THE BOTTOM LINE
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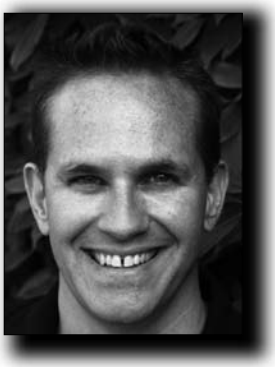
OFFICIAL PUBLICATION OF THE STATE BAR OF CALIFORNIA LAW PRACTICE MANAGEMENT AND TECHNOLOGY SECTION

THE INTERSECTION OF SOCIAL MEDIA, ONLINE ADVERTISING AND ATTORNEY ADVERTISING REGULATION

By Josh King



Josh King

MCLE ETHICS

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While attorneys are often depicted (sometimes quite fairly) as laggards when it comes to adoption of new technologies, they have taken to social media like few innovations before. Perhaps it's the slowdown in the legal market or that the medium of screen and keyboard appeals to our word-driven natures. Whatever the reason, lawyers are flocking to networking, profile-building and blogging in ever-growing numbers.

The benefits of social networking are easy to see. Profiles from Avvo, Facebook or LinkedIn allow attorneys to build out their presence online at no charge. Twitter offers the ability to connect lawyers and potential clients just about anywhere. And blogging, free or low-cost, lets attorneys showcase their expertise for all to see. Used correctly, these tools represent a powerful and extremely cost-effective means of networking and developing business.

But all is not sunshine and lollipops in the world of online networking. Attorneys, unlike most other professions, are subject to a variety of restrictions on the communications they may use to develop business, and it should come as no surprise that the rules governing attorney advertising have not evolved with anything approaching the pace of change experienced in social media. So it's natural to wonder about the extent to which these rules impact attorneys' use of social media tools, and how the rules should be interpreted when a tight fit between the rules and new modes of communication does not exist.

The Whys and Hows of Attorney Advertising Regulation

To understand the extent to which attorney advertising rules implicate the use of social media, we must start from the beginning. No, not quite as far back as *Bates v. Arizona*, the Supreme Court case that first found that attorney advertising was permitted at all, but *Central Hudson v. Public Service Commission of New York*, 447 U.S. 557 (1980). In *Central Hudson*, the Supreme Court held that commercial speech, while not entitled to quite the same level of First Amendment protection as non-commercial

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Our website can be found at www.calbar.ca.gov/lpmt — to register for MEMBERS ONLY section see page 21.

FROM THE CHAIR

Gideon Grunfeld

A State Bar Year in Review

This is my final column as Chair of the LPMT Section. I have no illusions about the number of people who read this column regularly, but still, I was determined to end my term on an appropriate note. So one Sunday morning in August I sat down with back issues of the California Bar Journal to remind myself what had transpired at the State Bar during the past twelve months. Here's a small sample of what I found:

- **September 2008**—The lead story discusses a lawsuit filed by researcher Richard Sanders seeking bar exam data; the MCLE Self-Study exam is about "Preparing The Workplace For A Pandemic."
- **December 2008**—The front page describes the conviction and sentencing of the man who murdered Garvin Shallenberger, who served as President of the State Bar in the late 1970s. Diane Karpman's "Ethics Byte" column issues a stern warning about the ethical risks posed by the foreclosure meltdown in the mortgage markets.
- **January 2009**—The lead story is entitled, "Will a bad economy force more changes in the profession?"
- **February 2009**—The lead story describes the projected State Bar budget deficit including the possibility of laying off State Bar staff.
- **March 2009**—The lead story is that the "Bar issues foreclosure ethics alert." Apparently, too few lawyers took to heart Diane Karpman's words of warning.
- **April 2009**—The lead story describes the controversy surrounding calls to boycott the Annual Convention and the Board of Governors' decision not to move the site of the Annual Meeting from the Hyatt Hotel in San Diego.
- **May 2009**—The lead story is "Bar monitors loan modification advertising." The foreclosure crisis continued to pose an ethical risk for lawyers. Buried at the bottom of page 3 is the news that a former employee of the State Bar was charged with embezzling $675,820. Talk about burying the lead.
- **June 2009**—The Board of Governors approves a modified "Find A Lawyer" program, which doesn't include the ability to search for lawyers by their areas of practice.
- **July 2009**—The front page features a trifecta of happy stories: "Budget tax means closed courtrooms, furloughs;" "Email scams continue to successfully target lawyers;" and the Board of Governors decides not to reappoint the chief trial counsel, Scott Drexel.
- **August 2009**—The front page features a picture of sunny San Diego, which will host the upcoming Annual Meeting and the following utterly predictable headline, "Foreclosure attorneys face discipline charges."

Perhaps this is nothing more than another application of the maxim that bad news sells newspapers. Perhaps I should have warned you to avoid sharp objects before reading this parade of horribles.

My recollection of the past year is very different.

My term as Chair started with a memorable visit from Pam Wilson. The downturn in the economy has certainly been a recurring issue. It impacted our discussions about setting Section dues; it influenced our decision to reduce the number of LPMT Section speakers who attend the Annual Convention. For the most part, however, the Executive Committee of the Section ignored doom and gloom news about the economy and continued to work hard to serve our members.

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eFILING: CONVERSIONS, REDACTIONS AND UPLOADS, OH MY!

By Robert D. Brownstone

Robert D. Brownstone

Traditionally, filings in courts and governmental agencies, as well as law office record systems, were paper-based. Nowadays, however, nearly all federal courts have deployed mandatory electronic filing systems for civil cases[a] and many for criminal cases as well. Though the adoption curve has been slower in the California state court system, over the past few years California superior courts have been joining the eFiling fray on an ad hoc basis. Electronic Case Filing (ECF), as it is called in the federal court system, or "eFiling," is not simply a matter of "pushing the button" to render everything automatically accomplished. Most filers will find it necessary to develop protocols to execute electronic filings in the various courts.

To have an effective and legally compliant eFiling regime, a firm should follow a three-pronged approach of: 1) adequately setting up an administrative regime that will serve you well in the trenches; 2) purchasing and deploying requisite hardware and software; and 3) developing, maintaining, and appropriately training employees on overall protocols to avoid reinventing the wheel when the pressure is on to meet a deadline.

I. Administration: What to Do First

Become a Registered eFiler

Do not wait until you are the attorney of record in an eFiling case. As soon as you are admitted to the bar, or join (or launch) a law practice that litigates in federal court, make sure you and your colleagues are admitted to practice before each of the four federal district courts in California and before the Ninth Circuit Court of Appeals. Typically, each federal court has its own distinct mandatory registration process enabling an attorney to become an eFiler at that court's Web site. Thus, your next step will be to go through the separate ECF/Case-Management (CM) registration process for each of those four trial-level courts, as well as for the Ninth Circuit.[b] If you do bankruptcy work on behalf of debtors and/or creditors, go through the same process for the bankruptcy court within each district.[c] Moreover, do the same for every non-California federal district court in which you are admitted.

Waiting until you need to make a filing or respond to a complaint can be problematic, especially in the Central District, where court-specific training—live or online—is, for all intents and purposes, a prerequisite to becoming an eFiler.[d] The negative ramifications are obvious if you have to tell a client you need to delay filing a complaint or cannot receive an electronic pleading filed by the client's litigation adversary.

As for the state courts, go to the Web site for each superior court in which you practice and anticipate practicing. All fifty-eight trial court home pages are linked off of the Judicial Council Web site.[e] For each such court that has an eFiling program, go through the necessary steps to become a registered eFiler.

Additionally, for every pertinent federal and state court, make sure to store your eFiling login name/ID and password in a safe electronic location. Moreover, if you have a paralegal, secretary, or anyone else who might assist you on a future eFiling, make sure each of them can access that login and password. Add each of them (with his or her respective email address) as a "delegate" so that they can each receive notices of electronic filings in your set of ECF/CM cases at each court.

