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DEALING WITH THE RISING TIDE OF ONLINE JUROR MISCONDUCT

By Shawn M. Larsen

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Facebook, Twitter, MySpace: the rise of social networking Websites has been credited with influencing world politics, from galvanizing American youth in the 2008 presidential election to providing an innovative resource for Middle Eastern democracy supporters to communicate (and as a medium for 2012 Presidential hopefuls to promote their candidacies).

By creating an avenue for individuals to share their everyday musings and reach a larger audience, posting "status updates" on Facebook and "tweeting" thoughts in 140 characters or less has become a ubiquitous form of expression in today's society. Facebook alone has an estimated 500 million users who range from teenagers trading party pictures to their parents reconnecting with high school friends, and includes everything and everyone in between.

With every new technology, however, come new legal pitfalls. Recently, one Facebook user's propensity for "oversharing" at the wrong time and in the wrong place landed him in hot water. The pending case of *Juror Number One v. Superior Court of Sacramento County (Royster),* California Court of Appeal, Third Appellate District, Case No. C067309 ("*Juror Number One*"), raises questions regarding a criminal defendant's constitutional right to a fair trial as weighed against a juror's right to privacy.

At the center of the *Juror Number One* matter is Arturo Ramirez, who was selected to act as the jury foreperson in a gang-related beating case. Six members of the "Killa Mobb" Sacramento street gang were charged with attacking a San Francisco man in a gas station on Halloween night 2008. Five defendants were found guilty. (*The People of the State of California v. Ramirez*, Sacramento Superior Court, Case No. 08F09791.)

Shortly after the verdicts had been issued, Juror Number Five "friended" Mr. Ramirez on Facebook and, much to his surprise, discovered several postings by Mr. Ramirez during the course of the trial. In his online writings, Mr. Ramirez mused about his jury service and the case at hand. For example, one typical post read: "Back to jury duty can it get any more BORING than going over piles and piles of metro pcs phone records...uuuuughhhh." As is custom-

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FROM THE CHAIR

Robert D. Brownstone

Hello Good-bye

By the time you read this column, the Annual Meeting will be fast approaching. So will my last days as Chair of the Executive Committee (ExCom) of our beloved Section. As Carol Burnett used to sing at the end of her variety show each Saturday night: "I'm so glad we had this time together just to have a laugh or sing a song. Seems we just get started and before you know it, comes the time we have to say so long."

Instead of getting misty-eyed, regaling you with yet another form of poetry, or looking back on the past year, I simply ask you to join me in a quick look into the crystal ball at the folks who will become the LPMT Section's new ExCom Officers in days to come.

The Chair for 2011-12 will be current Vice-Chair extraordinaire Will Hoffman, a veteran lawyer and eDiscovery expert. Already a four-year veteran of the committee, Will possesses a brilliant mind and a keen wit. He is extremely creative and is thus a constant source of new ideas. Will's sense of justice and his dedication to inclusiveness should serve us all well. His broad perspective and varied skills will position our Section to respond to whatever structural changes await the State Bar in the near future.

The Vice-Chair will be Perry Segal, a combination lawyer/technologist who writes the very popular and often-honored "e-Discovery-Insights" blog. In his two years on ExCom, Perry has been quite active on our Internet, Technology, and Education subcommittees. His appointment as an officer should enable Perry to help lead our Section and its members during a period of rapid changes in law practice management and technology.

The Treasurer will once again be Cindy Mascio, whose three-year term as a voting member has been extended one more year. A paralegal for over 25 years, in 2010 she received the Orange County Paralegal Association (OCPA) NALA Affiliate Award as well as OCPA's Lifetime Achievement Award. Cindy has been an all-star ExCom participant as a liaison and then a voting member. She has served as our treasurer for several years and has agreed to continue serving in this capacity. Cindy has also been a tireless leader of *The Bottom Line* and has contributed in other ways too numerous to mention.

Last but certainly not least, the Secretary will once again be Patricia ("Patty") Miller, an ace legal assistant by day and the LPMT MVP by night. Patty has served as the ExCom Secretary for the last three years, including this current year (2010-11) in the capacity of Special Advisor. Now that there has been a one-year gap since her three-year service as a voting member, Patty was appointed to another three-year term. As Secretary, Patty's minutes of each meeting are always detailed, flawless, and prepared ahead of time. Patty also now prepares an "Action Items" list in between meetings to keep us all on track on our "to-do's". In addition to her hard work as Secretary of the Executive Committee, Patty has made outstanding contributions to the committee as the editor of our e-newsletter and numerous other efforts, including membership.

We owe many thanks to Will, Perry, Cindy, and Patty for their contributions this year and in prior years. I also wish to thank our Special Advisors on whom I have leaned quite a

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ary, the postings were visible to all of Mr. Ramirez's "friends," many of whom responded with equally visible comments on his Facebook wall.

Juror Number Five, perhaps resisting the urge to make a comment of his own, contacted the defendants' attorney, claiming that he had stumbled upon what he believed to be juror misconduct. The attorney, not surprisingly, seized on the postings to demand a new trial. At his urging, the presiding judge eventually held an evidentiary hearing to determine whether Mr. Ramirez had violated the court's admonition not to discuss the case, a common rule implemented to ensure that jurors consider only the evidence presented at trial. The court and defense counsel examined both Mr. Ramirez and Juror Number Five. For his part, Mr. Ramirez testified that he had done nothing wrong. He had not discussed the case with individuals during the trial, and aside from the "boring" post, his musings never went beyond updates to friends and co-workers that he was still on jury duty.

The defendants attempted to subpoena Facebook to obtain Mr. Ramirez's electronic communications. But as is most often the case, Facebook resisted this attempt vigorously, arguing that the Federal Stored Communications Act shielded it from producing documents in compliance with the subpoena. Hoping to extricate itself from the litigation altogether, Facebook eventually turned over the materials to Mr. Ramirez's counsel, from whom the defendants then attempted to subpoena the materials. The presiding judge quashed the subpoenas to Mr. Ramirez, and instead issued an order requiring Mr. Ramirez to execute a consent form sufficient to allow the search and release of his Facebook postings. He bolstered the order with a warning that if Mr. Ramirez failed to execute the consent, the court would find him in contempt.

Mr. Ramirez, however, kept up the fight to keep his postings out of the defendants' hands. He first filed a petition for writ of prohibition, which the appellate court summarily dismissed. He next sought review of that decision by the California Supreme Court. The Supreme Court eventually sided with Mr. Ramirez, directing the appellate court to conduct a full review of the trial court's decision and to hear arguments from all sides. The hearing likely will occur in the next several months.

