

Hearsay

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If you have any questions about the publication or would like to submit an article for a future issue, please contact Shanda Pearson or Andrew Loose.

MSBA



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Greetings from the Chair

Lacee Anderson

With how cold our winter has been, it is hard to believe that Spring is just around the corner, but it is! And we have some exciting things coming up in the second half of the year.

Before I get too far along, I want to thank everyone who worked very hard on making the annual Tri-Bar social and Toys for Tots fundraiser and toy drive a success. Despite a tough economy, young lawyers and area firms gave generously. I am also thrilled that the effort truly was one of all three area New Lawyers Sections: HCBA, RCBA, and MSBA.

Our community service and networking continues with our Spring Social on April 15th. We will be hosting a CLE at William Mitchell with our monthly meeting and social to follow at The Liffey. Look for details in the emails you receive from NLS. It is always a great event!

In January, we hosted our third annual “Real Life Financial Planning for Young Lawyers” seminar. Those in attendance learned about keeping our “financial house” in order, particularly during these turbulent economic times. In February, we had Deidre Van Nest, a career coach, present on how to get clients and maintain client relationships. She had excellent advice! If you missed these events, we will have free CLEs in March and April the hour before our council meetings. On March 18th, we will have Judge Cahill of the Hennepin County District Court speak on technology in the courtroom. This CLE will be held from 4:45 to 5:45 p.m. at the MSBA office. At the March meeting we will also vote on the ABA-YLD District Representative position. This position represents the NLS of the Minnesota and Wisconsin Bars at the ABA Conferences for the 2010-2012 Bar years. Look for additional details in the NLS emails.

We love it when new members attend our council meetings and provide us with valuable feedback on the issues we discuss and events we’re planning. Our meetings are the third Thursday of the month, through May, at 5:45 p.m. at the MSBA office (except for our April meeting). Our next meeting is Thursday, March 18th.



Lacee Anderson is the chair of the MSBA New Lawyers Section and an Attorney Search Director at Special Counsel. Lacee can be reached at lacee.anderson@specialcounsel.com.

New Age of Technology and Criminal Law

How Criminal Law is Being Impacted by Social Networking Sites

Landon Ascheman

It's a new age of technology; computers have advanced beyond the expectations of many. Generations before us have been left in the wake of the rapid advancement in online communication and networking. The laws are struggling to catch up, and the world of criminal law is no different.

The intersection between online interactions and criminal law is continuing to grow and these cases are rarely examined by the higher courts. This places a large amount of power in the district courts and allows the new and technologically savvy attorney the opportunity to make a large impact with the direction that criminal law will take.

When we see interactions on social networking sights as potential evidence in a criminal case, we can divide the common interactions into three separate categories: character evidence, circumstantial evidence, and an actual element of the crime.

Character Evidence at Trial

Character evidence is generally a threat hanging over the defendant's head. If he attempts to prove that he is a good person and would never commit the crime with which he is charged, the prosecutor will attempt to bring up every scrap of evidence she can find to counter the good character claim.

For example, in Indiana, Ian Clark was found guilty of murdering a young girl. In support

of its case, the prosecution introduced Mr. Clark's statement on MySpace. "Society labels me as an outlaw and criminal . . . To those people I say, if I can do it and get away. B. . . s. . . . And with all my obstacles, why the f . . . can't you." The Indiana Supreme Court found that the statement was admissible character evidence.¹

How do you handle this as a defense attorney? In most situations, the harm has already been done. Even if the defendant removes the incriminating information from the social networking site, most sites archive their data. That archived information is still available, and it is becoming more and more common for the police and prosecution to investigate these treasure troves of character evidence. Be aware and be prepared to identify and explain any character evidence that may arise in your case. Make sure your client is aware of the ramifications of the character evidence.

Character Evidence at Sentencing

Not all character evidence regarding a defendant is introduced for purposes of conviction. In many cases it arises during sentencing. A key area where this can arise is in DWIs.

