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Perspective

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The Tao of No—How Learning to Say "No" Makes You AND Your Practice Better

By Glenn Truitt

We are, by nature, helpers. It's a part of who we are. No matter what we might say, that's a part of how and why we all got into this crazy business. We like having the answers to people's problems and questions, and, more importantly, we like *sharing* them. After all, once you strip away all the billable hours, law firm politics, and the other assorted unsavory bits associated with the practice, it really is all about *helping* people, isn't it? Which is why most of us find saying "no" to be so difficult. We take on cases, clients and matters that we *know* we shouldn't and find ourselves confused as to how we got into the messes we are in. This is especially difficult for small firms and solo practitioners in a down economy—when the pressure couldn't be higher to take *everything* that comes through the door. But you'll soon discover that refusing to turn down work is just as certain a recipe for failure as refusing to take any work at all.

After a couple of years of solo practice and commiserating with other solo and small firm attorneys, I've come up with a few simple rules for *when* to say no, *who* to say no to and *how* to turn those no's into the kind of clients you *really* want—three things at a time:

> *"After all, once you strip away all the billable hours, law firm politics, and the other assorted unsavory bits associated with the practice, it really is all about* helping *people, isn't it?"*

3 Reasons to Say No

1. **You're Too Busy**. There are two kinds of lawyers: ones who hate to admit how busy they are, and ones who can't *wait* to tell you about it. But no matter which you are, we're *all* busy—*really* busy. And I'm not just talking about work. It's not only about the law anymore. You've got a life (well, as much as you can for a lawyer), and you've got things to do; more things every day. As a matter of surviving the practice at all, you've learned to manage an overfull work schedule already; learned to get everything done and to get it done well. But when you're a solo/small firm practitioner, there isn't a pressure relief valve (*i.e.*, another attorney, associate, paralegal, etc.) so when you really do reach capacity and you don't have time to do something, it's just not going to get done. And if you *do* do something without enough time, you know you won't do it right—at least not as right as you could, and you (and your clients) know that's

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NYSBA

A Message from the Outgoing Section Chair

Why Bother?— The Purpose of Section Membership

(This is a modified version of my address to the participants of the second day of the NYSBA Young Lawyers Section's Bridging the Gap program in New York City on January 28, 2011).

Why bother? This is what I have heard from many young attorneys when I ask them about joining a Section. I could have said the same thing as I was just as busy as they were. I have spent my entire eleven years of practice actively involved in Bar Association activities and Section programs. Most of this time was spent actively participating in events involving newly admitted attorneys or young lawyers.

After my return to Syracuse from Western New England College School of Law, I did not know that many local attorneys or judges. Upon my admission in 2000, I received an invitation from Christine Woodcock-Dettor, Esq. and Karin Sloan-Delaney, Esq. to join the Onondaga County Bar Association's New Lawyers Section. I started going to meetings and I was hooked. Over the five years I was involved in the New Lawyers Section, I learned how to set up CLE programs, lunch meetings and run a small group. In that time, I met more judges than I ever would have otherwise. My first interactions with many members of the judiciary were at events like the Winter Reception at the Corinthian Club in Syracuse. These were golden opportunities to get to know the judges on a personal level without having to worry about a client. This also took away my fear of appearing in front of a new face. The judiciary was always willing to take the time to speak with me and give me some great pointers and advice (always within the bounds of the rules of conduct).

Through my Section membership, I learned how to set up large-scale programs such as the twelve-part Litigation CLE program I designed for the Onondaga County Bar Association.

"I will guarantee the opportunities for professional growth, personal development and a whole lot of fun are there for you to experience—all you have to do is actively participate and enjoy."

In 2003, I received an e-mail from the New York State Bar Association (NYSBA) Young Lawyers Section (YLS) notifying me of their Supreme Court Admissions Program. I went to this event and had a wonderful time. The Justices read decisions, swore us in and I even had my picture taken with Senator Bob Dole. I loved the idea of being admitted just to have had the experience of doing so. I assumed that this would be my sole appearance before the High Court. I was wrong and it was in a way I had never expected.

In 2006, my girlfriend (now wife) Betsey wanted to be admitted to the United States Supreme Court along with her entire family. They asked me to make the motion for their admission. We brought a group of ten admittees (nine related and one honorary Snyder) and their families to Washington D.C. for the admission.

When you make the motion you are given a rigid script to read off of and the Court instructs you not to deviate. I received my script in the morning and was separated from the family and waited for them in the courtroom. My solitude was interrupted by William Souter, the Clerk of the Court, who informed me that Chief Justice Roberts wanted me to add family titles when I read each name. They were not on the script but if the Chief Justice wants the titles then he will get the titles. During the ceremony, I was called to the podium and I read the script slowly. I made sure to add in the family titles. When I finished, Chief Justice Roberts turned to the admittees and asked, "Didn't any of you want to be a doctor?"

Not only did I have the honor of setting up a joke for the Chief Justice of the Supreme Court, but I later found out that this admission tied the record for the number of family members admitted at the same time to the Court. On the way home, we received a call from a friend who informed us that the story had made the NBC Nightly News.