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Become a Registered "Retriever"

Federal: eDocket by eDocket

Being ready to eFile/upload a pleading or brief only gets you halfway through the planning stage. In the federal court system, once an attorney is a registered eFiler before a particular court, he or she may need to notify the court in each case to "associate" his or her email address with the particular electronic docket ("eDocket"). Only then will the attorney be eligible to receive a Notice of Electronic Filing of an order by the judge or of any document eFiled by another party to the case. The eDocket association step is crucial because email notice may well be the only notice the attorney is given of a court order or of an adversary's filing of a motion.[f] As to our state's court system, proposed legislation—still in the "invitation to comment" phase—would expressly authorize similar "electronic notification" as a validated means of service.[g]

DO NOT WAIT UNTIL YOU ARE THE ATTORNEY OF RECORD IN AN EFILING CASE. AS SOON AS YOU ARE ADMITTED TO THE BAR, OR JOIN A LAW PRACTICE, SIGN UP TO BECOME AN EFILER IN BOTH STATE AND FEDERAL COURT

Every attorney on the case should become a registered eFiler, *and* everyone's name-plus-email address should be associated with each respective eDocket. Moreover, the more colleagues and assistants you designate as "delegates" for receipt of ECF emails from the court, the more people will receive notice; this is especially important if one of you is tied up or out of town when a link to a motion or court order arrives electronically.

Federal: Public Access to Court Electronic Records (PACER)

A PACER account is essential for every law firm, as a PACER login and password are required to download and retrieve an electronically filed order or pleading from a federal ECF/CM eDocket. Unlike ECF login information, an entire firm can share one PACER login. To establish a free PACER account for your firm, register online with a credit card at: http://pacer.psc.uscourts.gov/psco/cgi-bin/register.pl. Additionally, some federal courts' ECF/CM programs provide the additional convenience of allowing every attorney at a firm to "associate" his or her respective ECF login/password with the firm's one PACER login/password.[h] Doing so enables the use of your ECF login and password for *both* logins and retrievals when using a given court's ECF/CM site.

Aside from cases in which your firm is counsel of record, having a PACER account is a must for the modern attorney. It enables searches and retrievals from all U.S. eDockets. This database, available at https://pacer.uspci.uscourts.gov/cgi-bin/search_cv.pl?puid=01201568291, is a great research tool. It is also incredibly inexpensive—decisions are now free. Other documents are only $.08/page, to a maximum of $2.40 per non-transcript document.

State: Court by Court

Each of the fifty-eight superior courts tends to have its own proprietary approach to retrievals. At least one court requires the installation of a special Web browser "plug-in" as a prerequisite to retrieving pleadings from an eDocket.[i]

"White Lists" in Spam Filters

Do not block emails from courts' Web domains or email addresses used for transmitting Notices of Electronic Filings. Indeed, several federal court decisions have imposed an affirmative obligation on attorneys to add such information to spam-filter "white lists" to ensure that such notices get through.[j] It is also wise to set up a weekly, automated reminder to everyone who works at your firm to check his or her spam filter.

Federal and State Administrative Agencies

For governmental agencies, eFiling may consist of either inputting information into an electronically submitted form (that you hopefully "print" to PDF format before clicking "submit") or uploading electronic copies of documents that were historically sent in hardcopy form.[k] A thorough discussion of eFiling in the federal and state agency setting is

beyond the scope of this article. In any event, governmental agencies' eFiling systems are too varied to permit a meaningful generalization about how they operate. Instructions for the completion and submission of eFilings to governmental agencies are on their Web sites or are part of their respective online forms.

For many years, the Securities Exchange Commission (SEC) and the IRS were out in the forefront of the eFiling movement.[l] In addition to those two agencies' expansions,[m] there have been many other developments over the years, including recently at the Department of Justice (DOJ).[n]

II. Technology

Technology is not an end unto itself or a "magic bullet." It will only work well if effective administration and adequate protocols are in place. In any event, the following computer hardware and software are highly recommended to support eFilings and retrievals:

A High-speed Internet Connection

Why does speed matter?

The faster the connection, the less time it takes to upload a file, download a file, and launch a PDF file in the browser.

Multiple Browsers

(Internet Explorer and Mozilla Firefox)

Why shouldn't I just have my favorite one available?

Occasionally, especially when one is retrieving a PDF from an eDocket, an ECF/CM system and Internet Explorer (IE) have compatibility issues—though not as much as in the early days of ECF/CM. So, it is nice to have a backup browser in your arsenal.

Adobe Acrobat 8.0 or 9.0 Professional

(or, perhaps other PDF creation software)

Why PDF conversion software?

Throughout the past decade, courts and administrative agencies have standardized use of the PDF format. Courts often require automated conversion to .pdf (rather than printing to paper and then scanning). Yet, even if it not required, an automated conversion has the following benefits:

- Takes much less time than printing to paper and scanning and avoids the risk of missing or shuffled pages;
- Generates a much smaller PDF file, which takes a lot less time to upload or launch in a browser; and
- Yields a "PDF Type 1" file, which is:
- Full-text searchable;
- "Text-copyable" for pasting into a later pleading; and
- Savable back to word-processing format.

Why Adobe?

In addition to some essential features, it has these generally helpful tools: Optical Character Recognition (OCR) ("Recognize Text Using OCR") and "Reduce File Size."

Why Adobe Acrobat 8 or higher?

Unlike older versions, it has its own metadata-removal ("Examine Document") feature.

Why the Professional version of Adobe Acrobat 8?

Unlike older versions and unlike Adobe Acrobat Standard 8.0, each of Adobe Acrobat Professional 8.0 and 9.0 has a redaction tool ("Mark for Redaction").[o]

Scanner with feeder

Why, especially when documents are already in electronic form, can and should they be converted in an automated way?

When only a hardcopy of a document is available, you will need the tools to scan it into electronic form and contemporaneously or thereafter convert it to PDF format.

Why a feeder?

It enables faster scanning and lowers the odds of shuffling the sequence of pages.

Metadata-Scrubbing Software[p]

Why?

To meet the ethical obligation of doing one's best to prevent "hidden" confidential information from being exposed in 1) an uploaded PDF file converted from a word-processing file; or 2) a word-processing version of a Proposed Order that must be emailed to a judge.[q]

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For more detail on the metadata issue, see Section III below.

III. PROTOCOLS/EDUCATION

As pointed out by the author and his mentor in a lengthy article a few years ago:

Until eFiling matures in its use of legal XML or some other standard markup language, the biggest challenges to lawyers will be to:

1. Develop and train staff to use appropriate protocols for compliance with the individual requirements of the various courts and agencies;
2. Train legal and non-legal staff in how to prepare, perform, and preserve electronic filings; and
3. Design a system that will provide an orderly means to internally file, maintain, and retrieve copies of the electronically filed records.[r]

Indeed, time spent preparing such protocols in advance and keeping them up-to-date will save time on many occasions in the future when you are under the gun trying to meet a filing deadline. So will use of the online tutorials and training databases provided by some of the courts. Ultimately, it is not possible to cover all the particulars of an eFiling protocol directed to the procedures at any particular court, let alone a protocol of general applicability. Even within the federal ECF/CM system, each district court has its own unique—and often lengthy—compilation of local rules and procedures. However, a short-form example is included below, as well as a discussion of some key additional considerations.[s]

Develop and Maintain Written Protocols

You should not rely on this sample summary, but should develop your own summary for each court before which you regularly practice. You should also keep each one up-to-date by staying abreast of changes in requirements at the respective courts' Web sites.[t]

Some Key Additional Considerations

Transparency

The ubiquity of the federal ECF/CM system, combined with free PACER accounts, evinces a larger trend toward greater public availability of information.[u] Therefore, even more so than in the past, circumspection is needed when drafting the content of electronically filed briefs and pleadings, as well as when choosing which documents are to become exhibits.

Metadata

Unless "scrubbed" by metadata removal software, file systems and embedded data can expose client confidences or an electronic file's prior content.[v] Before emailing a proposed order to a judge's chambers, make sure to "clean" the metadata. Moreover, some metadata migrates upon conversion of a word-processing file, spreadsheet, or presentation file to PDF format. To avoid that migration scenario, scrub the original file before or during its conversion to PDF, and maybe *after* as well. Adobe Acrobat 8.0's or 9.0's "Examine Document" feature removes metadata.

Electronic Redaction

If, after reading the local rules *and* checking with the judge's chambers, you learn that you must eFile, as opposed to manually file, a redacted brief or pleading, be aware that conversion to PDF does not magically fix—but rather perpetuates—an improperly handled electronic redaction.[w] Given that a federal eFiling exposes a PDF, for a mere $.08 per page, to anyone in the world with a PACER number, the stakes are high. Electronic redaction is even more significant in light of relatively new Federal Rule of Civil Procedure 5.2's mandate to protect personally identifiable information.

