

## Keep Busy When Business Is Slow

By Sarah North

In every legal career, a day comes when work slows down or, worse, comes to a screeching halt. If you're currently chained to your desk until midnight and on a first-name basis with the local food delivery service, you may dream of sitting around in your office with little or nothing to do. When slow days become slow weeks, however, the reality of not having enough work or not having enough *interesting* work sets in, and you may feel bored, restless, and frustrated. To combat these feelings and make the most of slow periods, try these tried and true suggestions:

**Focus on efficiency.** When you have too much time and not enough work to fill it, it's all too easy to allow current projects to expand to fill the time available. One way to avoid this "project bloat" is to allocate specific blocks of time to working on a particular task. For example, dedicate one hour to a specific legal research project and focus solely on that research during that time. When the hour is up, move on to something else. If you need more time for the project, schedule another hour for it later in the day. Setting time limits will not only prevent you from spending too much time on a particular project but will focus your attention and result in more productivity.

**Beware of the Web.** Although it's tempting to click on your browser "just for a second" to read your favorite blog, order some great shoes, or check your personal e-mail account, the Internet has a way of sucking you in and spitting you out half an hour and ten Web sites later. If you can't resist the

online urge, promise yourself two ten-minute Web breaks a day and save your serious surfing for home.

**Ramp up your marketing efforts.** Slow periods can be a perfect time to focus on bringing in new business. Call or e-mail friends, acquaintances, and business contacts you haven't heard from in a while. Research and write a law review article or, better yet, an article for an industry publication targeted at potential clients. Submit a speaker proposal for a CLE or trade conference. Not only will you spend your time doing something meaningful, you may also attract new business that will solve your problem of too much downtime.

**Do some good.** If you usually "don't have time for pro bono work," you now have no excuse. Call up your local bar's pro bono referral center and volunteer. Apart from the obvious benefits of helping someone who needs legal services, you'll also engage your mind and keep the rust off your legal skills.

**Complete your CLE requirements.** You have to get your CLE hours sometime, so you may as well do it while you have the time. Attending CLE programs is a productive use of your time and may present good networking opportunities.

By following these suggestions during slow periods, you'll remain productive, use your time wisely, and perhaps even make it rain. Before you know it, you may even be overworked, overwhelmed, and longing for the good old slow days.

Sarah North is an associate at The Platto Law Firm in Norwich, Vermont.

## Blowing the Whistle on Yourself: When to Report Potential Legal Malpractice Claims to Your Insurer

By Michael K. Feeney

Inexperience—it's the obstacle impeding all young lawyers at the beginning of their legal careers and, unfortunately, often leads to mistakes. When are young lawyers required to report those mistakes to their legal malpractice carriers?

According to most legal malpractice insurance policies, lawyers are required to report potential claims to their carriers when the lawyer has an "independent knowledge of

ment of whether there is a potential claim at hand. Get the file. Examine it exhaustively. Look for error and assess the potential harm resulting from the mistake. Determine whether the error can be remedied. Have a more experienced lawyer review the file for a second opinion. Many times, a thorough case analysis will reveal a solution to the underlying error so that a claim need not be brought at all. And, when you're not that lucky, an in-depth

you don't report. Not reporting a potential claim could result in significant coverage issues and possible exposure to personal liability. In other words, if you don't timely report potential claims to your carrier, you get to pick up the tab for damages.

Although many lawyers are hesitant and perhaps embarrassed to report a potential claim, the sooner you report it to your carrier, the better protected you will be. Legal mal-

"The sooner you report a potential claim to your carrier, the better protected you will be."

facts or circumstances that could give rise to a claim" under the policy. So what does that mean to young lawyers trying to make their way in the real world?

Being hit over the head with a legal malpractice lawsuit or a demand for money damages is not the only way in which circumstances demonstrate that a claim is at hand, although it is the most obvious. If that happens, call your carrier at once. Notice of *potential* claims, however, are more cleverly disguised: a letter from a former client's new lawyer announcing their intention to investigate your handling of the case, an inquiring letter from the client, or a simple phone call asking for possession of the case file. None should be ignored.

To sort out this gray area, lawyers should make an independent and unbiased assess-

review will at least reveal whether the potential claim should be reported to your carrier.

Reporting a potential claim, of course, always carries with it the potential of increased insurance premiums. Your wallet, however, could end up being considerably lighter if

practice insurance carriers don't just indemnify you from damages covered by the policy—they also provide a defense. If problems are caught early, they can sometimes be rectified before the harm fully takes hold. Bringing in experienced legal malpractice defense

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# Are You Working Securely?

By Bradley Dinerman

“Are we secured?” That is a question that all law firms, and small businesses in general, should ask.

