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# the PRACTITIONER

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MCLE Article: Ethics and Social  
Media: A Critical Juncture

*Megan Zavieh, p 14*

Attracting Your Ideal Client Without  
Breaking a Sweat or the Bank

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The Magazine of the Solo & Small Firm Section of the California Lawyers Association

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# Letter From the Chair

By Ritzel Starleigh Ngo



**Ritzel Starleigh Ngo** is the Chair for the Solo & Small Firm Section of the California Lawyers Association, and she practices family law in Pasadena. Ms. Ngo is experienced in contentious

dissolutions; parentage matters; child custody and visitation, spousal and child support; property division; temporary and permanent restraining orders; including domestic violence, elder abuse, and civil harassment. She can be reached at [ritzel@gmail.com](mailto:ritzel@gmail.com).

Dear Solo and Small Firm Section Members:

**T**hank you for your membership. This quarter's articles in *the PRACTITIONER* are interesting and useful to each of our legal practices. Thank you to Omar Anorga, Editor-in-Chief, for putting together a fabulous issue.

This past Spring, we welcomed new programs, as I welcomed the birth of my son, Thomas.

We had a successful turn out to our live in person MCLE program on April 13, held at Loyola Law School in Los Angeles, which was led and organized by our Education Chair/Treasurer-Elect, Sabrina Green! Thank you Sabrina for your hard work and continued contributions to our section.

We also visited a few local bar associations this Spring, including the Tahoe-Truckee Bar Association, in which our section presented the MCLE "What to Do When the State Bar Calls," in Truckee. We met many skilled attorneys, and established new connections, particularly with President Kate Shaw, who welcomed us back for a possible summer MCLE program. Stay tuned to our e-news for future details.

Additionally, this Spring our section visited the Tulare Bar Association for an MCLE lunch in which our section presented at a beautiful venue called the Vintage Press in Visalia, where we presented "The Difference Between Mistake and Malpractice." It was great to network and meet attorneys in the Central Valley, and learn about practice issues and how our committee can serve the needs in this part of our state.

We encourage the continued involvement of attorneys to participate in our section subcommittees. If your local county bar association is interested in having an MCLE program, please contact Nancy Goldstein or me to arrange for the program presentation.

I am grateful to the participation of so many of our excom officers who are juggling the demands of life, running a solo or small law firm, while finding time to volunteer and serve our section membership.

Nancy Goldstein and Marilyn Monahan are instrumental with the e-newsletter that our members receive each month. Content is invaluable with regard to best practice tips and changes in the courts.

## the PRACTITIONER FOR SOLO & SMALL FIRMS

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Omar Anorga, [omar@anorgalaw.com](mailto:omar@anorgalaw.com)

### Disclaimer

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the PRACTITIONER for Solo & Small Firms is designed to provide accurate information to professional advocates. However, we make this subject matter available to our members with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

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Christopher Toews takes copious meeting minutes for our ExComm and has presented useful MCLE programs.

Renee Galente, our Chair-Elect, has acted as Chair in many ways leading our ExComm while I unexpectedly gave birth to my son a few weeks early. Thank you, Renee, for your leadership over the years.

Thank you to Jeremy Evans, Vice-Chair-Elect, for representing our sections needs in the transition to the California Lawyers Association while managing as Treasurer for our section. Jeremy has positive energy and has contributed his hard work and innovative ideas to bettering our section benefits.

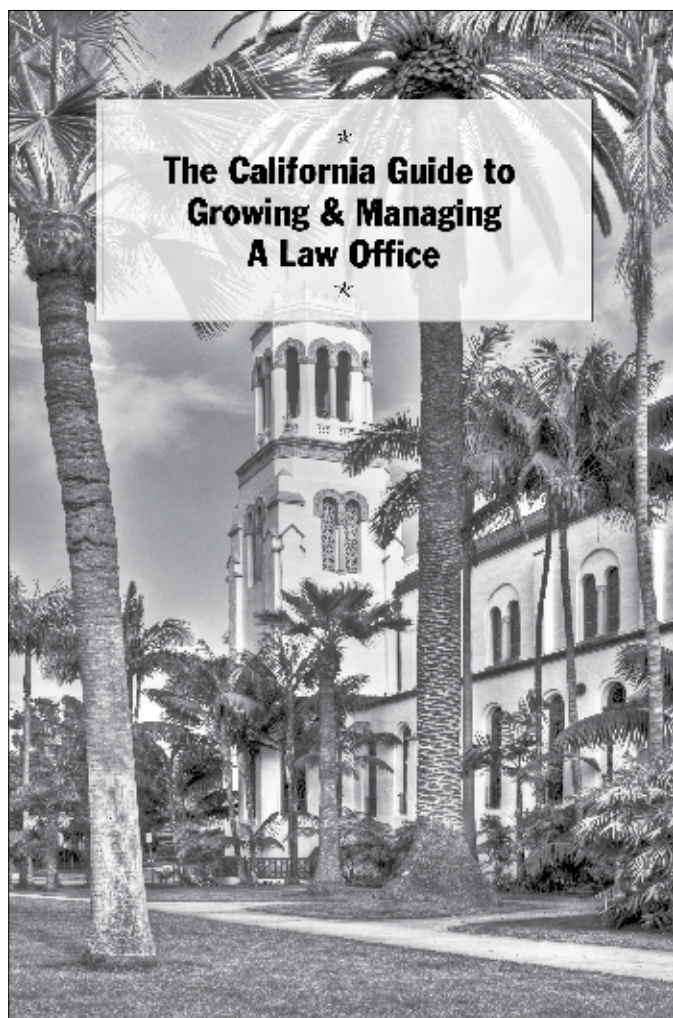
Cynthia Elkins has also been instrumental in our section's transition to the California Lawyers Association as well as contributing to the solid future of our section. Thank you to Cynthia for her leadership and direction over the years.

I am thankful to each of our ExComm members and advisors on our team this year for your advice and support in serving our section membership.

I hope to see you at the Sections Convention in San Diego on September 13-14, 2018.

Sincerely,

Ritzel Starleigh Ngo



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# Letter From the Editor

By Omar Sebastian Anorga

The third issue of *the PRACTITIONER* is bookended by a pair of outstanding mediation articles. The opening article, by prominent mediator Jeff Kichaven, “Mediating with Goliath” is about what an attorney, especially those practicing in solo or small firms, can do to level the playing field when mediating against big-firm opposing counsel, and those mediators who repeatedly mediate with these types of firms. The closing article, by long-time trial attorney Clark Rivera, is entitled “Your Next Mediation: Think It Through,” is a mini-action guide on the mediation process and how to effectively use that process to maximize efforts and potential settlement results.

Next, Neil Wertlieb provides us with an important update on the approved new and amended Rules of Professional Conduct, which become operative on November 1, 2018. In the second issue of *the PRACTITIONER* for this year, Neil provided us with an in-depth look at these new and amended Rules, and spelled out the potential affects these Rules could likely have on your practice and, particularly, solo practitioners.

We then have three articles dealing with some topical issues in law management: (1) podcasting; (2) communicating on social media; and (3) the use of virtual assistants. In “Practical Podcasting for Professionals,” attorney David Pizarra discusses what you need to do start up your own podcast, and why you should be doing it. If you do start up a podcast, and begin communicating with the public, you should pay close attention to Megan Zavieh’s “Ethics and Social Media: A Critical Juncture” article about



**Mr. Anorga** represents businesses and individuals with various legal problems, and he strives to always resolve these problems in a smart, and cost-effective manner. Mr. Anorga has vast experience with litigating legal

disputes in both state and federal court. Lastly, The Anorga Law Firm, Inc., has a large stable of Spanish-speaking business owners, and Mr. Anorga is able to communicate with them in their native language.

how to effectively and ethically communicate through social media. Lastly, Dina Eisenberg writes the article “Attract Your Ideal Client Without Breaking a Sweat or the Bank,” which discusses how we can get desirable clients, and how virtual assistants can help us better represent those clients.

I hope you enjoy this issue.

Omar Sebastian Anorga.

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# Mediating with Goliath

By Jeff Kichaven

**H**ow can solos and small-firm lawyers—the Davids—ever get a fair shake in mediation against the Goliaths? Actually, it's easy, and this article will explain how.

First, let's ask, who are these "Goliaths" whom the solo and small-firm "Davids" fear? Are they your big-firm opposing counsel? The international corporations and insurance carriers you're suing? No. If you're well-prepared and conscientiously put your client's interests ahead of your own, big-firm opposing counsel and their hoary clients won't scare you.

