

Perspective

A publication of the Young Lawyers Section
of the New York State Bar Association

A Message from the Section Chair

Dear Young Lawyers Section member:

Welcome to the newest edition of *Perspective*—the printed publication of the NYSBA Young Lawyers Section (YLS)! We are currently in the middle of the 2012-2013 term of the YLS—our 74th year! This has been, and promises to continue to be, an exciting year and as always we have plenty of social, educational and networking opportunities for you. On October 18-19, 2012 we held the YLS Fall Meeting and CLE Program in Albany. Lisa R. Schoenfeld, Esq., YLS Chair-Elect, put together a great program and it was the second formal meeting of the term—we held our first program of the term, the Supreme Court Admissions Program, in Washington, D.C., June 10-11, 2012. General William K. Suter, 19th Clerk of the U.S. Supreme Court, was our keynote speaker at the Sunday dinner, and NYSBA President Seymour James, Esq. moved the admission of our admittees before the Court. After the admission ceremony, we were honored to have Justice Ruth Bader Ginsburg and Justice Sonia Sotomayor spend time speaking with our group in the Courthouse's East Conference Room.

January 2013 brings in the New Year and also the New York State Bar Association (NYSBA) Annual Meeting. We will be in New York City from January 23-25, 2013 for

our half-day CLE and Section meeting on Wednesday, January 23 (CLE Chaired by Erica M. Hines, Esq.), and our annual two-day Bridging the Gap program on

Thursday and Friday, January 24-25, 2013 (CLE Co-Chaired by Erin Flynn, Esq. and Alena Shautsova, Esq.).

We are planning to hold the Fourth Annual Young Lawyers Section Trial Academy at Cornell Law School in Ithaca, New York, for five days—March 20-24, 2013—so keep your eyes open for more exciting details about that program. The Trial Academy is the cure for the inexperienced attorney because it provides an opportunity to become familiar



with the courtroom, its procedures and decorum, as well as trial practice and skills. The Academy teaches hands-on practice of matters at the heart of trying cases, including *voir dire*, opening statements, direct and cross examinations, and closing arguments. Experienced practitioners and judges from across the State share their expertise as lecturers and critique faculty members. Mark your calendars!

The YLS will also be heading back to Washington D.C. in June 2013 for our United States Supreme Court Admissions Program.

This year, NYSBA President Seymour James, Esq., has numerous projects and initiatives that members can become involved with. We encourage all YLS members to be active in our Association, and to help further its goals and projects.

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We are also pleased to announce that most of our Executive Committee positions have been filled. Some vacancies do exist, however, for District Representatives and Section Liaisons. If you or someone you know is interested in becoming more involved with YLS, please contact me or one of the other Officers to discuss the potential of their taking a position on the Executive Committee for the remainder of the 2012-2013 Term. At Annual Meeting in January, we will be electing the new slate of Section Officers and Executive Committee members for the 2013-2014 Term that begins June 1, 2013.

Our Section publications, *Electronically-In-Touch* and *Perspective*, are always in need of great articles. Please consider drafting a submission for either or both. All of our District Representatives, Committee Chairs and Section Liaisons have been asked to submit at least one article during the course of their 2012-2013 term, concerning a substantive legal issue, or a program or event. But we also welcome articles from our general YLS membership, as well as from non-YLS attorneys.

One of my initiatives this term was to amend the Section's By-Laws so they are updated, and to resolve internal inconsistencies. The YLS By-Laws Committee is chaired by our Treasurer, Sarah Gold, Esq., and we have made great progress—with the amended By-Laws almost completed as of the time of this writing (they have been voted on and passed by two consecutive YLS Executive Com-

mittee votes, and when approved by the State Bar Association's Executive Committee they will be finalized).

A second big initiative for this year is my creation of a YLS Civics Poster/Essay Contest—one answer to the call of the ABA and NYSBA for encouragement of better civics knowledge and education for our students and citizenry. I appointed a Special Committee of YLS charged with developing, organizing and running the contest. For the start, only several Judicial Districts across the State will be involved. The contest will be open to high school students studying U.S. History and Government, with monetary prizes for the top three essays and the top three posters in the State. YLS is fortunate to have an anonymous donor who has pledged financial support for the program. The Co-Chairs of the Committee are Erica M. Hines, Esq., YLS 4th District Co-Representative, and Michele L. Babcock, Esq., YLS 9th District Co-Representative. Our goal will be to have the submissions received and judged, with award announcements ready, before the YLS' 75th Anniversary celebration—presently scheduled for spring/summer 2013. The call for submissions has already gone out to high schools (public, private, parochial and home-school) in the participating Judicial Districts. More information will be forthcoming.

