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Letter From the Chair

By Renee N. G. Stackhouse



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BEING SOLO DOESN'T HAVE TO MEAN YOU'RE ALONE.

I started my message to you in 4th Quarter 2018 with the same words. A year later, I hope you truly feel it. Over the course of this past year, the Solo & Small Firm (SSF) Section has taken a critical look at what it does and what it should do. Early on, the members of the Executive Committee met and asked whether we provided tangible benefits to our members, and, if not, what changes we could make.

And so, this has been a year of change. We started with creating a Mission Statement that would reflect the work we do. That mission is "to foster a supportive community for solo and small firm practitioners across all areas of practice, to guide our members on their path to becoming strong, competent and ethical solo and small firm business owners, and to recognize the accomplishments of solos and small firm professionals across the state."

In order to help SSF practitioners become strong, competent and ethical business owners, we determined that we needed to really focus on what this section is about: the particular challenges facing solos or small firms. To this end, we created a bi-annual Signature Event, the Symposium for Solo Success which focuses on how to open, manage, and grow a solo and small firm and provide guidance on

the technology that really helps SSF practitioners. We also partnered with multiple practice specific Sections to make sure that the SSF practitioners within that practice area would receive tips that would especially benefit them.

In order to properly recognize the accomplishments of our solo and small firm professionals across the state, we revamped our Attorney of the Year Award. This year, we began the Excellence Awards, recognizing SSF practitioners that epitomize excellence in their practice and their service to the community. We celebrated the inaugural recipients in conjunction with the resurrected Solo and Small Firm Summit with the largest awards reception that existing members can remember.

In order to foster a supportive community of SSF practitioners, we worked on building, creating and strengthening tools to help even the most rural solos feel like they were an integral part of this Section as well as CLA. We accomplished this the creation of new committees (which are open to all of our members), as well as providing sponsorship/advertising opportunities at affordable levels to

the PRACTITIONER FOR SOLO & SMALL FIRMS

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provide statewide exposure to solo and small firms and writing and speaking opportunities in our print publication the practitioner and webinars. We upped our game on our monthly e-new, changing the name to the "Solo Advisor" and making sure to provide news, tips and blogs to help our members. We provided resources and links on our Section webpage. We identified, and often spoke out, on important issues facing solo and small firm practitioners. And you better believe that the moment CLA has the ability to host a listserve, we'll be there front and center to connect you statewide virtually for referrals, questions, and best practices. Until then, please join us on our new LinkedIn group and let's get the conversation started.

I hope it's clear how much work your Executive Committee has done this year and you will join me in thanking all of them for their efforts and enthusiasm. It has been my pleasure to serve as Chair this year and to work with all the extremely talented people that make up the Solo & Small Firm Executive Committee. I would like to extend special thanks to outgoing member Angelica Sciencio who led the

Section's Rural Outreach, traveling and presenting to underserved communities in less populated areas. To me, she epitomized the Section's goal of providing support across the state to all SSF practitioners no matter where located. I am grateful for the time she took away from her practice to do so. Thank you, Angelica.

Finally, I would like to thank our outgoing Vice Chair, Jeremy Evans. Jeremy has been a strong leader on the SSF Executive Committee and we are proud that he has been elected Vice President of CLA.

I also extend a warm welcome to our new Executive Committee members: Kimberly Lee, Phillip Shapiro, Megan Smith, Joshua Bonnici, and Yuri Kvichko. We're excited for the new energy, enthusiasm, and skills you will bring with you.

SSF is looking forward to a strong 2019-2020 year. We hope you'll join us for the ride.

Un saludo,

Renee N. G. Stackhouse



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Letter from the Editor-In-Chief

By Somita Basu

Reflection is a natural by-product of the end of any year, but especially so for solo and small firm attorneys. As one more hectic year ends and a new year dawns, we often wonder if the sacrifices and compromises we continuously make to stay afloat and independent are worth the time and effort. This can often be the by-product of our stressful professions, made more so by the unique challenges of practicing as a solo or small firm practitioner.

In this issue, we focus on how solos and small firm practitioners can focus on work-life balance. Sweeping the issues under the rug don't help; we try in this issue to shine a light on some areas that keep us all up at night and provide you with some insight and guidance.

Managing stress in your life as solo and small firm practitioner is a huge concern for many of us. While the successes are ours alone to enjoy, so are the failures and setbacks. Gayani Weerasinghe provides us advice on how to incorporate mindfulness into our lives to improve our mental well-being. Her advice is practical, non-judgmental, and enlightening.

While our mental well-being is important, most of us are pressed for time every day – there never seems to be enough hours in the day to complete our to-do lists. Kimberly Lee writes about actual tools and worksheets that we can use to help us manage our time to be as effective as possible. Beyond managing ourselves, sometimes our own clients can be the hurdles that we face and the cause of stress. As a solo practitioner, how can we determine if our client's erratic behavior is due to capacity issues or undue influence? Tara Burd provides an overview of these



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questions to help guide you to make the best decision possible in this difficult scenario.

Financial worries are not new for most solo and small firm practitioners. We all have good months and low months. But as we mature as practitioners how do we plan for retirement for ourselves and our employees with fluctuating incomes? Sherri Boutwell and Jim Norman discuss retirement options for small firms.

Finally, at the end of a long day (week, month, or year) sometimes we want to relax with an adult beverage. Everyone attorney knows the issues surrounding alcohol and drugs in the profession. But an occasional happy hour or two is necessary, right? It's not as easy of a question to answer as you may think. In our MCLE article this quarter, Eric Ganci discusses substance abuse and gives us all the information we need to know about making wise decisions.

This is my final issue as Editor-In-Chief as *The Practitioner*. I want to thank the Solo and Small Firm Executive Committee and all the Advisors for their support and I wish the incoming Editor-In-Chief, Josh Bonnici, the best of luck in his new role.

Everyday Mindfulness and Activities for Mental Wellbeing

By Gayani Weerasinghe

As a busy professional, the last thing we want to hear is to add another thing to our growing “to-do-list.” When you hear someone talk about the benefits of mindfulness, you may think, “I simply don’t have the time.” Maybe you envision one day when you are retired, having the luxury of practicing mindfulness or taking up yoga or meditating while sitting on a beach somewhere remote.

However, I am here to share with you that you don’t have to set aside extra time to practice mindfulness, you can and you already are doing things that are part of mindfulness practice and all you need is to fine-tune a little to change or adjust your habits to obtain the benefits. Mindfulness is not just setting time aside for meditating, although, if you can, it will offer excellent health benefits. Mindfulness can be a part of your self-care routine, as I will share some tips at the end to incorporate both mindfulness and activities to add as part of your total mental wellbeing. In this article, I will discuss the science behind mindfulness, why it matters to attorneys and other professionals, and provide quick tips to bring this practice into your daily activities.

What is mindfulness? For this article, I will adopt the definition provided by Cleveland Clinic’s Center For Functional Medicine, “mindfulness is the practice of bringing one’s complete attention to the present experience on a moment-to-moment basis.”¹ It can something as easy as taking a minute to take three deep



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breaths to reset yourself between tasks or being intentional with what you are doing and actively engaging in your thoughts and being aware of the present moment with compassion and non-judgment. Mindfulness can take many shapes and forms. To cultivate mindfulness, you most often require training your mind to be aware of your thought patterns, stop ruminating on past events, stop creating its own narrative, and become more conscious about your own feelings. Mindfulness is a practice and even small changes to our daily routine and habits can bring positive outcomes and benefits far greater for our long-term wellbeing.