Categorizing Documents

Many ECF systems require that one categorize each document during the upload process. Don't wait until the upload—which may be performed by a non-lawyer—to make the category determination. Rather, review in advance the particular court's online "List of Events," which is generally available online.[x]

24/7 Trap

Do not lull yourself into procrastination based on the theoretical 24/7 availability of online filing systems. Plan to upload papers one day in advance. Start the upload as soon as possible and no later than the middle of the business day on the due date. That way, if there is a Web site or other technical problem, you will be able to talk to someone at the court and will be protected by any local rules that excuse late filing.

Counting

eFiling provides the benefit of simultaneously serving and filing a pleading. But you should check the eDocket well in advance to ensure each of the other parties is represented by at least one registered eFiler whose email address is displayed. Otherwise, you may not learn of your obligation to serve one of the parties the old-fashioned way until you are uploading the pleading. And at that point, absent a prior stipulation as to electronic service, it may be three days too late to timely serve a party represented by a non-eFiler. In general, make sure to check any local rules and local ECF guidelines about counting forward to determine the deadline for responding to an eFiled document (e.g., court order).

Conclusion

The three-part approach laid out in this article should start you on your way to compliance with the various eFiling requirements out there. You need to remain vigilant, however, by keeping abreast of (and making sure colleagues and staff are educated about) new and changing procedures.

Robert D. Brownstone is the Law & Technology Director at Fenwick & West LLP, headquartered in Silicon Valley. He advises clients on eDiscovery, retention/destruction policies and protocols, information-security and electronic information management. A nationwide advisor, speaker and writer in those areas, Robert is frequently quoted in the press as an expert on electronic information. He is a member of four state bars and the Vice-Chair-Elect of the Executive Committee of the State Bar of California's Law Practice Management and Technology (LPMT) Section. His full bio and contact information can be found at www.fenwick.com/attorneys/4.2.1.asp?aid=544.

Endnotes

a "CM/ECF systems are now in use in 99% of the federal courts, [including] 94 district courts [and] 93 bankruptcy courts." U.S. Courts, *About CM/ECF; Case Management/Electronic Case Files (CM/ECF)* (May 2008), available at http://www.uscourts.gov/cmecf/cmecf_about.html.

b A link to the home page for each of those courts—and every other federal court—is available at http://www.uscourts.gov/courtlinks/.

c The bankruptcy court may very well have disparate filing and classification procedures and/or a different payment method. *See, e.g.*, U.S. Bankr. Ct. N.D. Cal., *CM/ECF* (2006) at www.canb.uscourts.gov/ecf/ecf-home.

d *See* http://support.cacd.uscourts.gov.

e www.courtinfo.ca.gov/courts/find.htm. Many, but not all, of the existing eFiling programs are linked off of www.courtinfo.ca.gov/programs/eFiling/projects.htm.

f *See, e.g.,* N.D. Cal., *General Order No. 45* § IX(D) ("[o]rders filed by the court in cases designated for electronic filing will be served only via the email Notice of Electronic Filing; no paper service will be made by the court") at https://ecf.cand.uscourts.gov/cand/docs/go45.htm#IX.

g *See* Cal. Court Technology Advisory Committee, *Proposed Legislation on Electronic Service of Documents: Amend Code of Civil Procedure section 1010.6*, Item No. LEG09-01 (July 24, 2009) at www.courtinfo.ca.gov/invitationstocomment/documents/leg09-01.pdf.

h *See, e.g.,* N.D. Cal., *Associate your ECF login with PACER* (May 2, 2005) at https://ecf.cand.uscourts.gov/cand/faq/general/access/associate_login.htm.

i Super. Ct. of Cal., County of S.F., *San Francisco E-Court,* www.sfgov.org/site/courts_page.asp?id=77500.

j *Pace v. United Servs. Auto. Assn*, (D. Colo. July 9, 2007) 2007 U.S. Dist. LEXIS 49425, available at http://spamnotes.com/files/31236-29497/Pace.pdf; *Majic Window Co. v. Milgard Windows*, (E.D. Mich. Sept. 14, 2006) 2006 U.S. Dist. LEXIS 65617; *Fox v. Am. Airlines, Inc.*, (D.C. Cir. 2004) 389 F.3d 1291, 1294 ("appellants' . . . counsel's effort at explanation, even taken at face value, is plainly unacceptable[;] regardless whether he received the email notice, he remained obligated to monitor the court's docket").

k *See* Fenwick & Brownstone, *eFiling: What is it? What are its Implications?*, June 2002, 19 Santa Clara Computer & High Tech. L.J. 181, (hereafter "Fenwick"), available, as revised Nov. 26, 2003, at www.fenwick.com/docstore/publications/Litigation/eFiling.pdf.

l Since the mid 1990s, the SEC has been accepting electronic versions of documents through the EDGAR system previously filed in expensively printed form; many filings are now required to be electronic. *See* www.sec.gov/edgar.shtml. The IRS experimented with individual electronic tax returns for a few years but has now made electronic filing broadly available at the eFiling portion of its site http://www.irs.gov/efile/index.html.

m One of the latest developments at the SEC has been a movement toward interactive—as opposed to text—disclosure via eXtensible Business Reporting Language (XBRL). In May 2008, the SEC proposed a phased implementation for XBRL. *See* News Release 2008-85, *SEC Proposes New Way for Investors to Get Financial Information on Companies* (May 14, 2008) www.sec.gov/news/press/2008/2008-85.htm. The "Interactive Data" rule requires use of XBRL after December 15, 2008 by companies having a market capitalization of more than $5 billion and using U.S. GAAP. SEC Release No. 33-8924 (May 30, 2008) www.sec.gov/rules/proposed/2008/33-8924.pdf. The new rule also establishes a goal of full implementation by 2011. *See generally* Aguilar, Melissa Klein, *SEC Wants Quick Action on XBRL*, Compliance Week (June 10, 2008) www.complianceweek.com/index.cfm?printable=1&fuseaction=article.viewArticle&article_ID=4188.

n The DOJ has begun moving to an electronic submission system

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for Voting Rights Act filings; *See* Moretti, *DOJ makes changes to submission format for VRA jurisdictions* (Aug. 16, 2007) Electionline Weekly, available at www.pewcenteronthestates.org/report_detail.aspx?id=33646.

o Either way, users of Microsoft Word 2003 should also download Microsoft's free "Office 2003 Add-in: Word Redaction v1.2" at www.microsoft.com/downloads/details.aspx?familyid=028C0FD7-67C2-4B51-8E87-65CC9F30F2ED&displaylang=en.

p Metadata-cleaning software is relatively inexpensive: a single workstation license for Payne Consulting Group's Metadata Assistant costs $80 (www.payneconsulting.com/products/metadataretail). A one-year subscription to Workshare Protect Premium costs $49.95 per user (http://store.workshare.com/servlet/ControllerServlet?Action=DisplayPage&Locale=en_US&SiteID=workshar&id=ProductDetailsPage&productID=82854000).

q *See, e.g.,* U.S.D.C. N.D. Cal. General Order 45 § VIII(A), available at https://ecf.cand.uscourts.gov/cand/docs/go45.htm#VIII.

r Fenwick & Brownstone, *eFiling: What is it? What are its Implications?*, June 2002, 19 Santa Clara Computer & High Tech. L.J. 181.

s *Id.* at 23 (.pdf).

t For example, for the Northern District of California, you should periodically check the "What's New" segment at https://ecf.cand.uscourts.gov/cand/info/whatsnew.htm.

u *See generally* Brownstone, et al., *Secrets Easily Leaked by Friend or Foe In Publicly Filed .PDF Documents*, (Oct. 2007) 9 No. 10 E-Commerce L. Rep. 7, available at www.fenwick.com/docstore/Publications/IP/IP_bulletins/IP_Bulletin_Fall_2007.pdf; Fenwick & Brownstone, *eFiling: What is it? What are its Implications?*, June 2002, 19 Santa Clara Computer & High Tech. L.J. 181, 26-28, 33-37 and 39-41; National Center for State Courts (NCSC), *E-Courts 2006* (Dec. 11, 2006) *Federal Courts and eFiling* at 16 ("PACER charges 8 cents per page to review documents, and a cap of charging for 30 pages . . . [; t]here is data mining going on") http://ctl.ncsc.dni.us/presentations/eCourts2006NotesRLWPart1.pdf; *but see* Pamela A. MacLean, *Electronic Docketing Reform Urged* (Nat. L. J. June 14, 2007) ("increasingly, independent media investigations have turned up hundreds of cases in Seattle, Las Vegas and Washington, D.C., that are completely sealed in violation of legal standards for sealing").

v *See generally* Brownstone, *Metadata: To Scrub or Not To Scrub; That is the Ethical Question*, Cal. Bar J. (Feb. 2008), available by at http://Metadata-MCLE-2-1-08.notlong.com.

w For details, see Brownstone, et al., *Secrets Easily Leaked by Friend or Foe In Publicly Filed .PDF Documents*, supra note 20.

x For example, see the List of Events for the Northern District of California gives events by category, available at https://ecf.cand.uscourts.gov/cand/faq/index_events.htm.

