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Perspective

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Young Lawyers in a Down Economy: Hanging Up Their Own Shingles

By Anting Wang

With the economy in a downward swing, young lawyers have increasingly begun to hang their own shingles and market their skills as legal entrepreneurs. I was fortunate to have two law school classmates venture out on their own recently (one in Los Angeles and one in New York), marketing their skills as young, flexible pioneers in the area of legal practice. Their experiences are illuminating and lend color to the breadth of opportunities that are available to attorneys of all stripes.

1. Experiences in the Los Angeles Legal Start-Up Market

During law school, one classmate of mine was a trailblazer determined to carve out his own path. Charismatic and funny, he followed a non-traditional path to Stanford Law, graduating from the U.S. Naval Academy with a degree in Mathematics and then serving on a submarine for five years. He won election as co-president of our class with flyers featuring himself as a cartoon character, and repeatedly broke from voting blocs during negotiation seminars to strike out on his own. It wasn't a surprise to learn that he had followed a similarly independent path after graduation.

(a) Professional Background

After graduating from law school in 2005, this attorney practiced corporate law at a major Los Angeles firm for two years, finding it educational, if not entirely stimulating. When a client of the firm, with whom he had established a strong rapport, offered him a position as General Counsel-Chief Operating Officer, he jumped at the opportunity. The job was the perfect training ground for a budding entrepreneur, as it required his input in areas such as marketing, human resources and information technology, fields he had not been able to explore during firm life. Further, his legal skills were honed in subjects critical to running a company—he provided legal advice in contexts as diverse as employment law and technology licensing, both common areas of counsel for emerging corporations.

In conjunction with the start-up position, this attorney worked part-time as a strategy consultant for a Big Four accounting firm. Such experience was invaluable, he said, in providing exposure to the types of decisions often faced by high-level management. He and his team were retained by a number of Fortune 500 corporations to evaluate business opportunities, minimize corporate waste, and to improve generally the operations of each client.

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Inside

NYSBA

A Message from the Section Chair

It is a privilege to serve as Chair of the Young Lawyers Section (YLS) of the New York State Bar Association (NYSBA). Our Section is the lifeblood of the profession. Over the years our Section has provided new lawyers with opportunities for networking, as well as a platform to learn practical legal skills through numerous continuing legal education (CLE) seminars. One of the greatest benefits of our Section is providing a forum for mentoring by connecting new lawyers with experienced attorneys.

With these thoughts in mind, we have formulated the YLS Trial Academy. This five-day trial techniques program will teach, advance and improve the courtroom skills of young lawyers, and place an emphasis on direct participation. Each morning will feature a lecture on an aspect of the trial process, followed in the afternoon by small breakout groups to put the theory into practice on topics such as jury selection, opening statements, evidence, foundation and objections and closing statements. Each breakout group will be led by an experienced trial lawyer who will be with each group throughout the program. This year's trial academy will take place at Cornell Law School, to commence Wednesday, March 24, 2010 through Sunday, March 28, 2010.

The YLS Trial Academy has the support of the entire Bar Association. I believe this is in recognition of the fact that young lawyers need the confidence and skills to properly handle criminal or civil litigated matters. According to the American Bar Association, 15% of cases went to trial in 1962—compared to less than 5% in 2002. The National Center for State Courts reports that from 1976 to 2002 civil jury trials decreased by 28%. Far too often young, inexperienced lawyers prematurely settle cases for a lack of confidence in their own knowledge and skill in the courtroom. The Trial Academy is designed to instill confidence and teach the requisite skills in an intensive five-day program.

I invite all young lawyers interested in litigation to participate in the Trial Academy. We understand that some law firms may not immediately recognize the benefit of sending a young associate away to a Trial Academy for five days. It is my belief that the profession owes a duty to mentor younger lawyers. NYSBA, through the Young Lawyers Section and participating substantive Sections, has accepted that responsibility by putting together one of the most comprehensive trial technique programs in the country. The faculty includes some of the most well-respected litigators and judges in the State of New York. We hope firms and solo practices alike will see that the benefit gained by this experience far outweighs the investment.

The YLS is offering one "free-ride" scholarship to the Trial Academy to a young lawyer who submits an article for publication in the next issue of *Perspective*. Our Executive Committee will be providing more details regarding this contest and the criteria for judging the submissions. Sponsoring substantive Sections, like the Trial Lawyers Section and the Torts, Insurance and Compensation Law Section, may also be providing scholarship opportunities for young lawyers to attend the Trial Academy. I strongly encourage you to take advantage of these opportunities.

The Trial Academy is only one of several benefits the Young Lawyers Section offers to its membership. We are often asked by young lawyers why they should join our Section. This question challenges our leadership to provide meaningful, practical and cost-effective opportunities to our members. I believe the Trial Academy is such an opportunity. The Young Lawyers Section also offers less intensive continuing legal education credits at our Annual Meeting. The 2010 NYSBA Annual Meeting is being held this year at the Hilton in New York City. We will be offering young lawyers CLE credit at our Bridge the Gap program, as well as our half-day program focusing on bankruptcy and business reorganization.

Finally, I encourage all young lawyers to be involved on a local level. The Young Lawyers Section has a district representative in each judicial district throughout the state. The district representatives are charged with planning, coordinating and conducting events in each district. These events provide wonderful opportunities to young lawyers to network with other lawyers practicing in their own community. Our Section also offers opportunities to be involved with the leadership of other substantive sections via liaison positions. Liaisons interact directly with the executive committees of substantive sections and are members our Executive Committee. This type of networking and mentoring opportunity is essential to the development of a young lawyer in his or her career.

I invite all of you to contact me directly should you have any questions about any of the programs sponsored by the Young Lawyers Section. I also encourage your involvement in the Section at any level your busy lives will allow. I look forward to hearing from you.

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Yes We Can't?

By Joseph M. Hanna and Joohong Park

Joseph M. Hanna

"Change" and "diversity" are two words that have gained prominence in mainstream America's vernacular since the recent election of our nation's first African-American President. Unfortunately, collegiate and professional athletics, arenas very often viewed as trailblazers in the field of diversity, still face many issues related to the hiring and retention of minority coaches.[1]

The disproportionate representation of minority head coaches is most evident in college football. For instance, among the 119 NCAA football programs, there are only four African-American coaches.[2] A recent example of a collegiate coaching hire that evokes talk of discrimination is the hiring of Gene Chizik as the head coach of football at Auburn University.[3] What was notable in the hiring of Chizik, who had previously compiled a losing record of 5-19 for two seasons at Iowa State,[4] was the fact that a highly qualified African-American candidate, Turner Gill, was also interviewed for the position but did not receive an offer. Gill took over as head coach at the University at Buffalo three years ago and succeeded in turning around one of the country's worst football programs by guiding Buffalo to a winning record, its first Metro Atlantic Conference championship and its first bowl bid in 50 years.[5]

Auburn's passing over of Gill evoked an emotional response in some quarters. NBA Hall of Famer Charles Barkley, a notable Auburn alumnus, has been quoted as saying, "I think race was the No. 1 factor.… You can say it's not about race, but you can't compare the two résumés and say [Chizik] deserved the job. Out of all the coaches they interviewed, Chizik probably had the worst résumé."[6] Barkley also stated, "I told him you can't not take the job because of racism. [Turner] was worried about being nothing more than a token interview. [Turner] was concerned about having a white wife. It's just very disappointing to me."[7]

"Unfortunately, collegiate and professional athletics, arenas very often viewed as trailblazers in the field of diversity, still face many issues related to the hiring and retention of minority coaches."

The Auburn controversy has focused a spotlight on the issue of minority hiring within collegiate sports. Now, it is up to the NCAA whether it will choose to remedy this situation on its own or whether it will be forced to do so by the courts.

Self-Regulation/Non-Litigious Means

Collegiate and professional sports have often mirrored each other both on and off the field. For example, NCAA Division I-A football and the NFL often adopt the ideas, policies and on-field rules of each other's respective organizations. Instant Replay is one example of an on-field policy that was initially adopted by the NFL (in 1986[8] and fully implemented in 1999)[9] that the NCAA then also later adopted (in 2006).[10]

One rule which has not been implemented by the NCAA, but which exists in the NFL, is the "Rooney Rule," enacted in 2002.[11] The "Rooney Rule" was named after the owner of the Pittsburgh Steelers, Dan Rooney, who chaired the NFL Committee on Workplace Diversity and helped formulate a policy that any NFL club seeking to hire a head coach must interview one or more minority applicants for the vacant position.[12] The fact that today approximately one-fourth of all NFL teams have minority head coaches[13] can arguably be attributed directly to the NFL's implementation of the "Rooney Rule." Conversely, in collegiate athletics, which lacks a functional counterpart to the "Rooney Rule," approximately only four percent of NCAA football programs have African-American coaches.[14]

Joohong Park

As a result of the apparent disparity in minority hiring between the NCAA and NFL, it has been argued that the NCAA should also adopt its own version of the "Rooney Rule." Furthermore, if the NCAA or its member institutions cannot be persuaded to enact such a rule on their own accord, litigation through Title VII has been discussed as an avenue of implementing such a policy change.[15] It must be noted that the NCAA has stated publicly that it does not believe it can implement a collegiate version of the "Rooney Rule" because even though it is a governing body, it cannot instruct its members how to hire.[16] At a hearing before the House Subcommittee on Commerce, Trade and Consumer Protection in 2007, Myles Brand, President of the NCAA, stated that

> [j]ust as no central authority dictates to American higher education who among all educators and administrators they ought

> to interview or hire, the colleges and universities will not cede to the NCAA the authority to dictate who to interview or hire in athletics. This is not a challenge that can be managed through Association action in the same way we have done with academic reform. The universities and colleges retain their autonomy and authority in the case of hiring and in the case of expenditures, and they will not cede it to the NCAA or any other national organization.[17]

"If an organization wanted to bring a lawsuit on behalf of minority coaches who were denied interview opportunities or otherwise denied coaching positions, it would also have to seek class certification."

When specifically asked about the implementation of a "Rooney Rule," Brand stated that he believed "[s]uch a rule will not work for higher education as a whole, nor can a specific sport be singled out to operate apart from the institution."[18] More tellingly, Brand indicated that he believes such a rule is unnecessary.[19] Although he cited his work with the Black Coaches Association (BCA) in helping the BCA design the Minority Hiring Report Card that grades and publicizes the results of interview and hiring efforts in Division I,[20] it is clear that little progress has been made to date.

Directly suing a university may not only bring more attention to the issue of minority hiring than just the Minority Hiring Report Card, but may also spur the NCAA or its member universities to enact its own type of "Rooney Rule" in order to avoid both negative publicity and further litigation.

Accelerating Minority Hiring Through Litigation

Title VII Litigation

Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.[21] Specifically, Title VII states:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[22]

If an organization wanted to initiate a lawsuit on behalf of minority coaches against an institution based upon a violation of Title VII, a number of requirements must first be met. The organization would have to: (1) establish that it has standing to bring a lawsuit on behalf of the coach (the plaintiff);[23] (2) if applicable, achieve certification as "class"; (3) establish that the plaintiff is a member of a protected group/class; (4) prove that the plaintiff was qualified for the position; (5) demonstrate that the plaintiff suffered an adverse employment action; and (6) prove that the adverse employment action occurred under circumstances that give rise to an inference of discrimination.[24]

In the context of federal court litigation, "standing" is the basic legal requirement that determines whether an individual or class of individuals is a "proper party to request an adjudication of a particular issue."[25] Specifically, the courts have stated that to establish standing, a party must prove:

> (1) that the plaintiffs have suffered an injury-in-fact—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
> (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and
> (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[26]

Courts have held that "[o]nly someone who claims he has been, or is likely to be, harmed by [an] ongoing discriminatory practice has an adequate stake in the litigation to satisfy the "case or controversy" requirement of Article III."[27] "If [a] named plaintiff lacks standing to sue, he cannot prosecute the pattern or practice claim, and unless an employee who has been, or is likely to be, harmed by the discriminatory practice is substituted as the named plaintiff, the claim fails."[28]

If an organization wanted to bring a lawsuit on behalf of minority coaches who were denied interview

opportunities or otherwise denied coaching positions, it would also have to seek class certification. In order to establish a "class" of litigants, the law requires that there exist numerosity, commonality, typicality, and that adequacy is satisfied so that relief is appropriate for the class as a whole.[29] A class of minority coaches could fulfill the requirement for class certification, since there are a number of qualified minority coaching candidates and the basis of their claim could fall under the rubric of discrimination and Title VII. However, the difficulty would be in establishing a class of minority coaches who faced commonality of circumstances with regard to the alleged hiring practices of a university.

The next set of elements: (1) that the plaintiff is a member of a protected class; (2) that the plaintiff was qualified for the position; and (3) that the plaintiff suffered an adverse employment action would not be difficult to establish. First, race is a protected class. Therefore, an African-American coach who was denied a head coaching position will fall under the definition of a protected class.[30] Second, a minority coach can often cite his prior coaching experience to prove that he was qualified for the head coaching position at issue. Finally, failing to be hired will suffice as an "adverse employment action."

The thorniest issue to be resolved for both educational institutions and any coach who believes that he or she was discriminated against is the issue of proving such discrimination. In a Title VII action, the plaintiff has the burden of establishing the case of racial discrimination.[31]

The Supreme Court has cited two methods of analysis under a Title VII lawsuit: (1) the pre-text analysis[32] and (2) the mixed motive method.[33] Under a pre-text analysis, the plaintiff carries the initial burden of establishing a *prima facie* case of racial discrimination. In *McDonnell Douglas Corp. v. Green,* the Supreme Court set forth a model for resolving claims of intentional discrimination where there is no direct evidence of discriminatory intent. The Court stated that the plaintiff could establish a *prima facie* case of racial discrimination by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[34]

"Unlike professional sports leagues such as the NFL, the government could not force the NCAA to pass regulations by threatening to withdraw an entity's anti-trust exemption."

The Court added that "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[35] The plaintiff must then establish that the reason offered by the employer was merely a "pretext" for an employer's discriminatory hiring practices.[36]

According to the Court, one method of establishing that an employer's reason was merely pretext for its racially discriminatory decision would be to establish that "whites engaging in similar illegal activity were retained or hired by petitioner."[37] The Court also added that other relevant evidence in establishing pretext could include facts that an employer had followed a discriminatory policy toward minority employees. Finally, the Court stated that "statistics as to [an employer's] employment policy and practice may be helpful to a determination of whether [an employer's] refusal to rehire [plaintiff] in this case conformed to a general pattern of discrimination against blacks."[38]

"Under the mixed-motive method, a plaintiff must present sufficient evidence, direct or circumstantial, that, despite the existence of legitimate, non-discriminatory reasons for the adverse employment action, an illegal factor (i.e., race) was a motivating factor in that decision."[39] A party does not have to establish that race was the only motivating factor, only that race did play a motivating part.[40] In addition, the racial bias must originate from a decision maker and race must have had a role in the employer's decision making process and a determinative influence on the hiring decision.[41] However, it must be noted that standing alone, a deviation from an institution's policy does not establish discriminatory intent.[42]

Conclusion

When all of the legal tests and factors are viewed together, it becomes clear that the burden for a party or individual attempting to bring litigation against the NCAA or an educational institution regarding the disparity in minority coaching hires is steep and a potential plaintiff faces significant evidentiary challenges. An organization would have to find a minority coach that was clearly discriminated against by an educational institution and then attempt to find some direct or circumstantial evidence of discriminatory intent. In addition, statistical imbalances, although very real and prevalent, may not prove to be decisive in proving a case of minority hiring discrimination.

Unlike professional sports leagues such as the NFL, the government could not force the NCAA to pass regulations by threatening to withdraw an entity's anti-trust exemption. Additionally, the NCAA does not even have the authority to tell its members how they should hire. However, similar to the NFL, the threat of litigation and the related negative publicity could spur universities to self-regulate by instituting their own version of the "Rooney Rule."

Endnotes

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2. http://sports.espn.go.com/ncf/news/story?id=3770769.
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5. *Id*.
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8. http://www.nfl.com/history/chronology/1981-1990.
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10. http://www.ncaa.org/wps/ncaa?ContentID=4802.
11. https://www.nfl.info/nflmedia/News/2002News/NFLDiversityProgram.htm.
12. *Id.*
13. http://sports.espn.go.com/ncf/news/story?id=3780386.
14. *Id.*
15. *Id.*
16. *Id.*
17. http://www.ncaa.org/wps/ncaa?ContentID=3303.
18. *Id.*
19. *Id.*
20. *Id*.
21. http://www.eeoc.gov/policy/vii.html.
22. 42 U.S.C.A. § 2000e-2.
23. *Bennett v. Spear*, 520 U.S. 154 (1997); *Murray v. U.S. Bank Trust Nat. Ass'n*, 365 F.3d 1284 (11th Cir. 2004); *see also Hall v. Alabama Ass'n of School Boards*, 326 F.3d 1157 (11th Cir. 2003) and *Cotter v. City of Boston*, 323 F.3d 160 (1st Cir. 2003).
24. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).
25. *Flast v. Cohen*, 392 U.S. 83 (1968) states: "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Citing Baker v. Carr*, 369 U.S. 186 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.
26. *Bennett v. Spear*, 520 U.S. 154, 167 (1997) *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).
27. *Flast v. Cohen*, 392 U.S. 83, 99-101 (1968) (internal citation omitted).
28. *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955 (11th Cir. 2008).
29. *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, FN 20 955 (11th Cir. 2008); and Fed.R.Civ.P. 23(a) which states: "One or more members of a class may sue or be sued as representative parties on behalf of all only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."
30. *Johnson v. St. Luke's Hosp.*, 2007 WL 3119845 (E.D. Pa., Oct. 23, 2007); *see generally* Title VII.
31. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
32. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Ward v. City of North Myrtle Beach*, 457 F. Supp. 2d 625 (D.S.C. 2006).
33. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *see also Hill v. Lockheed Martin Logistics Management*, *Inc*., 354 F.3d 277 (4th Cir. 2004).
34. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973).
35. *Id*.
36. *Id.*
37. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), *citing Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); Blumrosen, Strangers in Paradise: *Griggs v. Duke Power Co*.
38. *Id.*
39. *Ward v. City of North Myrtle Beach*, 457 F. Supp. 2d 625 (D.S.C. 2006), *citing Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
40. *Id*.
41. *See generally Ward v. City of North Myrtle Beach*, 457 F. Supp. 2d 625 (D.S.C. 2006), *citing Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004).
42. *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355-56 (11th Cir. 1999).

