

Contra Costa Lawyer Online



The screenshot shows the homepage of the Contra Costa Lawyer Online website. At the top is a banner with the title "CONTRA COSTA LAWYER" over a landscape image. Below the banner is a navigation menu with links: Current Issue, Features, Spotlight, Pro Bono, Self-Study MCLE, About, and MarketPlace. A secondary menu includes: Inside, President's Message, News & Updates, Bar Soap, Lifestyle, LRIS, Ethics Corner, Coffee Talk, and Magazine Archive. The main content area features a large article titled "IT Security of the Law Office" with a sub-headline "Security" and a lock icon. The article text states: "A simple firewall and anti-virus is not enough these days. The following is a review of the four systems, as a starting point for good security, that every firm should have in place." Below the article is a row of six small thumbnail images. The "Spotlight" section contains two items: "Bar Soap: February 2016" with a photo of Judge Richard Arnason and a short obituary notice, and "Ethics and Your Online Presence" with a photo of a woman and text about social media regulation. The "News & Updates" section contains two items: "2015 CCCBA Holiday Party [photos]" with a photo of a party and text about the event on December 17, 2015, and "Only a Few Weeks Left to Renew Your Membership" with a photo of a membership card and text urging renewal by February 29.

CONTRA COSTA LAWYER

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IT Security of the Law Office

Security

A simple firewall and anti-virus is not enough these days. The following is a review of the four systems, as a starting point for good security, that every firm should have in place.

Spotlight

Bar Soap: February 2016
We lost several more friends and colleagues since my last column. Judge Richard Arnason quietly passed away in his sleep at the age of 94.

Ethics and Your Online Presence
State bars are in a race to regulate social media use, but their limited knowledge of technology means that they have a difficult time defining the ethical boundaries.

News & Updates

2015 CCCBA Holiday Party [photos]
CCCBA held its annual holiday party on December 17, 2015, at the CCCBA office in Concord.

Only a Few Weeks Left to Renew Your Membership
To avoid any interruptions to your CCCBA member benefits, please renew by February 29.

The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA), published 12 times a year, in six print and 12 online issues.

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Inside: Guest Editor's Column, February 2016

Monday, February 01, 2016

It is 2016, and I find myself guest editing another Contra Costa Lawyer edition. This month's edition revolves around technology issues, which should be no surprise for those who know me and recall the prior issues I have guest edited.

In addition to all of the great articles written about technology and its effects on your practice, many readers are also parents. A few may even be grandparents. The applications that teens use to communicate today may eventually work their way into the law office, much the way Facebook has.

So, what are teenagers using to communicate today? This series of articles written by teenager Andrew Watts is a great primer:

- A Teenager's View on Social Media
- What Teens Really Think about YouTube, Google+, Reddit and Other Social Media

He covers not only the major apps such as Facebook, Instagram and Twitter, but also lesser-known (or unknown to adults) apps such as Yik Yak, Medium and Plag.

I highly recommend that everyone take a look at the two articles. Not only may you find your kids using them but, in litigation cases, they may provide additional resources of social media to use in discovery. With so much of our communication moving online and into various apps, even email can seem quaint at times.

Enjoy the February edition of the Contra Costa Lawyer and have a great 2016.



Health, Happiness and ... Technology?

Monday, February 01, 2016



And just like that ... it's February, and you have settled back into the daily grind. Not to be all harpy, but ... how are those resolutions going? You know the ones about being good to yourself, exercising more, eating better, spending time doing what you enjoy and with people you love. *Um Hm*. If you are at all like me, they went out the window the minute you looked at your inbox on January 4.

The stress of the legal profession takes its toll on attorneys. According to a Legal Week survey of senior American and English attorneys, 82 percent of surveyed attorneys feel that long hours at work are damaging their health[1]. It can also affect our mental health. A 1990 John Hopkins study found that attorneys are 3.6 times more likely to suffer from depression than other professions.[2]

Stress and depression often go hand in hand with substance abuse, which may explain why attorneys are twice as likely as others to suffer from substance abuse. Sadly, attorneys are more likely to commit suicide than others.[3] Clearly, we need to find practical ways to manage our stress and maintain our health.

In this issue, our authors discuss how social media and technology can benefit your practice. Technology can also make it easier or fun to maintain your health, reduce stress and enjoy life. Below are some tips for incorporating technology into a healthy lifestyle.

Join a Fitness Challenge

You don't have to climb mountains or run marathons; just get moving. Being active improves health and helps to manage stress. The American Heart Association recommends walking 10,000 steps per day. To make sure that I keep moving throughout the day, I wear a FitBit fitness tracker to measure my activity. Some smartphones include pedometers. There are also apps for smartphones like Moves (for Android) that track activity. Not only does my device allow me to track activity to ensure I meet my personal goals, but it allows me to satisfy my competitive and social nature by participating in fitness challenges with friends and my sister-in-law. Nothing like a little friendly

competition to keep me motivated.

By the way, if you and a fitness partner use different devices, check out the app MatchUp. It allows challenges between folks using different devices and, with the purchase of a premium membership, it will manage challenges with groups of more than 10 members.

Try Meditation

A 2014 study published in JAMA Internal Medicine[4] found evidence that meditation can help reduce anxiety, depression and pain. But wait ... there's more! Many law schools and companies (General Motors, Google and Facebook, to name a few) also believe it can help create more focused and creative attorneys. These organizations are incorporating mindfulness into their curriculums and corporate structure.[5]

And guess what, benefits can come from a meditation as short as five minutes, so in less than a ".1" you can do something to improve your health. In fact, Bay Area attorney and USF Adjunct Professor, Jeena Cho, even has a ".1 Guided Meditation for Lawyers" along with several other slightly longer, and free, guided meditations, on her website, the Anxious Lawyer. There are many apps out there to lead you in guided meditations. I use Insight Timer, which has dozens of guided meditations of various lengths and subjects. It also has a timer for silent meditation.

Eat Well

I know you are busy, and I'm not going to tell you to pack a salad. But eating out and making healthy choices is a lot easier if you use an app like Healthy Out. By using this app, you can find restaurants that cater to your preferred diet (paleo; vegan; low fat) and are located near the office. Healthy Out tells you what dishes the restaurant offers that fit your dietary requirements. It even includes take-out joints that you might not have realized can cater to healthy eating. There are several similar apps you should also check out including Food Tripping and Locavore.