I learned this in dramatic fashion from a small-firm "David" who was actually named Don. Don's clients had a legal malpractice claim against a senior partner in a big firm, the kind of firm that has its name on the side of its building. This defendant was represented by two senior partners from another big firm, which also has its name on the side of its building (probably several buildings across the country). We had four mediation sessions spanning fifteen months. The two big firms tried to wear Don down, but he wore them down instead. His clients received a large, fair, settlement.

Afterward, Don told me his secret, the key to his approach. He said that he'd been in small firms for his entire forty-year career, almost always against large opponents. As he recounted it to me, his mentor taught him always to remember that it comes right down to—whether it's the key deposition, standing up in court on major motions, trial—it's always really just one lawyer against one lawyer. If you're better prepared, there's nothing to fear.



**Jeff Kichaven** is an independent mediator with a nationwide practice, based in Los Angeles. He is "Ranked in Chambers USA 2018" as one of the very finest mediators in the country. He has also been named Best Lawyers' "Best

Mediation Attorney in Los Angeles" (2015) and "California Lawyer Attorney of the Year" in ADR (2006). He is an Honors Graduate of Harvard Law School (1980) and a Phi Beta Kappa Graduate of the University of California, Berkeley (1977). His views on mediation have been cited in *The New York Times* and *The Wall Street Journal*. While he has mediated nearly every sort of civil dispute in his 23-year ADR career, he has particular expertise in Intellectual Property, Insurance Coverage, and Professional Liability cases.

One lawyer against one lawyer! Like Dempsey against Tunney, the Dodgers against the Giants, Evert against Navratilova, it's a battle of titans and a fair fight. No, big-firm opposing counsel and their clients are not the "Goliaths" the small-firm "Davids" fear.

Rather, the "Goliaths" the small-firm "Davids" have to fear are, sadly, mediators. If the mediator is against you and aligned with your big-firm opponents, you're on the short end of a two-on-one, and the fight is not fair.

Over the years, countless solo and small-firm "Davids" have expressed this concern about mediators. This fear will never go away. Solo and small-firm "Davids" will always ask, "How can we protect ourselves from the risk the mediator will put his thumb on the scale for the big guy, the repeat player, the fellow member of his establishment?"

To find the answer, we first need to identify the source of the mediator's potential power to tilt the scales against you. Then, we can figure out what to do about it.

While this may surprise you, the source of the mediator's potential power to tilt the scales against you is... You! Yes, your own decisions and conduct in the mediation are what give the mediator the potential power to abuse you and your client.

Let's consider the nightmare scenario solo and small-firm "Davids" fear most. As you enter the mediation, you and the plaintiff you represent have analyzed the case and decided you should settle for no less than 80 (on a scale of 1-100). After hours of wrangling, you have reduced your demand from 125 (admittedly, an extreme opening demand) to 85, and told the mediator you're getting close to the end of your rope.

Down the hall, the defendant's team tells the mediator that while they could pay up to 90 to settle, it would really make them look good in their supervisors' eyes if they could bring this in around 75. They remind the mediator—as if they need to—that they are big clients for him, and for the mediation company where he works, and (cracking their knuckles as they speak), they look forward to many, many more mediations together.

As this nightmare scenario continues, the duly chastened mediator walks into your room, head bowed, shoulders slumped. He sits down and slowly looks up, brow furrowed. His eyes balefully look skyward. "I've tried everything, everything, with them," he sighs and shrugs. "I'm so sorry. They are just so stubborn. It's like talking to a wall. I begged them to be more reasonable. But the most I can tell you they will pay, the top, is... 70."

Seventy! You're shocked. The case is worth more and everyone knows it. Your client can barely handle the stress of litigation, though, and would sure rather get cash now instead of years from now, after trials and likely appeals. Still... 70...? You look the mediator dead in the eye and tell him you need more. You lower your demand to 80 and tell the mediator it's your bottom line. You look serious. The mediator nods glumly and leaves.

Next, the mediator goes downstairs for a smoke. He returns a couple of unrelated calls. After a while, he comes back and tells you he has decided to make a "Mediator's Proposal" at (you guessed it) 75. The mediator says that, while it may be a tough sale, he thinks the other side will bite. In fact, he may or may not have communicated a Mediator's Proposal at 75 to the other side at all. It's not actually necessary; he knows he has the 75 in hand as his repeat customer's dream-come-true number.

You are in a pickle. While 75 is not enough to be fair, it's not so unfair as to be dismissed out of hand. And, the mediator has put his imprimatur behind it. When you talk to your client about 75, he starts to sweat. Seventy-five! It's not enough. But, he's not a wealthy man, either. When was the last time he saw that much money in one place? His thinking dances with what he could buy with the 75 in hand (less your fee and his costs, of course). He starts thinking about getting his life back when litigation ends. Then he blinks. He says yes. He takes 75.

Despite lingering doubts because of the lack of transparency of it all, you think the mediator is somewhat of a hero for getting the big, bad defendant all the way up to 75. But the defendant would have settled at anything up to 90. The mediator has played you for a fool.

Have you been there? Have you been there, and not been aware you were there?

More importantly, what can you do to make sure you are never stuck there (again)? How can you take care that a mediator never becomes "Goliath" to your "David," and uses his power to tilt the playing field against you? To answer this question, we must return to the issue of how mediators get the powers of "Goliath." Then, the contours of an appropriate ounce of prevention become clear.

## **REMEMBER THE SOURCE OF THE MEDIATOR'S POWER—IT'S YOU!**

A famous anecdote proves the point. It's the story of the extraordinary Brendan V. Sullivan, Jr., of Washington, D.C.'s Williams & Connolly, best known for his defense of U.S. Marine Lieutenant-Colonel Oliver North in the aftermath of the Iran-Contra scandal in the 1980s. According to Sullivan's Wikipedia page,

Sullivan shot to national prominence in 1987, when he represented Oliver North in televised congressional hearings over the Iran-Contra scandal. During the hearings in front of the Joint House-Senate Iran-Contra Committee, chairman Daniel Inouye suggested that North speak for himself, admonishing Sullivan for constantly objecting to questions posed to North. Sullivan famously responded,



“Well, sir, I’m not a potted plant. I’m here as the lawyer. That’s my job.”<sup>1</sup>

Yes, a lawyer is not a potted plant. Yet at too many mediations, lawyers act like potted plants allowing mediators to take primary (or even sole) responsibility for conducting face-to-face communications with the other side and drafting the contracts (confidentiality agreements at the beginning, and settlement agreements at the end) which often bookend the mediation day. Lawyers too often sit by, intimidated by the mediator’s high status or forceful personality, as mediators seize, and lawyers acquiesce in the mediator’s seizure of, excessive responsibility for what goes on.

This acquiescence by lawyers can raise serious ethical as well as practical problems. Rule 3-110, California Rules of Professional Conduct, limits the extent to which lawyers can delegate responsibility for lawyering tasks to others who do not have the lawyer’s professional responsibilities—including the duty of undivided loyalty—to their clients. This limitation continues in new Rule 5.3, California Rules of Professional Conduct, effective November 1, 2018. Mediators, whatever their ethical duties are or aren’t, do not have a duty of undivided loyalty to anyone. Mediators work for all sides. Therefore, mediators are clearly in the class of people to whom lawyers cannot delegate excessive responsibility for lawyering tasks. Drafting contracts and conducting face-to-face negotiations are, equally clearly, lawyering tasks.

## **DON’T GIVE MEDIATORS THE POWER TO HARM YOU**

The solution to the problem is now straightforward. Remember that the mediator works for you, you do not work for the mediator. You must supervise the mediator, the mediator must not supervise you. Ultimate responsibility for the representation of your client’s interests belongs to you and you alone, not to the mediator. While lawyers work in concert with mediators and value the mediator’s counsel and input (the mediator, after all, sees things at the other end of the hall which you never see), as far as your client is concerned, the buck always stops with you. So you must keep more responsibility for lawyering tasks yourself. When you do not delegate those tasks to

the mediator, the mediator never gets the opportunity to use the power to perform those tasks against you.

Here are some concrete steps you can take:

### **Exchange Mediation Briefs**

When you exchange mediation briefs, you control the message the other side gets about your case, and the message you get about theirs. You and the other side can prepare more comprehensively to join the issues and move them forward more efficiently on the mediation day. Sure, the mediator will have input, some of it perhaps highly evaluative. But both you and the other side will have the primary sources for evaluation, your respective analyses of the case in the mediation briefs, unfiltered by the mediator’s biases (and everyone has biases).

