NYSBA FALL 2016

Perspective

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

www.nysba.org/YLS

Upcoming Young Lawyers Section Events and Co-Sponsored Events

2017 New York State Bar Association Young Lawyers Section Annual Meeting Events

Wednesday, January 25, 2017

Young Lawyers Section Program
New York Hilton Midtown | 1335 Avenue of the Americas | New York City | 8:45 a.m. - 12:00 p.m.

Young Lawyers Section Executive Committee Luncheon Meeting and Awards
New York Hilton Midtown | 1335 Avenue of the Americas | New York City | 12:00 p.m. - 3:00 p.m.

Thursday, January 26, and Friday, January 27, 2017

Bridging the Gap CLE
New York Hilton Midtown | 1335 Avenue of the Americas | New York City | 8:15 a.m. - 5:00 p.m.

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Wednesday, April 5 - Sunday, April 9, 2017

New York State Bar Association Young Lawyers Section Trial Academy
Cornell University School Of Law | Ithaca

The New York State Bar Association Trial Academy is a five-day trial techniques program. Geared toward new and young attorneys. Participants will take part in sessions which will advance and improve their courtroom skills. With an emphasis on direct participation, the Trial Academy is a great learning experience for all involved.

Scholarships are available. Please note that scholarships cover registration fees only. Trial Academy scholarship recipients must pay travel, accommodations and some meals.

Seats are limited and the Trial Academy always sells out. For more information about the New York State Bar Association Young Lawyers Section Trial Academy, please contact Megan O'Toole at motoole@nysba.org.

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Monday, June 12, 2017

Supreme Court Admissions Program
Washington, D.C.

The Young Lawyers Section is proud to sponsor the 2017 United States Supreme Court Admissions Program for members of the New York State Bar Association. Every year the Young Lawyers Section accepts applications from 50 attorneys to gain admission to practice in front of the United States Supreme Court. The deadline for registration submission is December 19, 2016. For more information, please contact Alex Englander at aenglander@nysba.org.

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Request for Articles

If you have written an article and would like to have it considered for publication in *Perspective*, please mail or e-mail it to:

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Guidelines

Articles can range from op-eds, current events pieces, short-form law reviews, and articles that highlight certain aspects of law or policy. Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include a brief bio.

www.nysba.org/Perspective

A Message from the Section Chair

I'm privileged to be the Chair of the Young Lawyer's Section for 2016-2017 and look forward to carrying on the traditions and quality leadership that has been demonstrated by our past chairs. I can't believe we are already about halfway through my term as chair.

Even though summer is traditionally a slower time for bar associations, YLS accomplished a lot this summer. We started with our annual Supreme Court Admission Program in June where 50 admittees and their guests were once again honored when Justice Ruth Bader Ginsburg met the group in acknowledgment of her New York roots. We most recently held our Fall Meeting in Albany. John Christopher deserves a big hand for chairing such an ambitious program that included a tour of the Court of Appeals, a networking dinner and an impressive CLE program. Great district events were also run in Albany and Long Island.

Mark your calendars for our Annual Meeting program on January 25–27, 2017. On Wednesday, January 25, we have our half-day program chaired by Norina Melita and co-sponsored by the Committee on Leadership Development. This looks to be a great program covering everything a young lawyer should know about the CPLR, Ethics and using bar association work to build your resume and enhance your career. Following the half-day program will be the presentation of the Outstanding Young Lawyer Award and Law Student Awards.

Christina Canto and Clotelle Drakeford are chairing our two-day Bridging the Gap program on January 26 and 27. They have put together extraordinary line up of speakers who will provide attendees with all the CLE credits needed for the year in two days. For the first time we will include a networking event for all young lawyers on Thursday evening.

Our Section liaisons are hard at work making sure that young lawyers are represented in the programming the Sections put on and our district reps have been hard at work putting together networking opportunities in their judicial districts. Look for upcoming events—especially holiday parties.

Our biggest success so far this year has been filling out committee rosters with active and engaged members who have gotten to work quickly. Joining a committee can be a great way to get involved with the Young Lawyers Section in a specific limited scope projects or events that you are passionate about.

The Pro Bono and Community Service Committee, under the direction of Kara Buonanno, is planning to run community service projects in various areas of the state and looking into ways young lawyers can get involved in pro bono work. Eric Garcia has stepped up to chair our Committee on Diversity, which is fast at work planning events and programs. Jennifer Aronson and Tara Zurheide are co-chairing our Communications Committee that is always looking for new authors for our three publications and our social media. Jessica Gelsomino and Jessy Albaz are chairing our Law Student Development Committee and have been very busy visiting law schools to fill the committee roster. Anne Dello-Iacono and Kristin Gallagher are chairing our Membership Committee.

I look forward to celebrating all the work that our committees, section liaisons, and district representatives have done in the spring. Please let me know if you would like to get more involved with the Section.

Erin Kathleen Flynn

From the Editor's Desk

A few months ago, acting as a court-appointed guardian, I had to physically go to the local social security office to take care of an issue involving the SSI funds of one of my wards. For those of you who don't know, the local social security office might as well be the tenth circle of Dante's inferno. It's crowded. You wait indefinitely. You cannot bring your coffee.

The minutes ticked by as I sat in my uncomfortable chair, experiencing caffeine withdrawal and waiting to be called. I checked my e-mail for the umpteenth time, only to become more frustrated when one e-mail was a text-transcribed voicemail from a judge who had called me on my office line. I grew more and more impatient and I inwardly rolled my eyes and thought, "For this, I went to law school."

And then, I thought about it. I really thought about what I was there doing that day. I was helping a young woman, who has severe mental disabilities and nobody else to look out for her, obtain funds to keep a roof over her head and put food in her mouth. So yes, for that, I went to law school.

As young lawyers, we are the ones most likely to get assigned the least glamorous tasks. However, even with the simplest tasks, we are entrusted with an awesome and powerful responsibility—to be a voice and an advocate for people who are struggling to speak for themselves. Even a task as awful as sitting in the social security office is a privilege. It's all a question of perspective.

I hope you enjoy this issue of *Perspective*, and I hope that articles I have selected help you to gain the perspective you need to feel happy, confident, and fulfilled in your practice.

Keri A. Mahoney
The Law Office of Keri Mahoney, PLLC
Editor-in-Chief

The Engagement Letter: Defining the Attorney-Client Relationship

By Amianna Stovall and Joel A. Chernov

While in-house counsel often focus on the rates and fees set forth in an engagement or retainer letter, a well-crafted agreement with outside counsel addresses far more than costs. Although clarity with respect to cost is obviously an essential element of a client's relationship with counsel, other aspects of the relationship are equally important. This is especially true for in-house counsel tasked with juggling a myriad of legal needs for any number of entities and individuals. In such environments, it is important to have a carefully drafted engagement letter that identifies the client with specificity; describes in some detail the services that counsel will be performing; and identifies who will be represented should a conflict arise. An engagement letter that addresses each of these issues will help avoid confusion and ill-will between in-house counsel and their outside lawyers. More importantly, an adequate engagement letter may prevent claims for malpractice and/or motions for disqualification.

I. Identifying the Client

Specifically identifying the client is the first step in defining the scope of the representation. In the context of transactions involving corporations, for example, an engagement letter should plainly state if the attorney is representing the corporate entity, affiliates of that entity, or individual directors, officers, and employees of the entity. Carefully identifying the specific client may have significant ramifications. In *Kurre v. Greenbaum Rowe Smith Ravin Davis & Himmel, LLP*, individual shareholders brought a legal malpractice action concerning a failed corporate transaction.[1] The court dismissed the lawsuit because the engagement letter specified that the law firm represented only the corporate entity and further advised the individual shareholders to obtain separate counsel due to their differing "interests and concerns."[2]

II. Multiple Clients and Conflicts

When a lawyer represents multiple clients, in-house counsel should ensure that the engagement letter addresses what will occur should a conflict of interest arise. Will the firm withdraw? Or will the firm seek to represent one or more of the clients? An engagement letter that memorializes the representation of, for example, a corporation and each of its individual directors and officers, or states that the representation does not create an attorney-client relationship between the law firm and the individual directors and officers, will help avoid misunderstandings and, hopefully, disqualification. In the event that multiple clients are being represented, however, the engagement letter should advise the clients that confidential, attorney-client communications will be shared.

III. Advance Waivers

In-house counsel should also be mindful of "advance waivers" which many law firms now include in their standard form engagement letters. By virtue of such a waiver, a client gives its informed consent to waive any potential conflicts among multiple defendants, as well as any conflicts that may arise with prospective clients. While the enforceability of advance waivers is typically determined based upon the facts specific to each case, courts consider, among other things, the sophistication of the client; whether the waiver is sought to be enforced in a litigation, as opposed to a transactional matter; whether the client was represented by independent counsel when it agreed to the advance waiver; whether the advance waiver is a wholesale or limited waiver; and, ultimately, whether the conflict is waivable at all, notwithstanding the advance waiver. However, courts are becoming increasingly tolerant of advance waivers. Indeed, relatively open-ended advance waivers have been enforced against sophisticated clients with in-house counsel, where the client "routinely retain[ed] different, large law firms to advise the corporation on various matters across the country."[3] The court in *Galderma Labs., L.P. v. Actavis Mid Atl. LLC*, explained: "[w]hen a client has their own lawyer who reviews the waivers, the client does not need the same type of explanation from the lawyer seeking the waiver because the client's own lawyer can review what the language of the waiver plainly says and advise the client accordingly."[4] As a result, it is important for in-house counsel to appreciate the potentially broad consequences of advance waivers and to discuss them with their lawyers before signing form engagement letters.[5]

IV. The Scope of the Engagement

In addition to identifying the client and potential conflicts, in-house counsel should make certain that the engagement letter will define with some specificity the services that the attorney agreed to perform. When the charging fee is expected to be in excess of $3,000, New York *requires* that there be a written engagement letter and that the letter specify "the scope of the legal services to be provided."[6] Toward that end, an engagement letter involving any new matter should spell out the tasks involved in the representation, as well as any restriction or limitation on the representation and the potential consequences of those limitations and restrictions.

For example, if an engagement letter provides that the representation is limited to proceedings before certain tribunals, a legal malpractice action for the attorney's failure to take an appeal is likely to be dismissed.[7] Similarly, where an engagement letter limited the claims and counterclaims to be litigated, the New York Court of Appeals found that the attorney had no duty to pursue other causes of action that might have been viable.[8] In *AmBase Corp. v. Davis Polk & Wardwell*, a client sued Davis Polk for failing to properly advise it about whether certain tax liability could be allocated to another entity.[9] Relying on the language of the engagement letter, the Court concluded that the scope of Davis Polk's representation was limited to the resolution of tax issues before the IRS—which it did, successfully absolving the client of over $20 million in tax liability.[10] The Court found that Davis Polk had no duty to advise its client with respect to whether, in the first instance, the client was primarily or secondarily liable for that tax liability.[11] It is, however, incumbent upon the lawyer to advise a client that seeks to limit a representation as to the potential consequences of such a limitation, and that advice should be reflected in the engagement letter.[12]

V. Conclusion

In the end, an engagement letter should not be viewed as a mere formality to comply with the ethics rules. Rather, articulating the scope of the engagement is a benefit to both client and counsel to the extent it provides both transparency and guidance. While in-house counsel are obviously alert to issues involving the costs associated with the legal services that they are retaining, they should also be alert to the other details in the proposed engagement letters. The actual breadth of the services being rendered by outside lawyers—or their limitation as the case may be—and to whom those services are being rendered should be set down in writing in order to provide basic parameters for the attorney-client relationship. Clarity and precision at the beginning of the relationship will go a long way toward preventing uncertainty in the event a dispute arises later.

Endnotes

1. *Kurre v. Greenbaum Rowe Smith Ravin Davis & Himmel, LLP*, No. A-5323-07T1 2010 N.J. Super. LEXIS 832 at *1 (N.J. Super. Ct. App. Div. Apr. 16, 2010).
2. *Id.*
3. *Galderma Labs., L.P. v. Actavis Mid Atl. LLC*, 927 F. Supp. 2d 390, 402 (N. D. Tex. 2013).
4. *See id*. at 405.
5. *See, e.g.*, *GEM Holdco, LLC v. Changing World Techs., L.P.*, 46 Misc. 3d 1207(A), 7 N.Y.S.3d 242 (Sup. Ct., New York Co. 2015), *aff'd*, 127 A.D.3d 598, 8 N.Y.S.3d 119 (1st Dep't 2015) (law firm was permitted to continue to represent one set of codefendants against the other after they became adverse where the codefendants entered into an engagement letter that included an advance waiver specifically contemplating a future conflict of interest between them and notwithstanding law firm's receipt of information from former client that could be used to the advantage of law firm's current client).
6. N.Y. Comp. Codes R. & Regs. tit. 22, § 1215.1(b)(1) and (2) (N.Y.C.R.R.); *see also* 22 N.Y.C.R.R. § 1215.2(1). There are exceptions to this provision "when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client." Rule 1.5(b), Rules of Professional Conduct, 22 N.Y.C.R.R. § 1200.0; *see also* 22 N.Y.C.R.R. § 1215.2(2) (the 22 N.Y.C.R.R. § 1215.1 requirement for a written engagement letter does not apply to a "representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client").
7. *See, e.g.*, *Turner v. Irving Finklestein & Meirowtiz, LLP*, 61 A.D.3d 849, 879 N.Y.S.2d 145 (2d Dep't 2009).
8. *DeNatale v. Santangelo*, 65 A.D.3d 1006, 884 N.Y.S.2d 868 (2d Dep't 2009).
9. *AmBase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 834 N.Y.S.2d 705 (2007).
10. *Id.* at 709.
11. *Id*. *But see Superior Tech. Solutions, Inc. v. Rozenholc*, 2013 N.Y. Misc. LEXIS 1423, *15-17, 2013 N.Y. Slip Op. 30690(U) (Sup. Ct. New York Co. 2015) (engagement letter ambiguous as to whether scope of engagement was limited to litigation; thus, motion to dismiss legal malpractice action for negligence in connection with transactional work was denied).
12. *See* NYSBA Comm. on Professional Ethics, Formal Op. [No. 604 Nov. 14, 1989]; *see also Rupert v. Gates & Adams, P.C.*, 83 A.D.3d 1393, 919 N.Y.S.2d 706 (4th Dep't 2011) ("[a]n attorney has the responsibility to investigate and prepare every phase of his… client's case") (internal citations omitted); *Ellenoff, Grossman & Schole LLP v. APF Grp., Inc.*, 26 Misc.3d 1029(A), 907 N.Y.S.2d 100, at *2 (Sup. Ct. New York Co. 2009) (denying summary judgment where limitation on firm's engagement was unsupported by written evidence); *Unger v. Horowitz*, 8 A.D.3d 62, 777 N.Y.S.2d 648 (1st Dep't 2004) ("To the extent that the…defendants assert their role was limited to that of consultant or 'of counsel,' it was incumbent upon them to ensure that plaintiff understood the limits of their representation."); Restatement (Third) of the Law Governing Lawyers §19 (2000) (the client must be adequately informed and consent if the lawyer wants "to limit a duty that a lawyer would otherwise owe to the client").