BRIEF OVERVIEW OF SCIENCE BEHIND MINDFULNESS

Mindfulness is often discussed in relation to meditation and a myriad of studies in recent years have come to reveal evidence of how this practice can be beneficial to us. These benefits include both physical and mental conditions, such as irritable bowel syndrome, fibromyalgia, psoriasis, anxiety, depression, chronic pain, and post-traumatic stress disorder.² The Cleveland Clinic’s “Functioning for Life Mindfulness” program is offered in conjunction with other clinical inventions to help patients in their long-term objectives, including help gain focus, enhance self motivation, boost working memory, improve energy levels, develop good habits,

lower emotional reactivity, improve cognitive flexibility, self-regulation, provide better relationship satisfaction, and manage emotions that interfere with progress towards healthy habits.³

Although, a lot more expansive research studies on the benefits of mindfulness are in the beginning stages and further studies are needed to confirm results, leading research institutions such as National Institutes of Health, Harvard University, Stanford University, Cleveland Clinic, and others have expanded their ongoing research studies to dig deeper into the subject and have incorporated it into treatment modules of certain diseases as discussed below.⁴

For example, in one study that examined the brain scans of eighteen participants enrolled in an 8 week mindfulness-based stress reduction program, seventeen participants in the control group demonstrated statistically significant increases in gray matter concentration in the left hippocampus, the area of the brain involved in learning, memory, and emotional control, compared to the control group with no significant changes.⁵ Both the mindfulness participant group and the control group (a group that did not perform the mindfulness exercises) were comprised of ages 25 to 55-year-olds, with a mean age of 38/39 respectively, almost an even split of males and females, and composition of similar ethnicities.⁶ The mindfulness group participated in eight weekly group meetings lasting 2.5 hours each and additional full day (6.5 hours) on the sixth week that included mindfulness training exercises for training to develop mindfulness skills as these participants were new to the practice.⁷

While this article by no means is intended to be an extensive survey of biomedical research in stress-related loss of brain volume in hippocampus or any other related parts of the brain, it is worth noting that numerous studies have linked loss of hippocampal brain cells and lowering of functionality to anxiety, depression, post-traumatic stress disorders, and more. The above mentioned same study found that the gray matter also increased in other brain regions, including the posterior cingulate cortex (PCC), the temporoparietal junction (TPJ), the cerebellum, and areas of the brain stem of the test group who performed daily mindfulness practice compared to the control group that did not perform any mindfulness training exercises.⁸ Additionally, while the specific functions of

each of these areas are still being investigated by scientists, the study discussed how these areas along with prefrontal cortex are important for our emotional processing, learning and memory, our defensive mechanisms for stress management, and other cognitive and behavioral functions.⁹ Some of these cognitive functions include PCC, TPJ, cerebellum and other parts of the brain that activate or deactivate during our recalling past events, planning future events, worrying, problem-solving based on emotional stimuli that we are receiving at the moment.

Another scientific study examining the therapeutic intervention of Mindfulness-Based Stress Reduction (MBSR) program for ninety-three individuals diagnosed with a generalized anxiety disorder were randomized to an eight-week group intervention found that MBSR provided significant anxiety reduction compared to Stress Management Education (SME) as a therapeutic intervention.¹⁰ This study included individuals who are over the age of 18 and given a psychiatric diagnosis of generalized anxiety disorder and opt into participating in the MBSR or an SME program as an active control group for the study.¹¹ MBSR intervention comprised of weekly group classes (2 to 2.5 hours) for eight weeks with a single weekend retreat day (4 hours), daily home practice guided by audio recordings, in-class training including breath-awareness, a body-scan, and gentle Hatha yoga to cultivate awareness of internal present-moment experiences to built acceptance and non-judgment. The SME intervention comprised of the same time commitment of weekly group classes for eight weeks with a single weekend retreat day, daily home practice guided by audio recording, in-class time included information given in didactic format, covering topics of stress, stress physiology, effect of stress on body systems, time management techniques, sleep physiology, insomnia, optimal nutrition, effects of stress on diet, caffeine, exercise...etc., and to supplement the yoga of the MBSR group, this group was taught gentle strength and posture exercises by a physical therapist for the same amount of time.¹² The researchers concluded that MBSR not only was successful at reducing anxiety symptoms in patients with generalized anxiety disorder compared to the SME group but also they postulated that patients who learned mindfulness meditation had improved coping mechanism during a laboratory stress test, therefore raising the possibility that these training

can cultivate resilience to stress and increase positive self-statements.

Further, another study from Harvard found the mere act of clearing your mind for fifteen minutes a day for eight weeks can demonstrate changes to 172 genes that regulated inflammation, circadian rhythms, and glucose metabolism and including a meaningful decrease in blood pressure.¹³ These areas are all important for us as high blood pressure can be damaging to our organs and cause long term serious health issues; inflammation has been linked to many autoimmune diseases, such as lupus, Alzheimer's, Parkinson's, and other illnesses; circadian rhythm controls our basal bodily functions, including sleep/wake cycles and lack of it can lead to anxiety, depression, fatigue and more; and glucose metabolism leads to metabolic diseases such as diabetes that lowers our quality of life and can be life-threatening if it's not managed well.

This is just a glimpse of some studies I found to be fascinating as the medical field and researchers are expanding their efforts to validate the claims of benefits related to mindfulness-based practices.

WHY MINDFULNESS PRACTICE MATTERS TO ATTORNEYS

In recent years we have increased awareness of incidents of suicides in our profession, in some cases contributed to chronic depression, anxiety disorders, substance abuse problems, and general unhappiness or lack of satisfaction felt in the profession. Attorneys are constantly bombarded with deadlines, meeting expectations of clients, colleagues, bosses and personal obligations. These expectations and obligations are ever expanding, and electronic communications have made it almost impossible to step away from the job even at times that should be dedicated to sleep, rest, and renewal, as it has become the norm to expect immediate responses. We often sacrifice rest, sleep, time with friends and family to meet the demands of our profession. However, this also means a busy mind that is constantly churning and does not get the normal rest, relaxes, renewal cycles that we need for our own wellbeing. Studies have shown that frequent multitaskers are poor performers, have trouble organizing their thoughts, have trouble discerning irrelevant information, and generally less productive.¹⁴

As the practice of mindfulness is a practice of focusing and paying attention to the moment, it is a great tool to retrain your mind to stay in the moment. Because the practice of mindfulness cultivates the ability to focus better, pay attention better, it is greatly helpful for attorneys in their daily activities. For example, it can help attorneys in court as they argue cases, as it would train them to stay more in the present and allow better responses to judge's questions or form better cross-examination questions. Further, a person who practices mindfulness is likely to be more aware of the client's needs during a meeting, pay attention to details, intake the complex situations better, and arrive at creative solutions. It can also help with your energy level, your anxiety levels, and help you stop ruminating on stressful triggers and instead focus on the present moment.

BRINGING MINDFULNESS TO YOUR DAILY ACTIVITIES

Before getting into the mindfulness I wanted to briefly discuss a few examples of being in the present moment and in effect being mindful that you are already doing but may not realize. For example, when you are with friends and truly break out into laughter, that is actually being in the moment as you are fully aware of that moment, your mind is not processing other thoughts. When you are watching a game or a show, if you are captivated by it, that is actually focusing on one thing instead of letting your mind wander. A conversation with a friend, when we find ourselves completely engrossed in the moment, that is being in the present moment. If you are playing a sport, you are in the present moment. Listening to good music or dancing is usually being present in your body and enjoying the moment. These are a few examples of how you may already be practicing mindfulness in your daily lives.

BASIC MINDFULNESS MEDITATION

Find a quiet place, sit with your spine straight, put away your phone and lay your hands on your lap, with palms open, focus on breathing through your diaphragm, drop your shoulders, and feel the opening of your chest. If your mind starts to wonder, bring it back to the breath. You can focus on a word or a phrase if that helps, such as when you breathe in, you can think "I am" and as you exhale, think "present." Some other helpful phrases can be, "I am loved," "I am open," "I am grounded," or any other simple phrase that may

resonate with you. *It is normal to have thoughts appear, find your mind has wandered, when you become aware, bring it back to the breath.* Also, with thoughts, it is important to just observe them, see it as something passing through like on a TV screen instead of something you engage. You may also find it useful, at least in the beginning to try a guided meditation or create your own guided meditation if that helps.