If getting a healthy dinner on the table is a challenge, you might consider trying a service like www.munchery.com that offers same-day delivery of chef prepared dinners to your home or www.blueapron.com that delivers ingredients and recipes for healthy dishes that you prepare yourself. With these services, you order online and affordable, fresh meals are delivered to your home or office.

Get Some Sleep

Trust me, you aren't doing anyone any good trying to write that brief at 2 a.m. But more importantly, studies have shown a connection between sleep deprivation and poor health—specifically, obesity, diabetes, heart disease,[6] and perhaps, Alzheimer's.[7] Develop good sleep habits. Get your eight hours of sleep by selecting, and sticking to, a specific bedtime. Limit your alcohol intake in the evening, as alcohol consumption can disrupt sleep cycles. And if you have trouble getting to sleep, try the free "Body Scan for Sleep" guided meditation from the UCLA Mindful Awareness Research Center, available free (along with others) at <http://marc.ucla.edu/body.cfm?id=22>.

Have Some Fun

I enjoy gardening and reading, but I decided recently to try something I haven't done before ... playing the guitar. I am taking free lessons online at www.justinguitar.com. As you know, you can find anything on the Internet, so pick something that interests you and get started. The key is to have fun and enjoy.

You would think given all the Type A personalities in our profession, we would all be very good at taking care of ourselves. However, often we are so focused on doing the best for our clients and families that we neglect ourselves. The fact is that by taking care of yourself, you will provide better service to your clients, better care of your family and create a better life for yourself.

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[1] <http://www.legalweek.com/legal-week/analysis/2404264/eighty-percent-of-senior-lawyers-say-their-health-is-being-damaged-by-long-hours-culture>

[2]
http://www.abajournal.com/mobile/mag_article/how_lawyers_can_avoid_burnout_and_debilitating_anxiety/

[3] <http://www.scbarr.org/Portals/0/Outline%20for%20Lawyers'%20Epidemic.pdf>

[4] <http://archinte.jamanetwork.com/article.aspx?articleid=1809754>

[5] <http://www.wsj.com/articles/lawyers-go-zen-with-few-objections-1434586250>

[6] <http://healthysleep.med.harvard.edu/healthy/matters/consequences/sleep-and-disease-risk>

[7] <http://www.npr.org/sections/health-shots/2016/01/04/460620606/lack-of-deep-sleep-may-set-the-stage-for-alzheimers>

- Change passwords every 90 days so. This helps lessen the effectiveness of some password attacks.
- Do not use the same password for all of your websites, computers, phones, etc. This prevents one password compromise from opening up all of your other systems and accounts.
- Enable account lockout after a certain number of bad passwords. This stops “brute force” password guessing software.

One of the best ways to manage the multitude of passwords is to use a password manager such as LastPass (free) or 1Password (purchase) to manage many passwords to multiple websites with only one master password.

Security System #2: Automatic Whole System Backup

Having a rock-solid backup helps mitigate many security problems as well as several other IT issues. They are often not set up properly, not monitored, not the right type of backup and not tested to make sure you can restore from them if need be. Here are some key points to remember when evaluating your current/future backup solution:

- Choose a solution that takes a “snapshot” of the entire system, not just some of the files and folders. This is important and will greatly decrease the time it takes to recover a server or a PC. Also, some solutions will not automatically add new folders that you create, so you could be missing data that should be backed up.
- Have a 100 percent automated solution. Many backup solutions rely on the user to change out a tape or external hard drive, insert a USB key or DVD. Anything that relies on people to perform some of the activities has a much higher level of failure.
- Keep a copy of your data both locally as well as in the cloud. A local copy of the data is key for fast data recovery and a copy in the cloud is important to combat against machine failure, theft, loss and disaster.
- Have alerts sent to you or your IT team/provider to warn you or them when backups fail.
- Test your backups. This is critical and should be done at least quarterly. This will make sure that the backup system is actually working and your data is recoverable.

Security System #3: Patch Management Program

Most people have heard of computer patches and understand that patching needs to be done. Turning on automatic patching and leaving it there is not enough. You should require your IT team/provider to manage the patching of your firm network including all of its servers, PCs and laptops. This should include Macintosh computers as well. A recent study indicates that up to 85 percent of targeted attacks are preventable.[4] A good patch management program includes:

- The ability to manually approve patches by the IT team/provider. Setting software patches to “automatically install” can really come back to haunt you during the three to four times per year Microsoft releases a patch that breaks something else or locks you out of your system.
- Patching more than just Windows and Apple OS. It should patch other major applications such as Adobe Acrobat/Reader, Flash, Java and Internet browsers such as Firefox and Chrome.
- The ability to report on the efficacy of the patching system. You should look for 90 percent or more in your ability to keep your systems up to date.

Security System #4: User Security Awareness Training

“Companies looking to protect themselves from cyberattacks need to look at the weakest link in the chain: employees. Humans are trusting in nature and that lends itself to exploitation from malicious agents. Employee training is key to plugging the weakest gap in security. Education around secure passwords, safe web use, and social engineering/phishing prevention are a great place to start.”[5]

Security awareness training is designed to help people become aware of common threats facing the firm as well as to be aware of and adhere to its security policies. This type of training is one of the most important steps in preventing security incidents and compromises. The training should cover:

- How to be safe on the Internet while browsing.
- How to detect and avoid fraudulent or malicious email.
- Safe remote access to firm data from public locations.
- Appropriate social media use.
- The firm’s acceptable use policy.
- Safe wireless use outside of the office.
- How to prevent social engineering.

Effective security is multilayered in its approach. There are other controls not mentioned above that should also be in place. You are now armed with information to begin a conversation with your IT team/provider today to start on the road to becoming more secure.

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[1] <http://www.forbes.com/sites/capitalonespark/2012/12/17/5-ways-small-businesses-can-protect-against-cybercrime/>.

[2] BUS. & PROF. CODE § 6068(e)(1) and Cal. Rules of Prof. Conduct. 3-100(A).

[3] <http://www.pcworld.com/article/2109210/report-average-of-82-000-new-malware-threats-per-day-in-2013.html>.

