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the PRACTITIONER

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Letter From the Chair

By Renee N. G. Stackhouse



Renee Stackhouse is a San Diego trial attorney and founder of Stackhouse, APC who focuses on plaintiff's personal injury, military, and criminal defense. She is Chair of the CLA Solo & Small Firm Section,

Immediate Past President of California Women Lawyers, President of the CWL Foundation, and sits on the San Diego County Bar Association. She is faculty at the prestigious Gerry Spence Trial Lawyers College and the founder of MSheLE.com. She can be reached at Renee@StackhouseAPC.com.

Am I alone in feeling that there is a perception that a solo or small firm is not “on the same level” or as “prestigious” as a big firm? It seems that the belief is “the bigger the firm, the better.” Why is that? And, more importantly, do we unwittingly perpetuate it?

The last time someone asked you where you worked did you enthusiastically give them your firm name and elevator pitch? Or did you murmur, “I own my own firm” or “I’m a solo”?

If the murmur described sounds like your default response, I would ask you to make a conscious change and start responding with a strong, “I work at (law firm name). We/I do (elevator pitch).” I guarantee you will notice a difference in how people respond to you and what you do.

I, for one, am incredibly proud to run my own business and have done so for several years now. I’ve come a long way from the young attorney who finished drafting her first complaint as a solo and proudly put it in her outbox...before realizing there was no one to come whisk it away and do, well, *something* with it.

Solos and small firm practitioners make up the majority of lawyers in the state of California,

comprising an estimated 60-70 percent of active attorneys. These attorneys – *we* – are responsible for representing and advocating for clients, managing businesses, and rain-making; we are our business. Our face. Our reputation. Our word. Our character.

Lawyers of all demographics, at all stages in their career are turning to the #SSF lifestyle with purpose. I believe this is because now, more than ever, technology allows a solo or a small firm of lawyers to accomplish more than they ever could in the past. Technology has leveled the playing field.

Technology is one of the four cornerstones of what solos and small firms need to know to have a successful practice (along with how to open, manage, and grow your firm). So, I am excited to see this issue dedicated to “Technology” and thank Editor-in-Chief Somita Basu for focusing on the topic so that we can meet our Mission; to “guide our members on their path to becoming strong, competent and ethical solo and small firm business owners.”

the PRACTITIONER FOR SOLO & SMALL FIRMS

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I also want to thank the SSF Awards Committee (Robbie Klein, Evie Jeang, Cindy Elkins, and Eileen Eib) for their work in vetting and recommending for selection some truly incomparable SSF lawyers who will be honored as our inaugural Excellence Award recipients.

Please join me in congratulating Norma J. Williams of Williams & Associates (Los Angeles), Sheila-Marie Finkelstein of Ahava Law (Newport Beach), and Summer C. Selleck of S.C. Selleck Law (Walnut Creek) on their recognition. These strong women lawyers exemplify what we as SSF practitioners should strive to accomplish. They are role models and leaders and we are proud to recognize them and celebrate them at the our SSF Reception on June 14, 2019 at the Solo Summit in Huntington Beach. We hope you will join us.

As solos and small firm practitioners, there is so much to learn; about our practice area, about our business, about how to be the best we can be, and from each other. The one take-away I'd like you to

make this month is that it takes courage to be a solo or small firm practitioner.

As Christopher Robin told Pooh Bear, "There is something you must always remember... You are braver than you believe, stronger than you seem, and smarter than you think."

I hope that you keep that in mind when you identify yourself as a solo or small firm practitioner and you do so with pride. It's time to reframe the perception of solos and small firms.

#WeAreSSF

Renee N. G. Stackhouse



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Letter From the Editor

By Somita Basu

Technology has transformed our personal lives and its effect on the practice of law is no less impactful. As solo and small firm practitioners, many of us are looking for ways to make our practices more efficient, more effective and ultimately, more profitable. Technology can be the great equalizer, enabling small firms and solos to take on cases and service clients in a way that was just not possible before.

The paperless office, virtual law practice, and the plethora of applications, software, and hardware available to the solo or small firm attorney is unprecedented. We have so many options, it's hard to decide which way to turn.

In this issue of *The Practitioner*, we bring you an array of technology focused articles to help you leverage technology in the most effective way possible for your practice. In our lead article, James Crosby guides us through the tools he uses to back up his data, increase his productivity through dictation software, and how to leverage eDiscovery to not only reduce costs to clients but as a marketing tool.

With the advent of e-filing in multiple jurisdictions, Jeffrey Williams provides an insightful primer on e-filing in California appellate courts. Every litigator can come away with some tips on how to avoid the most common mistakes when e-filing for their appellate practice.

Our Section Chair, Renee Stackhouse writes about how mobile lawyering works for her practice. This article provides guidance on not just what apps to use, but also the 'tech-thics' of practicing while on the go, as many of us do.

We have included in this issue a spotlight on a solo/small firm practitioner, Kris Mukerji. Kris is based in



Somita Basu, Esq., is a founding principal and managing partner of the Santa Clara, Beverly Hills, and Las Vegas offices of Norton Basu LLP. Ms. Basu is currently the incoming Editor-In-Chief of *The Practitioner*, a quarterly publication distributed by the the California Lawyers' Association's Solo and Small Firm Section, where she is also serves on the Executive Committee. Ms. Basu is based out of the Santa Clara office and lives in the South Bay with her family.

San Diego and has a passion for his practice to which many solos and small firm attorneys can relate.

Technology is not without its risks and uncharted frontiers. Cryptocurrency constitutes a risky, uncharted area for many attorneys that raises more questions the more you learn about it. David Majchrzak discusses the use of cryptocurrency in the law and the ethics involved in accepting this form of payment as an attorney.

It's well known that the biggest risk involved with becoming a technology dependent practice is the risk of hacking and electronic subterfuge. Bill Kammer provides us with elementary but necessary tips about cybersecurity.

If increasing the productivity and profitability of your practice through technological and other innovations interests you, please consider joining us from June 13th to June 15th at the California Solo and Small Firm Summit at the Hyatt Regency in Huntington Beach. The theme for the Summit is "The 21st Century Law Firm". We know you will come away from the Summit with great ideas to improve your practice. We look forward to seeing you there!

Solo/Small Firm Tech – Lean, Efficient, Effective

By James D. Crosby

Successful solos and small firms have a number of increasingly valuable attributes that can attract new clients – excellent client service and communications; greater availability to clients across various platforms; lean, efficient operations resulting in lean, fair billing; forward thinking use of technology to foster efficiencies and effectiveness; and, a more direct connection between lawyer and client. These attributes effectively position solos and small firms to compete against larger firms for work in a rapidly changing and highly competitive legal market. With the technology available to attorneys and the associated decreasing cost, the percentage of cases that only large firms can handle - because of size, complexity, high stakes, or institutional inertia – is becoming ever smaller. But, competing for and getting the work in the door is only half the battle – solos and small firms must be prepared to handle the work they attract, compete with larger well-heeled, well-staffed firms, and effectively advocate, and succeed, for their clients. To do so, solos and small firms must dispense with old, inefficient, ways of practice and use the tech available to be lean, efficient, and effective.

There are multitudes of devices, platforms, apps, and software available for attorneys to do their work in various settings. More options pop up every day. Like all of you, I want to be as efficient and effective as possible in my work, utilizing the newest devices and technologies to the extent they are cost-effective and match my skill set. This article focuses on several areas where I have worked to develop what I think are effective and cost-efficient uses of technology in my



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solo practice. Those areas are Data Storage, Offsite Access, and Content Creation. And, I will add a few small comments about eDiscovery software.