According to data compiled by *Reuters Legal*, more than ninety trials have been the subject of requests for a mistrial due to Internet-related juror misconduct, with more than half of those occurring in the last two years. Courts have handled these requests, and attempted to remedy the claimed misconduct, using varying techniques. For example, in *U.S. v. Fumo*, 2009 U.S. Dist. LEXIS 51581 (E.D. Pa. 2009), four individuals had been indicted by the federal government on 141 counts ranging from "fraud and conspiracy to defraud the Pennsylvania Senate" to obstruction of justice. Two of the defendants pled guilty, leaving the other two to stand trial. After a five-month trial, both were found guilty on numerous counts. During deliberations, however, a local television station reported on the Internet postings of a juror. That juror, Eric Wuest, sent a single "tweet" and made several Facebook postings about the trial, such as, "Wondering if this could be the week to end Part I." Mr. Wuest happened to see the news report and quickly deleted all of the relevant comments. The following day, the defendants moved to have Mr. Wuest removed from the jury. The court held an *in camera* review of the Internet postings, during which it "extensively questioned Wuest about his activities related to his use of the Internet." Based on the hearing, the court denied the defendants' motion, finding Mr. Wuest to be "one conscientious guy trying very much to comply with all the rules and regulations I've established, more so than I would ever imagine that a juror would do." The *Fumo* court affirmed the trial court's ruling, finding that there was "no evidence

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MORE THAN 90 TRIALS HAVE BEEN THE SUBJECT OF REQUESTS FOR A MISTRIAL DUE TO INTERNET-RELATED JUROR MISCONDUCT

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presented by either party showing that his extra-jury misconduct had a prejudicial impact on" the defendants.

Other examples abound. A Georgia Superior Court judge fined a juror $500 for "Googling" information about a rape case. In Michigan, a juror posted on Facebook during trial: "Gonna be fun to tell the defendant they're GUILTY." The Circuit Court judge fined the juror $250 and ordered her to write a five-page essay about the constitutional right to a fair trial. In Pennsylvania, a high-school librarian may face criminal charges for conducting online research while acting as a juror in a capital-murder case, causing the judge to declare a partial mistrial. And a federal district court judge declared a mistrial in a complex drug prosecution after discovering that 10 of the 12 jurors had done independent Internet research on the case (*U.S. v. Frank Hernandez*, Crim. No. 07-60027) (S.D. Fla. mistrial declared March 10, 2009.)

OUR INCREASED ACCESS TO ONLINE NEWS AND SOCIAL COMMENTARY IS SEEMINGLY IN DIRECT CONFLICT WITH A JUROR'S ABILITY TO WEIGH THE SELECTIVE EVIDENCE THAT IS PRESENTED IN AN IMPARTIAL MANNER

In California, even the Superior Courts have taken a position on social networking sites. As of Jan. 1, 2010, the California Superior Court in San Francisco requires that all juror questionnaires include a cover sheet containing the following statement: *"You may not do research about any issues involved in the case. You may not blog, Tweet, or use the Internet to obtain or share information."* (S.F. Super. Ct. Rule 7.2.)

Prospective jurors who use social networking websites on a daily basis are increasingly immune to admonitions to avoid blogging, texting, "tweeting", and posting while in court and during deliberations. But while a juror's penchant for online sharing and commentary may seem innocuous (or, in the case of the juror caught red-handed, embarrassing), it raises very serious issues regarding potential bias.

Under the Sixth Amendment to the United States Constitution and basic principles of due process, all defendants in a criminal proceeding have the "right to a speedy and public trial, by an impartial jury of the State." Jurors who post comments on Facebook or "tweet" about their boredom, provide commentary and criticism about the incompetence of lawyers, or comment on the nature of the case, are in turn soliciting comments from their friends and followers. Comments in support of the posts affirm the juror's views and perspectives toward the whole judicial process and arguably influence the juror's opinion and decision in the trial. Indeed, from one vantage point, our increased access to online news and social commentary is seemingly in direct conflict with a juror's ability to weigh the selective evidence that is presented in an impartial manner.

In hopes of addressing this problem, several state courts, as well as the federal court system, have undertaken the task of rewriting civil and criminal jury instructions to bar jurors from tweeting, texting, blogging, emailing, or researching proceedings online. For example, California Civil Jury Instruction No. 100, which is given at the outset of every civil case, includes the following admonitions: "Do not use any electronic device or media, such as a cell phone or smartphone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or Website, including social networking Websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty." The Ninth Circuit Court of Appeals Model Criminal Jury Instructions similarly prohibit jurors from communicating with anyone about the merits of a case, including "discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, Website or other feature." (9th Cir. Crim. J. Inst. 1.9.)

But for all of these efforts, it seems that jurors still find themselves tempted to post thoughts, comments, and access the Internet, leaving courts and legislatures

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in the position of having to determine an appropriate punishment for such conduct. As the examples provided above illustrate, most courts now opt for the imposition of monetary sanctions (as well as the occasional homework assignment.) But if such fines, even when coupled with a threat of criminal contempt, cannot stop the problem, what are courts to do? Would more severe monetary penalties serve as an adequate deterrent? One look at the person talking on the cell phone next to you during the commute to work, despite the potential for a hefty fine, leads to the conclusion that the answer likely is "no." An alternative approach may be for attorneys, while conducting *voir dire*, to ask questions designed to gauge how Internet-savvy a potential juror is. But the ease with which a person surfs the Net does not necessarily correspond to his or her willingness to disregard jury instructions regarding online communications.

These efforts, however, raise a competing issue: what about a juror's right to privacy in his or her online writing? Defense arguments regarding the right to a fair trial are vulnerable to a claim by jurors that their posts constitute private, protected communications. At least in the employment context, most courts have been reluctant to adopt this view, ruling, for example, that employees' online activity is not private and may constitute grounds for termination. But if the court-ordered consent in *Juror Number One* is upheld, Mr. Ramirez's personal, and arguably private, postings —along with a complete inventory of corresponding comments from third party "friends"—will become available for the world to see. The dissemination of such information can be a frightening proposition for a juror who has just voted to convict a gang member. On the other hand, courts may be reluctant to find sympathy for a juror who has knowingly placed him or herself in such a perilous situation through a knowing disregard for court orders.

In sum, this case ultimately raises more questions than answers. The best path for navigating the intersection of a defendant's Sixth Amendment rights and a juror's privacy in this modern age is still unclear. We can expect to see state and federal legislatures enact new laws, and courts to adopt new practices, in an effort to find the proper balance. In the meantime, one thing is certain: if you are selected to serve on a jury, be careful what you post on your Facebook page!

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MORE THAN JUST RULES: FROM THE MOMENT POTENTIAL CLIENTS INQUIRE ABOUT SERVICES ATTORNEYS SHOULD FOLLOW THE GUIDING PRINCIPLES OF ETHICS

By Lee Kanon Alpert

Lee Kanon Alpert

Ethics are taught in law school and are included in the State Bar's Rules of Professional Conduct. However, ethics must be understood as more than simply words in a textbook or lines within a set of rules. Attorneys must rely on the guiding principles of ethics from the moment a potential client inquires about their services.