It’s vital to understand that there really is no such thing as a system or firm that is *fully* secure. The best that you can do is to make your computers *sufficiently* secure—a determination made by weighing industry best practices against your firm’s needs and resources—in such a way that you can quickly respond to new security threats as they are exposed.

Like any small- or medium-sized business, law firms must understand the meaning of security and start by asking what they are trying to secure themselves from or against. There are two sources of threats—external and internal. External threats are usually obvious; the enemy is well-defined. The enemy’s weapons of choice are viruses, exploits and compromise of weak passwords; and it usually delivers these in e-mail, spyware, or direct attack at and through the firm’s Internet connection.

do something unethical and illegal? [internal threat]

- Are we secured from viruses or worms coming in to our system via e-mail? [external threat]

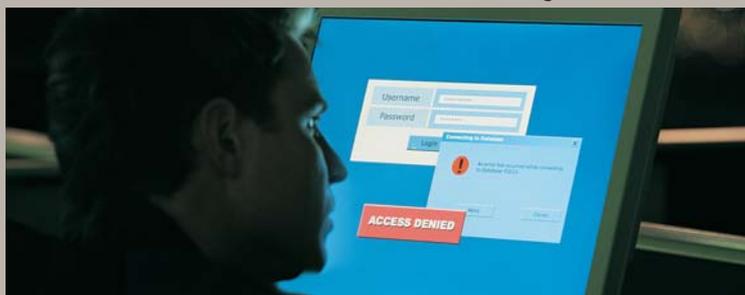
- Am I secured from the liability of having someone surf inappropriate Web sites? [internal threat]

- Are we secured from a disgruntled former employee trying to use his back-door account to steal our clients’ data for a competitor? [internal threat]

- Am I secured from my server crashing and removing all traces of my client data? [internal threat]

- Do only the appropriate staff members have change-level access to billing and matter records or other key files? [internal threat]

It is a safe assumption that the single-most important factor that affects a firm’s decisions regarding security and infrastructure is budget. Small firms in particular do not usually have tens of thousands of dollars to spend on IT infrastructure. They often take shortcuts, which do not necessarily translate to “working securely.” An example of this is the firm administrator who purchases an off-the-shelf wireless access point and sets it up with default settings without realiz-



Internal threats are much more subtle and difficult to address. Yet they can do significantly more damage to the firm’s infrastructure and reputation.

Assess the firm’s overall security level and identify external and internal threats by answering the following questions:

- Are we secured from hackers trying to break into our network? [external threat]
- Am I secured from my colleague guessing my password and using my credentials to

ing that it creates a serious hole in the firm’s network.

Some solutions to security questions can include firewalls, patch management systems, and antivirus and antispam software. Despite all the solid, technical measures that your firm may put in place, there is no real security without user education, acceptable use policies (documented and signed), and an emphasis on both implementing security measures and proactively maintaining

and updating them regularly.

For firms that do not have an adequate budget to retain a full-time, IT support staff, there are other solutions, including outsourcing the function to a local solutions provider. This option is attractive to many firms because the cost of the provider over the course of a year should be significantly less

than the cost of even a single, full-time staff member. But whatever solution you choose, implement it. Secure yourself!

Bradley Dinerman is the vice president of information technology for MIS Alliance ([www.misalliance.com](http://www.misalliance.com)) an IT/MIS consulting firm and solutions provider that serves small- and medium-sized businesses in the metropolitan Boston region, and the

founder and president of the New England Information Security Group (NEISG, [www.neisg.org](http://www.neisg.org)).

## READY RESOURCES

- *Information Security: A Legal, Business, and Technical Handbook*. 2004. PC #545-0033. Section of Science and Technology Law members receive a discounted price. To order online, visit [www.ababooks.org](http://www.ababooks.org).

# How to Respond to Bar Complaints

By Keathan B. Frink

As an assistant public defender, my work is frequently criticized and scrutinized. Many people believe that public defenders are neither “real” lawyers nor strong advocates for their clients—a misperception that often results in bar complaints from unsatisfied clients. Regardless of the practice area, all lawyers are susceptible to complaints. How do you handle bar complaints or prevent them?

## Plan Ahead

Communication is one of the most important aspects of the attorney–client relationship. Remember that clients have a vested interest in their cases and are directly impacted by the outcomes. Speak with your client after every major event in the case. Return phone calls as soon as possible. Between

phone calls, write letters and/or send e-mails. Also send copies of all pleadings. This way, your clients will know that work continues on their cases.

## Annotate Your File

Be certain the file reflects all of your work related to your client’s representation. Maintaining a properly annotated file and filing system will help if you receive a future complaint. Keep copies of every document involved in the case in the file, including all correspondence between you and your client. Make notes indicating the date, time, and subject of all conversations with your client.

