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# the PRACTITIONER

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Small Firm

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The Magazine of the Solo & Small Firm Section of the State Bar of California



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## Editorial Committee

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# Letter From the Chair

By Megan Zavieh



**Megan Zavieh** focuses her practice on attorney ethics, representing attorneys facing state bar disciplinary action and providing guidance to practicing attorneys on questions of legal ethics. She has been representing attorneys facing disciplinary action before the California State Bar since 2009 and is admitted to practice in California, Georgia, New York and New Jersey, as well as in Federal District Court and the U.S. Supreme Court. She blogs at [CaliforniaStateBarDefense.com](http://CaliforniaStateBarDefense.com) and is a contributor at [Lawyerist.com](http://Lawyerist.com) and [AttorneyatWork.com](http://AttorneyatWork.com).

Welcome to the new bar year! It is with great excitement that I assume the role of Chair of the Solo and Small Firm Section for the coming year. I would like to thank Terry Szuczko for his leadership over the past year, through a time of great change with the State Bar, and for his mentorship as I take on this new job.

I have had the honor of serving on the Executive Committee of the Section for four years. One lesson I have learned in my time of service is that the need to reach our members in meaningful ways is of paramount importance; if you do not see the work of the Section as a benefit to you, then your membership is of little personal value. I firmly believe that membership in this Section is worth its weight in gold, so my number one goal this year is to reach each and every member in a useful way, to bring you value for your membership dollars. We will do this through programming, publications, and discounts and freebies you may not have known come with your membership.

The 2016-2017 year promises to be an eventful programming year. In addition to Section programs presented at the State Bar Annual Meeting in San Diego, the Section has a packed calendar of webinars coming your way. Be sure to watch your email for announcements of live webinar programs and replays of past programs scheduled for airing. The online CLE catalog is growing rapidly with current programs available for purchase on demand.

This year also brings the return of the Section's Outreach program for underserved bar associations. If you are a member practicing in an outlying area without many live programs available, be sure to contact the Section; we may come to you with a live presentation for a networking event for your local bar association at no cost to you. This work is made possible by a grant from the CalBar Foundation.

Our glossy magazine formerly known as *Big News* is undergoing a wonderful transformation this year, under the stewardship of our new Editor-in-Chief Jeremy Evans with the assistance of Editor-in-Chief Emeritus Henry David. Now known as *the PRACTITIONER*, your quarterly magazine includes valuable self-study MCLE in every issue in addition to articles on topics related to solo and small firm practice. Not only is *the PRACTITIONER* a great publication to read, but we also invite our members to submit articles for publication. If you are looking to reach other solos and smalls, bring us your writing for consideration.

Complementing our magazine is our electronic newsletter, which as a member of the Section you will automatically receive. Be sure to open it and see what great information it brings—from events announcements to ethics advice to local courthouse information and legal news, you never know what it will bring.

The Section also provides members with discounts and freebies that more than compensate for the cost of your membership—you just may not have known about them. This year I hope to see our members take advantage of these benefits to their fullest. For up-to-date details on the benefits and how to access them, check the Section's website (<http://solo.calbar.ca.gov/>). Current benefits include six hours of free MCLE online and discounts on CEB products (including a discount equal to your Section dues on a Gold CLE Passport).

As we set out to meet our goal of bringing value to each member, we also want to hear from our members. Please let us know how we are doing and what we can bring to you to make this Section your most valuable membership. Contact any Executive Committee member directly, or you can engage with the Section on Facebook (<https://www.facebook.com/calbarsolo/>) and other social media.

I look forward to working in the coming year toward our mission of reaching our members, and I thank the 2016-2017 Executive Committee for their hard work in achieving our goals.

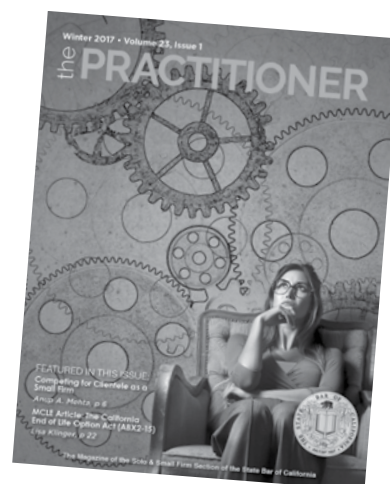
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## the PRACTITIONER FOR SOLO & SMALL FIRMS

Editor  
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We welcome original articles ranging from 1500-4000 words. All submissions should come in the form of a Word document in an email. Include your name and contact information, including phone and email. Be sure to include proper attribution (Blue Book style citation form) when quoting published sources, citations or interview subjects. Please submit your queries or completed articles to: [hdauid@davidfirm.com](mailto:hdauid@davidfirm.com).

### Visuals

Photographs and artwork are welcomed as .tif files at 300 dpi.

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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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The State Bar of California, 180 Howard Street, San Francisco, CA 94105.

# Letter From the Editor

By Jeremy M. Evans



**Jeremy M. Evans** is the Managing Attorney at California Sports Lawyer, representing sports and entertainment professionals and businesses in contract drafting, negotiations, licensing, and career growth. He is

the Director of the Center for Sports Law & Policy at Thomas Jefferson School of Law in San Diego, California. Evans is an award-winning attorney and community leader. He can be reached at [Jeremy@CSLlegal.com](mailto:Jeremy@CSLlegal.com) or via his website: [www.CSLlegal.com](http://www.CSLlegal.com).

Dear Members,

When our colleagues on the Executive Committee honored me with the opportunity to become Editor-in-Chief of the Official Publication for the Solo & Small Firm Section of the State Bar of California, it was both an exciting and wonderful opportunity. Our most recent Editor Henry David is a terrific person and Editor, and he has thankfully decided to stay on the Editorial Board. Executive Committee Chair Megan Zavieh, Treasurer Renee Galente, Steve Krongold and Advisor Eleanor Southers complete the Editorial Board for 2016-2017.

In 2016-2017, there are a few things we will be doing. First, we welcome incoming Chair Megan Zavieh, who is our attorney warrior, licensed in multiple states, beloved mother and wife, and of course a solo practitioner. We also welcome new Executive Committee Members Sabrina Green, Angelica Sciencio, and Steven Krongold. They will also be contributing to the magazine, which will move to four issues during this cycle and hopefully beyond.

In terms of branding, we will be looking at opportunities to build upon the great success of the past editors, Editorial Board, and contributors. For one, we will look at adding more color and vibrancy to the magazine. As solo practitioners and small firms, we all know none of us is one-size-fits-all, and

our publication should reflect that. Second, we will be exploring better name recognition for the magazine so that our reach is far and wide. Going forward, our Section's newsletter's official name will be *the PRACTITIONER*, which is a nod to the past and a look to the future.

We are always in need of contributors and our continued mission will be to seek and find great writers from our membership and third parties who contribute on a consistent basis, while offering a diverse set of articles for our members. We want the magazine to be both a resource for information, updates in the law and business of the law, and a way to pass the time and clear our heads from a busy day. Our goal is for our members to pick the magazine and to be both proud of its new look and feel, while simultaneously being excited about its content. At the end of the day, our hope is that you will be proud to share the magazine with your colleagues, friends, and family.

We hope you are excited as we are as we enter and engage in this terrific journey called solo and small practice life in the law through our publication.

**Jeremy M. Evans, ESQ.**  
Editor-in-Chief

# Competing for Clientele as a Small Firm

By Anup A. Mehta



his own Firm name, Mehta Law.

**Anup A. Mehta** was once a Defense Attorney representing Acute Care Hospitals and Skilled Nursing Facilities before switching sides. He now practices in all areas of Plaintiff's Personal Injury under

I have always had a high level of respect for my fellow attorneys regardless of our differences in practice areas or whom we choose to represent. After all, we have all gone through similar struggles to get to where we are today. Whether you have been practicing for the past forty years or are a newly barred attorney, we have all overcome obstacles getting to where we are—it is our common ground.

Another common ground for some of us is the difficult decision we made to go out on our own as a solo practitioner or as a small firm. As some of you can attest, the decision to “go solo” becomes exponentially more complex as you progress in life and your career.

In April of 2016, I opened the doors to my own small firm in the hopes of taking resolute strides towards the pot of gold at the end of the rainbow. For me, the “pot of gold” was, and still is, the thrill of owning something in which I can invest and watch grow, while having complete autonomy over my life and finances. I am sure many of you had the same ideas when first making this important decision for yourselves.

In any event, soon after my decision, I gained an instantaneous and marked increase in respect for solo practitioners and small firms alike and the labors they face daily.

From the occasional doubt that creeps in to your mind about your abilities or whether you made the right decision to forego a stable paycheck to the frenzied management of day-to-day office tasks, including obtaining new clientele, it can be difficult

and trying. You have my utmost respect. Just keep in mind that you are doing this all for yourself and your family. Each one of you has the focus and mental resilience of Michael Phelps staring down Chad Le Clos at the 2016 Rio Summer Olympics.

Nevertheless, because I have been in business less than one year, some of you may think that I am not yet qualified to offer the ensuing advice on competing for clientele as a small firm. I get it. It has become second nature for many of us to be critical of the information we receive and to be equally cynical of the source from which the information originates. However, I have attained some experience with respect to competing for clientele against larger law firms. None of my advice or the information below is backed by any scientific data; they are just my thoughts, pen to paper.

## YOU CANNOT WIN AGAINST THE GOLIATH

I am sure this subheading will irk many of you. Relax. We take our ourselves too seriously. I will say it again, “You cannot win against Goliath.” Forget Goliath, we may have struggles competing against the younger brothers and sisters of the reputed Goliath. Before you turn red with rage, take a second.