Finally, another of my initiatives is to increase our Section membership not only beyond 4,000 members, but hopefully closer to 5,000 mem-

bers. We are currently the fourth largest Section of the State Bar out of 25 Sections. Last year YLS crossed the 4,000 member threshold, but following the membership dues and "drop" period, we fell below 4,000. As of the time of this writing, however, we are back to just about 4,000 Section members. We need to emphasize to our colleagues who are not YLS members the great benefits of being a member of our Section, so that we not only obtain new members but also retain them for years. I am asking each member of the Section to recruit just one new YLS member this term. If accomplished, that alone would put us over 7,400 members!

Should you have any questions, or wish to know more about the New York State Bar Association or the Young Lawyers Section, please go the State Bar's website, www.nysba.org, or feel free to contact me at mlf@jacobowitz.com, our Staff Liaison Tiffany Bardwell, at tbardwell@nysba.org, or any of our YLS Officers or Executive Committee members. Our other Officers this term are: Lisa R. Schoenfeld, Esq., Chair-Elect; Sarah E. Gold, Esq., Treasurer; Jason M. Clark, Esq., Secretary; and James R. Barnes, Esq., Immediate Past Chair.

Thank you for being a member of our Section. This should continue to be a busy, fun and exciting year!

Sincerely,

Michael L. Fox, Esq.
Section Chair

The Up and Down Ten—The Five Best and Five Worst Things About Running Your Own Practice

By Glenn H. Truitt

Starting, developing and running your own law practice are simultaneously much more and much less than you could have possibly imagined. Amidst days of defeat and delight, you have just as many moments of “why did I do this” as of “why didn’t I do this sooner?” But now you’ve traded a life of predictability for a life of uncertainty and excitement. And so, in tribute to the rollercoaster ride that has been my first four years of solo and now small-firm lawyering, here are the five best and five worst things about running your own practice:

The Best

1. **Door Shot.** Although you may be the first person to see it in the morning and the last person to see it at night, there aren’t many better feelings than seeing your name on the door. But having your name on the door also means that the buck stops with you (see #2 below).
2. **The Buck.** While not all the dollars stop in your office, the buck definitely does. Previously, you could fill half your day at the firm complaining about how things were done at the top. But now, you can fill half your day with doing things the right way...at the top.
3. **It’s About the Clients.** There is no more poignant reminder as to why you practice law than meeting every client and helping them each step of the way. It is frustrating, challenging and exhausting, but the first time they look you in the eye, shake your hand and really thank you—you’ll get it. No matter how strongly you are constituted, this moment will shake you like the ending of *Old Yeller*.
4. **There Ain’t No Such Thing as a Free Lunch.** This statement is still true. But those fancy lunches

you felt lucky to be invited to before? Now you’re the one scheduling those lunches—and the one putting down the credit card. Further, it’s nice to have a “working lunch” that doesn’t involve eating takeout at your desk.

5. **Oh Captain, My Captain.** No matter what kind of car your law school classmates pull up to the reunion in, or what kind of karma your Legal Aid friends are earning by serving the public, there is simply no better peace of mind than knowing that you are a professional in complete and utter control of your own destiny. You live and die by your practice ability, and that kind of freedom has its own sweet success.

The Worst

1. **Wishful Thinking.** Remember all that time you spent wishing you had a job as simple and straightforward as a staff position? You now get to spend all that time finding out just how wrong you were, and counting down the days to when you can afford to hire someone to do it for you again before you beat your head against your desk.
2. **Autograph Hound.** Being “The Guy Who Signs The Checks” at the office is only slightly less exciting than being “The Guy Who Signs The Checks” at your house. Except now, you get to do it for all kinds of things that you had no idea you signed up for. Hooray.
3. **Helping Hands.** There was a time when “good help is hard to find” was a trite old saying that your dad used to throw around when talking with his grown-up friends. That time officially passed when you discovered you couldn’t do it all on your own,

and good help really *is* hard to find.

4. **Midnight Oil.** The only people who work longer hours than associates at large law firms are partners at small law firms. It turns out having your name on the door is actually just a way for people to know who is in the office after 10 p.m. and all weekend long. At least you’ll get to know the cleaning crew in your office really well.
5. **Late Starts.** A work day full of staff meetings, client meetings, office administration, billing reviews, sales calls, new client interviews and returning calls and e-mails wouldn’t actually be so bad—if it wasn’t the reason you were starting your actual legal work (you know, the stuff you get paid for) around 4 p.m.