In 2004, there was an opening in the YLS for an Alternate 5th Judicial District Representative and I notified NYSBA of my interest. I attended the Section Meeting at Turning Stone that year and enjoyed getting to know the group. In 2007, there was an opening for the Secretary position and I, by proxy, submitted my nomination. I have spent the last four years with the honor of serving the Section as an officer and being able to put on events and programs to help young lawyers throughout the state. I have also met so many amazing attorneys through this experience—ones that I would not have met but for my travels with the Section. I have worked alongside of the finest leaders of this Section, including

Justina Cintron-Perino, Valerie Cartright, Sherry Levin-Wallach, Tucker Stanclift, James Barnes, Michael Fox and Dana Syracuse as well as our NYSBA staff liaison and advisor Megan O'Toole. I am proud to have had them as my teammates and to call them friends. They taught me a lot about how to lead with dignity, building and sustaining momentum of a large group and having fun while stressed. Their abilities made the Young Lawyers Section thrive, which I am glad to have been a part of.

All of these things are wonderful, but they pale in comparison to the greatest opportunity Section Membership presented to me—one I can never repay. You see, in 2002 on a very snowy November night, I drove from Fayetteville, NY to Utica for a Young Lawyers Section 5th Judicial District event. On that night, at the Fort Schuyler Club, I met a number of young lawyers, including three sisters. One of the sisters was the 5th Judicial District Representative who had red hair and beautiful blue eyes. Many (patient) years later she did me the greatest honor and became my wife. Thanks to that fortuitous meeting through the Young Lawyers Section, I have Betsey in my life and for that I am forever grateful.

Now for the disclaimer—past successes do not guarantee future results and there is no way to ensure you will have the same experiences I did. I will guarantee the opportunities for professional growth, personal development and a whole lot of fun are there for you to experience—all you have to do is actively participate and enjoy. I also had the benefit of very understanding employers (my friend and mentor Frank Josef, Esq. as well as the officers at NYCM Insurance). They were very pragmatic and saw the value in my professional growth and how I was able to translate that into a benefit for them. I cannot thank them enough for their understanding.

As I stand before you at Annual Meeting, I am staring at 40[1] and know my days as a Young Lawyer are numbered. In the twilight of my YLS career, I start to look towards the future and think about where I want to go next. After my year as YLS Chairperson I may take a little time to relax but I expect that I will not be sedentary for too long. The pull of camaraderie, the desire to serve and the thirst for knowledge cannot be ignored.

Philip G. Fortino

Endnote

1. The Author took a little creative liberty as that he turned 40 on the day this address was delivered.

Note: Philip Fortino's term of office ended on June 1. James R. Barnes is the new Section Chair.

How to Lose a Client in 10 Days

By Glenn Truitt

Breaking up is never easy. It's even harder when you have a sworn ethical obligation not to. But as we all know, it can be a whole lot less painful if you can convince whoever you're trying to break up with *to break up with you*.

"And so for the lawyers who can't find it in themselves to tell that client to hit the road, a day-by-day guide on how to lose a client in 10 days…"

Sure, it's not the most courageous thing to do but sometimes you've just got to get out. You know the client I'm talking about, the one whose name on your caller ID gives you that same pit in your stomach you get when you see flashing lights in your rear-view mirror, or when you were called to the Principal's Office. The client whose bill you would completely write off if he or she would simply *go away*. And so for the lawyers who can't find it in themselves to tell that client to hit the road, a day-by-day guide on **how to lose a client in 10 days**:

Day 1: Remember how they told you at your first job to bill for any time you even spend *thinking* about a matter? Do that, and use that notation on your invoice.

Day 2: Answer any questions posed to you with "it depends..." followed by at least one minute of awkward silence.

Day 3: Use Latin whenever possible. Do not offer to explain. If *forced* to explain, bill for it.

Day 4: If asked to give a time estimate on the completion of anything, answer with "two weeks," unless it's something that really will take you two weeks, then answer with "90 days."

Day 5: When giving fee estimates, be sure to include "time spent learning [insert activity here]"—make certain it's at least 30% of the bill.

Day 6: Offer up single-digit percentage chances of success. Then say the words "conservative estimate" with a confident nod.

Day 7: Let *all* calls go to voicemail. Return all calls *precisely* 48 hours later. If you have a secretary, instruct him or her to tell the calling client that you're in a meeting with a "very important" client and will get back to them later.

Day 8: Offer to meet for lunch. Insist on a pricey restaurant. Insist on picking up the tab, and bill it, including the valet, to the client. Do not discuss the matter during the meal.

Day 9: Complain about the cost of your malpractice insurance. Make subtle reference to not having *that* many grievances filed against you.

Day 10: If all else fails, change the e-mail and text message alert on your phone to the "doink doink" sound from Law & Order, and do *not* place your phone on vibrate. Ever.

And when parting ways, make sure to apply the lessons you've already learned from your own fractured and abortive personal life (*e.g.*, note how "it's not them, it's you," "you just want them to be happy," "you hope to keep in touch," etc.). After all, you never know when the client you lose may just lead you to the client you always wanted.

Glenn is the founder and principal of MyContractsGuy.com, a legal practice based in Las Vegas, Nevada. He graduated from Stanford Law School in 2005.

New Ideas in Practical Training for Young Lawyers and Litigators: The Approach in England and Wales

By Nilesh Yashwant Ameen

I. Introduction

Upon graduation from law school in the United States, one common complaint from both young lawyers and those involved in the recruitment, hiring and employment of young attorneys is the comparative lack of practical legal skills that attorneys possess upon entering the profession. The perceived lack of practical skill attained by young attorneys is perhaps amplified in the litigation setting, especially in smaller trial and litigation practices where attorneys are expected to take on responsibility earlier, and in government litigation departments where young prosecutors may be "thrown into the deep end" and expected to take on litigation, trial and advocacy work at an early stage.