Prosecutors in Santa Barbara, California, discovered the importance of checking social networking sites before sentencing hearings. In 2007, Jessica Binkerd was driving under

the influence; the resulting car crash killed her passenger. She was hoping for probation. The prosecutor produced photos from Ms. Binkerd's MySpace page showing her partying with friends and wearing bandoleers of shot glasses. The court was convinced that she had shown no remorse for the tragedy and sentenced her to 5 years and 4 months in prison.²

Within months, Laura Buys was involved in a nearly identical case. At sentencing, postings of drinking stories and a picture of her drinking wine convinced the court that she also had no remorse. She was sentenced to 2 years.³

Luckily, this is an area where the knowledgeable defense attorney can make an impact. Be aware of the social networking sites that your client frequents and make him aware that the prosecution and court may well find anything that is posted. Even if the client believes that he has restricted access to postings or pictures, the prosecution has the authority to get the information if made aware of it. Although posting sob stories about how a defendant learned his lesson is not likely to elicit sympathy from the court, it's better than what happened to Ms. Binkerd and Ms. Buys.

Circumstantial Evidence

Social networking sites may also provide circumstantial evidence. As with character evidence, the harm often is already done by the time a defense attorney becomes involved.

In Martinsburg, Pennsylvania, Jonathan Parker was charged with one count of felony daytime burglary. While in the home, Mr. Parker paused to stop and check his Facebook account on the victim's computer. Unfortunately, he forgot to log out before leaving the house. Any defense in this

case is difficult and most likely boils down to damage control.

This past November, students at the University of Wisconsin were confronted by what appeared to be a random, attractive co-ed who wanted to be their "friend" on Facebook.⁴ Like most college students, they jumped at the friend request. Only later did they discover that the "random" was actually an undercover officer. The officer went into the students' Facebook photo albums, identified pictures in which they appeared to be drinking underage, and sent citations. Because the citation was only \$227, many of the students paid the fine. In this case, however, the defense has many arguments available to it. Where's the proof that the beverage was alcohol? Where's the proof that the student was drinking it? (Remember they were being charged with drinking, not possession.) Finally, and most importantly, where is the proof that the court even has jurisdiction over the offense?

Actual Element of the Crime

The new trend, and possibly the most important intersection between law and technology is when the defendant's online presence is an actual part of the crime. Every criminal attorney should be aware of the legal significance this intersection has on his or her client's case. Ascherman & Smith had a recent case where Defendant "Jessica" (not her real name) had a court order prohibiting her from contacting the victim. When the court order was put into place, Jessica ceased all contact with the victim. However, Jessica had previously accepted a friend request from the victim on Facebook. Jessica rarely used Facebook and failed to realize that this "friendship" was still in place. The prosecution realized it, and a hearing was called to determine if Jessica had violated the court order.

A significant question at this point is whether Jessica was reasonably expected to know that allowing the connection between Facebook pages to remain would be a violation of the court order. It is important to have a good understanding of how websites work to be able to explain that Jessica didn't actually make any contact with the victim.

Jessica created a website under the structured format required by Facebook, as did the victim. When completed, both Jessica and the victim authorized said website to be viewed by the other person's account. When this authorization was created, there was no court order. When the court order was put into place, there was no explicit requirement to sever the connection. In defense, we argued that the prosecution failed to show Jessica made any actual contact with the victim. However, the court has yet to rule.

In contrast, a defense attorney recently used a Facebook posting to negate an element of a crime. More specifically, she showed that the defendant was not present when the crime was committed. In October, Defendant Rodney Bradford was updating his Facebook status in Harlem. The next day he was arrested as a suspect in a robbery at the Farragut Houses in Brooklyn. That simple Facebook update became Mr. Bradford's alibi. After discussing the Facebook update with Mr. Bradford's defense attorney, the prosecutor verified the information and the charges were dropped. Although the posting could have come from someone other than Mr. Bradford, there were other witnesses to support the alibi. This appears to be one of the first cases where a social networking site has been used to help a defendant.