Amianna Stovall is a partner in the law firm of Constantine Cannon LLP. Ms. Stovall has extensive experience in complex commercial litigation, with particular expertise in legal malpractice and securities law. She has litigated in several federal and state courts and arbitration forums.

Joel A. Chernov is of counsel to Constantine Cannon LLP. Mr. Chernov has handled a wide range of complex commercial and securities litigation matters, including matters involving partnership disputes and accountant and attorney liability.

This article originally appeared in the Winter 2015 issue of Inside, *published by the Corporate Counsel Section, and the Summer 2016 issue of* One on One, *published by the General Practice Section of the New York State Bar Association.*

Diversity in Health Law: Three Perspectives

Editor's Note: The area of health law embodies a wide variety of practice areas—from in-house counsel at a hospital, to professional licensing, to regulatory compliance, to medical malpractice—the list goes on! As young lawyers, we may not have a full understanding of what exactly a health lawyer does. This article attempts to provide three different perspectives of what health law is from three self-described health lawyers with varying levels and types of experience.

By Edie Brous, Nathan G. Prystowsky, and Jennifer Brown

Edie Brous: Administrative Law and Professional Licensing

Describe Your Practice Area of Health Law

My practice is administrative law. I represent health care professionals before the licensing boards in disciplinary matters. When people think about professional liability they generally think about medical malpractice, but there are many other areas of concern to health care professionals. A professional license is a person's livelihood. The damage can be more consequential with licensure discipline than with lawsuits because licensing boards can prohibit a person from practicing and end a career.

I represent and advise health care professionals who are being investigated and/or disciplined by the board. Some of my clients can prevent licensure discipline completely, while others will be potentially subject to penalties ranging from reprimand to revocation. I prepare them for the investigative interview and represent them at that interview. I also review and submit additional materials to the investigator and prepare clients and materials for informal settlement conferences. Some cases require formal hearings. This is similar to trial work, as it involves exhibit preparation, witness planning, and participation in judicial proceedings to admit evidence and conduct examinations before the hearing panel.

What Led You to Practice in This Specific Area of the Law?

I was a nurse, practicing in the Emergency Department, Critical Care and the Operating Room for about 20 years before I went to law school. I had climbed the administrative ladder to Assistant Director of Nursing when my mother died of medical malpractice. I knew my way around hospitals, doctors, and the entire medical system, but did not know anything about the law, so that drew me to law school.

As a new lawyer, I practiced in a medical malpractice defense firm. I left to work as a contract nurse attorney in multi-district litigation for pharmaceutical defense for a while, then returned to medical malpractice litigation. As a nurse attorney, I worked with the largest professional liability insurance company for nurses and began representing nurses and other health care professionals for licensure issues as well as malpractice. I then broke from firm life to open a solo practice in 2005 devoted exclusively to licensure defense for health care professionals.

What Recommendation Would You Make for Someone Interested in Your Area of Practice?

Develop the interpersonal skills required for the counseling aspects of representation. Health care professionals who are under investigation and facing potential disciplinary charges are stressed, or even traumatized. They cannot process and retain information critical to their defense unless their lawyer understands trauma and knows how to address many unspoken fears.

I would also recommend that law students or young lawyers take as many business courses as possible. Understanding the law and developing legal skills are only a part of being successful. It is also essential to understand the business of law and of running a practice.

What's Your Favorite Part About Practicing in This Area?

As a nurse myself, I enjoy representing members of a profession I understand so well. My clients don't have to translate the medicine to me or explain nursing practice issues, so we can focus solely on the legal issues. Nurses feel safer when the attorney representing them also has a nursing background and can speak their language from personal experience. It allows me to think of things a person without this background would not be able to, and that is particularly satisfying.

I attend as many nursing board meetings as I can and have developed professional relationships with many board members, prosecutors and investigators. Although our roles might be adversarial, there is a mutual professional respect and civility in our communications. That works to the advantage of my clients and allows me to be more effective in representing their interests.

What's the Worst Part?

Administrative law can be a little Kafka-esque. Licensees don't have the rights they assume they do and the system can be unfair. There tends to be a presumption of guilt at the outset, yet confidentiality provisions don't allow the person who is the subject of the complaint, and whose livelihood is at risk, to see the complaint or other investigative materials for use in their own defense. Most health care professionals are regulated by the Education Department in New York, and final decisions are made by a Board of Regents, so the bureaucracy can be inconsistent and frustrating to deal with. The parties with power are either not health care professionals themselves, or are disproportionately people with that background, but who are not in current clinical practice.

Much of the regulatory approach to adverse events is accusatory and punitive. For nurses in particular, this approach blames providers for human error, rather than addressing organizational and system problems that don't permit nurses to practice safely. There is not always a distinction made between purposeful misconduct and simple (and inevitable) human error. Nurses are often held to an unrealistic standard and expected to overcome human limitations. Being investigated by the nursing board can be demoralizing, and I have clients who chose to leave nursing altogether as a response to the experience. We are requiring them to knit with one needle, then punishing them for poor quality stitches. It always makes me sad to see someone who loved nursing and was wholly devoted to the profession leave it in despair. I have sent many of my clients for trauma counseling but the field still loses some of them forever.

How Could a New Attorney Learn How to Practice in This Area?

Take courses in law school or CLEs in administrative law, particularly in the state in which you will be practicing so you understand the difference between civil and administrative law. Read, re-read, and re-read the professional practice and administrative procedure acts that underline the regulatory agencies you will be working with. Review published disciplinary actions to see what professionals are disciplined for and what kind of penalties are imposed. I found that basic litigation skills were helpful as a background and getting at least a few years of experience in a firm can assist in developing networks and potential mentors. Develop counseling skills and know as much as possible about the working conditions and culture of the client population you will be serving.

What Advice Would You Give to New Attorneys Still Seeking Their Niche?

Look back on previous employment experiences and analyze what you liked and didn't like about those jobs. Evaluate your skills—are you good at writing? Do you speak more than one language? Do you have life experience in some field? Think about how you would like to use those skills in the practice of law. Do you prefer working alone at a desk or in public settings with others? Do you need slow and steady, predictable days or do you prefer the adrenalin shots of unpredictability? What do you find stressful? What do you find rewarding? Know yourself. Determine what client population you are interested in working with and what area of the law you find interesting. Belong to bar associations and committees to interact with others and to learn practice management. Have the flexibility to shift gears and try new things. Do something because you will enjoy it—not because you think it is lucrative or prestigious. If you do what you love you will never regret your decisions; your work will be meaningful and your niche will find *you*.

Nathan G. Prystowsky: Vendor Governance

Describe Your Practice Area of Health Law

Taking care of patients requires a coordinated team effort. A large part of patient care rests on vendors who provide medical supplies and vendors who perform services like medical waste disposal. Every doctor I know takes better care of their patients when they can rely on having these resources at their disposal. I help build a reliable network of vendors to support patient care. That means I develop internal policies with the doctor's goals for patient care in mind. I then take those policies and use them to create contractual relationships with outside vendors that will ensure we are being provided the best materials to support our patient's health. I then actively manage our vendor relationships to keep the goals of the practice in line with the resources our vendors provide.

What Led You To Practice in This Specific Area of the Law?

The key to finding a practice area comes from a combination of curiosity, a willingness to get out of your comfort zone, and a general sense of how to make a contribution to the field. Developing a willingness to get out of my comfort zone was important. Early on in my career I can remember a partner I worked with pulled me aside and told me "It would be nice if we could just work on one case at a time, finish up and move to the next one, but that's just not the reality of the practice of law and you have to get used to touching twenty or more files in a given day." It takes time to have the confidence to go from a single research assignment to managing a caseload and eventually tackling new and novel legal issues. Once I could do that, I looked for opportunities to practice in an area that I was eager to explore. What attracted me to health care was all the technological innovations and the legal challenges to keep up with the application of these technologies. For example, it used to be that a person performing a surgery needed to be in the same room and certainly the same state as the patient being operated on. That reality is something that will change in the future and knowing how to make the law work to accommodate a situation where a person in New York operates

on someone in California is a problem that intrigues and interests me.

What's Your Favorite Part About Practicing In This Area and What's the Worst Part?

The best part of this area of practice is that every day there are exciting new innovations in technology and jurisprudence that require thinking and real world decision making. All the topics in the news like privacy, cybersecurity, ethics with stem cell use, and telehealth/jurisdiction issues with licensing come up and require real solutions to existing problems. The worst part is for many of these issues the law has not caught up to the challenges presented by these innovations and that means answers at times do not exist, or are in the process of being developed, and many times the answer one day changes the next day. You have to be willing to get out of your comfort zone and rely on the best information available and present state of the law without having a secure permanent answer. A hundred years of precedent does not exist for these issues yet.

What Would You Recommend for People Interested in This Area?

A lot of the legal positions in my area of health care do not fit into the general practice model we think about in law school. It requires a diverse skill set. The positions have legal aspects but assume a multitude of responsibilities and fall under different titles. It is not uncommon to see people have a job with a dual role of human resources and regulatory compliance. In this career path people start work doing the employment aspect of the law and that develops and carries over into other forms of compliance like HIPAA. Most positions are created to have elements of law practice, contract management, information technology expertise, among other areas where law and management fuse together.

How Could an Attorney Learn to Practice in This Area?

Counseling a client in this area means knowing how to make it easy for a doctor to walk in, see patients, and take care of patients' needs. Attorneys work on a very specific support aspect of this business by providing guidance on how to make use of legal instruments and procedures to accomplish this goal. That means studying up to learn how to implement new regulations by using policies and contracts. When the law requires the use of electronic prescriptions, the doctor should only need to worry about pushing the buttons on the phone. Among other things, this means vetting many vendors to ensure they have the requisite certifications, reviewing the contracts, setting up internal policies so the right people have access to patient records and making sure this system works with the current line of business system for medical records.

Jennifer Brown: In-House Counsel for Medical Start-Up Company

Describe Your Practice Area of Health Law

I currently am the Staff Attorney for Progressive Emergency Physicians a company that staffs, manages, and consults for emergency departments. I practice labor and employment, corporate and transactional, and health law. Within the health care arena, I have several responsibilities, including familiarizing myself with relevant rules and regulations, such as HIPAA and MACRA, and drafting and training on internal policies and procedures. Additionally, I handle both managed care contract negotiation and review. Furthermore, I acquire and maintain all insurance, such as professional liability insurance, for the company.

What Led You to Practice in This Specific Area of the Law?

The opportunity to go in-house for a start-up company presented itself to me in July of 2014. I had no experience in health law and I had graduated law school in May of 2013; I was a brand new attorney. Working for a small company would be an experience unlike any other. I knew I had to take the position.

What Recommendation Would You Make For Someone Interested in Your Area of Practice?

I recommend working for a firm that concentrates on health law. Health law is great for many reasons, one of which being you're not simply studying HIPAA. Health law reaches corporate and transactional and labor and employment areas of law and exposes you to business strategy as well. Understanding the business that you're involved with is almost as important as understanding the law. Your clients will appreciate you if you are cognizant of their time and goals.

What's Your Favorite Part About Practicing in This Area?

This area of law is always evolving and reaches many other areas of law.

What's the Worst Part?

The law seems to be out of touch with the "business" of medicine.

How Could a New Attorney Learn How to Practice in This Area?

CLEs and educating yourself. Subscribe to online publications, such as ModernHealthcare or Crain's, that address health care either partially or exclusively. This will keep you abreast of the most recent issues surrounding healthcare.

What Advice Would You Give to New Attorneys Still Seeking Their Niche?

Get as much exposure doing as much as possible. It's as important to find out what you *don't* like as it is to find what you *do* like.

Edie Brous RN, BSN, MS, MPH, JD, is a Nurse Attorney in private practice in New York City where she concentrates in professional licensure representation and nursing advocacy. She has practiced in major litigation law firms representing nurses, physicians, hospitals and pharmaceutical companies. Edie is admitted to practice before the bars of the state courts of New York, New Jersey and Pennsylvania, the Southern and Eastern Districts of the New York Federal Courts and the United States Supreme Court. She is a member of many bar associations and nursing organizations and was the 2011 president of The American Association of Nurse Attorneys.

Ms. Brous has an extensive clinical and managerial background in the Operating Room, Emergency Department, and Critical Care Nursing. In addition to her law degree, she holds masters' degrees in Public Health and in Critical Care Nursing from Columbia University. She has been part-time faculty at Columbia University, and has held adjunct faculty positions at several universities teaching legal aspects of nursing. Ms. Brous has lectured and published extensively on legal issues for nurses and co-authored the textbook *Law and Ethics for Advanced Practice Nurses*. She is the 2008 recipient of the Outstanding Advocate Award from The American Association of Nurse Attorneys.

Nathan G. Prystowsky is the Director of Vendor Governance at Janet H. Prystowsky, MD, PC. He graduated from Pace Law School in 2008.

Jennifer Brown is the Staff Attorney for Progressive Emergency Physicians. She graduated from the Maurice A. Deane School of Law at Hofstra University in 2013 where she was a member of the *Journal of International Business and Law*. Ms. Brown is a member of several bar associations and is admitted to practice in New York and New Jersey.