Remember that to cultivate mindfulness through meditation, it does not have to be a long practice. You can try it for a couple of minutes, gradually increase it to maybe five minutes, then ten and so forth. When I first started mindfulness practice in 2014, I remember thinking there is no way I could turn off my mind, but what I have come to realize is that you don't have to turn off your mind, you can focus it on your awareness. It is important to understand that even if the best you can do is just sit still for a few minutes, that is a good start. Remember, it is training and practice, therefore it is more like weight lifting, you must slowly build your strength and the muscles.

Here are a few suggestions to bring mindfulness to your activities.

- Commute to work – you may find that there are times when you drove to work and you can't remember the drive or the songs you listened to or the radio station you tuned into because you were on "autopilot." It's an activity that you are so used to, that your brain feels free to wonder while paying minimal attention to the traffic to keep you safe. But your commute to work is a great time to turn off the music or the radio and take a moment to stay in the present moment. Even before you start your drive, take a minute, put your hands on the wheel, take a deep breath, let it go before you start the car. Actively pay attention to your commute, engage in the process, and stop your brain from going into autopilot mode.
- Brushing your teeth – if you are using an electric toothbrush with a two-minute timer, spend the two minutes in the present moment, feeling the sensations and turning down your thoughts.
- In the shower – next time you are in the shower, instead of thinking about your to-do list, take a moment, feel the water, focus on your breath for

a few minutes. You can imagine the water washing away your stress.

- First thing in the morning – stay in bed for a couple of minutes, bring your awareness to your body. Set an intention for the day.
- Right before sleep – take a moment to focus on your breath or do a gratitude meditation as you are falling asleep. A gratitude meditation, as the name suggests, is focusing on people and things for whom you are grateful, coming up with least three to five things from that day and listing them with gratitude. Part of this would cultivate a practice in which you are looking for these moments, which can train your mind to look for the positive aspects of your day. If you are new to meditating, you can easily find many different Apps that provide guidance. For instance, I use "Insight Timer" which has many free guided meditations, on many different topics, from many different instructors lasting for different lengths of time (such as for 5, 10, 20, 30, or 60 minutes). Also, YouTube has many different meditations and meditation music.
- During the day – think about setting an alert on your phone to remind yourself to take two minutes to just relax and focus on letting go or deep breaths.
- Short walk – if you find it hard to sit still, do a short walk, or try a walking meditation.
- In between meetings – instead of surfing on the internet or checking social media, take a few minutes and do a mindfulness exercise.

These are some of the few quick-tips to give you an idea of the type of activities that would allow you to incorporate mindfulness into your daily activities. As you are incorporating these practices, remember to add some activities that cultivate joy and bring mental downtime, meaning turning off that analytical brain to allow your brain to recharge. As this topic of mental downtime maybe another article for another day, it is important to note that downtime has demonstrated to improve your attention span and your overall wellbeing.¹⁵ When incorporating these activities with mindfulness, you can reap better benefits and cultivate a healthier

lifestyle, focusing both on your mental and physical wellbeing. Here are some such activities:

- Yoga – doing yoga can be a mindfulness exercise.
- Playing a musical instrument – learning to play a musical instrument or practicing a musical instrument is also a mindfulness exercise that allows mental downtime. While you may not have much free time in your day, even setting aside 30 minutes once or twice a week to do something like playing the guitar can be just turning off the analytical mind and focusing on the moment.
- Arts and crafts – working on a craft project or painting is a good way to turn down the analytical mind and stay in the present moment.
- Cooking or baking – being fully present during these activities is a creative way to stay in the present moment.
- Other activities – cycling, walking, running, hiking or other activities can also be turned into mindfulness activities by being present in the moment, truly enjoying the surrounding.

CLOSING REMARKS

As you take these steps toward a more conscious life, remember to practice non-judgment and compassion toward yourself. Your mental wellbeing is just like your physical wellbeing requires practice, so don't be too hard on yourself when you have trouble staying in the present moment. Just keep practicing and trying new ways to stay in the moment.

ENDNOTES

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Time Management for Busy Attorneys:

Eight Key Strategies to Increase Productivity and Reduce Stress in Your Practice

By Kimberly Lee



Kimberly Lee owns the Desert Law Group in Indian Wells, California. Her practice focuses in Estate Planning, Probate, Trust Administration and Elder Law. In her spare time, she is an Adjunct Practice

Advisor for Atticus, the leading attorney business coaching firm in the country. Kimberly credits Atticus for being a big part of her law firm's success and her ability to live a great life by design.

The process of planning, prioritizing, and deciding how to effectively spend your time sounds simple enough. But there is a subtle art to time management, a calculated formula that enables you to increase productivity and reduce stress in your busy law practice. A pioneer of the self-improvement industry, Paul J. Meyer once said, “Productivity is never an accident. It is always the result of a commitment to excellence, intelligent planning and focused effort.” To manage your time, you must first ask yourself: what does your current daily planning look like?

You might start the day with the best intentions — an early alarm, a meticulously planned to-do list, an already prepped wholesome breakfast — yet find that you still end up working late. You’re rushing from task to task and the to-do list seems to almost always carry over to the following day. For busy attorneys time management is one of the most powerful skills you can master to increase your productivity and reduce your daily stresses.

There are two very distinct styles of time management: reactive versus proactive. A reactive style means that you let other people or clients’ emergencies dictate your days. If you find yourself falling off course frequently, you might be succumbing to a reactive style. A proactive style, on the other hand, means that you actively anticipate what may happen and you plan your day and your week accordingly. This style is our focus in this article and we discuss eight key strategies that will help you become a proactive time manager.

STRATEGY #1: WEEKLY TEAM MEETING

Weekly meetings offer the perfect opportunity to fine-tune your time management skills and set the office tone for your team. Always prepare an agenda to help you and the team stay focused on the purpose of the meeting. Distribute the agenda in advance so that meeting goals and a timeframe can be established. Review upcoming due dates, court dates and filing deadlines to make sure things don’t fall through the cracks. As the leader, remember that it’s important to maintain a positive attitude surrounding the weekly team meeting. Celebrate what your team has accomplished by sharing the “Wins and Gratitude,” (things that went well) which will help to generate the “fuel” they need to face the challenges in the upcoming week. Always end meetings on a positive note, on time, and with a list of action items to move the matters toward completion.

STRATEGY #2: QUESTION BATCHING

Batching refers to grouping all questions in order to minimize frequent interruptions and increase productivity. Question batching is an excellent strategy to implement in the office. It rids the workplace of the “lurk & blurt” where team members find themselves hanging out by the attorney’s office (“lurk”) waiting to get the attention of the attorney so they can “blurt” out their questions. This creates an interruption and breaks the flow of work for the attorney. Using a Question Batching Form forces team members to identify the essence of their question.

Often times, the solution emerges, and they are able to solve the problem on their own. If they're unsure about what to do, they can come up with one or more proposed solutions — which will help to increase a team member's problem-solving abilities over time. Ridding the workplace of unnecessary questions that come at unexpected moments is a key strategy for improving time management.