## If You Receive a Complaint

Take the time to understand the allegations in the complaint. Don’t be so upset about your client’s complaint that you spend too much time venting to the

bar and fail to properly respond to the complaint’s allegations.

Determine when your response is due to the bar. Usually there is a short amount of time to submit the response. Your failure to timely respond could be a sign to the bar that the allegations in the complaint



have some merit. If you need an extension or have questions, simply contact the staff attorney handling the complaint. The bar is usually more than willing to answer any questions and assist when possible.

Some malpractice insurance carriers require notification of bar complaints, so be sure to check your policy. [Also see the article, “Blowing the Whistle on Yourself” on page 1.]

## Respond to the Complaint

Take the time to properly answer the complaint and its allegations. Briefly give an explanation of the matter behind the complaint and share some of the strengths and weaknesses of the case as well as the possible outcomes. Then answer the allegations. Supplement your position with copies of the documents you have from your well-annotated file, which should contain enough information to demonstrate your proper representation.

The bar will make its findings after reading your

response. If it finds you did not commit any violations, then it closes the file. The file is usually kept for a brief period (about one year) and then destroyed. If you were found in violation of the Rules of Professional Conduct, then the bar may take disciplinary action.

As a professional you must conduct yourself appropriately at all times. Remember to communicate with your client, work diligently, and hopefully you will avoid bar complaints.

Keathan Frink is an assistant public defender in Ft. Lauderdale.

## FOR MORE INFO

Visit the ABA Center for Professional Responsibility Web site at [www.abanet.org/cpr](http://www.abanet.org/cpr) for numerous resources to guide you through ethical dilemmas. The ABA Standing Committee on Lawyers’ Professional Liability also has legal malpractice resources at [www.abanet.org/legalservices/lpl](http://www.abanet.org/legalservices/lpl).

# When Your Client Is the City

By D.J. Doody

Few of us walked into our first class of law school with dreams of becoming a city attorney. Many of us had goals of becoming successful trial lawyers, corporate lawyers, or perhaps criminal defense lawyers. But a city attorney?

Representing a city, town, or village can be every bit as challenging as any other area of law. Municipalities are public corporations with budgets in the millions of dollars and a range of legal issues requiring an ever-increasing level of expertise. As in all legal practice areas, a strict adherence to the canons of ethics and a commitment to expend large amounts of time and energy is required for success and competent representation.

Generally, a city attorney is a charter officer of the municipality whose primary responsibility is to serve as the city’s chief legal officer. A city attorney

represents the client in matters involving constitutional law, zoning law, labor law, telecommunications law, environmental law, and appellate law, to name a few.

City attorneys prepare ordinances, resolutions, contracts, interlocal agreements, developers’ agreements, conduct labor negotiations, and attend meetings of the city commission or town council. It is not uncommon for a lawyer who represents a municipality to be

called on to provide legal advice to elected officials, the city manager, police or fire chiefs, or department heads on issues involving annexation, employment agreements, medical benefits, franchise agreements, billboard signs, zoning moratoriums, collective bargaining agreements, and the like. One morning you may assist in labor negotiations with the firefighters’ union and that same afternoon sit in on a meeting with staff members of the planning department to review a proposed site plan for a mixed-use development project that involves the transfer of development rights.



Few of us will be employed directly by a municipality, but for those of you who would like to obtain a municipality as a client, here are some do’s and don’ts:

## Do:

- become active in the community as a respected lawyer and participant in community activities.
- volunteer on any one of the various boards created by the municipality, such as planning, code enforcement, or civil service.
- gain some expertise in matters involving zoning, contracts, and litigation, and offer to serve as special counsel if the city attorney defers or has a conflict of interest.
- seek employment with a law firm that already represents a city, and gain exposure to municipal issues as assistant city attorney.

## Don’t:

- seek the position through political patronage. An attorney

perceived to have obtained the position through politics will most likely have a short tenure.

- count on working from 8:00 a.m. to 5:00 p.m. Many cities and towns hold their commission/council meetings in the evening. Municipal clients may call or e-mail you in the evenings or on the weekend. Be prepared to be available 24/7.

As your career detours from your original plan, consider the opportunities and challenges of representing a city or town. The title of city attorney may be one that fits comfortably in your career objectives.

D.J. Doody is a shareholder in Goren, Cherof, Doody & Ezrol, P.A., which represents ten municipalities in the South Florida area.

## READY RESOURCES

- *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients and Public Officials*. 1999. PC #533-0067. Section of State and Local Government Law members receive a discounted price. Order online at [www.ababooks.org](http://www.ababooks.org).

