for many less serious felonies will be served in county jail rather than state prison. This applies to defendants *sentenced* after October 1, 2011. Those who are serving sentences for most crimes *committed* after October 1, 2011 will receive 50% custody credits; that is, for each day they serve in jail or prison, they will receive two

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<sup>39</sup>[http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0101\\_0150/ab\\_109\\_bill\\_20110404\\_chaptered.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101_0150/ab_109_bill_20110404_chaptered.html) ↩

<sup>40</sup><http://cclawyer.cccbba.org/?p=2842>

days' credit. Also effective October 1, 2011, most prisoners released from state prison will be placed on post-release community supervision (rather than traditional parole) and be supervised by our County Probation Office (rather than by parole agents). Revocations of post-release community supervision (cleverly called "PRCS") will be adjudicated by our Superior Courts (rather than by the Parole Board) and any additional custody time will be served in our county jail.

Other than changing the location where most felony sentences are served and the credit calculations for many offenders, the realignment legislation did not alter the basic sentencing process. All defendants who were eligible for felony probation remain eligible. Wobblers can still be reduced to misdemeanors under Penal Code Section 17(b) if the defendant is sentenced to less than one year in county jail. The sentencing triads for most felonies remain the same. Enhancements generally are unchanged. The primary effects of the realignment legislation is that most felony sentences, no matter how long, will be served in county jail, and that most convicted felons will serve less actual time in custody.

Now the painful part: the details.

The following felony sentences must be served in county jail:

- (1) Crimes where a penal statute specifies that the defendant "shall be punished by imprisonment pursuant to subdivision (h) of Section 1170" of the Penal Code without designation of a term of imprisonment. In these cases, the crime is punished by 16 months, two or three years in county jail.
- (2) Crimes where a penal statute specifies that the defendant "shall be punished by imprisonment pursuant to subdivision (h) of Section 1170" with a designated triad or term.

The following sentences must be served in state prison:

- (1) When the defendant has a current or prior conviction for a *serious* felony as defined in P. C. § 1192.7(c), a current or prior conviction for a *violent* felony as defined in P. C. § 667.5(c), or a prior out-of-state conviction that would qualify as a serious or violent conviction under California law.
- (2) When the defendant is required to register as a sex offender under P. C. § 290 as a result of a current or prior conviction.

(3) When the defendant currently is convicted of a felony and sentenced with an enhancement for aggravated theft under P. C. § 186.11.

(4) When the defendant currently is being sentenced on one of a list of over 70 specified crimes in addition to the serious or violent felonies and those that require P. C. § 290 registration.

The disqualifying priors do not include juvenile adjudications, so an adult defendant with a prior juvenile adjudication – even if it qualifies as a strike – is not required to go to state prison if the current conviction is not serious, violent, etc. Courts cannot strike disqualifying priors under P. C. § 1385 to make a defendant eligible for county jail. If any portion of a defendant’s sentence must be served in state prison, then the entire sentence must be served in state prison. For example, if a defendant is convicted of a P. C. § 211 Robbery (a violent felony to be served in state prison) and a V. C. § 10851 Unlawfully driving or taking a vehicle (a county jail offense), he will serve his entire sentence in state prison.

Felony sentences imposed under P. C. § 1170(h) have no parole tail. For example, if a defendant is convicted of Vehicle Code Section 10851 (a county jail felony) and has a (non-strike) prison prior; the court denies probation and selects a two-year term from the triad, adds one year for the prison prior, and sentences the defendant to three years in county jail, the defendant will likely serve 18 months (with 50% custody credits) and be released without any form of supervision.

To make matters more confusing, the Legislature added a new type of felony sentence: a “split sentence” (also called a “blended sentence”). Under Penal Code Section 1170(h)(5), a defendant who is sentenced to county jail on a felony can be required to serve a portion of her sentence in custody and a portion on “mandatory supervision,” which is eerily similar to probation. The Court can decide what portion of a sentence is to be served in custody and what portion on mandatory supervision – the division can be at any point along the spectrum of the sentence. The total period of the sentence – the custody portion plus the mandatory supervision portion – must equal the term imposed by law, no more and no less. Taking our earlier V. C. § 10851 example, once the Court selects the term from the triad (two years) and adds the prison prior (one year), then the total term of the sentence is three years. The Court can order that the defendant serve one year in county jail and two years on mandatory supervision, or vice versa. If the

former, the defendant would likely serve six months on the one-year custody portion and then begin her two years of mandatory supervision. If the latter, the defendant would likely serve one year on the two-year custody portion and then begin her one year of mandatory supervision.