Conclusion

Social networking sites are everywhere. Their influence is growing, and they are

impacting every area of life, including criminal law. It is vital that attorneys take the time to know how these sites work, and how these sites can affect the cases on which they are working.

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Notes

¹ *Clark v. State*, 915 N.E.2d 126, 129 (Ind. 2009), available at http://www.internetcases.com/library/cases/2009-10-15-clark_v_state.pdf.

² See <http://www.dailynexus.com/article.php?a=13440>; <http://www.keyt.com/news/local/3514741.html>.

³ See <http://www.judicialaccountability.org/articles/internetnotprivatewhenlibel.htm>; <http://cbs2.com/local/Laura.Buys.Jenny.2.531335.html>.

⁴ See http://www.lacrossetribune.com/news/local/article_0ff40f7a-d4d1-11de-afb3-001cc4c002e0.html?mode=story.

Answering the Bell: How to Handle Client Emails Without Sacrificing Your Sanity

Joseph A. Larson

It's hard to comprehend the complexities of a business entity that's only become your client in the last 24 hours, find and apply the legal precedent you're going to need to know for the case, and decipher the strategy of opposing counsel when you have a limited amount of time to prepare for a TRO hearing. But it's especially hard when a bell goes off a foot from your head ten times an hour.

While it's true you can disable the "ringing" mechanism on your computer that alerts you to a new email message, there's certainly nothing you can do to stop people from sending them, other than ignoring them. But, when the emails are from your client, ignoring them is never an option. In an era where the use of email has become the primary means of communication in business litigation, how can a lawyer prevent it from becoming a distraction?

As an example, I'll use a recent case our firm, the Holstein Law Group, handled. Our client, the Defendant—charged with usurping a corporate opportunity, stealing trade secrets, and breaching his fiduciary duty, among other things—hired us on September 15, 2009. The Plaintiff was a large, multi-national corporation with two law firms at its disposal, the first a national firm with over 30 locations across the United States, and the second, one of the largest law firms in Minneapolis. The Plaintiff filed a motion for a temporary restraining order that would have effectively shut down our client's start-up company and thrown it into bankruptcy. Our firm needed to act immediately in formulating

our new client's response. We needed to gather facts about our client and the Plaintiff quickly, as well as find answers to critical questions to better understand exactly who we were representing and who we were opposing.

Because a number of players in our case were located throughout the United States and Europe, email was the most effective means of gathering that information. Further, though we were successful in arguing against the TRO, the court granted the Plaintiff's motion for expedited discovery, which was largely based on Plaintiff's unsubstantiated claims that our client's start-up (which hadn't even made \$1 million in revenue yet) was detrimentally affecting the Plaintiff's key product revenue. After ordering expedited discovery, the court scheduled a full jury trial on the merits *in thirty days*. This meant our firm—only 5 lawyers—was not only responsible for collecting all relevant documents to answer Plaintiff's document requests and interrogatories, but we also had to determine which employees of Plaintiff's multi-billion dollar company we wanted to depose. It's a daunting task in a case of this size with such high stakes, but with the trial date set so soon, it was clear email was going to play a paramount role in our preparation.

In fewer than 45 days—the time from the TRO hearing until the eve of trial—the information we collected via email was nothing short of colossal. Included in the roughly 2,000 documents produced by our client (over 12,700 pages), there were almost 700 email chains. In the Plaintiff's production—which is ongoing

after a continuation of the trial date at the last second, largely due to some missing emails in the Plaintiff's production—there were 285 email chains. On top of this, an outside company involved in the subject of this litigation produced over 3,200 emails. Besides complying with discovery requests and culling evidence for our defense, we also received almost 400 emails from our client during this time period, on topics as wide-ranging as our strategy for the case, legal theories, answers to factual questions, scheduling matters, and document transfers.