For all its ups and downs, I don’t imagine there is any truer way to practice law than in your own office. We live in an exciting time, where “non-traditional” success stories have begun to outpace their “traditional” counterparts, and no one is in a better position to serve and understand these new pioneers than those who are pioneering a new way to practice law. Because while solo and small firm practice may fail to be the panacea for all that ailed us from large firm life, it does provide lawyers the unique opportunity to both truly serve the needs of the rapidly changing world around us and to do something we rarely ever do: put our money where our mouths are.

Glenn Truitt is principal and founder of the Truitt Law Group based in Las Vegas, Nevada. He has significant experience in custom contract drafting, complex business formations and regulatory compliance matters.

Bridging the Gap: Learning from the Stars

Thursday and Friday, January 24-25, 2013

Hilton New York

**1335 Avenue of the Americas
New York City**



Tentative Schedule and Speakers

DAY 1, January 24, 2013

Handling Your First Misdemeanor: To Plea or Not to Plea

"How to" course for new attorneys, starting from formation of client-lawyer relationship to plea negotiations.

Speakers: Tucker Stanclift, Robert Wells and Hon. Jerald S. Carter

Handling Your First Misdemeanor: To Plea or Not to Plea

(cont'd) Arraignment. Motions. Hearings before trial: their names, purpose and recent changes.

Speakers: Tucker Stanclift, Robert Wells and Hon. Jerald S. Carter

Ethics—Speakers: Mikhail Israilev and Catherine Sheridan

Basics of Landlord Tenant Practice: lease, rights, eviction—Speaker: Eric J. Dinnocenzo

Commencing an Action in Federal and State Courts—Speaker: Timothy Fennell

Electronic Discovery and Document Preservation—Speaker: Michael L. Fox

Effective Negotiations for Lawyers—Speaker: Zach Goldstein

Matrimonial Practice: Representing Non-moneyed Spouse—Pendente lite motions; fee agreements—Speakers: Lisa Schoenfeld and Karen Platt

DAY 2, January 25, 2013

The Big Deal About Small Law: Leaving, Starting Over & Succeeding Without the Firm—Speakers: Anthony Colleluori and Glenn Truitt

Ethics Pitfalls for Young Attorneys—Speakers: David A. Lewis and Jeremy Feinberg

Real Estate Basics—Speaker: Boris Serebro

Real Estate Ethics—Speaker: Anne Copps

Defending a DUI Case—Speakers: Eric H. Sills, Sherry Levin Wallach and Peter Gerstenzang

Basics of Business Law and Corporate Formation—Speakers: Jeremy Poland and Svetlana Sobel

Immigration: Representing non-U.S. Citizens—Speakers: Joanne Macri and Allen Kaye

For more information or to register, go to www.nysba.org



**NEW YORK
STATE BAR
ASSOCIATION**

A Brief Overview of Commodity Market Regulators

By Nilesh Yashwant Ameen

I. Introduction

The effectiveness of the global commodities market is of universal concern, affecting not only financial traders looking to hedge or speculate in such markets, but also individual consumers and commercial businesses. With the increasing complexity of these markets, increased regulation is necessary, and the organizations tasked with overseeing such regulation are numerous and diverse.

This article sets forth key agencies and organizations which oversee the commodities markets, and briefly reviews their regulatory powers and functions. Attorneys would be well-advised to maintain familiarity with these agencies and organization, and to be informed with respect to the specific rules and regulations affecting their clients.

II. The Commodity Futures Trading Commission

The Commodity Futures Trading Commission (CFTC) was created by Congress in 1974 as an independent agency to regulate commodity futures and options.¹ The CFTC is headed by five Commissioners who are selected by the President of the United States “with the advice and consent of the Senate” and serve five-year terms.² The President selects a Chairman from one of the five Commissioners.³

The Commissioners oversee four divisions: (1) Clearing and Risk; (2) Enforcement; (3) Market Oversight, and (4) Swap Dealer and Intermediary Oversight.⁴ All divisions regulate the commodity futures markets, but the Division of Enforcement is likely of greatest interest to attorneys, as it may initiate enforcement actions against firms and individuals for conduct involving fraud and manipulation under the Commodity Exchange Act.⁵