What Young Lawyers Need to Know About Their Ethical Obligations in Light of State-by-State Legalization of Marijuana

By Brad Landau

Introduction

The Honorable Judge Gustin Reichbach suffered from pancreatic cancer.[1] "Elected to the New York State Supreme Court in 1999, [Judge Reichbach] decorated his courtroom with pictures of Paul Robeson, Clarence Darrow...as well as a neon sign showing the scales of justice."[2] In his time on the bench, Judge Reichbach was no stranger to controversy. Known once as the "condom judge" for handing out free condoms,[3] Judge Reichbach more recently made headlines as the "pot-smoking judge" when he openly advocated legalizing medical marijuana, publicly revealing that he illegally used the substance to alleviate pain associated with cancer.[4]

In an op-ed published in May 2012 with the *New York Times*, Judge Reichbach described the constant nausea, pain, and difficulty eating, and the relief that marijuana brought.[5] Judge Reichbach urged New York lawmakers to legalize medical marijuana, not as a law and order issue, but as a medical and human rights issue.[6] At 65 years old, Judge Reichbach passed away at his home in Brooklyn on July 14, 2012.[7] Judge Reichbach was never disciplined for openly smoking marijuana,[8] and it may have been that Judge Reichbach knew his life was coming to an end when he wrote "[i]t is to help all who have been affected by cancer, and those who will come after, that I now speak."[9]

Shortly after the passing of Judge Reichbach, New York State became the twenty-third state to legalize medical marijuana in 2014.[10] As the legislation was introduced, there was some discussion of calling it "Gus's Law,"[11] as symbolic of Judge Gustin Reichbach. While the legislation was ultimately called the Compassionate Care Act,[12] Judge Reichbach's plea did not fall on deaf ears. The only conundrum to Judge Reichbach's posthumous victory is that if he were still alive today, suffering from cancer, he would be found in violation of the Code of Judicial Conduct for using medical marijuana.[13] Similarly, Judge Reichbach would also be found in violation of the Code of Judicial Conduct even if he were living in any of the handful of states that now legalize recreational marijuana.[14] This conundrum, and its implications for young lawyers, is the focus of this article.

I. Lawyers, Professional Conduct, and State Bar Ethics Boards

Every lawyer is responsible for observing the Rules of Professional Conduct[15] at all times.[16] This responsibility, found in the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules"), has been adopted by forty-nine states in whole or in part.[17] Additionally, every state has implemented its own State Rules of Professional Conduct ("State Rules") that closely resemble the Model Rules.[18] The Model Rules assume the importance of the adversarial system for reaching truth and rendering justice, and essentially set a floor for unethical attorney professionalism.[19] Concerns about the application of the Model Rules and State Rules are raised when states legalize marijuana for both medical and recreational use, while federal laws continue to prohibit all uses of marijuana.

Two decades ago, the concept of legalizing marijuana was unthinkable. But now, in just the past six years, over half of the states have legalized medical marijuana.[20] And a handful of states, in just the past three years, have legalized recreational marijuana.[21] Bold and proud, United States citizens are approving marijuana more and more,[22] and this culture shift is not about to cease. As many states create billion dollar marijuana industries,[23] and even allow tourists to experiment with their new state laws,[24] lawyers have started to ask four pertinent questions: (1) whether they may personally use medical and recreational marijuana under state law, (2) whether they may advise clients about the parameters of new medical and recreational marijuana laws, (3) whether they may advise marijuana-related businesses, and (4) whether they may be directly involved in operating a marijuana-related business.

Numerous state bar ethics committee opinions have been released in recent years answering these questions.[25] The opinions cite regularly to Model Rules 1.2 (scope of representation)[26] and 8.4 (misconduct).[27] In a few states, appellate courts have amended their State Rules by adding new subsections or comments under their rules 1.2 or 8.4, making it clear that lawyers in those states may advise clients about the parameters of new medical and/or recreational marijuana laws, as well as advise marijuana-related businesses.[28] So far, New York State has not amended its State Rules due to new medical marijuana laws.

So far, every state bar ethics committee that has answered the question of whether lawyers may personally use medical and/or recreational marijuana has held that lawyers may use marijuana to the extent permitted by state law. Specifically, the Alaska, Connecticut, Ohio, and Washington state bar ethics committees, the only committees to answer this question, have said that lawyers are not acting in violation of their ethical obligations (despite the fact that they are acting in violation of federal law) when they personally use medical marijuana within the context allowed by state law, unless the lawyer's use of marijuana also implicates the lawyer's trustworthiness or honesty (e.g., if the lawyer lies to federal investigators

about his use of marijuana) or otherwise affects the lawyer's competency or fitness to practice law.[29] Additionally, two out of the four states that have legalized recreational marijuana (Alaska and Washington) released ethics opinions saying that their lawyers may personally use recreational marijuana.[30] Colorado and Oregon, the other two recreational marijuana states, are silent on the question of whether a lawyer may personally use recreational marijuana. Every opinion, of course, is careful to make clear that a lawyer who personally uses medical and/or recreational marijuana is in technical violation of federal law and that this *may* adversely reflect on a lawyer's honesty, trustworthiness, and fitness to practice law.

State bar ethics committees have also unanimously found that lawyers may advise clients on the parameters of new state marijuana laws, so long as lawyers advise clients about conflicting federal law.[31] But notably, a split is forming in the opinions of various state bar ethics committees on the questions of whether lawyers may counsel clients in marijuana-related businesses,[32] and whether lawyers may be directly involved in operating a marijuana-related business.[33]

II. Judges, Judicial Conduct, and Judicial Ethics Advisory Boards

A judge shall comply with the law, including the Code of Judicial Conduct.[34] This canon, found in the ABA's Model Code of Judicial Conduct, is similarly found in every state code of judicial conduct.[35] The canon lays the core principle that maintaining public confidence in the judiciary is a vital government interest justifying the discipline of judges whose actions impugn non-compliance with the law.[36] Concerns about the canon are raised when states begin legalizing marijuana for both medical and recreational use while federal law continues to label marijuana use as a crime.

State judges have recently started to question whether they may use medical and recreational marijuana. So far, this question has only been asked and answered by one state's judicial ethics advisory board, and its answer is no. Under Colorado state law, both medical and recreational marijuana is legalized.[37] A Colorado judge requested an advisory opinion from the Colorado Supreme Court Judicial Ethics Advisory Board ("the Colorado Board")[38] asking whether a Colorado state judge, in his or her personal time, may use medical and recreational marijuana.[39] The Colorado Board concluded that marijuana remains illegal under federal law, and therefore no state judge may use marijuana for any purpose.[40]

In its opinion, the Colorado Board first analyzed Rule 1.1(A) of the Colorado Code of Judicial Conduct ("the Code") and its definitions-terminology section.[41] Rule 1.1(A) requires judges to "comply with the law."[42] Neither Rule 1.1(A) nor the definitions section specified adherence to both federal and state law.[43] But the Colorado Board analogized sister-state court cases where other judicial ethics advisory boards disciplined state judges for violating various federal laws, thereby finding it to be beyond dispute that judges are required to comply with federal law.[44] As such, the Colorado Board found that judges may not use marijuana because federal law still prohibits the use of marijuana for any purpose.[45]

However, the Colorado Board's opinion went further by analyzing an alternative Rule, which states that not every violation of the law constitutes a violation of the Code.[46] Colorado's unique provision, Rule 1.1(B),[47] creates an exception to Rule 1.1(A).[48] Rule 1.1(B)'s exception is narrowly limited to minor violations of the criminal law. The Colorado Board gave two examples of criminal laws that are minor and exempt from the purview of Rule 1.1(A), based on the minutes/notes of the Committee to Consider Revisions to the Code.[49] The two examples noted are violations of (1) relatively insignificant traffic offenses, and (2) local ordinances, "not state or federal drug laws."[50] Therefore, the Colorado Board concluded that using marijuana is not a minor violation of the criminal law, and does not meet the Rule 1.1(B) exception to Rule 1.1(A).

Additionally, Washington State, another that has legalized medical and recreational marijuana,[51] advised on a similar issue. Here, a Washington State judge requested an advisory opinion from the Washington Supreme Court Judicial Ethics Advisory Committee ("the Washington Committee") for the obligations of a judge when the judge learns that a court employee owns a medical marijuana business in compliance with Washington State law.[52] The Washington Committee's opinion, although not as detailed as the Colorado Board's opinion, used similar analysis. By concluding that Washington State court employees must comply with both state and federal law, and that violating the law undermines the public's confidence in the integrity of the judiciary, the Washington Committee held that a court employee owning a medical marijuana business remains illegal.[53] It is important to note that the Washington Committee's opinion, which is restrictive toward the judiciary branch as it relates to marijuana, is very different from the Washington State Bar Ethics Committee opinion which is the most relaxed opinion for lawyers who seek to use and participate in Washington's new medical and recreational marijuana laws.[54]

Conclusion

Legal use of marijuana, whether in a recreational or medical context, is a new and growing concept. As lawyers, we must always be mindful of our ethical obligations and be wary where our conduct is permissible under state law but forbidden under federal law. This article is an important reminder to all young lawyers who wish to take advantage of state laws legalizing marijuana use (whether for personal use or to advise and assist clients) to remain mindful of their professional obligations and be proactive in searching for current and relevant ethical guidance in this evolving landscape.

Endnotes

1. Jim Dwyer, *Gustin Reichbach, Judge With a Radical History, Dies at 65*, N.Y. Times, July 17, 2012, www.nytimes.com/2012/07/19/

nyregion/gustin-reichbach-judge-with-a-radical-history-dies-at-65.html.

2. *Id.*

3. Andrea Peyser, *'Condom' judge also dispensing junk justice*, N.Y. Post, Dec. 16, 2010, 5:00 AM, nypost.com/2010/12/16/condom-judge-also-dispensing-junk-justice/.

4. Victoria Bekiempis, *Will Gustin L. Reichbach, Pot-Smoking Judge, Get In Trouble For Using Medical Marijuana?*, The Voice, May 17, 2012, www.villagevoice.com/news/will-gustin-l-reichbach-pot-smoking-judge-get-in-trouble-for-using-medical-marijuana-update-6703220.

5. Gustin Reichbach, Op.-Ed., *A Judge's Plea for Pot*, N.Y. Times, May 16, 2012, www.nytimes.com/2012/05/17/opinion/a-judges-plea-for-medical-marijuana.html?_r=0.

6. *Id.*

7. *Gustin Reichbach, Judge In Favor Of Medical Marijuana, Dies At Age 65*, The Huffington Post, July 16, 2012, www.huffingtonpost.com/2012/07/16/gustin-reichbach-judge-medical-marijuana_n_1675684.html.

8. Jen Chung, *Pro-Medical Marijuana Brooklyn Judge Dies From Cancer*, Gothamist, July 15, 2012, gothamist.com/2012/07/15/pro-medical_marijuana_brooklyn_judg.php.

9. Reichbach, *supra* note 5.

10. Jon Campbell, *Cuomo signs New York's medical marijuana bill*, USA Today, July 7, 2014, www.usatoday.com/story/news/nation/2014/07/07/cuomo-signs-medical-marijuana-bill/12323967/.

11. Emily Jane Goodman, *Reichbach Would Find No Comfort Under Marijuana Law*, 251 N.Y.L.J. 6 (June 25, 2014).

12. New York State Medical Marijuana Program, https://www.health.ny.gov/regulations/medical_marijuana/ (last visited Sept. 28, 2016).

13. *See infra* II (examining recent Judicial Ethics Advisory Board opinions).

14. *Infra* II.

15. Model Rules of Prof'l Conduct Preamble § 12 (2015); Model Rules of Prof'l Conduct R. 5.7 (2016); *see also* Christina Parajon Skinner, *The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short*, 63 S.C. L. Rev. 241, 260 (2011) ("It is well understood that a lawyer is expected to conform his behavior to the rules of professional conduct at all times, not just while at work.").

16. *See In re C de Baca*, 11 P.3d 426, 429–30 (Colo. 2000) (holding that lawyers must adhere to the Rules of Professional Conduct even when suspended from the practice of law).

17. *State Adoption of the ABA Model Rules of Professional Conduct*, Am. Bar Ass'n, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Sep. 28, 2016). California is the sole exception. *Id*.

18. Katherine Tianyue Qu, *Passing the Legal Bar: State Courts and the Licensure of Undocumented Immigrants*, 26 Geo. J. Legal Ethics 959, 971 (2013).

19. Amy J. Schmitz, *Ethical Considerations in Drafting and Enforcing Consumer Arbitration Clauses*, 49 S. Tex. L. Rev. 841, 847 (2008).

20. *State Medical Marijuana Laws*, National Conference of State Legislatures, http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited Sept. 28, 2016).

21. Tom Huddleston, Jr., *How Legalized Marijuana Is Sweeping the U.S.—in One Map*, Fortune, June 29, 2016, http://fortune.com/2016/06/29/legal-marijuana-states-map/.

22. Jeffrey M. Jones, *In U.S., 58% Back Legal Marijuana Use*, Gallup (Oct. 21, 2015), http://www.gallup.com/poll/186260/back-legal-marijuana.aspx.

23. Available economic research demonstrates that "the legal marijuana industry generated roughly $1.53 billion in revenues in 2013." Christopher Ingraham, *The marijuana industry could be bigger than the NFL by 2020*, The Washington Post, Oct. 24, 2014, https://www.washingtonpost.com/news/wonk/wp/2014/10/24/the-marijuana-industry-could-be-bigger-than-the-nfl-by-2020/.

24. *See e.g.*, Colo. Const. art. XVIII, § 16 (making no distinction about in state residents versus tourists, in terms of recreational possession, purchase or consumption of marijuana in Colorado); Colo. Rev. Stat. §§ 12-43.4.

25. *See, e.g.*, NYSBA Comm. On Prof'l Ethics, Formal Op. 1024 (2014).

26. Model Rules of Prof'l Conduct R. 1.2(d) (2016) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent").

27. Model Rules of Prof'l Conduct R. 8.4(b) (2016) (explaining that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer.").

28. *See, e.g.*, *In the Supreme Court of the State of Alaska Order No. 1863*, Alaska Court System (June 23, 2015), www.courtrecords.alaska.gov/webdocs/sco/docs/sco1863.pdf (amending Alaska Rules of Professional Conduct rule 1.2 by adding two new subsections, and 8.4 by adding a new comment).

29. *Ethics Implications of the Law Legalizing Some Sales of Marijuana: An Informal Preliminary Analysis by the Ethics Committee*, Alaska Bar Association, https://www.alaskabar.org/servlet/download?id=3075 (last visited Sep. 13, 2016) [hereinafter *Informal Analysis by The Alaska Ethics Committee*]; Conn. Bar Ass'n Prof. Ethics Comm., Informal Op. 14-08 (Nov. 2014); Sup. Ct. of Ohio Bd. of Prof. Conduct, Op. No. 2016-6 (Aug. 2016); Wash. Bar Ass'n, Advisory Op. 201501 (2015).