### **Have an Opening Joint Session**

A critical part of the mediator’s job in 2018 is to determine whether an agenda can be tailored for an Opening Joint Session which will be productive and constructive. The so-called “plenary” Opening Joint Session of the 1990s (where the mediator asks one side’s lawyer “what do you have to say?” and then asks the other side’s lawyer “what do *you* have to say?”) is no more utilized today than the 1990s hit “Macarena” is still played at weddings and Bar Mitzvahs. Both seem quaint and outdated.

In 2018, when a mediator can read the briefs and talk to the lawyers before the mediation day, and the lawyers can read each other’s briefs, all involved can often work together to find issues which can be discussed directly in an Opening Joint Session, without being filtered through the mediator’s biases, to move the negotiation forward. Many times, a good issue for this agenda is the measure of damages. This issue rarely involves direct criticism of a party’s conduct and is often key to the appropriate settlement amount.

When you insist on delivering and receiving messages directly, you take power back from the mediator. The mediator loses the power to deliver messages in a way that doesn’t serve your interest. Neither can the mediator deliver the other side’s message to you in a way that may exaggerate its merit.

Of course, there will always be a few cases where mediation briefs should be confidential and the sides should not sit in a room together. When Opening Joint Sessions are curated, not plenary, though, the number of cases where you should avoid them will fall.

### **Conduct Face-to-Face Negotiations Yourself**

As long as mediators take sole responsibility for running offers and demands back and forth with so-called “shuttle diplomacy,” solo and small-firm “Davids” will never lose the fear that the mediator may manipulate the negotiation against them and in favor of the large repeat players on the other side. The answer? Do more of this important work yourself, in consultation with and chaperoned by the mediator as necessary.

Here’s how it may look, in a nutshell:

After a curated Opening Joint Session, the mediator meets (typically) with the plaintiff’s side to discuss the issues further and formulate an opening demand. The mediator, having had some communication with the defense side, can offer some informed opinions (without violating confidences) about how the defense might respond to whatever the demand might be.

Plaintiff’s counsel and the mediator might then meet with defense counsel, an “attorney summit.” Either the mediator, or more likely plaintiff’s counsel, might express the opening demand. It generally has greater conviction when plaintiff’s counsel does it. Plaintiff’s counsel can judge defense counsel’s response directly, and answer any questions. This provides valuable, unfiltered information in both directions. It deprives the mediator of the power to tell plaintiff’s counsel that defense counsel was any more shocked by the opening demand than they actually were. Counsel then report back to their clients, with or without the mediator’s assistance as appropriate. This process of attorney summits and private conversations between lawyers and their respective clients can continue through several rounds of negotiation. Sometimes, but less frequently, it may be appropriate for a mediator alone to shuttle an offer or demand.

Ultimately, the defense may make an offer and say it’s their top dollar. When plaintiff’s counsel reports this to her client, her client will almost surely ask, “Do you believe that’s all we can get?” Plaintiff’s counsel must be able to answer with a convincing “yes” before plaintiff will consider accepting, for this “top dollar” will almost certainly be below plaintiff’s subjective evaluation of what the case is worth. How much better it is for plaintiff’s counsel to be able to answer that question after hearing defense counsel say it directly, rather than relying on what may be the manipulative or biased hearsay statement of the mediator as to the defense side’s state of mind. Again, direct communication deprives the mediator of the power to tilt the negotiations against you.

When picking mediators, solo and small-firm “Davids” should ask mediators, as part of their due diligence, whether those mediators employ processes such as these or instead hoard power over the negotiation. “Davids” cannot just ask the open-ended question, “Can you be fair to me and my clients?” Who would ever answer “no”? It would be as useless as the same question in jury voir dire. “Davids” should ask mediators for references to other solo or small-firm practitioners, to ask whether the mediator treated them fairly and respected their responsibilities toward their clients, or instead became “Goliaths.”

Solo and small firm “Davids” must guard their own roles in mediations jealously to ensure they retain the power necessary to discharge their fiduciary duty of undivided loyalty to their clients. To do this, they must conduct more lawyering tasks for their clients themselves.

### **ENDNOTES**

- 1 Brendan Sullivan, WIKIPEDIA (May 1, 2018), [https://en.wikipedia.org/wiki/Brendan\\_Sullivan](https://en.wikipedia.org/wiki/Brendan_Sullivan)

# An Update: Rules of Professional Conduct

By Neil J Wertlieb

**N**ew Rules of Professional Conduct have been approved by the California Supreme Court. On May 10, 2018, the Court approved sixty-nine of the seventy proposed new and amended Rules of Professional Conduct that had been submitted to the Court by the California State Bar in March 2017. The new rules represent the first comprehensive rewrite of the Rules of Professional Conduct in almost thirty years. The Court's Order containing the new rules can be found at <http://www.calbar.ca.gov/Portals/0/documents/Supreme%20Court%20Order%202018-05-09.pdf>.

In Volume 24, Issue 2 (Spring 2018) of *the PRACTITIONER*, I described the history of the proposed rules and highlighted a number of the proposed changes of particular interest to solo practitioners. The description of the proposed rules contained therein is applicable in full to the rules as approved (with the exception of Rule 1.2.1 [Advising or Assisting the Violation of Law], which appears to be subject to further modification). As a result, now that rules have been approved and will become effective later this year, I encourage every reader to refer to my article in the Spring 2018 issue, which can be found at <http://WertliebLaw.com/wp-content/uploads/2018/05/Proposed-New-Ethics-Rules-and-Their-Impact-on-Solo-Practitioners.pdf>.



**Neil J Wertlieb** is an experienced transactional lawyer who provides expert witness services in litigation and arbitration matters. He has served as an expert witness in disputes involving business transactions and corporate governance, and

in cases involving attorney malpractice and attorney ethics. He is a former Chair of the California State Bar's Committee on Professional Responsibility and Conduct, a former Chair of the Business Law Section of the California State Bar, and a former Co-Chair of the Corporations Committee of the Business Law Section. He is also an Adjunct Professor at UCLA School of Law, the General Editor of *Ballantine & Sterling: California Corporation Laws*, and the Vice Chair of the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee. For additional information, please visit [www.WertliebLaw.com](http://www.WertliebLaw.com).

The new Rules of Professional Conduct will be effective on November 1st. As a result, all attorneys in the State should be aware of the changes implemented by the new rules.

# Practical Podcasting For Professionals

By David Pissarra



**David Pissarra** is a Podcaster and Global Speaker. His Santa Monica based family law practice is focused on men and fathers. He hosts the Men's Family Law podcast which is available for download on iTunes in both audio and video formats.

He has additional videos on YouTube.com and he can be reached at [www.MensFamilyLaw.com](http://www.MensFamilyLaw.com) or [www.DavidPissarra.com](http://www.DavidPissarra.com)

In my experience, most lawyers hate marketing themselves; they don't know how to do it, and have a hard time finding clients—which is why the “rainmakers” get so much freedom in a firm. For the solo or small-firm lawyers who spend time and money at chamber of commerce mixers, you've done what I call the “Grip and Grin dance”—you introduce yourself to someone, shake hands, smile, and make some small talk about the canapés before asking the question... “So, what do you do?” Most of us politely nod our heads and make a note of our new friend, who is a Reiki Master, or one of the fourteen types of yoga instructors. We will chat for about five minutes, exchange business cards, and then disengage and move on to the next target.

This process of meet, introduce and move on, has deep roots in society and has been a slow but effective way to build a clientele for generations. Today, though, we have a new tool in the entrepreneur's toolbox—the podcast.

When you want to find more clients and spend less time converting them, the answer is a podcast. I reach men who are facing divorce or child custody cases and educate them, empower them, and occasionally even entertain them with my Men's Family Law podcast. As a professional, I use the podcast as a means to answer my future client's questions so that they are ready to hire me, before they even speak to me. For my listeners who have spent a few hours with me in their head, they already know, like, and trust me. They have bought my books, watched my videos, and have a gut feeling about who I am.

If you are a professional who needs to do client development—and what lawyers doesn't need to do that?—podcasting is one of the most productive, time saving, and cost-effective marketing tools you can create. I'm a big advocate (or proponent) of the power of podcasting because not only does it allow you to reach your target audience, it also allows you to network.

In essence, a podcast is ‘On-Demand Radio’ for the listener. A host records a show, and the uploads it to either their own website, or a media-hosting company. Once a show is online, a notice can be distributed to subscribed listeners through iTunes or what is called an RSS feed. RSS means ‘really simple syndication’.