# The Gears of Organizing

By Porter Knight

At work and at home, the process of organizing involves the arrangement of space (rooms, desks and other flat surfaces, storage areas), the placement of stuff (information, paper, tools, supplies), and the allocation of time (using lists and a calendar to keep track of what you have to do and when you are going to do it). I call space, stuff, and time the “gears of organizing” because when properly aligned, they give you strength and momentum to accomplish your goals.

Anne is an environmental lawyer with a small nonprofit. Her office is crowded with reports, scientific studies and analysis, office supplies and equipment, internal office correspondence, and books. Every surface is piled high, including two tables, a small desk, a cupboard, bookcases, chairs, and the floor. The chaos spills into the hallway where there are several small stacks on both sides of her door. Anne has fallen into the “I-have-to-leave-it-out-so-I-remember-to-do-it” trap, a common organizing pitfall.

Here’s what you (and Anne) need to know about space, stuff, and time: stuff is not an effective time management tool. Leaving it out does not lead to organization. It leads to piles that get in your way and requires repeated shuffling just to make room for yourself, your work, and more incoming material. If you have a report to read, data to analyze, or a memo to answer, leaving them all out will not lead to their being read, analyzed, or answered.

To effectively accomplish your goals, you need *open space* to move, work, and focus without distraction. To easily find what you need, your belongings must be in reliable *safe homes*. And you need a *time system* to track what you have to do and when you are going to do it.

Here’s how:

- Create open space. Don’t put things down, put them *away*. This keeps flat surfaces open and free of clutter.
- Create safe homes. To put things away, think about how you are going to use them *next*. Focusing on the future makes it easier for you to come up with a meaningful name and location for each item so you can find it when you need it again.
- Create an effective time system. Track both *what* you have to do (the list) and *when* you commit to doing it (the calendar). If you have more on your list than you have time for on your calendar, you aren’t fooling anyone (even yourself). Be realistic. Shorten the list.

The true power of being organized is having room to move, being able to find what you need when you need it, and getting done what you want to get done. Align your gears to let your space, stuff, and time propel you toward your dreams!

Porter Knight is author of the book and instructional DVD *Organized to Last: 5 Simple Steps to Staying Organized* ([www.organizedtolast.com](http://www.organizedtolast.com)). She is a keynote speaker, workshop leader, and hands-on organizing consultant who inspires audiences and teaches individuals to “Dream, Organize, and Achieve!”

## FOR MORE INFO

If you need help getting organized, contact the National Association of Professional Organizers ([www.napo.net](http://www.napo.net)) and search by zip code to find a professional organizer near you.

# Survive Discrimination After an Illness

By Aramis N. Donell

Recovering from a severe illness is a major hurdle in a person’s life that can seem more overwhelming and unbearable when an employer or potential employer uses that condition to discriminate. Although surviving cancer, for example, may increase one’s fortitude to meet career goals and fulfill one’s destiny, for some employers a history of

**Deemphasize any gaps in employment.** Consult a job counselor to help you prepare your résumé to highlight your current qualifications. Develop a résumé that is organized by your work experience instead of chronologically. Always be honest.

**Never volunteer your medical history.** One exception is if your condition has a direct

and you may have to balance principle against your reputation.

**Be aware of filing dates and deadlines.** Adhere to the Equal Employment Opportunity Commission’s filing deadlines when filing an ADA claim. It is always better to change your mind and retain the ability to drop the lawsuit later than to lose your option because of missed deadlines.

“Learn how to use the legal safeguards that can protect you.”

cancer may only raise concerns about excess time off, medical and life insurance impacts, and substandard work performance.

The Americans with Disabilities Act provides safeguards for employees against discriminatory practices and treatment, including termination, demotion, transfers, and various other undesirable actions by an employer. There are several ways you can reduce the possibility of discrimination and the likelihood of being targeted because of your medical history.

**Know your legal rights.** If you have or have recovered from a condition that could cause you to be the target of discrimination, learn how to use the legal safeguards that can protect you. Also, keep in mind an employer’s limitation regarding the line of questioning during the interview process.

affect on your ability to perform a potential job function. Otherwise, an employer’s main concern should be whether you are qualified for the position.

If your efforts to avoid discrimination are unsuccessful, however, litigation may be the most effective way to enforce your rights. Take the following steps to preserve your rights under the ADA:

**Document for when memory fails.** Document every action that creates concern. A written record of dates, times, names, and actions will provide a solid foundation for a lawsuit. Document your conduct and reaction in each circumstance as well.

**Prepare for potential consequences.** Every lawsuit has positive and negative effects and no guaranteed result. Your goals in a lawsuit may affect your other professional and personal goals

Whether you choose to pursue legal action under the ADA is a personal choice that has significant consequences. If you have survived the illness, you can overcome what follows.

