

Law Trends & News

Practice Area Newsletter



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Spring 2009
Vol. 5, No. 3

Chair's Note

Dear Division Member:

Below is the third issue of *Law Trends* for the 2008–09 bar year. As always, the editors believe this is a very exciting issue, and I am very happy to present it to you. As with prior issues, this enewsletter includes articles, checklists, and other valuable practice information and practical tips, from our substantive practice and other areas in the **General Practice, Solo & Small Firm Division**. This issue continues to include articles dealing with practice management and issues affecting each solo and small firm attorney in these troubled times. It presents several articles dealing with managing your time in the practice of law.

In this issue, we are continuing to present articles about books recently released. One of those books, principally authored by Lisa Runquist, a solo practitioner, is a book concerning representing religious organizations, and is published by the ABA Section of Business Law. If you practice in this area, please take a look at the article and, if you find it valuable, click through to purchase the book. The other, written by Ronald Slusky and published by our **Division**, is a lawyer's guide to patent law. I also recommend you take a look at this article and, if you find it valuable, consider clicking through and purchasing the book. Also in this issue, the editors have continued to present articles that are of interest to lawyers with solo and small-firm lifestyles who are managing their practices. We are very pleased to add this new area to *Law Trends*, and we will be publishing articles quarterly in this area. Lastly, there are many articles authored by young lawyers. Those articles give many tips and other ideas on how to manage your practice, get new clients, and budget your time.

We hope you agree that with each issue, *Law Trends* continues to provide meaningful articles for each of you. We trust that this issue, like the others, will be helpful to you in your daily practice. I encourage you to take just a few moments to read the list of articles below. Of course, the issue is yours to download and keep as a reference for the future. And, as in the past, you can either download specific articles, or you may download the entire newsletter by clicking the **PDF**  link.

• **Home**

• **Family Law**

• **Business Law**

• **Litigation**

• **Real Estate**

• **Practice Management**

• **Young Lawyers**

• **Download** 

• **About GP|Solo**

• **Feedback**

• **Past Issues**



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**Tuesday, June 2, 2009:
1:00 p.m. – 2:30 p.m.
Eastern
Solutions: Overcoming
the Obstacles of Going
and Being Solo in a**

There are many Division members integrally involved in putting this newsletter together. Their hard work and dedication are certainly present. I thank them for producing this issue for the Division.

I hope each of you enjoys this issue of *Law Trends*. The publication will continue quarterly, and we hope you continue to find it a source of valuable information. If you are interested in either writing an article or participating in the production of the newsletter, please contact Jim Schwartz at attyjls@aol.com. I thank him for his work and dedication.

Best regards,

Robert A. Zupkus
Chair, General Practice, Solo & Small Firm Division

Letter from the Editor

The economy continues to affect each of us, many of us in not so pleasant ways. Several large law firms have announced significant layoffs or hiring deferments. Less in the news, but nonetheless present, is the “hurting” by solos and small firm attorneys because of fewer new clients, a reduction in the amount of work in their practice areas, and a reduction in the amount of money coming in. As with the prior issue, I have included several articles in the practice management section on time management issues, ways to network to increase new clients, and other issues that affect each of us. I hope these articles will be helpful to you, to help identify some problems we all share, some potential ways to avoid them, and some ways to correct and cope with them. They are also a message to say that you are not alone in these troubled times and that many of us share the exact same problems. Please let me know if there are other things that I can do or other kinds of articles that you would like to see, and I will do my best to include them. I also recommend Brian Annino's article on networking. In there, Brian gives you instructions on how to sign up for Facebook and Twitter as well as presenting the value to you in doing both. Thanks Brian.

In addition, I am introducing two books to you. One of those books is written by a solo, Lisa Runquist, and is being published by the ABA Section of Business Law. The book is entitled *Guide to Representing Religious Organizations* and is quite a remarkable book on the subject. I found it quite valuable, and hope you do as well. If you like Lisa's article and feel the book would be valuable, please click on the link to the book and purchase it. The other book, published by GPSolo, is entitled *Invention Analysis and Claiming: A Patent Lawyers Guide*. Authored by Ronald D. Slusky, this book will be quite helpful to anyone either registering a patent, or prosecuting or defending a claim. I recommend these articles to you. In the future, I plan to publish excerpts from both books. If you find this beneficial, use the click through to purchase it.

I look forward to hearing from you with any other thoughts or ideas. I hope all of you are well and that you enjoy reading this issue as much as I had putting it together.

Best to all of you,

Down Economy

CLE credit requested!