My first episode in December of 2013 was recorded on a MacBook Pro, using GarageBand—the music- and audio-editing software that it came with, and a \$79 Blue Snowball USB microphone I bought at Guitar Center. I don't have a soundproofed studio. I record in a portion of my office, usually early in the morning when no one is around and the phones are quiet. I have recorded on location with my phone using Voice Record Pro, and one time I was even under the blankets in a hotel room that was just too echoey otherwise. Creating a podcast can be as basic as hit the Record button, and talk until you're done, and hit the stop button. On the other end of the spectrum, podcasts can be professionally produced with intro music, outro music, commercials for your books, services, or complementary companies.

My podcast is in the middle of the production spectrum. I wrote out what I wanted as an



introduction and exit message and three commercials for my law firm. By hiring a professional voiceover actor, I put a professional polish on my podcast. For each episode, I then just have to insert my educational piece, and an interview if I have one.

Once I'm done with the recording, I save it as an MP3 and upload it to my media streaming account on LibSyn.com. I use an outside service to stream the media for two reasons. First, when someone is listening to my podcast they don't have those starts and stutters they might have from my MensFamilyLaw.com website, which is not designed to handle media files. Second, LibSyn keeps track of the downloads so I have information about what episode topics are popular, where people are finding me, and my overall distribution.

Some people want to do an episode a week. I did that for a while, and then I burned out. Then I did some more episodes, and what I realized was that my show's topic was really very timely only to an audience when they are in a crisis. My listeners find me once they have been served with papers—so my show is designed to be very evergreen in content. Other people do more weekly reviews of the law, or their industry and they have to constantly keep up with changes and news cycles. It all depends on the type of audience you are looking to reach.

The costs of producing a podcast are small compared to most of the advertising and marketing dollars spent by lawyers. My equipment costs were minimal, as I had a computer already, didn't need new software, and started with an inexpensive but good quality microphone. Today I have an editor who compiles my actual episodes to save me time—his hourly rate is much less than mine. LibSyn has basic accounts that start at \$5.00 a month for a small amount of media storage which is usually more than enough for the beginner podcaster.

No matter what your area of law, there is a way for you to develop a podcast and use it to market your firm, promote a book (even if it's just a pdf) and meet the movers and shakers in your area if you want to increase your celebrity and open doors. My podcast has a commercial for my law firm, and in about one third of the episodes I mention the books I have for sale on my website.

Beginner podcasters often are concerned that they will not have enough content that is interesting to talk about. I suggest that people start with a content calendar that lists the subject matter. Here's a Podcasting Ninja Trick: Use the outlines from your subject matter Rutter Guides as a starting point—all those entries are potential question and answer episodes. If you are concerned that you won't be able to talk for twenty or forty minutes by yourself, make a list of potential guests. The guests are experts in the field, complementary practice areas, even celebrities who have dealt with your specialty—who wouldn't want to listen to podcast on criminal law with a celebrity that did hard time!

I post my new podcast episodes on my website, in my Facebook feed and Pages, in my Twitter timeline, and on LinkedIn—these are all the areas that I want exposure to potential clients. Depending on your practice you may want to do some or none of those and use the podcast as an entirely different tool.

The Men's Family Law podcast is distributed through iTunes, Spreaker, IHeartRadio and many other databases that promote and share the episodes. Considering that there are well over 300 million handheld devices, and that doesn't include desktop computers, in the United States alone that can be used to listen to a podcast—why aren't you reaching a wider audience with your message? If you have an international practice—there are more than 1 billion handheld devices in use today.

If you want more help understanding the power of podcasting, are looking for a way to increase your reach beyond the chamber of commerce, and want to carry your message to what is literally a worldwide audience, then I suggest you check out the possibilities of podcasting, or drop me an email at [david@pissarra.com](mailto:david@pissarra.com)

# MCLE Article: Ethics and Social Media: A Critical Juncture

By Megan Zavieh



**Megan Zavieh** is a State Bar defense attorney serving lawyers throughout California. She is also the creator of The Playbook: The California Bar Discipline System Practice Guide, an online platform for self-represented respondents in California's attorney discipline system.

*(Check the end of this Article for information about how to access 1.0 self-study general credits.)*

Social media has changed how we practice law—not just how we market our services, but truly how we practice. It now impacts critical everyday aspects of practice, including how we advise clients, what we advise in litigation, and how we seek information from opposing parties.

With social media playing such a critical role in our work, it is imperative that we grasp the ethics surrounding its use to avoid having to defend ourselves before the State Bar for an errant post for poor advice regarding a client's use.

## SOCIAL MEDIA ETHICS IS NOT A SINGLE RULE

**When we talk about the ethics of social media in law, we are not talking about one specific ethics rule.** The California Supreme Court did not enact a new rule when Facebook became prevalent. Rather, the ethics rules with which we are all familiar have certain applications to the use of social media.

For example, if you fail to look into your opposing party's Facebook posts when trying to establish a critical fact, you are likely running afoul of Rule 3-110, Failing to Act Competently. If you hide your client to delete incriminating social media posts, you are likely violating Rule 3-110 again (and subjecting your client to sanction for spoliation of evidence), Rule 3-210 (Advising the Violation of Law), Rule

5-220 (Suppression of Evidence), multiple subsections of Business & Professions Code § 6068 (various duties of lawyers), Business & Professions Code § 6106 (acts of moral turpitude), and quite possibly more.

Business & Professions Code § 6068 contains several catch all duties of lawyers which could be used to prosecute almost any violation related to the use of social media. For example, subsection (b) requires lawyers "to maintain the respect due to the courts of justice and judicial officers." Subsection (d) requires lawyers "to employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." It is easy to see how either of these sections could be viewed as violated if the lawyer misuses social media.

None of the rules, nor any others, use the term "social media." They don't need to. Our ethical duties extend to all modes of doing, including the use of platforms like Facebook, Twitter, Tumblr, Instagram, and LinkedIn. The term "social media" is so broad that in learning about proper ethical use of social media, lawyers should not limit their thinking to one site or type of site. Rather, to be safe, consider the evolution of the application of ethics rules to social media to extend to all online communications.

## BIGGEST SOCIAL MEDIA RISKS TO LAWYERS

There are a handful of key categories into which most risks related to lawyers using social media fall.

**Marketing.** It seems like most lawyers think first about marketing as a social media risk. It certainly is a clear risk that is directly within the lawyers control—lawyers choose whether to post on social platforms and how to do it. So, to the extent lawyers do not know how to properly market on social media, it is indeed a risk. However, it is a completely manageable risk because it is entirely within the lawyer's control. (Keep in mind that the lawyer's control over posts is impacted when the lawyer outsources social media management, so such outsourcing should be done carefully and lawyers must still be ultimately responsible for the content posted.)

First, not all social media posts are advertising. California's Committee on Professional Responsibility and Conduct (COPRAC) has issued a directly relevant ethics opinion. Formal Opinion 2012-186 is a series of hypothetical Facebook posts from a lawyer and evaluates whether the posts fall within the attorney advertising rules or not. The key question is whether the post indicates that the lawyer is available for future employment. What the opinion does is give lawyers a roadmap for how to avoid being subject to the restrictions of the advertising rules in the first place.

Second, even if a lawyer's posts are advertising, it is not particularly difficult to remain in compliance with the ethics rules. COPRAC's guidance helps, as do frequently updated materials from ethics practitioners. Keep Rule 4-100 in mind at all times when posting on social media and find ways to meet its requirements through pinned posts and profile content.

Third, if you cannot do something through another method of communication, such as contact a represented party, you cannot do it on social media either. Rule 2-100 prohibits communication with a represented party, and even though it does not reference social media by name, it still prohibits contacting a represented party through a social platform.

**Evidence.** Social media is a huge source of evidence, particularly in litigation matters. This gives rise to two major areas where attorneys may go wrong.

First, lawyers need to be aware of what evidence they may have on their side of the case. This means collecting from clients their social media evidence, and it also means counseling clients on how to handle their social media accounts during the course of litigation. For example, a lawyer should never counsel a client to delete social media posts, particularly those that may be relevant to the case. Lawyers should also include in their standard instructions to clients how to behave on social media during the pendency of an action. It would reflect poorly on the lawyer, and depending upon the circumstances, it may even rise to level of an ethics violation, if a client were to severely prejudice her own rights due to her social media behavior during the course of the case. If the lawyer never advised her on how to behave online during the case, it could create discipline issues for the lawyer. It is not a stretch to argue that it is a failure of the lawyer to perform competently if he fails to provide such guidance.