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A Functionalist Perspective on the Effectiveness of the Gramm-Leach-Bliley Networking Exception

By Vlad Frants

On November 12, 1999, President Clinton signed into law the Gramm-Leach-Bliley Act. ("GLB").[1] The principal objective of the GLB was to authorize and facilitate affiliations of commercial banks with insurance companies, investment banks, and other financial entities.[2] With the passage of the Gramm-Leach-Bliley Act, most of the separation of investment and commercial banking imposed by the Glass-Steagall Act was repealed and the provisions of the Exchange Act that had completely excluded banks from broker-dealer registration requirements were revised. By enacting the GLB, Congress adopted what was, effectively, *functional regulation* for bank securities activities and created exceptions from Commission oversight for certain securities activities, such as the Networking Exception.

The Securities Exchange Act of 1934, Section 15[3] covers the registration of brokers and dealers and specifically states under Section 15(a)(1) that,

> [I]t shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer…to make use of the mails or any means of instrumentality or interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security [other than certain exempted securities] unless such broker or dealer is registered.…[4]

Interestingly, historically this section read differently to expressly exclude banks from the definitions of "broker" and "dealer" and thus, banks were not under any obligation at all to register with the SEC if they "[made] use of the mails or any means of instrumentality or interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security."[5] This was because at the time that the broker-dealer provisions were enacted in the Exchange Act, "there was little need for banks to be subject to broker-dealer regulation."[6]

"Functional regulation seeks to promote competitive equality, regulatory efficiency, and investor/consumer protection."

This was because the Glass-Steagall Act, which has now been repealed by the GLB, statutorily limited banks' ability to deal in securities and prevented banks' affiliation with securities firms.[7] Thus, as Professor Fanto points out, "[t]he exclusion of banks from the definitions of *broker* and *dealer*…did not at first present any significant regulatory problems."[8] However, as banks and broker-dealers became more competitive with one another in the financial services industry, and "banks and bank holding companies developed [their securities business] to the extent they were allowed by sympathetic bank regulators,"[9] the SEC, and, eventually, Congress, started to come to the conclusion that "in the interests both of investor protection and fair competition, the securities activities allowed for banks, particularly their brokerage activities, should be regulated in the same manner as when registered broker-dealers conducted them."[10] Thus, the GLB not only repealed Glass-Steagall, in effect ending the separation of commercial banking from investment banking, but GLB also amended the law to eliminate the complete exemption for banks and replaced it with detailed exclusions for bank broker activities.

At the same time that Congress gave banks expanded flexibility and freedom to affiliate with investment banks in conduct their business affairs, Congress was nevertheless concerned about the regulatory implications, particularly for banks, and was faced with the question: how should banks, given their expansive new rights, be regulated?[11] Congress posited that commercial and investment banks should be regulated "by the regulator with the most competence and expertise in their business," and thus, Congress engaged the concept of "functional regulation."[12]

Functional regulation is the colloquial term describing the bifurcated regulatory system of U.S. markets.[13] In its simplest form, functional regulation rests on the principle that like functions should be regulated alike, regardless of the type of entity performing the function.[14] Functional regulation seeks to promote competitive equality, regulatory efficiency, and investor/consumer protection.[15]

As GLB eliminated the blanket exception, the Act amended those definitions to provide banks with certain exceptions—one of which is the Networking Exception.[16] Generally speaking under the Networking Exception, "[a]s part of a third party brokerage (or "networking" arrangement), the Act permits bank employ-

ees to participate to a limited extent in referring customers and receiving compensation consisting of a "nominal one-time cash fee" that is not contingent on the referral resulting in a transaction."[17] The Networking Exception is set out in Section (3)(a)(4)(B)(i) of the Exchange Act.[18] It permits a bank to enter into an arrangement with a registered broker-dealer to offer the bank's customers certain kinds of financial services.[19] Generally speaking, a bank can do this under the networking exception "provided appropriate disclosures are given such that customers are aware services are being provided by the broker-dealer and not the bank."[20] Moreover, brokerage activities that occur must be clearly marked and physically separated from the bank's routine business activities such as deposit-taking, if practicable.[21] There are numerous other conditions, such as the fact that bank employees must perform only clerical or ministerial functions in connection with brokerage transactions and that unregistered bank employees may not receive incentive compensation other than nominal one-time cash fee payments which are not contingent on the success of the referral for any brokerage transaction.[22] Conditions such as these are designed to ensure that bank customers are clear on who actually offers the brokerage services and that bank employees do not become too involved in offering brokerage services.[23]

In order to consider the effectiveness of functional regulation and Networking Exception, a framework is critical. Former SEC Chairman John Shad laid out four policy arguments supporting the use of functional regulation, particularly in the banking and securities industries context[24]: first, functional regulation allocates to each regulatory agency jurisdiction over those economic functions it knows best.[25] Second, allocating regulatory jurisdiction by function permits the application of a constituent regulatory philosophy.[26] Third, a functionally-based system minimizes regulatory conflict, duplication and overlap.[27] Finally, according to John Shad, functional regulation has the distinct advantage that it enables the conditions for equal treatment of competitors.[28] Thus, functional regulation is aimed at reforming the regulation of financial institutions in order to promote three critical goals: (1) competitive equality; (2) regulatory efficiency; and (3) investor/consumer protection.

The principle of competitive equality states that entities engaged in similar transactions and products should be subject to the same rules interpreted and administered consistently by the same regulators.[29] In addition to reducing regulatory conflict, proponents of functional regulation suggest that it will decrease overlap and duplication of the regulatory function.[30] Finally, the theory of investor/consumer protection under functional regulation is that the availability of the widest range of financial products at the lowest cost to the public should be encouraged and that new and innovative products should be encouraged by a market driven system rather than by arbitrary differences in entity regulation.[31]

For the purposes of this analysis, if these goals are being met, then the Networking Exception is working and additional regulation is unnecessary; however, if these goals were not being met, then the Networking Exception would need to be reevaluated and additional (or different) regulation may be needed.

Three Select Provisions of the Networking Exception

1. Nominal Fees

The Networking Exception makes it clear that bank employees who are not also associated persons of a registered-broker deal generally may not receive incentive compensation for making referrals other than a "nominal one-time cash fee of a fixed dollar amount."

a. Investor/Consumer Protection

In their March 26, 2007 letter to the Securities and Exchange Commission, the Pace Investor Rights Project at Pace University School of Law argued that the three alternatives by which the meaning of a "nominal one-time cash fee of a fixed dollar amount" is calculated for purposes of determining referral incentive compensation of certain bank employees, all create an inappropriate incentive for retaining bank employees who refer customers to broker-dealers.[32] The rule defines "nominal one-time cash fee of a fixed dollar amount" to mean any amount paid only once for a referral not exceeding the greatest of: (1) $25 (adjusted for inflation every five years beginning on April 1, 2012); (2) twice the average hourly wage for the employee's "job family" (such as loan officers); (3) 1/1000th of the average annual base salary for the employee's job family; (4) twice the employee's actual base hourly wage; or (5) 1/1000th of the employee's actual annual base salary.

The Pace Investor Rights Project argues that the alternatives are inconsistent with the "nominal" fee requirement because "the actual value of the referral fee ignores the cumulative effect of making multiple referrals"[33] and that all of the alternatives create the potential for banking employees to collect excessive referral fees to the detriment of unsophisticated bank customers.[34] They argue that "banker salesmanship" poses a problem for small investors because over a period of time overzealous banker salesmanship could result in a cumulative payment that is far more than nominal and would motivate a degree of salesmanship that goes beyond the intended scope of the referral fee contemplated by Congress.[35] In other words, because of the fact that there is no cumulative cap on the maximum referral fee that could be collected, the practice of collecting fees would eventually result in a referral fee that goes far beyond "nominal." This, arguably,

may have the effect of reducing investor/consumer protection because a bank employee who seeks to make as many referrals as possible, given that there is no cumulative cap, may do so in an overzealous manner—and perhaps unethical manner—and may "contribute to the confusion that leads to brokers recommending unsuitable products to unsophisticated investors."[36] Whereas, if there were a maximum cap on cumulative collectable referral fees, bank employees would not have much incentive to pursue the "sell to everyone and sell at all costs" business model. Thus, consumer/investor protection would not be put at risk.

2. Bonus Plans

The Networking Exception provides that "a bonus is excluded from incentive compensation if it is paid on a discretionary basis and based on multiple factors or variables, provided that: (i) those factors or variables include multiple, significant factors or variables that are not related to securities transactions at a broker-dealer; (ii) a referral made by the employee receiving the bonus is not a factor or variable in determining the employee's compensation; and (iii) the employee's compensation is not determined by reference to referrals made by other persons [such as the employee's subordinates]."[37]

a. Regulatory Efficiency

While the Networking Exception provides banks with "welcome flexibility in structuring employee referral and bonus arrangements,"[38] it "still will not be fully harmonious with many banks' current incentive-based compensation programs, including bonus and rewards programs"[39] and will be unlikely to result in regulatory efficiency. The Networking Exception does not adequately accommodate current bank bonus programs since most of these plans are based on transaction revenues rather than overall profitability.[40] Most banks will now be required to substantially restructure their bonus plans.[41] Regulatory efficiency seeks a reduction in confusion and conflict of the regulatory function but where a rule is inconsistent with many banks' current compensation programs, as is the case here, there is more likely to be confusion and possible regulatory conflict as between the regulators and bank management's regulation of the compensation structure.

"While the Networking Exception is itself complex and is part of a complex piece of legislation, the weaknesses of select provisions of the legislation underscore the need for a careful reevaluation of the efficacy and implementation of the act."

b. Competitive Equality

Whereas "incentivized compensation programs has become the norm in the banking industry,"[42] certainly not every bank has an identical compensation system. Since most banks will now be required to substantially restructure their bonus plans in order to fully comply with the law, and different banks may have varying incentives to do so, "[u]ltimately, a bank may have to make a choice between three economically unattractive choices: (1) pushing-out its securities business to a registered broker-dealer; (2) maintaining the activities within the bank, but losing the benefits of an incentive based sales program; or (3) simply dropping the line of business."[43] The principle of competitive equality states that entities engaged in similar transactions and products should be subject to the same rules interpreted and administered consistently by the same regulators. Here, while banks may be engaged in similar transactions and products, they will not necessarily be subject to the same rules—and, ironically, will be forced to make a conscious decision about whether or not they want to be subject to certain types of regulation, merely because of the nature of their compensation structure.

Exemption for Referrals of High Net Worth and Institutional Customers

1. Competitive Equality

As previously discussed, the principle of competitive equality states that entities engaged in similar transactions and products should be subject to the same rules interpreted and administered consistently by the same regulators. The exemption for referral of high net worth and institutional customers, or the "institutional exemption," permits larger and non-contingent referral fees for large sophisticated customers. However, "the definition of the term 'high net worth customer' triggering the exemption in the case of referrals of natural persons requires a net worth of $5 million excluding primary residence and associated liabilities."[44] There is an argument that this amount is too high and that it discriminates against smaller banks that compete in smaller, less affluent markets.[45] "While large New York City banks may serve enormous numbers of individuals with a net worth of $5 million or more, a bank in Detroit or in small rural communities is not likely to be able to do so." Moreover, banks typically treat customers with $1 million or more in liquid assets as high net worth customers, eligible for bank programs limited to only such customers.[46] There is a particular geographical disparity in the application of this definition, and this is something that undoubtedly takes away from competitive equality.

Conclusion

While the Networking Exception is itself complex and is part of a complex piece of legislation, the weaknesses of select provisions of the legislation underscore the need for a careful reevaluation of the efficacy and implementation of the act.

Endnotes

1. Pub. L. No. 106-102.
2. Financial Services Modernization: the Impact of the Gramm-Leach-Bliley Act, Thursday, February 17, 2000. Materials prepared by the Association of the Bar of the City of New York, p 1.
3. This was enacted as part of the 1936 amendments to the Exchange Act, p 2-3.
4. An interesting quote from *Regional Props., Inc. v. Financial and Real Estate Consulting Co.,* 678 F.2d 552, 562 (5th Cir. 1982), sheds some light on the justification for this requirement: "[t]he registration requirement enables the SEC (and private citizens, through the implied right of action) to exercise discipline over those who may engage in the securities business and it establishes necessary standards with respect to training, experience, and records."
5. See James Fanto, Chapter 5 on Broker Registration and Exemptions, p. 21.
6. *Id.*
7. *Id.*
8. *Id.*
9. *See* James Fanto, Chapter 5 on Broker Registration and Exemptions, p. 21.
10. *Id*.
11. *See id*.
12. *See* James Fanto, Chapter 5 on Broker Registration and Exemptions, 24-25.
13. Richard Carlucci, *Harmonizing U.S. Securities and Futures Regulations*, 2 Brook. J. Corp. Fin. & Com. L. 461, 262. Interestingly, "Federal functional regulator" is defined in Section 509 of the Gramm-Leach Bliley Act, and includes, among others, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Reserve Board and the Federal Deposit Insurance Corporation. American Law Institute–American Bar Association Continuing Legal Education, July 24–25 (2008).
14. *See* Melanie L. Fein, *Functional Regulation: A Concept for Glass-Steagall Reform?,* 2 Stan. J.L. Bus. & Fin. 89, 89 (1995). "Examples of functional regulation in current law include zoning laws, fire codes, and tax laws. Such functional regulations apply to all businesses regardless of whether the entity is a restaurant, department store, or pet shop." *Id.*
15. *Id.*
16. *Id* at 24.
17. Financial Services Modernization: the Impact of the Gramm-Leach-Bliley Act, Thursday, February 17, 2000. Materials prepared by the Association of the Bar of the City of New York, p. 47.
18. *See* Regulation B, Exchange Act Release No. 49,879, 69 Fed. Reg. at 39,686.
19. *See id; also see* James Fanto, Chapter 5 on Broker Registration and Exemptions, p. 30.
20. Financial Services Modernization: the Impact of the Gramm-Leach-Bliley Act, Thursday, February 17, 2000. Materials prepared by the Association of the Bar of the City of New York, p. 98.
21. *Id.*
22. *Id.*
23. *See* James Fanto, Chapter 5 on Broker Registration and Exemptions, p. 30.
24. *See* Melanie L. Fein, *Functional Regulation: A Concept for Glass-Steagall Reform?,* 2 Stan. J.L. Bus. & Fin. 89, 90-91 (1995).
25. *Id.*
26. *Id.* at 91. Interestingly, "[a] major thrust of the securities laws is full disclosure. By contrast, bank regulators are concerned about the need for public confidence in banks, and therefore tend more toward confidentiality." *Id.*
27. *Id.*
28. *See* Melanie L. Fein, *Functional Regulation: A Concept for Glass-Steagall Reform?,* 2 Stan. J.L. Bus. & Fin. 89, 91 (1995). *Id.* at 93. However, functional regulation is not without its disadvantages. For example, it can result in a particular type of firm, such as a savings and loan firm or a credit union, having to deal with a variety of special-purpose agencies rather than a single agency, which can result in added regulatory costs. This is because the firms will have to deal with more than one agency.
29. Lindon Birkin Tigges, *Functional Regulation of Bank Insurance Activities: the Time Has Come*, 2 NCBNKI 455, 461 (1998). Whether this assumption is true is an important question. As will be discussed later,

    > [t]his logic ignores the potential for inconsistent application of the rules and regulations by various regulators operating under different motives and philosophies. Furthermore, it shows the lack of appreciation for the complex transactions and unique risks involved in those transactions that would require more than a simple training session taught by those with inadequate experience in the particular industry.

30. *See id.*
31. *See id*.
32. March 26, 2007 letter from the Pace Investor Rights Project at Pace University School of Law addressed to Mrs. Nancy M. Morris, Secretary, Securities and Exchange Commission, *available at* http://www.sec.gov/comments/s7-22-06/s72206-18.pdf.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. Jerome J. Roche, Babback Sabahi, *Regulation R: The Beginning of the End or the End of the Beginning of Bank Securities Brokerage Activities?* 12 N.C. Banking Inst. 145 (2008).
39. *Id.* at 145.
40. *Id.* at 150.
41. *Id.*
42. American Law Institute—American Bar Association Continuing Legal Education, January 12-13, 2006, *Regulation B: SEC Rules Governing Certain Bank Securities Broker Activities*, SL047 ALI-ABA 49, p. 67.
43. *Id.*
44. March 26, 2007 letter from Comerica Tower at Detroit Center to the Board of Governors of the Federal Reserve System and the SEC, *available at* http://www.sec.gov/comments/s7-22-06/s72206-8.pdf.
45. *Id.*
46. March 22, 2007 letter from the Bank Insurance & Securities Association to the Secretary of the Federal Reserve System, *available at* http://www.bisanet.org/gc/pdf/Scan001.pdf. In fact, $1million is the SEC's standard for "accredited investor" status, which permits individuals to invest in private offerings under Regulation D. *Id*.

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Tolling the Statute of Limitations on Prenuptial and Postnuptial Agreements: The Third (And Last) Version of DRL § 250

By Lee Rosenberg

After years of inter-departmental disagreement and two prior versions of legislation, we finally have a statute that effectively tolls the statute of limitations for three (3) years on the challenge to prenuptial and postnuptial agreements during an intact marriage—the new and improved DRL § 250 signed into law on May 21, 2008.

A prenuptial or postnuptial agreement is permitted under DRL § 236B(3)(4) and must, to be an enforceable document, adhere to the requirements of other such marital agreements. DRL § 236B(3) states:

> An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage pursuant to subdivisions one, two and three of section eleven of this chapter. Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this article. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.