Lawyers face subtle ethical issues daily. For example, prior to a potential client's initial interview, attorneys should check to ensure that there will not be a conflict of interest between a potential client and an existing or previous client. Unfortunately, many attorneys wait until the potential client is in the initial interview to conduct this check, and often find abruptly and inconveniently that a conflict indeed exists.

Awkward ethical positions like this can be avoided by conducting early due diligence. While not required by State Bar rules, law firms should implement systems that check and cross-check previous, current and potential clients for possible conflicts of interest.

Another ethical question arises when these checks reveal a conflict between an existing client and a potential client. State Bar rules allow attorneys to represent two clients with an existing conflict of interest as long as both sign a conflict of interest waiver. But is it ethically right to do so?

Even if both parties agree to a waiver, the answer to this ethical question is generally no. Regardless of how well written and exacting the waiver, odds are high that something will arise during the course of the matter that will place the attorney in a precarious position. If one client is unhappy with the outcome of the legal matter, the client may point to the conflict as the reason for the disappointing results. By rolling the ethical dice and accepting the second client, attorneys run the risk of finding themselves in the midst of a breach-of-confidentially lawsuit. If there is any conflict of interest between an existing client and a potential client, attorneys should choose to refer the potential client to another attorney.

Ethics also play a role in generating a congruous and successful initial meeting with a potential client. Fortunately, here ethics and good business sense go hand in hand. When a potential client first contacts an attorney about a legal matter, the attorney is not required to provide a written agreement outlining the attorney's obligations and fees for the initial meeting. It is only after the attorney is officially retained and agrees to undertake work on behalf of the new client that the Rules of Professional Conduct require a written agreement between the parties when the fees are expected to exceed a certain amount.

Prior to the initial meeting with the potential client, the attorney should draft, for the potential client's signature, a document containing pertinent information about the client and verbiage outlining the scope and fees for the initial meeting. The document should state that the potential client understands that the initial meeting is for consultation purposes only and does not guarantee that the attorney will accept the matter. Also included should be an explanation that the fee for the consultation is based on a stated hourly rate and is payable whether or not the client decides to retain the attorney's services. This can prevent disputes about consultation costs and misunderstandings about whether the attorney accepted the

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MORE THAN JUST RULES CONTINUED FROM PAGE 6

case, as well as whether further action on the part of the attorney was expected. The document should also clearly state that it supersedes any previous oral agreement.

The attorney should have the potential client sign this document before the consultation takes place. This way the attorney has clearly defined the attorney's role. If the client later refuses to pay for the consultation services, the signed document clearly shows the client understood the arrangement. While these agreements are not legally required or mandated by the bar, ethically they should be part of every lawyer's standard business practice.

Attorneys can also find themselves walking an ethical line once representing a client. The Code of Professional Conduct makes it clear that attorneys cannot improperly coach witnesses, permit witnesses and clients to sign declarations that they know are not true, or misrepresent facts before the court. If a client asks the lawyer to proceed in a way that is ethically inappropriate, the attorney is not under obligation to do so.

The Rules of Professional Conduct outline the minimum ethical requirements of the profession. However, rather than hew to these minimum requirements, attorneys must make ethical decisions on a daily basis that allow them to stay true to the standards of their profession, their own moral beliefs, and what will allow them to sleep well at night.

Lee Kanon Alpert *is a founding principal of Alpert, Barr & Grant, APLC in Encino, Calif. His principal practice areas include administrative and governmental relations, real estate, construction and commercial law. He serves as a mediator and arbitrator and as offsite counsel to businesses and corporations. He is also immediate past president of the Board of Commissioners for the Los Angeles Department of Water and Power, a member of the Regional Governing Ministry Board of Providence Health & Services and Chair of the Board of Directors for Genesis LA Economic Growth Corporation. He may be reached via email at LKAlpert@AlpertBarr.com.*

Excerpted from Daily Journal article "Line of Fire" by Lee Kanon Alpert.

FROM THE CHAIR CONTINUED FROM PAGE 2

bit during my term: Gideon Grunfeld, Ed Poll, Neil Quateman, and especially Andrew "His Eminence" Elowitt and Larry Meyer. I am happy to report that all of them will be returning as Special Advisors next year. Joining those five veterans as 2011-12 Special Advisors will be two key ExCom'ers whose terms as voting members are expiring: Christele Demuro and Yvonne Waldron-Robinson.

In the goodbye department, let's all bid a fond farewell and thanks to departing members Patricia Beyer, Kelly Francis, Deborah Neville and Gary Zeiss. As for me, I will still be involved next year—my sixth on ExCom—as "Immediate Past Chair." In my day jobs, I will continue not only to practice law and teach colleagues and law students but also to travel the globe and the Ethernet—striving to raise lawyers' technology skills and to translate among lawyers, techies, and others in the business world.

So, now it's time to put away the crystal ball and return to the present. . . . In conclusion, to paraphrase the immortal words of one of the time-travelling characters in the epic (though arguably neither classic nor classy) movie *Bill & Ted's Excellent Adventure*: "**Be ethical to each other.**"

Robert D. Brownstone
2010-11 Chair
Law Practice Management & Technology Section

UPGRADING YOUR LAW FIRM TO MS-OFFICE 2010

By Eric R. Crowther

Eric R. Crowther

What's New in Office 2010?

On the surface, Office 2010 does not appear very different than Office 2007, but it does offer some significant new and modified features that may be of interest to law firms. These are some of the key changes and improvements:

MS-Office Changes

Customizable Ribbon. In Office 2010, users can customize the contents of the ribbon, modifying its contents and even adding tabs of their own with the features they like to use.

The "File menu" is back! Office 2007 replaced the traditional File menu with a non-descript "Office button." Office 2010 restores the "File" tab (now called Backstage View) with a completely revamped set of options. In Word, you may save and manage files, set document permissions, view and remove Metadata, save documents into other formats or send them to other locations, such as Sharepoint.

Print Options. A new Print control panel on the File tab makes a variety of printing options readily accessible, while displaying a preview of the document as it will be printed.

MS-Word Changes

Navigation Pane: Displays a map of your document that allows you to drag and drop a numbered heading at any level (and all of the subheadings and body text under it) from one part of a document to another.

Protected Mode: When you open a document attached to an email, or from the Internet, Word 2010 displays a warning, and you must click an "Enable Editing" button in order to make any changes. In the Trust Center, you can determine which files will be treated this way, and whether and how Word should allow you to save Internet documents.

Paste Preview: When pasting content from any source, this allows you to preview what you are pasting and choose to keep source formatting, merge with document formatting, or paste as unformatted text.

Simultaneous Editing: This sounds dangerous and logistically challenging, but Word 2010 allows you to edit a document that someone else already is editing. It keeps you informed about the part of the document that the other person is editing, with a message in the status bar.