First, for context, I am a 35-year trial attorney with a solo complex business litigation/trial practice. On average, I try a couple of cases per year, a week or two in length, equal mix of bench and jury. I have a full-time paralegal who works up the cases with me and assists in trial. I also work with a contract attorney on a project basis and, occasionally, a law clerk from USD School of Law for research. It's an effective setup to prepare and try cases.

DATA STORAGE:

All my cases files are digital. We scan everything and maintain virtually no paper files. It took me some time to get to a true paperless office. The biggest jump was not creating and using electronic files, but, rather, getting rid of the paper. It doesn't make much sense to go paperless, and still keep the paper. So when something comes in on paper, we scan it, put the electronic version in its proper digital case file, and shred the paper. Small jobs we scan in-house. Large jobs, we send out to a vendor. This is getting to be less of an issue with electronic filing and service in most every case. Physical client documents are likewise scanned and maintained electronically. To the extent we hold physical client documents, which is rarely, we put them in banker's boxes in a secure location in the office.

My data is stored on Synology encrypted network-attached storage (NAS) devices. The NASs are in a

secure location in my office and networked with the office computers. They contain multiple hard-drives which in turn maintain duplicate copies of all stored data. If a NAS hard-drive fails, we would just replace it, and all data would be safe and duplicated again on the replaced hard-drive. All hard-drives on a NAS would have to fail at the same time to lose data. Additionally, each NAS is backed-up nightly to an encrypted external hard-drive. The NASs are easily expandable to much large capacities (up to 20TB) – just add larger and/or more hard drives.

My case and office files are located on one NAS and it's all folder-based. Each case has a folder with sub folders for Pleadings, Discovery, etc., each containing the corresponding documents in PDF format, maintained in chronological order. This is just the digital equivalent of old-school paper case files with expanding folders and tabbed clips.

Data and document productions from opponents and client data and documents are on a separate, much larger NAS. This NAS is part of a recent eDiscovery upgrade meant to ensure we can continue to handle the eDiscovery data and document storage and production requirements of most any case.

For extra protection, all data on both NASs is backed up continuously on-line with Carbonite. And, the back-up freak I am, I cycle a back-up of all my data on an encrypted external hard drive to and from home on a weekly basis. I use Retrospect software to quickly duplicate and update the data to the hard-drive. Needless to say, some very serious stuff would have to happen for me to lose my data. And, with the exception of the cloud-based Carbonite backup, everything is in-house, backed-up, encrypted, and password protected.

This entire set-up cost slightly under \$5,000 and has worked perfectly for several years now.

OFFSITE ACCESS:

The NASs holding my case and firm data are accessible offsite through an encrypted, multiple password-protected, VPN incorporated into the Synology NAS software. It works great. I can work directly off my case files from my home desktop or anywhere with my laptop. I just need Wi-Fi, or cellular with the Personal Hotspot function on my iPhone. Except in instances

of lousy Wi-Fi or cellular, there is little, if any, keystroke delay working through the VPN. This useable offsite VPN file access is something that just a few years ago would have been cost-prohibitive for all but the largest of firms. Now, its amazingly inexpensive.

CONTENT CREATION:

Perhaps the biggest change to my practice over the last decade is my increasing reliance on dictation software. I now dictate most everything – emails, memos, motions, orders, pleadings, letters (in those rare instances where I actually send a letter in the mail) – directly into the computer using Dragon NaturallySpeaking software. I use templates and dictate the substance and content into the template. I will edit and clean things up using a combination of the keyboard and dictation. However, the more I type, the less efficient I become. For me, speaking content is much faster than typing content. And in my opinion, the recent versions of the Dragon software are simply extraordinary, making dictation fast and remarkably accurate. The more you use the software the better it gets. In some ways, for me, it is the perfect combination of old-school skills and new-school tech. I cut my teeth as a lawyer dictating most everything onto micro-cassettes for typing by staff. That dictation cadence I learned as a young lawyer works perfectly with Dragon.

For a long period of time, I used a small Bluetooth headset, but begrudgingly. I just didn't like wearing it. Now, I use a high-end desktop microphone, a Yeti USB microphone by Blue that on my desk next to my monitor. It works wonderfully, allowing me to around my office and speak in a normal voice. The Yeti microphone picks up my voice accurately, and my computer transcribes my content with a high degree of accuracy. With just a few Dragon commands, I create, spell check, and send emails verbally, with few if any keystrokes.

On my laptop, a Dell XPS with lots of memory and a very fast processor, I have found the built-in microphone works remarkably well with Dragon and I have ditched the Bluetooth headset all together. I can simply speak at my laptop and, using Dragon, it creates my dictated content with great accuracy. In fact, large chunks of this article were dictated by me sitting on

the couch, the laptop on the coffee table, using Dragon and the laptop mic.

With my iPhone, I record content using a simple audio recording app and then email the recording to myself. Back at the office, I use Dragon to transcribe the audio recording. I dictate my time slips into my time-keeping/billing software as I work at my desk. I also track my time on my phone with a timekeeping mobile app which then synchronizes with my desktop timekeeping database. I have found that my time-keeping, and therefore my billing, is much more accurate using concurrent dictation of my time as opposed to entering slips by keyboard or, heaven forbid, by hand.

So, it all kind of circles back around to the same processes lawyers have always used, but with new tech and less overhead. In 1988, coming from a hearing, I would dictate an order or a notice of ruling into a micro-cassette and, back at the office, hand the cassette to a legal secretary to type up. In 2019, coming from a hearing, I will dictate an order or a notice of ruling into my phone and then email the audio recording to my office for my computer to transcribe. Amazing.

eDISCOVERY SOFTWARE

Clearly, one of the biggest issues now for any litigation practice in any case of any degree of complexity is the sheer volume of documents and electronically stored information ('ESI'). Even the simplest of contract cases can involve thousands of emails and other voluminous ESI in various different native formats. Investment in and, more importantly, actual use of eDiscovery software to input, categorize, search, and produce large volumes of ESI is no longer a luxury; it is essential and must be a core function of any competent litigation/trial practice. Further, it is increasingly becoming a significant factor in the marketing of a litigation practice. My representation to a prospective client that my practice has invested in an eDiscovery framework to handle the ESI burdens of litigation against hefty opponents in the digital age is a key part of any prospective client interview or pitch for work. Thus, the ability to handle the extraordinary volume of ESI now involved in almost any case is not only essential to my effectively representing clients, it also an effective, if not essential, marketing tool.

I use Eclipse SE software with all data residing on stand-alone NAS, as described above, and my paralegal has undergone significant training to use the software. Addition of this eDiscovery capacity has given me a distinct advantage in numerous cases, has resulted in reduced billings to my clients for document review and production, and has been a useful tool in my efforts to attract new work. It has paid for itself many times over in many different ways.

In investing in and building the processes and structures described above, I have deliberately tried to dispense with old, inefficient ways of practice and to utilize readily-available tech to build and operate a lean, efficient, and competitive litigation and trial practice. In my day-to-day work, in court, in pitches for work, in interviews by prospective clients and in my practice as a whole, it has been well worth the investment and effort. And if I can do it, so can you.

Portions of this article were first published in Mr. Crosby's blog, Trial Call, at www.trialcall.net and later appeared in the July/August 2018 issue of San Diego Lawyer magazine. They are reprinted here with the permission of Mr. Crosby and the San Diego County Bar Association.



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TO OUR 2019 AWARD RECIPIENTS

We are pleased to announce the 2019 inaugural Excellence Awards recipients:

Norma J. Williams (Los Angeles), Excellence in Practice
Sheila-Marie Finkelstein (Newport Beach), Excellence in Service
Summer C. Selleck (Walnut Creek), Excellence in Service



Norma
Williams



Sheila-Marie
Finkelstein



Summer C.
Selleck

The honorees will be recognized at the Solo and Small Firm Summit on June 13-15, 2019 in Huntington Beach, at a reception on June 14, 2019. Thank you to CEB for generously gifting these honorees with a 1 year subscription to OnLaw Library.