The supervision term of a split sentence is called “mandatory supervision” because, unlike probation (but like parole), the defendant does not have to agree to mandatory supervision; it is imposed by the Court. Defendants who are ineligible for probation can be given a split sentence because “mandatory supervision” technically is not probation (it just seems like it).

Criminal practitioners will find that the realignment legislation gives them a greater array of options in seeking bail, negotiating plea agreements, and litigating sentencing hearings. The realignment legislation envisions greater use of pre-trial release on home detention and electronic monitoring in appropriate cases. In plea agreements, counsel can agree to dismiss counts that mandate state prison, tailor split sentences to suit the particular circumstances of the case, and select effective terms of probation or mandatory supervision. At sentencing hearings, counsel can emphasize the benefits of a longer period of probation or mandatory supervision versus custody time as a means of discouraging recidivism.

When negotiating plea agreements, counsel should make every effort to reach clear agreements on – and make sure defendants understand – all of the potential terms of the agreement.

Plea negotiations ideally should address all of the following:

- (1) Whether the defendant is to be granted probation (formal or informal)
- (2) Where the sentence will be served – state prison or county jail
- (3) The length of any custody term, and how it was calculated
- (4) If a split sentence is to be imposed, what portion is to be served in county jail vs. mandatory supervision
- (5) Credits: Actual number of days and which custody credits formula applies
- (6) Any terms of probation or mandatory supervision

(7) Amounts of fines and fees

(8) Actual restitution amounts and to whom they are to be paid (if any).

The Court urges all counsel to have these issues fully resolved before stepping up to the lectern for the change-of-plea hearing in a negotiated disposition to avoid unpleasant mid-plea surprises. The custody credits formulas have changed three times in the last 18 months, so their application is not intuitively obvious to the casual observer. Nobody in the courtroom wants the parties to be unpleasantly surprised by the Court's determination of the applicable custody credits formula.

Our relatively brief experience thus far with realignment sentencing has been a pleasant surprise. Our justice partners have worked hard and engaged cooperatively to set up and master the new procedures and processes. The Sheriff's Office is increasing jail capacity, hiring staff, and buying EHD devices to expand its pre-trial release and custody alternative options. We have already seen a surge in the jail population from parole violations and AB 109 commitments. The District Attorney's Office and defense bar have made creative and effective use of the new sentencing options in their negotiated dispositions. Our Probation Office has done an extraordinary job of preparing for the influx of new parolees, lining up services to address the housing, mental health, substance abuse, and employment issues this new population will bring. Used effectively, the sentencing options created by the realignment legislation can enable us to reduce the state's prison population, monitor those released on parole and probation more successfully, and improve public safety by reducing recidivism.

## **Recent Developments in the Law of Lawyering**

Thursday, December 1, 2011

The last year has brought numerous developments in legal ethics and the law of lawyering. This article will help attorneys stay abreast of major developments and spot ethical and other practice issues.

### **New Ethics Rules in the Works**



The California State Bar Board of Governors has approved broad changes to the Rules of Professional Conduct. The proposed Rules are renumbered and contain numerous substantive revisions designed to bring California in line with the ABA Model Rules. The proposed new Rules will not take effect until the California Supreme Court approves them. The entire text is available for review on the State Bar's website.

### **Mediation and Confidentiality**

In a recent California Supreme Court decision, *Cassel v. Superior Court*<sup>41</sup> (2011) 51 Cal. 4<sup>th</sup> 113, the court addressed the effect of mediation confidentiality statutes on private discussions between mediating clients and the attorneys who represented them. In that case the client agreed in mediation to settle the underlying litigation but later alleged – in an action for legal malpractice, breach of fiduciary duty and fraud – that the attorneys had a conflict of interest and induced the client to settle for less than the case was worth. The Supreme Court ruled that the trial court had correctly excluded all evidence of attorney-client discussions immediately preceding and during the mediation concerning the attorneys' efforts to persuade their client to settle based on the mediation confidentiality statutes. The *Cassel* case reaffirmed the mediation privilege and now presents a strong defense to malpractice and other claims based on discussions between the attorney and client that took place in the mediation process.