What do I mean by this? Do I mean that you will not be able to render Goliath blind with your proverbial legal slingshot? No. You definitely can and will. However, the “Goliath” In this context is not your opponent in the classical courtroom sense, but rather the mid-size and large firms you compete

against for clientele. You cannot win against Goliath because of the “WOW” factor.

## THE “WOW” FACTOR

Think about how people may have reacted when they first set eyes on Goliath. By all accounts, Goliath’s description was that of a man between 6’9” and 9’9” tall and built like the spawn of modern day actors Vin Diesel and Dwayne “The Rock” Johnson. The description is enough for anyone to say, “Wow.” In the same way, on average, nine out of ten potential clients who walk in to a mid-size or large firm are going to be “wowed” by the square footage of the office, the size of the firm, the number of staff employed, and the well-placed oak wood throughout the suite.

One-hundred percent of those nine potential clients will equate these attributes to the mid/big-sized firm’s ability litigate their matter based on the sentiment that the larger the firm equals more resources. Who would not want a massive team working on their matter (or at least the impression of it)? While you and I both know that this is not necessarily true in practice, it is human nature for clients to assume that appearance means something. Psychologically, the “WOW” factor makes quite an impact on those who have not had much exposure to attorneys and the practice of law.

Unfortunately, as a solo or a small firm, many of us do not have the luxury of a large staff or a massive, lofty office in a high rise. Some of us are still answering our own phones. Simply, we cannot win against Goliath in this regard. Therefore, we are already at somewhat of a disadvantage when beginning the pursuit of potential clients. However, that does not mean we accept the foregoing as is and lay down. Nor does it mean that we cannot compete.

## KOBE TOLD ME

As a lifelong Golden State Warriors fan<sup>1</sup>, it pains me to do this. In a recent interview podcast with *Jim Rome* on *CBS Sports Radio*, Kobe Bryant said this about competing with the now-super team that is the Warriors: “If you are a real competitor, you look at that and say okay lace them up, let’s go. I don’t

care how many players you have over there, we are still going to take you down.”

Although I cringe when I write this, I agree with Kobe. Compete, we shall.

## CLEAN YOURSELF UP—GET HELP

Undoubtedly, each of us has read numerous articles and blogs stressing the importance of being frugal while managing your small business. Contrary to that advice, I submit that you should spend (albeit smartly), and even splurge at times, on things such as your office space and décor. Now, I am not advocating on importing furniture and marble from Italy, or recklessly signing a lease for an office that will bankrupt you in a month’s time, but appearance and presentation, as all of you should know, are important. Details matter, especially to prospective clients.

Your office and the décor of your firm are an extension of you and given such, will immediately give clients an impression of who you are. By being a little more selective and thoughtful about the location, office, and décor, even if it means employing someone to help you, you can send potential clients a good impression and then follow that up with top-notch legal performance.

By spending a bit more (time, money, and effort) on each, you will outwardly transform your firm from a solo/small firm to a “boutique” law firm. The difference between a “mom and pop” clothing store and a “boutique” shop is, at the most basic level, some nice décor and better products. You already have the “better product” because that’s you. Put some thought into your office and its décor, and now the option for potential clients becomes more level. Do they go with the “Walmart” of firms or the “boutique” law firms who can custom tailor it to their needs?

## MAKE AN IMPACT ON YOUR CLIENTS

Prior to law school, I always thought of smaller firms and especially solo practitioners as being all over the place and ridiculously disorganized, much like the tangled mess of cords underneath your desk. Since then, my viewpoint has changed quite a bit, but it is important to understand how some perceive us,

including the mass media. In view of that, I vowed not to fall victim to that stereotype when operating my firm.

To date, probably one of the most meaningful emails I have received from a client consisted of a single sentence and was sent approximately three minutes after walking out of my office. It simply read, “You are an impressive person.” The client’s comment was a combination of the streamlined processes I employed and my preparedness before, during, and after our consultation that led to this particular client being so impressed with me.

So what did I do? I was prepared; I highlighted what my firm could offer in a forthright manner and did it without having an ego. Here are three steps I took to be more successful in retaining prospective clients in my law practice:

### **Preparation**

A great way to be prepared is by systemizing your procedures like a larger firm such that everything runs smoothly and efficiently—from the timing of when you are going to offer your potential clients coffee down to having the documents and topics you intend on discussing ready. A “Welcome Packet” is also a nice touch. Another method I believe every small law firm should employ, even if it is just you, is to create your firm’s Policies and Procedures and follow them stringently. Again, this all ties in to the “boutique” law firm persona and gives everyone, including you, an air of confidence that you know what you are doing.

In the event that you are the first attorney a potential client has reached out to, we have a duty to us small people to blow away these inquiring clients. Even if they decide to consult with a larger firm or another attorney, prospective clients should be left with the impression that you are ready and able to compete with Goliath for their business. Do not be complacent; just because you are the first firm a client has consulted with, does not mean that you will make a better impression than anyone who may follow you. Think of rap artist Eminem in his song “8 Mile”: “You have one shot.” Be prepared regardless of whether another firm or attorney precedes or follows your consultation.

### **Stand Out**

You can also make an impact on clients by differentiating yourself from other firms, albeit in a respectable manner. As stated, not only can you do this by being prepared, but also by setting forth what you, as a smaller firm can offer in comparison to another. While doing so, focus on the strengths that you have rather than speaking negatively about other firms and/or attorneys.

In fact, this is where you can outshine larger firms. Rather than dwelling on the fact that you, as a smaller firm, do not have the level of financial resources available to you that larger firms do, frame it this way for a client: Your limited resources as a “boutique” law firm act as a system of “checks and balances” because it influences your firm to only take on cases that it truly believes in and ensures that your firm is exercising due diligence. In addition, it will show to clients your ability to take conscious steps to limit waste in time and money within the course of advocating for your clients.

Furthermore, highlight the benefits of retaining a smaller firm for potential clients, even if they are obvious. If you are a solo practitioner, one of your strongest selling points is that you do not have to answer to anyone, but yourself (and client), and not to mention, you are not under any strict billing requirements. In addition, you (the attorney doing the consultation) will be the attorney handling their case versus the bait-and-switch interview that happens in mid-size and larger firms with the partner where the work is handled by the first-year associate, but still at astronomical rates.

Moreover, emphasize that smaller firms are able to offer clients a customized approach to their respective legal issues, and most importantly, they have the ability to spend as much time as needed to consult with clients. Inform prospective clients that because you are a smaller firm, they can expect a higher level of transparency and availability from you and then deliver on it. A client who has never had any experience with lawyers probably expects confusing and convoluted answers. Surprise them. Be straightforward, be honest, and advise them of all the risks before you take them on as a client. Even if you eventually decline a prospective client’s case,



clients will always appreciate that you were straightforward and honest.

As a smaller firm, you can offer that “human” element that sometimes goes missing with larger firms.

### **Release Your Ego. Why not?**

Another thing you can do to differentiate yourself from larger firms, is to be free of your ego. At the beginning of this article, I warned that many of you may choose to disregard the information I impart simply because my firm is new. However, is that *really* a valid reason to disregard any potentially valuable information? It might be, but it also might be your ego that will not allow you to take advice from an attorney who might not have as much experience as you.

Let go of your ego. Do not be a doormat, but to the point where you can accept advice and/or valuable information from everyone, including those who are not attorneys.

One of the things my clients have always appreciated is that I allow them to participate in building their own case. The benefit is two-fold; many of them get to live out their *Law & Order* fantasies, all the while saving me half the work of doing some of the research. Some attorneys feel that the bar card they carry entitles them to disregard any information they receive from a non-attorney, especially a client of theirs. I am here to tell you, do not do that. Today’s clients know how to use the internet. They know how to read. They know how to process information. You may be overlooking a valuable piece of information or viewpoint that could potentially bolster your client’s case even further simply because you could not let go of your ego and self-importance.

To be clear, I am not saying that you should neglect to review the information you receive from a client or opposing party. What I am advocating falls under the “Why Not?” theory.

What harm could come from clients sending you information they located pertinent to their respective claims. Why not? Less work for you. Obviously, manage your clients if they begin to bombard you, but there is no harm in telling clients that if they

come across anything they believe will bolster their claims to send it your way. Mention to them that you may not get back to them immediately, but that you will definitely review anything they send, as is your duty. Let go of your ego. Sure, you may have more legal knowledge than your clients, but that does not mean that your clients are not intelligent.

### **THE IMPORTANCE OF STAYING HYDRATED**

Once you have employed the above as you see fit, be confident about what you have done and let things play out. Of course, be aggressive and seize every opportunity you have to continue, like “wowing” the client you are pursuing, but do not die of thirst in the Mojave Desert.

You can be aggressive by following up with clients to see where they are with their decision, but while doing so, be a decent human being. Ask about their lives, ask about “*that*” completely unrelated event that they mentioned. Be a compassionate human being, rather than someone trying to sell ice to an Eskimo. After you have done that, give prospective clients space to make an unpressured decision. Alternatively, under no circumstances should you chase after clients who are giving you clear signs they do not want to retain you.

It may have been endearing for Noah to send a letter to Allie every day for a year in *The Notebook*, but in real life, it is not. In addition, you are not Ryan Gosling playing Noah in the movie. If you cannot contain yourself and feel compelled to write that many letters to a potential client, I advise you to do so; however, rather than sending them out, place them in a time capsule buried under your home. I promise you in two years when your firm is thriving, you will see how ridiculous you would have looked.

Alternatively, I cannot recommend showing up to a client’s house unannounced, screaming from an alley and then climbing up a fire escape to whisk your client away, because—do not climb up fire escapes unless your client’s house is on fire. All joking aside, Richard Gere’s methodology and (terrifying) persistence may have worked in the movie *Pretty Woman*, but in reality, not only does it reek of desperation, it is annoying and just might violate some laws. Check your local rules.