For years, the First and Second departments were divided on the issue of whether the six-year statute of limitations to rescind an agreement as set forth in CPLR 213 was tolled by the existence of an intact marriage. The First Department had held that the statute tolled in deference to public policy considerations, including the intermediate appellate decision in *Bloomfield v. Bloomfield*,[1] and in other prior decisions such as *Lieberman v. Lieberman*[2] and *Zuch v. Zuch*.[3] The Second Department, to the contrary, had maintained that the six-year statute of limitations governed and such claims are time barred by CPLR 213. (*See DeMille v. DeMille*;[4] *Rosenbaum v. Rosenbaum*;[5] *Anonymous v. Anonymous*[6])

When *Bloomfield* went up to the Court of Appeals,[7] the Court, in lieu of breaking the tie between the departments, end-ran the issue and applied CPLR 203(d), holding that it permitted the defendant to contest the validity of the agreement when the claim arose from the same transaction asserted in the complaint, notwithstanding that the same claim "*might* have been time-barred at the time the action was commenced." (emphasis added) *DeMille*, which was decided post-*Bloomfield* by the Second Department, reiterated the lack of a tolling in that department and also determined, as per *Bloomfield*, that CPLR 203(d) could only be used by defendants and not by plaintiffs.[8] The Second Department's position on a lack of tolling was again reiterated in its February 2007 decision in *Katz v. Katz.*[9]

Given the ongoing discrepancy between the departments, DRL § 250 was enacted on July 3, 2007, and then immediately amended. In actuality, DRL § 250 was twice enacted on that day, as the initial enactment was made and then quickly amended. Its first incarnation was generated in January 2007, while the *Katz* appeal was pending, and was approved by the Assembly on March 19, 2007, by the Senate on June 4, 2007, and signed into law by then Governor Spitzer on July 3 at L. 2007, c. 104. The text read as follows:

> Section 1.
>
> The domestic relations law is amended by adding a new section 250 to read as follows:
>
> § 250. AGREEMENTS RELATING TO MARRIAGE; STATUTE OF LIMITATIONS. The statute of limitations for commencing an action or claiming a defense that arises from an agreement

pursuant to section two hundred thirty-six of this article shall be three years. However, the statute of limitations shall be tolled until such time as both parties have made an appearance in the action concerning the agreement. If an action is dismissed, dropped, or otherwise resolved, any remaining time limits shall be tolled until both parties make an appearance in a subsequent action concerning the agreement.

The session law read:

Section 2. This act shall take effect immediately and shall not apply to prenuptial agreements where the commencement of an action thereon was barred under the civil practice law and rules in effect immediately prior to such effective date. (emphasis supplied)

The statute was then amended on July 3 by L. 2007, c. 226. *and still presently* is as follows:

§ 250. Agreements relating to marriage; statute of limitations

1. The statute of limitations for commencing an action or proceeding or for claiming a defense that arises from an agreement made pursuant to subdivision three of part B of section two hundred thirty-six of this article entered into (a) prior to a marriage or (b) during the marriage, but prior to the service of process in a matrimonial action or proceeding, shall be three years.

2. The statute of limitations shall be tolled until (a) process has been served in such matrimonial action or proceeding, or (b) the death of one of the parties.

3. The provisions of this section shall not apply to a separation agreement or an agreement made during the pendency of a matrimonial action or in settlement thereof.

The language was modified so as to eliminate a re-tolling of the statute in the event an action was commenced and then discontinued or dismissed. When the amendment was made, the chapter 226 session law followed suit:

This act shall take effect on the same date [July 3, 2007] as a chapter [L.2007, c. 104] of the laws of 2007 amending the domestic relations law relating to the statute of limitations for agreements relating to marriage, as proposed in legislative bills numbers S.4564 and A.3074, takes effect; and *shall not apply to any agreement where the commencement of an action thereon was barred under the civil practice law and rules in effect immediately prior to such effective date*. (emphasis supplied)

Regardless of the version enacted on July 3, 2007, it seems clear in the plain reading of DRL § 250 that the statute of limitations on prenuptial and postnuptial agreements is three years and that it tolls during the intact marriage. It should be noted, however, that it does not begin to run from the commencement of the action, but from *service of process* in that action. Clearly, however, the session laws to the first two versions of DRL § 250 refer to agreements being time-barred under the civil practice law and rules in effect immediately prior to such effective date. It was arguable, then, that under the July 3, 2007 versions of DRL § 250, the statute did not apply to agreements in which an action thereon would have been time barred under the six-year statute of limitations in CPLR 213. Accordingly, it appeared that if on July 2, 2007, the six-year statute of limitations had expired, that agreement would not have been subject to attack nor was the tolling applicable to it—the Second Department position. Alternatively, it could have been argued that the session law intended that *actions* on agreements that were barred as of July 3, 2007 would still have been barred, but that actions not as yet commenced on those agreements (even if the agreement is more than six years old) benefit from the tolling—the First Department view.

In the May 6, 2008 decision in *Brody v. Brody*,[10] Hon. Robert A. Ross in the Supreme Court, Nassau County, actually addressed the issue head-on, finding that DRL § 250, as enacted for the second time on July 3, 2007, did not serve to toll the statute of limitations on those agreements that were executed six or more years prior to July 3, 2007. In that case, the prenuptial agreement was executed on January 26, 2001. The court did, however, permit the defendant to use CPLR 203(d) to challenge the agreement as a defense "as a shield," only to fend off the plaintiffs' attempt at its enforcement. The court found further that DRL § 250 did not expressly render the use of CPLR 203(d) unavailable even on agreements over six years old because no specific intent to rule out its use was set forth in the statute.

On May 23, 2008, Governor David A. Paterson signed a second amendment to DRL § 250. This time, the session law states:

§ 2. Section 2 of chapter 226 of the laws of 2007 amending the domestic relations law relating to agreements relating to marriage, is amended to read as follows:

§ 2. This act shall take effect on the same date as {a} chapter 104 of the laws of 2007 {amending the domestic relations law relating to the statute of

limitations for agreements relating to marriage, as proposed in legislative bills numbers S.4564 and A.3074,} takes effect; and shall not apply to any agreement where the commencement of an action thereon was PREVIOUSLY barred BY A COURT under the civil practice law and rules in effect immediately prior to such effective date. (emphasis in session law).

This final revision enacted on May 21, 2008 serves to eliminate the division that existed between the statute and the session law and between the First and Second departments as to those agreements that were more than six (6) years old as of July 3, 2007. DRL § 250 now makes it clear that the three-year statute of limitations on such agreements tolls unless a court had previously barred the agreement prior to July 3, 2007, under the old six-year statute.

As it now stands, existing prenuptial and postnuptial agreements can be challenged regardless of their age as long as the marriage is intact. So, the statute of limitations defense is now seemingly meaningless despite the three year limitation set forth in the statute, barring some very strange circumstances. Accordingly, it would appear foolish not to take issue with a prenuptial or postnuptial agreement that might be subject to challenge while a matrimonial action is pending for three years and then wait until after that period has expired to raise a claim. One last twist: The wife's case is pending for *over* three years. There is a prenup that is now 10 years old and would have been time-barred under the six-year statute of limitations of CPLR 213. She never raised issue with the agreement's validity as a result, but no court previously declared the agreement time-barred. She could not have availed herself of CPLR 203(d) because she is a plaintiff. DRL § 250 is prospective from July 3, 2007. Is the wife now barred under DRL § 250 because more than three years has passed since she served process upon the husband? Strange circumstance indeed, and one that remains for the court to decipher.

Endnotes

1. 281 A.D.2d 301 (1st Dep't 2001).
2. 154 Misc.2d 749 (Sup. Ct., N.Y. Co. 1992).
3. 117 A.D.2d 397 (1st Dep't 1983).
4. 5 A.D.3d 428 (2d Dep't 2004).
5. 271 A.D.2d 427 (2d Dep't 2000).
6. 233 A.D.2d 350 (2d Dep't 1996).
7. 97 N.Y.2d 188 (2001).
8. Both the Third [*U.S. Fidelity and Guar. Co. v. Delmar Development Partners, LLC*, 803 N.Y.S.2d 254 (3d Dep't 2005)] and Fourth [*Harrington v. Gage*, 843 N.Y.S.2d 745 (4th Dep't 2007)] departments adopted the *DeMille* Court's view of the use of CPLR 203(d) as being available to defendants only.
9. 37 A.D.3d 544 (2d Dep't 2007).
10. 20 Misc.3d 350 (Sup. Ct. Nassau Co. 2008).

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Recent United States Supreme Court Decisions Dealing with Criminal Law

The United States Supreme Court, during the last several months, issued several significant rulings in the area of criminal law, especially on the issues of search and seizure, right to counsel, and the confrontation clause. These cases are summarized below.

***Arizona v. Gant*, 129 S. Ct. 1710 (April 21, 2009)**

In a 5-4 decision, the Supreme Court ruled that police need a warrant to search the vehicle of someone they have arrested if the person is locked up in a patrol cruiser and poses no safety threat to the officers. The Court's decision places some limitations on the ability of police to search a vehicle immediately after arrest of a suspect, particularly when the alleged offense is nothing more serious than a traffic violation. The Court's most recent decision appears to be a limitation on the expansion of the ability of police officers to conduct searches of vehicles and their occupants. It appears that under the new ruling, warrantless searches may be conducted if a car's passenger compartment is within reach of a suspect and the officers have some legitimate fear for their safety. The vehicle may also be searched if there is reason to believe that evidence will be found of the crime that led to the initial arrest. Justice Stevens, writing for the five-judge majority, stated, "When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant." Joining Justice Stevens in the majority opinion were Justices Ginsburg, Souter, Scalia and Thomas.

Justice Alito issued a vigorous dissent, arguing that the Court's decision was changing police practices which have developed over the years based upon Supreme Court decisions. Joining Justice Alito in dissent were Chief Judge Roberts and Justice Kennedy. Justice Breyer also joined the dissenting opinion in part.

Based upon the Court's decision in *Arizona v. Gant*, the Court, during the last several months, granted certiorari, vacated the judgments, and remanded numerous cases involving vehicle searches in connection with arrests for further consideration in light of the Court's most recent decision.

***Flores-Figueroa v. United States*, 129 S. Ct. 1886 (May 4, 2009)**

In a unanimous decision, the Supreme Court held that undocumented workers who use phony identifications cannot be convicted of identity theft without proof that they knew they were stealing a real person's Social Security or other identifying number. The Court's decision was issued by Justice Breyer, and the Court's holding specifically rejected the government's argument that prosecutors need only show that the I.D. numbers belong to someone else regardless of whether the Defendant knew it. The Court's decision places some additional limitations on a 2004 federal law which was aimed at getting tough on immigrants who were picked up in workplace raids and were found to be using false Social Security and alien registration numbers.

***Kansas v. Ventris*, 129 S. Ct. 1841 (April 29, 2009)**

In a 7-2 ruling, the Supreme Court held that a Defendant's statement to an informant elicited in violation of his Sixth Amendment rights was nonetheless admissible to impeach his trial testimony. The majority opinion held that the use of the statement was proper in order to show that the Defendant's statement was inconsistent with his current trial testimony. Constituting the majority opinion were Justices Souter, Breyer, Thomas, Scalia, Alito, Kennedy and Chief Judge Roberts. Justice Stevens issued a dissenting opinion in which Justice Ginsburg joined.

***Montejo v. Louisiana*, 129 S. Ct. 2079 (May 25, 2009)**

In another 5-4 decision, the Supreme Court overruled a 1986 decision where the Court had stated that police were constitutionally barred from initiating interrogation of a criminal defendant once he or she had asked for a lawyer at an arraignment or a similar proceeding. The 1986 ruling in *Michigan v. Jackson*, 475 U.S. 625, has been a controversial one, and was often attacked by law enforcement officials as being unduly burdensome and difficult to implement. In the instant case, in a decision written by Justice Scalia, the five-judge majority held that the *Jackson* decision was poorly reasoned and had proven unworkable. Further, because of protections which had been created by the Court in *Miranda* and related cases, there was little if any chance that a defendant would be badgered into waiving his right to have counsel present during interrogation. The five-judge majority, in addition to Justice Scalia, consisted of Justices Alito, Kennedy, Thomas and Chief Justice Roberts.

Justice Stevens issued a dissenting opinion, calling the overruling of the *Jackson* decision unwarranted and stating that the Miranda warnings, in and of themselves, were not adequate to inform a defendant of his Sixth Amendment right to have a lawyer present at all critical stages. Justice Stevens was joined in dissent by Justices Souter, Ginsburg and Breyer.

***Safford Unified School District v. Redding*, 129 S. Ct. 2633 (June 25, 2009)**

On April 21, 2009, the Supreme Court held oral argument in a case of an Arizona school girl who was strip-searched on suspicion of carrying illegal pills. The case once again focused the Court's attention on the delicate balance between student privacy and the need for public school safety. In the past, the Court has basically followed a pattern of allowing school officials broad discretion in their supervisory role over students and the necessity to deal with the problem of drugs and illegal weapons in schools. After considering the matter for several weeks, the Court in June issued its decision and held that the search in question was unconstitutional. By an 8-1 vote, the Court found that school officials had gone too far in their search. The Court emphasized the difference between a routine search of a backpack and a search that exposes a student's private parts. The majority opinion, written by Justice Souter, found that a school official must have a reasonable suspicion of danger regarding the drugs sought and a belief that they could be hidden in a student's underwear before making the quantum leap from outer clothes and backpacks to exposure of intimate parts. Justice Thomas dissented, arguing that the decision was allowing judges to second-guess school officials who were trying to insure student safety.

Although ruling in favor of the Plaintiff on the search issue, the Court refused to award any monetary damages, ruling that the school officials were immune from being sued unless they blatantly violated clearly established law. Since this could not be sustained in light of the fact that several federal courts had come to conflicting conclusions on the issue, the majority of the Court concluded that no monetary damages could be awarded. Justices Stevens and Ginsburg dissented with respect to the immunity issue, and the failure to provide any monetary compensation.

***District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308 (June 18, 2009)**

In a 5-4 decision, the Court held that criminal defendants have no federal constitutional right of access to DNA evidence after they are convicted. The Court concluded that establishing rules on DNA evidence should be the job of legislators, not justices. Chief Justice Roberts wrote the opinion for the majority and stated "to suddenly constitutionalize this area would short circuit what looks to be a prompt and considered legislative response by the states and the Congress." Justice Roberts noted that 47 states and the federal government currently provide at least some post-conviction access to DNA evidence. Justice Roberts was joined in the majority by Justices Scalia, Kennedy, Thomas and Alito. Justice Stevens issued a dissenting opinion, arguing that the DNA test which the Defendant sought was a simple one which could be provided at modest cost, and that refusal to provide access to evidence which could prove innocence was wholly unjustified. Justices Souter, Ginsburg and Breyer joined in dissent.

***Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (June 29, 2009)**

In a 5-4 decision, the Supreme Court concluded that the Defendant's Sixth Amendment right to be confronted by witnesses requires that when drug, blood or other forensic reports are introduced by prosecutors at trial, the analyst who prepared the report must be available for cross-examination. Justice Scalia wrote the majority opinion and was joined by the unusual grouping of Roberts, Kennedy, Breyer and Alito. Often viewed as a pro-prosecution Justice in the area of confrontation, Justice Scalia has evidenced pro-defense tendencies and was the architect of the *Crawford* decision, upon which the Court's most recent decision is based. Interestingly, in the instant case, the usually pro-defense bloc consisting of Justices Ginsburg, Stevens and Souter voted in favor of the prosecution, where they were joined by Justice Thomas, making for another most unusual grouping.

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What Every Attorney Should Know About the New Durable Power of Attorney Form

By Anthony J. Enea

At first glance the most obvious difference between the old statutory durable general power of attorney form and the new statutory short form power of attorney (the "New Form POA" or the "New Form")[1] that became effective on September 1, 2009 is the length of the new form—it is considerably longer than the old form. Then there is the addition of the Statutory Major Gifts Rider (SMGR).[2] Beyond these obvious differences, the major distinction, in my opinion, is that the New Form poses significant execution problems, especially for seniors and small firm or sole practitioners who have difficulty obtaining witnesses for the execution of documents. In their zeal to protect the elderly from financial abuse, the drafters may have created a document that is so complicated and difficult to execute that it may end up being underutilized.[3] For example, at a recent seminar a prominent attorney suggested that he is strongly considering recommending to his clients that they execute and fund a revocable living trust, thereby avoiding the complexities of the New Form and what are likely to be the continuation of problems associated with recognition and acceptance of powers of attorney by financial institutions and banks.

I will highlight for you what I believe are some of the most important aspects/provisions of the New Form which necessitate your attention:[4]

1. The New Form must be in at least 12-point size font.
2. If more than one agent is designated, they must act together unless the principal initials the box permitting the agents to act separately.
3. If successor agents are designated, they must act together unless the principal initials the box permitting the successor agents to act separately.
4. The execution of the New Form automatically revokes any and all prior powers of attorney executed by the principal, unless otherwise stated in the "modifications" section of the New Form. Arguably, this would include any banking and financial institution powers of attorney previously executed by the principal. Certainly, other types of preexisting powers of attorney would also be revoked. Practitioners are urged to address this issue with the principal, and provide for previously executed and existing powers of attorney in the "modifications" section of the New Form.
5. Part (f), entitled "Grant of Authority," lists the specific powers—lettered "A" through "P"—that the principal may grant to the agent. The principal may either initial each of the letters corresponding to the specific power he or she wants to grant or he or she may initial the letter "P" and can then list each of the specific letters for each power to be granted.

   Letter "M" of the old form, as you may recall, contained a gifting provision. No gifting provisions are contained within letters "A" through "P" of the New Form. The sole exception is that under letter "I," entitled "Personal and Family Maintenance," the agent may continue making gifts the principal made to individuals and charities prior to the POA being signed, in an amount not to exceed $500 per recipient in any one calendar year.[5]

   Letters "A" through "O" of the New Form should not be modified in any way, shape or form. I also believe that no additional lettered matters should be added in Part (f). For an explanation of each of the powers granted a thorough reading of GOL §§ 5-1502A through 5-1502O is a must.[6]
6. Part (g) of the New Form permits the principal to state any "modifications" to the authority granted in Part (f) and otherwise modify some of the other default provisions of the New Form. However, it is important to note that any "modifications" stated in Part (g) should not be provisions which allow the agent to make gifts of the principal's assets or change the principal's interest in property. Any gifting other than the minimal gifting provided for in letter "I" must be provided for in the SMGR. For example, in Part (g), the principal could provide that the execution of the New Form does not revoke a prior banking or financial institution POA. The principal can also define the "reasonable compensation" he or she would like the agent to receive or he or she may limit the powers of a "monitor" (a newly created party under Part (i) of the New Form). Part (g) is also the section where many el-

der law planning techniques can be provided for, such as entering into a personal service contract. As long as the modifications do not involve gifts of the principal's assets or changes to his or her interest in property, it appears that a variety of modifications are permissible in Part (g).

7. If the principal wishes to allow the agent to make gifts in excess of the $500 provided for in letter "I" of the powers, he or she would need to initial both Part (h) of the form and complete and execute the SMGR.