Program Description |

Teleconference Online

Registration | Audio

Webcast Registration

Teleconference Event

Code: CET9SOO

Audio Webcast Event

Code: CET9SO2

Tuesday, June 16,

2009: 1:00 p.m.–2:00

p.m. Eastern

Recession-Proof

Yourself: Take Control

in a Down Economy

Program Description |

Teleconference Online

Registration | Audio

Webcast Registration

Teleconference Event

Code: CET9RYT

Audio Webcast Event

Code: CET9RY2

Tuesday, June 30,

2009: 1:00 p.m.–1:30

p.m. Eastern

Staying Positive in a

Down Economy:

Beyond the "Group

Hug"

Program Description |

Teleconference Online

Registration | Audio

Webcast Registration

Teleconference Event

Code: CET9SPD

Audio Webcast Event

Code: CET9SP2

Jim Schwartz

Editor

Family Law

- **Financing Your Law Business: How to Find All the Money You'll Need to Go It Alone and Grow Big »**

By Alexis Martin Neely

Featured Author

- **Grow Your "A" List »**

By Cheryl Lynn Hepfer

- **Hiring an Expert »**

By Melvyn B. Frumkes and Jack A.

Rounick

- **A Moving Case for Staying Put »**

By David N. Hofstein, Ellen Goldberg

Weiner, and Scott J.G. Finger

Business Law

- **Representing Religious Organizations »**

By Lisa A. Runquist

- **The Patent Lawyer's Mission—Isolate the Inventive Concept**

By Ronald D. Slusky

- **Retroactive Repeal of Rights for Corporate Directors »**

By Steven H. Goldberg and Michael B. Jacobson

- **The SEC Enforcement Manual—An Aid to Combat SEC Investigations »**

By James V. Masella III and Ryan Cronin

Featured Author

Alexis Martin Neely

Alexis Martin Neely built her law firm from nothing to more than a million dollars a year in only three years by putting in place a radical new business model that allowed her to work only a few days a week and have extremely happy clients who loved her. She now teaches her methods for attracting, engaging, serving, and retaining clients to thousands of lawyers through her company the Family Wealth Planning Institute. Its mission is to change the way lawyers think and change the way the American public thinks about lawyers. Alexis can be reached at 866-999-3974 or by email at alexis@familywealthmatters.com. Join her Law Business Revolution (www.lawbusinessrevolution.com) and receive more than \$22,500 of practice building resources and tools.



- **Survival of Arbitration Clauses After Termination of Contract »**

By Kenneth J. Ashman & Neal D. Kitterlin

- **Attorneys Who Prolong the Life of Insolvent Corporate Clients Do So at Their Peril »**

By Kenneth J. Ashman and Neal D. Kitterlin

Litigation

- **How to Handle a Workers' Compensation Case »**

By Bryan C. Ramos

- **What Do You Do When You Get a Call in the Middle of the Night From a Family Member Or Friend of a Potential Client Who Has Been Arrested? »**

By Darryl A. Goldberg

- **Preparing Your Client for a Video Deposition »**

By Michael A. Vercher

Real Estate

- **Final Rule on RESPA: Part II »**

By Linda Holder

Practice Management

- **Regular File Reviews or "Tickler" Systems »**

By Todd C. Scott

- **Depression and Our Bodies »**

By Dan Lukasik

- **Things to Do in a Slow Economy: Investing for a Turnaround »**

By Sally J. Schmidt

- **Closing the Deal: 10 Steps to Take Now »**

By Roxana Bacon

• **Changing Gears in Economic Downturn »**

By Savina P. Playter

Young Lawyers

• **The Truth About Having It All »**

By Jennifer Hilsabeck

• **Hanging the Shingle: A Young Lawyer's Experiences in Opening and Developing a Solo Law Practice (Part One of a Series) »**

By Brian Annino

• **Legal Networking Advice for New Solos »**

By Adam J. Post

• **Cut Your IT Costs With Open Source Software »**

By Richard Abbott

• **Increasing Court Involvement in the Alternative Dispute Resolution Process »**

By Jeffrey A. Carr

• **Millennials: Tips for Building a Foundation for Success »**

By Lauren Stiller Rikleen

• **Sweat the Small Stuff . . . and a Handful of Other Tips to Help You Make a Positive Impression Early in Your Career »**

By Scott H. Husbands

• **How Accessible Is Too Accessible? »**

By Iram Ansari

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Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

• Home

• Family Law

• Business Law

• Litigation

• Real Estate

• Practice Management

• Young Lawyers

• Download 

• About GP|Solo

• Feedback

Family Law

• **Financing Your Law Business: How to Find All the Money You'll Need to Go It Alone and Grow Big**

By Alexis Martin Neely

• **Grow Your "A" List »**

By Cheryl Lynn Hepfer

• **Hiring an Expert »**

By Melvyn B. Frumkes and Jack A. Rounick

• **A Moving Case for Staying Put »**

By David N. Hofstein, Ellen Goldberg Weiner, and Scott J.G. Finger

Financing Your Law Business: How to Find All the Money You'll Need to Go It Alone and Grow Big

By Alexis Martin Neely
Featured Author

When I first started my law practice back in 2003, I expected to pay the bills for my new business by bringing in clients.