Remember, people want to work with people they like, and rarely is it a person who is, well... desperately desperate.

## BE ACCEPTING AND ENJOY THE JOURNEY

A better way to conceptualize the process of obtaining clients is to think of it as the early stages of dating. "Being prepared" is like grooming yourself and dressing yourself nicely. Yes, you are single and there is competition out there, but you have the ability to compete. "Standing out" is just that. It might be your personality, your intelligence and/or your sheer beauty that makes you attractive, but even with these traits, if you are egotistical and/or desperate, you might be hard pressed to find someone to love you (i.e., retain you).

Whether you intend on remaining as a solo practitioner/small firm or intend on growing to a mid-size firm, accept where you are at and enjoy the journey. In keeping with the theme of dating, who seems more desirable to you? The person who is

constantly glum about being single or the person who is genuinely accepting of his or her situation and constantly working to better him- or herself? One thing I can assure you is that the person who is accepting and content with what life has imparted will more likely to meet and surpass their goals quicker.

In closing, revel in the journey that you are on as a small firm. Take time to experience the highs and lows, as they are short-lived. Best of luck from one small firm to another.

## ENDNOTES

- 1 In light of the fact that, as of late, it has become quite popular to brand every Warriors fan as "bandwagon", I feel compelled to qualify my statement and inform all readers that I have been an avid Warriors fan since before I could adequately process games. Not only was I raised in the Bay Area, but I have been a fan of the Warriors since the "dark" years (i.e. when the Warriors showed glimpses of greatness). In any event, *real* Warriors fan here.



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# How Mediators Have Become the Gatekeepers for Referrals and Why Solo Practitioners Should Pay Attention



**Daniel P. Nguyen, Esq.**

is a graduate of Thomas Jefferson Law School. He runs his own mediation practice in Orange County, California. Find more information about Daniel

by visiting [www.DMDRS.com](http://www.DMDRS.com).

By Daniel P. Nguyen

For any solo practitioner, the life blood of their business relies heavily on obtaining new clients through referrals. These often come from colleagues, friends, and former clients. However, there is a rich source of referrals that solo practitioners should start paying attention to . . . mediators. They are often overlooked by the legal community; many attorneys do not realize that they offer access to a stream of clients who may be looking for a wide range of legal services.

In this article, I will share my story of how I started my mediation practice and the lessons I learned. First, about the changing view of legal services. Second, how having strong relationships with mediators can be an untapped resource for referrals and new business for solo practitioners.

Coming out of law school, I worked at a couple different litigation firms before I decided to set out on my own. I knew I did not care much for litigation and wanted to take a more hands on approach in helping my clients. Alternative Dispute Resolution (ADR) was a big part of my legal education, so I decided to focus my efforts there and start my own mediation practice. Starting out was a difficult challenge, because the public is generally not aware of mediation and how it can help them. Therefore, a major part of trying to

obtain new clients was to educate them on the mediation process and get them to see that it was often times the best option to solve their problems. What I learned during my first several months of giving consultation to clients and hearing their stories of their experience dealing with attorneys who wanted to take a more traditional litigation approach to solving their problems was eye opening.

With today's technological advancements such as streaming media, ride sharing transportation, and communication through devices and applications, the legal industry is faced with the increasing challenge of catering to this generation's consumer expectations. If you are a solo practitioner and are your clients are not corporations or individuals who pay large retainers that can provide months or years of billable work, you are most likely relying on signing clients that can provide a steady stream of work, which may last a few weeks or months at a time. However, I believe the days of collecting retainers and making a living on billable hours are falling out of fashion in favor of more efficient alternatives. Instead, the current trend is for younger or less- experienced clients to be more savvy and looking for cost-effective services, forgoing expensive litigation to focus on streamlined problem solving practices that will

resolve their matters quickly and not break the bank.


Enter the mediator or, as I like to be called, the “problem-solver.” What was once seen as a tool to alleviate the overcrowded court docket, and used primarily to settled disputes often at the expense of sacrificing one party’s interest in the name of avoiding costly litigation, has evolved into an alternative means for resolving disputes. Mediation has now shifted its focus to bringing parties together and working towards common goals to resolve disputes without the need for large retainers and billable hours. Instead, when used effectively, mediation can settle disputes quickly, saving all parties involved time, effort, and cost. Today’s clients, who are mostly made up of millennials, are looking for alternative methods to handling their legal disputes without having to go through the traditional legal process. In fact, many are afraid of the traditional legal process and the expense of it. Therefore, more and more of these millennials are choosing mediation as a first option over traditional legal services.

As mediation can be used to resolve just about any kind of dispute, it also attracts a wide range of clients who may be in need of various types of legal services. Thus, as a byproduct of my practice, I learned that being a mediator requires you to be able to make referrals to properly service your client’s needs. In the event mediation fails or additional work needs to be done to solidify any agreement between the parties, these parties will need some type of legal service. If their mediator does not provide certain legal services, he or she will often times have to make a professional referral.

Having a strong network of contacts comes in handy and it is also why it pays to have a good relationship with a mediator. Those looking to increase their referral base should seek out mediators in their area and build strong professional relationships so that they can get those clients seeking help in that specific practice area. In fact, mediators should be looked at as gatekeepers for referrals. Mediators basically do

the intakes and determine what the client’s needs are and refer to attorneys who specialize in that area of law. Then these clients often come ready and willing to retain professional legal services to resolve their problems. It is a great way to increase your client base and grow your business.

My hope in sharing my experiences in this article is to shed light on why mediation is a legal tool that will only continue to grow and be utilized to solve disputes in the evolving legal landscape. In is becoming more likely that today’s clientele will seek out mediators first, rather than attorneys, in hopes of quickly solving their problems and do so in the interest of saving time and money. However, when mediation cannot solve their problems, then they will need a professional referral. Therefore, any solo practitioner looking to increase their referral base should seek out and cultivate strong relationships with mediators so they can capitalize on those referrals.



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THE STATE BAR OF CALIFORNIA  
JULY 28<sup>th</sup> 1927



# A Day in the Life of a Solo Practitioner: Let Technology and Mobility be Your Friend

By David J. Lee

It is 6:00 a.m. and the alarm goes off. It is time for court. I pop a Claritin and fix Nespressos for my sleeping wife and me. I turn on the *Dark Knight Rises* soundtrack on my Apple. I wash up and I am looking for my favorite Boss suit and Tom Ford tie. I kiss my wife and dogs (Mini & Cooper) goodbye. I am in the uberPOOL on my way to the Stanley Mosk courthouse in downtown Los Angeles. I have five court appearance assignments from other attorneys and I have to rush because I do not want to let them down. I get to my shared office space by 11:00 a.m.

I start preparing for my afternoon client meetings. I spend the afternoon meeting clients and returning phone calls and emails. No time for lunch today. By 7:00 p.m., I am in the uberPOOL again on my way to Souplantation to have dinner with my wife. I get home around 8:00 p.m. and spend the evening drafting settlement demands and complaints. I pass out to red wine and classic jazz. Next thing you know, it is 6:00 a.m. again...

Stepping back in time, exactly six months ago, I left a small litigation firm and started my own employment law practice. I feel in control of my life and so much more freedom to build a business and a life. I signed a lease for shared office space in the Paul Hastings building. The rest is history.

I also got rid of my car and started taking uberPOOL full-time. What has this done for my law practice and me?



**David Lee** is an employment law attorney. His practice is dedicated to the representation of employees for various employment and labor claims, mostly wrongful termination, retaliation and discrimination.

David is a litigator and a problem solver.

- I put myself into a situation to converse with three to six people every day;
- I save at least \$700 per month since I no longer have to make car and insurance payments, or pay for parking fees and gas;
- I do not want to waste my life stuck in traffic, one to two hours every day doing nothing. Now I get to rest, spend time with my wife and dogs, talk with clients, and work everywhere I go in the uberPOOL avoiding “hands free” cell phone laws and accidents. I am like Matthew McConaughey in the movie *Lincoln Lawyer*, which was also based in Los Angeles!

As far as my law practice goes, most of my clients are employees who are on a contingency fee agreement, so I started making court appearances for various attorneys at the “Mosk” courthouse to help pay my bills. I do two to five court appearances every day and I get to learn the practice of law, about judges and clerks in each department, courtroom procedures, and local rules. It also pays the overhead for my law practice.

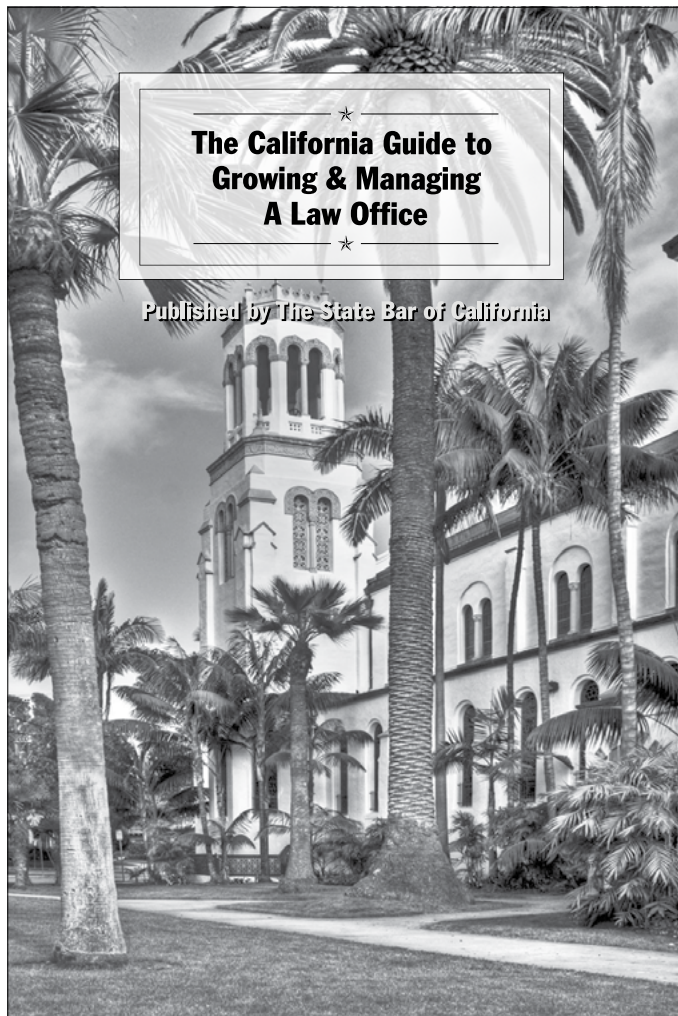
I make it a daily goal to refer a client to another attorney from people whom I meet through uberPOOL, public transportation, or social media, such as Facebook. You may or may not be surprised, but people always ask what I do when wearing a suit

and generally when riding in uberPOOL. Moreover, I found it fascinating that the attorneys I meet are referring cases to me just by meeting them. It has been six months and I see that my law practice is growing in terms of clientele and income.