[4] <http://www.publicsafety.gc.ca/cnt/ntnl-scrtp/cbr-scrtp/tp-strtgs-eng.aspx>.

[5] Jordan, David (October 2015). You Can't Get Unhacked. *Fast Company Magazine*.

Surprising Traps of Social Media in the Workplace

Monday, February 01, 2016

Employee activity on social media continues to skyrocket, and each day more new social media platforms and apps are released to the public. Employers can no longer turn a blind eye to what was once thought of as a personal recreational activity. These days, employees are posting on Facebook details about their jobs, supervisors and customers, along with their daily activities, meals and vacations.

Some savvy employers have truly embraced the concept of social media in the workplace by encouraging their employees to harness the power of social media for the company's benefit—so called “employee advocacy programs.”



While the law regarding social media use in the workplace is slow to adapt, here is a look at some of the not-so-obvious traps of social media in the workplace.

Social Media Policies: Being Reasonable May Not Be Enough

Generally, it is a good idea to have a social media policy. Additionally, other related policies, including anti-harassment, confidentiality, use of mobile devices and workplace privacy should be updated to add social media-related components.

However, having what appear to be “reasonable” policies may not be enough. Examine, for example, the following sample policies:

- “You may not make false or misleading representations about your credentials or your work.”
- “Be respectful to the company, other employees, customers, partners and competitors.”
- “Don’t pick fights online.”
- “Do not make ‘insulting, embarrassing, hurtful or abusive comments about other company employees online,’ and ‘avoid the use of offensive, derogatory, or prejudicial comments.’”

These seemingly reasonable employer policies were found to be unlawful by the General Counsel of the National Labor Relations Board (NLRB).[1] Certainly every attorney advising employers on social media and employee handbooks should review the General Counsel’s memo.

It explains that employees have a “Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees ... Thus, an employer’s confidentiality policy that either specifically

prohibits employee discussions of terms and conditions of employment—such as wages, hours or workplace complaints—or that employees would reasonably understand to prohibit such discussions, violates the Act. Similarly, a confidentiality rule that broadly encompasses ‘employee’ or ‘personnel’ information, without further clarification, will reasonably be construed by employees to restrict Section 7-protected communications.”[2]

Conversely, “broad prohibitions on disclosing ‘confidential’ information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information.”

So, what does this mean? Below are examples of unlawful and lawful policies on maintaining confidentiality, according to the General Counsel:

- You must not disclose proprietary or confidential information about [the employer, or] other associates (if the proprietary or confidential information relating to [the employer’s] associates was obtained in violation of law or lawful company policy). **UNLAWFUL**
- Discuss work matters only with other [employer] employees who have a specific business reason to know or have access to such information. Do not discuss work matters in public places. **UNLAWFUL**
- Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers. **LAWFUL**
- Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [employer] is cause for disciplinary action, including termination. **LAWFUL**

The “lawful” policies are ones, according to the General Counsel, that: (1) “do not reference information regarding employees or employee terms and conditions of employment; (2) although they use the general term ‘confidential,’ they do not define it in an overbroad manner; and (3) they do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications.”

Consequently, proactive employers will review their policies in light of Section 7 of the National Labor Relations Act, and hope to avoid a complaint with the NLRB (which has been the most active government agency concerning the topic of social media in the workplace).

Terminating Employees for Social Media Activity Is Tricky

On October 25, 2011, Hernan Perez, an employee of Pier Sixty, was working as a server at a fundraising event. During the cocktail and dinner service, Perez felt that he and other employees had been subjected to disrespectful treatment by one of their managers. Perez took a break to calm down, and went outside. During his break, Perez used his iPhone to post the following on Facebook regarding his supervisor (censored for this post):

“Bob is such a NASTY MOTHER F----- don’t know how to talk to people!!!!!! F--- his mother and his entire f----- family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!”

Perez's Facebook friends included a few of his coworkers, and current and former coworkers commented on the post. Perez made his post two days before the union election, and removed it the day after the election. After an investigation, Pier Sixty terminated Perez's employment, saying that Perez had violated company policy by posting his offensive comments.

Naturally, Perez filed a claim with the National Labor Relations Board. And, naturally, on March 31, 2015, the NLRB sided with the employee and determined that Pier Sixty violated Perez' rights when it fired him.[3]

Cases like this one involving Pier Sixty really put employers in a quandary. Here, the NLRB stated that "[a]lthough we do not condone Perez's use of obscene and vulgar language in his online statements about his manager, we agree that the particular facts and circumstances presented in this case weigh in favor of finding that Perez's conduct did not lose the Act's protection." This is so even though the dissent characterized Perez's Facebook comments as "fraught with insulting and obscene vulgarities."

The NLRB reached this conclusion by focusing on several factors. One such factor was that it found that Pier Sixty had not disciplined other employees in the past for language similar to that used by Perez, and noted that such remarks were "a daily occurrence in [the] workplace, and did not engender any disciplinary response."

The evidence demonstrated that since 2005, Pier Sixty had "issued only five written warnings to employees who had used obscene language, and there is no evidence that [Pier Sixty] has ever discharged any employee solely for the use of such language." As a result, according to the NLRB, Perez may not have known that his use of such language would result in his termination.

Additionally, since Perez was allegedly (by stating "Vote YES for the UNION!!!!!!") posting in order to help protect the rights of his fellow employees, the NLRB found that his post was an example of protected concerted activity under the National Labor Relations Act.

Finally, the NLRB examined Pier Sixty's policies. The NLRB noted that Pier Sixty's policy on "Other Forms of Harassment" did not prohibit vulgar or offense language. And, Pier Sixty did not claim that Perez's post on Facebook was directed at any protected characteristic listed in the policy.

What Should Employers Do?

Employers must act to avoid these situations and being overruled by the NLRB. Here are a few steps to take:

1. **Update or create policies.** These policies should be as specific as possible, and should not contain a blanket prohibition on employee use of social media, except when the employee is expected to be working. They could prohibit the use of vulgar language and profanity, and should be created or updated along with any anti-harassment and anti-bullying policies. Note, however, even with these tightly worded policies, the NLRB and/or courts may still determine that such policies are in violation of the National Labor Relations Act.
2. **Train employees.** Having policies and a handbook is a great start. However, they only get you so far. Employees must be trained to understand what these policies mean. Supervisors and managers must learn the same, and how or when to enforce

such policies. Furthermore, they must know when to discipline employees and what types of discipline are at their disposal. Alternatively, they need to know enough to know when to refer a situation to the Human Resources department.