FROM THE CHAIR CONTINUED FROM PAGE 2

We celebrated the 30th anniversary of *The Bottom Line*; two of our members, Robert Brownstone and Will Hoffman, participated in a Webinar about the new electronic discovery law; Patty Miller continued to crank out information-packed issues of our e-newsletter; our Treasurer, Cindy Mascio, did a bang up job; she along with Alex Lubarsky spearheaded the first revision of our advertising rates in many years. I don't have the time or space to list all the Executive Committee Members, Liaisons, and Special Advisors who made a contribution to the work of the Executive Committee and did so with good humor. Thanks to each and every one of you. Above all, I will remember that we continued to innovate, have fun, and, where necessary, tried our best to curb some of the State Bar's excesses.

My final column as Chair would not be complete without mentioning Julie Martinez and Patti Beyer. Julie is the member of the State Bar staff who is the liaison to our Section; Julie, you have been darn near indispensable. Thank you! Finally, Patti Beyer and I have been working together on the Executive Committee for three years. In September, she will begin her term as Chair of the Section. I can rest easy knowing that we are in very good hands.

Above all, thanks to the members of the LPMT Section. Thanks for taking the time to contact me and share your thoughts. I know that we will continue to work hard to fulfill our mission—to help you practice ethically and profitably.

Gideon Grunfeld
Chair, LPMT Section
Gideon@lawfirmdevelopment.com
(310) 734-6073

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QUESTIONS: eFILING

MCLE CREDIT

1. Once an attorney is admitted to practice by the State Bar of California, then he or she is automatically admitted to practice in the federal courts in California.
True False

2. The Federal Rules of Civil Procedure require that personally identifying information be redacted from documents eFiled in the federal district courts.
True False

3. If a law firm or law department has downloaded the free Adobe Acrobat Reader software, then it is prepared to convert word-processing and spreadsheet files to .pdf format.
True False

4. Metadata removal is especially important when filing a word-processed version of a Proposed Order.
True False

5. Once an attorney is admitted to practice before a California federal district court, then he or she is automatically and simultaneously registered as an eFiler in eFiling pending at that court.
True False

6. It is advisable to log into the electronic docket for a Federal case at least three days before the eFiling deadline.
True False

7. Once an attorney is registered as an eFiler in one of the four California federal district courts, then he or she is automatically a registered eFiler in all of the other three such courts.
True False

8. The 58 California Superior Courts employ a uniform approach to eFiling.
True False

9. A "white list" is a significant risk-management step for law firms whose lawyers litigate in the federal court system.
True False

10. The California state trial-level courts use the ECF/CM system for uploads and retrievals.
True False

11. A registered eFiler's ECF login and password can be used by as many lawyer colleagues and non-lawyer colleagues as that registered eFiler sees fit.
True False

12. Although eFiling systems tend to be available 24/7, ideally one should start an upload no later than midday on the due date.
True False

13. Federal eFilings are effectuated via email and not by means of a Web browser.
True False

14. If one has used an improper method of electronic redaction when a pleading was created as a Word file, then converting that document to .pdf form via Adobe Acrobat will cure the redaction deficiencies.
True False

15. In at least one California federal court, an attorney of record can enable multiple colleagues, paralegals and/or secretaries to receive each "notice of electronic filing" from the court by email.
True False

16. Once a Word, Excel or PowerPoint file has been converted to .pdf format in an automated way, it is too late to clean the metadata from the .pdf document.
True False

17. Acrobat Standard 8.0 and higher enables metadata removal but not redaction.
True False

18. Pending proposed legislation would officially authorize electronic notification as a method of service.
True False

19. Once one has obtained a login and password for the federal Public Access to Courts Electronic Records (PACER) service, he or she is eligible to eFile pleadings and motions in cases pending in the United States District Court closest to his or her business address.
True False

20. All of the lawyers at a very large law firm may share the same federal PACER login and password.
True False

MCLE ETHICS

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speech, is nonetheless protected unless state regulation can survive "intermediate scrutiny."

We'll get to the technical side of this intermediate scrutiny in a moment, but the first and most important concept to keep in mind is just how limited the definition of "commercial speech" is. The *Central Hudson* court, citing a string of previous decisions, noted that commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Id.* at 562. The court also noted with approval that the regulations at issue in the case attempted to limit only advertising "clearly intended to promote sales" and not "institutional and informational" messages. Three years later, the Court built on this concept, noting that commercial speech is that which "does no more than propose a commercial transaction." *Bolger v Youngs Drug Products Corp.*, 463 US 60, 66 (1983). This encompasses only a limited form of communication indeed: straight-ahead advertising.

But even where communication is clearly adver-

THE RULES GOVERNING ATTORNEY ADVERTISING HAVE NOT EVOLVED WITH ANYTHING APPROACHING THE PACE OF CHANGE EXPERIENCED IN SOCIAL MEDIA

tising, regulation is unconstitutional under *Central Hudson* unless it fits within constrained guidelines: The regulation must meet a "substantial government interest;" it must directly advance that interest, and it must be narrowly tailored in pursuit of that interest. *Central Hudson* at 567. As the Court subsequently noted, regulators must "carefully calculate" the burdens imposed by their regulations and ensure that those burdens are justified in the light of the weight of the government's objectives. *SUNY v. Fox*, 492 U.S. 469, 480 (1989).

What this means is that, regardless of how expansively a state bar regulation may be written, it must in fact be applied very narrowly: First, to only a narrow category of communication (i.e., out-and-out advertising) and second, the regulation is only permissible to the extent it operates in pursuit of a substantial government interest. These fundamental limiting principles are critical to keep in mind when considering whether a new form of communication implicates advertising regulations.

So What About Those Regulations?

Attorney advertising in California is governed by not one, but two sets of regulations: the Rules of Professional Conduct (RPC) 1-400 and Business & Professions Code §§ 6157-6159.2. While these rules largely follow the ABA's Model Rules of Professional Conduct with respect to attorney advertising, they are more detailed. The Bus. & Prof. Code sections in particular contain a number of specific restrictions on attorney communications and a provision that purports to create a "rebuttable presumption" that certain advertising techniques—including depictions of events or images of dollar signs—are misleading. While this latter provision has not been tested, it's difficult to see how such a blanket rule would square with the requirement that restrictions on advertising be narrowly tailored.

In any event, let's look at a number of examples of online activity and social media and how California's ethics rules might be implicated.

Web Sites

Rule 1-400 differentiates between "communication" and solicitation; the latter is subject to considerably more regulation. Ponder, for a moment, whether the expansive definition of "communication" (which includes any reference to a firm name, or any unsolicited correspondence from an attorney) meets the narrow definition of "commercial speech" in *Central Hudson*, and whether any typical attorney Web site would likewise meet that definition. While Web sites may contain certain messages that "do no more than propose a commercial transaction," most sites also contain all manner of biographical information, background information and publications that do not qualify as commercial speech. Nonetheless, California Ethics Opinion 2001-155 found that attorney Web

sites as a whole, while not "solicitation," represent a regulated form of "communication" under the rules. Not surprisingly, the Opinion does not explore the extent to which the application of Rule 1-400 is limited by the commercial speech doctrine.

Online Ads and Sponsored Listings

One curious feature of RPC 1-400 is an enumerated list of attorney advertising "standards" —forms of communication that are presumed to violate the rules. First among these is the concept that communications containing predictions of an outcome are prohibited. So what of those sponsored listings or online ads claiming "you can win!" "we'll get you the recovery you deserve!", etc? The likeliest outcome is that such claims are typical commercial puffery and not the sort of thing that can be regulated (wait, did I just predict an outcome?). However, the brevity of online advertising does not lend itself to disclaimers and caveats, so it's important to ensure that advertising messages are not misleading or overreaching.