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On Appeal: A Primer on E-Filing in State Appellate Courts

By Jeffrey N. Williams

It seems hard to believe, but the concept of electronic filing in the California state courts is nearing its twentieth anniversary.^{1,2} E-filing was promised to bring the legal profession into the information age, streamline the filing process, and deliver cost savings to clients by cutting out cumbersome printing and delivery logistics associated with paper filing.

However, the roll-out left something to be desired, and even in 2019 many large law firms have opted to hire dedicated filing staff to stay up-to-speed on the patchwork of e-filing systems and practices that have been implemented throughout the superior courts. That is a luxury that a solo or small-firm litigation practice is unlikely to have.

The alternative, of course, is to pay an attorney service to handle our client's filings. Indeed, some of the superior courts have even cemented the role of the attorney service by requiring all e-filings to be routed through certified third-party providers before reaching the court. Nonetheless, how many clients like seeing line items for filing expenses on their invoices? Is not the elimination of line item billing and invoicing what e-filing was supposed to eliminate in the first place?

Fortunately, despite the difficulties that seem to persist in the superior courts, the appellate courts have finally all gotten on the same page and implemented a uniform e-filing system called TrueFiling. TrueFiling is relatively user-friendly and can both file and serve your appellate pleadings in a matter of minutes, all without the use of an attorney service or even an assistant, if one is so inclined. Following its adoption



Mr. Williams is an attorney at the law firm of Wargo & French LLP and has been certified as a specialist in the field of appellate law by the California State Bar. He is admitted to practice and has significant experience

in the California state appellate courts, along with the U.S. Court of Appeals for the Ninth and Eleventh Circuits. He is available for consultations or referrals and can be contacted at jwilliams@wargofrench.com.

by the Second District effective October 30, 2017, electronic submission through TrueFiling is now mandatory in all six districts of the California Court of Appeal and for most California Supreme Court filings. (The most significant exception to mandatory e-filing in the supreme court concerns merits briefs and other documents filed after the court grants a petition for review. Those documents actually cannot be e-filed under the current rules, for reasons that remain a bit unclear.³)

Therefore, what do we need to know before firing off that next appellate brief with lightning-quick speed? Given the caveat that court rules are always subject to change and are undoubtedly the best reference for current, detailed information, here is a brief primer on some best practices to avoid that dreaded 'rejection' e-mail from the clerk.

THE TRUEFILING SYSTEM

Although a few minutes poking around on the website after registration is probably the best way to answer any questions about the process, here's how to get started with TrueFiling. First, either locate a pending appeal by using the "Case Search" function, or if this is the first filing in an original proceeding or a supreme court petition for review, use the "Initiate Case" function to open a new matter directly. The tricky part about this, however, is that a court must be selected as a "favorite" before it will display in the menu here. Select a court either by using the "Court Lookup" button next to the drop-down menu, or by going directly to the "favorites" page using the menu bar to the left.

Second, make sure that all case participants—including any assistants that might be filing or processing documents—are registered as contacts once you have reached the “Case Detail” page. TrueFiling will e-serve a filing on all case contacts for an additional fee, so it is important to have the necessary recipients in place before you or your opponent takes advantage of this feature. While none of the appellate courts currently require e-service, it is immensely helpful, and not just for the environment (although the trees will thank you). Indeed, one of the best features of TrueFiling is that it automatically generates a proof of service for all e-served documents, certifying that the document was sent to an attorney’s registered e-mail address. This makes it a bit more difficult for an opponent to claim that your filing was lost in the mail.

Third, start your filing by selecting “Create New Bundle.” A “bundle” can be a single document or a group of documents; for example, a brief and an appendix, or a motion with an accompanying request for judicial notice and proposed order(s). Think of it as the envelope in which your paper filing would otherwise be sent to the court. TrueFiling automatically applies the same properties to each document in a bundle, such as the filing attorney and the service recipients. Once all the documents in a bundle have been uploaded, they can all be submitted together. From there, TrueFiling will deliver the bundle to the court and to any e-service recipients chosen. An important tip is to be sure to select the correct event associated with the document being filed, particularly if there is a fee due in connection with the filing (for example, the party’s first brief in a case). If TrueFiling fails to charge the necessary filing fee because the correct event was not selected, the document may make it through TrueFiling, but will be rejected once it gets to the court.

Fourth and finally, after submitting, wait for an e-mail from TrueFiling letting you know that the bundle has been received by the court and is awaiting review by a clerk. An additional e-mail will follow—sometimes within minutes, but potentially in the next day or two—to state whether the clerk has accepted or rejected the filing. If accepted, you’re all finished. If rejected, the clerk will let you know what deficiencies need to be corrected before the document(s) can be

re-submitted. Keep in mind that while you only have to pay a filing fee to the court once, convenience and/or service fees to TrueFiling must be paid for each submission, so it is important to ensure that the correct event is selected and that the documents themselves comply with all relevant court rules.

BRIEF AND MOTION FORMATTING

Did I get your attention with that last bit about the fees? Yes, unfortunately, one of the pitfalls of the TrueFiling system is that non-compliance with court rules can not only force you to go through the whole process again, but to pay again for the pleasure of doing so. It would be impossible to cover all of the courts’ individual rules in detail here, but here are some of the most common errors that can cause a filing to be rejected.

Text-searchable PDF formatting. This is, by far, both the easiest rule to follow as well as the fastest way to elicit a rejection e-mail. All districts of the court of appeal as well as the supreme court require that an e-filed brief or motion be submitted as a text-searchable PDF. What this means is that the brief must either be converted to PDF directly from your word processor or scanned using Optical Character Recognition (“OCR”) technology.

Given that OCR is still a bit unreliable and printing a document only so you can scan it back to your computer seems redundant, the former method comes highly recommended. In most recent versions of Microsoft Word, simply select “PDF” in the drop-down menu labeled “Save as type” when saving the brief to your hard drive. Then, to confirm that the document you’ve created is text-searchable before filing, open it in your PDF viewer and search for a word or phrase using the “Find” (Ctrl-F or Command-F) function. If your PDF viewer is able to navigate to the word or phrase, the document is text-searchable. Just make sure that you know the word or phrase is actually in the document before driving yourself crazy doing this!

Electronic bookmarks. All districts of the court of appeal and the supreme court also require that e-filed briefs, motions, and appendices contain electronic bookmarks. Electronic bookmarks are text links that appear in the bookmarks panel of an electronic

document (they are not the same as hyperlinks, which are the focus of the next topic). While bookmarks can be created after a document is otherwise finished using a PDF editor like Adobe Acrobat, the easiest way to create them is directly in your word processor.

In Microsoft Word, use the “Styles” toolbar to assign the “Heading 1” style to each of the headings in your brief. “Heading 2,” “Heading 3” and so on can be used for subheadings. Be sure to tag not only the headings and subheadings in the body of a brief, but any other navigable component of the document such as a declaration, certificate of word count, certificate of interested parties, or proof of service. If the filing also includes tabs, exhibits, or attachments—which will frequently be the case when creating an appendix—those each have to be separately bookmarked as well.

Once complete, a version of what should essentially look like a table of contents will form in the navigation pane on the left side of your screen (in fact, using the “Heading” styles in this manner is also the easiest way to create your table of contents). The bookmarks are now in the Word document, but one more step is needed to make sure they also end up in the PDF for e-filing. Following the same directions as laid out above for saving a text-searchable PDF, and after selecting “PDF” in the drop-down menu labeled “Save as type,” an “Options” button should appear below. Select that button and make sure that the “Create bookmarks using . . . Headings” boxes are checked before proceeding to save the file. As before, confirm that the document you have created contains the bookmarks before filing by opening it in your PDF viewer.