In law school, courses in trial advocacy are commonly available and many students often get involved in mock trial and moot court teams. In addition, various law school-run legal clinics in different areas of practice exist, allowing students the opportunity to receive practical experience in a particular field of law, such as criminal law or family law.

Despite all this, complaints sometimes emanate from employers that young attorneys do not have all the practical skills they need to succeed at an early point in their careers. Bearing this in mind, it is worth speculating whether the United States legal education and training system could borrow from outside legal systems in its development and training of young attorneys.

II. The British System

With its similarities to the U.S. legal system, legal training in the British system may be a useful comparison. In particular, the system of lawyer training in England and Wales and the opportunities available to young lawyers in England may provide solutions to improving any deficiencies in the skills of young lawyers.

Lawyers in England have historically been divided into two professions, solicitors and barristers. Each profession has had a different role within the legal system, and over time, each occupation has developed its own particular skills and training to suit the needs of its role.

"[I]t is worth speculating whether the United States legal education and training system could borrow from outside legal systems in its development and training of young attorneys."

III. Solicitors

Solicitors have generally been seen as the "junior branch" of the profession, and have somewhat been perceived as "out of court" lawyers, historically not having "rights of audience" in the higher courts in England (essentially the right to appear as an advocate).[1] The general prohibition (again, there were limited instances in which solicitors were allowed to appear) on solicitors appearing in higher courts[2] has been lifted in recent years and solicitors now may qualify as "Higher Court Advocates" enabling them to practice more generally as advocates in higher English courts.[3]

In addition to a two-year "training contract" in a recognized legal practice (such as a law firm) that nearly all prospective solicitors must undertake, solicitors wanting to practice as advocates in the higher courts in England must undertake a special advocacy course and assessment before they are granted so-called "higher rights of audience" in the English courts.

IV. Barristers

Barristers have historically been seen as the "senior branch" of the legal profession in England, and a large focus of the profession has been as a specialized trial and advocacy bar.[4] A significant part of training for barristers therefore focuses on litigation and advocacy skills (though barristers do engage in and advise on non-litigation work, and train heavily in the areas of negotiation and counselling skills). After completing their legal education and skills course, trainee barristers must undertake a "pupillage," which consists of training in a recognized barristers' chambers.[5] Indeed in the second part of a pupillage, pupils are effectively enabled to practice law, and essentially practice as a qualified barrister would do and appear in court for clients.[6] It has been said that even at this stage, a young barrister begins to develop his or her professional reputation,[7] and of course this will stay with them as they progress through their careers.

V. The Free Representation Unit

Another avenue for law students and young lawyers in England to gain advocacy and litigation experience is by working as a volunteer advocate for the Free Representation Unit (FRU). The FRU is a charity that provides representation to individuals in front of the Social Security and Employment Tribunals in the UK.[8] Individuals who believe they are

entitled to social security benefits or employment can have their cases and appeals heard in front of these tribunals (these tribunals are roughly akin to administrative agency proceedings in the United States), and volunteer advocates from the FRU represent individuals in these proceedings after referrals from various agencies who pass on cases to the FRU.

Representatives are expected to handle cases from start to finish, after consultation with a supervising FRU lawyer, and are bound by the Bar Code of Conduct that sets out the ethical standards governing barristers in England and Wales. Cases involve the collection of evidence; consulting with, interviewing and conferencing with clients; and presenting the evidence and client's case before a tribunal at hearing. Advocates are also expected to communicate with tribunals and administrative bodies, as well as liaise with the agencies referring cases to the FRU.

Representatives may also take on numerous cases, thereby developing an expertise in conducting certain types of matters before a tribunal, and also becoming highly knowledgeable about a particular area of legal practice. The FRU Program in some ways resembles certain U.S. *pro bono* clinics, such as those on social security law or employment law, though the amount of time and experience spent on practical litigation, advocacy and tribunal work may well even exceed certain U.S. *pro bono* programs. For example, heavy emphasis in cases may be placed on gathering evidence such as medical evidence for a social security hearing, and then rigorously challenging the government's medical evidence at hearing.

VI. Suggestions and Observations

In dealing with the supposed deficiency in the practical litigation skills of young lawyers, perhaps the U.S. system of legal training can draw on various aspects of the English training system. From the solicitors' profession, aspects of the "training contract" in a recognized law practice could be brought into U.S. legal training by requiring law students to spend significant time working in a law firm before admission to the Bar. This time could be used to pick up important practical skills not taught in law school but that could be very helpful when an attorney is admitted to the bar and ready to practice law.

From the barristers' profession, perhaps some of the specialized litigation and advocacy skills taught to barristers as part of their "vocational course" could be emphasized in U.S. law schools. In law school in the U.S., these may be taught as part of a lawyering skills course but they are not seen as a separate stage of training; perhaps the final year of legal education should emphasize these litigation skills. In addition, perhaps aspects of the barristers' "pupillage" could be worked into U.S. legal training by requiring some pre-bar admission representation experience in court under the supervision of a skilled attorney — especially for those young lawyers who wish to work as litigators in court and before regulatory agencies.

From the Free Representation Unit, perhaps more programs (such as pro bono programs) could be developed in the United States allowing young lawyers to advocate extensively before courts and tribunals during their early years of practice. Such programs would ideally focus on skills such as the collection and presentation of evidence, communications with courts, administrative agencies and tribunals, and the ability to manage and conduct a case from beginning to end.