Second, lawyers must be cognizant of what evidence may exist on the other side of the litigation matter. Discovery should include seeking information from the other side's social media accounts. Failure to do so would certainly appear to be a failure to perform competently.

**Online Reviews.** Online reviews are another major source of trouble for lawyers using social media. Social media includes reviews on sites such as Facebook, Avvo, Google, and Yelp. There is a major temptation for lawyers to respond online for negative reviews. Unfortunately, this can easily lead to a lawyer divulging confidences and otherwise prejudicing clients.

When a lawyer is attacked through a bar complaint or a malpractice action, there is a limited waiver of the attorney-client privilege to allow the lawyer to defend herself. Such is not true when a client leaves the negative online review. So, a lawyer responding to an online review must still uphold all of her duties to the client, including those of privilege and confidentiality, regardless of what the client says in the review.

## WAR STORIES

Stories are the best teachers. Below are true stories of lawyers who have gotten into some serious hot water in the world of social media.

Matthew Murray of Charlottesville, Virginia, had a client whose wife had been killed by a cement truck in a traffic accident. He was plaintiff's counsel in a wrongful death action against the cement company.

The young widower had posted some pictures on Facebook that did not support his claim to be a grieving widower. Specifically, he had pictures of himself in which he was drinking beer and wearing a T-shirt which read "I Love Hot Moms."

Discovery requests required production of these Facebook posts. Instead of producing them, Mr. Murray had his paralegal contact the client and ask him to remove the photos. They were not produced to the other side. Plus, in the written response to discovery, the lawyer and plaintiff stated that the plaintiff had no Facebook page at all.

In this Internet age, it is a huge risk to think that the other side does not already know that such posts exist. And they did.

The widower won a \$10 million verdict against the cement company. Then the company's lawyers brought up the Facebook posts. The client lost half of his verdict to a court order reducing the damages after reviewing the conduct of the lawyer and party. The lawyer lost his career. He lost his job, he was sanctioned \$542,000 (and his client \$180,000), and he stipulated to a five-year suspension from practice.

Betty Tsamis of Illinois received a terrible review from a client on Avvo. He accused her of doing a poor job on his case. Her first action was to ask him to remove the negative review. He offered to do so in exchange for a refund. She should have done that. Instead, she dug in her heels, refused to refund his money, and responded publicly. She wrote, "I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions and beating up a female co-worker are what caused the consequences he is now so upset about."

In responding to the review, she disclosed client confidences and violated her ethical obligations. She litigated her discipline case for a year and was eventually publicly reprimanded.

Perhaps more important for her career, she is now repeatedly cited as an example of what not to do in response to a bad review. How simple it would have been for her to agree to his refund, or simply remain silent. After all, we have no duty to respond to a negative review.

Kristine Peshek of Illinois was unhappy with a client. She was an assistant public defender when she posted on her blog extremely negative comments about him. She wrote, identifying the client by jail identification number, "This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch.' I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense."

As to another client, apparently she thought she was entitled to divulge all kinds of confidential information. She wrote, "'Laura' was a middle aged woman with 7 children, 2 of them still adolescents. She was a traditional housewife. Her husband, a recovering alcoholic, worked. She stayed at home, and home schooled her child who was handicapped and (sic) learning disabled. In her favor, her original offense was a matter of sheer stupidity. . . . [blog entry went on to describe her case and defense in great detail, including that she received a lenient sentence due in part to swearing she was clean, but she did have to serve 5 days in jail immediately.] I went back there to see what her concerns were. 'But I'm on Methadone!' she tells me. Huh? You want to go back and tell the judge that you lied to him, you lied to the pre-sentence investigator, you lied to me? . . ."

Finally, in other posts, she referred to a judge as being "a total asshole" and another as "Judge Clueless."

She was suspended for sixty days.



## TAKEAWAY

War stories like these are somewhat extreme, in that they are egregious examples resulting in relatively severe sanctions for the lawyers. However, they should not be disregarded. They are highly instructive. When we sit at the computer and type out something on social media, it matters. You are not talking to yourself, but rather you are making some of the most public statements you will ever make. Social media comments are more public than briefs filed in court, statements made on the record, and statements made from the stage at a large gathering. They have a huge audience and will remain accessible for years to come.

The same is true whether it is the lawyer making those statements or clients or opposing counsel posting them. As lawyers, we have duties to understand how social media works and how to utilize the evidence created on the platforms.

This article is available as an  
**ONLINE SELF-STUDY TEST.**



Visit: **CAlawyers.org/Self-Study**  
for more information.

# Welcome!



THE CALIFORNIA LAWYERS ASSOCIATION'S  
*Solo and Small Firm Section*  
would like welcome its newly elected  
Officers for 2018-2019:



Renee Galente, Chair • Jeremy M. Evans, Chair-Elect  
Sabrina Green, Treasurer

# Attracting Your Ideal Client Without Breaking a Sweat or the Bank

By Dina Eisenberg



Lawyer turned award-winning business leader, **Dina Eisenberg** is an Outsourcing Strategist for Solo & Small Firm lawyers. She prepares lawyers to delegate, automate and design a law practice that fits your life. A sought after educator and podcast guest, Ms. Eisenberg is the creator of Dina's Rolodex, the only on-demand Delegation Resource Library, and Get a VA, online delegation training program. Her thought leadership has been featured in Inc and Entrepreneur magazines, as well as, the ABA Young Lawyer Division Learn more at <https://OutsourceEasier.com>

**W**hy did you go to law school? That is the first question that I ask my clients.

That question sets the tone and quickly establishes rapport between me and my new client. More importantly though, the question often reveals the lawyer's state of mind about the law and running a law business.

The heart-warming answers vary but most, if not all, fall into the bucket of "*I wanted to help others*," which includes responses like these:

- The immigration lawyer who champions the rights of new immigrants to this country because he watched his parents often getting scammed as he grew up.
- Another Immigration lawyer who works with small businesses to go through the H-1B visa process because her dad was a professional who couldn't get work at the appropriate level in this country.
- The estate-planning lawyer who focuses on new parents who might not otherwise be able to afford planning because she was well taken care of when her parents died young.

Or myself. I went to law school to help people access power through knowledge because I saw my own family struggle financially because they didn't know where to turn for help.

Almost none of the lawyers that I know said they went to law school to make loads of money. I think most lawyers would rather practice than do any marketing. Yet, marketing is what keeps the lights on.

How can we serve our purpose and make money? By planning to attract your ideal best clients who inspire you to do your best.

## DEFINE YOUR TARGET MARKET

You know about target markets. They are the group of people who need your services. That's what gurus say but I have a twist we'll talk about in a minute.

Conventional wisdom says that your target market should meet these criteria:

1. A big enough market that is growing
2. The market can be communicated with affordably
3. The market knows that it has a problem
4. The market wants to solve the problem
5. The market is not waning
6. The market is willing to pay for a solution

**The last criteria is the most important.** When I was a small-business mediator, the American Institute of Architects hired me to train architects on how to manage client conflict better.

Architects were certainly a big enough market, and they were tired of nagging clients who delayed decisions or requested costly changes. The AIA gave me access, but there was a problem. The architects had such tight margins they weren't willing to invest in a mediator to resolve their issues. Architects were a bad target-market material.

**Be sure that you select a target market that meet the above criteria.** Then, own that market through market research. Market research makes business development much easier. Why? Because when you know how your target market thinks and speaks about their legal problems, you can speak their language. When you speak their language and offer solutions that appeal to them, you become top choice to be their lawyer.

## WHAT IS YOUR NICHE?

Now that you have an overall target market, **it's time to niche down.** Yes, it seems counter-intuitive to narrow your focus when you want more clients. Think of it this way.

**We live in the era of personalization.** People want a solution personalized for their specific situation just like they want a double chai latte with soy foam. People are willing to pay to work with an expert in their legal problem. **Be the expert for a specific problem.**

The other day I heard about a criminal-defense lawyer. There are plenty of those, right? Not like this guy. This lawyer represents clients who commit crimes while on vacation. That is a brilliant target market and niche. Many people go on vacation, and there is a steady stream of people arrested on vacation who realize they have a big problem and are very willing to pay.

**Niching down within your target market makes you the recognized expert** and the trusted advisor that prospects will turn to for help. But, that's not the twist.