Directory Profiles

Could your Facebook profile be subject to attorney advertising regulation? Much like Web sites, the definition of "communication" in 1-400 covers anything related to any attorney's availability for professional employment. Although profiles are primarily biographical, to the extent they are professionally-oriented one could argue that they meet the definition of "communication" under 1-400. However, assuming you don't post advertising messages in your profile, or misleading details of litigation victories. there's simply no way that these profiles fall within the commercial speech definition of communication that "does no more than propose a commercial transaction."

Endorsements & Testimonials

Consider yourself lucky you don't practice in Florida, where advertisements must be pre-screened by a review committee and testimonial advertising by attorneys is flat-out forbidden. However, even in California testimonials and endorsements cannot be used unless accompanied by an express disclaimer. While the purpose of this restriction is intended to restrict traditional testimonial advertising, it precedes the explosive growth of client review sites and the use of endorsements on profile sites.

Client review sites should be easy; when a client leaves a review on a site like Avvo, Google Local or Yelp, the attorney isn't posting, paying for or controlling that review. Thus, review sites should be viewed no differently than an online version of the world-of-mouth reputation that has accompanied the work of attorneys since time immemorial.

But what of endorsements? On LinkedIn and Avvo, another attorney or co-worker can write an endorsement of your work. These may be solicited or unsolicited, and you don't post them yourself. However, you can choose to *delete* an endorsement from your profile. Does this feature mean a disclaimer is required? While I think the best view is that these endorsements are neither the type of communication anticipated by RPC 1-400 nor commercial speech, those taking a conservative view of the rules may want to consider deleting endorsements that contain references to specific outcomes.

Twitter

Using Twitter is akin to being part of a massive, multi-threaded conversation, with one significant difference: You can use keywords to search for any conversational threads that might interest you, even from people who are not part of your Twitter network. Say you practice personal injury law in Fresno; you can run a search that will provide you all "tweets" mentioning car accidents in Fresno. Wouldn't it be great to follow up directly with these people, and offer your services via Twitter?

While RPC 1-400 prohibits in-person and telephonic solicitation, it does not as yet follow ABA Model Rule 7.3(a), which prohibits, in addition to in-person and telephonic solicitation, that which is carried out by "real-time electronic communication." While there is a proceeding underway to add this rule in California (along with a number of other initiatives designed to harmonize RPC 1-400 and the Bus. & Prof. Code, and more closely follow the ABA Model Rules of Professional Conduct), those changes have been in the works for years and there is no current timetable for their finalization or implementation. Therefore, business development via Twitter does not violate the anti-solicitation rule at this time.

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Vulnerable Parties

But don't go after those injured folks quite so quickly; RPC 1-400 presumes that communications (and not just solicitations) at the scene of an accident or on the way to the hospital violate the rules. Similarly, the standards proscribe communications delivered to parties in such a physical, emotional or mental state that they would not be expected to exercise good judgment in the selection of counsel. While these restrictions must be read narrowly under *Central Hudson*, it is good practice not to solicit too aggressively in response to Twitter posts. A simple note that you are available to discuss is more than sufficient. Likewise, one should not use the serious illness or accident "group" pages of social networking sites like Facebook or LinkedIn to solicit business. Members use these groups for empathy and consolation, and, ethics rules aside, you will quickly gain pariah status online if you attempt to use these forums for anything more than the purpose intended by the participants.

THE BREVITY OF ONLINE ADVERTISING DOES NOT LEND ITSELF TO DISCLAIMERS AND CAVEATS, SO IT'S IMPORTANT TO ENSURE THAT ADVERTISING MESSAGES ARE NOT MISLEADING OR OVERREACHING

Talking Up Your Results

Whether on Web sites, blogs or Twitter, there's nothing like highlighting your significant victories. But what to make of Bus. & Prof. Code § 6158.1, which creates a rebuttable presumption that messages "as to the result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result" are misleading and deceptive, and hence barred under the rules?

While this regulation could be a poster child for vagueness in statutory construction, it's important to keep in mind, as always with these regulations, the limited scope available for commercial speech regulation. Blogging does not fit within the constitutional parameters of attorney advertising regulation. You may be blogging to showcase your expertise or results as a way to drum up business, but as the Supreme Court noted in *Central Hudson* and its progeny, the mere fact that communication is made within a commercial context does not subject it to advertising regulation. Once again: only communication "that does no more than propose a commercial transaction" may be subject to this form of regulation.

So if you're writing on your blog about recent cases you've worked on, or including such information on your Web site, there's little to worry about. However, if case results are used on ads, or highlighted on Twitter as a form of advertising (an unfortunate use of Twitter by some lawyers), you may be running afoul of the regulations. Online ads and Twitter's 140-word limit offer little room to provide context or information on the facts and law behind the result obtained.

Administrative Requirements

Rule 1-400 also requires that communications seeking professional employment be labeled "advertisement" and that copies of communications be retained for two years. While these requirements are relatively easy to comply with for some forms of social media, others are more problematic. Twitter doesn't offer an easy way to locate old posts, and maintaining every iterative change of profile text or design is wellnigh impossible. However, as most social media use does not meet the narrow definition of "commercial speech," these administrative requirements should not apply. Furthermore, even in instances where communication <u>is</u> commercial speech, it's difficult to see how these requirements would meet the *Central Hudson* standard that regulations be narrowly tailored to meet a substantial government interest. So don't worry too much that you don't have a copy of every change you've made to your Facebook profile.

Extrajudicial Statements

With a smartphone or netbook, sharing your thoughts with the world via your blog or Twitter is only a few keystrokes away, even when you're at the courthouse. The dark side of this immediacy is that it may not give you adequate time to reflect. Frustrating day in court?

Beyond the obvious issues with client confidences, professionalism and zealous advocacy that arise when airing your frustration publicly, there can be ethical problems as well when your hastily-chosen comments surface. Under RPC 5-120, you may be sanctioned—even for protected speech—when your comments create a "substantial likelihood of prejudice" in relation to adjudicative proceedings. The Supreme Court has specifically sanctioned this type of rule, noting that an attorney's First Amendment rights may be constrained at the courthouse door (see *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1032 (1991)). So always think twice before EVER using social media to vent your grievances about the justice system.

Unauthorized Practice of Law (UPL)

With social media, blogging and features like Avvo Answers, attorneys can answer questions and provide general legal advice to people with legal problems, regardless of location. Some see a problem with this—how can an Arizona attorney, for example, provide guidance on California law? And for a profession that loves clarity and bright lines, the regulations on the unauthorized practice of law (UPL) are surprisingly vague. What is the "practice of law," anyway?

But keep two things in mind: First, informal guidance of the sort that takes place in social media forums are not what most attorneys would consider the "practice of law," and is, in fact, no different in substance than the kind of general guidance attorneys are familiar with dispensing at social events. And secondly, UPL rules—backward, vague and out-of-step with the realities of modern practice—focus entirely on where the attorney is located when legal services are provided. Take a look at CA Rule of Court 9.48 or ABA Model Rule 5.5, which require the attorney's presence within the state as a prerequisite to UPL rules being implicated (and in the case of the ABA, "systematic and continuous" presence in the state). For these reasons—and particularly due to the fact that guidance provided via social media is general and not part of an attorney-client relationship—there should be no cause for concern that blogging or responding to inquiries from other people in other states constitutes the unauthorized practice of law.

A Final Note

This article has attempted to describe the constitutional framework within which attorney-advertising regulation must be understood and interpreted. That said, one must acknowledge the tremendous power the bar has to regulate the profession, and the fact that some attorneys will choose to interpret the bar's rules expansively to avoid even the slightest chance of running afoul. Until and unless the rules are amended to reflect both constitutional limits on regulation and the realities of social media communication, those with such a compliance mindset will find it hard to use these tools.

However, unlike states like Florida and Louisiana that have taken a more repressive view of attorney advertising, the California Bar has shown no agenda of trying to push the limits of its rules and constrain the use of social media by attorneys. With that in mind, and understanding that all attorney advertising regulation must be read through the lens of the commercial speech doctrine, I hope that most attorneys will find comfort that the vast majority of social media uses are problem-free under California's rules governing attorney advertising.