VII. Conclusion

Legal training in the United States is thorough and exhaustive in many respects, from the breadth of subjects covered in law school to the amount of time spent on seminar papers, final examinations and the Bar examination. However, young attorneys and employers sometimes express frustration at a lack of preparation for the "real world" practice of law, which is perhaps magnified in the areas of litigation and trial advocacy.

Perhaps borrowing from various aspects of the English and Welsh model of legal training, such as the early litigation and practical skills experience gained by solicitors and barristers, and the experience gained through such legal organizations as the Free Representation Unit, would enhance the practical skills that young attorneys and litigators entering the "real world" would be equipped with and ready to practice with.

Endnotes

1. For a brief history of the Law Society, the organization that historically regulated of solicitors in England and Wales, see <<http://www.lawsociety.org.uk/aboutlawsociety/whoweare/abouthistory.law>>. A short interesting and informative review of the development of the legal professions in England and Wales is found here: <<http://www.lawgazette.co.uk/features/legal-ethics-past-and-present>> (part two of a three part series on English legal ethics and history from the news journal of the Law Society).
2. As a general rule—and this is very much a simplification—"higher courts" could be seen to consist of the Crown Courts, where serious criminal cases are tried, civil courts with larger "amounts-in-controversy" at issue, and higher appellate courts including the English Court of Appeal. "Lower courts" would be courts such as the Magistrates Courts, and civil courts with smaller "amounts-in-controversy" at issue.
3. For the original Act that opened the way for solicitors to gain general higher "Rights of Audience," see Courts and Legal Services Act 1990, c.41 pt. III §27.

The regulations governing the rights and procedures for solicitors to be able to practice in the higher courts have been modified over the years. For the most recent rules see the information provided by the Solicitors Regulations Authority (the body that now governs admission as a solicitor in England and Wales) <<http://www.sra.org.uk/solicitors/change-tracker/higher-rights-audience-regulations.page>>. For more details regarding the advocacy and training assessment necessary to gain "higher rights of audience" see<< http://www.sra.org.uk/solicitors/accreditation/higher-rights-of-audience.page>>.

4. For a very brief overview of the history of the Bar see <<http://www.barcouncil.org.uk/about/history/>>.
5. The following link to information provided by The Bar Standards Board (the body regulating barristers in England and Wales) sets out the basic education and training requirements to become a barrister: <<http://www.barstandardsboard.org.uk/Educationandtraining/>>. For further information regarding the vocational (professional skills) course to be taken after completion of a law degree see the following link: <<http://www.barstandardsboard.org.uk/Educationandtraining/aboutthebvc/>>.
6. For more on the pupillage structure, see the following information provided by the Bar Standards Board (the body regulating barristers in England and Wales) <<http://www.barstandardsboard.org.uk/Educationandtraining/whatispupillage/structureofpupillage/>>.
7. See the discussion of pupillages and tenancy provided by the Law Careers Action Network, an advisory service for law students and young lawyers in England and Wales <<http://www.lcan.org.uk/pupillages_and_tenancy.htm>>
8. The Free Representation Unit (the FRU) website is <<http://www.thefru.net/>>. Further information regarding the services provided by the FRU and the training of the services provided by the volunteers can be found on the available links on the website.

Nilesh Yashwant Ameen, Esq. (nilameen@aol.com) is a New York attorney who currently resides in London, England. He holds an LL.M. in Comparative Law from the University of San Diego School of Law and an LL.B. from the London School of Economics. He is the Editor of the NYSBA Young Lawyers Section e-newsletter *Electronically-In-Touch*.

Defending the Child Pornography Case

By Anthony J. Colleluori

Child Pornography is defined by 18 U.S.C. § 2256 as:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 U.S.C. § 2256 (2010).

The Internet has moved the child pornography business into homes and offices throughout the nation. In fact prosecutions are up in this area and the Justice Department, with the support and urging of a number of otherwise disparate political groups, is spearheading this effort. Hence, federal prosecution of child pornography is a new cottage industry in criminal law.

The Federal Sentencing Guidelines in most cases can cause the possessor of such material to actually serve more time in prison than the person who actually commits acts of violence against or has sex with children. Sentences of twenty years or more are regularly administered throughout the nation and a five-year sentence is the minimum. Further, certain opportunities to reduce prison terms are unavailable to the child porn defendant due to the very nature of both the crime and the Internet. Unlike most crimes, here the possessor never meets, nor can he actually identify his potential co-defendants. Recently a local prosecutor wrote to the court that with the exception of one case in seven years, he had never seen a defendant in one of these cases actually provide a lead that led to a prosecution of another individual.

"[F]ederal prosecution of child pornography is a new cottage industry in criminal law."

In other words, a 5k.1 letter (a letter from a prosecutor advising the court of substantial cooperation of the defendant warranting a reduction of sentence below guideline and even mandatory minimum sentences) is usually not seen in these cases.

Finally the crime is sure to land the defendant on a sex-registry listing which could, under certain circumstances, cause the defendant to be placed into a locked down sex offender therapy unit after his sentence is completed. There is no required release from such a unit.

As a result of these horrors it is of great import that counsel on these cases take certain steps as quickly as possible. Counsel's first priority should be to find out who has arrested the client and where the client is. Counsel should invoke the defendant's right to counsel and his right to remain silent and stop any questioning that may be taking or about to take place. Counsel should also try to get his hands on any evidence he can and have it evaluated as soon as possible. Destruction of such evidence is illegal. Hence counsel must be careful to make sure nothing in his procedure leads to spoliation of the evidence. Finding out who had access to a client's computer is also very important. If a computer is a "family" computer then no one should be given permission to look at the computer. No consent search should be performed. Obviously if the computer belongs to the client alone he should not agree to the taking or reviewing of the contents of the computer. Let the prosecution try to get a court order to view the images.