## WHO IS YOUR BEST CLIENT?

**Your target market is selected based on external factors**—like market size—that are outside of your control. That method of defining ideal clients

doesn't take into account how you like to work and what client qualities lead to the best results.

**This is the unique twist** that will bring you better clients and allow you to earn more.

*Only work with your ideal best clients.*

**Your best client market is selected based on your personal interests,** needs, beliefs and values and who allows you to bring more passion to your work. There are a number of questions to ask to define your best client. First off, ask yourself:

1. Who do I enjoy working with?
2. Which clients get the best results from me?

Happy lawyer + satisfied client = profitable law practice!

**Your ideal client truly appreciates the expertise you bring** to the table and demonstrates that by paying your rate on time. The idea that your client would appreciate and value you is a new concept for many lawyers who practice 'door law' and accept anyone who enters their office. Don't be that lawyer.

**Accepting anyone that shows up into your practice is a depressing idea** that ultimately leads to lowering your self-esteem. Over time, you won't have the energy or confidence to accept any other types of clients. Avoid that fate by making the time to define your ideal best client and identify how you can reach them locally.

## WHERE ARE YOUR IDEAL BEST CLIENTS LOCATED?

**Your ideal best client is closer than you think.** Did you know that 71% of legal buyers want to find a local lawyer, according to FindLaw U.S. Consumer Legal Needs Survey 2014 (<https://tinyurl.com/findlaw2014>)? That's you!

How do you find these special clients? Market research, my friend. Through local research you can determine where your ideal best client hangs out and who they connect with in your town. That knowledge allows you to do targeted marketing that lowers your cost and increases your conversion rate. But before you worry about adding one more thing

to an already overflowing plate, can I make a suggestion?

### **GET A VA TO DO THE RESEARCH FOR YOU!**

Let's face facts. You are super busy. You don't have time to do the research nor the knowledge of online search to do it properly. **Let go and delegate to virtual help instead of ignoring your marketing.**

*Often I have seen that the attributes that make for a good lawyer lead to a reluctance to delegate within their practice, even non-legal tasks. A good business person understands the value of their time and delegates appropriately. Your team will appreciate being trusted with important work and overall you can accomplish more.*

*Mary Juetten, Attorney/Author, Small Law Firm KPIs How to Measure your Way to Greater Profits*

**The virtual assistant industry has grown up and continues to find new ways to support** business owners like you. (Your law practice is actually a law business.)

Expand your concept of who a "virtual assistant" is and you'll have a wealth of talent to choose from. Contract lawyers and accountants are virtual assistants, too.

Your virtual assistant can help you...

- \* Research your ideal best client
- \* Manage your intake
- \* Set appointments
- \* Create your business budget
- \* Do financial forecasting
- \* Create your marketing strategy
- \* Manage your other VAs
- \* Identify speaking opportunities & do outreach
- \* Write your blog or newsletter

In this case, your virtual assistant will help you research your local region for your ideal best client based on the detailed information you share about your IBC.

You won't have trouble finding a virtual assistant as there are many options available. For marketing and administrative work, I suggest trying Upwork, one of the most popular online outsourcing workplaces. It offers many advantages include key performance indicators, time tracking, and a workroom to easily communicate with your freelance talent on an ongoing basis. There are also lawyer-exclusive sites that offer legal research and drafting by contract attorney. Try Firecite.com and TheFreelanceFirm.com. You can even create a micro-clerkship with a law student on the site Book-It-Legal.com. Where shouldn't you look for an assistant? Facebook. There are no performance indicators to guide your selection, and if there is an issue, there is no dispute resolution process to help you.

**Save money, save time and grow your law business**

**You can live your purpose, be happier and earn a good living as a lawyer when you define and locate your ideal best clients.**

Take a good look at your target market to make sure it is growing and wants help to solve legal problems. Think about who you like to work with and who benefits the most from working with you. Then, get a VA to research where and how you can connect with your ideal best clients locally.

Your marketing will be more effective and be less costly because you'll be addressing the exact issues your IBC are concerned with and gaining their trust by using the same words and phrases they use. When your client thinks you know their problem better than they do, you become the obvious choice to be their trusted legal advisor.



# Your Next Mediation: Think It Through

By Clark Rivera

Mediation is so commonplace these days that it is easy to forget how astonishingly effective it is in resolving cases. If you talk to senior litigators, they will recall a pre-mediation environment where it was difficult to settle cases, in part because practitioners worried that if they even revealed an interest in settlement, it could be interpreted by the other side as a sign of weakness. Getting your case into a settlement environment is much easier today, and sometimes even unavoidable, but dangers, or at least concerns, still lurk in the mediation environment. The purpose of this article is to pass along some suggestions that might ease your mediation pathway.

## 1. LET THE “GLADIATOR WITHIN” EMBRACE MEDIATION

We live in a world of litigation in which more than 90 percent of all cases settle without going to trial. This raises an interesting question: which is the more important skill set—the gladiator’s trial skills, or the negotiator’s polish in pursuing compromise? As lawyers, we can have a robust internal debate on that point, but most of us would readily concede that our clients did not hire us for our “polish in pursuing compromise”; they hired us to vanquish the opponent. Consequently, the gladiator within each litigator can have misgivings about mediation, possibly believing that mediation’s inherent push towards compromise will require the gladiator to abandon the attack on the opponent’s walls, and instead press his or her own client for concessions, thereby losing luster in the client’s eye and placing the gladiator’s strength, and even loyalty, in question.

Therein, however, lies the basic genius of mediation, because in that environment the parties gain a facilitator who can promote the benefits of risk-



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personal injury, professional malpractice, and employer-employee disputes. He has also represented clients in other dispute resolution endeavors, including arbitration, formal mediation, and private negotiation of settlements. A graduate of the UCLA School of Law (where his daughter now attends), Mr. Rivera’s practice has been located in Pasadena since 1987. He can be reached at [cr@clarkriveralaw.com](mailto:cr@clarkriveralaw.com).

avoidance and compromise without costing the gladiator his or her client credibility, hopefully keeping the client’s “whose side are you on” dagger in the sheath. Therefore, the gladiator within each litigator really should embrace mediation, for one simple reason: it is ultimately the mediator, rather than the gladiator, who puts pressure on the client by exposing case weaknesses, while talking up the benefits of dispute resolution. The gladiator, in turn, is spared credibility by never really having to acknowledge the wisdom of what the *opponent* is saying or claiming, but rather only what the neutral, and very experienced, mediator is saying.

Of course, mediation offers more than just cover for the lawyers. In many instances, it gives your side of a case a direct line to the opposing party, without the same attorney shield that may have stifled any dispute resolution dialogue up to that point. It provides an opportunity for your side to float its major case themes to a neutral listener and ascertain whether those themes have the hoped-for traction or possibly any unanticipated boomerang effect. Perhaps most importantly, the process tends to hold people together longer, in semi-captivity, than their ordinary allotment of patience would allow, and many settlements seem to be produced well after one side or the other has begun doubting the efficacy of the process. Unquestionably, the process produces settlements in a high percentage of matters. However, the main reason for the gladiator to welcome the mediation process is that the wisdom of settlement

can be pursued without any loss of valor. You have the help you need in the process, but you need to use that help. It is likely to give you the best chance at resolving your dispute.

## **2. REGARDING MEDIATION: LET TIME BE ON YOUR SIDE.**

In this section, I want to make a short but important point: timing is responsible for many failed mediations. Some mediations fail because they come too late in the game, after the conclusion of virtually all depositions and even after experts have already been retained. The good part of a late-scheduled mediation is that the parties presumably know enough about the case and its strengths and weaknesses to mediate intelligently; the problem with this timing is that the parties are basically ready to resolve their dispute by trial and have rather fully invested in that process, and there will not be sufficient savings of legal expense if there is a settlement to really lubricate the settlement gears. Be willing to address the possibility of mediation while the savings to be derived from settlement remain significant.

Some mediations, however, fail because they are essentially premature. Early mediation can be a terrific idea, because the parties can resolve their disputes well before excessive business interruption and personal aggravation have occurred, and they can save large amounts of money that would otherwise be spent on attorneys and experts. However, early mediation sometimes stumbles because the parties may not have adequate information to mediate intelligently.

If early mediation, undertaken intelligently, would appear to benefit the parties, then there are options at your disposal, but they come with risk. If my opposing counsel is a trustworthy pro, I will consider a voluntary early exchange of information so that the parties will have what they need to have to engage meaningfully in the mediation process. This can be incredibly productive, because by providing information the other side needs for mediation, a demonstration is being made of your good faith and fair dealing as it relates to your approach to resolving the parties' dispute.