3. **Be consistent.** The NLRB was unimpressed by Pier Sixty's decision to terminate Perez when Pier Sixty had not terminated the employment of any other employee before for using such language. It is unknown if the NLRB would have ruled differently if Pier Sixty had terminated other employees for offensive or vulgar language, but it likely would have helped Pier Sixty if Perez was the fifth employee, and not the first employee, to have been terminated for these reasons.
4. **Scrutinize terminations.** Before terminating an employee for their posts on social media, employers should be extremely careful to analyze their decisions. On the one hand, if the employee has revealed confidential or trade secret information, then termination may be very clear. On the other hand, if the employee is venting about work conditions, even using profanity, the employer must analyze whether such comments could be considered protected concerted activity.

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[1] Memorandum GC 15-04 of the General Counsel of the National Labor Relations Board, March 18, 2015.

[2] National Labor Relations Act; 29 U.S.C. §§ 151-169.

[3] *Pier Sixty, LLC and Hernan Perez and Evelyn Gonzalez*, NLRB Cases 02-CA-068612 and 02-CA-070797, March 31, 2015.

Telephonic Appearances and Your Practice

Monday, February 01, 2016

It is now 2016, and technology abounds. Silicon Valley (our neighbor to the south) is at historic heights. Its innovations have transformed the world we live in by making things more efficient and more affordable. It is now all but considered a given that a person—especially a lawyer—can use their smartphone, computer or tablet device to video conference or make telephone calls.

In some cases, making such calls over the web occurs with better voice quality than from cellphones or even landlines. With all this technology sprouting and thriving around us, lawyers nevertheless seem hesitant to use such technologies, especially when making a court appearance, meeting a client or participating in mediation.



Believe it or not, there is a California Rule of Court—Rule 3.670—that codifies the legislature’s intent to promote appearances in court by telephone in civil cases. The rule of court is designed to improve access to the courts and reduce litigation costs. The rule specifies various circumstances where a telephonic appearance is not permitted, such as trials, hearings on temporary restraining orders, settlement conferences, trial management conferences and various other hearings.

This general policy of promoting and encouraging telephonic appearance is one that has even extended to allowing video appearances, which are permitted in Los Angeles and Merced counties. There is generally a fee of \$86 to \$100 or more for a court call and a several hundred dollar fee for video call appearance. Telephonic appearances require landlines, although some attorneys use their cellphones for the calls either because they are out of the office when the call occurs or they no longer have a landline.

If you use a cellphone, make sure that you have sufficient battery, as you may be on hold for over an hour before your case is called. The provider for all telephonic appearances in California is CourtCall.

Even with the public policy to promote telephonic court appearances, many lawyers keep going to court or refuse to make telephonic appearances. There are many reasons for this: Getting face time (not the iPhone FaceTime, but real face time) with a judge and other lawyers, getting a feel for the courtroom, and probably what most of us courtroom litigators know to be the case—avoiding technological glitches like bad voice quality or being disconnected from a call. Some do it for the less legitimate reason that it allows them to bill more time to a file.

The reality is that unless there is a comfort level with the court and opposing counsel, appearance by telephone can be risky. If opposing counsel likes to file papers the day of the hearing, then an attorney appearing by court call will be unable to see the filed papers and will have some explaining to do to the client. If an unknown party or witness appears at a routine hearing, then a person appearing by court call cannot meet with the surprise

person in the hallway prior to court or even during a recess from court to discuss matters.

Some lawyers have clients who insist their lawyer appear in court because they wish to appear in court (let's be honest, it looks awkward when an attorney calls in while their clients are sitting in court by themselves).

Aside from court, some clients simply do not have the means or the technology to communicate by video call. Some mediators refuse to allow participants to call into mediation or appear by video call, insisting that they need the individuals present in order to have the desired effect intended during the mediation session. Some lawyers and clients who appear in person to a court appearance or mediation take the lack of a physical appearance by the other attorney as disrespectful.

In other words, even though the technology is available and encouraged, there are numerous reasons why lawyers, clients and mediators insist on personal appearances and resist the use of court call or video call technology.

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Smartphones and the Police: Riley v. California

Monday, February 01, 2016



In 2014, the United States Supreme Court addressed an evolving Fourth Amendment issue in *Riley v. California*, 134 S.Ct. 2473 (2014). Given the proliferation of smartphones, when coupled with their rapidly expanding capability, it was only a matter of time before the Supreme Court would be called upon to address the application of the Fourth Amendment to smartphones. *Riley* was that case.

The Law Before *Riley*

People v. Diaz, (2011) 51 Cal.4th 84, was the controlling California authority on the search and seizure of an arrestee's cellphone. The police conducted a warrantless search of the text message folder on the defendant's cellphone approximately 90

minutes after his arrest on a narcotics charge. An incriminating text message was found and the defendant's motion to suppress was denied. The Court of Appeal affirmed.

Despite the time gap between the arrest and search, the California Supreme Court held that the warrantless search of the defendant's cellphone was valid because it was "immediately associated with defendant's person" and the search was valid irrespective whether an exigency existed.[1]

The *Riley* Decision

In *Riley v. California*, the United States Supreme Court addressed the issue whether the police can conduct a warrantless search of a "smartphone" seized incident to an arrest.

Riley involved two consolidated cases regarding whether the police properly conducted a warrantless search of a cellphone incident to an arrest. Following a traffic stop, Riley's car was impounded and an inventory search disclosed concealed and loaded firearms. The police seized his smartphone, which contained various gang-related information and photographs of Riley standing in front of a car the police suspected had been involved in a prior shooting.

Riley was charged in connection with the shooting, which carried a gang enhancement. The Court of Appeal affirmed the denial of Riley's motion to suppress evidence from the smartphone. The California Supreme Court denied the petition for review.

In the second case, petitioner Wurie was arrested on a narcotics charge. One of Wurie's two cellphones was a "flip phone." At the police station, Wurie received several phone calls which the police traced to an apartment building bearing Wurie's name on the mailbox.