30. *Informal Analysis by The Alaska Ethics Committee*, *supra* note 29; Wash. Bar Ass'n, Advisory Op. 201501 (2015).

31. *See, e.g.*, NYSBA Comm. On Prof'l Ethics, Formal Op. 1024 (Sep. 2014). Importantly, the Colorado Bar Association originally stated that lawyers may not advise clients on any laws related to medical marijuana, but the Colorado Supreme Court subsequently amended its State Rule 1.2(d) to allow lawyers to provide legal advice and services related to medical marijuana.

32. State bar ethics committee opinions that allow lawyers to advise clients on marijuana-related businesses are Arizona, Alaska, Colorado, Connecticut, Hawaii, Illinois, New York, and Washington. *See* State Bar of Ariz. Ethics Comm., Ethics Op. 11-01 (Feb. 2011); *Informal Analysis by The Alaska Ethics Committee*, *supra* note 29; Colo. Bar Ass'n Ethics Comm., Op. 125 (Dec. 2013) (withdrawn May 2014) (superseded by Colorado Rule of Professional Conduct 1.2(d)); Conn. Bar Ass'n Prof. Ethics Comm., Informal Op. 2013-02 (Jan. 2013); Disciplinary Bd. of the Haw. Sup. Ct., Formal Op. 49 (Aug. 2015) (superseded by Hawaii Rule of Professional Conduct 1.2(d)); Ill. State Bar Ass'n, Prof. Conduct Advisory Op. 14-07 (Oct. 2014); NYSBA Comm. On Prof'l Ethics, Formal Op. 1024 (Sep. 2014); Wash. Bar Ass'n, Advisory Op. 201501 (2015). Additionally, the State of Minnesota took a very different route and has allowed its lawyers to advise clients on the parameters of its medical marijuana law, as well as advise clients on medical marijuana-related businesses, pursuant to state statute. *See* MINN. STAT. § 152.32(2)(i). On the other hand, some states, like Maine, Ohio, and Pennsylvania have adopted a stricter standard for attorneys seeking to advise clients about marijuana-related businesses. *See* State of Me. Bd. of Overseers of the Bar Prof. Ethics Comm., Op. 214 (May 2016) (forbidding lawyers to counsel clients engaged in the business of medical marijuana, but recommending that the state amend its Rule 1.2 to allow such counseling); Sup. Ct. of Ohio Bd. of Prof. Conduct, Op. No. 2016-6 (Aug. 2016) (concluding that "a lawyer cannot provide the legal services necessary to establish and operate a medical marijuana enterprise or transact with a medical marijuana business."); Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm. & Phila. Bar Ass'n Prof'l Guidance Comm., Joint Formal Op. 2015-100 (2015) (prohibiting lawyers from counseling or assisting clients involved in marijuana-related activities authorized under state law, but recommending that the state amend its Rule 1.2 to allow such counseling).

33. The Washington State Bar Ethics Committee opinion is the only opinion allowing lawyers to be directly involved in operating a marijuana-related business. *See* Wash. Bar Ass'n, Advisory Op. 201501 (2015). *But see Informal Analysis by The Alaska Ethics Committee*, *supra* note 29 ("a lawyer should exercise caution and not become directly involved in operating a business that remains illegal under federal law."); Sup. Ct. of Ohio Bd. of Prof. Conduct, Op. 2016-6 (Aug. 2016) ("a lawyer cannot provide the legal services necessary to establish and operate a medical marijuana enterprise or transact with a medical marijuana business.").
34. *See* Model Code of Judicial Conduct Canon 1.1.
35. Marie McManus Degnan, *No Actual Bias Needed: The Intersection of Due Process and Statutory Recusal*, 83 Temp. L. Rev. 225, 227 (2010) ("All fifty states have adopted the American Bar Association's Model Code of Judicial Conduct… in substantial part.").
36. *See generally*, Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 26 Syracuse L. Rev. 1181, 1205 (1986).
37. *See supra* notes 20-21.
38. *Judicial Ethics Advisory Board*, Colorado Judicial Branch, https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=15 (last visited Dec. 19, 2015). The Colorado Board is a seven-member panel comprised of both judges and non-judges that provides "advice on ethical issues to judicial officers who request an opinion on prospective conduct." *Id.*
39. *See* Colo. Sup. Ct. Judicial Ethics Advisory Bd., Advisory Op. 2014-01 (July 2014).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. Rule 1.1(B) of the Colorado Code of Judicial Conduct states in full that "[c]onduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law." This provision is not in the model code or codes in other states, although the model code notes in the preamble that "it is not contemplated that every transgression will result in disciplinary action." *See also* Model Code of Judicial Conduct Scope § 6 (2016).
48. Colo. Sup. Ct. Colo. Judicial Ethics Advisory Bd., Advisory Op. 2014-01 (July 2014).
49. *Id.*
50. *Id.*
51. *See supra* notes 20–21.
52. Wash. Sup. Ct. Ethics Advisory Comm., Op. 15-02 (2015).
53. *Id.*
54. *See supra* II and accompanying footnotes (examining the Washington State Bar Ethics Committee opinion).

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Ten Great Reasons to Become an Elder Law Attorney

By Anthony V. Falcone and Ellen Victor

There's both good news and bad for America's seniors. The good news is that healthier lifestyles and modern medicine have resulted in longer lifespans. In 1950 the worldwide life expectancy was about 50 years. Today it is pushing 80. And, of course, those numbers are higher for women. (There are lots of variables, including where you were born, when, and so on). The bad news is that seniors are increasingly less able to care for themselves both physically and financially. That's where elder law attorneys come in.

1. It's a growing and versatile field. The baby boomers aging. Today, the oldest baby boomers are already in their 60s and older and by 2030, about one in five Americans will be older than 65. Some experts believe that the aging of the population will place a strain on social welfare systems. Additionally, many known illnesses that would have otherwise caused death just twenty years ago are now being treated or cured. This will ultimately result in a much larger elderly population. Therefore, the need for attorneys who can provide their elderly clients not only with information about alternative ways of paying for health care such as SSD, Veteran's Aid and Attendance and Medicaid will only continue to grow in the future. Elderly clients will need someone who can draft the appropriate documents to ensure their hard-earned assets are not diminished because of a health-related or financial crisis.

   As to versatility, one of the nicer things about being an elder law attorney is that whatever the client's financial situation, we can help. For the less affluent client, we can prepare Medicaid and SSI or SSD applications. We can advise on social programs such as veteran's benefits and make a real difference in their quality of life. For the Middle Class who have assets such as real property(ies), an IRA and some money in the bank, we can prepare trusts that can preserve assets while making them eligible for means-tested programs such as Medicaid, which helps pay for health care expenses including but not limited to, home care aides and nursing home stays. For those lucky enough to have a large amount of assets, the client will tend to want to avoid income tax, capital gain and estate taxes so you may want to become familiar with more advanced methods of trusts and tax laws. Because you could potentially represent all of these groups of individuals, your pool of potential clients will be larger as well.

2. It never gets boring. Elder Law encompasses numerous practice areas. We often draft wills and trusts just as any estate planning attorney does, but with a focus towards the unique issues facing the elderly. More complex trust work for an elder lawyer often involves Medicaid asset protection. Medicaid is a federally mandated, state-run program that provides financial assistance to those with limited financial means that are in need of substantial medical assistance with their daily activities of living. Pre-need planning protects a person's assets so that he or she meets the minimal asset requirement should her or she be in need of assistance at a later point in his or her life. Should a senior not have pre-planned, we often deal with crisis planning. People call us when a loved one is either entering a nursing home or in immediate need of home health care assistance. Pre-crisis planning also involves drafting powers of attorney and health care directives so that persons are not in need of a guardianship should they become so incapacitated that they cannot make their own decisions. If someone has not signed directives and decisions need to be made for the senior about his or her care, guardianship is a lengthy, intrusive and expensive alternative. Even within a guardianship proceeding, an elder lawyer can play many roles—attorney for the allegedly incapacitated person, for the person seeking guardianship, as court evaluator (essentially is the attorney for the court), or court examiner. In a crisis case, elder lawyers often handle filing the Medicaid applications. Some elder law attorneys are also able to handle planning and filing for certain Veteran's benefits for aid. Finally, we then handle the probate (with a Will) or Administration (without a Will), finalizing people's affairs after they die.

3. We care. Along with never being bored, we often need to act in an almost social worker capacity. Our clients are often at very fragile points in their lives, or they are dealing with loved ones who are also very vulnerable, dealing with grief, and having to make quick decisions about how to get the best care while not impoverishing themselves or their spouses. Even when our clients are healthy, having to discuss their own mortality and potential incapacity can be quite emotional. Our conference

rooms use a steady supply of tissues. Our job is to be good listeners, and to have empathy for the client's situations. It is very rewarding to be able to guide people at this most vulnerable stage, get them the best results and help them realize their goals.

4. Knowledge is Power. It is of key importance to utilize all of your sources of knowledge and to shadow a mentor or senior attorney before you tackle any elder law task. Mistakes in this area of the law often mean there is financial or benefit loss to the client which, as you can imagine, is unpleasant to deal with and in fact could result in a law-suit or disciplinary action against you. But fear not, knowledge is power in the elder law field. All of your resources are there to give you everything you need to succeed. You should not take this information in large gulps but rather small sips over a long period of time to ensure that you are comfortable advising your clients. Please see your local bar association and inquire about mentorship programs for newly admitted attorneys.

5. Important piece of puzzle to other attorneys:

   a. Family law—Oftentimes married couples create wills, trusts, powers of attorney and health care proxies naming each spouse as the primary fiduciary. What happens when they divorce? The elder law attorney who is well versed in estate planning techniques will be there to discuss ways to distribute marital assets such as the Qualified Domestic Relations Order (QDRO) and, of course, to prepare all new wills, trusts and advanced directives, like a power of attorney and health care proxy, for your clients. You will also be able to lend a valuable voice to the conversation when it comes time to discuss how their divorce will affect their estate or their Medicaid eligibility and prepare documents for them accordingly.

   b. Personal Injury—If a client is receiving Medicaid and receives a personal injury award, our guidance and planning is often needed to preserve that award. Often trusts and estates attorneys who do not have the specific skill sets in elder law will reach out to us for help either for their clients, or their clients' parents.

6. Cases are often exciting and unique. There are no cookie-cutter cases. Because of the unlimited number of variations to an individual or family's personal or financial circumstances, each case you encounter will be as different as a fingerprint. This provides you with a multitude of ways of testing your problem-solving skills as well as your knowledge on a daily basis. For many attorneys in the elder law arena, your ability to reach into your tool box of knowledge and help a client is fulfilling, exciting and fun.

7. Help clients claim benefits through navigating bureaucratic nightmares: Applying for most government benefits provides a mountain of road blocks and frustration. For example, Supplemental Security Income (SSI) is a means-tested program that comes with the added benefit of automatic Medicaid coverage. However, in order to access SSI, one must wade through a tremendous amount of bureaucratic rules and regulations. Similarly, Medicaid for seniors will consist of payment of medical services over and above their own resources and insurance for an indefinite period—sounds great, but applying for this benefit requires intimate knowledge of the Social Services Law and the rules for transferring assets for eligibility. Social Security Disability (SSDI) is also an arduous process and requires the ability to at least advise your clients where to go and what to expect (while not technically a benefit for elderly clients it is helpful to be familiar with this benefit). Veteran's benefits such as Aid and Attendance are wonderful benefits to eligible elderly clients to assist with payment of care while living at home; you can be invaluable to the client who may not even know this benefit exists. Finally, let's not forget Medicare—the card comes in the mail at age 65, but what does it cover? What is Medicare Part D? Part B? Again, you can unravel these messy but necessary programs for your clients and the sheer look on their faces when they finally get it will not only be fulfilling to you personally but will likely gain you clients for life.

8. Return business. Frequent flyer program! Although many clients are one and done (e.g., the client who needs a Will may never need you again unless the law or his or her circumstances change) there is potential for return business. Many trusts that were initially drafted for the purpose of asset protection are drafted for those who are already medically fragile, and when they need long-term care, whether in their homes or in a nursing home, they come back for help with the Medicaid application. Many times, family members of your now-deceased will client will come to back for help with the probate.

9. Close-knit field with lots of support from peers. As you circumvent the field of other elder law attorneys in court, during one of our scheduled annual or quarterly meetings or on our excellent New York State Bar Association list serve, you will no doubt create connections with some of the brightest minds in the industry, who in turn become valuable sources of information and advice. The kind of support and access you will have to new relevant laws, cases, fair hearings, forms and the like will help you better serve your clients as well as comfort in

knowing that your peers are all there to support each other.

10. Earn a great living. Whether you hang up your own shingle or you work for a firm, the potential earning possibilities are promising.

    a. Working for a firm: If you work for a firm, your salary will be based upon a number of factors. The size of the firm. Small firms (6 or less attorneys) will tend to pay less and provide less by way of some benefits, but they also tend to provide greater opportunities to work on a larger variety of work and thus expand your experience base. Some of the smaller firms will practice elder law as a primary practice and other areas are simply ancillary. Medium and large firms are great for the type of attorney who works well in the corporate structure and subscribes to the credo "work hard and move up the ladder." Larger firms will likely only have a branch dedicated to elder law and some even have branches for the sub-specialties. The salary is generally higher than smaller or medium sized firms. Nevertheless, elder law is generally a necessary staple to any well-rounded large firm, so the odds are most firms will have a job for you too. Solo practitioners can make their own hours and run their businesses and market ing practices according to their own needs.

    b. With so many baby-boomers aging in place, with the cost of a nursing home on Long Island topping more than $17,000/month (that is not a misprint), the middle class urgently needs protection. Medicaid rules are becoming more restrictive as the states are also fighting budgets in order to not run out of money with those high costs of long-term care for the aging population. Being an elder attorney means you can live comfortably, while also knowing that you are helping many families navigate their most vulnerable moments.

Elder law has emerged as a very popular area to enter but also one that requires very specialized knowledge. Many attorneys have felt that they could supplement their practice by "dabbling" in a Medicaid application or preparing a Medicaid Asset Protection Trust or two. Unfortunately, this has oftentimes come back to bite them when an application was not filed properly, or even worse, timely. Or perhaps a trust was prepared but it was not prepared in such a way that Medicaid disregards the principal or income.