8. Part (i) of the New Form allows the agent to appoint a "monitor" who may demand accountings by the agent, including records and documents of all transactions, and also obtain documents from third parties. Caution here. If we counsel a principal to appoint one family member as agent and another family member as monitor, we may be leading our clients down a slippery slope toward family power struggles that can detrimentally impact the agent's ability to act under the New Form. It may be wise to specifically delineate the monitor's authority and the extent that he or she can seek and demand records. For example, you may wish to limit the ability to demand for records to once or twice per year. This is so especially as monitors are also permitted to commence a lawsuit against the agent(s).[7]

9. Part (j) of the New Form provides that the agent may be reimbursed for reasonable expenses incurred on the principal's behalf. If the principal wishes to allow the agent to receive "reasonable compensation," he or she must initial the box in Part (j). If the principal wishes to limit or define "reasonable compensation" he or she should do so in the modification section, Part (g).

   As you can see, the number of times the principal is required to place his or her initials has significantly increased from the old POA form. For many seniors this will be another hurdle to executing the New Form.

10. Part (l) of the form concerns the revocation and termination of the authority of the agent. Of course, the New Form POA terminates when the principal dies or becomes incapacitated if the POA is not durable.[8] The New Form is durable unless the principal states otherwise.[9] Under the new law, as in the past, delivery of a written instrument to both the agent(s) and any third party who may have relied on the POA as to the revocation of a POA is sufficient notice of revocation.[10]

11. The new POA form must be dated and signed by the principal and acknowledged by the principal before a notary public.

12. Part (n) of the New Form provides the agent with a statement of his or her legal obligations, duties and liabilities as an agent. It clearly places a significant burden and responsibility upon the agent for record keeping.

    In my opinion, the agent under the New Form POA is now in a similar fiduciary position as the trustee of a trust. Part (n) also places the attorney representing the principal in the unenviable position of having to advise the agent that there may exist a potential conflict of interest, and that he or she may wish to seek separate legal counsel before executing the New Form. If the agent does not obtain separate legal counsel, it may be wise to obtain from him or her some written acknowledgement of the waiver of the potential conflict of interest and the decision not to retain counsel.

    I believe a significant number of prospective and named agents will decide that they don't want the responsibility of being an agent, once they have read the notice provisions of the New Form and consulted with an attorney.

13. The agent must sign and have their signatures acknowledged before a notary public in Part (o) of the New Form; the New Form POA is not valid until all of the agents have signed and had their signatures acknowledged before a notary public. Multiple agents, however, do not need to sign at the same time and do not need to sign at the same time as the principal.

14. The SMGR must be executed simultaneously with the POA form by the principal. When both documents have been fully executed, they will then be read as one document.

    Gifting under the SMGR is authorized only if the principal has initialed Part (h) of the New Form POA. Clearly, the SMGR is intended to alert the principal of the gravity and importance of granting gifting powers to the agent, particularly if the agent is to have the authority to gift to him or herself. However, when one analyzes both the execution requirements of the SMGR and the legislative provisions relevant to the powers enumerated in the "modifications" section—Part (b)—of the SMGR, there are enough ambiguities and contradictions, in my opinion, to devote a full-day seminar. Nevertheless, here are highlights:

    A. If the principal wishes to allow the agent to make gifts to others, not

including him or herself up to the federal annual gift tax exclusion ($13,000 for 2009), he or she will need to initial the box in Part (a) of the SMGR.

B. Part (b) of the SMGR must contain any "modifications" or expansion of the gifting powers the principal wishes to give to the agent(s), and the box in Part (b) must be initialed by the principal. The Part (b) modifications relate to any expansion or modification of the power of the agent to gift beyond the annual exclusion amount ($13,000) to third parties. The powers in Part (b) *do not* include the powers to the agent to gift to him or herself (emphasis added). That authority must be provided in Part (c) of the SMGR. The gifting to third parties in Part (b) can be unlimited or gifts of a specific amount. Sample modifications of the gifting powers that can be inserted in Part (b) can be found in GOL § 5-1514(3). It does not appear that GOL § 1514(3) limits the modifications that can be made.[11] However, this seems to be another area of ambiguity.

C. Part (c) of the SMGR also has to be initialed by the principal if he or she wishes to grant the agent the authority to gift to him or herself, to the extent or limited as delineated therein. Thus, it appears that the boxes in Part (a), (b) and (c) of the SMGR will have to be initialed by the principal if he or she wishes to grant expanded gifting powers to the agent with respect to third parties and him or herself. The principal will also have to clearly state his or her modifications of these powers.

D. In Part (e), the SMGR must be dated and signed by the principal with his or her signature acknowledged before a notary public.

E. In Part (f), the SMGR must be witnessed by two people who are not *potential* recipients of gifts under the SMGR and the witnesses' statement must indicate that they observed the principal sign the SMGR.

F. And finally, Part (g) of the SMGR must state the name(s) and address(s) of the person or persons who prepared the SMGR.

Conclusion

This article is by no means an exhaustive review of the New Form POA and the SMGR that went into effect on September 1, 2009. More changes in the form of technical corrections are imminent, once the legislature is back in session. Hopefully, I have made the reader aware that the New Form POA and the SMGR have many complexities that must be carefully studied, understood and followed or modified depending on each client's situation. I wish you and your clients the best of luck in doing so.

Endnotes

1. 2008 N.Y. Laws ch. 644. On January 27, 2009, Governor Patterson signed into law Chapter 644 of the N.Y. Laws of 2008. *See* 2009 N.Y. Laws ch. 4. All statutory references herein are to the amendments to the N.Y. General Obligations Law §§ 1-1501, *et seq*., and are referred to for convenience and ease of use as GOL.
2. GOL § 5-1514.
3. The author wishes to acknowledge all of the hard work and efforts of the drafters of the new form and of all the sections and committees involved. He is hopeful that the statute and form are viewed as works in progress.
4. At the time this article was written, there were at least two bills pending—A.8392 and S.5589—that propose technical corrections to the New Form with respect to the revocation or termination of the POA. While these technical corrections address some of the concerns raised in this article, it was not likely that these amendments would be enacted before the New Form became effective on September 1, 2009.
5. GOL § 5-1502I.
6. *See* GOL §§ 5-1502A–5-1502O.
7. GOL § 5-1509.
8. *See* GOL § 5-1511.
9. GOL § 5-1501A.
10. *See* GOL § 5-1511(3).
11. *See* GOL § 5-1503.

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Ethics Matters
New York's "New" Rules of Professional Conduct: The Essentials for Labor and Employment Lawyers—Part II

By John Gaal

[Part I of this piece appeared in the Spring 2009 issue of the Labor and Employment Law Section's *L&E Newsletter* and dealt with both a general introduction of the new Rules of Professional Conduct in New York (which took effect April 1, 2009) and a more focused discussion of changes to a lawyer's obligation to maintain confidentiality. Part II continues the discussion of specific provisions of the new Rules, focusing on Conflicts of Interest, Prospective Clients, Rights of Third Persons, Communications with Represented Persons, Fairness to Opposing Party and Counsel, Lawyer as Witness, and Rules for Lawyer-Arbitrators/Mediators.

Since publication of Part I of this article, the New York State Bar Association has issued its "final" Comments to the new Rules. These Comments, which add detail and guidance to the text of the Rules, can be found at www.nysba.org.]

IV. Rules 1.7, 1.8 and 1.9 and Conflicts of Interest

Although there are some language changes in the new Rules dealing with conflicts of interest, Rules 1.7 and 1.8 do not appear to be substantively different than the former Code provisions dealing with conflicts of interests involving current clients (DRs 5-101 and 5-105). Under both, a lawyer cannot represent clients which have "differing interests" or otherwise represent a client in a context which poses a significant risk that the lawyer's professional judgment on behalf of that client will be adversely affected by the lawyer's own financial, business, property or other personal interests, unless:

- the lawyer reasonably believes that he or she will be able to provide diligent and competent representation, and
- the affected client gives informed consent.

The significant difference between the Code provisions and the new Rule comes in the form of the required consent. Under the Code, consent/conflict waivers did not have to be in writing. While the best practice dictated written consents typically, there are likely any number of situations in which lawyers did not resort to written conflict waivers. That, however, will no longer suffice. Now, all conflict waivers under Rules 1.7 and 1.8 (and 1.9 involving conflicts with former clients) must be "confirmed in writing." Rule 1.0 (Terminology) explains that "confirmed in writing" means:

- a writing from the person to the lawyer confirming that the person has given consent;
- a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or
- a statement by the person made on the record in any proceeding before a tribunal.

Where it is not feasible to obtain or transmit the writing at the time the person gives oral consent, the lawyer must obtain or transmit it within a reasonable time thereafter.

As noted, the changes made in the context of concurrent representations, except for written confirmation of client consents, are not significant. What may be significant is a change that was not made. The Bar Association's proposals called for limiting conflicts to matters in which one client was "directly adverse" to another, instead of instances of mere "differing interests." (Direct adversity is the terminology of the Model Rules.) We do not yet know the significance, if any, of this. On one hand, the Bar Association's phrase "direct adversity" seems narrower than the current definition of "differing interests," which includes:

> every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest.

However, the commentary proposed by the Bar Association and the COSAC Reporter's Notes does not suggest a significant difference in scope. But because the courts did not explain why this (or any other) provision in the proposals was rejected, we are left to speculate as to what meaning, if any, to afford this rejection.

Neither the Bar Association's proposed Rules nor the Rules finally adopted by the Courts expressly address advance waivers—requesting a client to waive a conflict in advance of it actually arising and thus often before its full scope can even be identified. But the Bar Association's Comments (22 and 22A) to Rule 1.7, which were neither adopted nor even commented upon by the courts, provide a fairly detailed discussion

of advance waivers. Moreover, it is a discussion which reflects fairly wide acceptance of advance waivers, especially when provided by "sophisticated" users of legal services.[1]

New Rule 1.9 deals with conflicts involving former clients. It continues the prior rule that a lawyer cannot be materially adverse to a former client in the same or a substantially related matter unless the client consents, but with the added requirement that any consent be confirmed in writing.

Of some note with regard to former clients is a change that deals with the former client's confidential information. Under the prior Code, a lawyer could not use confidential information obtained in a prior representation unless otherwise permitted by the rules or the information had become generally known. (Presumably if a lawyer could not use such information, he or she could not disclose it, although DR 5-108 did not explicitly reference disclosures.) New Rule 1.9 expressly prohibits the disclosure of a former client's confidential information, but it only prohibits a use of that information which is disadvantageous to the former client. In other words, apparently a lawyer may now use a prior client's confidential information to the advantage of a new client (or to his or her own advantage), provided that use does not disadvantage the former client.

V. Rule 1.18 and Prospective Clients

Although there have been numerous ethics opinions and court cases dealing with the confidentiality of information imparted to a lawyer by a prospective client, as well as whether such disclosures provide a basis for disqualification in the event a lawyer seeks to represent a party adverse to a prospective client, under the Code there was no Disciplinary Rule which dealt with this issue. *See generally* ABA Formal Opinion 90-385; New York City Opinion 2001-01 (2001), dealing with confidentiality, and Nassau County Opinion 98-9 (1998), *Desbiens v. Ford Motor Co.*, 81 A.D. 2d 707 (3d Dept. 1981); *Ullrich v. The Hearst Corp.*, 809 F. Supp. 229 (S.D.N.Y. 1992), dealing with disqualification.

New Rule 1.18 remedies this omission and provides that a lawyer shall not use or reveal information learned in a consultation with a prospective client except as would be permitted with respect to information obtained from a former client. In other words, a lawyer may not reveal that information nor can he or she use it to the disadvantage of the prospective client, although the lawyer apparently may otherwise use it to the advantage of another client.

A prospective client is defined as one who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter. The new Rule specifically provides that one who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, or one who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation, is not a prospective client for purposes of this Rule.

Rule 1.18 also provides that a lawyer who has had discussions with a prospective client may not represent another client with interests materially adverse to that prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in that matter, unless the lawyer has consent, confirmed in writing, from all affected parties.

Moreover, other lawyers in that lawyer's firm will be disqualified from representing another client in a materially adverse matter that is substantially related to the prospective client's matter *unless*:

- the lawyer receiving the "harmful" information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client;
- the firm acts promptly and reasonably to notify others in the firm that the lawyer is screened from participating in the representation of that new client;
- the lawyer gets no part of any fee earned from that representation;
- written notice is promptly given to the prospective client; and
- a "reasonable lawyer" would conclude that the law firm will be able to provide competent and diligent representation notwithstanding these circumstances.

This new Rule obviously puts a premium on firms keeping records of prospective clients for conflicts-checking purposes, so that if it does find itself in a position to represent an adverse party in a substantially related matter, it can take advantage of these screening provisions.

VI. Rule 4.4 and Respect for Rights of Third Persons

A common dilemma faced by lawyers is the handling of confidential information mistakenly sent to them by an opposing party or counsel—the misdirected fax or e-mail. Although the Code did not expressly address how these situations should be handled, numerous ethics opinions over the years did. While those authorities have not been of one view, the "majority" view seems to be that upon realizing the inadvertent receipt of confidential information, the lawyer should read no further, advise the sending person of the receipt and, at least sometimes, return the misdirected materials or otherwise follow the sender's instructions with respect to those mate-

rials (including instructions to return, destroy or not use the materials). *See generally* ABA Formal Opinion 92-368 (since withdrawn) and New York County Opinion 730 (2002) (following ABA approach) *but see* New York City Opinion 2003-04 (2003) (following ABA approach only if the lawyer is made aware that the material was inadvertently sent prior to reviewing it, and requiring only notice to the sender when the material is reviewed prior to any advance warning that the material was inadvertently sent).

New Rule 4.4 now explicitly addresses this issue, but does not necessarily provide much guidance to lawyers. Specifically, Rule 4.4 provides that a lawyer who receives a document relating to the representation of the lawyer's client and who knows or reasonably should know that the document was inadvertently sent must promptly—but merely—notify the sender of that receipt. (Interestingly, the Rule is not limited to "confidential information," but rather covers any "document" relating to the representation of a lawyer's client.) As a matter of ethics, this Rule imposes no requirement that the recipient refrain from further review, that the material be returned, that the sender's instructions be followed, that the material not be used, etc. It only requires that the sender be notified.

Having said that, it is important to understand that if the document in fact contains attorney-client privileged information and the lawyer keeps reading beyond what is necessary to realize he or she is not the intended recipient, then the lawyer may still be at risk that a court will disqualify the lawyer, or otherwise impose sanctions and/or preclude evidence. *See, e.g., State Compensation Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799 (Cal. Apps. 1999) (sanctions); *Spears v. Fourth Court of Appeals*, 797 S.W. 2d 654 (Texas 1990) (disqualification); *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992) (order precluding use of information). Thus, before a lawyer keeps reading, he or she should make sure to see if in the relevant jurisdiction inadvertent disclosure is a waiver of the privilege. If not, the prudent course may be to not read further without first seeking court intervention.

Rule 4.4 is silent with respect to the intentional, albeit perhaps improper, receipt of an opposing party's confidential information. A number of jurisdictions have adopted the view previously expressed by the ABA in Formal Opinion 94-382 (since withdrawn): refrain from further review of the materials upon learning of their confidentiality, notify the adverse party or their lawyer of the receipt and either follow their instructions or seek court intervention for a resolution of proper disposition. *See* NYSBA Formal Opinion 700 (1998). When the ABA added Model Rule 4.4 (identical to New York's Rule 4.4) to its Model Rules in 2002, it withdrew Formal Opinion 94-382, reasoning that in light of the fact that Model Rule 4.4 only addresses inadvertent receipt of materials, a lawyer is under no general ethical constraints with respect to how he or she deals with materials intentionally provided to him or her (unless, of course, some other law provides differently), and not even notice to the other party is required. We simply do not know whether similar reasoning will now apply in New York in light of Rule 4.4's identical scope.

VII. Rule 4.2 and Communications with Represented Persons

Rule 4.4 provides no significant substantive change from the prior Code, DR 7-104 (A), which prohibits direct communication between a lawyer and another party who is represented by counsel with respect to the matter of that representation. Nor is there any change in the Rule which would alter who, in an organizational context, is considered represented by virtue of the organization's representation by counsel. Similarly, there is no change in the circumstances in which a client may communicate directly with an opposing party who is represented by counsel.

Rule 4.4 also carries forward, exactly, the provisions of DR 7-104 (B), which permit a lawyer to cause a client to communicate directly with a represented party, and to fully assist that client with those communications, provided the lawyer has given reasonable advance notice to that other party's lawyer. Interestingly, the Bar Association's proposal called for eliminating the need to provide advance notice to opposing counsel before causing a client to engage in and assisting a client with direct communications, but the courts failed to include this change.

VIII. Rule 3.4 and Fairness to Opposing Party and Counsel

Rule 3.4 generally continues to prohibit a lawyer from:

- suppressing any evidence lawyer or client has a legal obligation to produce;
- knowingly using perjured testimony or false evidence;
- concealing or knowingly failing to disclose that which the lawyer is required by law to reveal;
- participating in the creation or reservation of evidence when the lawyer knows, or it is obvious, that the evidence is false, or
- knowingly engaging in other illegal conduct or conduct contrary to the Rules.

Of some significance, this Rule also continues DR 7-105's prohibition (which has no explicit counterpart in the Model Rules) that a lawyer will not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter. The Bar Association had proposed prohibiting threats of criminal charges only if doing so were unlawful (e.g., extortion), and

would have otherwise permitted them even "solely" for the purpose of gaining an advantage in a civil matter. The courts rejected this proposed change, and the provision remains unchanged.

This continuation includes keeping the existing language, which only prohibits threats of "criminal" charges. Given NYSBA Formal Opinion 772, which concluded that this very specific language does not apply to non-criminal charges (such as professional misconduct charges), presumably the Courts intended to continue this narrow interpretation as well.

Also of some significance is another proposed change that the courts rejected in connection with Rule 3.4. Model Rule 3.4 contains a provision which prohibits a lawyer from even requesting a person other than a client to refrain from voluntarily giving relevant information to another party unless that person is a relative, employee, or agent of the client (and then only if the lawyer believes that that other person's interests will not be adversely affected by refraining to provide that information). There was no similar provision in the Code. The Bar Association proposed adding this Model Rule provision to Rule 3.4, with the modification that a non-cooperation request could also be made to a former employee of a client or to someone who is contractually obligated or otherwise owes a legal duty to the client to refrain from disclosing certain information. The courts rejected this proposal as well, suggesting that a lawyer may request anyone to refrain from voluntarily providing information to other side.