STRATEGY #3: DAILY FOCUSER™

Distractions and interruptions are inevitable; they happen all the time in the workplace and in life. That's why it's crucial to have good habits, as they govern many of our daily activities. By using Atticus' Daily Focuser™ or a similar tool you can keep your habits in check and organized. From emails to objectives, it will help you to map out your daily accountability, which is key to reaching your goal. When you're looking at the list of tasks at hand, understand that not all tasks are created equal. Some are more important than others, which is where the Big Rocks First idea comes into play. If you have an empty jar and a bunch of rocks, both large and small, the best way to fill the jar is to start with the big ones first. If you start with the small rocks first, there will be no room for the big rocks. In our office, each team member identifies the three "Big Rocks" they want to accomplish each day. This keeps their eye on the goal, even amidst external distractions, and helps keep them accountable.

STRATEGY #4: EMAIL MANAGEMENT

If just reading the word email gives you anxiety, you aren't alone. Email is a huge problem for attorneys and a leading source of stress. We live in an "Amazon" world (now with 1-hour delivery!) where clients expect an immediate response. Instead of letting email enslave you, try utilizing the "Inbox to Zero" strategy. It's a term originally coined by Merlin Mann, writer of 43 Folders, and doesn't refer to keeping your inbox empty — but rather to "Process Inbox to Zero." Once you've opened a piece of email, use the following formula: Delete, Delegate, Defer or Do. If you do none of these things, you'll be left with more work later on. The idea is to block out specific time during the day to process your email, make the decision and stop thinking about it. Don't use your email box as your "To Do" list. Email management is not a one-

time event. Rather, you must "Rinse and Repeat" daily.

STRATEGY #5: STRATEGIC DELEGATION

Successful delegation is key in increasing efficiency. Just because you might be able to do all the things in your task load, does not mean it's the most productive use of time. Realizing when it's time to let go is an empowering experience, to both you and your team. There are typically two types of delegation attorneys like to practice. The first, and less desirable, is "drive-by" delegation. This refers to the attorney dropping the file on the desk of the paralegal or associate with very little instruction as to what's expected. Attorneys use "drive-by" delegation to save time. But in the end, it costs more time because inevitably, you'll end up with a result that might not be what's expected, which increases the chance of the paralegal interrupting the attorney to get more specific directions later on (more "lurk and blurt"). Instead, use "S.M.A.R.T" delegation — Specific, Measurable, Accountable, Realistic (achievable), and Time-lined (with a deadline). In doing so, you'll have an effective delegation process and your team will be happier, too.

STRATEGY #6: SYSTEMIZE YOUR OFFICE

Systemizing your office will help ensure that everything runs smoothly, which will save you both time and your sanity. Systemize your sequence of activities by using a flowchart to determine the "life of the file." Establish "model files" for your team to follow and to keep everyone on the same page. Create written instructions for processes and procedures for the team to reference so that they don't have to interrupt the attorney. Systemizing the office is a key strategy for eliminating time-consuming interruptions.

STRATEGY #7: CLEAN YOUR OFFICE

In the simplest terms, a cluttered desk equals a cluttered mind and a desk that is free of mess is free of distractions. Both your desk and your computer desktop are essentially Your Practice Talking to You. If there are lots of files or pieces of paper untidily scattered about, they could be deferred decisions that you're not ready to make or "reminders" for action items. These visual distractions will steer you away from the task at hand and pull you in another

direction. You can use Atticus’ Clean Office Solution™ Worksheet or a similar tool for step-by-step strategies that will help you clear your desk — and clear your mind. Your environment and its cleanliness are crucial indicators of positive productivity.

STRATEGY #8: INTERRUPTIONS

Sometimes, we have to save the best for last. Interruptions are one of the ultimate productivity killers and they can add up to cost us minutes, hours, days, or weeks of lost time. External interruptions include the more obvious interruptions, like phone calls, walk-ins and office socializing. Then, there’s the idea of “one quick question” which typically indicates a lack of office procedures and systems or a lack of access to the attorney. In an attorney’s office, the need for letter and court filing signatures is prominent, too, but can be easily grouped in batches to minimize interruptions. Internal interruptions add up fast and can come in droves. With emails, schedule a time to process the daily emails to zero and sign out of your account when you don’t want to be derailed by incoming messages. Turn off all notifications and

alerts on your computer and put your phone away or on silent during productive times. Create a clean field of vision — with a desk that does not create a visual distraction. Finally, turn down the noises in your head. Meditation and deep breaths can help and allow you to regain focus and intention.

When you’re implementing strategies to improve productivity, remember that Rome was not built in one day. Don’t overwhelm yourself by trying to incorporate all of these key strategies at the same time. Simply start with one and make it a habit.

Work to find joy in the process and remember that time is an equal opportunity employer — we are all given the same number of minutes each day. What will you do with yours?

Reach out to Atticus for the various tools I mentioned in the article, so that you can start on these strategies today and become a master of time-management. Please send your emails to: FreeStuff@AtticusAdvantage.com, with the Subject Line: “Send Me Kimberly Lee’s Tools!”

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Understanding Client Capacity and Undue Influence

By Tara R. Burd

By understanding potential challenges based on a client's lack of capacity, fraud, or undue influence, legal practitioners can better protect their clients from abuse and a competent client's wishes from becoming the subject of future litigation.

America has a long history of valuing an individual's freedom: the freedom of speech, freedom of expression, freedom of religion, freedom to vote, and freedom to contract. However, every day, people make mistakes by spending outside their budget, investing poorly, choosing the wrong friends, and eating the wrong foods. Despite these poor decisions, and absent the commission of a crime, most Americans wake up the next morning with their freedoms intact. Nonetheless, the aforementioned freedom for the elderly, whose decision-making is often under constant scrutiny by family, friends, and sometimes ne'er-do-well opportunists is more challenging. When a 50-year-old unfriends a toxic relative, it is a sign of maturity, but when a 70-year-old disinherits a toxic relative, it is a sign of incapacity. Practitioners should understand what signs indicate possible incapacity or undue influence, to better protect clients on *both* sides of the line.

HOW MUCH CAPACITY IS REQUIRED

There is a rebuttable presumption that all individuals have the capacity to make decisions and be responsible for their own acts or decisions.¹ It may be surprising to learn that a doctor's note or diagnosed disorder may be persuasive evidence, but it does not necessarily result in legal incapacity. Instead, a finding of



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incapacity should be based on evidence of a deficit in one or more of a person's mental functions and not a diagnosis of a mental or physical disorder.²

Legal capacity is determined based on factors identified in Probate Code section 811. Factors to consider include:

- alertness and attention;
- orientation to time, place, person, and situation;
- ability to attend and concentrate;
- short- and long-term memory, including immediate recall;
- ability to reason using abstract concepts;
- ability to plan, organize, and carry out actions in one's own rational self-interest;
- ability to reason logically;
- severely disorganized thinking;
- hallucinations; and
- delusions.

To lack capacity, the deficits must significantly impair the person's ability to understand and appreciate the consequences of his or her actions regarding the type

of act in question.³ Clients with declining capacity can often express their contemporaneous desires but lack the ability to reason logically. For example, a client may initially seem rational and competent when they express their desire to sell a business. However, if the same client is unable to understand the complexities of the business sale, or expresses irrational and disorganized thinking, that client may lack enough capacity to handle the sale personally. This is particularly true when the client is serving in a fiduciary capacity on behalf of an organization, trust, or estate.

Testamentary capacity has its own, distinct requirements. It requires a relatively low level of capacity and requires the trier of fact to look the point in time in which the testamentary document was executed. A person is not mentally competent to make a will if *at the time of making the will* either of the following is true:

(1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.

(2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.⁴

Even individuals with declining capacity have good days and bad days. It is possible for someone who suffers from ongoing hallucinations to have moments of clarity and execute a valid will or trust so long as the testamentary instrument is executed during the clear moments. Testamentary capacity has also been applied in matters concerning simple revocable trusts.⁵ The capacity to execute or manage more complex trusts, such as those that include ongoing businesses concerns, should be determined under Probate Code section 811.