The CFTC is particularly concerned with fraud in the commodity futures markets, and members of the public and investors should regularly review the agency’s periodical fraud advisory bulletins.⁶ For example, one fraud advisory highlighted the risk of fraudulent commodities schemes following Hurricane Katrina in 2005.⁷ Such bulletin stated, “Any claims made of potential profits from trading in futures or options on energy products or other commodities based on the effects of Hurricane Katrina are probably fraudulent.”⁸

Equally significantly, the agency has in recent years stepped up its efforts to punish instances of sophisticated market manipulation in the commodity futures markets. In the area of oil and gas futures, the CFTC brought a high-profile enforcement action against the hedge fund Amaranth Advisors and its trader, Brian Hunter, alleging that Hunter engaged in a scheme to manipulate the price of natural gas futures contracts sold on the New York Mercantile Exchange (NYMEX), and then submitted false trade reports to conceal such scheme.⁹

Recently, in April 2012, the CFTC entered into a consent order including a civil penalty of \$13 million with trading firm Optiver LLC as a result of its enforcement action against the firm’s conduct in allegedly manipulating the price of various oil and gas futures contracts.¹⁰

Additionally, the CFTC has passed recent anti-manipulation rules¹¹ in response to the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) that was created in the aftermath of the 2008 global financial crisis.¹² Through increased litigation stemming from its expanded enforcement powers, the CFTC has indicated its intent to actively combat manipula-

tions and distortions of the commodity futures markets. Attorneys are well-advised to be cognizant of the CFTC’s increased vigilance in this area.

Commodity producers sometimes use financial instruments known as “swaps” to hedge their business risk, and Dodd-Frank has granted the CFTC greater oversight over such swaps.¹³ Further, the CFTC has been instructed to set “position limits” regarding futures and swaps—these limits prevent traders and others from distorting market prices through abnormally large positions or trades in the futures and swaps markets.¹⁴

III. The National Futures Association

The National Futures Association (NFA) is a self-regulatory organization that regulates the nationwide futures industry.¹⁵ The NFA requires registration of certain firms and professionals, sets annual fees for membership, and may discipline members for breaches of its rules.¹⁶ Attorneys advising futures firms and market professionals should ensure that their clients comply with the various registration and member conduct rules which apply under the NFA.

IV. Exchanges and Over-the-Counter Transactions

Commodities (and the futures and option contracts associated with them) can be bought and sold over various exchanges both domestically and internationally. Exchanges operate electronically or in various international financial centers, again reflecting the global nature of the commodities markets.

Leading operators of exchanges include the CME Group (which operates the Chicago Board of Trade, Chicago Mercantile Exchange, NYMEX

and COMEX),¹⁷ the Intercontinental Exchange (“ICE”—which operates three global futures exchanges),¹⁸ and NYSE Euronext (which operates the European exchange NYSE Liffe and the U.S. exchange NYSE Liffe U.S.).¹⁹ All exchanges set rules and regulations for exchange members, as well as non-members active on the exchange. Attorneys advising clients who trade over exchanges should ensure that clients comply with exchange rules, in particular those rules regarding market conduct, record-keeping and disclosure.

Commodities may be bought and sold between parties through privately negotiated contracts “off-exchange” or “over the counter” (OTC). Because OTC products and transactions have been at the center of much regulatory debate in the aftermath of the recent global financial crisis, there has been a push to increase regulation in this area.²⁰

V. International Regulators

Commodity markets are international in nature, and international regulators are heavily involved in ensuring that transactions regarding global commodities and related financial instruments are conducted smoothly, transparently, and legally.

Important international regulators in the foreseeable future with respect to the oversight of the commodity markets and their related products will likely include the United Kingdom’s Financial Services Authority (FSA),²¹ France’s Autorite des Marches Financiers (AMF),²² the European Securities and Markets Authority (ESMA),²³ China’s Securities Regulatory Commission (CSRC),²⁴ and Japan’s Financial Services Agen-

cy (FSA).²⁵ Attorneys working with international clients on cross-border transactions may interact with these regulatory agencies.

VI. Conclusion

As the recent global economic downturn has demonstrated, the integrity of global commodities markets, among other markets, is of primary concern. To prevent further economic crises, it is imperative that financial markets pertaining to commodity trading and production are regulated efficiently and transparently. Attorneys should be familiar with the various entities regulating the global commodities markets, and be aware of the rules and requirements set by these regulators for optimal client representation.