Finally, if you intend to become an elder law attorney, do it, but don't dabble in it, go into it all the way. There are many sub-specialties within elder law as noted, and you don't have to be an expert in every area. Some professionals never do Medicaid at all and stick to trusts. Some choose to focus on Guardianships; it's up to you! Whatever your decision you should endeavor to fully understand the intricacies of each sub-specialty and maintain an updated knowledge of that area. If you do this the practice of elder law will prove to be a very fulfilling and lucrative area of practice for many years to come.

Ellen Victor's practice focuses on all aspects of Elder Law, Estate Planning and Special Needs Planning and is located in Garden City, New York. She understands the difficulties inherent in caring for aging parents, having gone through the experience of placing her beloved mother in a nursing home. As the parent of a special needs child, she is particularly passionate about serving the legal needs of families with disabled children. Ms. Victor can be reached at (516) 223-4800 or through her website at www.victorlawfirm.com where she often blogs about elder law and special needs trusts.

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A Primer on the Basic Rules and Guidelines for Defending Depositions

By Andrew S. Kowlowitz and Alex T. Paradiso

A deposition is often the single most important discovery device. Depositions provide each side the opportunity to evaluate the credibility of a witness and the merits of a case. The deposition has several practical applications: the testimony may be used in support of a motion for summary judgment, may preserve the testimony of a witness who may be unavailable for trial, and/or maybe used to impeach a witness at trial. The deposition is also often used to "lock" a party into a story, or version of events.

Although much attention is given to strategy and tactics for taking depositions, ethical and effective defense of depositions can be equally important. Moreover, a strong understanding of the rules governing a defending attorney's conduct can be equally beneficial to the questioning attorney. As most experienced practitioners are all too familiar, some defending attorneys may use excessive objections and other interruptions as a means for disrupting the questioning attorney's examination and subtly (or not so subtly) influencing the witness' testimony. Understanding the limits placed on defending attorneys will better equip those taking depositions to challenge defending attorney's objections and proceed to gather the broad discovery that they are entitled to.

What follows is a primer on the basic rules and guidelines for defending depositions, which should be equally helpful for defending and examining attorneys alike.

Scope of Allowable Questions at Deposition

New York adheres to a philosophy of broad discovery. However, not all discoverable material will be admissible at trial. Accordingly, the range of permissible questions at a deposition is more expansive than questions or evidence that may be admissible evidence at trial. In short, "all questions posed at depositions should be fully answered unless they invade a recognized privilege or are palpably irrelevant."[1]

In *Hertz Corp. v. Avis, Inc.*,[2] the First Department articulated the parameters of deposition questioning, stating:

> [A]t an examination before trial, questions should be freely permitted and answered, unless violative of a witness' constitutional rights or a privilege recognized in law, or are palpably irrelevant, since all objections other than as to form are preserved for trial and may be raised at that time. Implicit in this formulation is the recognition that questions answered at an examination before trial, even though not "palpably" improper or irrelevant, may still appropriately be excluded upon timely objection, in the exercise of discretion. The true test is one of usefulness and reason. Thus, even information "reasonably calculated to lead to relevant evidence may be beyond the scope of disclosure because it is more trouble to gather than it is worth."

Understanding and asserting proper, timely objections is a critical component of the defending attorney's role at the deposition.

Objections under CLPR 3115

CPLR 3115 provides that, with certain exceptions, objections other than as to form are preserved for trial, without the necessity of interposing an objection at the deposition. The preservation rule is generally incorporated into the "usual stipulations," which the parties ordinarily agree to at the beginning of the deposition. While the "usual stipulations" ordinarily preserves the parties right to object at trial, certain objections to form will be waived if not interposed at the deposition.

A. Objections and the Immediate Cure

CPLR 3115(b) addresses objections at the deposition that can be immediately cured, such as objections to form that may be cured by rephrasing or narrowing the question, or the order in which depositions will be conducted. Any objection to form or other irregularity that may be immediately cured must be made at the deposition, or it will be waived.

Proper Objections to form include:

- Questions which are ambiguous/do not make sense
- Questions which are argumentative
- Questions which assume facts
- The mischaracterization of prior testimony
- Compound questions
- Harassing/vexatious questions
- Questions which have been asked and answered

B. No "Speaking Objections"

The Uniform Rules for the Conduct of Depositions, enacted in 2006 (often, informally referred to as the "New

Rules"),[3] do not permit the defending attorney to make "speaking objections." In other words, if any objection to form is made, the objection must be succinctly stated and framed "so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement of as to any defect…"

Specifically, Section 221.1 of the "new rules" provides:

(a) **Objections in general.** No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer, before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the CPLR.

(b) **Speaking objections restricted**. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

Along the same lines, Section 221.3 of the "new rules" provides restrictions on when an attorney may communicate with a deponent while a question is pending. Specifically, Section 221.3 provides:

> An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

In light of the amendment to the rules, the defending attorney must be judicious in making speaking objections. While making speaking objections is technically inappropriate, it may be tolerated if done sparingly. However, making an excessive number of speaking objections may be construed as coaching the witness. The restriction on speaking objections makes witness preparation all that more important, as the defending attorney is limited in her ability to vocalize her objection to a question.

Objections under Federal Rules

The Federal Rules of Civil Procedure contain similar restrictions on objections in depositions. The commentary to the Federal Rules provides:

> Objections must be stated in a non-suggestive manner. Some objections to questions must be raised at the time of the deposition or they are waived, others are reserved until trial. The way to determine whether an objection must be made is to determine whether the examiner could rephrase the question to cure the objection. Thus, parties must object to leading questions in order to give the examiner an opportunity to ask the question in a non-leading fashion. Conversely, parties do not need to raise objections such as relevancy or competency that cannot be cured.

The Federal Rules (Federal Rule Civ. Pro. 30 (d)) commentary provides further instruction on the scope and method of objections:

> **Stating Objections**: Objections must be stated in a non-suggestive manner. Attorneys should not use an objection to instruct the witnesses how to answer (or not to answer) a question. However, the specific nature of the objection should be stated so that the court later can rule on the objections (i.e., "objection, leading" or "objection, lack of foundation").
>
> **Instruction Not to Answer**: Directions to a witness not to answer a question are only allowed in three narrow circumstances: to claim a privilege (i.e., attorney client communication); to enforce a court directive limiting the scope or length of the deposition; or to suspend the deposition for purposes of a motion under Rule 30(d)(4) relating to improper harassing conduct. Thus, it is inappropriate for counsel to instruct a witness not to answer a question on the basis of relevance, on the basis that the question has been asked and answered, is harassing, or on the basis that the question is outside the areas of inquiry identified in the notice of deposition for a Rule 30(b)(6) deposition of a party representative.

Instances When a Witness Should Be Instructed Not to Answer

Practically speaking, a witness should be instructed not to answer in four instances: (1) to assert the attorney-client privilege; (2) to assert the doctor-patient privilege; (3) to assert the Fifth Amendment privilege; or (4) when a question is palpably irrelevant or unduly burdensome.

1. Attorney-Client Privilege

The attorney-client privilege attaches "(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except if the protection is waived." Privileged material is given absolute immunity to discovery. The party claiming the privilege bears the burden of establishing the right, the protection must be narrowly construed, and its application must be consistent with the purposes underlying the immunity.[4]

2. Doctor-Patient

CPLR 4504 provides that "unless the patient waives the privilege, a person authorized to practice medicine… shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."[5] While the question of privilege may be "raised by any party to the action," as with the attorney-client privilege, the party asserting the privilege has the burden to show the existence of circumstances justifying its recognition.[6] To meet this burden it must be established that (1) the person whose testimony sought to be excluded was authorized to practice medicine or dentistry or was a registered professional or licensed practical nurse, (2) the information to be excluded was acquired by such person while attending the patient in a professional capacity, (3) the information was necessary to enable such person to act in that capacity, and (4) the information was intended to be confidential.[7] Also like the attorney-client privilege, the doctor-patient privilege belongs to the patient and applies unless waived in some manner. *See* CPLR 4504(a). A person waives the doctor-patient privilege when he commences an action in which his physical condition is in controversy.

3. Fifth Amendment Right

In general, the Fifth Amendment privilege against self-incrimination "may only be asserted where there is reasonable cause to apprehend danger from a direct answer" and "a blanket refusal to answer questions based upon the Fifth Amendment privilege against self-incrimination cannot be sustained absent unique circumstances."[8] Moreover, "[w]hile the witness is generally the best judge of whether an answer may tend to be incriminating…when the danger of incrimination is not readily apparent, the witness may be required to establish a factual predicate."[9] In such a case, "in order to effectively invoke the protections of the Fifth Amendment, a party must make a particularized objection to each discovery request."[10]

4. Palpably Irrelevant/Unduly Burdensome

As previously addressed, generally a deposed witness is required to answer all questions posed unless the question is palpably irrelevant or improper.[11] Information is palpably irrelevant when it does not directly relate to the opposing party's claim.[12] Likewise, discovery is improper when a party's request is overly broad and unduly burdensome.[13]

Improper Conduct in Depositions

New York Jurisprudence[14] provides that a lawyer may be subject to sanction for engaging in improper conduct during depositions. Such sanctionable conduct includes *inter alia* ordering a client not to respond to questioning in areas which counsel unilaterally deems irrelevant, continually objecting to matters other than form, failing to turn over documents requested during a deposition, filing unnecessary motions to compel depositions, and using disruptive behavior or improper language towards opposing counsel during the deposition.

New Developments in Rules for Non-Party Depositions

In 2013, the Fourth Department in *Scia v. Surgical Association*[15] affirmed its prior holding in *Thompson v. Mather*[16] establishing that "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition." The decisions, which were based on a "plain reading" of CPLR 3113(c),[17] were widely criticized for causing inconsistencies among the Departments of the Appellate Divisions, and for consigning the role of non-party counsel in a deposition to that of a "potted plant."

In response to the Fourth Department's decisions, the Legislature recently enacted (and the Governor signed into law on September 23, 2014) "[a]n act to amend the civil practice law and rules, in relation to conduct of the examination before trial." The new law specifically overrules the Fourth Department's holdings in *Scia* and *Thompson* by amending CPLR § 3113(c) to provide that that "examination of deponents shall proceed as permitted in the trial of actions in open court, *EXCEPT THAT A NON-PARTY DEPONENT'S COUNSEL MAY PARTICIPATE IN THE DEPOSITION AND MAKE OBJECTIONS ON BEHALF OF HIS OR HER CLIENT IN THE SAME MANNER AS COUNSEL FOR A PARTY*."

The new law took effect immediately (i.e., on September 23, 2014) and "shall apply to all actions pending on such effective date or commenced on or after such effective date."

Endnotes

1. *Tardibuono v. County of Nassau*, 181 A.D.2d 879, 881, 581 N.Y.S.2d 443, 445 (2d Dept. 1992).
2. 106 A.D.2d 246, 249, 485 N.Y.S.2d 51 (1st Dept. 1985).
3. 22 NYCRR § 221.1–221.3.
4. *See generally United States v. Bein*, 728 F.2d 107, 112 (2d Cir. 1984); *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377, 575 N.Y.S.2d 809 (1991); CPLR 3101(b).
5. *Mayer v. Albany Medical Center Hospital*, 56 Misc.2d 239, 288 N.Y.S.2d 771 (Sup. Ct. Albany Co. 1968).
6. *Koump v. Smith*, 25 N.Y.2d 287, 303 N.Y.S.2d 858 (1969).
7. CPLR 4504(4).
8. *Chase Manhattan Bank, Natl. Assn. v. Federal Chandros,* 148 A.D.2d 567, 568, 539 N.Y.S.2d 36 (2d Dept. 1989).
9. *State of New York v. Carey Resources, Inc.*, 97 A.D.2d 508, 509, 467 N.Y.S.2d 876 (2d Dept. 1983).
10. *Chase Manhattan Bank Natl. Assn.*, 148 A.D.2d at 568, 539 N.Y.S.2d at 37.
11. *Mora v. Saint Vincent's Catholic Med. Ctr.,* 8 Misc.3d 868, 800 N.Y.S.2d 298 (Sup. Ct. N.Y. Co. 2005).
12. *Hertz Corp. v. Avis*, 106 A.D.2d 246, 485 N.Y.S.2d 485 (1st Dept. 1985) (erred in requiring a large corporation to compile and reveal confidential financial documents in the absence of a claim that defendant's alleged misappropriation of plaintiff's trade secrets by recruiting plaintiff's management personnel resulted in a loss of profits to plaintiff).
13. *Brandes v. North Shore Univ. Hosp.*, 1 A.D.3d 550, 767 N.Y.S.2d 666 (2d Dept. 2003) (plaintiff's demands for bylaws of the hospital and its medical staff, as well as the rules, regulations, policies, and procedures for nine separate departments is overly broad and unduly burdensome).
14. 24 N.Y. Jur.2d Costs in Civil Actions § 76.
15. 104 A.D.3d 1256, 961 N.Y.S.2d 640 (4th Dept. 2013).
16. 70 A.D.3d 1436, 894 N.Y.S.2d 671 (4th Dept. 2010).
17. CPLR 3113(c) provides that that questioning in pre-trial examinations "shall proceed as permitted in the trial of action in open court."

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Advantages of the Elder Law Clinic Experience

By Emily Bensco, Adam Cooper, and Kristen Chang
With Deirdre Lok, Donna Harkness and Matthew Andres






Attorneys who practice Elder Law know that being a successful and effective advocate for elderly clients requires more than just a thorough understanding of the substantive law. Elderly clients present a unique set of vulnerabilities which can manifest as problems with communication, ambulation, diminished mental capacity, and potential abuse. These specific vulnerabilities demand a combination of patience, sensitivity, zeal and ingenuity, creating a stimulating and rewarding experience for students. Since working with elderly clients requires so much of attorneys, and since 10,000 Americans are reaching retirement age every day, taking an Elder Law clinic in law school is an invaluable opportunity for aspiring lawyers.

There are approximately 30 Elder Law clinics at law schools throughout the country, where students are given the opportunity to represent older adult clients in a variety of contexts. This article includes perspectives from three students who each participated in one of those clinics: Adam, from The University of Memphis Elder Law Clinic; Kristen from the Elder Financial Justice Clinic (EFJC) at the University of Illinois College of Law, and Emily, from the Helping Elders through Litigation and Policy (HELP) clinic at Brooklyn Law School.