Unfortunately, this comes with a risk, because if you do not gauge your opponent correctly, you might find yourself being played for information by a party who lacks a real incentive to settle, and you might have some explaining to do to your client if the goodwill gesture blows up in your face. One way to protect yourself is by arranging a series of simultaneous exchanges, where each side can demonstrate its good faith with some partial production that establishes reliability and credibility in the process, and minimizes the risk of any embarrassing blowup.

However, the simple point here is to try to time your mediation effectively, to give yourself the best chances for success.

## **3. IS MEDIATION COST AN ISSUE?**

Ordinarily, payment for mediation is usually not an issue: the parties divide the costs and the division will be either per-side or per-party. However, we do see situations in which the parties do not agree on expense allocations. Sometimes there exists a great economic imbalance between the plaintiff and the defendant, so that affordability is an issue; in other cases, one side may have resisted legitimate discovery or otherwise raised questions as to whether that party would mediate in good faith, which creates a risk of a failed investment in mediation.

One approach I have had work, when a plaintiff either cannot afford the expense of mediation or feels it is too financially risky, given the presumed lack of good faith of the opponent, is to have the defense front the cost of mediation, but to have agreement that if a settlement is reached, then half of (or more than half of) the mediation costs can be deducted from the settlement amount. You can expect push-back on this approach, because the defense generally wants the plaintiff to have some "skin in the game", but I have gotten some cases into mediation that otherwise would not gone there using this approach, and this kind of structure tends to incentivize the defense to mediate in good faith, which in turn can help combat the plaintiff's skepticism regarding the process.

## **4. PRE-MEDIATION SETTLEMENT AGREEMENTS: ARE YOU KIDDING ME?**

We have all been to mediations where, once the basic settlement is reached, it still takes several hours to get

signatures on a final document, and some of us have seen settlements blow up in this process. Given the above experiences, I have long made it my practice to show up at mediation with a pre-drafted settlement agreement on a drive, to shorten the time between the announcement of a settlement and the placing of signatures on an agreement.

But, at the urging of one very good mediator, I have begun in appropriate cases to take this agreement-preparation one step further, and not only pre-draft a proposed settlement agreement (with deal points obviously left blank), *but also to get opposing counsel's pre-approval of the form of the agreement.*

I will confess that this entire process cut against my grain when it was first suggested to me. I had concerns that it made my client and I look too eager to settle, and it raised the possible specter of coming to serious disagreement on an aspect of settlement before the parties had even begun to cover the main deal points.

However, despite these misgivings, and when the relationship with opposing counsel is workable enough, I have found this practice highly advantageous. Let me use a concrete example for illustration purposes. I had an employment case in which the employee had a strong claim and the employer wanted mediation. However, the employer wanted a confidentiality provision, and that employer's standard agreement contained a forfeiture provision whereby all of the settlement consideration would need to be repaid to the employer in the event of a breach of confidentiality. Given that such "breaches" can be word-of-mouth swearing contests, and given that the employee would be having withholds deducted from the settlement amount, such a provision could have had him paying the employer back more money than he ever received, on a questionable claim, when the employer's damages were de minimus. Because we had adequate leverage, we were able, *in advance of mediation*, to eliminate the forfeiture provision and address employer concerns with liquidated damages, coupled with other mechanisms. At mediation, it took us less than an hour following the end of negotiations before we had a final agreement, and we had pre-resolved an issue that could have been very troublesome late at night, after party elasticity had evaporated.

This approach's chances of success are proportional to the professionalism of counsel and the equality of bargaining position. However, in an appropriate case it can eliminate a lot of the risk that a settlement will come apart, and it tends to assure a prompt and very welcome wrap-up once a settlement is actually reached.

## 5. PREPARING THE CLIENT FOR MEDIATION

Your own client may have substantial misgivings about undergoing the mediation process, on various grounds. Therefore, you need to prepare the client for a successful mediation, and covering the following ground may help.

### A. BUILD TRUST IN THE MEDIATOR, BUT NOT TOO MUCH TRUST

If the gladiator is to remain the gladiator, help will be needed from the mediator to reduce inflated client expectations, promote understanding of the risks and costs of litigation, and otherwise foster a climate of compromise. Therefore, counsel will want to build up client trust in the mediator. All this means is that you should give the client your best reasons to listen carefully to what the mediator has to say, since the mediator will be helping you. This is really very easy; in truth, the best mediators really have astonishing success rates, and they know how to do what they do. So if you have such a mediator, it is not particularly difficult to let the client know that he or she is headed down a settlement path strewn with successes. Let the client know that you welcome the participation of the mediator and that you expect the mediator not only to have insights on the case, but also to do lots of things that will advance your positions, and thereby facilitate settlement. Stress the mediator's neutrality, and stress the value of receiving a neutral opinion. Clients don't mind hearing that you are so firmly in their corner that you see things through their eyes; hence the need to listen carefully to those who do not have a stake in the outcome. You will need the mediator to help facilitate your client's required "travel" to settle, and you will need to inspire basic confidence on the part of the client in the mediator, so that the client will listen to the mediator's urgings and cautions.

I will posture myself as being willing to listen carefully to the mediator, and during mediation I will sometimes offer a basic theme of the case and ask the mediator to tell me if I am wrong in believing in that theme. This can be an effective way of messaging, because if he concurs in the theme, it is reassuring to the client (and counsel), but if he takes issue with a theme, then it will be the mediator and not counsel urging the client to be less certain of success than the client currently is, and why. In the meantime, counsel has reaffirmed his client loyalty by declaring his attachment to the theme, but has opened the theme up to discussion and criticism by a neutral. This helps facilitate compromise during the course of the mediation.

However, there are reasons not to inspire too much confidence in the mediator. The job of the mediator is to facilitate a settlement. In the ethics of their profession, the duty to represent and protect the interests of the settling parties belongs to their counsel. Thus, a mediator's bottom line is that he or she will push for the settlement that is available, whether it is fair to your client or not. If the mediator decides to push for a settlement you truly believe not to be viable, then you will have positioned yourself to remind the client that it is only counsel who has the duty of direct loyalty to the client.

## **B. PREACH THE VALUE OF THE PROCEEDING**

Because as litigators we experience mediation all the time, and know its moving parts, we tend to take the process for granted. However, in truth, it is magical. In a single day, the parties focus all their energies not on fighting but rather on resolving their differences and returning to a certain non-litigation normalcy in their lives, and that day is different from every other day in the case. Normally, mediation does settle the case. Let the client know the process works.

## **C. TELL THE CLIENT ABOUT THE MONKEY**

Clients, their own attorneys, and opposing counsel all take very different approaches to settlement. The client will tend naturally to focus on the misdeeds of the other party, and on what should have happened instead of what did happen, and on what is needed to

make it right. This is a historical, rear-view mirror focus.

The client's attorney, by contrast, is forward-looking: counsel is basically flying a plane and looking at two possible landing strips, one of which leads to trial and the other of which leads to settlement. The client's attorney simply engages in an organic analysis of which strip provides the better landing, and as counsel brings the plane down, little if any thought is given to the runway behind the plane, only to the runway ahead.

Opposing counsel is also trying to land the plane, but if he is defense counsel, what he is really focused on is the monkey—the monkey on the plaintiff's back. You see, in most cases, there is a certain amount that can be offered a plaintiff, and it does not represent full compensation; it does not represent justice; and it does not represent fairness. What it represents is an amount of money that starts to cause the plaintiff grave concern about turning that money down and then taking his or her chances at trial in an effort to get more. When an offer reaches that level, it puts a monkey on the plaintiff's back. That is when the settlement occurs.

Therefore, in preparing the plaintiff for mediation, counsel needs to move away from backward glances, and needs to explain the entire monkey-on-the-back dynamic. Of course, some clients are very risk-tolerant, and it will take a high percentage of the ultimate value of the case to place a monkey on that client's back. Other clients are less risk-tolerant, and may want their lives back to a greater degree. The client, however, needs to understand that the process, counter-intuitively, is not about resurrection, justice, or validation. It is about the monkey.

## **6. AVOID THE INSULT OFFER OR DEMAND, BUT PREPARE YOUR CLIENT TO RECEIVE ONE**

Remember, you need the mediator. As we have indicated, he is the one who can talk the other side up or down, as the need may be, and he can assist you with your own client's travel towards a settlement. However, you need to give the mediator the tools required for his or her task. A first offer or demand that is insultingly high or low undermines what the mediator is trying to accomplish, and in some

instances could cause the other party to walk out of the mediation.