Endnotes

1. <http://www.cftc.gov/About/MissionResponsibilities/index.htm>.
2. <http://www.cftc.gov/About/Commissioners/index.htm>; 7 U.S.C. § 2(a)(2)(A).
3. <http://www.cftc.gov/About/Commissioners/index.htm>; 7 U.S.C. § 2(a)(2)(B).
4. <http://www.cftc.gov/About/CFTCOrganization/index.htm>.
5. <http://www.cftc.gov/LawRegulation/Enforcement/index.htm>.
6. <http://www.cftc.gov/ConsumerProtection/FraudAwarenessPrevention/CFTCFraudAdvisories/index.htm>.
7. http://www.cftc.gov/ConsumerProtection/FraudAwarenessPrevention/CFTCFraudAdvisories/fraudadv_hurricanekatrina.
8. *Id.*
9. See *Commodity Futures Trading Commission v. Amaranth Advisors LLC*, 554 F. Supp. 2d 523 (S.D.N.Y. 2011) (order denying motion to dismiss).

10. *Commodity Futures Trading Commission v. Optiver US LLC*, No. 08 Civ. 6560 (S.D.N.Y. April 19, 2011) (final consent order).
11. Public Law 111-203, 124 Stat. 1376 (2010).
12. See 17 C.F.R. pt. 180.
13. <http://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm>.
14. http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_26_PosLimits/index.htm.
15. <http://www.nfa.futures.org/NFA-about-nfa/index.HTML>.
16. <http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=1001&Section=1>.
17. <http://www.cmegroup.com/>.
18. <https://www.theice.com>.
19. <http://www.nyse.com/>.
20. See, e.g., the CFTC’s effort to regulate agricultural swaps under the Dodd-Frank Act. http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_19_AgSwaps/index.htm.
21. <http://www.fsa.gov.uk/>.
22. <http://www.amf-france.org/Default.asp?lang=en>; France made commodity market regulation a priority of its G20 Presidency at the 2011 G20 nations summit http://www.amf-france.org/documents/general/9913_1.pdf.
23. <http://www.esma.europa.eu/#>.
24. http://www.csrc.gov.cn/pub/csrc_en/.
25. <http://www.fsa.go.jp/en/index.html>.

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New Developments in Legal Education: The “Law School Firm” at Pace University

By Anting J. Wang

Several law schools have responded to today’s constricted job market by seizing upon a new model of legal education informally known as the “Law School Firm.”¹ A law school firm is essentially a firm associated with a law school which provides recent graduates a space to develop lawyering skills while also providing legal services to clients. The experience is akin to a medical residency, with the aim of providing a transitional training period to resident attorneys while also generating profits and ultimately achieving firm economic self-sufficiency. In essence, a law school firm is a “professionally-managed, revenue-generating, non-profit law firm” established by a law school.²

Pace University’s Community Law Practice (PCLP) in White Plains, New York, promises to be a ground-breaking pilot effort in this new framework, providing recent graduates an avenue to develop skills suited for solo practice or small-firm litigation, while also addressing the needs of the surrounding low-income community.

1. Background

A confluence of events set the stage for PCLP’s establishment. First, Westchester County had a significant unmet need for pro bono and low-bono legal services, particularly in the areas of immigration and related advocacy issues. Pace sought to remedy this by establishing the PCLP, whose initial focus will be immigration law. Immigration was particularly appropriate for first-year development because the U.S. Department of Justice’s Board of Immigration Appeals (Board) provides recognition to nonprofit organizations and accreditation of non-attorneys who can then assist clients in immigration

proceedings, thus bypassing the need for formal bar admission. Further, although Pace already sponsors an Immigration Justice Clinic for enrolled students, significant extension of services was appropriate as legal demand had not yet been met, and to build upon Pace’s significant expertise in this substantive area.

Second, as employment opportunities for recent graduates declined amidst a faltering economy, the law school saw PCLP as an opportunity to cushion these young attorneys’ entry into the workforce by providing them a one-year “residency” (akin to a medical residency) through which they could further develop their skills and hone legal knowledge.

Last, in recent years clients have exhibited an increased unwillingness to pay exorbitant fees for first- and second-year lawyers, who often enter the profession with little experience and are essentially trained “on-the-job” on the client’s dime. Although PCLP resident attorneys are likely to enter public service or solo practice, residents are not barred from private practice once their tenure at Pace ends and may join a number of well-established firms. Under the residency framework, PCLP provides fellows hands-on experience as practicing attorneys, thereby moderating the transition while simultaneously addressing clients’ reluctance to fund legal training.