### **Hybrid Fee Agreement Must Comply With Bus.& Prof. Code 6147<sup>42</sup>**

*Arnall v. Superior Court*<sup>43</sup> (2010) 190 Cal. App. 4<sup>th</sup> 360 held that "hybrid" fee agreements containing both hourly and contingency fee components cannot be enforced unless they comply with all the requirements for a contingent fee set forth in Business and Professions Code Section 6147<sup>44</sup>. The consequences of failure to comply is that the client can void the agreement and the attorney can only collect a "reasonable" fee which may be significantly less in a large contingent fee case.

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<sup>41</sup><http://caselaw.findlaw.com/summary/opinion/ca-supreme-court/2011/01/13/253736.html> ↩

<sup>42</sup><http://law.onecle.com/california/business/6147.html>

<sup>43</sup><http://caselaw.findlaw.com/summary/opinion/ca-court-of-appeal/2010/11/22/252930.html> ↩

<sup>44</sup><http://law.onecle.com/california/business/6147.html>

## **Specific One Year Statute in CCP 340.6<sup>45</sup> Applies to a Malicious Prosecution Case Against an Attorney Rather Than Two Year Statute in CCP 335.1<sup>46</sup>**

The Fourth District Court of Appeal recently addressed an ambiguity in the application of the statute of limitations to an attorney alleged to have engaged in malicious prosecution. In *Vafi v. McCloskey* (2011) 193 Cal. App. 4<sup>th</sup> 874 the Court held that the one year statute in CCP Section 340.6<sup>47</sup> applied to a malicious prosecution claim against an attorney, not the two year statute set forth in CCP Section 335.1<sup>48</sup>. Attorneys should calendar the one year statute to avoid a barred claim.

## **Taking Position Adverse To A Former Client**

The California Supreme Court recently held that a lawyer breaches the fiduciary duty of loyalty by publicly expressing a personal position against a former client on an issue in which the attorney had previously represented the client. In *Oasis West Realty v. Goldman*<sup>49</sup> (2011) 51 Cal. 4<sup>th</sup> 811, a developer hired an attorney to obtain city approval of a development project. The attorney eventually withdrew from the representation and became personally involved in public measures opposing the development including obtaining signatures on petitions from neighbors and circulating a letter opposing the development. The court rejected the attorneys claim that his activity was protected by the First Amendment. The court stated that attorneys who take public positions on issues adverse to their clients on the very matters for which they were retained have breached their duty of loyalty and are subject to State Bar discipline.

## **Attorney Exposed To Conversion Claim For Negotiating Settlement Check With Knowledge Of Prior Attorney Lien**

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<sup>45</sup><http://law.onecle.com/california/civil-procedure/340.6>. ←  
html

<sup>46</sup><http://law.onecle.com/california/civil-procedure/335.1>. ←  
html

<sup>47</sup><http://law.onecle.com/california/civil-procedure/340.6>. ←  
html

<sup>48</sup><http://law.onecle.com/california/civil-procedure/335.1>. ←  
html

<sup>49</sup><http://scocal.stanford.edu/opinion/oasis-west-realty-v-goldman-33970> ←

A Court of Appeal has held that an attorney's negotiation of a settlement check without obtaining a signature or permission of another attorney/payee possessing of a valid lien may subject the attorney to liability for civil conversion. *Plummer v. Day/Eisenberg LLP*<sup>50</sup> (2010) 184 Cal. App. 4<sup>th</sup> 38. Therefore if you are aware of a prior attorneys lien on the case, make sure you obtain his or her endorsement on the check or permission to negotiate it in writing.

### **Ethical Screening Of Conflicts Of Interest**

In general when an attorney is disqualified by a conflict of interest based on an earlier representation the attorney's entire firm is also vicariously disqualified. One California appellate court has held that when an attorney tainted by a conflict from a previous representation moves to a new law firm, that new law firm may in certain circumstances rebut the presumption of imputed knowledge and vicarious disqualification by proving it implemented an effective ethical screen that prevented the sharing of clients confidences. *Kirk v. First American Title Ins. Co.*<sup>51</sup> (2010) 183 Cal. App. 4<sup>th</sup> 776.