MS-Outlook Changes

Outlook has a Ribbon: All Office applications, including Outlook, now use the ribbon interface first introduced in certain applications by Office 2007.

New "conversation" features automatically group all emails that contain the same subject line and allow you to remove all emails and replies that are fully contained within a more current message.

A new Ignore button allows you to ignore an entire "conversation." When you select an email and choose this option, it deletes all messages in your Inbox that belong to the same thread, as well as *future* emails relating to that same thread.

A new Quick Steps section of the ribbon allows you to create your own single-click options to perform what otherwise would require multiple steps. For example, you could add a Quick Step that creates the email, selects one or more specific recipients, and inserts a standard subject and/or body text, with a single click.

Outlook 2010 uses the new Windows 7 Jumplist feature. You can launch a new email, appointment, meeting, contact or task

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simply by right-clicking the Outlook icon in the Windows taskbar, without having to open the main Outlook window.

Excel Changes

A new Sparklines feature inserts simple graphical representations of data, such as line graphs and bar charts, to better illustrate changes or trends in values.

Slicers make it much faster and easier to select and view data in reports (pivot tables) based on the data in a worksheet.

PowerPoint Changes

PowerPoint 2010 allows you to record slideshows as video presentations and offers new design templates, animations and slide transitions.

If you set up an Office Live Workspace account, PowerPoint 2010 offers a new option to broadcast your presentations to clients and others by sending them a link that takes them directly to the video.

Planning an Upgrade to Office 2010

If you are planning an upgrade to Office 2010, be sure to consider the following:

Hardware requirements: Your firm's server and workstation hardware may require upgrade or replacement. Consult with your IT staff and/or network integrator to determine this.

Software requirements: Verify that all of the software applications used at your firm which integrate with Office 2010 in any way are fully compatible with Office and with one another. You should obtain expert assistance with their integration. See *Integration with Third-Party Products* below for details.

Design and customize the new environment: Most or all of the software applications you install include options and settings you can select. Be sure to carefully consider these options and settings, how they will affect your use of the products and their integration with other products. The various Office applications also allow you to customize the ribbon and other interface elements. Carefully considering this before deployment will go a long way toward ensuring a smooth transition and efficient use of the new software. Your integrator and the third party vendors should help you determine the best settings in various applications. Your macro system vendor, in particular, should help you customize the Word environment.

Document compatibility and conversion: Office 2010 introduces a new file format, and this has implications for the conversion of documents, as well as compatibility with older versions of Office. See *Document Compatibility* below for details.

Integration with Third-Party Products

Your firm most likely uses one or more third-party software applications that integrate with MS-Office. Be sure to verify that each one of the products you use has been tested and proven to work properly with Office 2010.

Types of Programs that Commonly Integrate with MS-Office

- document management
- case management
- document assembly
- templates and macros
- legal research / table of authorities
- metadata removal
- anti-virus
- PDF creation
- forms packages
- document cleanup or conversion

Product vendors may claim that they offer a version compatible with Office 2010. Nonetheless, at times significant integration issues are resolved only after the initial release of a "compatible" version. Every vendor (including our company) needs a first client willing to adopt a new version of its system, but not all vendors test their products thoroughly or adequately consider the integration of their products with other applications that may be present on your system. Ask your network integrator and other law firms using the same products if they have successfully integrated and tested each third party application you intend to use with Office 2010.

Document Compatibility

Office 2007 and 2010 introduced a new file format in several applications, including Word and Excel. Documents are stored in XML format, a text format similar to HTML. The various components of a document—body, headers, footers, footnotes, graphical elements—are stored in separate files that are compressed into a single file. This new file format is identified by a new file extension that ends in an "x" (e.g., docx, xlsx).

When you use Office 2010 to open files that were saved in the earlier Office 97-2003 format, they should

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remain intact. However, if you save or convert these files to the new XML format, certain Layout options affecting the way the text appears in the document, and the pagination of the document, are cleared. If you plan to convert your documents, be sure to determine whether certain documents are altered by this conversion, and make provisions to restore cleared Layout options. Your macro system vendor should be able to help with this.

When you send documents saved using the new XML format to people outside your firm who are using earlier versions of Office (97-2003), they will not be able to open the files unless they have installed a free Compatibility Pack that is provided by Microsoft at no charge. To find it, just search for "Microsoft Compatibility Pack" in your Web browser. If you do not consider it realistic to require others to install the Compatibility Pack, you must save your XML files in Office 97-2003 format before sending them. Be sure to determine and advise everyone at your firm of the specific steps for doing this, particularly if you use a document management system.

Since certain new features in Office 2010 are not compatible with earlier versions of Office, they will be converted when a document is saved into 97-2003 format. If the document is returned to you, many of those features will remain in their backward-compatible state.

Which Version of Office 2010: 32-bit or 64-bit?

When you install Office 2010, you must choose between the 32-bit version and the 64-bit version. You may install the 64-bit version only if you are using a 64-bit version of Windows (Vista or 7). In addition, you must verify that every third party product you use that integrates with Office provides a 64-bit version. Microsoft itself recommends installing the 32-bit version unless you have a specific need for the 64-bit version, mostly because many third party products are not 64-bit compatible. (See http://technet.microsoft.com/en-us/library/ee681792.aspx.)

The most meaningful advantage of the 64-bit version is that it can use more virtual and physical memory than the 32-bit version. This means that it can handle very large files, such as Excel files that are larger than 2 gigabytes. However, law firms typically do not create files anywhere near this large. Some believe that the 64-bit version will run faster than the 32-bit version, but even a Microsoft product manager, when asked about this, denied that it had this advantage. (See http://social.technet.microsoft.com/Forums/en-US/office2010/thread/dabcc284-c1f3-46ed-9619-4833359a441e.)

Eric Crowther *is the President of Crowther Consulting Corporation, which offers CCC Macro Pro, a comprehensive system of legal macros, templates, styles and other formatting and automation tools for Microsoft Word. Eric Crowther can be reached directly at (310) 390-9650 or eric@crowther.com.*

MARI J. FRANK INTERVIEWS ROBERT D. BROWNSTONE ON PRIVACY PIRACY

By Mari J. Frank

Mari J. Frank

Information security and privacy issues are in the news every day, and privacy litigation is one of the fastest growing areas in our profession. Attorneys are faced with critical decisions about what information to collect about their clients, how to protect that information, and how they will deal with electronic discovery, information organization policies, retention and destruction policies, privacy protocols and responsible information management.

Business and corporate counsel must also advise their clients as to best practices. I recently had the opportunity to interview Robert Brownstone as host of Privacy Piracy, a radio show dedicated to privacy and technology issues in the information age.