IX. Rule 3.7 and Lawyer as Witness

Under Code provisions DR 5-102 (A) and (C), a lawyer could not be both an advocate before the tribunal and a witness on a significant issue for his client (except in a few narrow situations, i.e., an uncontested matter, testimony that relates to a fee, etc.). So if a lawyer "had to be" a witness for his client, he could not advocate before the tribunal. This prohibition did not prevent the lawyer's firm from appearing as an advocate on behalf of the client, nor did it prevent the lawyer from participating in non-advocacy matters associated with the representation (e.g., discovery, outside presence of court). *See* Gross, *Amendments to the New York Code of Professional Responsibility, Part III,* N.Y.L.J. (March 12, 1990); *Conigliaro v. Horace Mann School*, 1997 U.S. Dist. LEXIS 5169 (S.D.N.Y. 1997); Nassau County Opinion 92-37 (1992).

New Rule 3.7 does not substantively change this outcome in that it continues to prohibit a lawyer from acting as "advocate before the tribunal" in any matter in which he or she is "likely" to be a witness on a significant issue of fact (except for basically the same exceptions).

DR 5-102 (B) and (D) also provided that if a lawyer "ought to be called" as witness other than on behalf of his client—i.e., by the other side—and his or her testimony might be prejudicial to the client, neither the lawyer nor his or her firm could continue to represent the client, at all (i.e., in an advocacy role or otherwise).

New Rule 3.7 continues to preclude any lawyer in a firm from advocating before the tribunal on behalf of a client if he or she is likely to be called as a witness (other than on behalf of the client) on a significant issue, and his or her testimony may be prejudicial to the client. But in a potentially significant change from the Code under the new Rules, the non-testifying members of the firm are not necessarily barred from continuing to represent that client in a role other than as advocate before the tribunal.

However, in no case may the firm continue representation, as an advocate or otherwise, unless doing so is consistent with Rule 1.7. Rule 1.7 prohibits representation of a client where there is a significant risk that the lawyer's professional judgment will be adversely affected by the lawyer's own financial, business, property or other personal interests. Certainly in a case in which another lawyer in the firm is likely to testify—and especially if that testimony is likely to be prejudicial to the firm's client—a lawyer must at least assess whether his professional/personal relationship to that testifying lawyer is such that he or she cannot continue to represent the client even in a non-advocacy role. And if he or she can pass this test, the client must consent, confirmed in writing.

X. Rules 1.12, 2.4 and 8.3 and Arbitrators and Mediators

Two provisions of the new Rules explicitly address issues related to lawyers who act as arbitrators, mediators and/or third party neutrals. First, Rule 1.12 provides that unless all parties give informed consent, confirmed in writing, a lawyer cannot represent anyone in connection with a matter in which the lawyer participated personally and substantially as an arbitrator, mediator or third party neutral. Although new, there is nothing surprising about a prohibition against moving from the role of arbitrator/mediator/third party neutral to the role of an advocate in the same matter without the consent of all parties. This Rule, however, would permit such a lawyer's firm to serve as an advocate, provided the arbitrator/mediator/third party neutral lawyer is screened from the firm's representation, receives no part of the fee from that representation, written notice is promptly given to the parties and any appropriate tribunal, and there are no other circumstances in the particular representation which create an appearance of impropriety.

Rule 1.12 also provides:

> A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the law-

> yer is participating personally and substantially as . . . an arbitrator, mediator or other third party neutral.

Presumably this provision is meant to prohibit an arbitrator/mediator/third-party neutral from seeking a job with a party or lawyer of a party where that party/lawyer is involved in a matter pending before that person in their role as arbitrator, mediator, or third-party neutral. However, the provision may be subject to an even broader interpretation. For example, if a lawyer is serving as an arbitrator in matter A, can he or she have discussions with one of the lawyers involved in that arbitration regarding his or her availability to serve as an arbitrator in an upcoming unrelated matter (including on behalf of entirely different parties)? Can he or she discuss with such a lawyer his or her availability to serve on a permanent arbitration panel being negotiated in a collective bargaining agreement for a different employer and union? Or would that constitute a negotiation for employment? Would that arbitrator's simple appearance on an AAA panel for another case involving one or more of the lawyers now appearing before him or her be enough to constitute a "negotiation" for these purposes? While it should be appropriate to assume that the latter situation—merely showing up on another AAA panel or even coming up as the "next" arbitrator in line under a previously negotiated permanent panel list—does not trigger an issue under Rule 1.12, literally it does not appear that an arbitrator could otherwise engage in any conversation with a lawyer appearing before him or her about his or her ability to serve in any other matter.

Rule 2.4, titled "Lawyer Serving as Third Party Neutral," expressly provides that a lawyer serving as an arbitrator, mediator or other third party neutral must inform unrepresented parties that the lawyer/neutral is not representing them. That Rule further provides that when the lawyer/neutral knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role as a third party neutral and a lawyer's role as an advocate who represents a client.

Rule 8.3 deals with reporting attorney misconduct. Under DR 1-103 of the Code, all lawyers were subject to a requirement to report another lawyer who we knew had committed a violation of the Rules which raised a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer, unless that knowledge was itself a client confidence. Rule 8.3 continues this requirement without change.

The Bar Association had proposed that lawyers serving as arbitrators, mediators or other third party neutrals be excluded from this reporting obligation if their information about another lawyer was gained in a confidential arbitration/mediation proceeding. The courts rejected this exception. Consequently, a lawyer-arbitrator/mediator/neutral, who in the course of that proceeding acquires knowledge that another lawyer has committed an ethical violation that raises a substantial question as to that lawyer's fitness to practice, is obligated to report that lawyer to the appropriate disciplinary authorities. It is not clear how this Rule will be applied in situations where a mediation session, for example, is considered "confidential" by statute or court rule, as opposed to a matter of professional ethics. Presumably, this reporting obligation is not intended to override such a statutory or similar obligation, but there is no explicit exception in the new Rules.

XI. Conclusion

The new Rules of Professional Conduct mark a new chapter in professional responsibility in New York. On the one hand, these Rules will bring New York practice into greater conformity with the rest of the country. In other respects, however, these Rules retain a special "New York flavor," which continues to mean lawyers practicing in New York cannot simply assume that our rules are like those which govern everyone else.

Unfortunately, the courts' adoption of these Rules—most identical to those proposed by the Bar Association, but some not—without any explanation, as well as their failure to adopt or otherwise even address the supporting Comments provided by the Bar Association, leave New York lawyers in the dark about a number of new provisions.

Endnote

1. Various ethics opinions issued under the Code have recognized generally the potential validity of advance waivers. *See* NYSBA Formal Opinion 823 (2008); New York County Opinion 724 (1998); New York City Formal Opinion 2006-01 (2006). The Comments to Rule 1.7 provide further support for their use.

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E-mail Traps and Troubles

By Leonard D. DuBoff and Christy O. King

I. Introduction

E-mail communications are extraordinarily efficient for lawyers whether they are corresponding across town, across the country, or around the world, but, unfortunately, they open the door to many pitfalls. Although the American Bar Association (ABA) has stated that sending unencrypted e-mail is not a *per se* violation of an attorney's duty to protect client confidences,[1] e-mail users must be careful to avoid the ethical, legal, and practical problems that can arise from using electronic correspondence. This article describes some of the problems to which attorneys should be attentive.

II. Common Traps and Troubles

A. Inadvertent Disclosure

It is quite common for attorneys to "carbon" (or "cc") clients on e-mails to opposing counsel. If your email cc's the client, then when opposing counsel uses "reply to all," that response will be transmitted to your client as well and may very well violate NYRPC 4.2, which prohibits direct communication with a represented party in most situations. To avoid this kind of problem, attorneys should blind copy (or "bcc") their clients.

Clients also should also be reminded not to *reply to all* when responding to an attorney's communication because that reply may go not only to the lawyer for whom it is intended but also may wind up being transmitted to opposing counsel and, perhaps, to that attorney's client as well. Such a mistake can be devastating when the e-mail contains strategy, negotiating points, or the like. This type of error can also waive the attorney-client privilege. Should such an error occur, the lawyer should immediately alert the party who inadvertently received the communication and request that it be deleted unread. By taking this action, it is likely that the attorney-client privilege would not be waived.

NYRPC 4.4(b) provides that:

> A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

This rule does not prohibit the receiver from claiming the right to retain the document. A New York Ethics Opinion[2] provides that whether the privilege has been waived by the inadvertent disclosure is a matter of law.[3] Recently enacted Federal Rule of Evidence 502 provides:

> (b) Inadvertent Disclosure. When made in a Federal proceeding or to a Federal office or agency . . . does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosures; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B). (c) Disclosure Made in a State Proceeding. When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure: (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or (2) is not a waiver under the law of the State where the disclosure occurred.

With respect to a New York state court matter, in order for a protective order to be granted, the proponent of the privilege must establish (1) that production of the documents in question was inadvertent; (2) an intention to retain the confidentiality of privileged materials; (3) reasonable precautions to prevent disclosure; (4) a prompt objection; and (5) an absence of prejudice to defendants.[4]

Lawyers also should also ensure that an e-mail sent to opposing counsel does not contain the stream of communications between the attorney and client that led to that communication. By providing the opposing counsel with the correspondence between you and your client, you may be once again compromising your client's privilege. It is, therefore, appropriate for attorneys to have the intended communication to opposing counsel sent as a fresh e-mail rather than as part of the e-mail stream that led to it.

Most lawyers have some form of standard disclaimer at the end of their e-mails. Frequently, this is automatically inserted by the attorney's e-mail program. When e-mails are exchanged within the lawyer's office so that a colleague or member of the firm's support staff can assist in refining the communication, the program may automatically add an additional disclaimer. When this communication is then ultimately sent out, it may have two or more disclaimers stacked up at its end. This will alert an astute recipient to the fact that this communication has

been wordsmithed by several people. To avoid this problem, delete any disclaimers that have accumulated at the end of the e-mail.

Metadata is another area of concern. Such information, which is invisible but retrievable, is often found in word-processing documents and may include details such as editing time, comments, authors, and even the edits themselves. The ABA has issued an ethics opinion stating that the receiving attorney is not prohibited from looking at metadata[5] and the New York State Bar Association has issued an ethics opinion stating that an attorney must exercise reasonable care in preventing disclosure of metadata.[6] Before sending an email attachment, be sure to either convert the document to PDF or to use a metadata scrubbing program.

B. Mistakes in Content and Delivery

It is also important to carefully review e-mails before they are sent. In many e-mail programs, spellcheck does not catch misspellings in the subject lines of e-mails. Also, it corrects only spelling errors; that is, it does not determine whether the word is properly used (for instance, "you" is often typed for "your"). Thus, you may find that words in your e-mail are all correctly spelled, but they may not be used in the proper context or even make sense.

E-mail users are frequently careless with the subject line of their communication, which typically refers to the first communication. It is rare for recipients who respond to that communication to revise the subject line to reflect the response, which may be addressing other issues. As the stream of e-mails continue, the original subject line may become less and less relevant to the ultimate communication's content, so it is a good idea to revise the subject accordingly.

When a lawyer receives an acrimonious e-mail or one from someone with whom there is a strained relationship, it is quite common to prepare a vitriolic response, which ultimately may prove embarrassing. For this reason, prudent attorneys will delay sending a response until they have either had time to cool off or can obtain input from colleagues who are more removed from the situation. Remember, your communications to opposing counsel may very well wind up as exhibits to pleadings, and you should ask yourself whether the communication you are about to send is something you would like to have read by the judge in your case, some other influential third party, or even your client.

While it is important to pay attention to the content of your e-mail and make sure it effectively communicates what you want to communicate, you also should pay attention to whom the communication is directed. When, for example, an attorney represents a business entity, and the communication deals with subjects that should be restricted to certain individuals in that organization, care should be taken not to send the e-mail to a general e-mail box. Thus, in communicating with the CEO of a company regarding a possible business sale, you should not have that communication go to a secretary or general information box without first obtaining permission from the intended recipient. Nor should you send e-mails to an individual client at his/her work address without the express consent of the client, since many companies have policies providing that e-mail in their systems is not private and can be read by supervisors and others in the company.[7] Similarly, an attorney who sends an e-mail to a family's e-mail address when it is intended for just one of the family members could be waiving the attorney-client privilege in that communication, and if it involves a family dispute, there could be other serious consequences as well.

Autofill, the feature of some e-mail programs that automatically places a full e-mail address in the "To" or "cc" position once a few letters of that address/name are typed in, also can be problematic. If the attorney is not careful to confirm that the e-mail is actually directed to the right person, the communication could easily go astray. For instance, you may have read about the lawyer for Eli Lilly & Co. who was trying to e-mail co-counsel Bradford Berenson with confidential information on settlement talks with the government but, instead, sent the communication to *New York Times* reporter Alex Berenson.[8]

C. Firm Policies

Law firms should have e-mail policies in firm handbooks covering a host of issues. These should include, among other things, the fact that the firm's computer system belongs to it, and e-mails received on it belong to the firm. Policies should also prohibit the use of profanity and other offensive, embarrassing, or derogatory language, as well as all forms of harassment and discrimination. Other issues that should be covered include a prohibition on sending e-mails with viruses, worms, or the like, or with content that infringes intellectual property or other rights.

Finally, attorneys should remember that merely deleting an e-mail does not expunge it from the system; rather, it remains on the hard drive until a special electronic scrubbing program is used to cleanse the hard drive or until the e-mail is overwritten by other data. Thus, you should be judicious when deciding whether to communicate via e-mail or through another less permanent vehicle.

III. Conclusion

Use of e-mail has become virtually universal within the legal community. This communication boom has, to some extent, leveled the playing field between large and small firms, although there is a host of items that should be considered when using this form of communication. We have tried to list many of the most common ones based on our

personal experience and that of other members of our firm, but virtually every day we are provided with additional learning opportunities. Lawyers should be diligent when using their e-mail systems, and it cannot be overemphasized how important it is to carefully read the final version of a communication before hitting *send*.

Endnotes

1. ABA Formal Op. 99-413 (1999).
2. NYSB Ethics Op. No. 709.
3. Federal Rules of Evidence 502.
4. *Delta Financial Corp. v. Morrison,* 12 Misc. 3d 807, 819 N.Y.S.2d 425 (Sup. Ct., Nassau Co. 2006).
5. ABA Formal Op. 06-442 (2006).
6. NYSB Ethics Op. 782.
7. *See Scott v. Beth Israel Medical Center, Inc.*, 17 Misc. 3d 934, 847 N.Y.S.2d 436 (Sup. Ct., N.Y. Co. 2007), holding that a doctor's e-mail communications with his lawyer were not protected by the attorney-client privilege, since the hospital's policies provided it with the right to access e-mails at any time.
8. *Did Lawyer's E-Mail Goof Land $1B Settlement on NYT's Front Page?*, *at* www.abajournal.com/news/lawyers_e_mail_goof_lands_on_nyts_fgront_page, Feb. 6, 2008; *Lilly's $1 Billion E-Mailstrom*, *at* www.portfolio.com/news-markets/top-5/2008/02/05/Eli-Lilly-E-Mail-to-New-York-Times?, Feb. 5, 2008.

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Young Lawyers Section Members Attend Commercial and Federal Litigation Section Meeting in Cooperstown

Young Lawyers Section members Dana Syracuse, Sherry Levin Wallach, and Phil Fortino with Judge Kaye at the Commercial and Federal Litigation Section's Spring Meeting held May 1-2, 2009 at the Otesaga Hotel in Cooperstown, NY.

Phil Fortino, Dana Syracuse, and Sherry Levin Wallach with Judge Lippman.

I'm Interested in Health Law—Now Where Can I Get a Job?

By Jennifer S. Bard, J.D., M.P.H.

Introduction

Health care is a trillion-dollar industry[1] that has grown exponentially over the past 10 years with very little sign of slowing. The demand for legal services has tracked the growth of the industry,[2] and, as a result, attorneys calling themselves "health lawyers" have grown from a small core of specialists to a large and diverse group of individuals who are as likely to specialize in bond issuance and tax planning as in torts or food and drug law. Moreover, the increasing regulation of health care has created substantial need for lawyers specializing in compliance with a vast array of federal, state and local regulations. Where 15 years ago most health law was done by small, specialized law firms, today many of the nation's biggest law firms have thriving health law practices. Health lawyers have several different professional organizations[3] as their numbers continue to increase. The American Health Lawyers' Association boasts that their "membership is diverse not only in background but in their practice areas and settings. More than 10,000 members strong, the membership of Health Lawyers includes in-house counsel, solo practitioners, health professionals, government attorneys, academicians, and students."[4] Whether you are attracted to health law because of its robust growth or because you have a pre-existing interest in the health care industry, this article will help you explore the vast opportunities available to lawyers with an interest in health law. It will also provide you with the information you need whether you are currently in law school or are thinking of applying to law school.

The demand for lawyers familiar with the special needs of the health care industry is reflected in the rapid expansion of health law programs in the nation's law schools.[5] Where 10 years ago there might have been a lone course in law and medicine, there is now a variety of courses in health law ranging from malpractice to financial transactions, from ethics to biotechnology. While perhaps a dubious honor, health care law programs have attracted the attention of *U.S. News & World Report* and are now ranked every year.[6] Increasingly, law schools are offering certificates in health law for J.D. level students and graduate studies in health law for those who already have law degrees. These degrees, called LLMs, can be excellent springboards for lawyers looking to change their specialty. The appendix of this article contains a listing of health law graduate programs.

This article came about while I was teaching on the faculty of the University of Texas Medical Branch in Galveston, Texas and was co-teaching with Dr. William J. Winslade in the University of Houston Law Center's Health Law LLM program. It has expanded over time and now has a more general focus on getting a job in the health law field at any stage of your career. There are specific sections on individual situations such as looking for work right out of law school and for students getting an advanced degree in health law. My premise is that knowledge about the field of health law, whether it is biotechnology, patients' rights, hospital acquisitions, or regulatory work opens the door to a wide array of interesting career opportunities. In addition to the traditional law firm positions, I will discuss working for the government, a non-profit, a corporation, and in academe.

About This Guide

Writing this guide for students interested in health law presents the challenge of speaking to all of you in your diverse interests and stages in your life. Many people studying health law are already health care professionals. Others are looking for their first job of any kind. Among graduate students the range of experience is even more diverse. Backgrounds vary from individuals who have just graduated from law school to experienced malpractice attorneys and even hospital counsel. What you all share is a desire to work in the health care field. I hope this article will be helpful to you. Its goal is to gather in one place a range of jobs which may interest you.

As indicated in the over one hundred Web citations in this article, the Internet is an invaluable source for career advice. There are sites which list health care law jobs, academic jobs, non-profit jobs and government jobs. Many of these sites also allow you to post your resume so it will be available to potential employers. In looking for Web sites I used two search engines, Ask.com and Google.com. Any search engine with which you are familiar will probably work just as well.