**Lorraine M. Walsh** is a 30 year attorney with offices in Walnut Creek, who recently became a State Bar certified specialist in Legal Malpractice Law. The State Bar recently added this specialty to its certification program. She was also recently appointed by the Board of Governors of the State Bar of California to the State Bar Committee on Mandatory Fee Arbitration. She continues to focus her practice on controversies involving attorneys and clients including legal malpractice and malicious prosecution actions, fee disputes and expert witness consultation and testimony on the standard of care and conduct.

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<sup>50</sup><http://caselaw.findlaw.com/summary/opinion/ca-court-of-appeal/2010/04/26/169443.html> ↵

<sup>51</sup><http://caselaw.findlaw.com/summary/opinion/ca-court-of-appeal/2010/04/07/169166.html> ↵

## 2011 MCLE Spectacular [Photos & Videos]

Thursday, December 1, 2011

Thank you to all of our speakers, presenters, panelists, sponsors, volunteers and attendees who made the 2011 MCLE Spectacular extra special! Below are some pictures and video of our plenary speakers: Professor Jesse Choper, California Chief Justice Tani Cantil-Sakauye in conversation with CCCBA President Kathy Schofield, and Judge Vaughn Walker (ret.).

**Jesse H. Choper, Earl Warren Professor of Public Law at the UC Berkeley School of Law**



Here are the links to the remaining videos: Part 2 of 4<sup>52</sup>; Part 3 of 4<sup>53</sup>; Part 4 of 4<sup>54</sup>

**Chief Justice Tani Cantil-Sakauye in conversation with CCCBA President Kathryn Schofield**

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<sup>52</sup><http://youtu.be/kE8uxXbki0U>

<sup>53</sup>[http://youtu.be/VJ6nuC6\\_0w8](http://youtu.be/VJ6nuC6_0w8)

<sup>54</sup><http://youtu.be/b929IqqhhNk>



Here are the links to the remaining videos: Part 2 of 4<sup>55</sup>; Part 3 of 4<sup>56</sup>; Part 4 of 4<sup>57</sup>

#### **Judge Vaughn Walker (ret.)**



Here are the links to the remaining videos: Part 2 of 3<sup>58</sup>; Part 3 of 3<sup>59</sup>

<sup>55</sup>[http://youtu.be/9PTXD\\_ox3p4](http://youtu.be/9PTXD_ox3p4)

<sup>56</sup><http://youtu.be/DCL5t7MJRfM>

<sup>57</sup><http://youtu.be/oPAvna1sL78>

<sup>58</sup><http://youtu.be/U9dB-QZf0qU>

<sup>59</sup><http://youtu.be/W0t14CIjYRk>



Judge Vaughn Walker (ret.)







CCCBA's Theresa Hurley, Jenny Comages and Lisa Reep





2011 CCCBA President Kathy Schofield, CA Chief Justice Tani Cantil-Sakauye, and 2012 CCCBA President Audrey Gee



Professor Jesse Choper

**For more photos, please visit our Facebook page<sup>60</sup> to browse the MCLE**

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<sup>60</sup><http://www.facebook.com/CCCBA>

**Spectacular photo album<sup>61</sup>.**

Thanks again to all of our 2011 sponsors: ADR Services, Inc., Certified Reporting Services and Litigation Media Group, JAMS, LexisNexis, MARSH, MassMutual, One Legal Online Court Services, Scott Valley Bank, Sutter Care at Home, The BAR Group, The Novak Group at UBS Financial Services, and the Recorder! See you next year!

## **The Color of Justice: Judges, Attorneys Encourage Students to Consider Legal Career**

Thursday, December 1, 2011

On November 4, 2011, judges and attorneys, including Richmond's own Christopher Darden, hosted an informal, interactive program aimed at encouraging students to become the new face of justice. As part of the program, students met and talked with legal assistants, attorneys and judges of color in an informal setting where they learned about their backgrounds and how they succeeded.