Aramis Donell is a former prosecutor currently serving as an assistant public defender in Orlando.

## READY RESOURCES

- *Fundamentals of Employment Law*. 2000. PC #519-0327. Tort Trial & Insurance Practice Section members receive a discounted price. Order online at [www.ababooks.org](http://www.ababooks.org).
- *Making an Employment Case under the ADA: Appellate Court Rulings Shed Some Light*, by Ann Kierman, *GPSolo* magazine, Volume 15, Number 3, July/August 1999. Available online at [www.abanet.org/genpractice/lawyer/complete/tcl\\_v15\\_3/kierman.html](http://www.abanet.org/genpractice/lawyer/complete/tcl_v15_3/kierman.html).

## Blowing the Whistle

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lawyers will also give you a realistic appraisal of the potential claim, take the stress of the situation off of your shoulders, and allow you to refocus on your practice.

Lawyers should also be extremely mindful of reporting both claims and potential claims when modifying their legal malpractice insurance coverage. It is crucial when adding, renewing, or adjusting coverage to fully disclose all

claims and potential claims. Otherwise, when a claim ripens and is reported, the carrier may deny coverage, return your premiums, and declare your policy *void ab initio*, on the basis that it would not have issued coverage had it known of the potential claim.

Finally, be sure to read and adhere to the specific language in your policy regarding reporting requirements. In most instances, reporting requirements are set forth in the “Notice of Claim or Suit” section of the policy.

Michael Feeney is an associate in the Pittsburgh law firm of Grogan Graffam, P.C., where he practices legal malpractice defense. He can be contacted at [mfeeney@grogangraffam.com](mailto:mfeeney@grogangraffam.com).

## FOR MORE INFO

Call the hotline of the ABA Standing Committee of Lawyer’s Professional Liability at 312/988-5755. You can also visit the Committee’s Web site at [www.abanet.org/legalservices/lpl/home.html](http://www.abanet.org/legalservices/lpl/home.html) for a wealth of resources on legal malpractice avoidance, insurance issues, risk management, and other helpful information.



# Need a Computer Forensics Expert? When and what to look for

By Hugh Pierce

Since the New Year, at least ten large organizations have suffered data confidentiality breaches. According to the Privacy Rights Clearinghouse, the list of organizations successfully attacked during January alone spans the financial industry, healthcare, higher education, state government, and the U.S. military.

A striking irony occurred in January, when a hacker gained access to customer records controlled by Guidance Software. Guidance is the company that sells what many consider the most common software application in use by computer forensics practitioners.

In the aftermath of each of these breaches came a team of computer experts. Their mission was to preserve, collect, and organize all the computer evidence they could find related to how the hacker gained access to the data and to determine what data was stolen. In general, these computer forensics investigations involved not only technical interrogation of computers and computer network devices but also interviews with employees, discussions with partner companies, and

exchanges of information with Internet service providers.

Selecting the best computer forensics team to evaluate the scope of damage and prepare evidence for use by civil attorneys and prosecutors was a matter of necessity for the first victims of 2006. This necessity is especially apparent when a company's brand is at stake or when criminal and civil culpability may be assigned.

Consider the following factors when assembling one or more experts to perform forensic handling of computer evidence:

- Is the candidate able to explain computer evidence concepts to both a technical and nontechnical audience?
- Has the candidate earned the trust of other computer forensics professionals or lawyers? Evidence of this might be a history of speaking, adjunct teaching, publishing, or training on the subject.
- Where in the range of technical expertise, from academic/theoretic to practical, do you want your expert to be grounded? Do you need a team consisting of both perspectives?
- Computer forensic experts usually come from one of two backgrounds: law enforcement or information security. Those with a law enforcement background may be strong in their investigative ability but weak in their technical computer ability. Those with an information security background may be strong in their ability to understand the technical extent of the computer incident but weak in their ability to interrogate a subject. Experts strong in both areas usually have their own consulting business or are the highest labor category at a large firm.
- Education level and computer certifications are moderately important. Because of the immaturity of the profession, the candidate's references and relationships may be more important. Are their past customers satisfied? Are they active within a computer security or forensics industry group, like SANS, InfraGard, or HTCIA?
- The number of computer-related certifications can be overwhelming. One approach is to give preference to at least one certification specific

to computer forensics and an additional certification in either a vendor-specific or information security discipline. Prominent certifications for (vendor-neutral) computer forensics include the IACIS CFCE, Cybercrime Institute's CCE, EC-Council's CHFI, and the stringent SANS GCFA. The CISSP is a popular information security certification, while EnCE and Cisco are vendor-specific.