Many plaintiffs will want to make a full-dollar demand at the outset of mediation, on the ground that they do not want to negotiate against themselves. That makes a certain sense, but mediators tend to look at it as a time-waster, because it is destined to produce a low-ball counter offer, and it does not send any message that the party is there to engage in realistic compromise. Chances are that your case will settle at some substantially reduced percentage of the plaintiff's full demand anyway, so shaving off some money from the initial demand only staves off the inevitable, but the important point is that it tells the mediator that you are working with her to get the matter resolved, and you may want to be express about that with the mediator. Of course, it also sends a positive message to the other side, and helps allay doubts as to whether you will be reasonable in your expectations during the course of the mediation. Actually, the money shaved off the initial demand is the easiest reduction of the entire negotiation, and it could prevent an entirely negative first-round exchange with the other side, which becomes important later as party elasticity dwindles.

By the same token, however, you need to prepare your client for an insult offer or demand. This is a common enough occurrence that it should not be the basis of alarm, and by reacting rationally rather than emotionally to this first communication, you are also sending a message to the mediator that you are reasonable and that your skin is thick enough to hang in for the duration. However, if your client is unprepared for this kind of treatment, it can come as a shock, and you will be dealing instantly with a need for client recovery, which you do not want at the outset of proceedings. As part of your client preparation, let the client know that a lowball first offer might well be forthcoming, and urge the client not to over-react. The point here is that you are preparing the client to stay the course, and you are exhibiting traits which will have the mediator wanting to help you as needed.

## **7. FIGHTING THE LOSS OF ELASTICITY: THE "TAKE IT OR LEAVE IT" URGE AND THE MEDIATOR'S PROPOSAL**

The first few moves of the negotiation swan dance can be interesting, but one can also tire quickly of it if the moves do not substantially shorten the distance between the disputing parties. In some business cases, the players are adept negotiators who have a lot of stamina for multiple exchanges, and this is really business as usual. In many cases, however, the parties grow increasingly frustrated and angry, and the exchange process, if continued, will rather quickly stall out.

Time is usually a factor here. If the mediator spent morning time "feeling the pain" of the parties, then the negotiation exchanges might not start in earnest until nearly noon or later, and as the day grows later the lack of progress can be discouraging. The temptation rises to make a "take it or leave it" offer or demand and this can be counterproductive.

The skills of mediators are tested when party elasticity starts to wane and the parties remain too far apart. However, sometimes the mediator and counsel will reach general agreement that the incremental exchanges are not getting the job done, and the question will arise as to what to do next. Since the mediator is the one person visiting both rooms, his or her opinion at this point can hold great value.

Many mediators will try to push each side for a last, best offer or demand, to see how close they can get the parties. Another alternative, which I have found very productive, is the "mediator's proposal", which is a procedural device whereby the mediator writes down what he or she opines to be the correct placement of the settlement number, and each party gets to sign a sheet indicating acceptance or rejection. If both parties accept, there is a settlement. If the mediator is particularly skilled, this process will often reveal just how much credibility that mediator has established, because oftentimes the parties will engage in their greatest stretch of travel for the entire day in accepting the mediator's proposal.

Mediators have their ways of closing the distance and getting the final deal done. Try to fight inelasticity, be willing to try to make the big move to a number

that can settle the case, and if all else fails, consider a mediator's proposal.

## 8. ADDRESSING THE DISAPPOINTMENT OF SETTLEMENT AND NON-SETTLEMENT

The old adage is that compromise pleases no one, and most settlements are a compromise. Seasoned mediators say that a good settlement displeases everyone. However, it does not have to be left that way with the client. After all, there were reasons to settle, and by settling, the client achieved several objectives. In summarizing the events of the day with the client, it should be a rather simple matter to recite what the client has achieved by way of the settlement. The client has exchanged an uncertain outcome for a certain outcome, and can now plan her business affairs and her life. If the client was paying attorney's fees on an hourly basis, that bleeding stops, and you will generally get no argument when you suggest to the client that she probably has better things to do with her company's money than to pay it out to lawyers. Your client probably also has a developed skill set, but that skill set probably does not include special training in fighting off cross-examination or reading what is on the judge's mind when that scowl crosses his face. Now the client can go back to what he or she is best at, and what they have chosen to do in their work life. You can also gently remind the

client that a day will come in the next week or two that this litigation will cross her mind, and then she will remember that it is over, and she will feel that sense of decompression and be glad that it settled.

What if the mediation was not successful? In truth, the parties can leave an unsuccessful mediation feeling defeated. For much of the day, they heard about the benefits of settlement and about the immediacy of the litigation's cessation if they settled. They heard about the depositions and trial they could avoid. Now that is all back on track.

However, not all is lost, even at that point. The client can be reminded that the settlement process, in its own way, was schizophrenic, because the parties were talking war and peace at the same time. Now, they no longer need to split their focus; they can concentrate solely on winning the lawsuit. Their gladiator gets to be a gladiator again. In addition, the other side, by failing to compromise, just gave them back the top end of their case. That show of resiliency on the attorney's part can have an impact upon and may stay with the client. However, it was all part of good preparation for mediation.

So think through that next mediation, and you and your client will be prepared for what happens.

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# Congratulations to the 2018 Lawyer of the Year David Dai-Wung Fu



The Solo & Small Firm Section of the California Lawyers Association is pleased to announce that David Dai-Wung Fu is the honored recipient of the *2018 Attorney of the Year Award*. This award will be presented at the State

Bar Annual Meeting taking place in San Diego, CA, on September 14-15, 2018.

David is deserving of this recognition as his achievements and philosophy towards the practice of law exemplifies the ideals that the *Award* recognizes.

David's law firm, David Fu and Associates, is a full-service law firm focusing on litigation and transactional matters for clients who are typically small or medium-sized business owners and real estate investors. David primarily serves an immigrant community which commonly lacks experience and sophistication in dealing with legal matters, and in dealing with governmental entities, legal issues and the court system. David's philosophy is to make the client's experience positive, along with conducting himself with honor, integrity and honesty.

David has been active in State Bar activities since 2007, starting with the Real Property Law Section. He began as a co-chair to the Sales and Brokerage Subsection. After that, he was part of the Executive Committee Subsection on Relations. He continued on becoming a committee member, then an officer, then he was the vice chair in 2011, and finally the co-chair from 2012 to 2013. Since then, he has been an advisor to the Committee. Starting in 2015, David was active in continuing education of the Bar, the Real Property Advisory Committee. Finally, and if that wasn't enough, starting in 2014, David has served on the Commission for Judicial Nominees Evaluation in which, typical of his history, he started as a member, then became the vice chair and he sits as the chair for the 2017-2018 calendar year.

David is also active in local Bar activities and professional associations. He is a member of the Los Angeles County Bar, Real Property Executive Committee. He is a

member of the Culver Marina Bar Association where he served on the Board of Directors from 2001 to 2004 and was president in 2004. He is active in the Chinese American Real Estate Professionals Association and serves as General Counsel. He is active in the National Association of Realtors as an instructor. He is a member of the San Gabriel Valley Bar Association and, finally, a member of the American Bar Association, Real Property Diversity Outreach Program.

A colleague has said of David that he "genuinely believes in the majesty, power and responsibility of the law, of lawyers and of society." He believes he has a duty to serve and has invested close to 1,000 hours in 2017 alone, working on programs benefiting the Bar, its members and the community.

His website embraces the credo, "Do no harm." His law philosophy is to give value for value in everything he does. Even in his litigation practice, he seeks the most cost effective, mutually acceptable resolution of a dispute. A principled lawyer, he understands the cost of litigation, the disruption litigation can have, and always works to educate his client and the opposing parties so a timely and mutually agreeable resolution serves those involved in a dispute.

Finally, David has been engaged in speaking for years, and the list is simply too long for this article. However, the highlight must be his testimony before the Commission on Judicial Appointments regarding the confirmation hearing of the Honorable Justice Mary H. Greenwood and Justice Thomas M. Goethals, which took place in January 2018.

David obtained his Bachelor of Arts in 1986 from University of California, Berkeley. He then obtained his Juris Doctor in 1996 from University of West Los Angeles. Finally, he received a Master of Laws Degree in Taxation from Golden Gate University in 2000.

All of us should celebrate and emulate a life and law practice lived well. The Solo & Small Firm Section of the California Lawyers Association is proud to present David Dai-Wung Fu with its 2018 Attorney of the Year Award.



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