Jennifer Friedman
Executive Director of
the Pace Community
Law Practice

2. Brief Description of the PCLP

PCLP has four fellows in its inception year, overseen by Jennifer Friedman, Executive Director of the PCLP and Director of Pace’s Public Interest Law Center, and supervised by Karin Anderson Ponzer, Assistant Director. Fellows currently serve one-year terms, although extension to longer terms may be possible. Friedman noted that PCLP’s mission is not to duplicate a law firm environment. Rather, the organization’s goal is to build a community-based legal practice aligned with Pace’s commitment to social justice and public interest work, while simultaneously providing an environment by which recent graduates may refine and further develop legal practice skills. Although the PCLP opened with a focus on immigration law, Friedman noted that clients are already calling with a variety of legal problems, and expansion into family, housing or other high-need practice areas is under consideration.

PCLP is anticipated as a “low-bono” organization, in which clients will be charged fees based on a sliding scale in accordance with their ability to pay. Although currently seeded by the law school and private sponsors, the long-term goal of the PCLP is to have a hybrid business model in which client fees support much of the program, supplemented with traditional sources of nonprofit funding. Further, PCLP differs from a traditional incubator program, in which solo practitioners gather to share resources, ideas and expertise. Instead, PCLP fellows work under the Pace name, are employees of Pace Law School, and are generally non-admitted attorneys being primed for solo or small-firm practice in the public interest arena.

3. Skill Development

PCLP fellows are expected to develop significant substantive expertise in immigration law under the guidance of Ponzer, an immigration specialist with previous experience at Catholic Migration Services and the New York Immigration Coalition. But in addition to legal expertise, PCLP fellows will be expected to engage in significant activities geared towards launching solo practice, including, among other items, case assessment and selection, client billing, record maintenance, time-keeping, drafting and editing retainers, and general case management. Further, a major advantage of the PCLP is that fellows will likely be required to engage in business development, an opportunity rarely provided associates in private practice. "Traditionally, attorneys in the private sector have little opportunity to develop a client base until they are fairly senior," said Friedman. "However, at PCLP, we expect fellows to engage in business development at an early stage. With the Pace name behind them, the fellows will have credibility and standing to begin courting new business." Although it is unclear how fellows will be evaluated in their first year, Friedman noted that they will be assessed as professionals, and not students.

4. Potential Critique

Recently, there has been a flurry of lawsuits alleging that some law schools are "gaming" their rankings in publications such as *U.S. News & World Report* by misrepresenting their graduates' employment prospects. Allegedly, law schools sometimes create post-graduate "jobs programs" into which they hire their own graduates, such that 9-month employment statistics are artificially inflated.³ This serves to improve the school's ranking, thereby luring potential law students to enroll.

However, Friedman noted that the development of the PCLP was never intended to bolster Pace's law school ranking. Instead, any positive effect was merely an unintended benefit. Further, fellows hired into the program are considered best in class, and likely would have been employed regardless. Thus, employment statistics likely would not be affected by the employment of four fellows from a class of approximately 200.

Further, law schools in recent years have been called upon to address the dire employment prospects of recent graduates in a distressed economy. To demonstrate its commitment to the student body, Pace created the PCLP to enhance new grad-

uate satisfaction and professional success, and not to serve the needs of an as-yet undetermined prospective student population.

5. Conclusion

Pace's Community Law Program represents a sea-change in legal education. With its focus on providing hands-on experience to new graduates, PCLP has found a way to moderate young attorneys' transition into legal practice, and to address the changing demands of the legal profession. "Pace is proud of the program we have," said Friedman. "Lawyering is an art, not a science, and we are excited to introduce new avenues by which students may find their way into satisfying and rewarding careers."

Endnotes

1. See Bradley Borden & Robert Rhee, *The Law School Firm*, 63 S.C. L. Rev. 1 (2011).
2. *Id.* at 2.
3. See Karen Sloane, *Judge Rejects Cooley's ABA/NALP Defense in Fraud Case*, *The Nat'l L.J.* (June 8, 2012), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202558671343>.

Anting Wang is a legal fellow at Fordham Law School's Feerick Center for Social Justice.