Hyperlinks. Hyperlinks are links in the actual body of a document that allow the reader to quickly navigate to an outside document. They are most frequently used to link to case or record citations. Unlike electronic bookmarks, hyperlinks are not currently required in any of the appellate courts. Nevertheless, they are still highly recommended. For one, the courts expressly encourage the use of hyperlinks because they save time. For another, there is nothing that makes an argument quite as persuasive as the ability to see—in one short click—the document in the record or the language from a case that directly supports your position.

Creating hyperlinks to case citations is simple. First, paste the case citation into Westlaw or Lexis. Be sure to include the pincite so that you are taken to the correct page(s) of the opinion or ruling. Then, look up to the URL (website address) at the top of your web browser. At the end of the URL, there should be a section that begins with a pound sign (#); this is the portion that causes a web browser to navigate directly to the pincited page. Copy the entire URL before opening your word processor back up. (Do not use the built-in link builder from Westlaw, as it will not include the aforementioned portion of the URL and therefore will not direct the reader to the pincited page.) Highlight the case citation and insert the hyperlink. In Microsoft Word, this is done using the “Insert . . . Hyperlink” function in the menu bar, or simply right-clicking the highlighted text and selecting the “Hyperlink” function there.

Creating hyperlinks to specific documents in the appellate record or an appendix is a bit more difficult. It can also be unreliable, depending on how the court downloads and views the brief and record. However, for those that care to go the extra mile, first be sure that your brief or motion is saved in the same folder on your hard drive as the record or appendix. From there, using Microsoft Word, select the “Hyperlink” function as discussed above and check the boxes for “Existing File or Web Page” and “Current Folder” along with the target document.

At this point, it would be great to just link to one of the electronic bookmarks we already created in the target document, right? No such luck. Microsoft Word, at least, does not allow linking to a bookmark within a PDF. The only options are to link to a “Named Destination”—which requires the use of a separate PDF editor such as Adobe Acrobat—or to link to a specific page of the document. To link to a specific page, select the target document as discussed above, then manually type at the end of the file name “#page=” and the number of the page you wish to link to. Unfortunately, even after all of that, the resulting link will only navigate to the correct page if opened in a web browser, not in a PDF viewer. However, enterprising court staff able to view the citation correctly will surely thank you for your hard work.

Consecutive pagination. One problem posed by the practice of linking or citing to certain pages within an e-filed document, of course, is that what a web browser or PDF viewer considers to be “page 1” may not be what the writer considers to be “page 1.” In fact, it is relatively commonplace for lawyers to use different pagination for different parts of a brief. The caption page may have no page number at all, and the table of contents and table of authorities may be paginated by roman numerals, pushing “page 1” to the body of the brief.

To combat this, all six districts of the court of appeal and supreme court require that e-filed documents be consecutively paginated using Arabic numerals (1, 2, 3, and so on). The page numbers listed in tables and indices must match both the numbers at the bottom of each page as well as the page counter within the web browser or PDF viewer. This allows the court and the parties to accurately locate the cited pages and ensures that page citations are consistent. The courts do generally allow parties to “suppress” the number on the caption page in the sense that it need not expressly appear there, but the caption page should still be considered “page 1” with all following pages numbered consecutively.

SERVICE OF E-FILED DOCUMENTS AND COPIES

Lastly, the advent of e-filing has eliminated a substantial amount of the previous paper-filing requirements, which ranged from simple (making sure the cover of your appeal brief was in the correct color) to fairly onerous (having to provide up to thirteen additional copies of a petition upon filing!). All districts of the court of appeal have promulgated local rules, for example, allowing a party to e-file a single PDF copy of a brief rather than the numerous additional paper copies otherwise required under Rule of Court 8.44.⁴ Additionally, e-filing a brief in the court of appeal satisfies any requirement to serve a copy of that brief on the supreme court, and vice versa. As for the supreme court’s own e-filing process, it has been significantly streamlined, but the court continues to require a single paper copy of most documents e-filed in civil, criminal, death penalty and habeas corpus matters.⁵

Moreover, an attorney’s registration to use the TrueFiling system—which is now mandatory—constitutes consent to electronic service of documents through TrueFiling. This generally eliminates the need to serve other parties in the case with paper documents although, as discussed above, e-service through TrueFiling is not currently required. The exception is in cases where a party is representing himself or herself *pro se* and is exempted from the requirement to register with TrueFiling. Those parties still must be served with paper copies of all filings.

Parties and counsel should also continue to be aware of the rules for service on non-parties, which have not changed. A copy of each appellate brief must be served upon the superior court clerk for delivery to the trial judge.⁶ In cases involving non-party public officers or agencies, certain statutes require those non-parties to be served with a copy of the brief.⁷ And where a case questions the constitutionality of a state statute or implicates state interests in certain enumerated ways, a copy of the brief must be served on the Attorney General.⁸

At end, it can seem a bit daunting to tackle an e-filing with one of the courts of appeal or the supreme court, particularly for newer attorneys or those whose most recent experience in the appellate courts took place before the adoption of the TrueFiling system. However, the relative uniformity in e-filing procedures and rules thankfully makes it easy to get up to speed in any of the appellate courts throughout the state. Doing so can help to ease a bit of the burden on courts and clients alike.

ENDNOTES

- 1 S. B. 367 1999-2000 Reg. Sess. (Cal. 1999) which added CIV. PROC. CODE § 1010.6 to the statutory rolls, was passed all the way back in 1999.
- 2 CIV. PROC. CODE § 1010.6.
- 3 See CAL. SUP. CT RULES REGARDING ELECTRONIC FILING r 2-3 (last amended May 1, 2018).
- 4 CAL. CT. R. 8.44; see, e.g., 1st Dist. L.R. 16.
- 5 See CAL. SUP. CT RULES REGARDING ELECTRONIC FILING, r 5 (last amended May 1, 2018).
- 6 CAL. CT. R. 8.212(c)(1); 8.500(f)(1).
- 7 CAL. CT. R. 8.212(c)(3); 8.500(f)(2).
- 8 CAL. CT. R. 8.29(c).

MCLE Article: On the Move: The In, Outs, & Tech-thics of Mobile Lawyering

By Renee N. G. Stackhouse



Renee Stackhouse is a San Diego trial attorney and founder of Stackhouse, APC who focuses on plaintiff's personal injury, military, and criminal defense. She is Chair of the CLA Solo & Small Firm Section, Immediate Past

President of California Women Lawyers, President of the CWL Foundation, and is a Vice President on the San Diego County Bar Association, Chairing the Programs, Education & Technology Committee. She is faculty at the prestigious Gerry Spence Trial Lawyers College and the founder of MShelE.com. She can be reached at Renee@StackhouseAPC.com.

One of the greatest benefits of being a solo practitioner in 2019 is the freedom that I have to travel from place to place and have my law practice be virtually uninterrupted thanks to modern technology. I've had the benefit of working with and learning from the incomparable Adriana Linares, of Law Tech Partners and Member Technology Officer of the San Diego County Bar Association, who has helped me learn and grow as a mobile lawyer. I'm happy to share what I've learned with you and hope that it helps you practice the way you want to, while protecting your client's confidential information.

MAKING THE BEST USE OF DEVICES ON THE GO.

I use a mix of Apple and PC hardware. I can't seem to make nice with Apple laptops but love every other Apple product. I use a Lenovo ThinkPad X1 laptop, an iPad, and my iPhone.