After observing a woman through a window resembling the photograph on the flip phone, the police obtained a search warrant for the apartment, where they found various narcotics, drug paraphernalia, firearms, ammunition and cash. He was convicted of

various narcotics and weapon charges. The District Court denied Wurie's motion to suppress. A divided panel of the 1st Circuit reversed the denial of the motion to suppress. The Supreme Court granted *certiorari* in both cases.

The foundation of *Riley* was found in three Fourth Amendment cases that laid the groundwork for the body of search and seizure law, including:

- *Chimel v. California*, 395 U.S. 752 (1969): Reasonable for the police to search and seize any evidence found on or near the arrestee, but a search of the entire house where the arrest was made was unreasonable.
- *United States v. Robinson*, 414 U.S. 218 (1973): A full search of the person including a pack of cigarettes containing heroin was not only an exception to the warrant requirement of the Fourth Amendment, but was also reasonable notwithstanding that the officer did not suspect that the defendant was armed.
- *Arizona v. Gant*, 556 U.S. 332 (2009): A search of the arrestee's car and jacket was unreasonable when the arrestee was handcuffed and placed in the police car.

The cynosure of these three cases was that, for purposes of officer safety, the arresting officer was entitled to conduct a search for weapons or evidence incident to the arrest.

Against this backdrop, the Supreme Court turned its attention to the modern issue of data secured on a smartphone. In this regard, the Supreme Court noted that the term cellphone is "misleading shorthand; many of these devices are in fact minicomputers," which also can be used as a telephone.[2] In the digital age, the storage capacity of cellphones has several privacy consequences. There is an element of "pervasiveness that characterizes cellphones but not physical records" including storing photographs, contacts and medical and financial information.[3]

Further, the apps can reveal a great deal about a person's life, ranging from political and religious associations to addictions, medical and dating histories.[4] Smartphones can also reveal Internet search histories and can reconstruct a person's specific movements through GPS monitoring.[5]

The Supreme Court decided:

"Our holding, of course, is not that the information on a cellphone is immune from search; it is instead that a warrant is generally required before such a search, even when a cellphone is seized incident to arrest." [6]

Despite this holding, the Supreme Court still noted that exigent circumstances could compel a warrantless search, such as to prevent the imminent destruction of evidence.[7]

Thus, *Riley* held that the arresting officer can seize, but cannot search the smartphone absent a warrant unless there are exigent circumstances.

The contours of the warrantless search and seizure of a smartphone is resolved with the *Riley* decision. That being said, does *Riley* extend to other technological devices such as a GPS? Appellate courts will undoubtedly wrestle with that issue in the future. This issue was raised—but not resolved—in *American News & Information v. Gore*, (2014) U.S. Dist. Lexis 132591. A reporter's media credentials were revoked but he continued to appear at crime scenes. He was arrested a few times for obstructing a police officer and twice the police seized his video camera.

In connection with a motion to dismiss, the court held “the video cameras at issue here appear to fall somewhere between the physical search of a cigarette package found in a pocket during a search incident to arrest allowed under *United States v. Robinson* and the data search of a cellphone under *Riley* that generally requires a warrant.”[8] The court granted qualified immunity to the officers.

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[1] *Id.* at p. 93.

[2] *Id.* at p. 2489.

[3] *Id.* at pp. 2489-2490.

[4] *Id.* at p. 2490.

[5] *Id.* at p. 2490.

[6] *Id.* at p. 2493.

[7] *Id.* at p. 2494.

[8] *Id.* at p. 27.

Effective Uses of Social Media in Family Law

Monday, February 01, 2016



According to a recent survey, 58 percent of people use or have a profile on one or more social media networks. That number increases to 89 percent for those under the age of 30. The largest and most popular social media site is Facebook, followed by Google+, LinkedIn, Instagram, Twitter, Tumblr, Snapchat and Pinterest.[1] The information available on these various sites can be tapped into and utilized in almost any family law proceeding.

Child and Spousal Support

A party's ability to work and pay child and/or spousal support is a common issue in family law cases. Often, one party claims he or she cannot work or is unable to find employment. In this situation, if a person has a

LinkedIn profile, you can obtain information and evidence including a resume, educational background, work experience, skills and employment history. This information, along with the party's communication with others in a network of contacts and connections can be used as to show the party has the ability (education, work experience, skills) and opportunity to work.

This can be a factor in child and spousal support cases where a party either cannot or will not obtain employment and you are asking the court to impute income to that party. On the other hand, if a person is actively making connections and contacts, he or she could use that information and other analytical data available on LinkedIn to show that the person is making a sincere effort to find employment. No matter what side you are on, LinkedIn is a resource that should not be ignored.

In addition to a party's ability to pay support, there is often the issue of the standard of living during the marriage that is relevant to most spousal support cases. Something as innocent as photos from a recent trip to Europe, a weekend in Vegas or pictures of food at fancy restaurants posted on Facebook or Instagram, can be used along with credit card and bank statement as evidence regarding a party's standard of living, disposable income or ability to pay child and/or spousal support.

Child Custody and Visitation

Facebook, for example, may reveal a person's contact information, work and education history, as well as a list of "friends," detailed conversations and posts that include photos, "check-ins," status updates and "likes." From this site alone, you can gather information regarding a person's interests, activities, beliefs and even attitude towards the other spouse or parent, as well as where that person is located at a specific time.

Facebook is often used to support a parent's claim that the other parent may not be spending custodial time with the children, or exposing the children to inappropriate activities (such as drinking or drugs) or undesirable friends. Keep in mind that it is not only what is on the parent's page, but also his or her friends and the comments made by

friends. This can be especially relevant if the party is also “friends” with the child or children and can see the photos, posts and comments made by the parent on his or her page about the other parent or the divorce proceedings.

The "Kevin Bacon" Effect

You’ve probably heard of the six degrees of separation theory. Because it is a small world, any one person (including Kevin Bacon) is connected to any other person through six or fewer relationships. The same concept applies here—even if your client is not “friends” with the other party, he or she probably has friends in common, thus giving the other party access to the information your client posts on his or her friend’s social networking sites.