First things first: a lot about finding a job is common sense, and you already have a lot of options available to you. Whether you are in law school or if you have already graduated, your school's career services office is your best overall job counselor. If you want to work outside your school's geographic area, the career services office can probably get you reciprocity at another school. In addition, there are dozens of books providing guidance on everything from identifying your interests to networking.[7] I recommend that you go to your career services office, a well-stocked bookstore or a public library and read as many of these as catch your eye. Each book has at least a useful nugget of information that will help you in your job search. My guiding theory for all career advice is that you spend too much of your life at work to do something you do not like. Although your focus as a job seeker is often to

get hired anywhere, in fact there will always be options. Time you spend finding out what you want to do is well spent. That is why my primary advice to job seekers in law school is to take advantage of externships and clerkship opportunities that will get you inside places where you think you would like to work. I will talk about this more later, but the best strategy for getting hired is to become known to the person doing the hiring.

The classic way to start out thinking about what kind of work you would like to do is to read Richard Bolles' *What Color Is Your Parachute*,[8] which takes you through a series of exercises to identify what kind of job would fulfill your work needs. That's important. In the throes of job hunting it often seems that any job with a paycheck and health insurance is a job you want. However, to let you in on a secret, the more the job is compatible with what you like to do, the more likely you will get it and, having gotten it, will enjoy it and grow professionally in it.

Another good book concerns the practicalities of legal job hunting: *Guerilla Tactics for Getting the Legal Job of Your Dreams*, by Kimm Alayne Walton, J.D.[9] Walton promises your money back if you use her "tactics" yet do not have a "job you'll enjoy" "doing interesting work with people you like" within "one year of the day you graduate."[10] Another book which I found very helpful is Barbara Sher's *WishCraft*.[11] She has written several books including a must read for second-career folks called *It's Only Too Late If You Don't Start Now*.[12]

As I hope this article will show you, there are many sources to find current listings for jobs that may interest you. Despite this plethora of information, the concept of the "hidden job market" is still a very real one. These are jobs that have not been advertised yet or may never be advertised. They may also be jobs that do not yet exist. This market is your opportunity to be proactive. Identify firms, agencies, or companies for whom you want to work. Using the Internet or a paper directory find the name of the person at the entity doing the work you want to do. In the case of a legal job outside of a law firm, this will often be someone in the office of the general counsel at a hospital or insurance company. For purposes of career exploration, it is always better to contact someone doing the job you want to do rather than the human resources or personnel office. It may well be necessary to file an application with this office when there is an official job opening, but with the increasing availability of information about institutions and their employees through the Internet, you do not need to go through the personnel office first.

Contacting people in the places where you want to work is an effective general strategy because even if they do not have a job opening, they are in the position of knowing about them. Please understand, however, that you are contacting these people for information and do not expect that they will have job openings. On the other hand, some organizations like a state's Attorney General's Office keep a pool of interesting candidates and consult it regularly when there is an opening so it is worthwhile to come to their notice even if there is no current job being listed.

The process I describe above is often called "informational interviewing" and is gone into in much greater detail in many excellent books. Richard Bolles in *What Color Is Your Parachute* is the authority on "informational interviewing" and his book says almost everything there is to say.[13] I want to endorse the process, however, because I have often seen it lead to employment. For example, when I was looking for a job working in-house at a hospital, some of the best advice I got was to apply to State Attorney General's Offices since they are almost all involved extensively in health care law. I had no idea and it turned out to be the best advice anyone has ever given me.

For emphasis, though, I want to repeat Bolles' mandate that you should never ask these people for a job if you told them you are only there for information.[14] Rest assured that if they like you and do know of a job opportunity, they will tell you. Otherwise, just get their advice and write them a prompt thank you letter.

This handbook is divided into eight sections; they are:

1. How to Find a Job
2. Fellowship Opportunities
3. Career Advice on the Web for Lawyers
4. Help Finding Health Law Jobs
5. Tapping into the Non-profits
6. Finding Jobs in Academe
7. In-House Counsel
8. Finding Work in the Government

Part 1: How to Find a Job

Let's get started right away. Question number one: What do you want to do? Is this a trick question? Isn't the obvious answer that you "want to get a job?" Well, no. The most effective way to get a job is to know what kind of work you want to do. A wise person once advised me that it was impossible to get what "your heart desires" unless you know what that is. Too many people approach job searches from the perspective of seeing what jobs are available. You are most likely to find a position where you are satisfied if you devote some time to thinking about your interests. If I can't persuade you to read further and you still want to jump in, the appendix to this article has links to Web sites with jobs, lots of jobs. Dive in. But I encourage you to keep reading through the article as you do so. Even if you've already found a job you want, I have other advice that will increase your chances of getting it.

Are you back? Did you enjoy looking? Did you see a lot of jobs? Even if none of them interests you at the moment, these job sites are a good way to get a feel for the wide range of possibilities available to you. The

jobs include everything from assistant legal director of a non-profit in Washington, D.C., to an administrative position at a major university.

Here's something else you should remember while doing your search: Usually, the best way to get a job is to get your foot in the door first. If you are in law school, the way to do this is with externships or with summer clerkships. But even if you have graduated, many job seekers find that temporary or contract jobs are a good way to gain experience and make contacts while you show off your skills to a potential future boss. This is just as true if you are already working as it is for students. If you are practicing law in an area other than health law and want to make the switch, get on the Web and find the contact information for the health lawyers association in your city or state. I guarantee they will be delighted to have your help in planning meetings or other committee work even though you are interested in but not yet practicing health law.

Part 2: Fellowships Opportunities

There are a number of fellowship programs of interest to lawyers looking for jobs having to do with health. Most of the health law in the country is done by government attorneys in government agencies. Unfortunately, government jobs are highly sought after, and it can be very difficult to break in. That's why the Presidential Management Intern Program (PMI), which I will discuss in more detail later, is so valuable to students graduating from law school. The PMI is designed to attract outstanding graduate students to public service. While being paid a government salary, participants in the program have first crack at the most interesting policy jobs in government. These are jobs that would probably never be advertised. When the program is over, participants will have worked for four federal agencies and will have an inside track at being hired by the agency of their choice.

Another interesting fellowship program is the highly prestigious White House Fellows Program.[15] Since this is for individuals who are at the early to mid-stages of their careers, but not at the absolute beginning, it could be a very attractive opportunity for students who already have some experience in public service.

I have also included information on fellowships that provide for further training in health law policy or bioethics. Additional training in health law will make you even more attractive to the admissions committees of these programs.

Part 3: Career Advice on the Web for Lawyers

Everyone on the Web wants to give you career advice. I have identified those sites geared particularly to lawyers.[16] These sites are an interesting way to get a general feel for the market and, again, get further ideas of where to look for opportunities. The best sources of career advice are your professors, your career services office, and people you know (and will get to know) who do the kind of work you are looking for.

Part 4: Help Finding Health Law Jobs

It is important to understand that the way to find and get a job in health law depends on what type of job you are looking for. The primary distinction is between a job in a law firm or the legal department of a corporation and a legal job in an institution like a hospital for which law is not the primary activity. Another major distinction is the academic world—both teaching and administration—which has its own hiring process. It is with this distinction in mind that I raise the issue of recruiting agencies also called head hunters. First, these agencies probably cannot help you find a first job in a law firm. However, when you are making a lateral move or when you are trying to get a job in a health care institution, they may be able to help since these jobs are often filled through recruiters. The primary thing to know, however, is the difference between recruiters who are paid by your future employers and those who ask you to pay them. Be very wary of the latter. It should not cost you anything to be brought to the attention of an employer. If someone asks you for money to do this, investigate long and hard as to whether they really have information or contacts that you cannot get otherwise. Also, ask yourself whether the price they are charging is worth the service they are offering. Some companies, such as one I recommend, provide a useful service by charging you a small monthly fee for access to a searchable data base of job listings.[17] Another piece of conventional wisdom is that you shouldn't contact recruiters, but rather wait for them to contact you. That is not necessarily true when you are trying to switch areas or careers and they may not have heard of you. My advice would be to identify recruiters who seem to have interesting jobs in areas where you want to work. Write a personal letter to the recruiter telling him or her about your background and your interests. You will go into that recruiter's pool, most probably a computer database that will highlight you when a job arrives that matches your experience.[18]

Remember, too, that there are recruiters who are specific to specific industries and that you will want to investigate recruiters who fill health care administrative jobs as well as those whose focus is on placing lawyers. Thus, jobs in risk management, ethics,[19] compliance, or research may be in the hands of a health care recruiter, not a legal recruiter.

The etiquette of working with a recruiter is that whoever tells you about a job first is the one who gets the fee. That said, there is nothing to prevent you from contacting a number of different recruiters even if this ends up with two different recruiting firms alerting you to the same

job. You should know that like real estate agents, recruiters expect to get a commission from the employer if they bring the job to your attention. However, that does not mean that you cannot deal with several recruiters at once. Your responsibility is merely to identify who told you first. Any dispute about who that was will take place between the recruiters and will not affect your job chances.

A final word on recruiters: You will often see advertisements in legal publications for "career counselors" who specialize in placing lawyers in attractive, non–law firm jobs. These agencies will charge both you and your employer a fee. If you are offered these services for free in connection with being fired or laid off you should definitely make full use of their time, advice and contacts. I do not, however, think it's worth paying out of your own pocket for anything more than a few hours of consultation on, for example, your resume. Given the explosion of job information created by the Internet, it is just no longer true that these companies will know of jobs you could not find otherwise. Moreover, the "advice" they offer is freely available from your career counseling center, you favorite professors, many Web sites, and dozens of very helpful books.

Part 5: Tapping Into the Non-profits

The world of non-profit organizations offers a rich array of jobs for lawyers with health care experience. Since these entities don't have the money to advertise, as private firms do, it is somewhat harder to find out about openings. Luckily, there are a number of excellent Web sites that do a good job of listing open positions.[20]

The key to looking in the non-profit sector is to think broadly. While certainly there are positions for lawyers per se, in fact there is a range of opportunities that may be of interest to you as a person with an interest in or knowledge of health care even though they are not characterized as "law jobs." These include jobs in policy, lobbying, and administration. In your local or career services library you will find a book called the *Yellow Guide* to non-profits. This lists every non-profit agency in the country. It is a rich source for identifying organizations in which you are interested.

Part 6: Finding Jobs in Academe

A. Positions in Academic Administration

The most common view of finding a job as a health lawyer in academe is to be hired by a law school to teach health law. This is, however, just a small slice of the pie. In addition to law schools, hundreds of institutions teach health law courses to people interested in being administrators and paralegals. As a lawyer with training in health law, you are also a very attractive candidate for an administrative job in a law school or other academic institution. The opportunities are even richer if you have an LLM. For example most law schools with an LLM program have an LLM as an administrator. Also, as law schools become complex conglomerations of "Institutes" and "Centers," the possibilities for jobs within the organization structure have increased exponentially. More traditionally, there are administrative jobs in student life, admissions, financial aid, and of course, career services. Further, as more schools realize the importance of internships, lawyers are being hired to run placement programs and supervise the participants. Much of this advice, and the advice below, is of general use to anyone interested in using their legal training to work in academe.

B. Legal Research and Writing

Many law schools have a legal research and writing program staffed by people seeking to begin academic careers. These jobs usually pay a reasonable, if not lavish, stipend and serve to put you on the faculty of a law school. They also provide excellent opportunities to gain teaching experience, find mentors, and even do some publishable writing of your own. Because many applicants are interested in only a two- or three-year stay, keeping these positions filled is an ongoing need for law schools. Of course, some people like teaching these courses so much that they eventually seek a permanent role as the head of a law school's legal research and writing program. It is important to investigate the specifics of the program of schools in which you are interested.

C. The Clinic

Almost every law school has a clinic which combines practical, hands-on experience with instruction from experienced attorneys. For a job seeker, these clinics combine the opportunity to share your knowledge with the next generation of attorneys while keeping your own skills sharp. Increasingly, law schools are developing special health law clinics or are adding health law cases to their clinic load. These developments have increased opportunities for lawyers with an interest in health care.

D. Teaching Law in a Law School: The Meat Market

The traditional way to get a law teaching job is the system sponsored by the Association of American Law Schools (AALS). This system is a highly organized combination of job fairs and dating service in which each candidate fills out one form outlining his or her credentials and these forms are sent out in 1,000-page books to every law school interested in hiring. Once a school's faculty appointment committee reviews all the forms, it selects candidates to invite for interviews at the central event in Washington, D.C. This is the "dating" part. After tremulously filing the form in August, you wait for the phone to ring. Then, if it does ring, you start making half-hour appointments for interviews with schools from across the country all in a single day. About two weeks to a month afterward, you may hear from a school inviting you to a second interview on campus.

That's the official story. In fact, the ins and outs of the law school

hiring market are as complex as the tax code. Sometimes professors and judges will make specific personnel recommendations to schools where they have contacts. Schools looking for someone to fill very specific positions may directly contact known experts in that area.

Much good material has been written about navigating the law school teaching market. You can, and should, consult your professors to see if they can offer you strategic tips or even recommend you for a position. On average, fewer than 70 applicants are hired to teach law every year out of the thousands who apply. The prospects are even worse than statistics indicate since many individuals with platinum credentials receive multiple offers.

So that's the bad news. Here's the good news: Each of you is distinguishable from the general applicant pool to the extent that you are already a health care professional or have pursued further study in health law. A growing trend in law school hiring is to look for students with advanced degrees. While this includes the traditional LLMs, it has also expanded to include people with master's degrees and Ph.D.'s in health-related subjects like medicine and nursing, of course, but also public health, political science and history or economics.[21] The degree also guarantees that you have done some serious writing, which will make it easier for a law school to make the decision to hire you.

Since writing is so important, the most helpful thing you can do before entering the law teaching job market is to review all the papers you have written at a post-graduate level and choose the best candidates to turn into a law review article. Just as valuable are short pieces you write on legal topics for a professional organization with a publication such as the Hart Leadership Program Institute's Web site.[22] Those of you working already in health care institutions will discover that there are numerous self-published periodicals in desperate need of content. The secret to getting published is that the more publications you have in any respectable venue, the better your chances of getting your work into more selective media.

The core of being a law professor is to publish articles. When evaluating a candidate who has written nothing but a law review note, the schools must rely on traditional indications of success like clerkships and class rank. By presenting yourself as an individual who likes to write and does so often, you will lift yourself to the top of the pile.

Another way to get a teaching position in a law school is to develop a new health law course and pitch it to the Dean. You should also include information about your credentials and express your availability as an adjunct or lecturer. This works best for graduates who have actual experience in health care law that the existing faculty may lack.

E. Teaching Law Outside of a Law School

For many of us the only law teaching we know about occurs in law schools. This is not true. My job is to teach law to students in a medical school. There are similar positions in nursing schools, schools of public health,[23] allied health schools, and business schools that offer coursework in health law and policy. There is also a national network of local and community colleges that train paralegals and health care workers. To search for jobs with schools in your area, start by getting all the catalogs of every local learning institution. The suggestion about developing a new course that only you can teach applies here, too. Not only will you be paid for this work, but also if it goes well, you will be sought out in your community to teach and lecture.

F. Academic Administration Outside of Law Schools

Academe is also a rich source for interesting administrative jobs. Many colleges and graduate schools, for example, look for a lawyer to administer their internal honor codes and systems of internal discipline. Universities are wonderful places filled with centers and programs eager to have a lawyer as an administrator or director's assistant. Finally, in something of a contradiction to the usual view of lawyers in society, lawyers in academe are still presumed to "know" things about business, affirmative action, and complex problem solving that the usually quite sheltered faculty does not. Therefore, lawyers are sought after in Student Services positions.

Part 7: In-House Counsel

As outside legal services become more expensive, health care organizations and insurance companies have shifted their emphasis toward bringing the day-to-day legal operations under one roof. Serving as in-house counsel can be one of the most exciting health law jobs. You are on the front line as unique problems arise. The bad news, however, is that new law school graduates are almost never hired for in-house jobs because the hospitals and companies don't have the resources to give a new lawyer the training he or she will need to be effective. Luckily, recent federal legislation including HIPAA[24] and Sarbanes-Oxley[25] has made legal regulation compliance a hot issue and one that many companies, health care entities included, are addressing by creating compliance offices staffed by lawyers. After the dramatic shutdown of hospitals like Johns Hopkins[26] and the University of Pennsylvania,[27] any medical institution doing research is clamoring for lawyers to oversee their IRBs and to head off problems before they are front-page news. The American Health Lawyers Association has an active in-house counsel practice group which is an excellent source for information about issues, and jobs, in this area.[28]

In addition to compliance and research concerns, every hospital faces legal issues ranging from contracting for services, supplies, and equipment, to credentialing doctors and dealing with malpractice suits. A number

of institutions have separated these functions into "legal counsel" which handles the contracting, employment disputes, patents, and "risk management," which is responsible for avoiding and managing medical incidents before they become lawsuits. A nurse/attorney is a top contender for a risk management job, as they are believed to understand both medical decision-making and liability control.

The caveat about these jobs is that people who have them love them and seldom leave. That's why you may have to be flexible regarding geography. Also, since these are often small departments, these in-house counsel offices often don't hire new graduates, but rather are looking for an individual with experience in a particular area such as contracting, patents, or Medicare reimbursement. Your first step in finding an in-house job at a hospital is to talk with people who already have these jobs. Learn what specialty areas they need and study them. If you have the opportunity, ask to work as an intern. Whether this is a formal program arranged through your school for academic credit or something you arrange yourself, it will give you experience to list on your resume and contacts in the field. Regarding specific openings, the best Web site is the American Health Lawyers Association's active job listing service.[29]

Part 8: Finding Work in the Government

The federal government of the United States employs millions of individuals. Many thousands more are hired by state, county and municipal governments. Lawyers in the federal government serve as FBI agents, prosecutors, and drafters of highly specialized legislation. There is so much available for a health care lawyer in government that the problem becomes sifting through opportunities to find what suits you best.