- Laptop

I have two physical offices about 45 miles apart from each other and I travel quite a bit. One of the best decisions I made was to get rid of desk top computers at the offices. Instead, I have two monitors at each office, a laptop stand, and a docking station. This allows me to keep everything centralized on my laptop and in the cloud. As a side note, I could write another entire article about the cloud, but let's just say

that one of the foundations for being a mobile lawyer is that your files are in the cloud so you can access them from any place that has an internet connection. Thus far, ethics opinions conclude that lawyers can use the cloud for file storage if they vet that the cloud computing vendor's data is stored securely. 'Vetting' includes asking questions like "Will I have unrestricted access to the stored data?", "Will the public have access to my data?" and "What is the cost of the service, how is it paid, and what happens in the event of nonpayment?"¹

The office setup described above allows me to plug in at whatever office I'm at, giving me three screens on which to work. If you aren't using multiple screens, now is the time to start. You can accomplish so much more with multiple screens!

- iPad

I primarily use my iPad for reading and writing when I'm not at my office. Depositions, pdfs, and images are much easier to review on an iPad than on a phone and also easy to mark up on a tablet. It's perfect for taking notes during a meeting (you can handwrite, type, or handwrite and have the text convert to type print) or signing documents electronically and then emailing or uploading onto the cloud to immediately save to the file.

- iPhone

Email access and apps galore keep me on the move on my iPhone.

APPS ARE YOUR BEST FRIEND AS A MOBILE LAWYER.

Apps can range from free to several hundred dollars, depending on what they do and who makes them. There are thousands of apps out there, but here are a few that are my go-tos (Full disclosure: I don't get any kick-backs for telling you about these apps. I just like them.):

Apps that Streamline

- *Gboard* is the Google keyboard that you can download onto your phone. It lets you do "glide typing" (lets you slide your finger from letter to letter instead of hunting and pecking). Gboard also has a built in Google search function. You can customize the way it looks, which is fun.
- *Numerical* is a calculator app that is customizable, features automatic brackets, has a running history and doesn't have an equal button- your result appears as you type.
- *Google Tasks* is a stand alone Google task list, that syncs across all devices and integrates with Gmail and Google Calendar.
- *Office365* is the subscription to all the Office products you need. You always have the latest version and it covers multiple devices, so you can have the products where you need them, including your tablet and your phone.
- *OneNote* lets you create digital binders of information. You can take notes, insert pdfs, draw, and insert audio. You can also share these notebooks with others.
- *ABBYY FineScanner* is an app that scans and can save as jpeg or pdf documents. It can split a two page book photo into two separate images, and straightens curved text. I also allows you to annotate pdfs and

exports to the cloud. Scannable by Evernote is another great app.

Apps that Help You Communicate

- *Basecamp* and *Trello* are project management software programs that you can use to coordinate and collaborate with a group of people.
- *Slack* is another team collaboration tool which is a great way to preserve messages and file sharing.
- *Doodle* is a tool that allows people to schedule events and meetings much faster than the normal multiple emails back and forth. It creates a calendar of available/proposed times and let's participants mark in one spot what works for them so everyone can see the best day/time for the meeting or event.
- *Zoom* is a video conferencing tool that lets you work with people from a distance and face-to-face. If you don't want anyone to see that you're working from home in pajamas, you can use Zoom for audio only calls as well.
- *HelloSign* lets you sign documents or request signatures from other people electronically, even getting multiple signatures at one time.

Apps that Help You Lawyer

- *Clio* is a platform that can single-handedly change a solo or small firm's life and has everything from client management to conflict checking to time keeping to billing.
- *Hourtracker* is a great on-the-go way to track your time, letting you customize your rate, how you round time, and allows you to export the time sheets.
- *Fastcase* is a legal research app for lawyers that has the advantage of not requiring annual contracts, so you can pay monthly and only use it as and when you need it.

- *LawPay* lets you process payment to your operating or IOLTA account and also lets you invoice clients through a secure link. LawPay has the advantage of integrating with Clio practice management software.

Apps that Help You Travel

- *Waze* is a GPS navigation software app. It is amazingly accurate at estimating time of arrival, finding alternative routes, and has a feature that lets you set the time you want to arrive somewhere, and it notifies you when you need to leave to get there by that time.
- *Dryver* is an app that helps you find a person to drive you around in your own car. A must for anyone who wants to be a “Lincoln Lawyer.”
- *SpotHero* is a parking reservation service that connects drivers looking to reserve and prepay for parking spaces with parking lots, garages and valet services.

The Tech Go Bag

The Tech Go Bag has changed my life. My life used to be a series of “It’s a quick day trip, I don’t need a charger” to “Hmmm. I feel like I’m forgetting to pack something...” only to realize later that I did, in fact, need a charger and the thing I forgot to pack was a plug and chord for my phone or iPad.

I’ve learned one simple fix: Preparing and carrying a Tech Go Bag. In it I have:

- A tiny Bluetooth keyboard that I can use for my phone or tablet;
- A travel sized mouse;
- A small apple plug;
- A large apple plug;
- A two port USB car charger;
- Two battery power banks;
- A cord to power the back up battery chargers;

- A short lightening chord;
- A long lightening chord;
- My iPad tablet pen;
- A phone stand;
- Two USB flash drives;
- A mini extension chord with three plugs and two USB ports;
- A presentation pointer.

All of these items fit in an 8 x 10.5 inch zipper pouch which I carry in my bag at all times. Since I started carrying this, I’ve been prepared for every meeting and never been without power. Life. Changing.

TECH-THICS.

With great mobility, comes great responsibility.

California recently revamped its Professional Rules of Conduct and those new rules went into effect on November 1, 2018. However, as part of the revamp, California did not choose to adopt American Bar Association (“ABA”) Model Rule 1.1 which explicitly requires a lawyer to maintain the requisite knowledge and skill including the benefits and risks associated with relevant technology in order to be competent. However, it should be noted that the “benefits and risks associated with relevant technology” maybe encompassed in “the learning and skill” necessary for the [competent] performance of [the legal] service.² Neither did California adopt ABA Model Rule 1.6 which states in relevant part that “a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” Instead, California’s Rule of Professional Conduct 1.6 states that a lawyer shall not reveal information protected by Business and Professions Code section 6068, Admission to the Practice of Law, (to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client) unless permitted to by the client or under certain circumstances. It is well accepted in California that “a lawyer’s duty to preserve the confidentiality of client information involves public policies of paramount importance.”³

The bottom line is that when a lawyer is mobile, that lawyer is more susceptible to threats to client confidentiality. Those threats, once recognized, can be reasonably reduced through some of the following:

Utilizing Privacy Screens

Remember that last flight you took where you watched *The Office* over the shoulder of the person across the aisle from you? Now imagine you're working on a client document instead and the person across the aisle from you is watching. Not as harmless a scenario, as lawyers often have access to private information belonging to other people. A privacy screen on your laptop, iPad, and phone will make a big difference in who can intentionally or unintentionally glean information from your screen.

For solos and small firms in shared office space, which is a growing trend, I'd also recommend privacy screens to ensure your client's information and details are protected.

Restricting Physical Access

First and foremost, don't leave your device unattended. Asking the stranger sitting next to you to watch your laptop while you run to the restroom is not a best practice.

If, however, you accidentally left your device somewhere make sure it's as protected as possible. A phone and tablet should have a security code on them to restrict access.

Laptops can have passwords, too, but understand that someone who really knows what they're doing can remove the hard drive from a computer and it acts, in effect, like a flash drive. The password does little to help at that point. However, you can very easily encrypt your hard drive (Mac users will use FileVault, PC users will use BitLocker) to prevent this from happening.