WHAT TO DO WHEN A CLIENT'S CAPACITY IS DIMINISHED

A California lawyer's duty of confidentiality extends to an attorney's concerns regarding a client's capacity and prohibits the disclosure of any confidential information, unless the attorney believes the client is about to commit a criminal act that would result in harm or death.⁶ The American Bar Association's (ABA) Model Rule 1.14 specifically addresses diminished capacity and allows an attorney to act by seeking the appointment of a guardian *ad litem*, conservator or guardian. However, California declined to accept this rule and did not enact anything similar in its place. Still, California attorneys may decline to represent an individual or facilitate the legal requests of clients they believe lack sufficient capacity. In other instances, diminished capacity may not prohibit representation completely but rather the attorney must decide to what extent the client has capacity to participate in each phase of a transaction or litigation.

In 2005, the ABA Commission on Law and Aging and American Psychological Association (APA) published "Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers."⁷ (herein "the Handbook.") The Handbook offers a detailed guide for attorneys to use to assess their client's capacity. For example, to determine a client's capacity to mediate, the Handbook explains the following:

In referring a client to mediation or representing a client in a mediation, a lawyer should be familiar with the capacity to mediate. The ADA Mediation Guidelines name several factors to be considered by mediators: The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement.⁸

This type of assessment can and should be performed any time an attorney recognizes a client's diminished capacity.

TIPS TO PROTECT A CLIENT'S ACTS AND AGAINST MALPRACTICE

Because there are no bright lines, it is imperative for a legal practitioner to document the assessment of a client's capacity and reasons for all decision-making with greater care than might otherwise be needed. This can be key evidence against anyone who might later challenge the client's decision-making or transaction on grounds of incapacity.

In any practice, the attorney should carefully document any interview with the client and consider performing the assessments recommended by the ABA and APA Handbook.

One valuable step further is to video record the client expressing his or her desires and reasoning for the decisions at issue. A quality video recording can be achieved by purchasing a microphone that clips to the client's shirt and plugs into a cell phone, and a mini tripod cell phone stand. For \$50 or less on Amazon.com, an attorney can save hundreds of thousands in future litigation costs and expenses through this method of documentation.

In estate planning, it is reasonable to ask the client to obtain a letter of capacity from the client's primary care or other qualified physician. In doing so, it is important that the physician understand the purpose of the inquiry so that he or she can perform the correct assessment and create a clear written record. For example, a doctor's letter that indicates the patient requires full-time live-in assistance, may have concerns over the patient's physical, as opposed to mental, abilities. These distinctions should be clear in any supporting doctor's letter.

NEW STANDARDS FOR UNDUE INFLUENCE OR FRAUD

The same factors and analysis that should be applied to evaluating a client's capacity, can also be applied to determining a client's vulnerability to fraud or undue influence.

At common law, the courts applied a 5-factor test that was difficult to prove. The California Supreme Court stated:

The indicia of undue influence have been stated as follows: '(1) The provisions of the will were

unnatural. . . (2) the dispositions of the will were at variance with the intentions of the decedent, expressed both before and after its execution; (3) the relations existing between the chief beneficiaries and the decedent afforded to the former an opportunity to control the testamentary act; (4) the decedent's mental and physical condition was such as to permit a subversion of his freedom of will; and (5) the chief beneficiaries under the will were active in procuring the instrument to be executed.'

The most difficult prong to prove was that the beneficiaries were active in procuring the instrument.

Newer statutory law offers a somewhat easier approach. As of January 1, 2014, Probate Code section 86 defines "undue influence" as having the same meaning as Welfare Institutions Code section 15610.70, which provides the following definition:

(a) 'Undue influence' means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:

(1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

(2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

(A) Controlling necessities of life, medication, the victim's interactions with others, access to information, or sleep.

(B) Use of affection, intimidation, or coercion.

(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

It's not always obvious that a client is being controlled by a third party, but a red flag should raise whenever there is a third party closely involved in a legal transaction in which they will receive a benefit to the detriment of the client or third party. Examples include: a client transferring a business to a family member or friend below market rate, or a client seeking to eliminate a trust beneficiary. Although these situations are not necessarily problematic, an attorney who recognizes that a situation could be *perceived* as improper can protect against later claims.

PROTECTING A CLIENT AGAINST UNDUE INFLUENCE OR FRAUD

It is difficult to ascertain when a family member is *assisting* as opposed to *controlling* a client's decision making. Documenting the client's specific desires and supporting reasons will produce powerful evidence to help preserve those decisions if they are subsequently challenged.

In some instances, a Certificate of Independent Review is *necessary* to avoid unfavorable presumptions of fraud or undue influence, but in other instances it can be a useful tool.¹⁰ A Certificate of Independent Review is executed by an "Independent attorney," which means "an attorney who has no legal, business, financial, professional, or personal relationship with

the beneficiary of a donative transfer at issue under this part, and who would not be appointed as a fiduciary or receive any pecuniary benefit as a result of the operation of the instrument containing the donative transfer at issue".¹¹ Having an independent third party evaluate the client and the transaction creates another witness to defend the transaction if challenged. This type of situation often arises relative to the transfer of real property or business interest.

REMEDIES OF UNDUE INFLUENCE OR FRAUD

If a beneficiary has probable cause that a will or trust was procured through fraud or undue influence under the statutes discussed herein, he or she can file a claim without violating a no contest clause, if one exists.

One method to recover wrongfully taken or transferred property is through a constructive trust. The court uses its equitable power to transfer property from one party (the wrongdoer) to another (the rightful owner).¹² The cause of action is based on fraud, breach of fiduciary duty, or another such act.¹³

Additionally, when property is taken by elder financial abuse or other bad faith acts, the court may award attorney's fees and costs. In addition, the person who committed the act may be liable for twice the value of the property recovered:

If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of a decedent, or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an action under this part. In addition, except as otherwise required by law, including Section 15657.5 of the Welfare and Institutions Code, the person may, in the court's discretion, be liable for reasonable attorney's fees and costs. The remedies provided in this section shall be in addition to any other remedies available

in law to a person authorized to bring an action pursuant to this part.¹⁴

Recently, in *Conservatorship of Ribal*, 31 Cal. App. 5th 519 (2019), the court clarified the method of calculating double damages. That is, the *total* damages are equal to twice the amount of the misappropriated assets. Up until this case, many attorneys doubled the value of the misappropriate assets and then *added* that amount to the amount of the misappropriate assets. This effectively resulted in treble damages issuing against the wrongdoer.

“Bad faith” has not been clearly defined as applied to Probate Code section 859. However, the law has always required a showing that a person have intended to deceive others before a double damages penalty may be imposed. In 1866, the California Supreme Court addressed whether the imposition of double damages for the wrongful taking from an estate was remedial or penal in nature.¹⁵ It found the statute to be remedial in nature, such that it did not create a new right of action, but merely increased the measure of damages.¹⁶

PROTECTING CLIENTS FROM UNDUE INFLUENCE IS IMPORTANT

The gray area between capacity and diminished capacity leaves a lot of room for abuse. People are often too afraid, embarrassed, and uncertain about the law to report the financial abuse to someone with authority to act. Unfortunately, California’s State Bar Rules of Professional Conduct limit the extent to which an attorney can help a client. Nevertheless, attorneys should be as proactive as possible to protect against these abuses. This includes not hesitating to refuse to act on behalf of a client whom they believe is subject to fraud or undue influence, or who lacks capacity for the particular transaction at issue.


ENDNOTES

- 1 CAL. PROB. CODE § 810.
- 2 CAL. PROB. CODE § 810(c).
- 3 CAL. PROB. CODE § 811(a)(4)(b).
- 4 CAL. PROB. CODE § 6100.5.
- 5 Goodman v. Zimmerman, 25 Cal. App. 4th 1667 (1994).