Each clinic deals with a different area of law, but as these students found, the most important lessons were universal. This article contains the students' thoughts on the various obstacles they faced, and specific situations they experienced which contributed to their learning.

The students immediately learned the importance of acting practically and thoughtfully before any legal issues are even presented. Many older adults are not able to ambulate easily, which can present challenges ranging from office meetings, courtroom access and safety and health concerns. Learning to create an inviting and accommodating atmosphere for clients is a critical skill for any attorney providing direct client services.

> Adam—*Our clinic encouraged us to make home visits for some of our clients who had difficulty getting to the office. It was valuable to see and appreciate the various situations that clients can be in when they turn to a clinic for help. This was an experience that helped me to put myself in the older client's place in a way I might not have been able to in the course of an office visit.*

> Emily—*We also were encouraged to make home visits, which always proved helpful. Since all of our clients were facing eviction, sometimes a home visit was necessary to assess the situation. I found that my relationship with clients whose homes I visited was even stronger because there was an increased sense of trust and familiarity which became helpful later in the representation.*

> Kristen—*Two of the cases that my partner and I handled involved clients who had difficulties driving and walking, which resulted in their inability to physically visit the EFJC office. This was a challenge in itself, but having limited mobility also makes a senior more susceptible to abuse. As a result, we were always sensitive to the effects of mobility challenges on different aspects of a client's life.*

Communication with older adult clients can also present challenges. Hearing impairments, speech impediments, vision loss, language barriers, reliance on technology, and stressful situations can make standardized attorney-client meetings difficult. Sensitivity to and awareness of each of these potential obstacles are necessary, and will continue to serve clinic students in their careers as new lawyers, regardless of practice area.

> Emily—*Several of our clients were non-English speakers, which made some communication difficult. Even though our office had access to a telephone translating service, dealing with a combination of barriers, including language, generation, and technology, made it difficult to establish and maintain a close relationship with some clients.*

Adam—*Since many of our clients came to us for help with trusts and estates, our clinic taught us how to speak frankly but sensitively with clients, about life and death and the distribution of possessions.*

Kristen—*Though communication can sometimes be a challenge for both the client and the attorney, having a representative who is willing to listen will have a positive effect on the client. As students assisting elderly clients at the EFJC, we were prepared to listen patiently to elders about topics that were tangential to the case. Sometimes, the elder simply needed a listening ear. Some form of validation is particularly crucial to building rapport and developing the client's trust so as to be able to investigate the case. The opportunities to speak with the senior also gave us a better impression of the senior's values and priorities.*

Many elderly clients will sometimes include other family members in the representation and decision making processes. This can be very helpful, but is also cause for wariness by an attorney. The students had differing experiences with this particular obstacle. Familiarity with the ethical issues that often arise in the course of legal proceedings can be helpful as clinic students move forward in their careers.

Emily—*Several of our clients usually had their adult children as a support system. I found working with a client's adult child to be a great asset in helping the client to fully understand the litigation process. I also found our clients to seem more at ease in the courtroom with a familiar face.*

Adam—*In one particularly difficult situation, my client was a 92-year-old lady who claimed that she had been forced to move to a nursing home where she felt isolated from her church and friends. Her family claimed that she was incompetent, but I found her to be competent and to complicate matters, it seemed that there had been some financial improprieties on the part of some of her family members. These cases were instructive regarding the need for attorneys to help older adults avoid being preyed upon by the people they trust.*

Kristen—*On a practical level in the clinic, involving family members in representation raised questions for us as students about who our client was, when an individual accompanying the senior could stay with the client during otherwise privileged meetings, and how to best reach a resolution that did not result in unintended consequences or repercussions for the elderly client's relationships with his or her close ties. In some ways, these ethical questions affect aspects of the client's life far beyond the scope of the legal issues in the case.*

While older adult clients may bring routine legal problems, there is a heightened possibility of some degree of cognitive impairment that needs to be addressed. Cognitive impairments present on a wide spectrum, and can be caused by a number of diseases that are often present in aging adults. As the students experienced, gaining a level of comfort in this area helps to hone listening and issue-spotting skills.

Emily—*In our weekly seminar we were able to learn about various illnesses that may have an impact on an aging person's mental capacity. Although we should be cognizant of any potential issues such as dementia, it is also important to remember that we are not experts in the field and cannot make diagnoses.*

Kristen—*My clinic partner and I found that symptoms of cognitive impairment may have made some elders more susceptible to financial abuse. Moreover, the limited memory or mental capacity of some clients may make it harder to conduct fact investigation and prepare clients to testify, which can make dire situations even harder to resolve.*

Adam—*Although dealing with a client who may have diminished capacity is challenging, I found that it helped refine some important skills. I became a keen observer of my clients' behavior—and I believe that made me a better interviewer.*

In many cases, seniors are identified as easy targets for many forms of abuse—physical, emotional, financial and even sexual. The students were all confronted with this harsh reality in some way in their clinics, and all found the experience informative and impactful.

Kristen—*In the context of dealing with elderly clients who may be financially, emotionally, or physically vulnerable, the consequences of moving forward without strategically examining contingencies and ramifications may be very grave. Elders most often face financial exploitation by those closest to them—their longtime friends, adult children or grandchildren, and caretakers. This puts elderly clients in a uniquely vulnerable situation when they arrive at the EFJC. Additionally, some of our elderly clients had psychological or emotional ties to their abusers, causing the client to feel dependent upon or beholden to the abuser due to the client's vulnerabilities.*

Adam—*Unfortunately some of our clients appeared to be victims of abuse. One client, the 92-year-old woman that I spoke of previously, seemed to have been the victim of financial abuse perpetrated by family members. Ultimately we were able to return the client's funds. While rectifying a situation of abuse was not the original goal of that representation, the experience taught us the positive impact an attorney-client relationship can have for a victim of abuse, and showed us that seniors are especially at risk.*

Emily—*In our field work, we focused primarily on housing, but our seminar, allowed us to take a different focus, that of elder abuse. Our professor, who is Assistant Director and General Counsel at an elder abuse shelter, presented us with an opportunity to screen for elder abuse as part of a legal intake process. The legal intake process is a perfect opportunity for such a screening because lawyers, or legal assistants, are already addressing serious problems with older adult clients, and questions that may help identify instances of abuse could be easily integrated into the process.*

Clinics often provide students their first experiences with the actual practice of law, and thus, especially when dealing with such delicate yet demanding issues, case-related tasks may take students more time than they would take experienced attorneys. However, elder law attorneys sometimes must work quickly, particularly if clients are sick or at risk of losing memories or capacity. Learning to generate high quality work under strict time constraints is a cornerstone of building a successful legal career.

Kristen—*Aside from the stress of these situations, working with elders also requires strategizing around timelines that bring remedies efficiently and effectively. For example, one of our EFJC clients brought up that a later trial would interfere with his potential cancer treatment timeline. Sometimes an older adult client cannot afford his or her cost of living after suffering financial abuse, or a client's ailing health can jeopardize the chance for the client to receive justice in what can be a slow legal process. We learned to be very conscious of the litigation timetable. Since most seniors are retired, we also learned to expect frequent calls from clients and to be prepared to provide clients with frequent updates. The case is often the senior's main priority, and while this may be the case with other litigation clinic clients too, the desire for frequent contact with student attorneys and the potential mismatch between student schedules and client schedules seemed especially pronounced with elders.*

Adam—*Because these cases may be especially sensitive and complex, I continued to work with some clients after the semester had ended, over the winter break and into the next term, instead of leaving it for another intern.*

Emily—*Since all of our clients were facing eviction, the pressure was on to resolve cases quickly so they could feel secure in their homes. Stalling a case may be a useful tactic in some areas of law, but an older adult client's peace of mind and sense of stability was of the utmost importance at the HELP clinic.*

All three clinics discussed here are categorized under the "elder law" rubric, and Adam, Kristen, and Emily shared many of the same insights. However, elder law is also unique in that it can encompass so many areas of substantive law. Having the opportunity to participate in an elder law clinic can afford law students with any number of novel educational experiences. Emily and the students at the HELP clinic were faced with problems that expand outside of an individual client's representation:

Emily—*Working with the HELP Clinic, we were in a unique position at the intersection of crises not just for our clients, but for the entire city. New York City is currently dealing with a rise in its older adult population coupled with a serious lack of affordable housing. According to NYC.gov, "Adults age 65 and older occupy almost 60% of the city's rent controlled units…and as the population of older New Yorkers continues to grow, the demand for affordable housing will undoubtedly increase as well." Working with the Elder Law unit at South Brooklyn Legal Services, we were directly addressing problems right in the middle of serious political and social issues troubling the city. Dealing with these problems first-hand at SBLS, not only were we able to make a real positive impact for our individual clients, but with our combined efforts, we felt like advocates for broader social change.*

Kristen and students at the EFJC learned that representing a client may require attorneys to come up with inventive solutions:

Kristen—*One EFJC client who was cheated by unlicensed roofers managed to obtain a judgment in her favor. However, the defendant filed for bankruptcy, and the skimpy sum the bankruptcy court ordered him to pay the EFJC client would have left the client with an inadequate sum to fix her roof. Throughout the semester, the EFJC students helping this client looked for ways to raise money or set up a crowd-fund through a third-party to bring the client a quicker, tangible resolution*

while arguing her case in bankruptcy court. Students should always consider solutions short of litigation. Since financial exploitation often involves family and close relationships, if amicable resolutions can be reached without going to court then it may help maintain family bonds and decrease the likelihood of a bitter breakdown. As in any case, the priority is the client, and EFJC students try to muster all possible resources to find a viable solution for their senior clients.

Adam and students at the University of Memphis were given the opportunity to learn about many different areas of law in one setting, which has been especially instructive as Adam starts his career as an attorney.

> Adam—*Working with elders brought me into contact with a wider array of legal issues than other legal clinics might handle. For example, I helped with estate, medical, family, and debt issues. I was able to appear in court on a debt issue and managed to negotiate a favorable resolution for the client. I am now working as an attorney in general practice. Although elder law is just a small part of my caseload, I still find myself using skills I was able to develop through working in the University of Memphis Elder Law Clinic and referring back to my experiences there.*

Organizationally, the programs sponsoring these clinics are all passionate about exposing a new generation of lawyers to the engaging, cutting-edge issues involved in working with older adults. The Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale and the Elder Law Unit at South Brooklyn Legal Services, cosponsors of the HELP clinic at Brooklyn Law School, view educating newly minted attorneys about issues surrounding elder abuse and older adult housing insecurity as a core element of their mission. Students carry a caseload advocating for older adults in Brooklyn Housing Court and participate in a seminar exploring the legal ramifications of aging in our society. Students receive cases via the Assigned Counsel Project (ACP), which provides legal representation and an assigned social worker to individuals over 60 who are engaged in eviction proceedings. To supplement their direct client experience, students also participate in a weekly seminar, which covers a variety of legal arenas including capacity, guardianship, family court, ethics, and access to justice and the unique ways in which older adults interact with these areas of the law. Over the course of the semester, each student completes a project related to larger social policy issues facing older adults in New York City.

The Elder Law Clinic at the University of Memphis Cecil C. Humphreys School of Law is a "live client" clinic staffed by upper division law students who are specially admitted to practice by the Tennessee Supreme Court. The Clinic works in partnership with Memphis Area Legal Services, a Legal Services Corporation-funded nonprofit legal services provider serving the low-income population of Memphis and the surrounding four-county area. Under the supervision of the Clinic Director, who is a licensed attorney, the students provide direct representation to indigent clients age 55 and over in a variety of civil matters, ranging from wills, advanced directives, consumer protection issues and financial exploitation to government benefits, housing and real property ownership, conservatorship and family law issues.

The University of Illinois College of Law's Elder Financial Justice Clinic is the first law school clinic in the country focused exclusively on combating elder financial exploitation. The clinic provides free legal services in Illinois to people 60 and over and vulnerable adults who have been victims of any type of financial fraud or abuse, and works for systemic change, including proposing and advocating for legislation, to improve the lives of financially abused seniors. The 44 students who have enrolled in the EFJC since it began three years ago are leaving the College of Law with a skill set and knowledge base that makes them uniquely qualified to continue to advocate for seniors. They have also hopefully gained an enthusiasm for public interest law that will encourage them to continue to serve disadvantaged populations once they enter practice.

In conclusion, for professors the field of elder law is an exciting and rewarding area in which to educate students. And for professors who are also elder law practitioners, it is fulfilling to be part of a constantly evolving legal field. Although the students' experiences represent the challenges and rewards of working in elder law, these experiences have made them better equipped to practice not just elder law, but any legal area.

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Incubating Community Law Practices: Post-Graduate Models for Lawyer Training and Access to Law

By Luz E. Herrera

While the greatest number of lawyers practice in solo and small firms, law schools do not devote sufficient resources to preparing law students for the opportunities and challenges that these type of law firms present. The recent economic recession has highlighted the need to better train lawyers to launch law practices right out of law school. However, experienced lawyers, law professors and state bar policy makers worry that individuals who start their own practices are not sufficiently trained to practice and could irreparably harm a client. Many new lawyers share that concern but also worry about the financial instability that comes with starting a business.

A handful of U.S. law schools and bar associations are addressing the need for new lawyer training as an opportunity to also build legal service delivery models that address the needs of low and modest income individuals who need lawyers. Law schools have launched post-graduate programs that ask lawyer participants to provide free and reduced rate legal services to underserved populations in exchange for subject matter training and support for their law businesses during their start-up phase. This article describes post-graduate incubator programs, specifically lawyer incubators, that promote access to justice and offers recommendations for best practices in designing such programs.