- Anticipate an expert in this field to charge between \$125 and \$500 per hour, with time for travel and court testimony often charged at a different hourly rate than for actual collection and analysis of computer evidence. Hourly rate is a very weak indicator of performance level, especially where brand recognition and a marketing engine are at work.
- Question your candidates about how they report potentially undesirable findings, the extent to which they will adhere to the evidence search scope you define, and if they have any moral objection to representing your client. Some experts have strong beliefs when a case involves criminal defense, government opposition, or child pornography. Awareness of these beliefs is a part of selecting the expert most appropriate for your needs.



Whether you represent a criminal defendant or are lead counsel for a multinational company facing a regulatory inquiry, these tips should prove useful in navigating the unregulated and highly technical computer forensics talent pool.

Hugh Pierce is a computer forensics practitioner and program manager in Vermont for the National Center at Norwich University—Applied Research Institutes.

## FOR MORE INFO

Visit [www.privacyrights.org/ar/ChronDataBreaches.htm](http://www.privacyrights.org/ar/ChronDataBreaches.htm) and [www.washingtonpost.com/wp-dyn/content/article/2005/12/19/AR2005121900928.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/12/19/AR2005121900928.html).

## READY RESOURCES

■ *Cybercrime and Its Role in an ESP (CD Package)*. 2005. PC # T05CIRC. ABA Center for CLE, Section of Science and Technology Law. To order online, visit [www.ababooks.org](http://www.ababooks.org).

# Capital Murder: Ready or Not?

By Ramel L. Cotton

Being a criminal defense lawyer involves a certain level of anxiety because your client's freedom is threatened. But a conviction of capital murder carries a more onerous possibility—the loss of your client's life. When deciding whether to represent a client charged with a capital crime, consider the following:

**Trial Experience.** Do you have adequate trial experience to represent a client facing a life or death sentence? A capital murder trial is not the one

to cut your teeth on; it will often involve the most complex legal issues in criminal law. Your mastery of the rules of evidence and your ability to timely, effectively, and persuasively argue their basis is essential. Undoubtedly there will be a witness with evidence against your client who should be challenged for admissibility.

**Pretrial Motion Practice.** Do you have adequate experience preparing and arguing pretrial motions? Capital murder cases require more than the run-of-

the-mill motions. Expect 20 or more pretrial motions, as many are common in nearly every capital murder case. For example, the most basic is a motion for discovery. A capital murder motion for discovery will probably be followed by several supplemental and more specific motions for additional discovery



as your investigation unfolds. Confidential informants, preliminary investigations, and undocumented interrogations that often will not be included in the form discovery package presented by the prosecutor will require supplemental motions and/or hearings before their production. Motions for the suppression of evidence likely will be necessary, as capital murder cases are often based on statements, forensic evidence, and other circumstantial evidence. Additionally, your client's intent to assert an alibi defense must be filed with the court prior to trial with specific facts about the alibi witness, along with a summary of testimony.

**Financial Stability.** Capital murder cases can be expensive and time-consuming. Every capital murder case involves an analysis of law enforcement's investigation, which requires hiring a seasoned and qualified investigator who also will provide insight on your trial theories and preparation. Some jurisdictions require such expenses. Many criminal defense lawyers use retired law enforcement officers or current officers from other jurisdictions. If your practice requires your daily attention for its operation and survival, however, consider referring the capital murder client to another lawyer or

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# The FOIA: Your Right to Snoop through Government Files

By Stephen Gidiere

**S**nooping on the federal government is not wrong—it's your statutory right. The federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, gives every person the right to access federal agency records upon request. Think of the FOIA as your key to the federal government's filing cabinets.

The FOIA can be an important tool for all types of lawyers. Litigators can use FOIA requests to supplement discovery. Transactional lawyers can use requests for due diligence. And regulatory lawyers can find out what the regulatory agencies are up to. There are, however, some things to keep in mind when considering a request.

**Look online first.** A person looking for federal records should exhaust every possible avenue before (or concurrently with) resorting to a formal written FOIA request. Many federal records are readily available on agency Web sites or those of other organizations. Often, a simple Internet search for a government document using one of the major Internet search engines will yield positive results. Assuming that the sought-after records cannot be located through these other avenues, a FOIA request to the relevant agency may be necessary.

**Know your target.** FOIA requests are directed to a specific federal agency and sometimes a specific office or division of an agency. There is no central, governmentwide records office. Even individual agencies do not have centralized, searchable record systems that allow for quick retrieval of any and all agency documents.

An agency's operations are usually spread over multiple offices and geographic locations, with each office and location

maintaining its own records. It is usually good practice to direct the request to the agency office or location that is most likely to have the particular records that are sought. Nevertheless, it remains the agency's obligation to search for responsive records, and that includes searching in all of the offices that are likely to contain the records.