Brownstone serves as Technology & eDiscovery Counsel with Fenwick and West LLP, based in Silicon Valley, co-chairs the firm's Electronic Information Management Group and chairs the Executive Committee of the State Bar of California Law Practice Management & Technology Section (http://lpmt.calbar.ca.gov/LPMT.aspx). His many articles and media interviews can be viewed at www.fenwick.com/attorneys/4.2.1.asp?aid=544. The following is adapted from parts of our interview, which aired June 6 and to which you can listen in its entirety via the podcast posted at www.kuci.org/privacypiracy.

Mari: *Small businesses and law firms often don't have in-house security staff. If a small business doesn't process credit cards, and doesn't collect much personal information from clients, should they be worried about leakage of personal identifiable information?*

Bob: Yes, because almost every company or firm has employees. The knee-jerk reaction on behalf of a company is that since we don't take in credit card information and we don't house a lot of financial information, we are safe—but most companies and law offices have employees. If someone maintains a database, or even just a spreadsheet, with all of the social security numbers, addresses and first/last names of the workers of the company, and puts that spreadsheet on a laptop, and doesn't encrypt that information, then there's information at risk.

Mari: *Especially if the law firm or company is self-insured for medical coverage. Consider all of the medical information one might expose as well.*

Bob: I know you are well aware that California became one of the first states to add the duties to protect and give notice of breach of unencrypted medical or health information in addition to financial.

Mari: *And these California security breach statutes even apply to government entities that learn of unauthorized disclosures of data. All organizations must understand—employees are our inside customers.*

Bob: Exactly. Employees comprise a whole other important constituency. We must ask, where do we keep information on paper—more likely, where do we keep information electronically—and who has access? If data is accessible by a limited number of people, that's great. Restrictions as to who can pull information down to a local desktop, laptop or other device can be a way to stem the problem at its source. A lot of times business leaders aren't thinking through all the different trails that information may travel.

Mari: *That's an important point: first you have to know what information you are*

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collecting, and then ask, where is it located? People forget that information is in so many places, from an iPhone to thumb drives to CDs to other electronic devices. People forget how easy it is to transport sensitive data!

Bob: Right. That's one of the best lessons that I've learned in my career—and I've been at Fenwick now for half of my legal career. During a collection for e-discovery you must think about asking the same kind of questions you'd ask in a fact-inquiry or in a deposition. Just logically go through where information may be. This is true not only of data collection, but also of protecting information as it travels through a series of sources and locations.

CALIFORNIA BECAME ONE OF THE FIRST STATES TO ADD THE DUTIES TO PROTECT AND GIVE NOTICE OF BREACH OF UNENCRYPTED MEDICAL OR HEALTH INFORMATION IN ADDITION TO FINANCIAL

Mari: *And people forget about this when they want to get rid of data; they don't even remember what they did with it. It may be sitting in some storage bin that they just throw away, or they give away a computer or a printer, but don't realize that there is sensitive data still in it.*

Bob: We must track the lifecycle of information. We can't just look at the beginning of the lifecycle when consumer information gets gathered, but look also at the end. However, it's one thing for there to be rules on the books, and it's another for a new company or firm that grows faster than its frameworks grow to implement those rules. It's hard to deal with the nitty-gritty and examine all the ways that information starts, moves, and then has a death date.

Mari: *There is personal or financial information in so many places, and entities collect it because it's so valuable now—especially to identity thieves and marketers. Most of the time with information collected by many companies, they don't clarify where it's going, who's got it, or how can it be accessed by unauthorized persons. Often they haven't segregated the sensitive from the non-sensitive data.*

Bob: A lot of times during information management projects my clients get daunted, and ask, "Am I going to be completely assured that nothing's going to get lost or compromised, that I'm keeping everything that I should, or I'm getting rid of everything that I should?" No, of course you're not going to be 100% perfect—but that's not the goal, though. The law doesn't require perfection, either in discovery or information security. But there are guidelines you can follow. When you come up with a protocol, you should be realistic about what you're going to try to accomplish and what to realistically de-prioritize, depending on your company's size and resources.

One of the first questions I'll ask a client is, "Do you encrypt your laptops?" And some will have that same knee-jerk reaction, "We don't take in credit card information, we don't keep a lot of personal information on individual customers." And I'll say, do you have a secret formula, do you have trade secrets, do you have a customer list, do you have your strategic plan—do you have anything that you wouldn't want in someone else's hands? Can anyone in the company pull this information off the network and carry it around on a laptop? Now, the same encryption software (or built-in operating-system feature) that protects individuals from identity theft will protect a whole host of information. So this one measure, encryption, can protect your workers, can protect your customers, and can also protect the company's secret sauce. Every business has something to protect.

Mari: *It also protects organizations from liability too, with California's security breach law. So, if companies encrypt sensitive data that is acquired by an unauthorized third party, there is no duty to disclose the breach, right?*

Bob: Exactly. So, the two reasons to encrypt are altruistic and selfish. The first one is to protect other peoples' information, as well as your own; and the second one is more selfish, in that if you've taken that encryp-

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tion step to protect the information and there is a compromise of sensitive information, you are not under that statutory duty to give notice. And that's a huge duty—it puts your company in the public eye; in the court of public opinion you can take a big hit, and it's very costly.

Mari: *The carrot is to encourage encryption, and the stick is to require public disclosure. So, I know you're very active in working with the National Employment Law Institute, and there are many issues with technology, privacy and employees. So, what about employees who post on such sites as WikiLeaks; what can an employer do about that?*

Bob: You're likely not going to stop someone who is dead set on exposing information to the world. On the other hand, some practical measures can be helpful. There are a lot of tools now that can readily block access to certain sites. And if an employer doesn't want to be so restrictive about what employees do on the Web, then certain kinds of information shouldn't be available to everyone within a company, like coworkers' social security numbers and payroll-type information. If there is information that a company doesn't want getting out, then they shouldn't let everyone have access to it. It's easier said than done, but there are ways to have partitions on network drives, and to have protection for documents in databases by restricting access rights. So, an organization can take a pragmatic, checklist approach of thinking through who gets to certain information.

Mari: *Isn't that issue also relevant to social media? Everybody is interacting on social media networks nowadays. What kind of policies should employers have?*

Bob: Well, employers should educate themselves on some of the less obvious risks that are out there. It is important for employers to have a technology acceptable use policy that covers social media. List the dos and don'ts, distinguishing between an employee's own social media page or an employer sponsored one. It's perfectly acceptable for an employer to lay out ground rules stating, "If you have identified yourself on your personal Facebook page as working for us, you must be clear that any opinions expressed are your opinions; you must disclaim that they aren't the opinions of our company; otherwise you're opening us up to liability."