Being a California licensed attorney and having my own law practice has become a dream come true. Making special appearances allows me to help other attorneys, learn the law and courtroom procedure, and it pays my bills and expenses. Spending time everyday referring cases/clients to other attorneys has benefited my law practice, indirectly, because I

have received so many referrals and contract work from those attorneys.

It is an honor and blessing to be a California licensed attorney. I treat every day like game seven in the NBA Finals, just trying to come back from 3-1 deficit and make history. It can be done. Every day is just another Monday. I have received so much support and encouragement from my friends and colleagues, and I want to use this experience and opportunity to help other solo practitioners. If I can do it, so can you.



## **The California Guide to Growing & Managing a Law Office**

Published by The State Bar of California

Growing a law practice can be a lawyer's most rewarding and challenging professional experience. The goal of this book is to make it less challenging and more rewarding. It picks up where *The California Guide to Opening a Law Office* left off, exploring challenges of growing a law practice in detail. Chapters include:

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3. The Financial Dimension of Growth: Increasing revenue and profits
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8. Planning for the Unexpected



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# Solo But Not Alone

By Cynthia Thomas



**Cynthia Thomas** is the owner of PLMC & Associates and the Operations Manager at Nolan Heimann, LLP. After 10 years of managing small and midsize firms in California, she started a law firm management consulting company providing best practices in human resources and staffing. She is the associate editor of ABA Law Practice Magazine, Chair Person of the ABA Law Practice Division Lawyer Leadership & Management Committee.

According to the American Bar Association's 2016 Lawyer Demographics report<sup>1</sup>, most attorneys in private practice are employed by small law firms, which are defined as those with fewer than twenty lawyers. Moreover, almost half of all lawyers in private practice are solo practitioners. This number will most likely continue to rise with the growing number of law students burdened with debt and the harsh reality of not receiving lucrative job offers upon graduation.

Often times when a lawyer decides to open his or her own firm, the excitement of getting that first client and generating income outweighs the importance of having systems, policies, and procedures in place. However, practicing law as a solo does not mean you are without colleagues or guidance. Whether you are a veteran solo attorney or newly minted solo embarking upon this journey, know that others came before you and learned valuable lessons to be shared, and many others are doing exactly what you are now. From the wisdom of these guides, here are some tips on starting and running a successful solo or small firm practice.

**ESTABLISH YOUR FIRM AS A BUSINESS.** Before you hang up your shingle or create a website, much time and energy must be dedicated on establishing your law practice as an entity. Before you open your doors, decide how you are going to structure your business. Are you going to be a law corporation (subject to registration requirements with the State Bar)? A sole proprietorship? There are many articles written on choosing the best entity for your practice.

**GIVE SERIOUS THOUGHT TO THE FIRST FEW MONTHS OF LIFE AS A SMALL BUSINESS OWNER.** A solo or small firm lawyer must recognize that running a law firm is akin to running a corporate

business. However, unlike business school, traditionally, law schools prepare students on how to practice law and not to become business owners or entrepreneurs. Therefore, lawyers who decide to be entrepreneurs and open their own firm often overestimate the amount of income they will bring in immediately, and underestimate the amount of work required to bring in business, handle routine administrative matters, and keep the business running. Therefore, when opening a solo practice or joining forces with a colleague to form a small firm, realistic expectations about cash flow and administrative needs must be established. This is particularly true when looking at the first few months of life as a solo when cash flow is likely to be far less than anticipated and administrative headaches far larger.

**PUT PROCEDURES AND TOOLS IN PLACE FOR FINANCIAL GROWTH.** Math might not be your forte, but as a solo/small firm attorney, you must understand the basic principles of accounting and bookkeeping to embrace the financial aspects of running a business. Even if you decide to hire someone to handle your firm's finances, as a solo or small practice lawyer you must ensure there are sufficient resources to weather the inevitable lean times in the first year or two. Hence, it is necessary to have timekeeping and billing software along with standardized policies and procedures in place to handle the firm's finances.

Your law firm growth and financial freedom can easily be accomplished by investing in legal timekeeping and billing programs. There are many time and billing software programs on the market and depending on the practice area, one may be better than another may.

It is important to take the initial time to investigate and research different programs before choosing one. The wrong timekeeping and billing software program can be detrimental to the survival of a thriving firm. In addition, the failure to use such program to its fullest to obtain the maximum reporting can be equally as damaging.

There are aspects of solo law practice that do not require specialized tools, and some solos can create great invoices and maintain adequate record keeping using QuickBooks and/or Excel. However, to be able to create a profit-loss statement and keep track of a client's IOLTA/Trust Account, these methods are too labor intensive and are not cost effective. This is particularly true if you want to scale your practice to serve a larger client base.

The labor intensity of tools not built for law practices is highlighted when solo attorneys fail to maintain passable billing records or even send out their legal invoices on a regular basis. This is unacceptable if you want to have a viable law practice and maintain record-keeping, which will allow you to track payments, send invoices for time worked and the replenishment of retainers, and file accurate tax returns.

**SECURE YOUR CYBERSPACE.** Once a time and billing program has been established, it is important to have security anti-virus and anti-spam ware in place. Law firms are a growing target for cyber thieves. Using unsecure networks or public Wi-Fi without having an anti-virus program in place is a recipe for disaster. Unfortunately, many attorneys lack security awareness training, and have limited to no policies on information security. This leads to weak passwords, lack of encryption usage, and more dangerous threats for its clients. If a law firm breach occurs, it can open a client up to significant financial and reputational loss. Therefore, it is of grave importance to have a security system and data breach policies and procedures in place.

**SET UP CASE MANAGEMENT AND DOCUMENT MANAGEMENT SYSTEMS.** Depending on the nature of your practice, specifically litigation practices with high levels of discovery, a case and document management program must be instituted. Just as it is important to keep track of income and

financial records, it is necessary to keep track of client documents and to have an online filing and storage system for such documents. It is a waste of time and income to aimlessly search through a computer hard drive to locate documents. The ability to access documents easily and quickly will allow a solo attorney not only to be more productive and cost efficient for his or her clients, but also will provide for a better work-life balance and time for other administrative tasks like marketing, advertising, and business development.

### **CREATE A REALISTIC MARKETING STRATEGY.**

In the business world, companies routinely spend a third of their revenue on marketing and business development; for emerging companies this percentage can run far higher. However, most solo and small firms either fail to recognize the necessity of paying to get the word out about their services or lack the resources to do so. Hanging your shingle requires that you put a realistic marketing strategy down on paper and implement it into practice.

A marketing plan should have several facets, from in-person activities to branding and your online image. Here are the two facets of business development.

**1. In-Person Networking.** One cost effective way to market is by networking. Introvert or not, the more people you connect with and tell about the services you provide, the more likely you will reach someone who might need your services. Keep in mind that networking requires patience and a commitment; Rome was not built in a day, and you cannot expect an evening or one to two networking events to yield a plethora of clients. One way to ease networking into your marketing plan is by using your lunch hour for networking. Having a lunch will take some of the unpleasant awkwardness or fear of approaching another individual and having small chat. It is suggested that as solo attorney or a member of a small one or two person firm, you should never eat lunch alone. Rather, call people who can refer business, take them out to lunch at the local restaurant, or meet for a coffee. This may include your local realtor, accountant, lawyers at larger firms, bankers, and other members of your local business community. Also, contact all your law school classmates, just to say "hello." Find out what they are



doing and let them know what you are doing so when prospective clients come along they will think of you and refer.

Another simple and easy way to network is by joining your state and local bar associations—especially the solo and small firm sections. Surrounding yourself with other solo and small firm lawyers will not only provide a sense of community, but also will allow you to develop relationships and situations to receive a referral or even find a mentor. It is valuable to surround yourself with likeminded professional individuals. This will allow you to stay informed with the current changes and events in the legal industry. In addition, your relationships will assist in maintaining the momentum of marketing and networking and help with the isolation that often comes from being a solo attorney.

**2. Online Presence.** Your online presence is critical to your marketing efforts. On the days you are not eating lunch with connections, spend that hour developing your social network and online presence. Whether it is growing your LinkedIn profile, adding content to your website, or writing articles and/or blogs, make online network marketing part of your daily or weekly routine.

More broadly looking at your online presence, make sure your website reflects your professional image. Potential clients and business associates often Google® attorneys when they need information about the attorney before retaining. Make sure it is your firm's professional website and not your personal Facebook® page coming up at the top of the results. If it is your personal Facebook page that comes up first in a search, make sure that the page is professional in nature and content. Remember that your image as an attorney does not end after leaving the office.