**Deliver it correctly.** Consider the method of delivering a FOIA request to the agency. The statute does not prescribe a particular method of delivery. Instead, the statute gives agencies the authority to issue "published rules stating the time, place, fees (if any), and procedures to be followed." Thus, agency regulations will describe how a FOIA request should be made and to what agency office it should be directed.

It is also important to send the request via a method that will allow confirmation that the agency's FOIA office received it (for example, certified mail, return receipt requested) because the statutory time limit for the agency response does not begin to run until the request is received by that office.

Recently, agencies began allowing FOIA requests to be sent via e-mail or an online request form through the agency's Web site. Electronic submission can be a convenient way to submit a request and can avoid mail delays or losses. For example, the anthrax attacks in October and November 2001 delayed up to six weeks the receipt of mailed FOIA requests by agencies in the D.C. area.

**Know the deadlines.** An agency is required to provide its response to a proper FOIA request within 20 working days. But a requester should not count on receiving a complete

response within 20 days—a full response can sometimes take much longer than that.

For one thing, the date of receipt that triggers the 20-day clock is the date that the correct agency office receives the request. In addition, an agency may unilaterally extend the 20-day limit by notifying the requester in writing of "unusual circumstances" necessitating an extension and the date upon which a determination on the request is expected.

If the agency is late with its response, your first step should be a polite call to the agency FOIA office. As the old saying goes, "you catch more bees with honey than vinegar."

**Know the exceptions.** Not all agency records must be released under the FOIA. The statute contains nine exemptions and three exclusions that create cat-

egories of records that need not (and in some cases must not) be disclosed. Through the FOIA's exemptions, the statute seeks to strike a balance between open government and the protection of legitimate governmental and private interests. For example, the FOIA's exemptions address such matters as classified information, confidential business information, internal agency deliberations, personal privacy information, and law enforcement information. Some exemptions are discretionary with the agency, so it never hurts to ask for a record even if you think it might fall within an exemption.

**Know your appeal rights.** A FOIA requester who is denied some or all of the records that were requested has the statutory right to file an action in federal district court to compel release of improperly withheld records. A FOIA requester generally must exhaust all available administrative remedies prior to filing suit, including filing a timely administrative appeal pursuant to the agency's regulations.

Only injunctive relief is available in a FOIA action. Money damages are not. The FOIA does, however, authorize the court to award reasonable attorney fees and other litigation costs to a FOIA requester who has "substantially prevailed" in the suit.

Using the FOIA takes patience and sometimes a little luck. Following these tips will give your request the best chance of success.

**Stephen Gidiere is a partner in the Environmental and Natural Resources Section at Balch & Bingham LLP.**

*This article is adapted by the author from his book on the FOIA and other government information laws, The Federal Information Manual.*

## READY RESOURCES

■ *The Federal Information Manual: How the Government Collects, Manages, and Discloses Information under FOIA and Other Statutes.* 2006. PC #535-0144. Section of Environment, Energy, and Resources members receive a discounted price. Order online at [www.ababooks.org](http://www.ababooks.org).

## Capital Murder

■ continued from page 5

associate another lawyer and sit second chair.

### Client Communication.

Many individuals charged with a capital crime become extremely guarded and reluctant to trust. Trust, however, is absolutely essential for you to adequately represent your client. Without developing a level of trust, your client will never divulge the crucial information you need to properly represent him. The natural reaction of someone charged with such a crime is to tell you only what they feel helps their case. You need to know what helps your client's case and what hurts it to avoid surprises at trial.

**Anxiety.** If the thought that your performance could lead to someone serving time in jail is stressful, think about someone dying because your performance was sub par. These thoughts are inevitable if you accept a capital murder case. The overriding question is whether you will be able to use the threat of the death penalty or life imprisonment as your motivation to provide the best representation possible or if you will allow it to consume you and detract from your ability to represent your client. Your client and his family will remind you constantly that his life is in your hands. Be truthful with yourself and your potential client regarding your ability and readiness to provide the best defense.

There is no greater feeling than hearing a not guilty verdict when your client faces the death penalty. Do your homework, hone your craft, and only apply for such cases when you know you are ready. Saving a life is a larger than life accomplishment—no pun intended.

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### FOR MORE INFO

Visit the ABA Death Penalty Representation Project at [www.abanet.org/deathpenalty](http://www.abanet.org/deathpenalty).

# Someone to Watch Over Yours? Child Care Considerations

By Ellen Rappaport Tanowitz

**W**hen I was expecting my first child I didn't know much but I knew I would have to return to work. So I had to find day care.