This prevalent use of email poses a number of concerns for lawyers involved in business litigation. The attorney's job is to collect and understand all the case information so he or she can provide the most efficient representation for the client. When that information comes in willy-nilly and fills your inbox—which is likely simultaneously being inundated with emails from other cases, interoffice memos, vendors, and who knows what other electronic flotsam and jetsam—it's easy to lose track of a piece of information that could potentially affect the outcome of the case. And, after being presented with a damaging fact or piece of evidence at trial, a lawyer never wants to receive an explanation from his or her client along the lines of "Well, I sent you an email about that..." Further, an influx of information via email serves as a devastating distraction to an attorney trying to compose a brief or research case law. That constant ringing from your computer or pop-up on your screen—the only natural reflex being to look up from that research you're doing and see what it is—can cause an idea or theory to be lost in the shuffle of information-gathering. Finally, although you're serving the client by answering emails and building your case, excessive or duplicative responses can cause the client's bills to increase exponentially, which is assuredly not what the client expects.

Thus, it's clear that litigators need to take steps to ensure that a system is in place for handling a deluge of emails from the client. The following are a few tips that may provide a shelter from electronic onslaught:

Designate one person in the office as the vessel for email communications with the client. Your client might frown upon losing unfettered access to his or her attorney at all times of the day. However, in a situation where time is an issue, this may be the only way to appropriately carry out the rest of your tasks, such as researching, writing, and strategizing. Before email became so prevalent, a lawyer used to be able to close his or her door and work without interruption. Designating a primary "client email recipient" could simulate those good old days (as long as the vessel isn't you) and allow you to work on one thing at a time, thereby avoiding distraction. Although this might take some getting used to for the client, it will surely provide you with the time and focus necessary for your best representation of the client's interest.

Request the client email you no more than once daily, unless it's an emergency. This may also ruffle feathers at first, but when the client sends fifteen 500-word essays a day to your inbox, a little bit of tough love may be the only answer. If the client can honor this request, you will be able to plan and set aside the time necessary to digest and analyze the information the client considers of the utmost importance each day.

Limit your use of the "cc" option in your office. Clients aren't the only offenders! Emails from other attorneys in your office can often cause even more of a burden than an enthusiastic client. If you're zeroed in on a task, the last thing you need is correspondence on an ancillary issue or another case altogether. Cautioning your co-workers to only "cc" you on matters that

demand your immediate attention will also allow you to focus on the task at hand.

Create a folder and a series of sub-folders on specific issues in the case and manage those folders each day. The problem might be that you know there is an email that speaks to the issue you're trying to solve, but you simply can't find it due to the girth of your inbox. Setting up a system with folders and subfolders you can access quickly will save you time and prevent you from losing important information in the swells of other emails in your inbox. If you keep up the organization, managing the different aspects of each case and the information that goes into them will be much easier.

Although these suggestions seem small and possibly a bit cumbersome at the start, it's not

worth the risk of what can happen if you fail to effectively manage your emails. And in a world where email has taken over as the most-used form of business communication, they may just save you and your client from a denouement much more debilitating than that constantly ringing bell on your computer.

Joseph A. Larson is a first year associate with the Holstein Law Group, specializing in complex business litigation. He graduated from Creighton University School of Law in 2009. He can be reached at jl Larson@holsteinlawgroup.com.



Don't Be Unemployed, Be a Solo

Kyle Lewis

With the recent downturn in legal hiring, there are quite a few law students and new attorneys looking for work. As a result, it will realistically take most attorneys looking for jobs longer to find them than it has in the past. When your student loans and other bills are piling up, this kind of delay can be truly disheartening. Many attorneys are choosing to start firms, either solo or with their friends. Starting a practice instead of sitting at home unemployed is a great idea and a lot of fun. Here is a quick guide to the process.

Benefits to Starting a Practice

Starting a practice will give you three key benefits. First and foremost, you will bring

in some money. Of course, there are startup costs, but they should not be prohibitive. You will most likely be paying for your license anyway. Malpractice insurance for a new attorney is unlikely to be more than \$600 or \$700 per year. Forming a business entity and registering it with the Lawyers Professional Responsibility Board currently is \$270. At least to begin with, you should not need office space. Just meet clients at coffee shops (or jail). All told, you will likely recoup all of your initial expenses with your first client.