Those same friends that allow you to view a spouse’s information may also come across postings by your client and share that information with the other party; or your client’s postings may be seen by the other party as others comment on or share them. Understanding how information gathered from social media sites can help support your case also forces us to consider how the information can be used against your client.

It is important to advise your client at the very first meeting to stop all social media activity. If the client refuses to do that, at least get him or her to agree to upgrade all privacy settings (and unfriend the other party) so as to limit who has access to the client’s information. You should give all of your clients the same advice, whether it is a text, email or post on social media: (1) Write it as if the judge is going to read it; and (2) When in doubt, don’t do it. You just have to hope your client will follow this advice.

Getting the Information: No Reasonable Expectation of Privacy

Most of the time, the information obtained from social media comes from our clients as a printout or screen shot of the page. Depending on the issues in the case and the resources available to the parties, it is a good idea to follow up these initial findings with formal discovery. Parties in litigation are entitled to discovery of all relevant, non-privileged information. Thus, social media content is subject to discovery, despite the privacy settings imposed by the account user. The user’s right to privacy is commonly an issue in discovery disputes involving social media.

Litigants continue to believe that messages sent and posts made on their Facebook pages are “private” and should not be subject to discovery during litigation. In support of this, litigants claim that their Facebook pages are not publicly available but, instead, are available only to a limited number of designated Facebook “friends.” Courts consistently reject this argument, however. Instead, courts generally find that “private” is not necessarily the same as “not public.” By sharing the content with others—even if only a limited number of specially selected friends—the litigant has no reasonable expectation of privacy with respect to the shared content.

Thus, the very purpose of social media—to share content with others—precludes the finding of an objectively reasonable expectation that content will remain “private.” Consequently, discoverability of social media is governed by the standard analysis and is not subject to any “social media” or “privacy” privilege. However, courts have held that the discovery requests cannot be too general or overbroad and must be tailored to show relevance to an issue in your case.[2]

Parties and counsel are well advised to adjust their thinking so that social media becomes just another type of electronic data, such as emails and text messages that must be preserved and is subject to discovery if relevant to the dispute. Clients should be advised against trying to delete or otherwise altering their social media (except for increasing privacy settings), since this could potentially be viewed as tampering or destruction of evidence.

As we all become more active on social media and as more sites are developed, it is important to remember that what may seem like an innocent “like,” post, check-in or picture may end up being used as evidence against in a divorce or child custody proceeding. As attorneys, we need to remember that the other party's social media pages may be a source of information helpful to assist us in presenting our case.

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[1] Source: Statistic Brain Research Institute, Browser Media, Socialnomics, MacWorld, December 1, 2015.

[2] See *Mailhoit v. Home Depot USA, Inc. et. al* 2012 U.S. Dist. Lexis 131095

Getting the Most from Your Online Legal Advertising

Monday, February 01, 2016



There are numerous online marketing options currently available to lawyers, but not all of them work for lead generation. For a maximum return on investment, a few of the marketing platforms are very good, some are adequate and others are duds. Marketing professionals may take issue with some of what I write here, but these are my recommendations for what they're worth.

With more choices coming online each month, as well as endless new offerings and enhancements coming from the bigger players, how is a lawyer to prioritize the spending of a limited marketing investment?

Every lawyer's law practice is different. Your practice areas and ideal client types are going to vary considerably from other attorneys in your community. That said, if you're targeting consumers and small businesses, my 25 years of legal marketing data, including the delivery of over 1 billion Google ads, make certain generalizations possible.

So platform-by-platform, in order of effectiveness, I'll summarize the pros and cons of most of what is available to lawyers in hopes that I can steer you towards what works and steer you away from what may be a less than optimal use of your investment. This article covers only paid advertising in this article and reserve for another time a comparable comparison of other sometimes-effective marketing opportunities like e-newsletters and guest-blogging.

Google Advertising

When done well, Google advertising delivers, plain and simple. You bid on phrases like "Walnut Creek divorce lawyer" and Google shows your ad on that search. When someone clicks on it, you owe Google a little and you have a legal consumer on the divorce page on your website. The new "call-only" ads allow you to run ads only on smartphones and you owe Google only when someone actually calls you.

The downside is that the learning curve on this kind of advertising is staggering and it is recommended that you outsource the account management to a competent professional.

On the bang-for-your-buck scale, Google wins.

Bing/Yahoo Advertising

Comparable to Google advertising and cheaper, you can bid on phrases and pay per click. Yahoo delivers Bing ads too.

The cons are that the clicks are cheaper but the inquiries are fewer resulting in more expensive leads than through Google. The learning curve is also steep and search

volume is low. Google owns most of the smartphone search market, as the default search engine on Androids and iPhones, so call-only ads in Bing won't deliver much.

I normally recommend against Bing/Yahoo advertising unless you're already spending as much as you can in Google, which for many practice areas is a significant investment.

In sum, Bing/Yahoo will work for lead generation but not as well as Google.

LinkedIn Advertising

LinkedIn advertising is a unique opportunity for lawyers who represent businesses and other professionals. They offer several marketing opportunities that can be effective. Since this piece is about targeting individual consumers, LinkedIn is beyond the scope of this article. It's worth exploring for business-to-business law firms.

Yelp Advertising

Like Google and Bing, you can bid on a pay-per-click basis for top listings when people in Yelp are searching for reviews about lawyers. It is believed by some that people who are reading reviews are at an advanced stage of the buying process so they are a valuable group to target.

Through Yelp's "self-serve" ads, you don't have to buy an expensive "enhanced listing" nor do you have to lock yourself into a 12-month commitment. An advantage of Yelp advertising over Google and Bing advertising is that it is easy to set up and it can be a set-it-and-forget-it tool.

The downsides are as follows: You target broad categories like "lawyers" rather than specific searches like "Walnut Creek divorce lawyers;" you cannot set your own bids and based on what I've seen, your cost per click will be higher than it is at Google and Bing; and the ads take consumers to your Yelp profile, not to your website.

There's a circumstantial component, too: You should not run ads in Yelp if you have a low star rating.

I often recommend against Yelp advertising unless you're already spending a lot in Google and Bing and/or you want to show off a large number of five-star reviews. It's cheaper and more effective to invest that money in Google.