As has been pointed out Nathaniel Burney in his blog Criminal Lawyer (http://burneylawfirm.com/blog/2009/05/07/memo-to-child-porn-defendants-the-"it-was-only-research"-defense-never-works/), the defense that one is "doing research" is generally not viable. In fact, the Court of Appeals for the Fourth Circuit in *U.S. v. Matthews*, 200 F.3d 338 (4th Cir. 2000) held that such a defense was not available to a reporter who actually did do a story on child pornography.

Faced with the *malum in se* nature of the offense and the terrible outlook for getting a fair and unbiased jury based on the offense's nature, what can and should competent defense counsel do?

There are a number of defense issues which must be raised which attack the quality of the evidence. For example, the prosecution needs to prove that there are over six hundred images on the computer in order to sustain the largest sentences. Counting them is important. Further,

defense counsel needs to hire experts who can review the evidence (which is often done in the prosecution's office or a lab as the law denies the defense the right to have the images even for the purpose of preparing a defense) to determine if the photograph is in fact a photo of real people; that the photos themselves are real; that the photos came from the computer they are alleged to have come from; and that the people in the images are in fact children.

Defense counsel and clients must remember that a computer drive is rarely ever "clean"—even if a piece of data is erased it may be found hiding in some nook or cranny of the computer's memory. It is possible that a computer which was the victim of a virus could become infected with child pornography without the owner ever knowing it was there. File-sharing programs such as limewire increase the chance that an outsider may control the computer even if the owner is using it simultaneously. Innocently clicking onto a website could cause downloading to begin even after the user has disconnected from the site. While such type of activity is thought to rarely occur, it does occur. In testimony before the United States Senate, Deputy Assistant Attorney General John Malcolm stated:

> One favorite trick of online pornographers is to send pornographic spam email. Another is to utilize misleading domain names or deceptive metatags (which is a piece of text hidden in the hypertext markup language (HTML) used to define a web page) which can mislead search engines into returning a pornographic web page in response to an innocuous query. As a result of these deceptive metatags, searches using terms such as Atoys,@ Awater sports,@ AOlsen Twins,@ ABritney Spears,@ Abeanie babies,@ Abambi,@ and Adoggy@ can lead to pornographic websites.

In a Massachusetts case, a government employee who was issued a computer was found to have downloaded over four times the amount of downloads than was common for one in his area of employ. When the computer's hard drive was accessed it yielded a lot of child pornography. Defense experts came in and determined that the information downloaded was done at a supernatural rate (some forty sites per minute), far more than a human being could have accomplished. The charges were later dropped. An opportunity to argue for jury nullification can be had if your expert finds that the alleged porn, while downloaded, was not viewed or opened and/or was immediately deleted. It is not a defense to the charges but it is the kind of thing a jury may hang its hat on if they are looking for reasons to acquit. Further, the defendant's lack of prior record and other psychological findings may be used to suggest that either the defendant was not the one who downloaded the material or that he didn't do so knowingly.

Sentencing advocacy is also very important in these cases. Sentences have risen sharply over the last decade as is pointed out in Clint Broden's article *Defending Child Pornography Offenses in Federal Court*, available at http://www.brodenmickelsen.com/blog/defending-child-pornography-offenses-in-federal-court/. In the article, Broden provides a chart of average sentencing over the last 20 years in these types of cases where there were videos and photos (videos are counted as over 600 images) (see below).

Sentencing advocacy in these cases does have an effect on courts when they begin to understand that actually having sex with a minor carries a lesser sentence than possessing and distributing the images. In a recent case, Judge Weinstein of the Eastern District of New York stated that these sentences were ruining lives of people who otherwise would never come into contact with the criminal justice system (*U.S. v. Polizzi*, 549 F. Supp. 2d 308 (E.D.N.Y. 2008)). The Second Circuit in *U.S. v. Dorvee*, No. 09-0648 (2d Cir. May 11, 2010) recently held that:

> District judges are encouraged to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2—ones that can range from non-custodial sentences to the statutory maximum—bearing in mind that they are dealing with an eccentric guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results. While we recognize that enforcing federal prohibitions on child pornography is of the utmost importance, it would be manifestly unjust to let Dorvee's sentence stand. We conclude that Dorvee's sentence was substantively unreasonable and, accordingly, must be revisited by the district court on remand.

Using a sentencing mitigation expert is a good way to reduce

Year from	Year to	U.S. Sentencing Guideline Level	Sentencing Range
1987	11/1990	13	12-18 months
11/1990	11/1996	18	21-27 months
11/1996	11/2000	22	41-51 months
11/2000	4/2003	27	70-87 months
4/2003	11/2004	29	87-108 months
11/2004	8/2010	34	151-188 months

the damage the guidelines and mandatory minimums bring. As most of the clients charged in child porn cases tend not to have any record and often are parents, community leaders or business people, the court needs to understand these individuals better. An expert in mitigation can put together a "day in the life" video or a booklet highlighting the experiences of the client and focusing on the defendant's contribution to the community. Moreover, in the simple possession or downloading case it seems that the Dorvee decision and the decision in U.S. v. Tutty, No. 09-2705 (2d Cir. July 16, 2010) requires that counsel call into question the underlying non-empirical approach to the guidelines as developed as well as the fact that some of the enhancements used to increase the guideline range could be considered "double dipping" in that the use of a computer in the possession is already contemplated by the original base guideline level. The lesson here is that in defending these types of cases, counsel must take a proactive approach to questioning the guidelines and deconstructing them.