Chris Darden, a Richmond native and practicing attorney, well-known for his role as prosecutor during the O. J. Simpson trial, participated in small group conversations with students throughout the program and addressed the full group of students as the program drew to a close:

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<sup>61</sup>[http://www.facebook.com/media/set/?set=a ↵  
.293702147328306.75378.156293777735811&type=3](http://www.facebook.com/media/set/?set=a↵.293702147328306.75378.156293777735811&type=3)



The program aimed to encourage minority students to consider the law and judgeships as career goals. It focused on career preparation through presentations by judges and lawyers sharing personal and professional insights, and through small group conversations during lunch. The Color of Justice<sup>62</sup> program provided an environment where discussion and debate among participants flourished. Students were also invited to observe an enactment of a realistic legal proceeding and act as interpreter for a witness.



<sup>62</sup><http://www.facebook.com/ColorofJustice>







The National Association of Women Judges presents

## The Color of Justice

Increasing Diversity in the Legal Profession

Do you want to make a difference?

### Why Not Become an Attorney? A Judge?

**Si Se Puede! Yes, You Can!**  
 Meet and talk with legal assistants, attorneys and judges of color in an informal setting.  
 Learn about their backgrounds, how they succeeded and how **you** can succeed.  
 Observe a mock criminal proceeding. Act as an interpreter for a witness.  
 Come Join us

**Make a Difference. Become the New Face of Justice**

- **When:** November 4, 2011, 8am - 1pm
- **Where:** Superior Court, Martinez
- **Eligible:** Students in Grades 9 - 10
- **How to Apply:** Contact your teacher or visit us on [Facebook](#) **ColorofJustice**

**Deadline for Applications: October 7, 2011.**  
 (Transportation and lunch will be provided.)

sponsored by NAWA, Contra Costa Superior Court, Contra Costa County Bar Association and its Diversity Section

The Color of Justice<sup>63</sup> Program was developed by the National Association of Women Judges<sup>64</sup> and has been implemented in states all over the country. Contra Costa County had the unique opportunity to plan and host the Program, in conjunction with members of the Contra Costa County bench, bar association and diversity section, for our local community.

## **“Saving Face” – Social Networking Pitfalls for Judges and Attorneys**

Thursday, December 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>65</sup>. Send your answers, along with a check for \$20, to the address on the test form.

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<sup>63</sup><http://www.facebook.com/ColorofJustice>

<sup>64</sup><http://www.nawj.org/>

<sup>65</sup><http://cclawyer.cccba.org/wp-content/uploads/2011/11/MCLE-selftest-LANGFORD.pdf> ↔



Carol M. Langford

Social networking can be a quick and low-cost way for lawyers and judges to both market themselves and stay in contact with friends and clients. Unlike many lawyers who embraced technology, I fought turning my privacy and free time over to the net, preferring my clients to call and meet me in person. It was a valiant fight, but one doomed to be lost, if only because my clients demanded I capitulate. However, you will not see me actively on Facebook<sup>66</sup> or LinkedIn<sup>67</sup>. Why? Because there are a variety of ethical mine fields in Web 2.0 for lawyers.

Ensuring confidentiality of your communications is not just wise, it is also an ethical issue.

Ask yourself if you are okay with everyone on the planet forever being able to see your posted photos and comments. You are? Okay, then ask yourself this – do you always think twice before you push the send button and do you always keep your posts emotion-free? You do? Okay, then how about this:

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<sup>66</sup><http://www.facebook.com/>

<sup>67</sup><http://www.linkedin.com/>



do you ever send things like "That judge is intellectually dishonest, and she was dead wrong today!" Or to your buddy: "Wish me luck today – it's my first trial." You do? Then read on.

Ensuring confidentiality of your communications is not just wise, it is also an ethical issue. The State Bar of California Committee on Professional Responsibility and Conduct has very recently addressed this issue in Formal Opinion No. 2010-179<sup>68</sup>. California attorneys have an express duty under B&P Code section 6068<sup>69</sup> "[to] maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her clients." This duty arises from the relationship of trust between an attorney and a client and, absent the informed consent of the client to reveal such information, there are very few exceptions. The safeguarding of this information is governed by the duty of competence, and that means ensuring that you have checked that the particular technology you are using affords a proper level of security. Most attorneys do not possess much technological savvy, and this Opinion compels lawyers to consult with someone with technological knowledge if you are unsure of any deficiencies in your firewalls. When the attorney-client privilege is at issue the failure to use sufficient precautions can be used in determining waiver.