**GUARD AGAINST ISOLATION.** Being solo attorney or working in a small firm can yield considerable periods of isolation. To avoid becoming a hermit, stay aware that isolation exists. Creating daily or weekly events with family, friends, and/or social networking groups will not only alleviate loneliness, but it will also provide work/life balance, which is often difficult to obtain as a solo and small firm attorney and entrepreneur.

**EMBRACE FLEXIBILITY.** Working as a solo attorney can provide an opportunity to having a more flexible work schedule. This does not equate to working fewer hours, but depending on the type of practice and the use of technology, the working day does not have to be as rigid as “9 to 5.” For example being your own “boss” can allow you take a yoga class at 3:00 p.m. Embrace that you are the beneficiary of all of your hard work and actively utilize your flexibility to find work/life balance.

**DEFINE YOUR PRACTICE.** Finally, before you solicit your first client, be sure you have identified exactly what it is you do as a solo lawyer (i.e., your area of practice). It is important to pick a niche practice area and focus on that area of law only. Being a jack-of-all-trades and a master of a few or none of them will not generate more income—especially if you have to spend hours of unbillable time researching uncharted areas of law. Rather, by focusing on one or two related practice groups, you can position yourself as an expert a particular area of law. For example, you may be the expert in your area on animal rights law. This will allow you to focus your marketing efforts on one or two areas of the law, receive referrals in only those areas, and learn your substantive area well enough to avoid committing malpractice.

Running your own solo practice can be an amazing and rewarding experience, but it is not for everyone. You should know that up front. It requires the legal knowledge and an entrepreneurial spirit and grit to survive and thrive. By going through the above, it will hopefully bring to light whether going solo or the small firm way is right for you.

## ENDNOTES

- 1 [http://www.americanbar.org/content/dam/aba/administrative/market\\_research/lawyer-demographics-tables-2016.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf)

# Yelped!—What Is the Best Response to Negative Online Reviews

By Steven Krongold

Attorneys are not immune from the new phenomenon of negative online reviews posted anonymously. The number of such websites has proliferated in recent years to include Yelp, Avvo, Yahoo!, Yellow Pages, Glassdoor, and Citysearch. These websites scour public databases and, without consent, list attorneys, accountants, doctors, dentists, real estate agents, and other professionals. The websites then give members of the public the ability to create accounts and critique the professional without any editorial oversight. Many online reviews make accusations of fraud, gross negligence, and even criminal conduct. Not surprisingly, professionals are fighting back. This article explores best practices when you or your client(s) become victims of defamation posted anonymously.

## WEBSITE IMMUNITY

Professionals defamed anonymously have limited options. Congress passed a law giving civil immunity to “interactive computer services,” most commonly websites that publish content created by third parties. The statute appears in Section 230 of the Communications Decency Act (“CDA”), 47 U.S.C. § 230(c). Congress was motivated, in part, to promote the free exchange of information and ideas over the Internet. The CDA shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties. (*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009).) Websites are therefore careful



**Steven L. Krongold** specializes in business litigation. For the past 30 years, Mr. Krongold has litigated disputes involving trademarks, copyrights, trade secrets, invasion of privacy, cybersquatting, investment fraud, defamation, and other business-related torts. Mr. Krongold can be reached at the Krongold Law Corp., P.C., located in Orange County, CA.

to avoid creating or editing material. They would lose statutory immunity if found “responsible, in whole or in part, for the creation or development of the offending content.” 47 U.S.C. § 230(f)(3).

The Ninth Circuit recently rejected a creative attempt to plead around the CDA’s civil liability shield. In *Kimzey v. Yelp! Inc.*, 21 F.Supp.3d 1120 (W.D. Wash., 2014), aff’d 2016 U.S. App. LEXIS 16665 (9th Cir. 2016), plaintiff alleged that Yelp designed and created its signature star rating system, and thereby served as “author” of the one-star rating which conveyed content. Plaintiff further alleged that Yelp transformed the review into its own advertisement or promotion on Google, featuring the unique star-rating system. The Ninth Circuit refused to accept this argument, stating: “We fail to see how Yelp’s rating system, which is based on rating inputs from third parties and which reduces this information into a single, aggregate metric is anything other than user-generated data.” (*Id.* at \* 13.)

## CEASE & DESIST LETTER

Since the defamation victim cannot sue the website that fails to take down the damaging statements, the only option available is to pursue remedies against the author. Identifying the author thus becomes a top priority. Proper identification enables the victim to send a cease and desist letter. Many times the author’s identity can be ascertained from the contents

of the post and the files or records of the business. The letter can explain why the statements are actionable. Libel in California is defined as a provably false assertion of fact “which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” (Civ. Code, § 45.) The letter should use a professional tone and include evidence to support the truth of the statements. The letter should advise of the consequences of defamation, but not create more problems by using inflammatory or offensive language.

## ONLINE RESPONSE

If the author refuses to take down or correct the review, the professional should next consider posting a response to the review. Most websites allow the affected business or professional to “claim” the listing and comment publicly on the negative review. The statements in the response should be matter-of-fact, and clearly explain how and why the review was incorrect. Offensive or rude language should be avoided in all circumstances. Moreover, since attorneys, doctors, and other professionals are bound by confidentiality and privacy rules, they must use extreme caution to avoid making public a fact that would otherwise be privileged. It would indeed be a twist of irony if the professional is sued for violating the duty of confidentiality based on his or her response to the negative review.

## UNMASKING “THE ANONYMOUS” POSTER

What happens if the author cannot be identified from the post itself or other research? Asking the website to identify the author is futile. Websites vigorously resist unmasking the identity of reviewers, citing the First Amendment and privacy policies. Yelp, Avvo, and others websites market the benefits of anonymous use. They will not voluntarily produce identifying information. This means you must file a lawsuit for defamation against one or more “Doe Defendants,” fictitiously named parties, and then serve a subpoena on the online publisher (i.e., website) for identifying information.

The decision to file suit requires a thorough analysis of costs, benefits, and risks, while defamation

lawsuits can result in very large awards. In a recent case, an attorney and her law firm sued a former client for posting a negative review on Yelp. The court entered a default judgment exceeding \$500,000 USD, and an injunction against further publication of the defamatory material. Yelp, who was not a party to the action, was ordered to remove the material from its website. (*Hassell v. Bird* (2016) 247 Cal.App.4th 1336, 203 Cal.Rptr.3d 203, rev. granted, 2016 Cal. LEXIS 7914 (9/21/2016, No. S235968).) The Supreme Court granted review in order to decide issues (specifically, whether Yelp had a right to notice before a court issued the removal order and whether the CDA barred the injunction and any related contempt proceedings) beyond the scope of this article.

In addition, a defamation lawsuit will undoubtedly trigger a special motion to dismiss under the anti-SLAPP statute, raising the specter of paying attorney’s fees to the prevailing defendant. (C.C.P. § 425.16.) It is, however, beyond the scope of this article to discuss whether a negative review about a particular interaction implicates matters of public concern or involve an issue of public interest for purposes of the anti-slapp statute. (See, *Wong v. Jing* 189 Cal.App.4th 1354, 1366, 117 Cal. Rptr. 3d 747, 759. (2010)) Nonetheless, you should be aware of the consequences and possible reactions to a defamation lawsuit.

## THE KRINSKY CASE

If a lawsuit is filed, the attorney should be familiar with *Krinsky v. Doe*, 6159 Cal.App. 4th 1154, 1165, (2008) the seminal case on using subpoenas to unmask the identity of anonymous Internet users. The plaintiff in *Krinsky* served a subpoena on Yahoo to learn the identity of the person who posted comments on a financial message board that allegedly defamed management. The court first noted the long-standing constitutional right to comment and criticize anonymously. On the other hand, the court recognized that a libel plaintiff has an equally important and legitimate interest in discovering an anonymous speaker’s identity in order to effectively prosecute a libel action. (*Krinsky*, supra, 159 Cal. App.4th at 1165.)

The court therefore adopted the following test to determine a libel plaintiff's right to uncover the identity of the alleged defamer: the plaintiff must make a prima facie showing that a case of defamation exists. (*Id.* at 1171.) Stated another way, "the court may refuse to quash a third party subpoena if the plaintiff succeeds in setting forth evidence that a libelous statement has been made. When there is a factual and legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment." (*Id.*) The court reasoned further: "Requiring at least that much ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism." (*Id.* at 1171.) Plaintiffs need to produce evidence of only those material facts that are readily accessible. In an Internet libel case, that burden should not be insurmountable. The court noted that all that is required is proof the statement was made, evidence of its falsity, and the effect it had on plaintiff. (*Id.* at 1172.)

## STANDING

In response to a subpoena for identifying information, the only rights the website can assert are those of fictitiously named parties, i.e., the Doe defendants, not any named parties. *Matrixx Initiatives, Inc. v. Doe* 138 Cal.App.4th 872, 877 (2006). In order to assert first amendment, privacy or other rights of Doe defendants, the website must demonstrate a close relationship to the anonymous user, and some hindrance to the ability of the affected individual to protect his or her own interests. *Id.* The 'close relationship' is usually satisfied because the website has a commercial interest in protecting the identity of its users and their right to post anonymously. The 'hindrance' standard requires some evidence the affected subscriber could not receive notice of the subpoena or otherwise take action to protect his or her own identity. Once the threshold issues of standing are met, the court will address the merits, that is, whether plaintiff has shown a prima facie case of defamation.

## IS IDENTITY PROTECTED BY STATUTE?

The website may assert that all identifying information is protected from disclosure by the Stored Communications Act ("SCA"), 18 U.S.C. §

2701 et seq. However, do not be fooled. One section of the SCA makes hacking into email servers a crime. Another section protects against unauthorized disclosure of the *contents* of a communication while in electronic storage. (18 U.S.C. § 2702(a).) The "contents" includes any information concerning "the substance, purport, or meaning of that communication." (18 U.S.C. § 2510(8).) Thus, the actual content of an email, text, or post is covered. However, the statute *permits* disclosure of "a record or other information pertaining to a subscriber" or customer to "any person other than a governmental entity." (18 U.S.C. § 2702(c)(7).) Indeed, Yelp's Terms of Use and Privacy Policy clearly warn account owners that information "from and about you" may be shared with third parties.