Josh King *is Vice President, Business Development & General Counsel for Avvo, Inc. Josh has a diverse background in the law, having worked as a small firm litigator and in-house at technology companies, including roles as General Counsel of Cellular One of San Francisco and Vice President, Corporate Development at AT&T Wireless. A member of the California Bar, Josh received his JD from UC Hastings. He is a frequent writer and speaker on M&A, legal and social media issues.*

MCLE ETHICS

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QUESTIONS: ONLINE ADVERTISING

MCLE ETHICS

1. Commercial Speech is "that which does no more than propose a commercial transaction."
True **False**

2. Direct solicitation of business by attorneys is more heavily regulated than general advertising.
True **False**

3. Attorney Web sites are considered client "solicitation" under RPC 1-400.
True **False**

4. Providing general guidance via online Q&A forums or Twitter responses is not "the practice of law" for unauthorized practice of law ("UPL") purposes.
True **False**

5. Social networking profiles likely do not fall within the definition of "commercial speech."
True **False**

6. Two separate sets of regulations govern California attorney advertising.
True **False**

7. Testimonial advertising by attorneys is prohibited in California.
True **False**

8. Client reviews posted on review sites such as Avvo, Google Local or Yelp are not "testimonials" for the purpose of attorney advertising regulation.
True **False**

9. *Central Hudson v. Public Service Commission* of New York was the first Supreme Court case holding that attorney advertising is constitutionally permissible.
True **False**

10. CA differs from the ABA Model Rules in not prohibiting real time electronic solicitation by attorneys.
True **False**

11. Facebook groups organized for victims of defective products or workplace discrimination would be a good place to solicit new business.
True **False**

12. Sending a Twitter message to someone who had just posted about being in a serious accident would be OK.
True **False**

13. Blogging about your cases is not likely to violate CA attorney advertising rules.
True **False**

14. Violation of the attorney advertising standards in RPC 1-400 is a material violation of the rule.
True **False**

15. Attorneys must keep copies of all social media communications for two years.
True **False**

16. Commercial speech regulation must survive strict scrutiny and a 4-prong test to be permissible.
True **False**

17. There are no issues with referring to your pending cases in Twitter or a blog.
True **False**

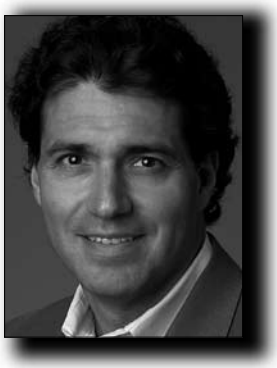
18. CA UPL rules limit the ability of out-of-state attorneys to interpret CA law, regardless of the attorney's location.
True **False**

19. Short online advertisements do not ever require disclaimers.
True **False**

20. Facebook profiles should be labeled "attorney advertising."
True **False**

COURTROOM GRAPHICS: WHY TO USE THEM AND HOW NOT TO ABUSE THEM

By Professor Fred Galves



Fred Galves

Attorneys have long used visual aids, such as charts and photographs, to help juries understand key facts and issues during trial. That tradition continues, but many of today's trial attorneys have upgraded to sophisticated computer graphics and automated display systems to improve their connection and communication with modern jurors. No matter how high or low tech the visual aids, enhancing an attorney's arguments and persuasive presentation of evidence remains the goal.

There are some in our profession who still prefer an overhead projector, or the seductive sound of their own voice, to all the "fancy computer stuff." But in more and more cases, especially those involving complex technology or issues, computer graphics can simplify, clarify, and vivify intricate, technical, and even boring, but critical, information for jurors in a way that a static flip chart or a poster board exhibit cannot.

Notwithstanding the clear benefits of using visuals, there are some common mistakes attorneys make when using computer graphics, including legal admissibility/disclosure related errors, as well as strategic presentation/persuasion related missteps. Fortunately, these mistakes can easily be identified and remedied.

This article addresses why attorneys should use computer graphics at trial, how to avoid mistakes when using them, and how to overcome certain objections.

Why Use Computer Graphics At All?

The time-honored notion that "A Picture Is Worth a Thousand Words" is the short answer to this question; especially when one considers that the modern juror has an even shorter attention span, and much more exposure to complex visual information than the typical juror of the past. Remember that at one time, great attorney orators such as Clarence Darrow made long spell-binding closing argument soliloquies, keeping the jurors—whose information intake was primarily via political speeches, preacher homilies, and theatrical plays—on the edge of their seats. Today, many jurors come to court conditioned to assimilating information through a stimulating combination of visual and oral media via TV, the Internet, Computer Games, and Special Effect Movies.

It is telling that the typical modern juror receives close to 12,000 hours of classroom instruction by high school graduation, compared to over 14,000 hours of watching TV, and very few hours listening to an attorney in court. But instead of accusing modern culture of "dumbing down" society by bombarding people with visual images, lawyers should acknowledge that people, more than ever before, are processing vast amounts of information visually and therefore rise to the occasion in trial. Like it or not, people are accustomed to cable news shows with multiple picture frames and running text across the bottom of the screen.

To use another time-honored cliché, "seeing is believing." It is important to understand that, psychologically, words are just verbal clues for the listener to reconstruct a particular abstract concept, and then create their own mental image or idea about which the speaker is speaking. Many researchers assert that most people—and therefore most jurors—"think in pictures," according to their own mental "storyboard" that they create during trial. In virtually every forum, information conveyed by *showing* or *doing* is much more concrete and tangible than mere speech. Good visuals

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control the coherent "story" the attorney is trying to convey and convince the jury to believe.

In one of my courses, I teach foreign attorneys and law students U.S. corporate law and civil litigation. For most of these students, English is their second language. These foreign attorneys routinely remark how well they are able to understand the information I convey when I use computer graphics because they receive that information through two senses simultaneously—hearing *and* seeing—and are therefore better able to translate the abstract legal English words into more comprehensible concepts. Similarly, jurors often find that complicated factual or technical trial information seems like a "foreign language" to them. They can better understand this legal "foreign language" when it is complemented with visuals. Imagine constructing a model airplane if the directions were verbal only, without diagrams showing how the complicated pieces logically fit together. In fact, note how many products today are accompanied by an instructional DVD explaining assembly and usage.

IT IS TELLING THAT THE TYPICAL MODERN JUROR RECEIVES CLOSE TO 12,000 HOURS OF CLASSROOM INSTRUCTION BY HIGH SCHOOL GRADUATION, COMPARED TO OVER 14,000 HOURS OF WATCHING TV

Even if the jury understands a case and is persuaded by your presentation during trial, it does no good if those jurors cannot recall vital information during deliberations. Numerous studies demonstrate that recall is improved when oral presentations are coupled with visual presentations. One study found that when jurors were given visual presentations, they retained 100% more information than those given only oral presentations. Even more importantly, those given a combination of oral and visual presentations retained 65% more information than those given presentations without visuals.

Perhaps some attorneys have avoided the use of visual technology in trials for fear of making mistakes or not being able to sufficiently overcome objections. If so, it is important that such mistakes and objections do not become reasons, or rationalizations, for disregarding this powerful vehicle of information conveyance.

How to Avoid Abuse or Misuse of Computer Graphics:

Disclosure and admissibility mistakes

1. Many attorneys forget to disclose to the judge and opposing counsel their intentions to use technology in their opening statements and to determine beforehand if certain images or exhibits can be shown. Some courts will not allow any exhibit to be used during an opening statement that has not first been admitted, while others will allow it if there is a good argument for its admissibility that will be made during the case-in-chief. Lawyers should get any images and exhibits they want to use in their openings either stipulated to, or they should file motions in limine in order to obtain a pretrial ruling on admissibility, so there can be no objections or unfortunate surprises requiring changes during their openings.
2. On the other hand, some lawyers disclose too much of their visual technology so that their opponents get an unfair preview of their entire opening statement, which is a strategic blunder. Attorneys should not disclose their entire PowerPoint presentation that accompanies their openings anymore than they should disclose a written outline of their opening statement. Attorneys should request admission for both their opening statement exhibits, along with their other trial exhibits, so that the opposing side does not know which particular exhibits will be shown during the opening and during trial. Also, the work product doctrine should be claimed for anything in the presentation that is not itself an evidentiary exhibit.
3. If it is ruled that opposing counsel must disclose a PowerPoint or other computerized visuals, a savvy attorney requesting such disclosure will argue that the visuals should

be disclosed in a computer-based format that reveals motion, layering, or other special effects, because these aspects can on their own present ideas and arguments. If only a printout of the PowerPoint is what is disclosed, note that printed versions of slides may hide images that are displayed in an overlapping format and will not reveal motion or other special effects.