Second, starting a practice will give you invaluable experience even if it does not work out or you choose to accept a job offer. If you were a family law firm hiring partner,

would you hire the attorney fresh out of law school, or the attorney who got some real-world experience with five divorce cases before applying?

Third, starting a practice will help keep your spirits up. When you are unemployed, days can seem endless if you do not have something to do. Starting a firm will help keep you focused and give you structure.

Forming an Entity

Every situation is unique, but most new attorneys should consider forming a business entity to provide legal services. The increase in credibility alone is worth it, plus it will protect your personal assets from a wide variety of liabilities (but not malpractice).

Most likely, an LLC will be the best business entity for you. A normal corporation subjects you to double taxation, once at the corporate level and again on your personal income tax when earnings are distributed as dividends. Corporations also have stringent record-keeping requirements that can eat a lot of your time if you are not careful. Not good when you're starting out. An S corporation has flow-through taxation, meaning that profits flow through to the owners without being taxed at the corporate level, but still leaves you with a lot of paperwork. An LLC gives you flow-through taxation and less stringent record-keeping requirements, which can save time. But don't let the looser requirements lull you into poor record keeping. Make sure you keep current the records that are required.

Don't forget that law firms are subject to the Minnesota Professional Firms Act, Minn. Stat. §§ 319B.01 to 319B.12, in addition to the statute governing your underlying business entity. Minn. Stat. § 319B.11, subd. 3, requires you to register your firm with the Lawyers Professional Responsibility Board

before you can start practicing under its name. Once you form the entity, keep up with the paperwork! If you let it slide, a court may not respect your limited liability shield.

If you are going to be practicing alone, you can most likely do sufficient research to create an entity correctly on your own, even if you don't have extensive business law experience or coursework. It's just a matter of filing all the forms correctly. If you plan to have a partner, I recommend you contact a more experienced attorney to make sure you don't miss any of the business issues that arise from having multiple owners.

Malpractice Still Matters

While the benefits of LLCs are important, the protection from liability they provide is not unlimited. Actions by the corporation will not endanger your personal assets, but your actions are still your responsibility.

For example, let's say that your client, Tim, slips and falls on the sidewalk outside your practice. If you signed the lease as My Professional Firm, PLLC, then Tim will only be able to sue your PLLC. All of your personal assets will still be protected. However, if Terry hires you and you miss the statute of limitations on his claim, that is your personal responsibility. You might face a malpractice lawsuit in your personal capacity, even though you were practicing as an employee of your PLLC at the time. For this reason, most lawyers find it worthwhile to carry malpractice insurance, even if they have a limited liability entity.

Getting the Word Out

There are countless books and articles on how to market your law practice. For example, Jay Foonberg's "How to Start & Build a Law Practice" has guided generations

of lawyers. Also, Minnesota CLE presents seminars such as “Networking Professionally and Ethically.” I won't duplicate them all here, but you should read a few, decide what strategies you are most comfortable with, and go for it.

I will, however, take a moment to address the unique situation of someone who is starting a law practice while simultaneously looking for a job. When you tell your friends and family that you are both taking cases and looking for a job, they may get the impression that your practice is just a backup for your job search, one you will abandon when you find employment. It is important to forestall this notion, because they are unlikely to refer you cases if they do not think you are serious. In reality, your practice should be an integral component of your job search, providing money, experience, and structure. If someone asks what you will do with your clients when you find a job, tell them that firms love it when new hires bring a book of business with them. Your practice is an asset, not a liability.

Doing the Work

Don't worry about it. Really. You would not have gotten into law school in the first place if you weren't pretty smart, and I would bet that you have learned a thing or two since you took the LSAT. Read up on the basics of each area in which you intend to practice so you can explain to clients what will happen when they hire you. When a case comes in, work your tail off and learn the relevant law inside and out. Call a friend if you need a second opinion or some forms to get you started. But do not try to anticipate every legal issue that might arise in your future cases and learn the law beforehand. It is distracting and pointless.