YouTube Advertising

Not many people realize that YouTube is the second largest search engine in the world and has hundreds of thousands of law-related searches each month. Advertising on YouTube is managed through your Google advertising account and is astonishingly cheap at about \$0.08 per view. As a preliminary matter, you need a high-quality video ideally less than 30 seconds in length.

I've served up thousands of video views for different law firms and it's unclear to me whether there is a measurable return on investment. As with other types of Google advertising, this is probably something you don't want to run in-house.

For a budget of maybe \$2.50 per day, I recommend it tentatively for lawyers who have a

good video just because it is really cheap exposure.

Facebook Advertising

For legal lead generation, Facebook advertising is ineffective. It works for promoting a specific post or getting a lot of “likes” for your fan page, but people are not in Facebook looking for legal help. You cannot target Facebook users by keywords like in Google and Bing. Your options are vague, unhelpful demographics like age, location and interests.

Facebook brings several important benefits to your online ecosystem and your law firm should be active in Facebook, but I recommend against Facebook advertising except to get more “likes” for your fan page.

Twitter Advertising

Like Facebook advertising, I have found Twitter advertising ineffective for lead generation. In Twitter’s favor, its advertising is keyword targeted so you can show your ads when someone is tweeting about lawyers. This makes it better than Facebook advertising.

The advertising can be useful in raising awareness of your Twitter account or specific Twitter posts and can help get “followers” but Twitter users are not there to hire lawyers.

I usually recommend against Twitter advertising for lead generation, unless you’re already spending a lot in Google, Bing and Yelp.

Paid Directories

There’s often a disconnect between what major national legal directories charge for a listing and the traffic you get in return. These listings have a calculable value and on the occasions I’ve had to pour through data for my clients, I have found the listings to usually be worth about a third of what is charged. There are exceptions where the value of the listing is equal to or greater than the cost and it’s a case-by-case calculation.

We shouldn’t discount the intrinsic value, aside from the direct traffic, to a link from some directories. Google wants your website to have trusted websites linking to it. For example, for Google, one link from the Contra Costa County Bar Association’s directory is much more valuable than hundreds of links from many of the lower-quality paid directories.

Keeping in mind that there are exceptions, I have found listings on the major national legal directories to be grossly overpriced.

Banner Advertising on Local Websites

Banner advertising on local websites like radio station websites or online newspapers are often delivered by Google. In the event that a local website is trying to sell you a banner on their website independent of Google, then it is a matter of traffic and cost.

This is a case-by-case situation. Sometimes it’s a value, other times it’s cheaper to run your banners directly through your Google advertising.

It is hoped that this article will help focus your current marketing investment. The Internet is crowded with marketing options and separating the fruitful from the wasteful is not

easy. My data and years of experience marketing attorneys supports what I've written here, but it's always worth noting that other marketing professionals may have different opinions. As you formulate or refine your marketing plan, please do some research, invest wisely and make 2016 a productive new year.

Ken Matejka, J.D., LL.M., is a California-licensed attorney and president of *Matejka Marketing, Inc.*, a San Francisco-based Internet marketing company for solo practitioners and small law firms. If you have questions about this article, Ken can be reached at ken@matejkamarketing.com.

Bar Soap: February 2016

Monday, February 01, 2016



It has been a bit too long since I penned a Bar Soap column, but no shortage of information to round out 2015, and move into 2016.

The annual MCLE Spectacular was once again the event of the year. Hard to believe it has been 21 years for that great event. **Dick Frankel** was on the board back when the event was conceived and the worry was, "What if we sponsor such an event, rent the hotel space and no one shows up?"

Well, we all know it continues to be a resounding success each year. So a pretty good gamble, don't you think? It is, of course, a great way to get those needed continuing legal education credits. But it is also a great way to see old friends, do your own legal marketing and have some fun.

At one time, the CCCBA holiday party was the event of the year. Things are a little quieter nowadays, however. For a long time, the holiday party was at a hotel. The 2015 party at the Bar Association office was indeed a success, but from an attendance standpoint, not quite as spectacular as the MCLE Spectacular.

And speaking of parties, the 40th anniversary celebration by **the Veen Firm** was off the charts. The party was held at the Waterbar and Epic Roasthouse in San Francisco. Goodness! What an event. For those of you lucky enough to get an invitation, you know what I am talking about. It reminded me of the **Zandonella** holiday parties back in the day.

On a sadder note, we lost several more friends and colleagues since my last column. **Judge Richard Arnason** quietly passed away in his sleep at the age of 94. And his private invitation-only funeral service was equally quiet. He certainly was a legal giant in our world and many of us are sad we didn't get to participate in a final send-off for that wonderful human being.

We can all take comfort in the fact the dedication of the Richard Arnason Courthouse in Pittsburg back in 2010 was a grand and wonderful event for Judge Arnason, and that will have to be our send-off memory. On a more personal note, my mother, who was a French and English teacher at Alhambra High School, taught Judge Arnason's children, also "back in the day."

Equally quiet was the passing of **David Del Simone**. David was a delightful and talented criminal defense attorney. We met when I was a deputy district attorney. He was a real force in the West County legal community. David was a Cal grad and a USF law school grad. Look up his obituary in the October 11, 2015, Contra Costa Times, and you can get a real sense of that wonderful man.

Most of you probably heard of the sad and untimely passing of **Mark Coon**. He, too, was a special lawyer. He and I had a nice chat on a Friday night at the Veen party in San Francisco and he was gone the following Monday. For those of you who did not know Mark, he was the city attorney for Concord.

William "Bill" Shinn passed away in October 2015. When I first met Bill, he was a lieutenant with the Contra Costa County Sheriff's Office. He was a true professional and a no-nonsense public servant. Bill rose all the way to commander in the Sheriff's Office, and then ran for City Council in Concord. He served for almost 10 years on the council, and during that time, was vice mayor and mayor (just not at the same time). Although Bill was not an attorney, he certainly was a part of our Contra Costa legal community.

I always like to mention people on the move in this column. Let's start that topic with judges on the move. The judicial assignments for 2016 came out and there are a few changes of note. I say "note" only because people often ask me about those assignments and I generally refer those asking to the Contra Costa Lawyer magazine. Here are the latest assignments.