There are also education issues not obvious to people out on the Web. A great example is LinkedIn: a lot of employers have a policy that no one is allowed to give a recommendation of a current or former employee. Yet, on LinkedIn, with a click or two, anyone can request a recommendation from one of his or her contacts. But what if someone got fired for performance reasons, and then there are all these references out on LinkedIn saying how great the person was? In sum, people's sense of appropriate behavior can go by the wayside when they're on the Web. If you're on LinkedIn, and you check a box to recommend someone, now thousands of people could possibly see it, or one person could share it with everyone, even those not on LinkedIn. These technologies have developed so fast that people's excitement about them has outpaced their measured thought process of asking "Why am I doing something in front of millions of people that I wouldn't do in front of two or three?"

ONE MEASURE, ENCRYPTION, CAN PROTECT YOUR WORKERS, CAN PROTECT YOUR CUSTOMERS, AND CAN ALSO PROTECT THE COMPANY'S SECRET SAUCE...EVERY BUSINESS HAS SOMETHING TO PROTECT

Mari: *If you're at your computer in the office or at home and you're interacting, you forget how public the comments are—for the whole world to see. Employers must provide training and education as to potential exposure to legal liability.*

Bob: We actually have a sentence or two in our firm's technology acceptable use policy's social media segment saying, in essence, "Just FYI, you should know that things you post on the web have a long life

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span, so learn more about the privacy settings on social media sites, and think before you post." Another area that's worrisome is the posting of photos, whether a video on YouTube, a photo on LinkedIn or a tagged photo on Facebook, although I've had different clients with various perspectives. One client wanted to be really strict; their general counsel said, "We don't want anyone posting photos of a co-worker or an individual client or customer without the permission of that person" So I put that in a draft policy for another client, who said, "Oh no, we want photos of employees."

IT IS IMPORTANT FOR EMPLOYERS TO HAVE A TECHNOLOGY ACCEPTABLE USE POLICY THAT COVERS SOCIAL MEDIA

They said, "We have a European office and we have an office in the US and people don't see each other unless they have the social event followed by posting a bunch of photos. We want everyone to see how fun it is to be in the office in the UK, versus in Poland or in the US and for employees to get to know each other in that way. This draft is way too strict." The lesson is that there isn't one approach. Decide what you really want to enforce and will enforce on a consistent basis. Otherwise, you're writing a policy that you won't be following. You can get into a lot of trouble if you've got a very strict policy that you never really enforce until there's somebody who is universally disliked. Then if you come down hard on that person, he or she will point out, "Hey, wait you're being arbitrary!" And that could be a good argument, if that really is the case.

Mari: *It's not worth having a policy that nobody understands or enforces—that causes more legal liability. This leads to an important issue that arose in the Supreme Court Case of City of Ontario v. Jeff Quon (130 S.Ct. 2619, 2010). There was a policy about using the city's wireless devices for personal text messages, but it wasn't enforced.*

Bob: Yes, it dealt with a public sector employer, the police department in Ontario, California, and a cop who was using his employer-issued pager to send text messages to his wife and girlfriend. The question was: could the Ontario Police Department access the text messages when a no-privacy written policy was seemingly not enforced in the trenches? In that case, a lieutenant was told to go around and collect fees from cops who went over their monthly character limit (in texting), and he said things to the effect of, "If you just pay for the extra characters, no one's going to look at your content." Well, that was not the official policy; the formal written policy—that only covered e-mail—said no expectation of privacy. So, because of that discrepancy, the case went all the way to the Supreme Court. Be as specific as possible in educating managers and employees about what the parameters are, and then try to enforce as consistently as possible.

There are also some situations that are still not totally clear: what if an employee has a phone provided and paid for by the employer? Pretty clear-cut that the employer's no-privacy policy takes precedence. But what if the employee has a smartphone that he pays for himself, but through which he is given access into the employer's email system? What if the employee is reimbursed for part of the costs? Is that all going to be addressed in a policy? It should be. There's no perfect answer, but you want to avoid ambiguity by stating specific parameters and then training your staff to enforce them.

Mari Frank, *Esq., CIPP is the host of Privacy Piracy, airing Mondays at 8:00 am PST on KUCI AM 88.9 from the University of California, Irvine, simultaneously streaming on www.kuci.org and podcasting on iTunes. Listen to archived interviews at www.kuci.org/privacypiracy. Mari is a member of the Executive Committee of the State Bar of California Law Practice Management and Technology Section, serves as a privacy expert and is the author of several books and articles dealing with privacy and identity theft. See www.identitytheft.org.*

MEDIATION: GETTING TO THE OTHER SIDE OF THE TABLE

By Keith Turner

Keith Turner

Statistics show that over 90% of lawsuits settle before they reach trial.[1] Furthermore, the American Arbitration Association reports that over 85% of all mediations result in a settlement.[2] Because an attorney's duty of care to his or her client includes the obligation to attempt to effectuate reasonable settlement,[3] why do opposing attorneys often refuse to go to mediation?[4]

Perhaps some attorneys do not understand what mediation is. The California Rules of Court define mediation as the "process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." Cal. Rule of Court 3.852(1). It is voluntary and non-binding. California law provides a relatively absolute evidentiary privilege on communications during and for mediation, including documents prepared for mediation.[5]

Mediation provides an important opportunity for a client to vet their case with a neutral third party before a final and possibly binding decision is rendered. Mediation provides advantages at many points during the dispute process, including: potential substantial savings in legal fees and other litigation expenses; promptness of resolution; creative, business-driven solutions generally better for both parties than a solution available in court; maintaining control over the outcome of the dispute; preservation of business relationships; privacy and essential confidentiality; direct engagement by all parties in the negotiation of the settlement; and the review of the dispute by a neutral third party, which can assist the parties in exploring alternatives. Mediation can also be incredibly effective before litigation is filed, and in negotiating and finalizing a contract.

An attorney's dual role as advocate and counselor is sometimes an impossibility to completely accomplish. It should be recognized that it is not humanly possible to do both functions at 110% capacity at all times in all matters. Thus, counsel can benefit from the mediation process. However, it needs to be acknowledged that the underlying reality of a mediator's goal is to make a settlement. Many mediators are experts at perceiving the psychological dynamics and needs of the clients and their decision makers in order to find the pressure points that can make settlement happen. Thus, some attorneys are uncomfortable with the mediation process because the mediator is using pressure points other than the "law" and "facts" to push for dispute resolution.

Perhaps some of those who oppose or resist mediation believe that agreeing too easily to mediation is a sign of weakness. "An attorney may believe that suggesting mediation to an angry client, bent on vindication, will be perceived as a sign of weakness."[6] However, because of the relative privacy afforded to mediation-related communications, this reason does not make sense.

Perhaps some others oppose mediation because of the inherent conflict of interest created by the hourly fee arrangement.[7] However, mediation is usually a good marketing opportunity because it provides an attorney the opportunity to work collaboratively with the client and to showcase the attorney's skills for preparation, advocacy, and negotiation.