4. A very basic reason to obtain pretrial admissibility rulings is to avoid last minute adjustments to your trial presentation. If the attorney and witnesses are prepared using certain computer visuals that are not allowed at trial, or have to be redacted in some way, then the attorney and witnesses will have to adjust on the spot and conduct examinations in a manner in which they have not adequately prepared. The discomfort and quick adjustment might be mistaken for lack of credibility or lack of professionalism.
5. A strategic benefit of disclosing powerful, computerized graphics is that they often send a message of strength, preparedness, and resolve to the other side that may enhance one's bargaining position if settlement is still an option. They let your opponent know in a very striking way that your side "means business." In other words, their effectiveness should not be reserved only for the jury.
6. Bogus evidentiary objections to visual technology often need to be responded to adequately. For example, the extreme effectiveness of a compelling visual presentation should not sustain an "unfair prejudice" objection any more than should an attorney's extreme effectiveness of his or her unique, clear style of speech. The concern for unfair prejudice does not mean the judge is required to equalize the representation resources and effectiveness of both sides.
7. Proper timing between testimony and visual technology is necessary in order to avoid sustainable objections. A witness being asked "what happened next?" when a computer generated timeline of events is already up on the screen for all to see may prompt a "leading question" objection because the answer is already presented. Therefore it is crucial to ask a verbal question about the event, let the witness answer, and then support that answer with the computer graphic that visually represents the testimony. Even without an objection, a timeline or any completed graphic can be distracting if it contains information that the witness is not yet addressing. Additionally, the exhibit is more understandable and digestible to the jury if it comes in small bites. Attorneys should build or layer their graphics, rather than present them all at once, which can be confusing, intimidating, distracting, and objectionable.
8. Opponents sometimes object to expert witnesses using computer animations to testify about complicated technical or scientific information because the expert witness cannot explain how the computer animation itself was created. The response to this objection is that the expert is not being presented as a computer animation expert. When a physician uses a wax human model to testify about a neck injury, for example, he or she does not also need to be an expert in creating wax models. If a judge requests that the computer animation expert testify, an attorney should provide that, although it is no more required than the testimony from a wax model expert. An expert need only be an expert in the area the expert is tendered as an expert, unless the computer animation is itself rendering the expert's opinion (see below).
9. The novelty and effectiveness of visual technology sometimes mistakenly attracts the application of a higher evidentiary standard for admission. When an exhibit is used as a *demonstrative* exhibit, it is simply used to help clarify testimony, but is not evidence itself. Therefore, as long as it is a "fair and accurate" representation of what an eyewitness saw, or is a helpful clarification of an expert's opinion, no more foundation is necessary—whether it is a hand-drawn chart or a colorful computer slide. However, if the exhibit is being used *substantively*—if, for example, the computer program took input information and then rendered an image of what an accident or some other event *must have* looked like—then the computer program and the rendered graphic will require a much more elaborate foundation.

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Presentation and persuasion mistakes

1. When computer graphics are properly disclosed and deemed legally admissible, it is important not to waste the opportunity by presenting them poorly. As a general guide, good graphics are those that are easy to understand, largely self-explanatory, and cost-effective; they are not overly complex for the point, or more of a showcase for the technology than for the justness of a client's case.
2. A common presentation mistake is to use too much text in a PowerPoint presentation, and/or to read the visuals to the jury like a large visible teleprompter. These mistakes lead to one of the undesirable results attorneys are hoping to *avoid* by using technology—bored jurors. You should never expect the jury's "undivided attention," if you are dividing their attention between simultaneous written words and spoken words, and boring them in the process. Instead, toggle between relying solely on your oral presentation, letting your visual aids speak for themselves, and using your visual aids emphasize and underscore your speech.
3. With visual aids, often *less is more*. Every detail in a case is not so important that it should be emphasized visually. Like new law students who highlight almost all of the text in their assigned reading, if most of a case presented is highlighted by visuals, then the important points are hard to distinguish. To correct this problem, instead of trying to edit down your visuals, put aside everything you have created for trial, start over, and include only visuals that are absolutely necessary. Like a good movie director, you should leave much material on the cutting room floor.
4. With all visuals, attorneys need to have a basic command of the medium and equipment. Most jurors will not hold your lack of knowledge about how to restart a PowerPoint presentation against your client. However, jurors will not be so forgiving if the problem is not quickly remedied. As a result, many attorneys have back up systems in case of a computer crash, as well as spare hardware, such as extra projector bulbs or VGA cables in case there is a hardware malfunction. Such problems are fairly rare, but they do happen, and the "show must go on."
5. In the end, if the focus is on the case and not the technology, the visual aid will not fail from the distraction of the use of a computer. If a jury dismisses an attorney using a computerized exhibit as being "too slick," that attorney should reflect on themselves and their case and avoid blaming the technology. Long before electronics were invented, jurors would find some attorneys unbearable—and the reasons were usually their presentation style and personality, not their props. Technology merely reflects an attorney's message and makes it clearer. Thus, if the message is not such a good one to begin with, then the technology will just make that mediocre message even more mediocre. But if the message is a good one at its core, then the technology will make that message even better.

The Bottom Line

Attorneys should use visual technology in cases involving a high volume of complicated information because, by all accounts, it will improve the jury's ability to understand, remember, and ultimately be persuaded. Attention and basic preparation regarding admissibility issues and presentation style should eliminate mistakes and the inability to overcome many objections. With so much to gain and so little to fear, computerized exhibits should continue their trajectory towards the commonplace in the courtroom, especially as more jurors come to expect them, and more attorneys are comfortable and adept at using them.

Professor Galves *has been a member of the Pacific McGeorge faculty since 1993. A noted proponent of technology in the classroom and the courtroom, he teaches all of his classes using display technology. Since coming to McGeorge in 1993, he has worked on national banking legislation with both the Senate and House Banking Committees. He has also been a visiting professor at the University of California at Davis School of Law and Fordham Law School. One of his articles, "Where the Not So Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance," 13 Harv. J.L. & Tech. 161 (2000) was the first law review article with an accompanying CD-ROM with full-animation video footnotes.*

DON'T LET CONFIDENTIAL INFORMATION WALK OUT THE DOOR

By Kris Haworth & Mindy M. Morton

Kris Haworth

Mindy M. Morton

"She just took the thumb drive with her. We didn't know it contained our source code… millions of dollars of our intellectual property may now be on our competitor's system because she just walked out the door."

Attorneys and computer forensics professionals have all heard that statement from panicked executives many times. The truth is, intellectual property can be transported and distributed with frightening ease, and it is crucial to plan ahead to avoid or at least minimize the impact of these situations. It is vitally important to know what steps to take when an employee walks out the door.

When attorneys or staff members leave law firms, the same problems arise. Law firms have their own trade secrets, including their client lists, but they also have client trade secrets. It is critically important that law firms safeguard both their own and third party data. This article contains steps you can take to protect both law firm and client data.

Stopping Data Before It Leaves

Given the state of the economy and the need for many companies and firms to downsize, often without much warning, employees are leaving with company information on their home computer, Internet email account, or thumb drive. Even worse, their employer-assigned computers are often given or sold to them when they leave. Curbing these occurrences can be difficult, but at the very least companies should institute rigorous exit procedures and examine any employee computers to ensure that ex-employees are not leaving with company equipment or data.

These procedures are just as important (and perhaps even more so) when the employee resigns to pursue a "new venture." A large number of the trade secret cases filed in California involve former employees who resign willingly and take their former employer's trade secrets to start their own venture. Planning ahead to prevent these situations can save millions of dollars in litigation costs.

Some key steps include:

- Have each employee sign a confidentiality and invention assignment agreement when they start work. Make sure that the agreement clearly describes California Labor Code Section 2870 and its requirements for an employee to claim rights in any invention conceived or reduced to practice while employed at your company.
- Educate employees about the company's trade secret policies and have clear procedures in place concerning how to mark documents and emails for confidentiality purposes. Task managers with following up with employees to ensure compliance.
- Define and specify your trade secrets and key confidential or proprietary information, if possible, BEFORE theft of this critical data occurs so you aren't left scrambling to define it quickly once litigation commences.
- Hold exit interviews with all departing employees and remind them of the requirements of their confidentiality and assignment agreements. Have them sign exit interview paperwork.
- Do not allow employees with access to sensitive information to delete anything from their computers or email servers once you are aware of their departure, unless such deletions are supervised by an IT employee.

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- If employees had access to sensitive information, consider making a forensic image of their computer before reassigning the system and deleting data. If email is stored on a central server, consider saving the emails for a period of time to allow for recovery.