### **To Friend or Not to Friend – The Perils of Facebook**



Another ethical issue arises from friending potential clients. Lawyers now actively use social media to share information about their professional accomplishments and post their case rosters. Those postings prompt prospective clients or "friends" to ask for legal advice. Evidence Code section 950<sup>70</sup> defines "lawyer" for the purpose of the attorney-client privilege as ei-

<sup>68</sup><http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=↔wmqECiHp7h4%3D&tabid=837>

<sup>69</sup><http://leginfo.ca.gov/cgi-bin/displaycode?section=bpc&↔group=06001-07000&file=6060-6069>

<sup>70</sup><http://www.leginfo.ca.gov/cgi-bin/displaycode?section=↔evid&group=00001-01000&file=950-962>

ther a person authorized to practice law, or a person "reasonably believed" by the putative client to be so authorized. The word "client" is similarly broad: "a person, who, directly or through an authorized representative consults a lawyer for the purpose of retaining the lawyer or securing legal services or advice from him in his professional capacity." The truth of the matter is, it is pretty easy to unwittingly establish an imputed attorney-client relationship.

In addition, speaking with a client about his or her case on a social media site may arguably violate confidentiality, depending on the post. The Rules have no exception for social media. The American Bar Association has recognized the lack of guidance from state ethical boards on this and other social media issues and has launched the Ethics 20/20 Commission<sup>71</sup> which is tasked with focusing on ethics challenges arising out of advances in technology.

Another problem arises when attorneys transmit unilateral messages to judges about the merits of pending cases. Believe it or not, research reveals that it happens frequently. I think that is because lawyers and judges who are real friends (vs. Facebook "friends") who have become comfortable with social networking fail to see the impropriety of an off-the-cuff remark about a pending case. Rule of Professional Conduct 5-300<sup>72</sup> specifically forbids contacting a judicial officer about the merits of pending matters except in open court or with the consent of or in the presence of all counsel.

Problems arising out of informality are not limited to Facebook. They also plague other forms of social media such as blogging and micro-blogging on Twitter.

### **The Perils of Twitter**



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<sup>71</sup>[http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html) ↵

<sup>72</sup><http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule5300.aspx> ↵

Lawyers, like many other people today, sometimes feel the need to give a stream of consciousness play by play of what they are doing. Unfortunately, they don't always think before they tweet and they have been known to tweet about how their trial is going, even posting things like "Heard next defense witness has expunged theft conviction. LOL! Can't wait 2 m-peach." Tweets can be particularly troubling, as John Quinn of Quinn Emanuel<sup>73</sup> found out after he bragged on Twitter about the firm's victory in a fee dispute with the Winklevoss twins<sup>74</sup> (the twins who sued Facebook, Inc.) "Winklevoss twins lose again: QE payday cometh" when the details of the fee dispute were under seal.

It isn't just lapses of professional judgment that can get you into trouble. Personal tweets can be problematic as well. One lawyer tweeted about her vibrato<sup>75</sup>. Should a lawyer ever tweet about vibrators, or anything else that is personal? This question is starting to come up more and more in firms. Most firms have some kind of social media policy in place, but the Rules of Professional Conduct don't regulate personal tweeting as long as it doesn't violate 5-120<sup>76</sup> or the confidentiality rule, because personal tweets don't discuss firm clients or business.

### **The Perils of Blogging**



It isn't always clear, though, what is a personal and what is professional

<sup>73</sup><http://twitter.com/#!/jbqlaw>

<sup>74</sup><http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202476939482&slreturn=1> ↩

<sup>75</sup><http://www.examiner.com/social-media-in-national/feministe-blogger-jill-filipovic-wants-tsa-vibrator-controversy-to-go-away> ↩

<sup>76</sup><http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule5120.aspx> ↩

and there can be a large grey area. Earlier this year, a partner at Akin Gump wrote a post on a conservative blog<sup>77</sup> that he had he founded. The blog entry criticized a Yaqui Indian tribal prayer. His post drew the ire of an Indian law and policy partner in the firm who, along with the firm Chair, expressed their distaste for the commentary on the firm's website. He kept his job, but had to quit the blog.

Rule of Professional Conduct 5-120<sup>78</sup> regulates extra-judicial statements if the lawyer knows they have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. One lawyer was suspended from practice for blogging about a case in which he was a juror<sup>79</sup>. Unfortunately, the posting was unflattering to both the defendant and the judge. The blogging lawyer's defense, which did not carry the day, was that he did not think blogging fell under the Rule. He was wrong. It does.