Another layer of protection comes in the form of password management. If you're saved all your passwords for ease of use on your laptop, whoever has your laptop now has access to all of those accounts as well. You can combat that with a program like 1Password or RoboForm that will keep track of

all your passwords and let you use a single master password to get into all those individual accounts.

Increasing Recovery Odds

Make sure you increase your odds of recovering the device by labeling them with a sticker that has your contact information, or if it's your phone, the contact information of someone you trust that the finder can call. You can also download an app like Find My iPhone (iPad) to help you physically locate your device if it's on.

Alternatively, you may want to set up your device so that you can wipe it remotely if you are unable to recover it.

Ensuring Security

Ensuring your programs and software are up-to-date allows you to receive the latest security updates. If you are using an older software version, new security updates for your outdated version are often not unavailable, which will leave your device at risk.

Protecting Network Access

Beware free, or unsecured, internet. Sometimes it's a blessing and all we need in life to stream Netflix. The moment we start sending emails or touching client documents on the cloud, though, lawyers should take further precautions. You can solve the problem by using your phone as a HotSpot, which is a private network or by carrying a pre-paid wireless/broadband card.

Using Common Sense

If you get an email from someone but it seems "off" check the email address it came from (hover the mouse cursor over it, don't click it) to see if it really came from your contact. Reach out to the person via telephone and confirm they sent it. Don't download a .pdf attachment you're not expecting. Phishing and spoofing happen frequently, as does sending malware and/or ransomware. Don't respond to emails asking for a login and password, someone who says they're from the I.R.S. or healthcare provider, a request for account numbers, or uses suspicious language.

As Isaac Asimov, a writer and professor of biochemistry at Boston University once said, "I do

not fear computers. I fear lack of them.” I cherish the freedom my mobile practice gives me, and I would never want to go back to the days of being tied to a desk and a landline. It’s 2019 and technology allows lawyers practice law on the move. Done right, it helps lawyers accomplish more while living a better quality of life. Cheers to that and cheers to doing it ethically!



ENDNOTES

- 1 See Iowa Committee on Practice Ethics and Guidelines Ethics Opinion 11-01 (2011).
- 2 CAL. RULES OF PROF'L CONDUCT r. 1.1 (b)(i).
- 3 *In re Jordan*, 12 Cal. 3d 575, 580 (1974).

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Solo & Small Firm Spotlight: Kris Mukherji

Interview by Somita Basu*



Kris Mukherji

NAME: Kris Mukherji

FIRM NAME: Law Office of Kris Mukherji, APC

FIRM LOCATION: La Jolla

PRACTICE AREA: Business Law and Estate Planning

YEARS IN PRACTICE: 6

Best moment as a lawyer: Helping a client who was an unemployed sole proprietor, start a new company and build it beyond seven figures.

Best non-lawyer moment: The day my son was born and the day I got married.

Q: WHAT MADE YOU WANT TO GO TO LAW SCHOOL?

A: I have always wanted to go to law school. Freshman year of high school I joined the high school mock trial team and I was hooked. I did mock trial all 4 years of high school and I did mock trial in law school as well. I always knew that I would go to law school and become a lawyer.

Q: HOW DID YOU MANAGE LAW SCHOOL DEMANDS AND WORKING FULL TIME?

A: It was challenging but not crazy. I just remember driving a lot. I drove from home to work to internships to school and put a lot of miles on my car. At the end of the day I believe that my law school-work life balance actually helped when it came time to study for the bar exam. I was so used to taking on so many responsibilities, that when it came time to study for the bar, all I had to do was focus on studying. I wasn't working. I wasn't interning. All I would do was eat, sleep, study and

workout. It was probably the most relaxing time of my life compared to the previous 4 years of law school.

Q: WHAT LED TO YOU GOING SOLO/SMALL FIRM?

A: I always knew I wanted to have my own law practice/firm. I started law school when I was 28 and graduated at 32. I spent four years in law school as a part time student while working full time. I knew that when I graduated, I did not want to work for anyone else. I am married and have a 4 year old son, and I love that I can control my own schedule. I can be selective of who I work with. If you work for someone else, or work for a bigger firm, you don't have the ability to control your schedule, clients, and life. You may think you do, but you don't.

Q: HOW DO YOU GET BUSINESS?

A: I have always been very good at networking. I spent my first year out of law school networking every single day. I tried to meet every CPA, financial planner, banker, bookkeeper, realtor, business professional I could meet. I reached out to veteran attorneys for guidance and overflow work. Six years later, even though my practice is doing very well, I still have networking meetings several times a week. A lot of my business comes from other attorneys, referral from current clients, and other professionals such as accountants and financial planners.

Q: WHAT ARE YOUR BIGGEST CHALLENGES?

A: Constantly evolving and growing with the times. As a solo practitioner, you have to stay ahead of the

curve and you cannot become stagnant. You are a lawyer, but you are also a business owner which means you are the rainmaker and the technician of the firm. As you grow, you have to learn to bring on the right people. Finding the right people takes time. You have to find people who share your vision of where you want to take your company.

Q: WHAT IS THE BEST ADVICE YOU WERE GIVEN WHEN YOU STARTED AS A SOLO/ SMALL FIRM?

A: Limit overhead and don't be afraid to ask for help. As a solo I was very active on the San Diego County Bar Association listserv. I always reached out to experienced people for guidance. For the most part I found that most veteran lawyers in San Diego are open to helping a new attorney and provide guidance when needed. I don't think I would be where I am today, if it wasn't for the help for several veteran attorneys in San Diego. That's why it's important to me to pay it forward. I now try to help new attorneys do the same. I encourage any attorney who is starting a new practice to reach out for help.

Q: WHO WERE SOME OF YOUR MENTORS?

A: Danielle Barger. Pablo Palomino. Walt Pennington. Paul Campo. Alex Schiengross.

Q: WHAT KIND OF TECH DO YOU USE?

A: I use a desktop computer (Mac Pro) and a laptop. I also have a tablet.

Q: WHAT LAW FIRM SUPPORT FUNCTIONS DO YOU DO YOURSELF?

A: I use Mycase, Lexis Nexis, WealthCounsel.

Q: HOW INVOLVED ARE YOU IN YOUR LOCAL LEGAL COMMUNITY?

A: I am a member of the San Diego County Bar Association. I am a member and have been a member of several diverse bar organizations, including the South Asian Bar Association of San Diego (SABA-SD) and the Pan Asian Lawyers of San Diego (PALSD). I am a former President and Vice President and current board member of the South Asian Bar Association of San Diego.

Q: WHAT DO YOU DO WHEN YOU'RE NOT WORKING?

A: I spend most of my free time with my wife and son. I love traveling. I love taking my son to SeaWorld, the science museum, the natural history museum and Birch aquarium. Love going to La Jolla Shores and the cove. I enjoy working out.

Q: WHERE DO YOU SEE YOURSELF IN FIVE YEARS?

A: I see myself continuing to have a growing practice with a few associates and paralegals. I want to clear benchmarks that I set every year while I continue to have a well-balanced life and spend plenty of time with my family.

Q: DO YOU SERVE AS A MENTOR, AND IF SO, TO WHOM?

A: Yes. To new attorneys who reach out for guidance on how to start and run a solo practice.

Q: WHAT IS ONE PIECE OF ADVICE YOU WOULD GIVE TO OTHERS ON GOING SOLO/ SMALL FIRM?

A: You will be scared. You will be afraid to make some tough decisions. People will try to discourage you. Find better people to be around to mentor you and guide you, and you will succeed. Also make sure to manage your overhead expenses. You do not need to have the expensive software, or the expensive office when you first start. All that will come in time.