In conclusion, child pornography charges are among the most serious a defendant can face in the federal system. Counsel cannot throw up his hands at the charges and hold the defendant's hand as he goes to the gallows. Instead, the defense attorney needs to actively litigate against the charge and question the guidelines as well as the "usual thinking" in order to attain justice for his client.

Anthony Colleluori is a principal in the Law Offices of Anthony J. Colleluori & Associates, PLLC in Melville, New York.

Scenes from the Young Lawyers Section

Annual Meeting

Wednesday, January 26, 2011 • Hilton New York



















(Continued from page 1)

worse than not doing it all. So when the next thing would be one thing too much—leave it be.

2. **You Don't Know Enough**. Let's be honest, the vast majority of what you know about practicing law, you did *not* learn in law school. You probably don't remember *anything* you learned in law school and haven't touched a bluebook since graduation. But you *have* learned plenty since. You know how to draft, review, edit, correspond and manage clients and cases. But for all you *do* know, there are ten times as many things you *don't*. Being a solo practitioner or in a small firm means that you may not have the luxury of being a narrow specialist—but if you limited yourself to working on things that you have down cold, you'd never do anything. Trying out new things is how you become a better lawyer, but you also know enough to know when you're really in over your head. Non-lawyers like to think that a license to practice means that you can do anything and everything legal—and it's in our nature to please. But while you might be able to figure out how to do something if you had all the time in the world, your time is expensive and not just for you. If it seems like it might be a bit out of your reach, it probably is.

3. **You *Really* Don't Like The Work**. No matter how valuable a piece of work might be, or how easy it might be for you to do it, if it's work you hate, it's better to pass on it. Don't get me wrong, you can't expect everything that comes through the door to be right down the middle for you—the kind of projects you got into law in the first place for. But just like there are those "sweet spot" pieces of work that you can knock out of the park with the greatest of ease, there is also that work which, for whatever reason, you'd rather go back and take the bar exam again than have to do. And whatever they are, it's best to avoid them. Because no matter how valuable the work might be, and how much free time you've got—not only will your work not be your best stuff, you'll be miserable. And that's never something to volunteer for.

"If the first *thing a client is worried about is cost—that's probably a reliable indicator of their ability to pay for your services, and* definitely *a reliable indicator of them complaining about your bill."*

3 Types of Clients to Avoid

1. **Slow Payers/Non-Payers/ Short Payers**. Legal work has a lot in common with writing, interior decorating and marketing in that most people think they could do it themselves if they had enough time. But in reality, they wouldn't have the first idea what do to. The beauty of these professions is that if you do them right, they *should* look easy. Unfortunately, this sometimes makes getting paid for them a real challenge—especially when the price is high (*e.g.*, with legal work). If the *first* thing a client is worried about is cost—that's probably a reliable indicator of their ability to pay for your services, and *definitely* a reliable indicator of them complaining about your bill. If it's your first engagement with a client like this, you *must* get a retainer that covers at least *half* of the anticipated bill. If they balk at that, they weren't going to pay you anyway. So unless you're trying to fulfill a *pro bono* requirement, let these clients become someone else's collections headache.

2. **Guaranties**. In this products-liability world, it's not uncommon for consumers to have grown accustomed to having anything and everything guaranteed to them. Our electronics are guaranteed, our cars are guaranteed, and even diet/fitness plans are guaranteed. So, it's no surprise that people are looking for some similar kind of assurance when shelling out big bucks for legal help. Unfortunately, just as there are no real guarantees in life, there are even fewer in the law. It's an uncertain business, and if we were charging based on wins/losses, we'd be charging a whole lot more (to make up for not collecting on losses). Many solo/small firm practitioners offer a "satisfaction" guarantee that offers to continue to "work" to make things right—especially if you're a transactional attorney—but this is far from guaranteeing

results. If you find a client who asks for guaranteed results, you've also found a client who is looking for a reason not to pay you—and who deep-down thinks that what you do isn't worth much. A guaranteed-to-be-terrible client. Pass.

3. **Back Seat Litigators**. The world is not simply made up of lawyers and non-lawyers. In reality, there is a lot of grey area—*i.e.*, a lot of people who know a *little* about the law; just enough to be dangerous (or dangerously annoying). Whether it's the number of dramatic television shows about lawyers, the number of "legal correspondents" on the evening news, or simply the greater role that law plays in our everyday lives, people who don't know the first thing about practicing law have never purported to know more about it. Of course, by the time most folks get to the point where they're ready to hire a lawyer, they've realized they are in over their heads and ready to turn over the reins to a legal professional. Most folks. There are precious few who want to tell you *precisely* how they'd like you to help—and these same folks will read your itemized bill like an IRS auditor reading your tax return. Best to get out early and let them go ahead *pro se*. This is also the best reason to *never* take on a lawyer as a client—unless you know them personally, and know they know better.

3 Ways to Turn a "No" into a "Yes"

1. **Referrals Beget Referrals**. Clients are like love interests—in that, there is someone for everyone. And no matter how impossible it may be to believe, there *is* a lawyer right for that client you can't get out of your office or off of the phone fast enough. One of the best things you can do for the clients you *don't* want is to find them the lawyer that *will* want them. And this doesn't just apply to clients who aren't a good subject-matter fit. Some attorneys are much better equipped to handle troublesome types—whether it be with their practice style, business model or fee structure. And best of all, these attorneys almost always return the favor—giving you exactly the type of clients you're looking for that just aren't right for them. In the end, it's a win-win because the clients get the right lawyer, and your "no" turns into a "not me, but him/her." What's more, by offering to help them get help, you also get credit for helping by doing little more than keeping an active Rolodex.