Applying § 2702(c), the Ninth Circuit held that customer record information can be disclosed without violating the SCA; such information "generally includes the name, address, and "subscriber number or identity." (*Graf v. Zynga Game Network, Inc. (In re Zynga Privacy Litig.)*, 750 F.3d 1098, 1106 (9th Cir. 2014).) *Zynga* was followed in several district court decisions holding that information associated with the creation of an account (email address, names, mailing address, phone numbers, billing information, and date of account creation) is a "record or other information" and not "contents" of a communication. (*Svenson v. Google Inc.*, 65 F. Supp. 3d 717, 729 (N.D. Cal. 2014).)

Internet providers and website owners such as Facebook, Apple, and Verizon, have been sued for allegedly sharing information in violation of the SCA. These companies have been successful in getting these claims dismissed on grounds that the SCA covers the content of the communication, not the user identity or other subscriber information. For example, relying on the plain statutory language of § 2702, the court in *O'Grady v. Superior Court* 139 Cal.App.4th 1423 (2006), noted that a subpoena seeking the identity of the subscriber, not the contents of private messages stored on the server, is not protected by the SCA. *Krinsky* noted this distinction as well. (*Krinsky*, 159 Cal.App.4th at 1167.)



## **FAKE OR INCOMPLETE USER INFORMATION**

There is often a further layer complicating the search for identity. Many sites, Yelp included, do not require a true name, address, or other personal information in order to create an account and post a review. Sometimes the only information stored consists of a username, email address, and IP (i.e., internet protocol "IP" or public address). Further investigation needs to be undertaken to uncover the identity of the person or business associated with the email address or IP address. Once the identity is ascertained, the libel plaintiff can amend the complaint to state the true and correct name of the defendant.

## **CONCLUSION**

Anonymous online defamation is a growing concern among attorneys and other professionals. Unmasking the identity of the defamer is not an easy or inexpensive task. Careful attention should be given to learning the identity from internal documents or independent research. Non-threatening communications with the person, business, or entity is the best way to have the negative review taken down or at least modified to remove the offending language. If the identity cannot be ascertained or the author refuses to remove or modify, the victim may need to use legal process.

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# MCLE Article: The California End of Life Option Act (ABX2-15)

By Lisa Klinger, J.D.



**Lisa Klinger** has been an attorney since 1984 (University of Southern California) and has always specialized in employee benefits and employment law, focusing since 2010 on the Affordable Care Act.

She helps employers and their advisors understand what ACA and its regulations require. Since 2013 Lisa has been a volunteer with Compassion and Choices, and in 2016 has done many presentations on the California End of Life Option Act.

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

Effective June 9, 2015, California became the fifth state<sup>1</sup> to allow medical aid in dying through the signing of the California End of Life Option Act (“EOLO Act” or “Act”) that was codified in California Health and Safety § 443, *et seq.*, which allows a California licensed physician to prescribe aid-in-dying medication to adults who meet certain qualifications.

This article explains the requirements of the EOLO Act, particularly for attorneys who may be advising individuals, physicians and other health care workers, health care entities, or who simply are interested in keeping abreast of changes in California laws.

## REQUEST FOR AID-IN-DYING MEDICATION

**WHO can request.** Under the EOLO Act, a “qualified” individual<sup>2</sup> can request a prescription for aid-in-dying medication.<sup>2</sup> An individual may request to receive a prescription for an aid-in-dying drug if all of the following conditions are satisfied: (1) She or he must be an adult California resident<sup>3</sup> (2) who has the capacity to make medical decisions, (3) has been diagnosed by his or her attending physician as terminally ill<sup>4</sup>, (4) must follow the proper procedures in requesting aid-in-dying medication, and (5) has the physical and mental ability to self-administer the aid-in-dying drug.<sup>5</sup>

Only the individual her- or himself can request the medication. Another person cannot request it on behalf of a spouse or a terminally ill child, nor can a

request be made on behalf of a patient by a power of attorney, conservator, health care agent, surrogate, or a legally recognized health care decision maker.<sup>6</sup>

Even the individual her - or himself cannot obtain the aid-in-dying medication by requesting it in an advance health care directive *before* he or she has a terminal diagnosis and six-month prognosis, but while the person still has the mental capacity. This precludes a patient in the early stages of Alzheimer’s (or with a family history of Alzheimer’s) from participating under the Act by stating in an advance directive that they wish to obtain the aid-in-dying medication once the disease progresses to a specified point.

## **PROCEDURES to request aid-in-dying medication.**

An individual who wishes to use the EOLO Act must make two verbal requests for the medication and one written request. These requests must be made directly to the individual’s “attending physician”<sup>7</sup> although an interpreter can be used if specified legal requirements are met. The verbal requests must be at least fifteen (15) days apart, and the written request must be made using the statutory request form. The law also includes four other statutory forms, including checklists and a follow-up form physicians must use.<sup>8</sup>

The written request form must be signed by two adult witnesses, who must attest<sup>9</sup>:

- as to the identity of the patient,
- that they believe the patient is of sound mind and not under duress, fraud, or undue influence,

- that the request was voluntary and signed in their presence, and
- that each of them is not the patient's attending nor consulting physician nor the mental health specialist.

At least one of the witnesses must *not* be related to the patient by blood, marriage, domestic partnership, or adoption; not be entitled to a portion of the individual's estate upon death; and not be the owner, operator, or employee of a health care facility where the patient is or resides.<sup>10</sup>

## OBLIGATION OF PHYSICIANS

The EOLO Act imposes numerous obligations and documentation requirements on the "attending" physician, "consulting" physician, and "mental health specialist."

The attending physician is defined as "the physician who has primary responsibility for the health care of an individual and treatment of the individual's terminal disease."<sup>11</sup> A terminally ill patient is likely to have several physicians and more than one of them might fit this definition. For example, the family doctor may have primary responsibility for the former and the oncologist for the latter.

The "consulting physician" is one who is independent from the attending physician and is qualified by specialty or experience to make a professional diagnosis and prognosis regarding an individual's terminal disease.<sup>12</sup> The Act does not specify what "independent from" means.

A "mental health specialist" may be either a psychiatrist or licensed psychologist.<sup>13</sup>

The attending physician has all of the following responsibilities, which are also listed on the *Attending Physician Checklist and Follow-Up Form*.<sup>14</sup> The consulting physician's responsibilities are listed under item #3 below<sup>15</sup> and the mental health specialists' are listed under #1.e.<sup>16</sup>

### 1. *Initial eligibility determination*, whether:

- a. The individual is a California resident;
- b. The individual has the capacity to make medical decisions;

- c. The individual has a terminal disease;
- d. The individual has voluntarily made the request pursuant to Cal. Health & Safety Code 443.2 and 443.3;
- e. There are indications of a mental disorder. If so, the physician must refer the individual for a mental health specialist assessment, and no aid-in-dying drugs may be prescribed until the mental health specialist determines that the individual has the capacity to make medical decisions and is not suffering from impaired judgment due to a mental disorder.<sup>17</sup>

### 2. *Confirm the patient is making an informed decision.* The attending physician must discuss *all* the following with the patient to confirm s/he is making an informed decision:

- a. Medical diagnosis and prognosis;
- b. Potential risks associated with ingesting the aid-in-dying drug;
- c. Probable result of ingesting the drug;
- d. Possibility that she or he may obtain the drug but choose not to take it;
- e. Feasible alternatives or additional treatment options, including but not limited to: comfort care, hospice care, palliative care, and pain control.

### 3. *Refer to a Consulting Physician.*

The consulting physician must confirm the diagnosis and prognosis and determine that the individual has the capacity to make medical decisions and has complied with the provisions of the Act. If the consulting physician believes there are indications of a mental disorder, she or he must refer the individual for a mental health specialist assessment.

### 4. *Private consultation with patient to confirm request is voluntary.*

The attending physician must meet one-on-one with the patient (unless an interpreter is

required) to ensure the patient is not feeling coerced or unduly influenced by another person.<sup>18</sup>

5. ***Counsel the Patient*** about the importance of *all* of the following:

- a. Having another person present when the drug is ingested;
- b. Not ingesting the drug in a public place;
- c. Notifying the next of kin of the request for an aid-in-dying drug; (A physician cannot deny the request because an individual declines or is unable to notify next of kin.)
- d. Participating in a hospice or palliative care program;
- e. Maintaining the aid-in-dying drug in a safe and secure location until it is to be ingested.

6. ***Inform patient of right to rescind.***

The attending physician must inform the individual that s/he may withdraw or rescind the request for an aid-in-dying drug at any time and in any manner, and must offer a second opportunity to do so before prescribing the drug.<sup>19</sup>

7. ***Give patient Final Attestation Form.***

The attending physician must give the patient a *Final Attestation Form*, with the prescription, and must instruct patient to fill out and sign Form within forty-eight hours before taking the medication.<sup>20</sup>

8. ***Prescribe or deliver the aid-in-dying drug.***

The attending physician may provide the aid-in-dying drug either by dispensing it directly to the patient (if authorized under California and federal law), or, with the patient's written consent, by delivering the prescription to a pharmacist after contacting the pharmacist and informing him or her of the prescription(s). The physician cannot merely hand the patient a written prescription to take to the pharmacy.<sup>21</sup>

9. ***Comply with Act's documentation requirements.***

The attending physician must document all of the above in the patient's medical record<sup>22</sup> and submit such documentation to the California Department of Public Health (CDPH) within thirty calendar days after writing a prescription for an aid-in-dying drug; and must submit the *Attending Physician Follow-Up Form* to the CDPH within thirty days after the individual's death from ingesting the aid-in-dying drug.<sup>23</sup> The Act seems to assume the physician will know if the patient died as a result of ingesting the prescription.