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Somita Basu, Esq., is a founding principal and managing partner of the Santa Clara, Beverly Hills, and Las Vegas offices of Norton Basu LLP. Ms. Basu is currently the incoming Editor-In-Chief of *The Practitioner*, a quarterly publication distributed by the the California Lawyers' Association's Solo and Small Firm Section, where she is also serves on the Executive Committee. Ms. Basu is based out of the Santa Clara office and lives in the South Bay with her family.

CryptoCurrency: New Rules, New Money, New Issues

By David M. Majchrzak

In a traditional transaction, California lawyers receive U.S. dollars in exchange for providing legal services. But it is not unheard of to see transactions where lawyers are compensated in different ways. Most typically, alternate payments come through the provision of goods. There are, of course, other options. The most recent of these alternate payment trends is toward the use of cryptocurrency.

California does not yet have any opinions—whether through case law or from its several ethics organizations—on this subject. Therefore, this piece addresses what the author believes would be a common sense approach to addressing a situation that is perhaps ahead of even the recently revised Rules of Professional Conduct.

GENERAL BACKGROUND

John Oliver has quipped, “Cryptocurrency is everything you don’t know about money combined with everything you don’t know about computers.” Yet, cryptocurrency is not new, having been around since at least since 2009, when Bitcoin first released its open-source software. Since then, over 4,000 alternative cryptocurrencies have emerged. These digital currencies are transferred using blockchain technology, which means that each unit has a provenance encoded so that the names of each registered owner may be traced back to when the coin was initially mined or otherwise offered. Despite the increasing availability of cryptocurrency, it is still not in mainstream usage and, at the very least, presents unique challenges to handle properly, especially in the



David M. Majchrzak is a seasoned ethicist, law firm risk management consultant, civil litigator, and certified specialist in legal malpractice law by the State Bar of California. He is a shareholder of Klinedinst PC. He currently serves as the

immediate past chair of the San Diego County Bar Association's invitation-only Legal Ethics Committee, a director and secretary for both the San Diego County Bar Association and the Association of Discipline Defense Counsel, and a director for the Thomas Jefferson School of Law Alumni Association. He also serves as the chair of the Integration and Engagement Committee and a member of the Future of Lawyering Committee of the Association of Professional Responsibility Lawyers. He recently completed service as a three-year member of the State Bar's Committee on Professional Responsibility and Conduct, and chair of its outreach committee.

legal profession, where ethical rules govern lawyers' conduct.

NEBRASKA'S FIRST TAKE

Less than 18 months ago, Nebraska issued Ethics Advisory Opinion for Lawyers No. 17-03, the first published analysis of the circumstances, if any, under which lawyers may receive digital currencies as payment for legal services. While concluding it was permissible to receive cryptocurrency, Nebraska's Lawyers Advisory Committee concluded that there were some significant restrictions.

For example, it concluded that, to ensure that the fee charged remains reasonable, lawyers should mitigate the risk of volatility and possible unconscionable overpayment for services by (1) notifying the client that they will not retain the digital currency units, but instead will convert them into U.S. dollars immediately upon receipt; (2) converting the digital currencies into U.S. dollars at objective market rates immediately upon receipt through the use of a payment processor; and (3) crediting the client's account accordingly at the time of payment.¹ And, lawyers may hold digital currencies in escrow or trust for clients or third parties so long as the attorney holds the units of such currencies separate from the lawyer's property, kept

with commercially reasonable safeguards and records are kept by the lawyer of the property². Authors of the opinion noted that, since cryptocurrency is property rather than actual currency, it cannot be deposited into a client trust account.³

Whereas Nebraska's opinion provides a great outline for conversation, it does not necessarily reflect how an analysis under California law would come out. For that reason, it makes sense to explore how the matter might be treated in our state.

PAYMENT IN GENERAL

Rule of Professional Conduct 1.5 provides in part that a lawyer shall not make an agreement for, charge, or collect an unconscionable fee⁴. Given the acknowledged volatility of cryptocurrency valuation against the U.S. dollar, the most likely question to arise is when to assess whether the fees are unconscionable.

Subdivision (b) of rule 1.5 provides that unconscionability is determined based on all the facts and circumstances existing when the agreement is entered into "except where the parties contemplate that the fee will be affected by later events."⁵ There are two approaches to interpreting what that last clause might mean. On the one hand, it could refer to whether the liquidated value of the fee could be affected by later events. In the context of payment through cryptocurrency, that could mean that lawyers must consider market fluctuations that occur during the representation, and before accepting the payment that the lawyer and client agreed to at the beginning of the representation.

On the other hand, the concluding clause could simply refer to what the lawyer receives from the client could be affected by later events. Such an interpretation would mean that the conscionability analysis would properly take place after the engagement agreement where the amount of cryptocurrency could fluctuate (i.e., how many coins are paid), but not necessarily in instances where the comparative market value of the cryptocurrency changed.

The Nebraska opinion impliedly adopts the first point of view. It notes that the impact of fluctuations in the valuation of cryptocurrency could effectively convert payment for legal services at \$200 per hour in one month to payment of an hourly rate of \$500 the next⁶.

To safeguard against this, Nebraska lawyers have been advised to convert the cryptocurrency upon receipt to U.S. dollars⁷.

So long as the client consents, that appears to be a conservative and safe approach to handling the matter. And it would also make the handling of the funds much simpler, since they could be placed in a traditional client trust account, something discussed in more detail below. But it is unclear that such a step is necessary.

As a preliminary matter, there does not appear to be such a restriction on any other form of payment. That is, if a client wanted to pay in foreign currency, with stock, or through cases of wine, there would not be an assessment later on whether the fee makes sense simply because the market for the form of payment may change over the course of the representation. Ultimately, payment through such a form should be a business decision, not an ethical one, where an informed client and lawyer agree to shift the risk of loss or gain to the lawyer.

A contrary view, that we can only evaluate the conscionability of cryptocurrency at the time it is earned as opposed to the time of contracting, may reflect a reluctance to acknowledge that there are currencies other than the U.S. dollar and that valuation need not be based on a single monetary system, simply because it has been around the longest. If a client agrees to a flat fee of, for example, 100 coins at the beginning of a representation, then there is a good reason to assess whether 100 coins was a fair fee amount at the beginning of the representation. We would do the same thing if the agreement was for payment of \$10,000.

ADVANCE FEES

Let us assume that a lawyer has agreed that the client may pay for fees with cryptocurrency. And, since the lawyer believes that collections work is not fun, she requests a retainer. The client is willing to do so, but, since payment is to be made in cryptocurrency, the client asks what needs to be done.

Rule of Professional Conduct 1.15 addresses the safekeeping of client funds and property. It provides that all funds received or held by a lawyer must be deposited in a trust account. To the extent that lawyers

receive securities or property of a client, they must identify and label the property promptly and place them in a safe deposit box “or other place of safekeeping” as soon as practicable. And, of course, lawyers are proscribed from commingling their funds and property with their clients’.⁸

Compliance with these requirements is unclear when lawyers receive cryptocurrency. First, there is inconsistent government treatment of whether cryptocurrency should be classified as “funds” or “property.” California’s Money Transmission Act does not define virtual currency and the state’s Department of Business Oversight (DBO) has not published any guidelines. In 2014, the IRS released Notice 2014-21, which defined cryptocurrency as “a digital representation of value that functions as a medium of exchange.”⁹ Despite this acknowledgement that cryptocurrency serves the same function as more traditional funds, the notice stated that the IRS would treat virtual currency as property for federal tax purposes.

But there are several instances where courts have indicated that cryptocurrency should be treated as funds.¹⁰

Regardless of whether cryptocurrency is properly considered as property or funds, it seems clear that, at present, it cannot be kept in a trust account. Accordingly, there is some risk that regulators may conclude that lawyers may not accept cryptocurrency as payment of advance fees, settlement funds, or anything other than payment of earned fees. One safeguard against this might be attempting to deposit into a client trust account and then obtaining a document indicating that the unconverted cryptocurrency could not be accepted into the account.