The federal government is huge and there is a wide range of entities and departments with positions for health law attorneys. The Department of Health and Human Services,[30] which encompasses stem cell research, drug approvals, and the Medicaid and Medicare division, may well be the largest employer of health care lawyers in the country.[31] The Food and Drug Administration (FDA) has its own legal staff to support is consumer protection mission.[32]

In addition to the many federal opportunities, each state presents a rich array of agencies and the lawyers who represent them. Much of this work is done through the Attorney General's Office. In all states the attorney general is an elected official charged with representing the legal interests of the entire state. In almost every case this includes a conglomeration of state hospitals, licensing boards, and regulatory agencies. While the character of every AG's office is different, the most effective approach is to contact the Attorney General directly. He will refer your letter to the lawyers who oversee hiring but, if you impress him, he can follow up with the staff. As always, another excellent route is to submit your resume through someone you know at the AG's office. This may help bring your application to the top of the pile.

Every Health Department, Department of Children and Families, Department of Mental Health, and Department of Social Services, which oversees the Medicaid Program, need lawyers. Here again, your most high-yield approach is to write the Commissioner. He or she will forward your letter to departments that are hiring. The best way to search for all federal jobs is through the website USA Jobs, http://jobsearch.usajobs.opm.gov. The general occupation code for legal jobs is 09, but you have a joint degree or other job skills you should search more widely for jobs, such as policy jobs, which do not require a law degree. The federal government has a very little known, very impressive program, called the Presidential Management Fellows program (PMF), which is designed to attract to the federal service outstanding graduate students from a wide variety of academic disciplines who have an interest in, and a commitment to, a career in the analysis and management of public policies and programs. PMF members have access to rotations in every federal agency where they can test their interests and skills. A high proportion of PMF graduates are hired by the agency of their choice in a process that is completely outside the world of advertised positions and letters of inquiry.

Another very prestigious program is the White House Fellows. This highly selective program brings promising, early career professionals into the Executive Branch, where they work closely with top officials. The White House Fellows program may be particularly appropriate for LLMs who have a background and a proven track record in human service professions.

Advice for Those in Law School Now

If you are in law school now you have the opportunity to select elective courses that will prepare you for a career in health law. What are these courses? Obviously the health law–specific courses you can take depend on the offerings of your law school. You should consult with your own faculty to get their ideas and advice. In addition to those classes whose main focus is health law, there are some important basics that will increase your marketability. These include employment and labor law; nonprofit taxation; intellectual property; commercial transactions and insurance law.

Also, while you are in law school, you should take every opportunity available to work in health law settings. Whether these are externships for credit or paid clerkships or even volunteer opportunities, your best chance of getting a job is to have worked in a place. This is only common sense. If you were hiring someone, would you rather have a stranger with an impressive resume

or an individual that you know to be smart, hard-working and easy to get along with? Also, use your time in law school to write. If you are on law review, do your note on a health law related topic. If you are not, meet with your professors to discuss opportunities to submit articles to scholarly publications outside of your school or to local or national professional organizations. Consider writing opinion pieces for local papers. These are terrific ways to build a reputation. Most newspapers are looking for pieces of no more than 750 words about a topic of current (and by current they mean that week) interest. Newspapers will almost always accept submissions electronically so you should be able to quickly respond when there is an item of interest in the news.

Advice for Those Contemplating Law School

For the convenience of those who have not yet applied to law school, here in one place is all the information you need to get started. Let me add some advice of my own. First, never, never take the LSAT cold. It is simply not true that you cannot study for the LSAT. You can and should. Unfortunately, your LSAT score and your GPA will be the primary factors in your law school admission. There are many commercial companies with proven track records in preparing people for the LSAT. I have no opinion on whether any one is better than another. I do know, however, that all are expensive. I would start the process by buying a book or on-line program that lets you take a sample LSAT so you have an idea of your strengths and weaknesses. You can then make a better decision about what kind of preparation material suits you best. Can you study on your own with commercial material? Would you do better with a short, group class? Do you need individual instruction? It's up to you, but please do yourself a favor and go in prepared. Other people will. Also, whatever their stated policy, every school engages in some sort of rolling admissions. So be prepared to get your application in at the first posted date that applications are accepted. Even if you are short a recommendation or a document, your application may be judged by date of filing, so get it in. It is easier to get in when the upcoming class is empty than when there are only a few slots left to fill. Finally, although law schools do not require interviews, almost every school will be receptive to your meeting with a member of the admissions department. Do this if you can—it can make the difference between your being a number and your being a known quantitative.

Here is a summary of some of the categories of pre-law information and resources.

Law School Admissions Council (LSAC)

The LSAC puts out a booklet, "Think About Law School," that outlines the process of taking the LSAT (Law School Admissions Test), what the LSDAS (Law School Data Assembly Service) does and the CRS (candidate referral service) does. This booklet also covers general overview information related to what to expect from law school, curriculum, statistics related to applicants, and a list of recommended resources for more information and LSAC publications.

Law School Data Assembly Service (LSDAS)

The LSAC website gives general information on the LSDAS process.[33] Essentially, the LSDAS prepares a report with an undergraduate academic summary, LSAT scores, letters of recommendation and transcripts. This report is disseminated to designated ABA-approved schools. The LSDAS report is available for five years after registration. Other information offered on the website includes: getting started, LSAT, ABA-approved law schools, fee information, financial aid information, minority perspectives, information for LGBT applicants, law school rankings and resources, and LSAC data.

There is also an LSAT/LSDAS checklist for how to get started. The LSAT & LSDAS information booklet explains pertinent information about creating an online account, registering for the LSAT, alternative testing, accommodations for persons with disabilities, fee waivers, refund policy, ethical conduct, test center arrangements, regulations, what to bring the day of the test, LSAT scoring, how to cancel the score, data and chart on success of repeating the LSAT, score reporting, information about LSDAS Law School Forums, letters of recommendation information, transcript information, information about predictors of law school performance and LSAT scores, confidentiality and fairness procedures.

Other Pre-law Internet Resources

- www.ilr.cornell.edu/studentservices/ac/lawschool.html—Cornell's student services site gives advice on applying to law school.
- http://stu.findlaw.com/prelaw/considering.html—Findlaw for students has a list of pre-law resources.

LSAT Prep Courses

- Get Prepped (http://www.getprepped.com/multiweekclass.html) offers a multi-week prep course for the LSAT. Option A offers 24 classes for $899 and Option B offers 15 classes for $579.
- Kaplan (http://www.kaptest.com) offers test prep services for the LSAT for around $1,100.
- Princeton Review (http://www.lawpreview.com/LP_2002/Edited/free_forum.php?) also offers LSAT prep courses.
- ScorePerfect (http://www.scoreperfect.net/sp/lsat/) offers an LSAT prep course for Texans in Austin, College Station, Dallas, Houston and San Antonio. The company is owned by Robin Singh, who

also uses the TestMasters mark outside of Texas.

Other prep services: PowerScore (http://www.powerscore.com), PrepMaster's LSAT intensive review (http://www.prepmaster.com/toc.html), Oxford Seminars LSAT test prep master course (http://oxfordseminars.com/Pages/LSAT/lsat_about.htm), Campus Access (http://www.campusaccess.com/campus_web/educ/e5grad_lalstpre.htm).

Law School Prep Courses

- Barbri (http://www.lawschoolprep.com/program/program.shtm) offers a preparatory course for law school candidates. There is a 5-day program overview of the first year courses and mock classes and 1-day workshops on law school skills and legal research and writing.
- Princeton Review/ Law Preview Law School Forums offer free law school workshops on LSAT strategy, mock law school classes, and law admissions & career panel discussions. (http://www.lawpreview.com/LP_2002/Edited/free_forum.php?).

Law School Application Personal Statements

Admissions Essays offers assistance with writing law school personal statements.[34] This service essentially surveys personal information and helps write the personal statement. Cost for this service is $285. Another service is an essay critique service which reviews and critiques personal statements that were written by the applicant. The cost for the critique is $165.

Accepted is a website that offers tips and helpful instructions on how to write a personal statement.[35] This website also gives tips for writers of letters of recommendation, sample law school personal statements, and a list of "do's and don'ts" for writing the personal statement. This website also addressed addendums, optional essays, and wait-list follow-up letters. This website also offers law school application and personal statement consulting services.

Essay Edge also offers editing services for law school personal statements.[36] They also offer a comprehensive service package which includes a "seven-stage law school admissions consulting and writing process that will help you with topic selection, outline creation, and the editing of the final draft" for a cost of $299.95. Law360.com offers tips for writing law school admissions essays.[37] Virtual Red Ink offers editing services for personal statements from $30 to $170.[38] Admissions Consultants offers consulting services for J.D. and LLM admissions candidates.[39]

Financial Aid

LSAC offers a financial aid brochure, *Financial Aid for Law School: A Preliminary Guide*, that discusses financial aid options for attending law school and payment programs and options for after law school. Other financial aid resources are recommended on The Princeton Law Review website,[40] as well as various school and financial aid websites available by a Google search.

Early Decision Admissions Process

Many schools have an Early Decision process for applicants who have decided on a clear, first-choice school. The Law School commits to give an Early Decision to the applicant in exchange for the applicant's commitment to withdraw and not initiate further applications at other law schools after being accepted by the Early Decision school. The applicant essentially commits to attend a specific school in exchange for the certainty of an early admissions decision.

Conclusion

I hope this work in progress is helpful to you in beginning your job search. No matter how many times this piece is revised, however, it will not keep up with the explosive growth of information available on the Internet. Please let each other, and me, know of other useful sites you find in your own surfing. Final advice, though: you can't get a job sitting at home surfing the Web. It is absolutely true that the best way to find a job is through other people and the best way to get a job is by being there. All the efforts you make to be known to potential employers through informational interviewing, unpaid internships and committee work will bring you closer to what you want. Think about everyone you know and who they know. Remember that your school's health law faculty can be your most valuable link to health law jobs. Let them know what interests you so they can give your name to potential employers who call asking for a lawyer with health care expertise.

Good luck!

Endnotes

1. *See* U.S. Dept. of Health & Human Services, http://www.cms.hhs.gov/NationalHealthExpendData/02_National HealthAccountsHistorical.asp#TopOfPage (last visited Dec. 1, 2007). The United States Department of Health and Human Services' Centers for Medicare and Medicaid Services estimate that in 2005 the U.S. spent $2.0 trillion on health care. This equals $6,697 per person.
2. aareahttp://law.case.edu/student_life/journals/health_matrix/141/rothstein.pdf. (last visited Dec. 1, 2007). (In reflecting on the growth of health law over the past 50 years, Professor Mark Rothstein writes that

   > in the last fifty years, law has become an integral (if not universally welcomed) part of medicine. Physician practices are now concerned with privacy notices, informed consent documents, and advanced directives. At most hospitals, expanded in-house legal departments have been joined by related departments of risk management, regulatory compliance, and health information privacy and security. 213.

3. These organizations include the American Bar Association's Health Law Section, http://www.abanet.org/health/, which includes 12 separate interest groups, http://www.abanet.org/health/01_interest_groups/index.html; The American Health Lawyers' association,

http://www.healthlawyers.org; The American College of Legal Medicine, https://www.aclm.org/Default.aspx. In addition, almost every state bar has its own health care law section.

4. American Health Lawyers' Association, http://www.healthlawyers.org/Template.cfm?Section=Who_We_Are&Template=/ContentManagement/HTMLDisplay.cfm&ContentID=51783 (last visited Dec. 1, 2007).
5. *See* Henry Greely, *Some Thoughts on Academic Health Law*, 41 WAKE FOREST L. REV. 391 (2006); Mark Rothstein, *The Growth of Health Law and Bioethics*, 14 HEALTH MATRIX: JOURNAL OF LAW-MEDICINE 213 (2004).
6. U.S. News & World Report, *America's Best Graduate Schools 2008,* U.S. NEWS & WORLD REPORT, *available at* http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/rankindex_brief.php (last visited Dec. 16, 2007).
7. *See* American Bar Association, http://www.abanet.org/carreercounsel (last visited Dec. 20, 2007).
8. RICHARD BOLLES, *What Color Is Your Parachute,* Ten Speed Press, Published 2003.
9. KIMM ALAYNE WALTON, *Guerrilla Tactics for Getting the Legal Job of Your Dreams* (Harcourt Legal & Professional Publications, Inc. 1999) (1995).
10. *Id.*
11. BARBARA SHER, *Wishcraft: How to Get What You Really Want* (Ballantine Books, 2nd ed., 2003).
12. *Id.*
13. Bolles, *supra* note 8.
14. *Id.*
15. *See* White House Fellows Program, http://www.whitehouse.gov/fellows (last visited Dec. 20, 2007).
16. One of the most reliable websites is the American Bar Association, http://www.abanet.org/careercounsel.com (last visited Dec. 16, 2007).
17. Attorney Jobs, http://www.attorneyjobs.com (last visited Dec. 17, 2007).
18. *See, e.g.*, Recruiters Online, http://www.recruitersonline.com (last visited Dec. 16, 2007).
19. Ethics Jobs, http://www.ethicsjobs.com (last visited Dec. 17, 2007).
20. *See* Appendix.
21. *See, e.g.*, Grad Schools.Com, *Biomedical and Health Sciences Graduate Programs,* http://www.gradschools.com /biomed_health.html? WT.srch=1&gclid=CPrZrbXcjI8CFR2NgQodZTT9Hw; All Allied Health Schools, http://www.allalliedhealthschools.com/featured/health-administration-all-degree programs/?src=goo_ahs_hca_ 20355b; Guide to Health Care Schools.Com, http://www.guidetohealthcareschools.com (last visited Dec. 16, 2007).
22. *See* Hart Leadership Program Institute, http://www.pubpol.duke.edu/centers/hlp/index.html (last visited Dec. 17, 2007).
23. Public Health Law Association, http://www.phla.info/jobbank.htm (last visited Dec. 1, 2007). The Public Health Law Association has begun keeping a listing of jobs in public health law.
24. Health Insurance Portability & Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996).
25. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).
26. Meredith Wadman, Johns Hopkins Researchers Fume over Government Crackdown, Nature 412, 363 (July 26, 2001).
27. News story about shutdown by office of human subject research protection office.
28. American Health Lawyers Association In-House Council, http://www.healthlawyers.org/Template. cfm?Section=Group_Descriptions&CONTENTID=42273&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Dec. 1, 2007).
29. American Health Lawyers Association, http://www.healthlawyers.org/Template.cfm?Section=Career_Center (last visited Dec. 16, 2007).
30. Dept. of Health & Human Services, http://www.hhs.gov (last visited Dec. 16, 2007).
31. For specific information about finding a job with the Dept. of Health & Human Services both regionally and in Washington, D.C. please consult the following two websites: http://www.hhs.gov/careers/findjob.html & http://www.hhs.gov/ogc/career. html.
32. Food & Drug Admin., http://www.fda.gov/jobs/attorney.html (last visited Dec. 1, 2007).
33. Law School Admissions Council, http://www.lsac.org/LSAC.asp?url=/lsac/lsdas-general-information.asp (last visited Dec. 17, 2007).
34. Admissions Essays, http://www.admissionsessays.com (last visited Dec. 17, 2007).
35. Accepted, http://www.accepted.com/law (last visited Dec. 17, 2007).
36. Essay Edge, http://www.essayedge.com/law/editing (last visited Dec. 17, 2007).
37. Law360, http://www.law360.com/law-school-admission-essays.html (last visited Dec. 17, 2007).
38. Virtual Red Ink, http://www.virtualredink.com/wst_page12.html (last visited Dec. 17, 2007).
39. Admissions Consultants, http://www.admissionsconsultants.com//lawschool/index.asp (last visited Dec. 17, 2007).
40. *See* The Princeton Review, http://www.princetonreview.com/home.asp (last visited Dec. 17, 2007).

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APPENDIX

Law Employment Listings

- ABA Human Resources, http://www.abanet.org/hr/home.html
- ABA Internship Opportunities, http://www.abanet.org/hr/interns/home.html
- ABANET Internship & Career Opportunities, http://www.abanet.org/lsd/jobopp.html
- Advanced Legal Services, http://www.hrpages.com/law/
- Affiliates, http://www.affiliates.com/
- American Corporate Counsel Association Jobline, http://www.acca.com/jobline/
- American Health Lawyers Association, http://www.healthlawyers.org/home.htm
- American Internet Classifieds: Legal Employment Classifieds, http://www.bestads.com/aic/employment/legal/
- America's Job Bank, http://www.ajb.dni.us/
- AmeriClerk, http://www.americlerk.com/
- Arizona State University College of Law, http://www.law.asu.edu/placement/
- Assigned Counsel, http://www.assignedcounsel.com/
- Attorney Find, http://www.attorneyfind.com/
- Barrister Referrals, Ltd., http://www.barristerreferrals.com/
- Baylor University School of Law, http://law.baylor.edu/CareerSvcs/
- Bench & Bar of Minnesota, http://www.mobar.org/law/index.htm
- Boston University School of Law, http://www.bu.edu/law/careers/index.html.
- Brooklyn Law School, http://www.brooklaw.edu/career/
- Byron Employment Australia, http://employment.byron.com.au/
- California Western School of Law, http://www.cwsl.edu/main/default.asp?nav=career_services.asp&body=career_services/home.asp
- Cambridge Staff, http://www.cambridgestaff.com/
- Canadian Lawyer Index, http://www.canlaw.com/
- Career Builder, http://www.careerbuilder.com/
- Career Magazine, http://www.careermag.com/
- CareerPath.com (search help wanted ads from newspapers around the country)
- Careers & Jobs, http://www.starthere.com/jobs/
- CareerSite.com, http://www.careersite.com/
- Case Western Reserve University Law School, http://lawwww.cwru.edu/careers/
- Chronicle of Higher Education Job Listings, http://chronicle.com/jobs
- CityJobs—UK Legal Site, http://www.cityjobs.co.uk/cgi-bin/campaign.cgi?tid=903
- Coleman Legal, http://www.colemanlegal.com/
- Contract Counsel, http://www.contractcounsel.com/
- Counsel Network, http://www.headhunt.com/
- Counsel Source, http://www.counselsource.com/
- eAttorney, http://www.eattorney.com/
- Emory University School of Law, http://www.law.emory.edu/cms/site/index.php?id=363
- Emplawyernet, http://www.emplawyernet.com/
- Filcro Legal Staffing, http://www.filcro.com/page3.html
- Findlaw.com, http://www.findlaw.com/
- Findlawjob.com, http://www.findlawjob.com/
- Firm Finder, http://www.firm-finder.com/
- Franklin Pierce Law Center, http://www.piercelaw.edu/career/aboutus.htm
- Gibbons Arnold & Associates, Inc., http://www.gibsonarnold.com/
- Harvard Law School, http://www.law.harvard.edu/Admissions/career.html
- HeadHunter.NET, http://www.headhunter.net/
- Hieros Gamos, http://www.hg.org/employment.html
- Hornsby Partner, Inc., http://hornsbypartners.com/
- HOTRESUME.COM, http://www.hotresume.com/
- Howard C. Bloom Co., http://www.bloomlegalsearch.com/
- If Come.com, http://ifcome.com/
- iHireLegal.com, http://www.ihirelegal.com/
- Indiana University School of Law—Bloomington, http://www.law.indiana.edu/careers/