As far as lawyers on the move, here is what I have heard: **Richard Frankel** is now on his own with an office on Front Street in Danville. So I guess that means Stuart Goldware is also on his own, with an office in San Ramon. **Amy Foscalina** has hung her own shingle as well. Looks like she may have a Livermore office now. Rumor has it that **Terence Church** has left Brown, Church & Gee. Wait until next time for more information on the move and the remaining partners. Happy hunting to all who have made those recent moves.

Greg Rolan is a partner at Haight Brown & Bonesteel in San Francisco, continuing his legal work in, among other areas, public entity litigation. Attorney **Sharon C. Collier** of Archer Norris recently achieved board certification in civil trial law by the National Board of Trial Advocacy. Congratulations to both Greg and Sharon.

I am always pleased to learn that someone actually reads my columns. Recall in my December column, I made a little tongue-in-cheek comment about the American Board of Trial Advocates (ABOTA) and how difficult it is for anyone to qualify, given the fact fewer and fewer cases actually go all the way to jury verdict in our civil courts.

Well, I do know **David Samuelson** of Bennett, Samuelson, Reynolds, Allard, Cowperthwaite & Gelini read that article. He kindly advised that ABOTA changed the entry level eligibility requirement in recent years. The new requirement to apply as a member is to have "completed 10 civil jury trials to jury verdict as lead counsel."

Thanks, David, for that information. Don't forget, folks, that ABOTA is also by invitation only. One has to be a nice person, competent and sponsored by ABOTA members. It's not enough just to have tried 10 cases to civil jury verdict.

Please keep those reports, rumors and gossip coming, so I can tell all in my next column.

Email me at mguichard@gtplawyers.com.

Ethics and Your Online Presence

Monday, February 01, 2016

The use of social media by lawyers is only going to grow in the coming years. State bars across the country are in a race to regulate it, but their limited knowledge of technology means that they have a difficult time defining the ethical boundaries.

The New York State Bar Association recently took matters into its own hands and produced a set of Social Media Ethics Guidelines[1] with useful guidelines to avoid ethical problems when using social media. The best resource for lawyers practicing in California is to go to our State Bar site and view "Ethics and Technology Resources." You will find a plethora of ethics opinions, Rules and articles to keep you up to date on this subject area.



Before you do, keep in mind that Rule 1-400 on advertising and solicitation is currently being reviewed by the Rules Revision Commission (which I am on) to see if we can make changes that will make it easier to apply to electronic advertising. We are also hotly debating whether to keep the advertising standards. Those standards create a presumption that the lawyer has violated the Rule.

Rule 1-400 will likely change; that I am certain of. But how it will change is currently up for debate. In the meantime, Christina Harvey, Mac McCoy and Brook Sneath recommend the following guidelines[2] (with my California spin put in):

- First, social media profiles and posts may constitute legal advertising, so review California Rule 1-400 before posting on Twitter, blogging and updating your website.
- Avoid making false or misleading statements. Don't say things like "I win all my cases," unless you have actually done so and don't say things like "I am the very best lawyer in California."
- Avoid making prohibited solicitations. Remember, a solicitation is when you contact someone who you do not know and try to sell them legal services. Some contacts are allowed; some not. Review Rule 1-400.
- Never disclose confidential information about a client on a blog so that the public can connect the information with your client.
- Do not assume you can "friend" judges.
- Avoid conversations with represented parties.
- Be cautious in conversing with unrepresented parties.
- Beware of inadvertently creating attorney-client relationships (don't be "engaged without the ring").
- Beware of the unauthorized practice of law (because posts can be read by people in every state).
- Tread cautiously with testimonials, endorsements and ratings; i.e., don't have your mom and best friend do them to "up" your ratings.

One issue that frequently comes up in my practice is lawyers wondering what they can do when a client basically defames them on a ratings site. This one is tough, because the

tendency is to rebut the allegations by stating what obstacles the client put in your way, or worse.

However, the bottom line here is that you must keep your client's confidences and resist debunking their statements by using file information to contradict their allegations if it is embarrassing or detrimental to the client.

It seems unfair, but I would advise not doing anything about it unless you really want to pay for a big battle and are prepared to pay to have records sealed. Many clients, if confronted, will remove posts that are not accurate; they don't want a battle as much as you don't want one.

Have a great 2016, and happy marketing!

Carol M. Langford is currently serving on the Rules of Professional Conduct Revision Commission. She defends lawyers before the State Bar and is a lecturer in law at UC Berkeley, Boalt Hall School of Law.

[1] Social Media Ethics Guidelines, June 9, 2015, available on the New York State Bar Association website.

[2] Business Law Today, January 2014.

2015 CCCBA Holiday Party [photos]

Monday, February 01, 2016

CCCBA held its annual holiday party on December 17, 2015, at the CCCBA office in Concord. Below are photos from the event. To see more event photos, please visit the CCCBA Facebook page.

[gallery ids="11635,11634,11639,11638,11636,11637"]

Only a Few Weeks Left to Renew Your Membership

Monday, February 01, 2016

Renew today so you don't lose your CCCBA member benefits!

After February 29, anyone who has not renewed their membership will be moved to non-member status, removed from section rosters and will lose other member benefits including discounted MCLEs and inclusion in our Membership Directory.

Three easy ways to renew your membership:



- **Renew online today.** Simply review your current profile and update if necessary.
- **Renew over the phone.** Call our Membership Coordinator, Jenny Comages, at (925) 370-2543.
- **Renew by mail.** Printed statements were mailed the last week of January. Fill out the statement and return with your payment to:
CCCBA
Attn: Jennifer Comages
2300 Clayton Rd., Suite 520
Concord, CA 94520

Renewal Resources

- Membership Dues and Sections Fees
- Detailed Instructions on How to Renew Online
- Communication Preferences
- Join/Rejoin the Lawyer Referral & Information Service (LRIS)
- Directory Photo Shoot Schedule
- Restricted Access Court Security Cards

Thank you for your continued membership!



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Security

[IT Security of the Law Office](#)

A simple firewall and anti-virus is not enough these days. The following is a review of the four systems, as a starting point for good security, that every firm should have in place.



Spotlight



[Bar Soap: February 2016](#)
We lost several more friends and colleagues since my last column. Judge Richard Amason quietly passed away in his sleep at the age of 94.



[Ethics and Your Online Presence](#)
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News & Updates



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