Tracking Down Data Once It Has Left the Company

Even with the best policies and procedures in place, it isn't possible to stop all trade secrets and other confidential or proprietary information before it leaves the company. As a result, legal counsel and forensics experts find themselves on the front line, tracking down data that has gone out the door. Once the data has been lost or stolen, attorneys and forensic experts work together to get injunctions against former employees using the data, dealing with privacy rights of clients (and their customers and partners) whose information has gone out the door, and tracking down exactly what data has been lost or stolen and where it went.

If there is reason to suspect that intellectual property has left the company, there are a number of practical steps that can be taken that will help determine what happened and provide supporting evidence in the event of litigation. In this situation you should focus on ensuring that evidence is properly preserved, as well as preparing for what the court is going to require if litigation is necessary.

These steps include:

- Ensure that proper legal guidance is provided and obtain the full protection of the attorney-client privilege if your client's data is at issue.
- Maintain the chain of custody and ensure that the electronic data isn't altered or damaged during the investigation.
- Preserve relevant information: Any laptops or computers used by the ex-employee should be forensically imaged by trained forensics professionals as soon as you have reason to believe theft has occurred.
- Get a digital "fingerprint" of your intellectual property that can be compared to what has left the company.
- Be prepared to explain exactly what trade secrets have been or are believed to be stolen with a relatively high level of specificity. California Code of Civil Procedure Section 2019.210 requires disclosure of your trade secrets prior to obtaining any discovery.

Retain an Experienced Outside Litigation/ Investigation Team

In-house information technology professionals are fantastic at their jobs. However, the job does not generally include responding to investigative and litigation needs. Not only does this take them away from their day-to-day responsibilities, at times it can put a technology professional in a position of making legal decisions. We have seen many cases where a technology professional has determined that no data of interest could possibly exist on a server, only to discover later, in the course of discovery, that the server actually contained valuable information about the stolen intellectual property.

This is why it is important to have both counsel who is familiar with technology and a forensics expert involved from the outset of the investigation or litigation. A computer forensics expert working at the direction of counsel can produce reports and information that are generally shielded by the attorney-client privilege. Further, computer forensics and the collection of data is a different skill set than that typically held by an information technology professional. Computer forensics experts understand the bits and bytes of data and the ramifications of making certain choices and how those choices will impact potential litigation. An experienced investigation team will ensure that the company is meeting its obligations under the applicable discovery rules, complete a comprehensive fact gathering exercise, and make sure that the other party to the matter is also producing the data needed to resolve the matter.

The question becomes what tasks can, or should, a company's information technology professionals own. It is important for a company or firm's in-house staff to be proactive in the tasks that will aid in an investigation or litigation. For example, equipment that has been issued to each user should be tracked. This equipment tracking should include desktops, laptops, and external storage devices such as thumb drives. An assessment of what data has left the building at an early stage will go a long way.

These steps are important to both identify the issues and prevent further problems. The key is to recognize that it's not whether data is leaving, but rather when it might leave. After that it is a matter of how to protect valuable intellectual property.

Prepare For Litigation

The duty to preserve evidence commences prior to the actual initiation of litigation. The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party should reasonably know that the evidence may be relevant to anticipated litigation. If a party cannot fulfill this duty to preserve because the lawyer does not own or control the evidence, the lawyer still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence. When a lawyer who has been retained to handle a matter learns that litigation *is probable or has been commenced*, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client's custody or control and the potential consequences for failing to do so.

Of particular concern can be companies that have a standard rotation policy for such items as leased laptops. It is not that the laptop itself needs to be preserved but a plan needs to be in place to collect the potentially relevant evidence contained on that laptop. This can be as simple as collecting the email or as extensive as forensically copying the whole hard drive. It is critical to have a plan in place and have custodians, information technology staff and others fully aware of it. Case law has clearly shown that the obligation of notification falls on counsel.

Keeping everything is never a good idea but a clear, thought-out approach to preserving evidence can save a company (and counsel) from sanctions as harsh as punitive damages. What generally gets a litigant in trouble is simply operating as they always do. Even with a good document retention policy this can be a problem as discovery commences. No lawyer wants to have to contact the other side and disclose that inadvertently important data might be lost. Once it is gone it is hard to know how important or unimportant it was. That's when the trouble really starts.

Conclusion

Given the vast amounts of electronic data flowing in and out of law firms and companies every day, it is impossible to prevent all theft of intellectual property. However, by planning ahead and adopting protective policies, you can minimize the risk of losing your intellectual property as well as the costs of litigation. More than ever before, law firms need to be prepared to deal with the technical and legal aspects of intellectual property flying out their own doors, as well as those of their clients.

Kris Haworth *is a Managing Director with Evolver, and leads their west coast operation. She has more than seventeen years of professional experience in the technology industry and also is an attorney.*

Mindy Morton *is an intellectual property litigation partner at Bergeson, LLP in San Jose.*

WHAT DO YOU KNOW ABOUT YOUR EXPERTS? CASE ANALYSIS TOOLS CAN HELP YOU STAY ON TRACK

By Craig Larson

Editor's Note: Thomson-Reuters is a sponsor of the Law Practice Management & Technology Section.

Managing information in litigation is challenging for many reasons. First, cases often deal with volumes of data that stress law firm resources. And in today's litigation, attorneys encounter more and more file formats: a mildly complex case will often include emails, Word documents, spreadsheets, electronic transcript files, scanned pleadings and correspondence, emailed case opinions, and sometimes even multimedia.

Firms often have tools for document review, transcript management, organization of pleadings, but attorneys have to navigate across multiple solutions to find all the information important to the case. Plus, it's often difficult to connect factual information produced in discovery to other important information, such as legal research or pleadings. Litigation teams continually complain about the churn of time and effort expended to find "that document."

Unique challenges of expert witness information

Expert witnesses are essential to a strong litigation strategy, but managing expert witness information can often be complicated and time consuming. The documents that need to be managed include those produced for and during the case: affidavits, reports, curricula vitae, transcripts of testimony and motions regarding the expert (especially Daubert challenges).

Working with experts requires investigating the expert thoroughly and finding any and all useful information, including prior testimony, publications and articles authored by the expert, and information on prior Daubert challenges. Litigators don't want surprises from their own expert; similarly they want to exhaust every opportunity to uncover unfavorable information with respect to the opposition's expert.

Sharing information about experts with members of the litigation team is critical for ensuring a common strategy, but is not easily accomplished. Collaborating with your expert can also be taxing, and often means employing a delivery service to send a bankers box across town, or emailing large files in a format that is not easily managed.

How technology can help

Technology tools can be extremely helpful in organizing, sharing and analyzing information related to expert witnesses.

Organize information

Many litigators rely on case analysis tools such as West Case Notebook to help them organize information efficiently. There are many benefits of using case analysis software:

* Prior to a deposition, all the exhibits and transcripts of testimony can be accessed from a single location, organized and printed into hard copy for use at the proceeding.

* Annotation capabilities—the electronic equivalent of highlights and post-it notes—allow contemporaneous capturing and sharing of the team's thoughts on strategy and arguments for the case, and aid in preparing the deposition outline.

* At the deposition, attorneys most often are focused on questions around the exhibits presented to the witness. Tools allowing them to bring along an electronic set of documents from the case provide the peace of mind that, when absolutely necessary, other critical information is at their fingertips.

* Similarly, Case Notebook includes LiveNote's real-time capabilities, allowing collaboration with remote attendees. Members of the litigation team can attend from their office, receive streaming transcript text and video of the proceeding as it happens, and participate via Internet chat.

Share information with colleagues and third parties

Technology also can be used to communicate case status to clients and experts. Reporting capabilities allow attorneys to share the team's analysis in an organized, coherent fashion. Using a system like Case Notebook, reports can be published to PDF files or Web pages, and emailed or posted on extranets.

Case Notebook technology also bundles the electronic transcript and exhibits, and the free West E-Transcript Viewer lets attorneys deliver a package electronically so that the recipient can review the official record of the proceedings and all associated documents-saving the cost and time of shipping the equivalent banker box full of documents.

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CASE ANAYLYSIS TOOLS CONTINUED FROM PAGE 22

Analyzing information

After a deposition, the litigation team can use technology to identify portions of testimony as support for motions and filings. With case analysis functionality, identifying key testimony and exhibits and citing to them is much easier due to word processing integrations. Via these tools, the headache of re-typing long sections of text and formatting citation references is gone. Instead, the attorney can import the transcript text right into the section of a motion where it belongs in blue book format.

All of these advancements help manage a firm's resources by reducing costs and putting control back in the hands of the litigation team.

Craig Larson is director of Litigation Product Development for West. He can be contacted at craig.larson@thomsonreuters.com.