There is even national and international resistance to mediation. At least one group on the Internet argues that mediation deprives a party of its Constitutional right to have its

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claim heard and decided in court.[8] The Wall Street Journal reported earlier this year that Italian lawyers went on strike in protest of a new law requiring mediation in commercial cases.[9]

Whatever the reason for opposing mediation, arguably an attorney has a duty to at least notify his or her client if the opposing party to a dispute has requested or suggested mediation. An attorney is required by both statute and the California Rules of Professional Conduct to "promptly communicate" to the client the terms and conditions of any written offer to settle made by the opposing party. (Bus. & Prof. Code §6103.5; Cal. Prof Conduct Rules, Rule 3-510.) That duty could arguably apply to a written request for mediation.

MEDIATION PROVIDES AN IMPORTANT OPPORTUNITY FOR A CLIENT TO VET THEIR CASE WITH A NEUTRAL THIRD PARTY BEFORE A FINAL AND POSSIBLY BINDING DECISION IS RENDERED

As to whether the attorney has an affirmative obligation to recommend mediation if the opposing party has requested it, it is safe assumption that if the case turns out badly for the client, the client will easily be able to find an expert witness for the subsequent legal malpractice case. The expert witness will opine that counsel should have more fully advised the client about the benefits of at least trying mediation.

Assuming opposing counsel refuses to voluntarily go to mediation, an attorney who still believes that mediation may be in the client's best interest does have some potential judicial remedies.

California law only allows a judge to order mediation in cases in which the amount in controversy does not exceed $50,000 for each plaintiff, without regard to questions of liability, defenses or comparative negligence. Code of Civil Procedure §§1775.3, 1775.5; Cal. Rule of Court 3.891(a)(1).

California law does not presently provide that a judge can order the parties to mediation in cases in which the amount in controversy exceeds $50,000, but a judge can order the parties to participate in a mandatory settlement conference. "On the court's own motion or at the request of any party, the court may set one or more mandatory settlement conferences." Cal. Rule of Court 3.1380(a). When faced with a mandatory settlement conference, some attorneys who initially resisted mediation may be more willing to participate, rather than be subject to a settlement conference before the assigned judge or another judge in the same courthouse. Although a judge can order the parties to participate at a settlement conference, many do not.

One fundamental problem with either the mediation or mandatory settlement conference is that there is no way to ensure that the other side participates in good faith. In *Vidrio v. Hernandez* (2009) 172 Cal.App.4th 1443, the court of appeal reversed a trial court's order imposing sanctions on non-party insurer for failure to negotiate in good faith. As the court stated: "the failure to increase a settlement offer or to otherwise participate meaningfully in settlement negotiations violates no rule of court and is not a proper basis for an award of sanctions." *Id.* at 1460. However, a court can impose sanctions if a party does not appear, or if the party's representative does not have settlement authority. Having the person with actual authority to settle a case present at a mediation or settlement conference is an important requirement that is generally not enforced.

If an attorney believes that opposing counsel, but not the opposing party, is really the person refusing mediation, one commentator noted that a party can directly contract their opposing party to essentially try to bypass the apparently reluctant opposing counsel.[10] However, although the Rules of Professional Conduct do not apply to the parties negotiating directly, a State Bar opinion cautions attorneys about using clients as agents or intermediaries to negotiate behind opposing counsel's back.[11] Thus, an attorney should avoid being part of that strategy.

If all else fails, counsel should probably at least write a letter in a positive tone to opposing counsel confirming that the opposing counsel has refused to participate in mediation. At the end of the case, the opposing

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STRATEGIES TO LEVERAGE PARALEGAL CAPABILITIES

By Ed Poll

Ed Poll

My Section colleague, Cynthia Mascio, ACP, an advanced certified paralegal, has kindly shared with me a presentation she recently made on the cost and revenue impact that paralegals have in law firms. Her well-demonstrated point is that paralegals improve a firm's bottom line.

Like every other profession and trade, the practice of law is a business. This means we are governed by the formula: P = R – E: profit (take home pay) equals revenue collected less expenses. For a widget manufacturer, this equation shapes the question, "Can I sell enough widgets to cover all of my costs and have something left over?" Replace "widgets" with "hours" or "value" or "solutions," and you have the question that goes to the heart of "The Business of Law®" for law firms.

This article will look behind the cost and revenue numbers and analyze the strategies that firms can use to maximize the bottom line impact of their paralegals. These paralegals may be in-house, or they may provide outsourced services in a virtual relationship. Either way, paralegals epitomize the highly effective concept of leverage as a way that law firms can enhance their profitability. Leverage shapes the right strategies for maximizing paralegal capabilities.

The Concept of Leverage

There are two ways to address an economic model: assess your revenue and figure out what your cost structure should be so you can turn a profit, or look at your costs and determine how much revenue you need to cover those costs and make a profit. Either way, the critical law firm cost factor for serving a client is staffing levels. Competitive conditions are forcing firms to reconsider the practice of handling a matter with two senior lawyers, each with high hourly rates and likely with personal assistants. Instead, more firms involve an associate and a paralegal and get by with one senior partner, or even use associates and paralegals exclusively, with proper partner oversight.

The questions here relate directly to the issue of leverage—hiring and using paralegals and associates as a cost-effective way to do billable work in a team setting while boosting partner profitability. Leverage through the use of paralegals is only effective when the paralegals themselves are effective. It must be profitable for the firm to keep or otherwise use paralegals on an ongoing basis. While new paralegals may not earn more than they cost the firm in the beginning, at some point that situation must change.

What should firms expect from their paralegals to justify keeping them? The fundamental question in this regard is obvious: is there enough work? In analyzing a paralegal's worth to the firm, there is no formulaic expression that specifically depends on origination, billing or collection. To say that a paralegal is worth the amount of profit due to billing or the amount of profit due to business brought in does not take into account the subjective factors that should be considered, such as a desirable combination of skill and attitude. When all factors are present and positive, the paralegal relationship is most successful.

Leveraging In-House Paralegals

Lawyers should really only spend their time doing two things: practicing law and lining up new clients. A paralegal's fundamental task is to allow a firm's lawyers to do more client and marketing work by ensuring

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STRATEGIES TO LEVERAGE PARALEGAL CAPABILITIES

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that the client's needs are being consistently and properly addressed. The extra business that paralegals allow a firm to do under the principle of leverage more than pays for added salary, in addition to reducing lawyers' stress levels. In-house paralegals enable lawyers to break through time and income barriers and focus on the creative and effective application of the law.

PARALEGALS EPITOMIZE THE HIGHLY EFFECTIVE CONCEPT OF LEVERAGE AS A WAY THAT LAW FIRMS CAN ENHANCE THEIR PROFITABILITY

The starting point for hiring a paralegal should be a precise description of the tasks the paralegal will be asked to handle (intakes, pleadings, research, deposition summaries) and the skills required to effectively handle these tasks. Lawyers and firms are well advised to use specialized employment agencies that focus on paralegal positions. Ask for the agency's detailed rate sheet, printed information in addition to a Website, current references, samples of entrance testing, and requirements for employment. The agency should have also verified that the paralegal complies with the educational (and continuing educational) requirements set forth under Business & Professions Code § 6450, et seq.