> *"One of the most valuable things you can tell someone looking for an attorney is that* they don't need an attorney."

2. **Free Advice**. If you've got a law degree and friends/family, you're already giving out your share of free legal advice. And it seemed like sage advice when Heath Ledger (as the Joker) offered, "if you're good at something, never do it for free." But, it turns out that a little bit of free advice can go a long way. Sometimes the question being asked is simple enough that you can handle it with a five-minute e-mail, and keep someone from making a costly mistake. Sometimes all a client wants is a little professional validation on an opinion he or she already has. Sometimes a license to practice law means just lending your intellect to a problem without any "legal" analysis at all. Charging for five minutes of your time really only makes sense when it's the five minutes *after* you've spent fifty-five minutes already. Clients with five minute problems eventually have five *hour* problems, and they're much more likely to trust the lawyer who didn't hang them up for the quick answer they needed—and much *less* likely to think your bill is inflated when they do. In the overwhelming majority of cases where I've given out a small free bit of advice—I've ended up billing time and getting paid quickly.

3. **Non-advice (self-help/no lawyer needed/etc.).** One of the most valuable things you can tell someone looking for an attorney is that *they don't need an attorney*. I've never met *anyone* who is excited about finding a lawyer. Because most people *know* it's expensive and *know* that the processes involved are long, painful, and devoid of guaranteed results. So finding out that you *don't* have to go through all that is some of the best advice you can give. There have never been more or more easily accessible avenues for self-help—with little or no cost. Trademarks can be registered, corporations and LLCs can be formed, and small claims cases can be filed in *minutes* online—at a small fraction of what it might cost to have a lawyer do it for you. Sure, there are versions of each of these

activities which absolutely should be undertaken by a professional—but far more of them are paint-by-number administrative activities that anyone with a triple-digit IQ and internet access can accomplish. There are even more instances where someone doesn't just need to be told "no" to getting legal help—rather, they need just plain "*no*." *No*, they shouldn't sue; *no*, it's not legal; *no*, you *can't*. The money you save someone with this kind of "no" almost always comes back to you—directly or indirectly, because the public-at-large believes that honest lawyers are hard to find, and that lawyers who turn away easy business are even harder to find. So once think they've got one—well, let's just say you'll be hearing from them.

* * *

A Google search for "The Power of Yes" yields 29,100 results—impressive until you realize that a Google search for "The Power of No" yields over 44,000 results. The power of positive thinking has a nice ring to it—but anyone who survived his or her 20s can tell you, a whole lot of "yes" can be drastically more trouble than a whole lot of "no."

"'Yes' got you into law school, a J.D., an internship, a bar card, and that first job—but only 'no' will make you into a real lawyer."

Yes is easy; yes is fun; yes is the good times rolling—and no one ever really has a problem with that. But no is *hard*; no is disappointing people; no is awkward, uncomfortable and generally unpleasant. No is the difference between what you want to do and what you *have* to do. "Yes" is being an associate, a cog, a grinder. "No" is partnership, ownership, real professionalism. No one has to learn how to say "yes"—it's built into our subconscious as deeply as breathing, blinking and eating. But "no" is more art than skill, more wisdom than knowledge, and takes more artisan than craftsman. Most of all, "no" takes *time*—and learning it washes the green off of you, your fledgling practice and your work product faster than the years themselves. "Yes" got you into law school, a J.D., an internship, a bar card, and that first job—but only "no" will make you into a real lawyer.

Glenn is the founder and principal of MyContractsGuy.com, a legal practice based in Las Vegas, Nevada. He graduated from Stanford Law School in 2005.