A. Access to Lawyers

Media outlets, blogs and even dissenting legal educators have effectively conveyed the message that our country has too many lawyers. This assertion of an overpopulation of lawyers is perplexing, since there are millions of individuals who forego legal claims or who struggle through self-representation because they cannot find and access lawyers to help them. A national survey on civil legal services needs released by the ABA in 1994 found that financial status is a factor that impacts on whether or not individuals seek civil legal assistance.[1] Sixty-one percent of moderate-income households stated they did not seek assistance because the situation they were experiencing did not warrant intervention by a lawyer.[2] Seventy-one percent of low-income households said they did not access the civil justice system to address their legal problems as a result of cost or a belief that the civil justice system would not help.[3] Subsequent court surveys reveal that cost of legal services is not the only factor contributing to the rise of self-represented litigants but most report a high number of poor or near poor individuals accessing those services.[4]

Courts have responded to this need and preference for self-representation.[5] The Civil Justice Infrastructure Mapping Project of the American Bar Foundation found that every state in the U.S. has information online to help self-represented litigants and 98 percent of states have a selection of legal forms on those websites.[6] Further, more than 70 percent of states have at least one court-based self-help center that offers members of the public information and assistance to help them represent themselves.[7] The growing resources for legal services consumers provide options that are less costly than lawyers to sophisticated legal services consumers. Yet, these self-help resources are not always sufficient for individuals who face language barriers, suffer through emotional trauma or quite simply are not sophisticated enough to overcome confusing procedural issues.[8] When legal services consumers encounter these obstacles, many seek affordable non-lawyer options for assistance. There are a number of lay assistants and paraprofessionals, such as those accredited to represent individuals in state and federal agency proceedings, able to competently address some of the eligible populations' legal needs. However, many legal issues faced by low-income individuals, often made more complex due to their financial reality, require attorney representation.

The Legal Services Corporation (LSC) reported that in 2014, 63.4 million Americans were eligible for their services.[9] In that year, 4,318 attorneys employed by LSC-funded organization assisted 757,350 clients.[10] Since 1991, less than one percent of all lawyers in the country have worked as public defenders or in legal aid offices.[11] Like government lawyers, public defenders and legal aid lawyers are restricted to representing clients who fit the parameters imposed by government or program regulations.[12] While not all individuals eligible for legal services need lawyers, there is significantly more demand for free legal services from the eligible population than what LSC-funded organizations can provide.[13] Answering the question about the value and relevancy of legal education, therefore, requires a better understanding about who has access to lawyers in this country.

Historically, most attorneys in the United States have created their own jobs by establishing solo and small law firms. The latest ABA market research indicates that about three-fourths of all attorneys work in private practice.[14] Of those attorneys, 49% identify themselves as solo practitioners and approximately 14% work in law offices with five or fewer lawyers.[15] Attorney demographics confirm that the majority of lawyers in private practice are self-employed but despite this reality few law graduates enter the profession understanding the opportunities and challenges of starting their own law firms.

The idea for post-graduate training of lawyers to serve individuals who do not have access to lawyers is not new. Clinical education and various post-graduate fellowship programs were established as early as the 1970s to help address the needs of the poor. Many attorney incubator programs also serve the same client base that is income eligible, but perhaps not service eligible, for legal

aid services. However, participants in these programs are also trained and exposed to business practices that help them generate their income. These post-graduate programs focus on mentoring and training lawyers on business basics that facilitate the creation of sustainable business models. Incubator programs and post graduate residences are law schools' expression of their commitment to the career development of their graduates.

Lawyer incubators borrow the idea of entrepreneurial development from the business community. Business incubators have existed for decades but they did not formally become recognized in the legal profession until the early part of the 21st century. Lawyer incubators acknowledge that attorneys run law businesses. Like all business owners, lawyers who run their own law firms have a lot to gain from programs that support their entrepreneurial development. Law school teaches individuals how to think like lawyers but there are few law school courses focused on how to run a law firm as a business. A 2006 survey of U.S. law schools reveals that less than half of law schools offered law practice management classes in their curriculum.[16] The classes that exist are seen as appendices to core classes that explore substantive legal principals since they have small enrollments and are taught primarily by adjunct faculty.[17] Since understanding the business of law is not a central part of a legal education, lawyers graduate with a lack of training in business basics that are instrumental to lawyers with solo and small law firms. These skills are important to impart even for new lawyers involved in residency programs since these programs usually only provide support in the form of small salaries or stipends, for one or two years.

The post-graduate residency programs, like attorney incubators, are focused on training lawyers while increasing pro bono and low-bono legal services. Post-graduate residency programs are primary modeled on residencies in the medical context. Law school graduates receive small stipends for their participation in a teaching law firm where they benefit from supervised training.

As the future of the legal profession takes a new path post the Great Recession, most anticipate fewer jobs in traditional sectors for lawyers.[18] The most consistent and largest opportunity to make a living for many lawyers will be self-employment. Law schools that understand this reality are taking steps to provide direction to their students and alumni about how to create viable law practices.

B. Law Schools as Community Law Practice Incubators

Most law students do not see themselves as entrepreneurs or anticipate becoming small business owners. When they become lawyers, they generally lack a roadmap on how to use their professional training to generate their own salaries. In addition to helping law students think about creating their own businesses, law schools can offer post-graduate programs to support new lawyers who launch their law practices. For decades, law school alumni offices have offered continuing legal education programming and organized alumni networking events for their graduates. These programs help their alumni develop greater expertise and establish new contacts that help with business development.

The first effort to support solo and small firm lawyers providing low bono rates for Gap Clients was launched in 1997 as the Law School Consortium Project (LSCP).[19] The LSCP was formed by several law schools through a grant from the Open Society Institute to address the needs of Gap Clients and self-employed public-minded law graduates.[20] The most enduring projects to result from the LSCP program were Civil Justice, Inc. at University of Maryland Francis King Carey School of Law (Maryland School of Law) and the Community Legal Resource Network at City University of New York (CUNY) School of Law.

Maryland School of Law faculty developed the concept of Civil Justice, Inc. – an independent nonprofit entity that operates a referral service that pairs a network of solo and small firm lawyers committed to increasing access to low- and moderate-income individuals.[21] Civil Justice, Inc. has staff that facilitates mentoring and networking opportunities that include informal counseling by law school faculty and co-counseling arrangements with more experienced attorneys.[22] It also offers its attorney members assistance in managing their law practices to help them comply with ethical obligations.[23] Civil Justice, Inc. refers prospective clients to the solo and small firm bar who offer reduced rates. Maryland School of Law supports Civil Justice, Inc. by integrating into their curriculum instruction on the skills set needed to operate small law firms.[24]

CUNY School of Law also developed an active alumni support network and an incubator for self- employed graduates. The Community Legal Resource Network (CLRN), an attorney listserv that connects hundreds of attorneys who are otherwise isolated in solo and small firms is based at CUNY School of Law.[25] The community allows alumni to support and mentor each other while CUNY staff facilitates continuing legal education, discounts on law office management software and products, and opportunities for low bono work.

The work of CLRN led CUNY to develop its Incubator for Justice – a post-graduate program that houses self-employed graduates as they start their law practices and encourages low bono fees. CUNY's Incubator, established in 2007, trained a segment of CLRN members in general law office management issues such as "billing, record-keeping, technology, bookkeeping and taxes and at the same time, facilitating Incubator participants' involvement in larger justice initiatives and in subject-based training in immigration law, labor and employment and other topics that will arise continually as these attorneys build their practices."[26]

The CUNY Incubator accommodated up to twelve attorneys who are solo and small law firms over an eighteen-month period.[27] The attorneys operated their law firms independently but CUNY supported these attorneys

by facilitating the space at an affordable rate. CUNY alumni paid $500 in monthly rent for office space in downtown Manhattan, which was shared with an adjunct faculty member and alumna, who served as a mentor for the program and taught law office management at CUNY.[28] Participants in CUNY's Incubator for Justice received training to launch solo practices in underserved New York City communities.[29] CLRN and the CUNY Incubator use their network to provide low-cost legal services to individuals in New York that would not otherwise have access to lawyers. CUNY's Incubator for Justice is no longer operating, however, the program served as a model that was replicated nationally by law schools interested in supporting their graduates' entrepreneurial development and supporting a pipeline to offer more affordable legal services.[30]

Today, the American Bar Association's Standing Committee for the Delivery of Legal Services (ABA Delivery Committee) lists approximately 50 law schools that have some post-graduate program whose mutual goals are to train new lawyers and provide more affordable legal services.[31] Some of these programs are incubators that have some semblance of the CUNY model, while others are developed as post-graduate residency programs where students are paid to work at a nonprofit entity or law firm for a modest salary, in exchange for training. The degree of entrepreneurial training offered in these programs and the incubators depend often on the philosophy of the institution and the program director.[32]

The attorney incubator models are borrowed from the business community's practice of providing support services for new businesses to increase the likelihood of success.[33] The information compiled by the ABA Delivery Committee reveals that these incubators offer lawyers the following start-up support:

- In-house Mentoring
- Organized Networking Opportunities
- Law Practice Management Training
- Client Development Skills & Tools
- Office Space
- Opportunities to Engage in Pro Bono & Low Bono

The programs vary in terms of how much or if they charge lawyers for office space costs but generally the law schools foot the bill for an in-house director who helps organize the training and mentoring of the lawyers in the program. This director facilitates the development of the law practice skills and connects new lawyers with experienced lawyers who can help them develop greater expertise in substantive areas of law. The program director is not co-counsel on cases nor is there any fee-sharing arrangement. However, in some of these programs the director is charged with helping the program participants find opportunities for low bono work.

Incubator programs require that their participants offer free and reduced fee legal services to underserved populations. Most of these programs have a dual mission to (1) support attorneys; and (2) to make an impact for those who are not eligible for free or cannot access affordable legal services. These programs make setting up a law office less daunting for lawyers without much experience in running their own businesses. At the same time, they help address the growing need for affordable legal services. A lawyer who is building a client base understands that a handful of clients at $100 an hour is better than no clients at $300. Getting paid a contract hourly wage of $25-$50 is helpful for new lawyers to get experience but many soon realize they can keep more money in their pockets by taking on their own clients at $75-$150 an hour. Ultimately, lawyers who establish low bono law practices are only able to respond to a community need if the can develop sustainable law practices.

There are also law schools that are either making a significant commitment to subsidize or to collaborate with other institutional funders to support post-graduate residency programs. Residency programs hire experienced attorneys to supervise, not just facilitate, the work of participants and most focus more on substantive training than client development. The participant stipends are low and they vary by school but the amounts are similar as those paid by law schools to fund other post-graduate fellowships. Law schools that are experimenting with post-graduate residency models include those at Arizona State University, CUNY, Georgetown, Pace and Rutgers. In developing these programs, organizers have had to consider how to organize their residencies to comply with local unauthorized practice of law issues and federal Internal Revenue Service regulations and rulings that can hamper the tax-exempt status of the nonprofit host. In some jurisdictions and for some institutions, these issues are proving to be obstacles in creating these new legal service delivery models.[34]

C. Best Practices

Law school post-graduate programs are still relatively new and we have little data on their effectiveness. The specific structure of the program will vary based on its resources and the specific characteristics of the community and the law school where it resides. The following discussion addresses some of the best practices in establishing post-graduate programs in U.S. law schools.

Alumni Network

Attorney incubator programs work best for law schools that produce large numbers of solo and small firm lawyers. The characteristics of the alumni base may include individuals who sought a career in public services but started their own law practice due to the limited number of jobs in the public nonprofit and government sectors. Law schools that first develop alumni networks of solo and small firm lawyers can build a strong community of mentors to train and channel business to attorneys who start their own law practices. These alumni networks benefit incubator participants and also alumni who seek the additional support and camaraderie. Incubator pro-

grams are a good fit for law schools whose graduates do not work in practice settings that provide strong mentoring, continuing legal education, and support in ethical law practice management.

Director

The person hired to direct the incubator will be key to the program's success. An attorney incubator program requires the resources of at least a 50% full time lawyer. The director of the program should be licensed in the same jurisdiction as the incubator program and have strong ties to and a good reputation with the local bar. The main role of the director is to introduce the lawyer participants to the legal community. By selecting an individual who already has strong credibility in the local community of lawyers, the program's participants get immediate credibility based on the reputation of the director. Another important consideration for a director is to find someone who is comfortable with new technology and how it has changed law practice. A good director will not know everything but he or she will know how to gather the necessary people and programs to properly mentor new lawyers.

Faculty Support

Successful post-graduate incubator programs require support and interest from its alumni, staff and faculty. Obtaining faculty support is critical and can be achieved through a variety of ways. In some schools, post-graduate programs are fully advanced by clinical faculty. At other schools, faculty members are part of the committee that monitors these programs. At a minimum, faculty can be engaged by teaching in or supporting law school curriculum that facilities law student transitions into these post-graduate programs. Whatever the role, some degree of faculty involvement in these programs, signal a permanent institutional commitment to them.

Financing

One of the most important questions law schools ask about starting post-graduate programs is how to finance the program and the attorney. A law school must commit to devoting resources to these programs but the amount varies depending on the type of program.

The attorney incubator programs are the least resource intensive post-graduate programs for law schools to build. A small attorney incubator program can function with a part-time director. The underlying concept of incubators is to support, not fully subsidize, the development of a business. A lawyer starting a law practice should be prepared to pay for rent, malpractice insurance and other law firm necessities. Incubator programs should focus on developing relationships and finding funding opportunities for lawyers to secure reduced fee payment as a way to subsidize the cost of starting law offices.

Residency programs usually cost more to launch than incubator programs because in addition to the experienced lawyer director, they also provide stipends for new lawyers. Some of these models are just being implemented and it is not yet clear that they can sustain themselves without considerable subsidy by either the attorneys in the program or the continuing subsidy by a law school, a foundation or a law firm. Residency programs often require greater collaboration and funding but most are structured as nonprofit law firms who employ the new lawyers. That nonprofit employer relationship allows participants to qualify for student loan forgiveness while they are in the program.[35] Participants in incubator programs primarily qualify for income contingent plans.[36] As a result, there is a great deal of interest in creating more nonprofit residencies that incubate new attorneys. Despite their higher cost and the regulatory hurdles in establishing these post-graduate residencies, the hope is that once established they have the capacity to do well enough to be self-sustaining with smaller subsidies than required to launch them.

Innovation

Today's law graduates are entering the profession at a time when technology is drastically changing all aspects of our society, including the business of law. In the last decade, thousands of legal jobs, primarily involving document preparation and legal research, have been sent abroad. The long-term impact of outsourcing is yet to be determined, but what is clear is that the delivery of legal services has drastically changed. These new post-graduate programs can be the legal profession's playground for innovation. Post-graduate programs should incorporate instruction on how attorneys can leverage technology to provide more affordable access to legal services consumers. These programs should also help participants understand the role of unbundled legal services and the use of paraprofessionals in creating new models of legal service delivery or building on existing ones. These post-graduate programs can help the legal profession articulate the new role of lawyers in a new era.