Once the parameters are set and the agency begins interviewing, a lawyer should make the final hiring decision after interviewing every recommended candidate and determining which candidate is the best "fit" for the firm. Employment agencies typically charge 25 to 40 percent of the new hire's first year's pay as their fee: while this may seem high, this fee pays for the best contacts, the best screening process and the best knowledge of employment law, and ensures that the hiring process is done right.

Make sure the paralegal can demonstrate knowledge of local rules regarding court and civil procedure, in addition to practical insights pertinent to your practice. Other relevant skills include the ability to:

- Organize files and chronologies
- Prepare documents for summons, complaints, answers, motions and other proceedings
- Conduct investigations and summarize depositions
- Perform legal research
- Coordinate with outside vendors for trial preparation
- Create and maintain client files

Once they are part of the firm, paralegals can be leveraged not just through their technical abilities but also for their client service strengths. Consider such strategies as these:

- Failure to return phone calls or respond to letters is the number one complaint clients have about lawyers. Lawyers may be otherwise engaged, but clients still want to be assured that their matter is being dealt with. Having a paralegal step in and assure the client that their inquiry will be answered as soon as possible can prevent many client relations problems.
- Clients want to know what's happening with their matter. Even though the lawyer might be diligently working on the matter, if the client doesn't know that, there's bound to be a problem—usually at fee-paying time. Paralegals can often handle the kind of communication that clients appreciate by sending copies of documents or writing or making calls for updates. Clients who are kept informed at every step of their matter are happier clients.
- Clients should be able to connect directly with paralegals who may have an impact on their matter or who might be able to answer one of their questions. The client who walks away with an answer, even if not from the mouth of the attorney, is far more likely to be a satisfied client. That means that client service education training is a must for paralegals.

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STRATEGIES TO LEVERAGE PARALEGAL CAPABILITIES

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Of course, lawyers must continue to exercise direct supervision of paralegals. Firms have faced disciplinary problems for including paralegals along with lawyers on their Website under the category of "attorneys." The solution is not to remove paralegals from the Website but to create a separate category for them. Including paralegals on a Website gives clients additional contacts at the firm. It is also formal recognition that enhances the morale of the entire firm.

Leveraging Outsourced Paralegals

Technology is an efficient alternative in leveraging paralegal contributions, specifically in the form of the virtual assistant, or VA. VAs are paralegals who work offsite and online, creating work product customized to the firm's specifications and practice. They represent an extension of the outsourcing that lawyers and firms have done for years, but the relationship with a paralegal VA can be more complex and more rewarding. As an independent business owner, the VA paralegal is neither employee nor subordinate. VA paralegals more closely resemble an accountant or any other business consultant with whom the lawyer has an ongoing, collaborative relationship. They become familiar with the firm's practice and business needs as much as any service provider engaged for a substantial length of time.

When engaging a VA paralegal, look for an informative, well-constructed Web site as evidence of the technical skill and sophistication required to conduct an effective online business relationship. However, never initiate an engagement without a personal consultation. Beyond these business considerations, think through the professional qualifications that you want from the VA paralegal.

A VA paralegal should be able to accomplish the same tasks as an in-house paralegal, electronically from a remote location. That requires compatible email, word processing, document management and database capabilities. Another important consideration in the engagement of an outsourced VA paralegal is to ensure that the VA paralegal is actually an independent contractor: do not make the mistake of assuming that every part-time or offsite paralegal or legal assistant qualifies as an independent contractor. The IRS has very clear guidelines to determine whether a hired individual is an independent contractor or an employee for federal tax purposes.

Leveraging the Team

This discussion of economics should not imply that paralegals, whether in-house or VA, are merely an economic adjunct of the firm. Successful legal practice requires a team approach between lawyers, paralegals and additional staff. A strong team dynamic can be a powerful tool to best serve clients and market the firm to potential new clients. Inclusiveness will produce better results for everyone involved and increase the productivity and profitability of the firm.

Lawyers, like managers everywhere, are most effective when they connect with and rely upon their staff. When that connection is established and reinforced, it can create a shared work ethic and values structure, as well as reinforce the belief that what is done for clients is worthwhile. Conversely, failure to connect with and rely upon staff can cause inefficiencies, create disharmony within the firm, and contribute to a firm's failure. No lawyer or firm should consider paralegals and additional staff as "them," in opposition to the lawyers' "us"—for a firm to survive in today's business environment, the group that matters is "all of us."

Ed Poll *is a speaker, author and board-approved coach to the legal profession. LawBiz® and Fujitsu are sponsoring Ed's cross-country tour to reach bar associations and law schools. If you want Ed to stop in your community, contact Ed directly, and readers with questions for Ed should email edpoll@lawbiz.com or call (800) 837-5880. Also visit his interactive community for lawyers at www.LawBizForum.com.*

Join us for networking and conversation at LPMT's Welcome Reception

during the State Bar Annual Meeting in Long Beach on September 16, 2011, at the Westin Hotel, Room Centennial D, from 5:30 p.m. to 6:30 p.m.

There will also be some amazing door prizes!

counsel's client will probably be asking why the case did not settle earlier. Rarely do further depositions or another round of written discovery change the value of a client's claim.

Keith Turner *practices civil litigation involving business, real estate and insurance issues in Pacific Palisades, California.*

Endnotes

1 "For example, about 98 percent of civil cases in the United States federal courts are resolved without a trial." See http://en.wikipedia.org/wiki/Lawsuit.

2 M. Roberts, III, *Why Mediation Works.* See www.mediate.com/articles/roberts.cfm.

3 *Mutuelles Unies v. Kroll & Linstrom,* 957 F.2d 707, 711 (9th Cir. 1992) (citing *Lysick v. Walcom* (1968) 258 Cal.App.2d 136).

4 N. Barry III, *MEDIATION: Getting Your Client and the Other Side to the Table.* See www.mediates.com/drsprcnb.html.

5 Evidence Code §§ 1115-1128; *Cassel v. Superior Court* (2011) 51 Cal.4th 113.

6 N. Barry III, *MEDIATION, supra.*

7 N. Barry III, *MEDIATION, supra.*

8 Legal Process Reform, Reduce the Pressure toward Lawsuit Settlement. See www.legalreform-now.org/menu3_4.htm.

9 "Mandatory Mediation in Italy? Mamma Mia!" *Wall Street Journal,* March 14, 2011.

10 N. Barry III, *MEDIATION, supra.*

11 Cal. State Bar Form.Opn. 1993–131.