Request for Articles

If you have written an article and would like to have it considered for publication in *Perspective*, please send it to the Editor-in-Chief:

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include biographical information.

www.nysba.org/Perspective

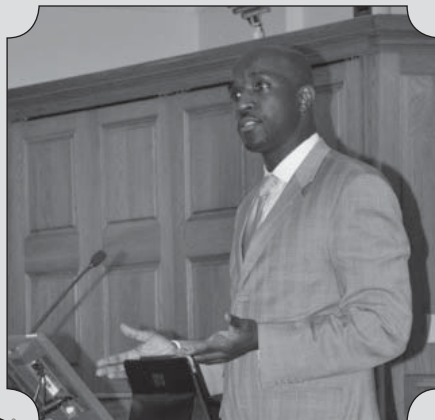


Scenes from the
Young Lawyers Section

TRIAL ACADEMY

March 21–25, 2012
Cornell Law School
Ithaca, NY





Tales from the Dark Side—Three Lessons Litigators Can Learn from Their Transactional Counterparts

By Glenn H. Truitt

Sometimes the origin of transactional attorneys is a better-kept secret than the location of the Holy Grail. Most law schools are more invested in creating litigators who may become jurists rather than transactional practitioners. We are an afterthought, a footnote, and likely to be mentioned in our alumni magazines only if we make a contribution big enough to get our name on a building. But despite this institutional oversight, transactional attorneys soldier on, drafting documents, organizing companies and doing deals that comprise the “other half” of what lawyers do.

Fortunately for those of us who chose transactional work, we don’t mind laboring in the shadows of our litigating brethren, or toiling in obscurity right up until the deal toy is handed out. We prefer our work single-spaced, and we’re far more comfortable with Google and Facebook than we’ll ever be with Lexis or Westlaw. In addition, transactional lawyers don’t mind learning from the work product of our more-visible counterparts. We regularly read case law, motions and briefs, and regularly engage litigators to better contemplate how we can draft clearly and with foresight to potential litigation. On the other hand, most litigators barely know who or what a transactional attorney is, much less what we do. But fear not! Following are three lessons from the trenches of contract drafting that might just make you a better lawyer.

1. **The World Is Not Just Wins and Losses.** For all their reasoning skills, litigators tend to see the legal world in terms of wins and losses—which is both fictional and can be detrimental (or even fatal) to the resolution of contentious matters. What deal lawyers know is that when a client

tells you what he/she wants, that’s a wish list and not a list of minimum requirements. When there is a deal at hand, there are two or more parties who share some common objectives, but who also have their own agendas, desires and concerns. These independent client goals come in at least three different categories—must-haves, should-haves, and like-to-haves—maybe more, depending on the complexity of the matter. The ability to understand a client’s goals and prioritize them properly is what makes a deal lawyer valuable. Placing all of your client’s goals into the “must have to win” category will likely prevent you from reaching a compromise.

Further, in litigation, it is the lawyer who frames an argument. By contrast, in transactional work, it is the deal that dictates the contract, and not the contract (or contract lawyer) that dictates the deal. These two structures place the involved attorneys in dramatically different positions, and it is vital to know when you are in each. When assembling an argument for the purposes of negotiation, zealous and comprehensive advocacy are necessary. But once in that negotiation, living only within the scope of those arguments makes resolution of the matter difficult to achieve.

In short, a loss of some of what you’re looking for can easily be a win overall. It’s a win to avoid the expense and antagonism of litigation. It’s a win to get the most important elements of what your client is

looking for at the lowest possible transaction costs. And it’s a win to act reasonably in lieu of fighting until the bitter end. As Shakespeare first noted in *Henry IV*, “Discretion is often the better part of valor.” Which is a fancy way of reminding us that the difference between fighters and champions is that only one of them fights if they don’t have to.

2. **Mop-up Duty.** When asked what I do, I sometimes remark that I “sweep up behind the parade of more important discussions.” That is, once a deal has been struck, I come in to put it all on paper and make sure everyone sticks to it. In addition to being a vast oversimplification, this view also feeds the litigator’s misconception that the real work in a matter is done in reaching a preliminary agreement between parties who started at odds with one another. In fact, the codification of a deal, settlement, release or any number of other outcomes to a dispute, are the most challenging and nuanced elements of the entire matter. In what most litigators consider to be “boilerplate” (which may be the most dangerous term in the law), resides the granting and/or omission of significant rights and responsibilities that could easily eviscerate the key terms of the deal. Deeply buried in sections which often appear too long, repetitive or overly “legal” may lie loopholes so substantial as to have the opposite effect of the section’s title. On the flip side, by taking this step seriously, and being intelligent, creative and careful

with the documents by which you memorialize your agreements, you can ensure that they survive future scrutiny, secure beneficial tax treatment and actually do better for both sides than originally expected.