Final Thoughts

Starting a practice can be a lot of fun, and excellent experience to boot. As long as you keep your overhead low, there is very little risk. The worst outcome is that you will have to get a job, which is the exact same position you were in at the start! Come up with a plan, and get started. You are guaranteed to learn a lot, get some good stories, and you will probably have fun while you do it.



Kyle Lewis is the founder of Lewis Law, PLLC, a Minneapolis business law firm. He is always glad to answer reader questions at 612-598-2206 or kyle@kylelewislaw.com.

HCBA NLS News

Greetings from the Hennepin County New Lawyers Section! The first few months of the year have been both active and very busy for the HCBA NLS, and we hope to carry this enthusiasm throughout the rest of the bar year.

The HCBA NLS has been active in the community helping those less fortunate as well as helping new lawyers in Hennepin County. Around the winter holidays, a group of HCBA NLS members attended a Feed My Starving Children event where we packaged food for children who are on the brink of starvation. During our shift we helped pack 15,336 meals, which would feed 42 children for an entire year!

We have also helped prepare new lawyers through our free Nuts & Bolts program and our other CLEs. Our Nut & Bolts program taught new lawyers of all practice areas how to deal with difficult clients, how to manage their money, how to take depositions, and many other topics related to difficult situations new lawyers will most likely encounter early in their careers. Our Nuts & Bolts program ended with a happy hour and fashion show to teach new lawyers the latest trends in appropriate office attire, whether it is courtroom attire or casual Friday dress.

The HCBA NLS is looking forward to the educational activities and socials to come in the spring.

Laurie Young and Sarah Rohne are co-chairs of the Hennepin County Bar Association's New Lawyers Section. Laurie Young can be reached at laurie.young@nm-iplaw.com or 612-339-7461. Sarah Rohne can be reached at sarah.rohne@gmail.com or 651-343-2803.

RCBA NLS News

Greetings from the Ramsey County New Lawyers Section! As many of you know, the RCBA NLS has been very active so far this 2009-2010 Bar Year, with more activities planned this spring. We look forward to our first Thursday of the month happy hours, continued work in the community and increased participation within our section and Bar!

In February, we expanded our New Lawyer happy hour and made a special effort to encourage all of our members to attend. Termed the "Sidebar," this happy hour was the result of collaboration between the Membership Section and the New Lawyers Section with the goal of cultivating connections and relationships between new and experienced lawyers within our Bar. With special thanks to our sponsor Larson King and hosts, Angela Brandt, Judge Robert Awsumb, and RCBA President Juan Hoyos, the event was a great success! Our first Sidebar was well attended by law students, new lawyers, experienced lawyers, and several judges.

On April 15, 2010, we will again join the MSBA NLS and HCBA NLS for the Tri-Bar Social. The Tri-Bar Socials are a great opportunity to meet your colleagues, network and develop relationships. Please mark this date on your calendar!

The RCBA NLS participates in a variety of community service events throughout the year. Please stay tuned for future announcements, or contact us to volunteer for our upcoming events.

Andrew Gifford and Lesley Adam are the Co-Chairs of the Ramsey County Bar Association New Lawyers Section. Andrew can be reached at andrew.gifford@northstarfinancial.com. Lesley can be reached at ladam@murnane.com. Also, please check out the RCBA NLS on its webpage: www.ramseybar.org/newlawyers.html.

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Antitrust Law

Joshua Dorothy

Arts & Entertainment

Larry McGee

Bankruptcy Law

L. Kathleen Harrell-Latham

Civil Litigation

Erica Tollefson & Melissa Wendland

Computer & Technology

Jeff Anderson & Todd Schenk

Construction Law

Chanel Melin

Criminal Law

Patrick Hayes

Elder Law

Mathea Bulander

Food & Drug Law

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General Practice, Solo and Small Firm

Kimberly E. Brzezinski

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Mia Thibodeau & Chrissy Mann

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Nygren

Civic Education

Elise Peterson

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Sitso Bediako

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Life & Law

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