Law Student Counseling

Starting solo and small firm law practices should be an integral part of career track conversation for law students. Regardless of whether students end up working in such practice settings, it is important for them to begin to think of themselves as managers and rainmakers of their law practices. Lawyers who know how to develop business are prized in law firms of any size. Individuals who show leadership will also have greater opportunities to advance to management positions within governmental and public interest organizations. Talking about the opportunities and challenges of running a law practice offers students greater transparency and exposes them to the additional skills they will need. Law schools should consider better integrating law practice management discussions into their professional responsibility classes. Also, greater exposure to the role of technology in the delivery of legal services and the impact that such technology has on the profession are important considerations for law students thinking about starting their own law businesses.

Public Service Component

Law school based incubators offer an opportunity to instill a public service commitment in lawyers. The American Bar Association and many states agree that lawyers have "a professional responsibility to provide legal services to those unable to pay."[37] These bodies encourage lawyers to donate at least 50 hours per year to help individuals of limited means or organizations "that are designed primarily to address the needs of persons of limited means."[38] In addition, the ABA and states such as California, encourage the provision of reduced fees to individuals and groups with limited economic resources. Despite the strong position, public service is not required of most of its lawyers.[39] Law school incubator programs can help train lawyers by developing relationships with public interest organizations that can train lawyers in exchange for pro bono services. These programs can work with courts, affordable housing developers, government entities and elected officials to coordinate limited scope legal services for a reduced fee to their constituencies. The most important public service agreements law schools can forge with community partners on behalf of its graduates are ones that offer lawyers an opportunity to learn and grow professionally. Lawyers in incubator programs must learn to balance their professional call to engage in public service and their need to charge fees that facilitate their own sustainability.

Space

There are various views about the best location for these post-graduate programs. Generally, these programs are located in bar associations, with legal aid organizations or in law office suites where some subsidy is available for the program and its participants. Some programs are also located within law schools. When they are, to mitigate risk of liability for the law school it may be important to clearly indicate the boundaries between the law school's pro bono clinical program and the post-graduate program. Some programs will prefer to be located close to courts and other attorneys. Others prefer to be grounded in underserved communities. Regardless of location, structures and technology should be set up to preserve client confidentiality. Availability of parking or accessibility via public transportation is another factor that will be important for both participants and their clients. Ultimately, most programs determine spaced based on the opportunity presented.

Evaluation Mechanisms

There is very little information available about the development of solo and small firm practitioners. As these programs evolve, it will be important to develop evaluation mechanisms to track these lawyers' successes and difficulties. Longitudinal studies of these programs and their lawyer participants will help us understand the type of support we need to provide members of the legal profession as they grow their practices or determine that another path is better for them. Any evaluation should also attempt to find out more about the types of clients they serve and the practice areas in which they work. Understanding the market for these new lawyers will help law schools and policy makers develop better products for legal services consumers.

Conclusion

Law school post-graduate programs help prepare lawyers to confront the new legal marketplace which requires more affordable quality lawyers. These programs are important and necessary to incubate community law practices that innovate to create greater access to law.

Endnotes

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2. National Center for State Courts, *How the Public Views the State Courts: A 1999 National Study (1999), available at* http://www.ncsc.org/~/media/files/pdf/topics/gender%20and%20racial%20fairness/publicviewcrtspub.ashx (survey respondents said they did not respond to the civil justice system because "the situation was not really a problem, that they could handle it on their own, and that a lawyer's involvement would not help"). *See also* Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics A Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 Fordham L. Rev. 1879, 1883-84 (1999).
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5. See Swank, *infra* note 8, at 376-378. *See also* Bonnie Rose Hough, *Description of California Court's Programs for Self- Represented Litigants* (2003), *available at http://www.courts.ca.gov/partners/documents/harvard.pdf* (summarizing data on the rise of pro se litigants in California's family law courts).
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10. *Id.*
11. ABA Mkt Research Dep't, Lawyer Demographics (2015) (hereinafter Lawyer Demographics) *available at* http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf.

Sources that fund the provision of legal aid are so scarce that lawyers are finding it more difficult to find or stay in jobs that facilitate free or affordable legal services. *See Legal Aid Association of California Shaping the Future of Justice: Effective Recruitment and Retention of Civil Legal Aid Attorneys in California* (April 2010), *available at* http://legalaidresearch.org/pub/1672/recruitment-retention-civil-legal-aid-attorneys-california/(discussing the retention problem for legal aid organizations in California).

12. For a detailed discussion of some of the principal restrictions on federally funded programs, see Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 Fordham L. Rev. 2187, 2189-90 (1999). While some restrictions have been softened recently, the population eligible for free services has also grown.

13. *See also* Rebecca Sandefur, Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study 3, American Bar Foundation (2014) (discussing that many individuals do not naturally recognize their problems as legal even if resolution can be found in the law).

14. The American Bar Foundation published The Lawyer Statistical Reports in 2012, 2004, and 1994. The reports respectively report that in 2005, 75% of all lawyers worked in private practice. Those figures were 75% in 2000 and 73% in 1991. The corresponding 1985 report also reports that 68% of all lawyers were in private practice in 1980. *See* Lawyer Demographics, *supra* note 11.

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20. *Id.* The LSCP schools included: City University of New York (CUNY) School of Law, University of Maryland Francis King Carey School of Law (Maryland School of Law), Northeastern University School of Law, and St. Mary's University School of Law.

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22. *Member Benefits*, Civil Justice, Inc., http://www.civiljusticenetwork.org/ForAttorneys/ Memberbenefits.aspx.

23. *Id. See also* Howard at 1249 (explaining that Civil Justice, Inc. offers its members "mentoring; networking and peer technical assistance; practice management assistance; substantive law training; access to a listserv; legal products and services at a reduced rate; a client referral service; marketing services and opportunities; and mediation training").

24. Michael Millemann, *The Symposium on the Profession and the Academy: Concluding Thoughts*, 70 Md. L. Rev. 513, 524 (2011).

25. *Id.*

26. See *Community Legal Resource Network* (CLRN), CUNY School of Law, http://www.law.cuny.edu/clinics/JusticeInitiatives/ Community.html.

27. Jonathan D. Glater, *Lawyers Learn How to Be Businesslike*, N.Y. Times, Jan. 9, 2008, at B6.

28. Richard Zorza, *NewsMaker Interview—Fred Rooney on the CUNY Incubator*, Richard Zorza's Access to Justice Blog (Sept. 11, 2011), http://accesstojustice.net/ 2011/09/22/newsmaker-interview-fred-rooney-on-the-cuny-incubator/; *see also* Emily Sachar, *CUNY to Train Start-Up Lawyers in Business Basics to Enhance Justice*, CUNY Law: A Community of Justice 6(2007), *available at* http://www.law.cuny.edu/magazine/archive/07-fall-cunylaw.pdf.

29. *Id.*

30. In its place, CUNY is launching CUNY Law Works – a program that offers graduates shared space to operate law offices. Telephone interview with Liz, Director of the Community Legal Resource Network at CUNY, November 16, 2015. For an account about replicating the CUNY for Justice model, see Fred Rooney & Justin Steele, *Exporting the Legal Incubator: A Conversation with Fred Rooney*, 9 U. Mass L. Rev. 108 (2014) (documenting conversation with CUNY's former Incubator for Justice director, Fred Rooney, regarding his experience helping other law schools establish legal incubator programs).

31. *See* Am. Bar Ass'n, *Incubator/Residency Programs Directory*, www.americanbar.org/groups/delivery_legal_services/initiatves_ awards/program_main.html. *See also* Ed Finkel, *Incubator-Style Programs Growing Among Law Schools,* 42 Student Lawyer No. 2, pp. 28-31 (discussing various post-graduate training programs including one at Rutgers University School of Law).

32. Katie Dilks, *Law School Incubator Programs: Models and Best Practices*, NALP Bulletin, October 2013.

33. For more information about business incubators, see the National Business Incubator Association *at* http://www.nbia.org.

34. *See generally* Adam Chodorow and Philip T. Hackney, *Post-Graduate Legal Training: The Case for Tax-Exempt Programs*, 65 Journal of Legal Education (forthcoming February 2016), available at http://ssrn.com/abstract=2687549.

35. For a discussion of the Public Service Loan Forgiveness Program and income contingent loan repayment programs see U.S. Dep't of Educ., Federal Student Aid at https://studentaid.ed.gov/sa/ repay-loans/forgiveness-cancellation/public-service.

36. *Id.*

37. *ABA Model Rule 6.1*, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_1_voluntary_pro_bono_publico_service.html,

38. *Id.*

39. The exceptions are New York and California who recently instituted new pro bono and reduced fee services requirements for lawyers seeking admission to their respective state bar associations. *See* New York State Unified Court System at http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml; *see also* the California State Bar Task Force on Admissions Regulation at http://www.calbar.ca.gov/AboutUs/ BoardofTrustees/TaskForceonAdmissionsRegulationReform.aspx.

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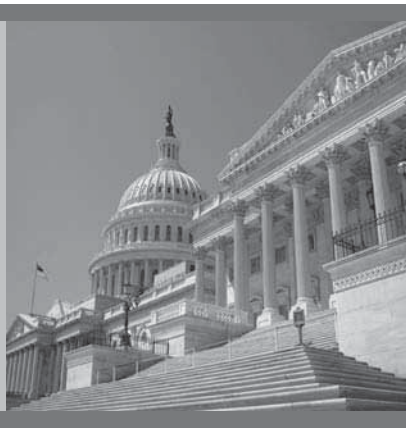
NYSBA Members are Invited to Spend An Exciting Day in Our Nation's Capital

To qualify for admission to the bar of the United States Supreme Court, you must have been admitted to practice in the highest court of a State, Commonwealth, Territory, Possession or the District of Columbia since at least June 11, 2014.

Washington, D.C. in June is a lovely city. Please plan on joining us for an exciting experience, culminating with your admission to the Supreme Court of the United States.



Schedule of Events

Sunday, June 11, 2017

4:00-6:00 pm	Young Lawyers Section Executive Committee Meeting (All Welcome), The Phoenix Park Hotel
6:00-7:00 pm	Welcome Reception

Monday, June 12, 2017

7:50 am	Walk to Supreme Court (about an 8 minute walk)
8:00 am	Meet on Courthouse steps for group photo
8:10 am	Security Checkpoint
8:20 am	Continental Breakfast at Supreme Court
9:15 am	Guests escorted to Courtroom
9:30 am	Admittees escorted to Courtroom
10:00 am	Admission Ceremony
11:45 am	Champagne Lunch at The Phoenix Park Hotel

Program Particulars

The admissions program is limited to **50 applicants**, so early completion and submission of your application and court admission fee (seperate from this pre-registration) is strongly advised, after you pre-register.

To qualify for admission to the Bar of the United States Supreme Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; must not have been the subject of an adverse disciplinary action pronounced or in effect during that 3-year period; and must appear to the Court to be of good moral and professional character.

After you submit your pre-registration form **(due no later than December 19, 2016)** and appropriate pre-registration fee(s), you will receive, in mid-January, a complete packet of instructions, formal application form, personal history sheet and list of sponsors in your area with whom you may choose to meet. If you know of other U.S. Supreme Court admittees (not on the list provided) who are willing to serve as your sponsor(s), please feel free to contact them directly.

Hotel Accommodations

The Phoenix Park Hotel, a Capitol Hill Hotel will be our headquarters for this program. The Phoenix Park Hotel is conveniently located within walking distance to most points of interest, including the United States Supreme Court.

Individual attendees may reserve a room by calling 1-877-237-2082 or 202-638-6900 and identify themselves as a member of the New York State Bar Association Group.

Additionally attendees may book reservations online by visiting our website www.PhoenixParkHotel.com and entering the Group Code 20846 in order to obtain the Group's rate.

Room Rates

$199.00 single | $209.00 double

Hotel Cut-off date: June 11, 2017

Pre-Registration Activity Deposit

The registration fees cover the processing fees, welcome reception, continental breakfast at the Supreme Court and the champagne lunch immediately following the admissions ceremony.

$185.00 - Member Attorney Registration Fee
$250.00 - Non-Member Attorney Registration Fee
$185.00 - Spouse/Guest Registration Fee

Supreme Court Fee

The above noted pre-registration fee **does not** include the Supreme Court admission fee of $200. This fee is due with your application, **no later than March 17, 2017**.

Please note: Registration fees do not include hotel accommodations. Reservations must be made directly with The Phoenix Park Hotel.

Guests at the Supreme Court Admissions Ceremony

It is a rule of the United States Supreme Court that **only one guest per admittee will be allowed into the courtroom** to observe the ceremony. This policy is strictly enforced. Electronic devices, purses, bags or backpacks are absolutely **not** allowed. Should you bring a camera, you will be required to leave it in the holding room during the ceremony. Children under six years of age will not be admitted in the courtroom.

Those who are not staying at The Phoenix Park Hotel must plan to arrive at the United States Supreme Court no later than 7:55 am on Monday morning.

Final Deadline Date

After you receive the application packet, your application for admission must reach the Bar Center in Albany by **March 17, 2017**. This is a firm date, due to the strict requirements of the United States Supreme Court.

Cancellations and Refunds

Refund of registration fee(s) will not be honored after May 6, 2017.

Questions

For questions regarding this program, please contact Alexander Englander, Member Development Specialist/Young Lawyers Section Staff Liaison at aenglander@nysba.org.

United States Supreme Court Admissions Program – June 12, 2017

Pre-Registration Form

Member Attorney registration fee: $185 | Non-Member Attorney registration fee: $250 | Spouse/Guest fee: $185

Name _____ Name of Guest (s) _____

Address _____

City _____ State _____ Zip _____

Phone (_____) _____ Email _____

Payment Information

❑ Check or money order enclosed in the amount of $ _____ **(Make checks payable to New York State Bar Association.)**

❑ Charge $ _____ to ❑ American Express ❑ Discover ❑ MasterCard ❑ Visa Expiration Date _____

Card number _____ Expiration Date _____

Authorized Signature _____

Please mail or email this form, no later than December 19, 2016, with your payment to:

Alexander Englander, Young Lawyers Section Staff Liaison
New York State Bar Association, One Elk Street, Albany, NY 12207

If you have any questions, please call Alex at 518.487.5578, or via email at aenglander@nysba.org.
If you need to cancel, refunds **will NOT** be issued after May 5, 2017

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