But that does not alleviate the lawyer of responsibility. Funds must still be held in a place of safekeeping. The nature of the payment raises a whole new world of possible issues in security and protection of client funds, primarily involving hacking and cybersecurity.

If lawyers cannot hold funds in trust, then what options do they have? Any solution should focus on giving security to the funds and segregating from the lawyer’s personal property. Options may include simple solutions such as using the blockchain system in the same way a trust account is used. For example, the

lawyer and client could both create electronic wallets. The lawyer would create two addresses within her wallet, one for client trust funds and one for earned funds. Upon engagement, the client could transfer the retainer amount (and then subsequent replenishments) to the client trust account wallet. The lawyer would then transfer the funds to the operating account wallet once they are earned.

CONCLUSION

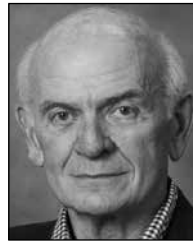
Cryptocurrency is just another means of transferring money. There should be no unique ethical issues to the process. Still, there are reasons to be cautious, including the facts that there is no consistent current treatment of what cryptocurrency even is and that the Rules of Professional Conduct may not have caught up to this aspect of the marketplace. Ultimately, the same concepts of protecting the client’s property and funds should apply regardless of the form of payment.

ENDNOTES

- 1 NEB. ETHICS ADVISORY OPINION FOR LAWYERS NO. 17-03 p. 3100 (2017).
- 2 *Id.*
- 3 *Id.*
- 4 CAL. RULES OF PROF’L CONDUCT r 1.5.
- 5 *Id.*
- 6 NEB. ETHICS ADVISORY OPINION FOR LAWYERS NO. 17-03, . 3107 (2017).
- 7 *Id.*
- 8 CAL. RULES OF PROF’L CONDUCT r. 1.15
- 9 I.R.S. Notice 2014-21, p. 1.
- 10 *See, e.g.*, U.S. v. Ulbricht, 31 F. Supp. 3d 540 (S.D.N.Y. 2014) (creator of website for selling drugs convicted of money laundering bitcoin because cryptocurrency was used to pay for goods and services); U.S. v. Faiella, 39 F. Supp. 3d 544 (S.D.N.Y. 2014) (*concluding*, “Bitcoin clearly qualifies as ‘money’ or ‘funds’ under these plain meaning definitions. Bitcoin can be easily purchased in exchange for ordinary currency, acts as a denominator of value, and is used to conduct financial transactions.”); S.E.C. v. Shavers, 2013 U.S. Dist. LEXIS 110018 (E.D. Tex. 2013) (*rejecting* argument that Bitcoin is not money and, therefore, investing in it is not an investment in a security).

Elementary CyberSecurity: 7 Basic Precautions Every Lawyer Should Consider

By Bill Kammer



Bill Kammer is a partner in Solomon Ward of San Diego, specializing in eDiscovery, technology, and data privacy. He is a frequent lecturer and writer and founded and chairs the steering committee of the San Diego ESI Forum. He has served as a court-appointed eDiscovery consultant and as a stipulated expert for mobile phone and social media discovery.

This article was previously published in the *San Diego Lawyer* magazine, Law + Tech issue.

Most commentators believe that the bad guys are becoming more sophisticated while cybersecurity defenses are not keeping up with the threats. Our profession is vulnerable because many lawyers don't like math and don't benefit from in-house IT support or the resources of cybersecurity professionals. Lawyers continue to be soft targets in the possession of valuable financial and client material. We must reasonably try to avoid responsibility for losing that data, and those efforts should include these seven basic steps.

1. DETERMINE WHETHER OR NOT YOU AND YOUR STAFF HAVE BEEN HACKED.

Almost daily we read of another company or website such as Target or Equifax whose stored personal information has been stolen and is now for sale on the dark internet. For years, many used work emails to conduct personal business because we had no other reliable email accounts. If any legacy account were hacked, our usernames, email addresses and passwords have been compromised. The simplest way to check is the website <https://haveibeenpwned.com>. Enter any username or office email address into that search engine, and you will learn whether you have been part of a prior named compromise. That

should serve as an initial warning to cease use of all passwords you may have used for those accounts.

2. BEEF UP YOUR PASSWORDS.

A recent headline read "Lackadaisical Employee Attitudes to Cyber Security are the Biggest Risks to Enterprises." Poor passwords are common and prone to security breaches. The risk is real: 43 percent of login attempts are malicious. But that risk can be solved: length is everything. Our offices should never allow passwords of less than 10 or 12 characters. The longer the better, and you can even use passphrases to avoid the challenge of remembering indecipherable passwords.

3. USE A PASSWORD MANAGER.

Lawyers should never use the same password on multiple sites. However, avoiding redundancy will tax your memory and resources. The simple way around that is a password manager that allows use of a different password for all sites of any consequence. That avoids having to memorize anything other than a master password used to open the manager. Two managers frequently recommended are 1Password and LastPass, and they are inexpensive or even free.

4. ENCRYPT EVERYTHING.

All of the data and documents on office systems should be encrypted. If the bad guys somehow gain

access to your data, it will be relatively worthless without the key to your encrypted files. Encrypt your communications and the documents you attach to them, particularly those sent to your clients. Ensure that all of your mobile devices, laptops, phones and tablets are encrypted. We have all heard stories of lost or stolen phones or laptops and the consequences to clients, attorneys and reputations. Finally, encrypt all of the USB drives you and your staff use. A recent study found that 8 out of 10 USB drives used by employees are unencrypted. Easily lost, those devices can contain valuable and confidential client and attorney data.

5. USE A VPN.

Whenever we travel, we probably use public Wi-Fi. We can expose data, passwords and credentials to hackers monitoring or intercepting that network traffic. A virtual private network is the simple solution. Some VPNs such as TunnelBear are free. Others, perhaps more robust and with better options, are reasonably inexpensive. When you have your VPN in place, all of your communications across public Wi-Fi networks are encrypted, and the threat of compromise is diminished.

6. USE TWO-FACTOR AUTHENTICATION.

We are probably familiar with two-factor authentication because it has been imposed upon us by the banks and financial firms we deal with. Two-factor authentication requires not only a user name and a password to log into a site, but then a second entry of a code received by some other means, usually a text message. Even if your primary credentials have been

hacked or stolen, the thief must also have your mobile phone to overcome the barrier posed by two-factor authentication. If we remotely log into our office networks, we should never do so without using two-factor authentication.

7. BE AWARE OF CLOUD SITE SECURITY.

Many are switching to cloud-based applications for the creation and storage of professional documents. Similarly, many use cloud sites to exchange electronic discovery or to transmit documents to and from clients. Use due diligence from the outset to

determine whether those applications or sites are password-protected, require two-factor authentication and store the data in an encrypted form.

These tasks don't get easier. For instance, many have only recently discovered the pervasive use of email tracking, particularly by merchants such as Amazon and social media sites such as Facebook. The emails we receive and read contain no apparent indication that information about the receipt or the opening of an email message is being sent back to the originator. Current estimates suggest that 80 percent of commercial email contains trackers and almost 40 percent of private email does also. Claims that someone never received an email or never read it are belied by the tracking information returned to the sender.

We all have ethical and professional responsibilities to safeguard our clients' data, and we should be motivated by business instincts to protect our own data in the same fashion. Sound cybersecurity practices will also ensure that you can pass client inspections or audits to determine whether the clients feel we are a security risk and subject to the compromise of their strategies or confidential information. It's not just good housekeeping — it could mean professional and business survival.

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