### **Think Before You Tweet**

So what is a lawyer to do? My advice to you would be to carefully consider whether you really want to throw out all your "old school" ways. Always remember that whatever you do and whatever you say reflects upon you personally and professionally and that you are always bound by the Rules of Professional Conduct.

Social media is here to stay but human to human contact gives a lawyer, whether through facial expressions of the listener or tone of voice, far more information to consider before saying something, well...dumb.

**Download the MCLE Self-Study test form here:<sup>80</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>81</sup>. Send your answers, along with a check for \$20, to the address on the test form.**

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<sup>77</sup><http://legalinsurrection.com/2011/01/big-law-firm-takes-down-big-conservative-blogger/> ↩

<sup>78</sup><http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule5120.aspx> ↩

<sup>79</sup>[http://www.abajournal.com/news/article/calif.\\_lawyer\\_suspended\\_over\\_trial\\_blog\\_while\\_serving\\_as\\_juror/](http://www.abajournal.com/news/article/calif._lawyer_suspended_over_trial_blog_while_serving_as_juror/) ↩

<sup>80</sup><http://cclawyer.cccba.org/wp-content/uploads/2011/11/MCLE-selftest-LANGFORD.pdf> ↩

<sup>81</sup><http://cclawyer.cccba.org/wp-content/uploads/2011/11/MCLE-selftest-LANGFORD.pdf> ↩

**Carol M. Langford** is a lawyer specializing in ethics and State Bar defense in Walnut Creek, California. She is an adjunct professor at U. C. Berkeley Boalt Hall School of Law in professional Responsibility.

**Want to read more about legal tweeting?** Here's a great article from the AM LAW Daily: The Tweet That Roared: Lawyers and Law Firms Navigate Social Media Land Mines<sup>82</sup>

## The 12 Days of Christmas (Slightly Modified)

Thursday, December 1, 2011



***On the first day of Christmas**  
my true love gave to me  
a smartphone with an app for TV*

<sup>82</sup><http://amlawdaily.typepad.com/amlawdaily/2011/11/twitter-vs-lawyers.html> ↵

***On the second day of Christmas***

*my true love gave to me  
an awesome tablet, and  
a smartphone with an app for TV*



***On the third day of Christmas***

*my true love gave to me  
a really cool TWINE,  
an awesome tablet, and  
a smartphone with an app for TV*



***On the fourth day of Christmas***  
*my true love gave to me*  
*useless bitcoins,*  
*a really cool TWINE,*  
*an awesome tablet, and*  
*a smartphone with an app for TV*



***On the fifth day of Christmas**  
my true love gave to me  
BigHand 4.2,  
useless bitcoins,  
a really cool TWINE,  
an awesome tablet, and  
a smartphone with an app for TV*





***On the sixth day of Christmas***  
*my true love gave to me*  
*Mobislyder,*  
*BigHand 4.2,*  
*useless bitcoins,*  
*a really cool TWINE,*  
*an awesome tablet, and*  
*a smartphone with an app for TV*



***On the seventh day of Christmas***

*my true love gave to me*

*Sony MDR-NC100D Noise Canceling Earphones,*

*Mobislyder,*

*BigHand 4.2,*

*useless bitcoins,*

*a really cool TWINE,*

*an awesome tablet, and*

*a smartphone with an app for TV*



***On the eighth day of Christmas***

*my true love gave to me  
a red Jawbone Up,  
Sony MDR-NC100D Noise Canceling Earphones,  
Mobislyder,  
BigHand 4.2,  
useless bitcoins,  
a really cool TWINE,  
an awesome tablet, and  
a smartphone with an app for TV*



***On the ninth day of Christmas***  
*my true love gave to me*  
*a hidden spy camera with built in DVR,*  
*a red Jawbone Up,*  
*Sony MDR-NC100D Noise Canceling Earphones,*  
*Mobislyder,*  
*BigHand 4.2,*  
*useless bitcoins,*  
*a really cool TWINE,*  
*an awesome tablet, and*  
*a smartphone with an app for TV*