Scenes from the Young Lawyers Section

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March 23-27, 2011

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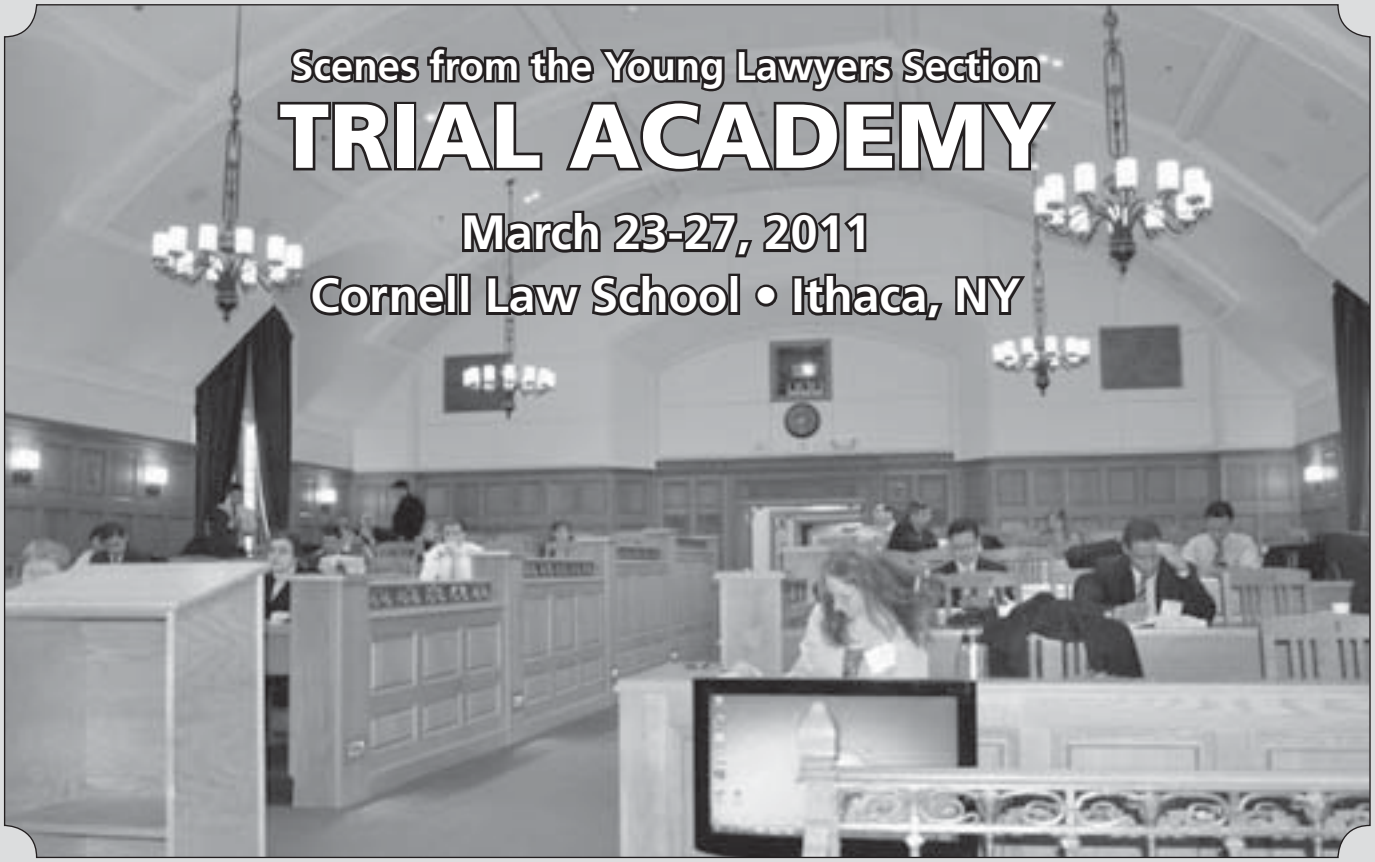







FINAL LAB REPORT





















Young Lawyers Section

FALL PROGRAM

October 20-22, 2011
NYSBA Bar Center • Albany, NY

Tentative Schedule

Thursday, October 20
Cocktail Reception (location TBA)

Friday, October 21

8:00-8:30 am	**Registration**
8:30-9:00 am	**Welcome Remarks**
9:00-9:50 am	**Segment on Initial Pleadings**—state and federal litigation (including property and Surrogate's practice/Article 81s). Contents, effective pleading, avoiding motions to dismiss, federal Twombly and Iqbal pleading issues (1 credit hour—50 minutes)
9:50-10:40 am	**General Initiation of Bankruptcy Practice, and Differences**—Chapters 7, 11, 13—issue identification, automatic stays, 341 creditor meetings, etc. (1 credit hour—50 minutes) *Confirmed Speaker: Hon. Robert E. Littlefield, Jr., Chief U.S.B.J., N.D.N.Y.*
10:40-10:50 am	**Break**
10:50-11:40 am	**Depositions and Discovery—**including e-discovery update (1 credit hour—50 minutes)
11:40 am-12:40 pm	**PART I. Ethics in Everyday Practice and Ethics in Litigation** (2 total credit hours—100 minutes) *Confirmed Speaker: Thomas O'Hern, Esq.*
12:40-1:40 pm	**Lunch**
1:40-2:20 pm	**PART II. Ethics in Everyday Practice and Ethics in Litigation** (2 total credit hours—100 minutes) *Confirmed Speaker: Thomas O'Hern, Esq.*
2:20-3:10 pm	**Jury Selection** (theory and practice), differences in Federal and State Courts, how to approach in State Court, how to approach in Federal Court and submit proposed voir dire to judge (1 credit hour—50 minutes)
3:10-3:20 pm	**Break**
3:20-5:00 pm	**Arbitration/Mediation** (2 credit hours-100 minutes) *Confirmed Speaker: Simeon Baum, Esq.*

2 credits in Ethics

For program updates, go to www.nysba.org/young

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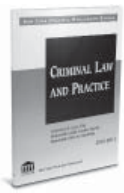

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NEW YORK STATE BAR ASSOCIATION
YOUNG LAWYERS SECTION
One Elk Street, Albany, New York 12207-1002

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PERSPECTIVE

Editor-in-Chief
Anting Jennifer Wang
227 East 87th Street, Apt. C
New York, NY 10128
anting@gmail.com

Section Officers

Chairperson
James R. Barnes
Burke & Casserly, P.C.
255 Washington Avenue Ext.
Albany, NY 12205
jbarnes@burkecasserly.com

Chairperson-Elect
Michael L. Fox
Jacobowitz & Gubits, LLP
158 Orange Avenue
PO Box 367
Walden, NY 12586-0367
mlf@Jacobowitz.com

Secretary
Lisa R. Schoenfeld
Schlissel Ostrow Karabatos PLLC
200 Garden City Plaza, Suite 301
Garden City, NY 11530-3301
lschoenfeld@soklaw.com

Treasurer
Dana V. Syracuse
Hartman & Craven LLP
488 Madison Avenue, 16th Floor
New York, NY 10024
dana.syracuse@gmail.com