- 6 CAL. RULES OF PROF’L CONDUCT r. 1.6.
- 7 ABA, APA, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005), <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>
- 8 ABA, *supra* note 7, at p. 6.
- 9 Estate of Lingenfelter, 38 Cal. 2d 571, 585 (1952).
- 10 CAL. PROB. CODE § 21384.
- 11 CAL. PROB. CODE § 21370.
- 12 Campbell v. Super. Ct., 132 Cal. App. 4th 904 (2005) (petitioner/trustee brought action for “Constructive Trust Based on Undue Influence.”).
- 13 BGJ Associates, LLC v. Super. Ct., 75 Cal. App. 4th 952 (1999).
- 14 CAL. PROB. CODE § 859.
- 15 Jahns v. Nolting, 29 Cal. 507 (1866).
- 16 *Id.* at 511.



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Retirement Plan Options for Small Law Firms

By Sherrie Boutwell & Jim Norman

Retirement savings is an important issue for the financial stability of all individuals. While not all individuals recognize this as a priority early in their professional lives, small businesses are wrestling with the best way to facilitate retirement savings for their owners and employees, either out of a need to offer competitive benefits, a sincere concern for their employees' retirement planning, or, in some states such as California, under state-mandated requirements.

For small or solo law firms, the challenges of sponsoring a qualified retirement plan include the costs of establishing a plan,¹ maintaining ongoing compliance, and ongoing costs and fees. The good news is that California employers have many options to address retirement savings accumulation for their employees, including the new CalSavers option:

- Programs based on individual retirement accounts (IRAs), including the CalSavers Retirement Savings Program (CalSavers); and
- Employer-sponsored qualified retirement plans

IRA-BASED OPTIONS

IRAs are simpler to administer than qualified retirement plans because there is no need to manage investments and they do not require the filing of annual reports on Form 5500. However, IRAs have lower dollar limits than qualified retirement plans, more limited creditor protection, and require a third-party custodian. IRAs can be either Roth or non-Roth. Below is a comparison of Roth v. Non-Roth IRAs:



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advisor on employee benefits topics. Sherrie takes pride in bringing a practical and down to earth approach to resolving complex benefits issues involving qualified plans, non-qualified plans and health and welfare plans.



James R. Norman, Jr., MBA, QPA, ERPA is an Enrolled Retirement Plan Agent, enrolled to practice before and represent clients with the IRS on all retirement plan matters. Since 1991 he has held a Qualified Pension Administrator designation from

the American Society of Pension Professionals and Actuaries. Jim is an expert in the design of 401(k), profit sharing and cash balance pension plans. Jim joined EGPS in 2015. He is also a co-founder of Penchecks, Inc., the largest independent retirement plan benefit distribution processor. Jim was a shareholder and board member for 25 years.

	<i>Non-Roth</i>	<i>Roth</i>
<i>Type of Contributions</i>	Pre-Tax	After-Tax
<i>2019 Dollar Limits</i>	\$6,000 per year (\$7,000 if 50+)	\$6,000 per year (\$7,000 if 50+)
<i>Distributions</i>	Taxable	Non-taxable distribution of contributions and earnings (first distribution must be at least 5 years after the first contribution)
<i>Age Limit</i>	Under age 70 ½	No age limit
<i>2019 Income Limit</i>	None	\$137,000 (single) (phased out beginning at \$122,000) \$203,000 (married, filing jointly) (phased out beginning at \$193,000)
<i>Required Minimum Distributions</i>	Apply	None during participant or beneficiary's lifetime
<i>Penalties/ Taxation on Distributions</i>	Distributions subject to income tax, contributions can be withdrawn without 10% penalty after age 59 ½	Contributions can be withdrawn at any time tax-free and penalty-free. Earnings may be distributed tax-free and penalty-free after the 5-year rule and age 59 ½

There are several types of IRAs:

- Individual IRAs (Roth and Non-Roth)
 - Spousal IRA
 - Rollover IRA
- Employer-Based IRAs (Roth & Non-Roth):
 - Payroll Deduction IRA
 - SEP IRA
 - SIMPLE Plan
 - CalSavers

For a comparison of these IRA-based plans and qualified retirement plans, see the chart below.

CALSAVERS RETIREMENT SAVINGS PROGRAM

While most IRA-based or qualified retirement plans are optional for employers, CalSavers² takes effect in 2020 and will mandate participation over a phase-in period unless the employer offers another retirement plan option. Mandatory participation dates are based on the number of employees:

- 100+ employees: June 30, 2020
- 50+ employees: June 30, 2021
- 5+ employees: June 30, 2022

Employers may also voluntarily participate in CalSavers beginning July 1, 2019.

Under CalSavers, employers must automatically enroll employees to defer 5% of gross pay after 30-day notice. Each year this percentage is increased by 1% up to a maximum of 8%. Participants may change their deferral rate or opt out completely at any time. These deferrals are held by default in a Roth IRA, meaning that these contributions are made on an after-tax basis. A traditional IRA, with pre-tax deferrals, will be an option that the enrolled employee may choose. For a discussion of the differences between a Roth IRA and a traditional IRA, *see* below. CalSavers participants make their

own investment decisions among a number of investment alternatives, although the first \$1,000 is automatically invested in a money market account.

Employers who participate in CalSavers pay no fees and the statute provides that they have no fiduciary duties regarding the program.³ The employer's role is limited to providing an employee census to the program (and updating it as employees are hired) and then forwarding payroll deductions. Unlike qualified retirement plans, and some IRA arrangements, discussed below, under CalSavers, employers may not make contributions to the CalSavers accounts of their employees, only employee deferrals may be contributed.

The process for participation in CalSavers is that the employer registers when notified by CalSavers, or the employer may contact CalSavers to begin participation earlier.

Once registered, the employer will set up a secure process to list delegates or payroll representatives, create a payroll list and add employees. After the account is set up, maintenance involves submitting contributions and adding new employees.

Although CalSavers was challenged in court as preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), at this point, it has been upheld.⁴ Plaintiffs contend that ERISA "supersedes any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ."⁵ The district court held that CalSavers was not preempted by ERISA as it does not create an employer plan nor affect existing employer plans. The district court gave plaintiffs' leave to amend and an amended complaint was filed, and of course the final decision from the district court could be appealed, so CalSavers remains open to further challenges.

EMPLOYER-SPONSORED QUALIFIED RETIREMENT PLANS

Employers may choose to offer employees a qualified retirement plan in which to participate. Qualified plans have several benefits over IRA-based options. They:

- offer much higher dollar limits
- employers may make contributions (not permitted in most IRAs)
- provide excellent creditor protection
- plan sponsors are allowed to self-trustee

However, qualified plans are more complex than IRAs, requiring written plan documents and administration generally by an experienced third-party administrator, including non-discrimination testing (unless an exception applies), filing annual reports on Form 5500, annual audits for larger plans, fiduciary oversight, and disclosure requirements. There are a variety of qualified retirement plans to choose from:

- **Defined Contribution Plans**—where the contribution going into the plan is set. Types of defined contribution plans are:
 - Code section 401(k) Plan
 - Profit Sharing Plan
 - Money Purchase Pension Plan
- **Defined Benefit Plans**—where the benefit paid out of the plan is set. Types of defined benefit plans are:
 - Pension Plan
 - Cash Balance Plan
- **Combination Defined Contribution and Defined Benefit Plans**

Code section 401(k) plans are particularly popular because, unlike the other types of qualified plans, they offer employees the opportunity to make deferral contributions. Employers may elect to make contributions matching the employees' deferrals and/or a profit-sharing contribution. Code section 401(k) plans also offer some unique options:

- **Safe harbor plans** which allow employers to avoid certain nondiscrimination testing in exchange for required contributions and initial and annual notices to participants.
- **Automatic Enrollment Arrangements (ACAs)** which can increase participation in a retirement plan and increase employee retirement savings. This may result in better nondiscrimination testing results as well as benefit retirement security for employees. Initial and annual notices to participants are required. Under an ACA, a specified uniform percentage of compensation is deferred from each paycheck, although participants may elect a different percentage deferral or completely opt out at any time. Automatic deferral increases may, but are not required to, apply each year up to a maximum percentage of compensation. Automatic deferrals must go into a default investment, but participants may direct their own investments.
- **A qualified automatic contribution arrangement (“QACA”)** which is a combination of both a safe harbor and an ACA plan—it can increase participation in a retirement plan and, in exchange for required contributions and annual notices to participants, eliminate some required nondiscrimination testing.
- **Defined benefit/cash balance plan** contributions can exceed \$200,000 for certain participants, but a firm must contribute to other participants sufficiently to pass IRS coverage and non-discrimination tests.
- **Firms with highly variable revenue** may prefer 401(k), profit sharing or IRA-based plans for maximum contribution flexibility. Defined benefit plans generally have required annual contributions and are therefore less flexible.