It is important to note that neither the attending, nor consulting physician, nor mental health specialist can be related to the patient by blood, marriage, registered domestic partnership, adoption, or be entitled to a portion of the patient's estate upon death.<sup>24</sup>

## **AID-IN-DYING DRUG & DISPOSAL OF UNUSED DRUG**

The EOLO Act does not specify what type of drug(s) the physician should prescribe to hasten the dying process. It does direct that if the patient dies before ingesting the medication, the "person who has custody or control" of any unused medicine should personally deliver it to "the nearest qualified facility that properly disposes of controlled substances."<sup>25</sup> In California, this would be a County Sheriff's station.

## **PRIVACY AND CONFIDENTIALITY OF DATA REPORTED**

The California Department of Public Health ("CDPH") is required to collect and review the information that attending physicians are required to submit and to publish a report annually beginning in 2017. The information collected shall be confidential and shall be collected in a manner that protects the privacy of the patient, the patient's family, and any medical provider or pharmacist involved with the patient under the provisions of this part. The information shall not be disclosed, discoverable, or compelled to be produced in any civil, criminal, administrative, or other proceeding.<sup>26</sup>

One issue that was raised even before the law was effective was what cause of death should be reported



on the death certificate. The Act specifically provides that medical aid in dying is not suicide. Some earlier articles suggested that physicians could write either the underlying disease or “pursuant to the End of Life Option Act” as the cause of death, but the CDPH issued a memorandum on June 9, 2016, advising physicians to list the underlying illness as the cause of death, and not to write in “pursuant to the End of Life Option Act” or words to that effect. The CDPH listed several reasons for issuing the memorandum, including: privacy rights of the patients and health care professionals, the need for accurate and useful information on death certificates, and consistency with national and international practices on data gathering regarding mortalities.

## **PARTICIPATION IN THE EOLO ACT**

No one is required to “participate” under the EOLO Act.<sup>27</sup> This applies to patients as well as “health care providers” including physicians, pharmacists, other health care workers (e.g., chiropractors, nurses, medical technicians, emergency medical technicians), clinics, health dispensaries, and licensed health facilities.

Physicians and health care workers are protected if they *decline* to participate and if they *elect* to participate.<sup>28</sup> As detailed below, however, an employer or health care provider can prohibit employees and independent contractors from taking specified actions in certain circumstances.

***Protection for health care workers who decline to participate.*** Cal. Health & Safety Code §443.14(c) specifically overrides California Health & Safety Code §§442-442.7 also known as the “*Terminal Patients’ Right to Know End-of-Life Options Act*” signed by Governor Arnold Schwarzenegger in 2008 that became effective on January 1, 2009. It provides that a health care provider who refuses to “participate” cannot be subject to “civil, criminal, administrative, disciplinary, employment, credentialing, professional discipline, contractual liability, or medical staff action, sanction, or penalty or other liability” for refusing to do so. It specifies that this includes refusing to inform a patient regarding his or her rights under the EOLO Act, not referring an individual to a physician who will participate under the Act, and even not taking

“any action in support of an individual’s decision” to participate under the EOLO Act.

Absent this protection, California Health & Safety Code §442.5(a) would require a physician who makes a terminal diagnosis to notify the patient or his/her representative of their right to “comprehensive information and counseling regarding legal end-of-life options,” and to provide such information or refer the individual to a hospice provider or other organization that specializes in end-of-life care case management.

***Protection for health care workers and others who elect to participate.*** Cal. Health & Safety Code § 443.14 provides that “a person shall not be subject to civil or criminal liability solely because the person was present when the qualified individual self-administers the prescribed aid-in-dying drug.” It also specifies that such person will not be subject to civil or criminal liability for assisting the patient by preparing the aid-in-dying drug so long as the person does not help the patient in ingesting the aid-in-dying drug.

California Health & Safety Code §443.14(c) provides additional protections for health care providers, except that a “prohibiting” health care provider can limit some of the actions its employees or contractors can take while on their premises or acting within the scope of employment.<sup>29</sup>

***Prohibiting health care providers from participating.*** A “prohibiting” health care provider is one who has adopted a written policy electing *not* to participate in some or all of the activities authorized under the Act. Such provider may enforce its policy only if it has provided prior written notice of it to affected individuals and entities. The policy may prohibit employees and independent contractors from “participating” while “on premises owned or under the management or direct control of that prohibiting health care provider or while acting within the course and scope of any employment by, or contract with, the prohibiting health care provider.”<sup>30</sup> As detailed below, there are certain activities a physician can perform even in the course of employment or on premises of a prohibiting provider and others a physician can perform only outside the scope of employment or not on premises.

California Health & Safety Code Section 443.14 provides that a health care provider (such as a physician) shall not be subject to civil, criminal, administrative, disciplinary, employment, credentialing, professional discipline, contractual liability, or medical staff action, sanction, or penalty or other liability for participating under the Act, including, but not limited to:

- determining the diagnosis or prognosis of an individual,
- determining the capacity of an individual for purposes of qualifying for the act,
- providing information to an individual regarding this part, and
- providing a referral to a physician who participates in this part.

Under Cal. Health & Safety Code §443.16, however, it appears that a prohibiting health care provider can prohibit employees and independent contractors on premises and acting within the scope of employment from taking the third and fourth actions unless requested by the participant, and perhaps from taking the second action at all.

***Actions a “prohibiting” health care provider cannot prohibit.*** Physicians *can* perform the following activities even while acting within the scope of employment or while on premises of a prohibiting provider<sup>31</sup>:

- Make an initial determination that an individual has a terminal disease and inform him/her of the prognosis
- Provide information about the EOLO Act to a patient *who requests it*.
- Provide an individual, upon request, with a referral to another physician.

***Actions a prohibiting health care provider can prohibit.*** A prohibiting health care provider can prohibit its employees and independent contractors from taking the following actions while acting within the scope of employment or on premises<sup>32</sup>:

- Perform the duties of an attending physician, or

- Perform the duties of a consulting physician, or
- Perform the duties of a mental health specialist, or
- Deliver the prescription for, dispense, or deliver the aid-in dying drug,
- Be present when the individual takes the aid-in-dying drug

***Actions a prohibiting health care provider cannot prohibit outside the scope of employment.*** A prohibiting health care provider cannot prohibit any other health care provider, employee, independent contractor, or other person or entity from any of the following activities while on premises that are *not* owned or under the management or direct control of the prohibiting provider or while acting *outside* the course and scope of the participant’s duties as an employee of, or an independent contractor for, the prohibiting health care provider<sup>33</sup>:

- Participating, or entering into an agreement to participate, in activities authorized under the EOLO Act,
- Participating, or entering into an agreement to participate, in activities as an attending physician or consulting physician while on premises that are *not* owned or under the management or direct control of the prohibiting provider.

***Possible Sanctions.*** A prohibiting provider who provides prior written notice of its policy can take certain actions against violating entities.<sup>34</sup> Such actions include: loss of privileges, loss of membership, suspension, loss of employment, termination of any lease or other contract, and/or imposition of other nonmonetary remedies provided for in the lease or contract.

Sanctions may *not* be imposed on an individual health care provider for contracting with a qualified individual to perform authorized activities if the individual health care provider is acting *outside* the course and scope of his/her capacity as an employee or independent contractor. However, a licensing board or agency may sanction an individual provider “for conduct and actions constituting unprofessional

conduct, including failure to comply in good faith with this part.”

## CRIMINAL PENALTIES

The EOLO Act specifically provides that the following acts are punishable as a felony<sup>35</sup>:

- Knowingly alter or falsify a request for aid-in-dying medication without patient’s authorization
- Conceal or destroy a withdrawal or rescission of a request for aid-in-dying drug, if done with the intent or effect of causing the individual’s death
- Knowingly<sup>36</sup> coerce or exert undue influence on another to request or ingest an aid-in-dying drug, or to destroy a withdrawal or rescission, or to administer an aid-in-dying drug to an individual without his/her knowledge or consent.

The Act does not prohibit an individual from *preventing* another person from requesting an aid-in-dying drug or from ingesting it once it has been obtained. Thus, terminally ill patients are not protected from possible actions by family members who disagree with the patient’s decision to hasten death by ingesting an aid-in-dying drug.

The Act specifically notes that additional criminal penalties under other applicable laws may be imposed for “conduct inconsistent with this section” and that this Act does not authorize “a physician or any other person to end an individual’s life by lethal injection, mercy killing, or active euthanasia.”<sup>37</sup>

## EFFECT ON INSURANCE POLICIES & CONTRACTS

California Health & Safety Code §443.13 affects insurance policies and contracts in several ways. It provides that the *sale, procurement, or issuance* of a life, health, or annuity policy, health care service plan contract, or health benefit plan, or the *rate charged* for a policy or plan contract may not be conditioned upon or affected by a person making or rescinding a request for an aid-in-dying drug.<sup>38</sup>

It also states that self-administration of an aid-in-dying drug is not suicide<sup>39</sup> and “shall not have an effect upon a life, health, or annuity policy other than that of a natural death from the underlying disease.”<sup>40</sup>

The Act also prohibits insurance carriers and Health Maintenance Organizations (“HMO(s)”) from providing an insured any information about the availability of an aid-in-dying drug unless requested by the individual or his/her attending physician at the behest of the individual. Additionally, an insurer’s or HMO’s denial of treatment cannot also include information about the availability of aid-in-dying drug coverage.