Who should watch your child is an extremely personal decision. Ultimately, you must choose care that will relieve your worries about your child during the day so you can actually think about work!

There are Web sites filled with suggested questions for a potential provider so I won't list them here. Generally, there are four broad categories of care: family member, day care center, family day care, and nanny.

**Family member:** If a relative offers to watch your child for free, it can be tough to say no. However, is the family member prepared physically and

emotionally to handle watching your child full-time? Watching kids, even babies, is hard work. Be certain that the family member understands the commitment involved. And what happens when there is another baby (either yours or another family member's)? Will grandma expect some compensation? Make sure everyone understands the parameters of the arrangement before it begins and how problems will be handled. What if grandma decides that she does not like caring for Junior every day? How much notice should she give you? And what if you decide you don't like the way grandma is caring for Junior? Will you be able to tell her your concerns about her caregiving?

**Day care center:** Most have a time by which you must pick

up your child; in my area it's 6:00 p.m., and late parents incur a penalty of \$1 per minute. If someone can't get to the center by the designated hour (traffic jams, car trouble, and the occasional emergency excluded), then this may not be the best option for you. On the plus side, centers are open year round and have many staff people so you don't have to worry about it closing for illness or vacation.

Because of the numbers of children in their care, day care centers also can be breeding grounds for common colds or bugs, which isn't necessarily a bad thing. Your child's early exposure to an onslaught of germs may help strengthen her immunity sooner so she'll be less likely to miss days from preschool and kindergarten.

**Family day care:** This is where a person watches children in their home—usually fewer than in a day care center. Make sure that the family day care is licensed by your state. Family

day care has a pick-up time but is often flexible—for an extra fee the caregiver may keep your child later. Some people have concerns about one person being alone with the children. When your day care provider wants to take vacation or has a sick day, where will that leave you?

**Nanny:** As with the family day care provider, a nanny is alone with your children all day. While not an issue when your child is very young, at some point your child will want or need socialization. What will the nanny do with your kids all day? If you live in an area with access to public transportation, there are myriad activities available. If not, will you need an extra car so the nanny can take your child to activities, including classes, the library, or the park? A nanny's schedule can be molded to yours, however, so if you don't usually walk in the door until 7 at night, you can arrange to have your nanny work accordingly.

Whatever you decide, do



what is right for you, even if your friends are doing something else. Although it is a pain, day care situations can be changed if necessary. If you do it right the first time, you've paved the way if you choose to have more than one child.

We chose family day care (until preschool age) and have had a wonderful experience. When my daughter begins school we will have spent eight years with our family day care provider. The best part of our experience is that I know my kids are safe and well cared for and I can focus on my job.

Ellen Rappaport Tanowitz is a solo practitioner in Newton, Massachusetts.

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## Smart Contact Management for Young Lawyers

By Adriana Linares and Ernest Svenson



**B**uilding and maintaining professional relationships with clients, colleagues, and business associates is key to having a successful law practice. As your success grows, so will the number of people you need to keep track of. The time to create a workable contact management system is now. An ideal system: (1) is simple and comfortable to use; (2) is

portable and always at hand; and (3) has categories for different types of relationships and information.

**Pick a Personal Digital Assistant.** PDAs are wonderful tools that make your data portable and allow you to synchronize and back up your contacts to your main computer. Whether you choose a Palm, Blackberry, or Windows device,

investigate the contact management features to learn about your choices.

**Train yourself.** Become an expert in your contact manager. Whether you are using Outlook, GroupWise, Gmail, or other software, learn how to quickly add, edit, update, and organize your contacts.

**Organize and categorize.** Think about groups and events: Who needs to receive your newsletter? Holiday card? Toastmaster announcements? Use categories to group associated contacts. Don't be afraid to put someone in more than one category.

**Commit to capturing information.** The best system is worthless if you don't routinely input new contact information.

When you meet people don't just think about today. Think about the future and capture as much information about them as you can. If you hear your client

mention her husband's name, add it to your information store. If you find out her birthday, put that in your PDA. Any piece of information is potentially valuable, and the cost of adding it to your system is zero. But the value of that information over time is priceless. How impressed will your client be if, two years from now, you meet her husband, reach to shake his hand, and say "and this must be your husband Curtis"?

*Adriana Linares is a legal technology trainer with LawTech Partners and Ernest Svenson is a solo lawyer practicing in New Orleans.*

### READY RESOURCES

■ *The Palm Approach to So Little Time, So Much Paper* (CD Package). 2002. PC #V02TPAC. Law Practice Management Section and ABA Center for CLE. Section members receive a discounted price. To order online, visit [www.ababooks.org](http://www.ababooks.org).

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