COMPARISON OF RETIREMENT PLAN VEHICLES

	IRA-Based Plans					Qualified Plans			
	<i>Individual IRA</i>	<i>Payroll Deduction IRA</i>	<i>CalSavers IRA</i>	<i>SIMPLE IRA</i>	<i>SEP IRA</i>	<i>401(k) (deferral only)</i>	<i>DC Plan (can include 401(k))</i>	<i>DB Plan</i>	<i>DC/DB Combo</i>
<i>2019 Dollar limit</i>	6,000	6,000	6,000	13,000	56,000	19,000	56,000	Varies based on funding - no annual limit so can exceed DC plan limit	Varies based on funding - no annual limit so can exceed DC plan limit
<i>Age 50 catch up</i>	1,000	1,000	1,000	3,000	N/A	6,000	6,000	N/A	N/A
<i>Total</i>	7,000 ⁶	7,000	7,000 ⁷	16,000	56,000	25,000	62,000	>56,000	>56,000
<i>Min # of Employees</i>	0	1	5	1	1	1	1	1	1
<i>Max # of Employees</i>	0	No max	No max	100	No max	No max	No max	No max	No max
<i>Funding</i>	IRA	IRA	IRA	IRA	IRA	Trust	Trust	Trust	Trust
<i>Loans</i>	No	No	No	No	No	Allowed	Allowed	Allowed	Allowed
<i>Types of Contributions</i>	Employee	Employee	Employee	Employer and Employee	Employer	Employee	Employer and Employee	Employer and Employee	Employer and Employee
<i>Investments</i>	Approved custodian; no insurance	Approved custodian; no insurance	State selected custodian and investments	Approved custodian; no insurance	Approved custodian; no insurance	Self-trustee; insurance within limits	Self-trustee; insurance within limits	Self-trustee; insurance within limits	Self-trustee; insurance within limits

CONCLUSION

In addition to the plans specifically designed for retirement savings discussed above, small law firms may also want to consider other ways of supplementing retirement savings such as non-qualified deferred compensation plans, medical account plans (such as health savings accounts and health reimbursement arrangements), or the purchase of life insurance or annuities.

Having adequate retirement income is concern common to all of us. Through a careful consideration of the many options available to California employers, small law firms and solo practitioners can choose the solution which best suits their situation.

ENDNOTES

- 1 There is a tax credit which may help: <https://www.irs.gov/retirement-plans/retirement-plans-startup-costs-tax-credit>
- 2 CAL. GOV. CODE §§ 100000-100050.
- 3 CAL. GOV. CODE § 100034.
- 4 *See* Howard Jarvis Taxpayers Association et al. v. CA Secure Choice Retirement Savings Program, No. 2:2018cv01584 (E.D. Cal. filed May 30, 2018).
- 5 Bd. of Tr. of the Glazing Health & Welfare Tr. v. Chambers, 903 F.3d 829, 837 (9th Cir. 2018).
- 6 May be able to contribute an additional \$7,000 for a non-working spouse for a total of \$14,000
- 7 Roth only—no tax deduction up front; higher income employees may need to opt out

MCLE Article: Can I Drive Home After Happy Hour? Have Booze and Cannabis Changed Things?

By Eric Ganci, Esq. and Ron Moore, Esq.

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

We released this self-study guide initially in 2015 and it was so well received, we decided to do it again! This topic of alcohol, substances, and, dare I say **math**, can be full of rigor, wonder and excitement! We wanted to provide an update as some things have changed. While the science of alcohol remains largely the same, laws have changed with the legalization of recreational cannabis and may change again soon with the possible lowering of the *per se* legal limit in California.

To start, the legal profession is one of the most powerful, wonderful environments. It is one where we can constantly learn, be artistic, and truly help others. However, “with great power comes great responsibility,” and it can also be a very stressful, heavy area of work. This stress can come in forms of feeling overwhelmed, overworked, or general incompetence or unpreparedness. With that, the body and mind need a way to unwind—to try and escape the world in which we constantly live.

There are many positive ways to try and disconnect and try to break away from the law, but many attorneys attempt to take the edge off by having a cocktail after work. For many persons, this can be



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to verdict. Eric is on staff teaching with Trial Lawyers College. He earned his JD from Thomas Jefferson School of Law and his BA in Music Education from Northern Illinois University.



Ron Moore is a forensic toxicologist and attorney. He worked for over 18 years in a crime lab, practiced law for 8 years, then opened his own toxicology consulting firm about 5 years ago. He graduated Valedictorian from Western State University College

of Law, and holds a Masters in Forensic Toxicology from the University of Florida.

fine, as it can be a way of slowing the day down, or celebrating yourself on a job well-done. However, it can also easily become a crutch: a requirement to begin allowing yourself to relax.

How can alcohol absorb and eliminate within your body? Obviously, drinking alcohol may not be against the law (if you’re over 21, not on a probation term restricting this, etc.), but it is important to be aware of *per se* legal limits as they apply to alcohol and driving.

Also, what about marijuana? How can cannabis process through your body? How long does it remain in your body? How long do its effects remain affecting you? And what are the considerations for the effects of cannabis plus alcohol?

Some think they can hit a happy hour, and as long as they stick to their “two drink” allotment, they will be fine to drive home. While that may be the case, it also may not. Especially for smaller females, two

drinks can quickly rocket you past the legal limit. Especially if the legal limit gets lowered to a 0.05 BAC (down from a 0.08). And if you add to that the different alcohol percentages for the different types of beverages of choice, it can be a dangerous combination. Although everyone has rights, and there are many legal and scientific issues with any DUI case, the truth is driving under the influence can be a very preventable crime as long as you know and understand these concepts, and then plan ahead.

MARIJUANA

How the law has changed:

California marijuana laws changed drastically with the decriminalization of possession (under 28.5 grams) and legalization of medical marijuana in 1996. And our marijuana laws changed again in 2016 after voters approved Proposition 64, the Adult Use of Marijuana Act. Under this law, persons 21 and over may purchase, possess, and consume up to 28.5 grams of marijuana in their private residence or in an establishment licensed for marijuana consumption for recreational use, not just medicinal purposes. While most criminal sanctions for marijuana were lifted immediately after the general election, licensing to legally sell and produce recreational marijuana began in January 2018.

How does marijuana get into your body and how long can it affect you?

The active ingredient in marijuana is delta-9-Tetrahydrocannabinol or THC. THC is typically taken into the body smoking but can also be ingested in a product from the burgeoning market of edibles or vaping liquids. While the peak felt effects from smoking or vaping happen relatively shortly after smoking, peak effects from edible products may take hours. Peak impairment in driving skills may not coincide with the peak felt effects. Effects from THC may persist for a few hours. THC is a fat-soluble molecule and can be sequestered in the body. Frequent users build up stores of THC in their bodies. In occasional users THC may be detectable in blood for 24 hours depending on the quantity consumed and the detection limits used, and in urine for a couple days, but in frequent users THC

can be found in blood up to several days after last use, and may show up in urine for weeks.