## SUNSET PROVISION

The EOLO Act will sunset as of January 1, 2026, unless the Legislature further extends it before that date.



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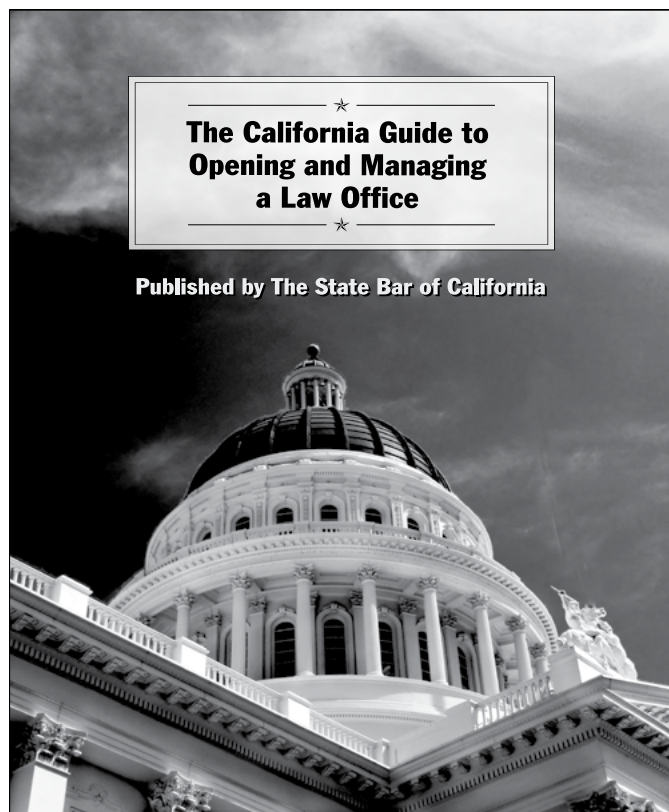
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## ENDNOTES

- 1 The other states are Oregon, Washington, Montana and Vermont.
- 2 Cal. Health & Safety Code §443.1(o).
- 3 The Act specifies several means by which an individual can demonstrate California residency, such as a current California driver’s license or state-issued ID, voter registration, owning or leasing property in California, or a filed California tax return from the most recent tax year.
- 4 “Terminal disease” is defined as an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, result in death within six months. Cal. Health & Safety Code §443.1 (q).

- 5 Cal. Health & Safety Code §443.2(a).
- 6 Cal. Health & Safety Code §443.2(c).
- 7 Cal. Health & Safety Code §443.1(c).
- 8 The five forms are: 1) Request for an Aid-in-Dying Drug to End my Life in a Humane and Dignified Manner; 2) Final Attestation for an Aid-in-Dying Drug to End my Life in a Humane and Dignified Manner; 3) Attending Physician Checklist & Compliance Form; 4) Consulting Physician Checklist & Compliance Form; and 5) End-of-Life Option Act Attending Physician Follow-Up Form. These forms can be downloaded at [www.cdph.ca.gov/Pages/EndofLifeOptionAct.aspx](http://www.cdph.ca.gov/Pages/EndofLifeOptionAct.aspx).
- 9 Cal. Health & Safety Code §443.3(b)(3)(A-D).
- 10 Cal. Health & Safety Code § 443.3(c).
- 11 Cal. Health & Safety Code §443.1(c).
- 12 Cal. Health & Safety Code §443.1(f).
- 13 Cal. Health & Safety Code § 443.1(l).
- 14 *See also* Cal. Health & Safety Code §443.5.
- 15 *See also* Cal. Health & Safety Code §443.6.
- 16 *See also* Cal. Health & Safety Code §443.7.
- 17 Cal. Health & Safety Code 443.5(a)(1)(A)(i).
- 18 Cal. Health & Safety Code §443.5(a)(4).
- 19 Cal. Health & Safety Code §443.5(a)(6) & (7).
- 20 Cal. Health & Safety Code §443.5(a)(12).
- 21 Cal. Health & Safety Code §§443.5(b)(1)&(2) and .5(c).
- 22 Cal. Health & Safety Code §443.8)
- 23 Cal. Health & Safety Code §443.9.
- 24 Cal. Health & Safety Code §443.17(d).
- 25 Cal. Health & Safety Code §443.20.
- 26 Cal. Health & Safety Code §443.19
- 27 Cal. Health & Safety Code §443.14(e)(1).
- 28 Cal. Health & Safety Code §443.14(b).
- 29 (Cal. Health & Safety Code §443.15).
- 30 Cal. Health & Safety Code §443.15.
- 31 Cal. Health & Safety Code §443.15(f)(3).
- 32 Cal. Health & Safety Code §443.15(f)(2).
- 33 Cal. Health & Safety Code §443.15(d).
- 34 Cal. Health & Safety Code 443.15(c).
- 35 Cal. Health & Safety Code §443.17.
- 36 “Knowingly” is as defined in Section 7 of the Penal Code.
- 37 Cal. Health & Safety Code §443.17(f) and §443.18.
- 38 Cal. Health & Safety Code §443.13(a)(1).
- 39 Cal. Health & Safety Code §443.18.
- 40 Cal. Health & Safety Code §443.13(b).



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# COACH'S CORNER

## Public Speaking Jitters? You Are Losing Business Development Opportunities.

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**Eleanor Southers** is a Professional Legal Coach who helps attorneys at all stages of their careers to become more successful and contented. Working one on one, Ms. Southers guides attorneys to uncover and fulfill their goals. She can be reached at [esouthers@aol.com](mailto:esouthers@aol.com) or her website: [www.southerslaw.net](http://www.southerslaw.net).

**For some, public speaking ranks right up there with root canals or at least something to be avoided at all cost.** Unfortunately, attorneys also know that being an effective speaker, whether it be in Court, a seminar, or in a classroom can be a great benefit to their profession.

**With that in mind, on why public speaking can be so intimidating how attorneys can work towards feeling more comfortable in public speaking:**

- Let us first look at why this topic causes so much fear. Are you afraid you will make a mistake? Do you have no idea what to speak about? Do you think everyone will walk out when you start speaking? Do you feel it will open you up to criticism? The reasons go on and on, can identify yours?
- For a first step, refute the idea that you cannot do it. This means you have to change your mind as well as your behavior. If you can identify your reason as really ridiculous (e.g., everyone will walk out when I start speaking), then you can begin your journey to confident public speaking. Take a look at what might disprove your thoughts. If you

cannot find something to speak about, look at the needs of your target audience. You can even ask them what they would like to find out or hear. You will also make fewer mistakes and be more confident if you are thoroughly prepared.

- If all else fails, think about joining a Toastmaster's Group where you can get some support and practice.

**Moving along, you have made up your mind that you can do it. Where do you start?** First, you will need an audience. This should be people in your "target market." That means people who have the ability to become clients or refer to you to clients. In addition, you will want people or a group where you can get some publicity and help in branding yourself as a competent and knowledgeable attorney.

For instance, if you are a family law attorney, Marriage and Family Therapists (MFCCs) might be part of your target market. They often need to refer clients to family law attorneys. What do these therapists need to know about the law? Is it about adoption? Is it about family support? Is it about bankruptcy? Is it about the rights of parents? There are many topics.



Next, you will need to find out where these groups meet. Do they have an organization that you can approach for speaking? If so, prepare a few topics and write up a proposal allowing them to pick from it a topic that they want to hear about. If you cannot find a group, it might be possible to form your own seminar by inviting all of your colleagues or membership to a group that you belong to in your area to a free seminar. Sometimes libraries will have free facilities to do this or you may have to use someone's large conference room or even rent a space. Just remember you will probably only get 10% to 15% of invited participants to actually show up to your presentation. Do not fret, it can be a blessing to have a very small crowd the first time around.

Before the presentation, you will have to PREPARE, PREPARE, AND PREPARE some more. Research and have a "core" of information that you are going to concentrate. This will make you less nervous because you have facts, opinions, and ideas that you are going to give to your audience. You will also need a beginning and an ending. Good speakers tell a story to open with, not a joke (that is old school).

Using the example of the family law attorney, often times you can start with a scary story about how a MFCC got in trouble for not knowing the law. You need something up front to grab the attention of the

audience immediately. Or, even better, a story of how an MFCC got a client out of trouble because he/she knew the law. If you do not have a story yourself, find one online, or in a publication.

The ending should be with a "call to action." What would you like your audience to do? This might include reading one of your articles that you have provided. Another might be to set up a consult with you over any issues or questions they have currently. Get creative here for more face-to-face time.

Lastly, know the venue and your audience. Arrive early to set things up for the presentation and to troubleshoot if needed. Coordinate with the sponsor (if there is one) so you know the time allotted for your presentation. Leave time for questions or tell your audience up front that you welcome comments and questions during your presentation. Be sure you have a microphone available if you need it. Whether or not MCLE credit is being offered, you should provide handouts, where you put your contact information.

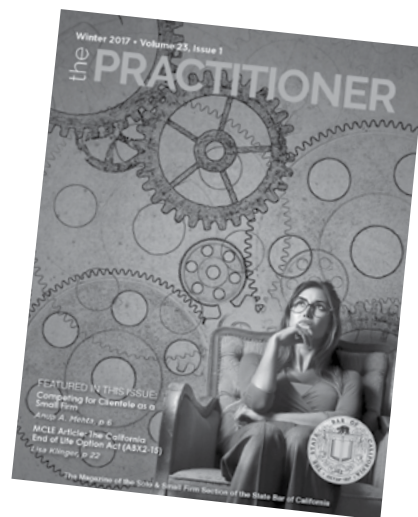
We have skimmed the surface of public speaking. Hopefully, this exercise may have calmed some of your fears. Now, go try it and increase your marketing and exposure. Your friends can be your first audience as it always helps to see a friendly face and get their reviews.

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