Further, unlike the “include every argument” paradigm behind much of motion practice, drafting transactional documents must be done precisely, and every element must have a purpose and reason for its presence in the document. And while I wouldn’t dream of advocating that every transactional document be created from blank pages, the only ethical approach to preparing such document requires, at a minimum, that you read every word of it to ensure its applicability to the matter at hand. If you don’t understand a provision or cannot explain why it is in there, then it shouldn’t be in there. For the record, any explanation that involves the words “the way we’ve always done it” or “industry standard” are not explanations; they are the absence of explanation, and require immediate and swift rebuttal. As a litigator, you’re familiar with the changing face of the law—and you’re in the best position to know if something in the documents you’re intending to employ is no longer valid, or doesn’t apply to your matter, your client or your cause.

In short, sweeping up behind your parade is just as important as the parade itself. Because as everyone knows, if you’re not careful cleaning up after the elephants go by, you’re going to step in something.

3. **Leave It to Us.** The riddle I often tell about accountants goes as follows: Q: What is the difference between lawyers

and accountants? A: Lawyers never try to do accounting. The underlying jab in this bit of humor is that accountants will often suggest to their clients that they don’t need to hire a lawyer to achieve their goals, *i.e.*, form a corporate entity, draft/review a contract, etc., because the accountant can do it just as well for less money. By contrast, I have never seen a lawyer offer to do the accounting underlying a transaction—we depend on professionals.

Unfortunately, litigators sometimes harbor the same catch-all approach to transactional attorneys as accountants. I have heard many litigators tell me that they are comfortable drafting contracts, forming companies, setting up operating agreements, etc., but I can’t think of any transactional attorneys who feel comfortable drafting motions, appearing in court or taking/defending a deposition. I have also had the opportunity to read some of the documents and review some of the formations done by litigators and I can say, with all due respect, you should stick to litigating.

Don’t get me wrong; both groups of attorneys have more than enough intellectual horsepower to accomplish the tasks that the other half regularly performs—but it requires a different way of thinking and a materially different approach. For those reasons, you should really get some help when it comes to these types of acts. Even if you simply consult a transactional attorney but do the work yourself, you’ll be miles ahead of where you’d end up on your own. But in most cases, the cost-effective maneuver is to hire a transactional lawyer when it’s time to draft that document. Sure,

you may not be billing the hours yourself, but you do get to keep the happy client who will be dutifully impressed by the end work product, and will appreciate that you got it done quickly, with a minimum number of drafts, revisions and rounds of negotiation. You also get a client who was billed half the time it would have taken you to do half as good of a job. Trust me when I tell you: that’s a win-win scenario.

* * *

Royal Navy Admiral Ronald Hopwood famously wrote in his *Laws of the Navy* in 1896:

If ye win through an
African jungle,

Unmentioned at home in
the Press,

Heed it not; no man seeth
the piston,

But it driveth the ship
none the less.

Those lawyers who choose to take the road less travelled (*i.e.*, become a transactional attorney), know well what this means, and care much more deeply for the success of their deals than the fame and notoriety received by their litigating colleagues. But the fact of the matter is that both groups of attorneys have a great deal to teach one another, and can be a tremendous source of knowledge, perspective and helpful advice. So for the young litigators out there, the next time you run into one of your transactional brethren, ask them what they’re up to and how they’re doing—the case you end up learning about may just be your own.

Glenn Truitt is principal and founder of the Truitt Law Group based in Las Vegas, Nevada. He has significant experience in custom contract drafting, complex business formations and regulatory compliance matters.

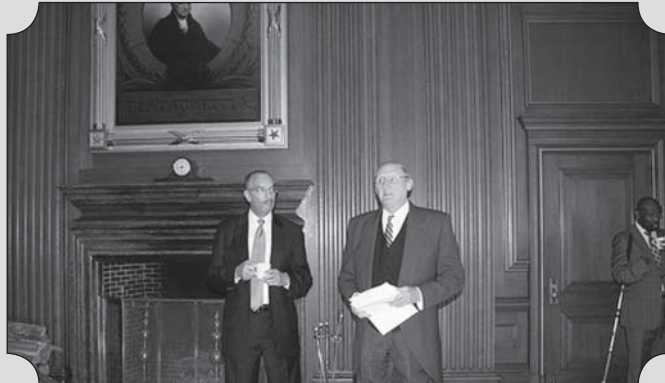


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