What can the effects of marijuana be if you add alcohol?

Alcohol often amplifies the effects of other drugs taken close in time. This is true with marijuana and alcohol. Studies have shown that the impairing effects of the two drugs taken together are often at least additive. Therefore, amounts of alcohol or marijuana that would not make you a dangerous driver when taken alone may be dangerous when taken together.

What is the law for driving while under the influence of drugs or drugs + alcohol?

Per California Vehicle Code section 23152(f): “It is unlawful for a person who is under the influence of any drug to drive a vehicle.” Want to add alcohol to the marijuana? Well, the Vehicle Code is watching you too on that: “It is unlawful for a person who is under the combined influence of any alcoholic beverage and drug to drive a vehicle.”¹

Now, what does it mean to be “under the influence?” As lawyers, we of course *would* ask that question! While that is an arguable term, California CALCRIM Jury Instruction 2110 defines “under the influence” as your mental or physical abilities are so impaired that you are no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.

To quote Lebowsky: “Well, that’s interesting man.” Do we have any further legal definitions in our Jury Instructions to what this further means? The answer is no. And this is what is argued at DUI trials.

Do we have a per se legal limit for marijuana in California?

While there are some states that have established a *per se* limit for THC blood levels while driving, California has not. While having a *per se* limit might make prosecution for DUI easier, it would also make it more unfair. Studies have shown that there is not a good correlation between THC levels and driving impairment. Some people may be unsafe at low levels, while people who have developed tolerance may not be under the influence at even higher levels.

HOW DOES ALCOHOL ABSORB INTO MY BODY?

Let's begin with the basics. Although you can ingest alcohol through other ways, most drink it. Once you take a drink, a very small amount of the alcohol can absorb into your mouth and throat. It then moves to your stomach, where about 20% can absorb through the stomach wall. It passes from your stomach, through your pyloric valve (the valve at the bottom of the stomach), and into your small intestine where it continues through your bloodstream.

Once swallowed, a drink enters the stomach and small intestine, where small blood vessels carry it to the bloodstream. Approximately 20% of alcohol is absorbed through the stomach and most of the remaining 80% is absorbed through the small intestine.

Alcohol is metabolized by the liver, and the alcohol enters the bloodstream and dissolves in the water of the blood. (Alcohol is naturally attracted to water.) The blood carries the alcohol throughout the body, and into the brain to create the effects of alcohol, which can range from nothing, to relaxation, to impairment.

Alcohol absorption has been vastly studied, for both medical and legal purposes to determine what rates and percentages persons absorb alcohol, and when the highest peak alcohol level is reached. Many factors play into this.

WHAT FACTORS INTO ALCOHOL ABSORPTION?

So many things must be considered with how fast or slow alcohol absorbs into your body, and it can vary from person to person. But it can also vary from that same person on different drinking occasions. The truth is, there is no way to truly know how fast or slow your body will absorb alcohol, but here are some things to consider.

As said before, alcohol is attracted to water. And muscle has more water than fat. So if you're lean, your body has more water, and your absorption rate can be faster. Also, females statically have a higher percentage of body fat than males, so with less muscle, women have less places to put the alcohol

once ingested. Ron Moore, an expert in alcohol analysis, gives a great example of treating the body like a bucket. If you have a smaller bucket (e.g., female), then you're going to reach a higher alcohol level simply because you have a smaller bucket into which to put the ingested alcohol.

Food is another big factor. If you have food in your stomach, the alcohol can absorb into the food in the stomach like a sponge and slow down absorption. The alcohol can then sit in the food until the stomach processes the food with the alcohol in it, and that alcohol will not process into the body until it passes past the pyloric valve, into the small intestine, and thus through the rest of the body.

What types of alcohol and how you drink those alcohols can affect absorption. Carbonated drinks can speed up absorption, while drinking alcohol straight can irritate the stomach and slow down absorption. Social drinking (e.g., sipping beers with some friends) can slow down absorption, both because your intake is slower and because it is spread out over time. Bolus drinking (drinking all in one dose, quick chug, shots) can speed up absorption (unless it irritates your stomach, as discussed above). Other things that can affect your stomach, such as smoking, can slow absorption.

Also, as attorneys, we deal with one big factor for absorption: stress. Stress can clench up the body such that the stomach does not let anything (or greatly slows down) alcohol from passing through the stomach. Then, once your body does allow the stomach to relax and release, it can create an alcohol dump from the stomach into the intestines. If you have ever went from not feeling any effects of alcohol to very, very, very impaired, this may be what happened to you.

In general, you can reach your highest alcohol level in about 15-45 min on empty stomach, and about 15-90 min full stomach. But it can range from just a few minutes, to up to a few hours.

WHAT CONSTITUTES A "DRINK"?

"It's ok, I only had one drink." Yes, but what was that drink?

The scientific community evaluates alcohol absorption off a “standard drink.” Again, borrowing from Ron Moore, a standard drink is basically

1. a 12-ounce 4% beer
2. a 4-ounce glass of 12% wine, or
3. a 1-ounce shot of a 100 proof liquor, or 1.25 ounce shot of an 80 proof liquor.

Here’s an example of that “one drink” you just had. I believe we now have more breweries than Starbucks in San Diego (not that the author is complaining about that), and one favorite beer is Sculpin IPA. Sculpin IPA is 7% ABV (alcohol by volume), compared to a Miller Lite, which is around 4.1% ABV. One 12-ounce Sculpin IPA is basically the same as drinking 1.7 Miller Lites. But what if you had a “pint?” While pints come in different sizes, we’ll assume a 16-ounce pint. One 16-ounce pint is 1.333 the size of a 12-ounce pint. Take 1.7 and multiply it by 1.333, and we see that one 16-ounce pint of Sculpin is not just “one beer,” but actually the equivalent of 2.266 “standard drinks.”

This may make someone re-evaluate an “I only have two drinks” method. Two Sculpins would be the equivalent of 4.533 standard drinks.

Now, some people may be able to handle that amount safely. But I’ll use myself as an example. As a male, 6’3”, weighing around 190 pounds, my BAC raises about .02 per standard drink. Multiply the 0.02 by the 4.533 (the two Sculpins from my example), and that can put my BAC at a 0.09. There’s more to consider obviously with elimination rates, but that is a very general benchmark to consider when happy hour’ing before driving home.

WHAT ARE THE GENERAL ALCOHOL-ONLY DUI CHARGES IN CALIFORNIA?

The legal per se limit for alcohol and driving in California is a 0.08, per California Vehicle Code section 231521(b). That limit may change, depending on your situation: It can be zero tolerance if you’re under 21 or on probation of some kind, or a 0.04 if driving commercially.

Also, California has proposed A.B. 1713² to lower the legal limit to a 0.05 BAC. Utah recently adopted

this per se legal limit and California may be the next state to follow.

Regardless of an alcohol level, you can also be guilty of DUI even if your BAC is under the per se limit. California Vehicle Code section 23152(a) makes it illegal to drive while “under the influence” of alcohol. And this is the same definition per CALCRIM 2110 for “under the influence” that I discussed above. One other interesting note is per California Vehicle Code section 23610, if you’re under a 0.05, you’re presumed to be *not* under the influence of alcohol.

Best practice? Plan ahead for getting home or to your next location. Sober transport is so easy and affordable now with Uber, Lyft, and taxis. Be safe; be smart.

This article is available as an
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ENDNOTES

- 1 CAL. VEH. CODE § 23152(g).
- 2 A.B. 1713, 2019-2020 Reg. Sess. (Cal. 2019).

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