- Indiana University School of Law—Indianapolis, http://indylaw.indiana.edu/career/internetjobs.htm
- infirmation.com, http://www.infirmation.com/
- Interactive Lawyer, http://www.interactive-lawyer.com/TLrecr.html
- Internet Job Locator, http://www.joblocator.com/
- Interview Experts, http://www.interviewexperts.com/
- JobBank USA, http://www.jobbankusa.com/
- JobHunt, http://www.job-hunt.org/
- JOBlynx, http://www.joblynx.com/
- Jobsite (United Kingdom / Also hosts "Jobs by E-Mail," a service that mails you jobs tailored to your specifications), http://www.jobsite.co.uk/
- Jobsite, http://www.jobsite.co.uk/
- JOBTRAK, http://www.jobtrak.com/
- John Marshall Law School, http://www.jmls.edu/careersvcs/index.shtml
- Law Bulletin, http://www.lawbulletin.com/
- Law Forum, http://www.lawforum.net/employ.htm
- Law Forum, http://www.lawforum.net/resume.htm
- Law Journal Extra! Law Employment Center, http://www.lawjobs.com/
- Law Resources, Inc., http://www.lawresources.com/
- Law Student Resources: Jobs and Internships, http://members.aol.com/dcingle/jobs.htm
- LawGuru.com Legal Jobs, http://www.lawguru.com/classifieds/viewads.html
- LawInfo Employment Center, http://jobs.lawinfo.com/
- LawInfo Employment Center, http://jobs.lawinfo.com/
- LawInfo.com, http://jobs.lawinfo.com
- LawLinks.com, http://lawlinks.com/ar-emply.html
- Lawlinks.com, http://www.lawlinks.com/
- Lawmatch.com, http://www.lawmatch.com/
- Lawyers Weekly Jobs, http://www.lawyersweeklyjobs.com/
- Legal Hire, http://www.legalhire.com/
- Legal Internships Home Page, http://www.usd.edu/~legalint/
- Legal Report, http://www.legalreport.com/
- Legal Search, http://legalsearchonline.com/
- Legal Search Network, http://www.legalsearchnetwork.com/
- Legal Services Corporation Funded Programs with Web Sites, Legal Services Corporation Office of the Inspector General Employment Opportunities, http://oig.lsc.gov/jobs/jobs.htm
- Legal Week, http://lwk.co.uk/
- Legalrecruiter.com, http://www.legalrecruiter.com/
- Legalstaff, http://www.legalstaff.com/
- LEXIS-NEXIS Employment Center, http://www.lexis-nexis.com/lncc/employment/
- Life After Law, http://www.lifeafterlaw.com/
- Longbridge International, http://www.longbridge.com/
- LPA Legal Recruitment, http://www.the-lpa.co.uk/
- Mailing Lists, http://www.legalemploy.com/maillist.htm
- Major Legal Services, Inc., http://www.lawplacement.com/
- Major, Hagen & Africa Attorney Search Consultants, http://www.mhasearch.com/
- Margot Haber Legal Search, Inc., http://www.haberlegal.com/
- Martindale Hubbell, http://www.martindale.com/
- Minority Corporate Counsel Association, http://www.mcca.com/
- Missouri Bar Placement Bulletin, http://www.mobar.org/law/index.htm
- Monster.com, http://www.monster.com/
- Moyer Paralegal Services, http://www.moyerparalegal.com/
- Myjob.com, http://www.myjob.com/
- http://www.paralegals.org/Center/home.html
- National Lawyers Association Resume Forum, http://www.nla.org/resume/main.html
- National Legal Aid & Defender Association Job Opportunities, http://www.nlada.org/jobop.htm
- NationJob Network, http://www.nationjob.com/legal/
- NetTemps, http://www.net-temps.com/
- Net-Temps, http://www.net-temps.com/

- Oklahoma City University School of Law, http://www.okcu.edu/law/careerservices/
- Oxford Legal, http://www.oxfordlegal.com/
- Oxford Search Group, http://www.oxfordsearch.com/
- Paralegal Classifieds, http://www.paralegalclassifieds.com/
- Paul Feldman & Associates, Attorney Recruitment Specialists, PeopleQuick.com (Canadian temporary legal help), http://www.peoplequick.com/
- Philadelphia Lawyer Employment Links, http://www.phillylawyer.com/Employment/employment.htm
- Pine Tree Legal Assistance Employment Opportunities, http://www.ptla.org/ptlajobs.htm
- Princeton Legal Staffing Group, http://www.princetonlegal.com/
- PSD International Group Recruitment—Law Page, Public Service JobNet, www.law.umich.edu/currentstudents/PublicService/jobnet.htm
- Recruiters OnLine Network, http://www.recruitersonline.com/
- Romac Legal, http://www.romaclegal.com/index.html
- San Diego Source Legal Classifieds, http://www.sddt.com/classified/ads/
- Social Law Library Employment Resources, http://www.socialaw.com/irg/er.html
- Special Counsel, http://www.specialcounsel.com/
- Sterling Careers Legal Search and Consulting Firm, http://www.sci-law.com/
- SummerClerk.com, http://www.summerclerk.com/index.asp
- Syracuse University College of Law, http://www.law.syr.edu/careerservices/
- Tax Law, http://www.law.com/
- Texas Office of the Attorney General, http://www.oag.state.tx.us/agency/jobs_ag.shtml
- TexLaw, http://www.texlaw.com/
- The Associates, http://www.associates.org/
- The Counsel Network, http://headhunt.com/
- The Internet Job Locator, http://www.joblocator.com/
- The Jameson Group, http://www.thejamesongroup.com/
- The Job Beat, http://www.searchbeat.com/jobs.htm
- The Lawyers Guide to JobSurfing on the Internet, http://www.legalemploy.com/lwyrsgd.htm
- The Legal Employment Bookstore, http://www.legalemploy.com/bookstore.htm
- Todays Legal Staffing, http://www.todayslegal.com/
- Top Jobs on the Net, http://www.topjobs.net/
- University of Kansas, http://www.law.ku.edu/career_alumni/career_services.shtml
- University of Pittsburgh, http://www.law.pitt.edu/career/index.php
- University of Texas, http://www.utexas.edu/law/depts/career/index.html
- Update Legal Staffing, http://www.updatelegal.com/
- USC Law School, http://lawweb.usc.edu/carserv/
- Usenet Newsgroups, http://www.legalemploy.com/news.htm
- VirtualResume, http://www.virtualresume.com/
- Wake Forest University School of Law, http://www.law.wfu.edu/careerservices.xml
- Wall Street Journal Career Center, http://www.careers.wsj.com/
- Washburn University, http://washburnlaw.edu/career/
- Washington University, http://ls.wustl.edu/CSO
- WISBAR (Wisconsin Bar), http://www.wisbar.org/bar/emp-menu.htm
- Worktree.com, http://www.worktree.com/
- Yahoo General Employment Index, http://hotjobs.yahoo.com/
- Zarak Group, http://www.zarakgroup.com/

Specific Sites for Health Law Jobs

- Science & Law Recruiting, Inc., www.imeg.com/scilaw/

Nonprofit Organization Listings on the Web

- ACCESS, http://www.accessjobs.org/
- American Medical Association, http://www.ama-assn.org/

- American Marketing Association, http://www.ama.org (job listings at the AMA)
- Community Career Center, http://www.nonprofitjobs.org/ (databank of non-profit jobs)
- Association Center, http://www.associationcentral.com/ (databank of non-profit jobs)
- ASPH Employment Council, http://cfusion.sph.emory.edu/PHEC/phec.cfm (public health employment connection)
- National Association for Public Interest Law Job Listings, http://www.napil.org/napjob.html
- The Chronicle of Philanthropy, http://philanthropy.com/
- The Foundation Center, http://fdncenter.org/
- National Council of Non-profit Associations, http://www.ncna.org/
- Idealist.org, http://www.idealist.org/
- Non Profit Employment, http://www.nonprofitemployment.com/
- Exec Searches.com, http://www.execsearches.com/exec/default.asp (recruiters for non-profit entities)
- Feminist Majority Foundation, http://www.feminist.org
- The Heritage Foundation, http://www.heritage.org/About/JobBank/index.cfm
- Finding Work in the Government Vacancies in the Federal Inspector General Community, www.pmf.opm.gov
- www.ustreas.gov/inspector-general/vacancies/
- U.S. Department of Justice Attorney/Law Student Hiring and Career Information, http://www.usdoj.gov/oarm/
- U.S. Department of Justice Career Opportunities, http://jobsearch.usajobs.opm.gov/a9dj.asp
- Federal Jobs Central, http://www.fedjobs.com/
- Federal Jobs Digest, http://www.jobsfed.com/
- FedWorld, http://www.fedworld.gov/
- United States Office of Personnel Management, http://www.opm.gov/

Resources for Nurses

- The American Association of Nurse Attorneys (TAANA), http://www.taana.org/

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Young Lawyers in a Down Economy: Hanging Up Their Own Shingles

(Continued from page 1)

(b) Formation of the Firm

However, by late 2008, he decided that a change was needed. He struck out on his own and formed a solo practice in response to the growing number of inquiries he had received from friends and family regarding various legal matters. Most inquiries, he said, he was unable to assist with beyond providing a reference. However, he realized that he had a special flair for those that were rooted in contracts and other document-intensive analyses, often providing much-needed insight and advice.

My former classmate's sole proprietorship offers legal consulting on corporate work at an hourly rate. His goal, he said, is to provide legal services to business entrepreneurs who need work done in a smaller capacity and at lower rates than those charged by large law firms. He described his model client as a businessperson who has two lawyers: on the one hand, an attorney at a sizable law firm who takes on the client's larger transactional work and/or litigation; and on the other, a "contracts guy" who manages smaller matters that are generally handled at a lower cost. He has modeled himself as that "contracts guy"—a provider of premium-level legal advice, but in smaller quantities and at a lesser price.

(c) Clientele and Legal Services

Thus far, he has marketed his services to mostly actors, writers, models and other self-employed individuals in the entertainment industry, capitalizing on southern California's Hollywood locale. However, as his practice has grown, he has had an increasing number of referrals to small to mid-size business entrepreneurs who need legal services, but who may not necessarily be able to deposit a sizable retainer.

His work includes a variety of legal matters, from negotiating leases and employment contracts to analyzing landscaping agreements. Most often, he is asked to review documents that have been presented to his client for signature, and to be on the lookout for potential loopholes and pitfalls. "My job is to find where the bodies are buried," he said. For example, one such contract would have awarded a recording company all future royalties stemming from his client's work. The client had assumed that such term was standard in the industry and had raised no opposition to its inclusion.

Further, he advises clients only to mention him as a last resort during their negotiations. He has found that mention of "my attorney" often brings an adversarial aspect to negotiations, which is usually better avoided. To assist his clients in negotiating on their own, he drafts contract language, but then also issues an accompanying document which provides lay explanations for his reasoning behind any modified language. For example, one client asked him to review a script submission release received from a major network. The attorney modified the release language to expand his client's rights, but also included a blurb to the client explaining the modified language in plain English. "Such back-up support," he said, "is critical to a client's confidence as he or she enters negotiations."

(d) Marketing the Business

Unsurprisingly, my former classmate has taken full advantage of the digital age in marketing his business to potential clients. Most impressively, he filmed a Youtube commercial advertising his business, and also writes a legal blog which has directed users his way. The purpose of these efforts is not only to popularize the Web site, but also to increase the site's "hit rating" on Google AdSense. As more users explore the site, its popularity index increases and enhances the probability that a link to the Web page will appear during a search for contract attorneys in Los Angeles.

Further, he created a Facebook page for his business, and answers legal questions at lawguru.com. His motto is "to do something every day"—he has committed to one promotional act per day, and likely these small actions will lead to a growing tide of interest.

(e) Working Virtually but Maintaining Client Contact

He has also been able to take advantage of the digital age by dispensing with the traditional brick and mortar idea of a law firm. He works virtually from his apartment and from start-up office space, often using Lexis and Westlaw services at a local law library. He uses standard forms available from on-line document-sharing sites when drafting agreements, and relies on his experience as a corporate attorney to modify such forms as needed.

Yet in-person meetings are crucial to his business—as in any client-based practice, in-person communication is necessary in developing a sense of trust between client and adviser. In this business model, however, the meeting usually takes place after services are rendered, and not before. Clients generally schedule an initial telephone conversation in order to assess the type of services needed. Then, after the necessary legal research and analyses have been performed, the attorney meets with clients face-to-face to answer questions and explain results. These meetings, he said, are critical to closing a transaction and instilling confidence in a client who may proceed directly into a negotiations setting.

(f) The Business Going Forward

Working with entrepreneurs as clients, my former classmate realized that his expectations with regard to the growth of his business in the near-term were likely unrealistic. But

he also came to the realization that his operation is scalable and could become a multi-person enterprise. He projects that in approximately 18 months, the business will grow beyond the services that he can provide alone, and more attorneys will be needed. "Then," he said, "everyone can have their own contracts guy!"

As to lessons learned from his efforts, he stated that just the experience of going through the process of starting a business is invaluable, whether or not it ultimately succeeds. "This is a cool market for entrepreneurs," he said, "and JDs shouldn't feel left out in the cold because we don't have business degrees. We were educated to be free-thinkers and leaders, and it's critical to keep that in mind when evaluating the opportunities open to us."

2. The New York Legal Start-Up Market

Another friend of mine has also been an iconoclast in establishing his own business and venturing into the realm of independent legal services. Formerly an associate at a major law firm that recently "all but lost its entire New York litigation team," he decided last year to strike out on his own, motivated by his love of the New York arts and music scene.

(a) Professional Background

This young attorney graduated from Stanford Law in 2007. Although hailing originally from California, I remember him as very attached to New York City, where he pursued undergraduate studies. During law school, he dressed fashionably each day in keeping with his New York frame of mind, instead of in the sweatpants and flip-flops worn by many of his peers. He closely followed the vibrant literary and arts culture of San Francisco and Berkeley while in school, and relocated to New York immediately after graduation to pursue his interests.

(b) Business Model

As an associate at a white-shoe law firm in New York, this attorney worked on litigation projects related to the finance industry and several pro bono matters. However, when the legal market imploded last year, he took advantage of the opportunity to found a practice which provides corporate services to artists and entrepreneurs, as well as select specialized services. He and his business partner, also an attorney, set out to create a client service model they believe will differentiate them from the culture and products offered by other legal providers.

Depending on the level of service required, clients will have the opportunity to purchase subscription-like services from the firm, which would include broad access to the partners via e-mail, text and a dedicated Internet phone line. The practice charges additional fees for in-person meetings requiring travel or strategy sessions, and clients may receive the benefit of preferred hourly rates should they require more traditional services such as time-intensive research and drafting, negotiations, or court appearances. The practice also anticipates offering flat fees for many engagements.

The founders foresee a "dataroom" product for long-term clients, in which all legal work for a particular client is stored online, accessible only by password. Clients will be able to view documents relating to their business in one location, and will likely be able to pose questions and review advice on individual secure pages attached to each client's dataroom.

Further, appointments with either partner may be secured quickly and easily via the Web site. Clients will be able to "order" meetings with one or both using a password-protected username, and may meet at either the founders' office in Brooklyn, or at a pre-determined location in Manhattan.

(c) Target Clientele

The partners hope to attract business from smaller clients who require legal services, but for whom the traditional large law firm is not the right fit. In its mission to offer legal services at a competitive price, the practice provides a relaxed culture in tune with an arts vibe, leveraging the relatively younger age of its staff and technological know-how to create a space and format familiar to creative entrepreneurs in their 20s and 30s. "Our target client," my former classmate said, "is a highly motivated small-businessperson who's ready to take the next step in terms of developing his or her enterprise."

(d) Challenges Going Forward

The greatest challenge thus far, according to the founders, has been determining and attracting the ideal client base to support the practice. The economic downturn's impact upon legal consumers' continued willingness to pay Big Law prices has also discouraged some would-be consumers from seeking out any legal representation whatsoever. Instead, these potential clients have decided to "go it alone," either forgoing representation altogether or pursuing *pro se* representation. Beyond finding the ideal marketing strategy for a start-up practice and discovering the appropriate niche to exercise the partners' interests and abilities, the founders have also been handling dozens of tasks familiar to small business owners. "In the midst of looking into office space, I'm also busy liaising with our Web developer, potential clients, and an insurance agent," said one.

"But I'm very lucky," he was quick to add. "My friends and family are behind me one hundred percent, and I look forward to this being the experience of a lifetime."

Anting Wang, an associate in the Litigation Department at Hahn & Hessen LLP in New York City, wishes to thank Steven J. Mandelsberg and John P. McCahey for their input and guidance in preparing this article. See MyContractsGuy.com and HelloLegal.com for examples of legal start-ups founded by young practitioners in Los Angeles and New York.

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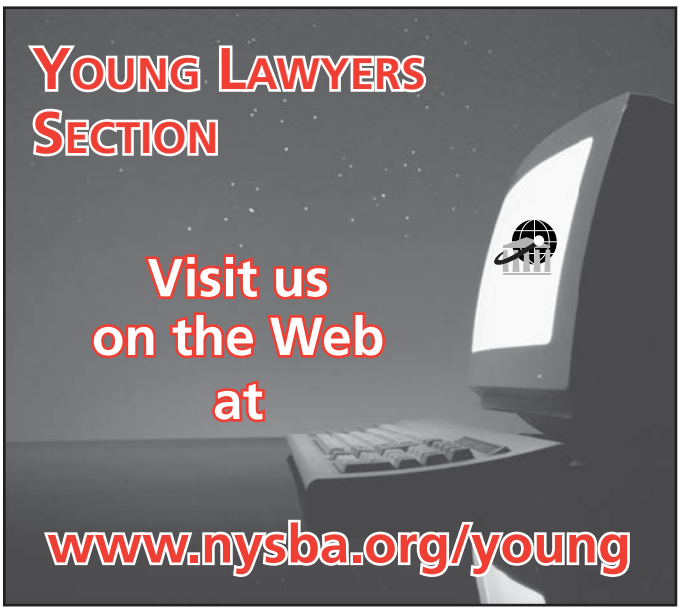

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