***On the tenth day of Christmas***

*my true love gave to me  
a flat screen for my bathroom,  
a hidden spy camera with built in DVR,  
a red Jawbone Up,  
Sony MDR-NC100D Noise Canceling Earphones,  
Mobislyder,  
BigHand 4.2,  
useless bitcoins,  
a really cool TWINE,  
an awesome tablet, and  
a smartphone with an app for TV*



***On the eleventh day of Christmas***  
*my true love gave to me*  
*a Bose® SoundDock® Series II,*  
*a flat screen for my bathroom,*  
*a hidden spy camera with built in DVR,*  
*a red Jawbone Up,*  
*Sony MDR-NC100D Noise Cancelling Earphones,*  
*Mobislyder,*  
*BigHand 4.2,*  
*useless bitcoins,*  
*a really cool TWINE,*  
*an awesome tablet, and*  
*a smartphone with an app for TV*



***On the twelfth day of Christmas***

*my true love gave to me  
Elder Scrolls V: Skyrim on PS3,  
a Bose® SoundDock® Series II,  
a flat screen for my bathroom,  
a hidden spy camera with built in DVR,  
a red Jawbone Up,  
Sony MDR-NC100D Noise Canceling Earphones,  
Mobislyder,  
BigHand 4.2,  
useless bitcoins,  
a really cool TWINE,  
an awesome tablet, and  
a smartphone with an app for TV*



## **Build Your Practice with LRIS – Client Comments**

Thursday, December 1, 2011

Here's what clients have to say about attorneys they were referred to through our Lawyer Referral & Information Service (LRIS) :

### **About David Hermelin:**

"He was GREAT – knowledgeable, patient, kind, and really helpful! I would definitely contact the LRIS again with a problem and I have referred clients to [the LRIS]."

### **About Andrew Steinfeld:**

"Mr. Steinfeld was extremely pleasant and informative. He also patiently explained everything to me and what was needed of me to answer appropriately."

### **About Ann Harding Battin:**



"I have used your [LRIS] several times. It's a terrific service and even though this time the attorney's specialty did not cover my question, she was very helpful. I'd recommend (and I have) this service to anyone."

**About Anne-Leith W. Matlock:**

"Attorney Matlock was sympathetic, extremely helpful and thorough. It may come to pass that I contact her at a later date for her services."

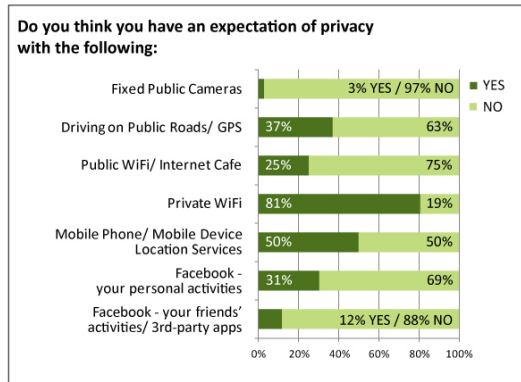
## **How is your expectation of privacy changing in the face of new and emerging technology?**

Thursday, December 1, 2011

An interesting way of stating the issue. I think we have a higher expectation of privacy than we actually have. We have clearly moved out of any type of society where we expect privacy concerns to be honored. Homeland Security, Internet adware, viruses and hacking pretty much do away with that kind of expectation. Sensationalism in journalism has changed dramatically where we print and publish anything on the ruse that the public has a right to know. With some personal application of safeguards, an individual can raise the level of privacy above the norm. But most people really don't care. They Twitter, Facebook, e-mail, browse and present themselves in public without regard really to who is watching or listening. This is kind of sad in a way. I mean privacy encompasses down time and reflection time, the modern use of high-speed turnaround in transmissions in communications almost makes that impossible. Once again, to gain at least the illusion of privacy, the individual has to become aware of and use any safeguards available. As we learned recently, that clearly means that lawyers should stay away from the Cloud.

**Wayne V. R. Smith**

**In a short survey last month, the Contra Costa Lawyer asked its readers about their expectation of privacy in various technology-assisted situations. Here are the results:**



I feel that I have to assume that anyone could be listening whenever I am using electronic means (even phones) nowadays. However, it is unfortunate that this reality is probably going to change the standard of privacy protection, and I DON'T like that.

I recognize that technology has so changed the world that privacy can no longer be expected in certain circumstances and it is often unknowingly waived.