I didn't have any money in savings, and

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allowed her to work only a few days a week and have extremely happy clients who loved her. She now teaches her methods for attracting, engaging, serving, and retaining clients to thousands of lawyers through her company the Family Wealth Planning Institute. Its mission is to change

• Past Issues

my husband was a stay-at-home dad without an income, so it was seriously do-or-die time for me and my family.

I had been making \$165,000 per year as an associate at the big law firm, and we were spending all of it, so I needed to at least replace that in profits from my firm.

Everyone told me that I needed to plan not to be profitable for at least a couple of years, but I believed I'd be the exception to this rule.

I did hedge my bets a bit by finding office space I could use without paying rent by trading my time with an attorney who had an empty office space in his suite. This worked out well for me because that office space also came with all of the big equipment I'd need to get started, like phones, a copier, and a furnished conference room.

All I needed was a laptop, my own phone line, a website, a desk, and some chairs. I was able to pay for all of that out of the little bit I had in savings and on my credit card.

Now, it was time to start bringing in some revenue.

Fortunately, I quickly discovered that as a business owner, I'd be keeping a whole lot more of what I brought in as a business owner than I was as an employee due to the favorable tax treatment for business owners who know how to use the tax code in the right way. (If you need a little brushing up on this, check out the book *Lower Your Taxes – Big Time!* by Sandy Botkin, CPA, Esq., the best resource I've come across on the subject.)

Pretty quickly, I realized I'd need to bring in at least one person to help me because it just wasn't possible for me to do everything I needed to do to attract clients, engage them, service their matter, and build a relationship with them without help.

At the time though, I didn't feel as if I had enough revenue to bring on an employee I'd have to be responsible for paying each month.

But when I really looked at the numbers and how much more money I could bring in if I could focus my energy on revenue-generating activities only, I decided I couldn't afford *not* to bring someone in. I'd just have to make the commitment to myself to bring in one additional new client per month to pay for my part-time employee and determined that with the extra time I'd have, I could do that.

At the time, I didn't know that as a small business owner I'd actually have access to financing that would help me grow my business.

the way lawyers think and change the way the American public thinks about lawyers. Alexis can be reached at 866-999-3974 or by email at alexis@familywealthmatters.com. Join her Law Business Revolution (www.lawbusinessrevolution.com) and receive more than \$22,500 of practice building resources and tools.

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And a part of me actually felt like I should be able to do it all on my own without any help. You know how a two-year-old blindly yells, “I DO IT, I DO IT!” and doesn’t want any help even though any adult looking on can clearly see that the two-year-old would benefit from a little assistance? Well, that was me. Business-wise, I was a two-year-old, blindly insisting I didn’t need any help.

But then I got to a point where I was stagnating. I wanted to grow bigger. I wanted to move out of that office space I was sharing with those other lawyers and into my own space. I had a very clear idea of how I wanted my office to look and the kind of image I wanted to create, none of which was possible in the high-rise office space I was sharing.

I wanted a team of staff members standing by at the ready to support me and my clients, instead of just the surly receptionist who growled “law offices” when she answered the phones. I didn’t want my clients to have to navigate a confusing parking garage. I wanted beautiful letterhead and envelopes and a better website.

All of that would take money, money I didn’t have and wasn’t going to save up seeing one or two clients per month, which was all I was able to bring in on my own without investing in some really good marketing, which of course I didn’t have the money for.

Right around this time, I happened to meet a local banker in my community who was opening up a new community business bank.

This was a fortuitous meeting because, up until then, I thought a bank was merely a place to deposit checks, and had no idea that a relationship with a banker could be helpful to me in my business. The banks had always been a necessary evil up until then and certainly not anywhere I would think to turn for help.

But this banker wanted to know about my business. He wanted to know what my vision was for its growth and how he could help me. I excitedly shared with him the amazing vision I had for the law firm I wanted to grow.

He could see the vision and wanted to help me make it a reality, so he let me in on how I could find all the money I’d need to build my business.

Here’s what he told me to do:

1. Figure out exactly how much money you would need to do everything you want to do and write it all down. Think big. You can always scale back later or do it in stages, he said.
2. If you have family, he said, have a frank conversation with them about what they are willing to invest in your business. Let them know your

vision, how you'll use their investment, and when they should expect to receive their investment back. Put it in writing.

3. Next, look into a loan or line of credit through the United States Small Business Administration (SBA). He said he would help me complete all the paperwork for this. (This is the benefit of working with a small community bank who takes an interest in you and your business.)
4. He also told me that I could use equipment financing for things like my computer network, my phones, and even furniture. He connected me with an equipment financing company that was able to roll everything together into one neat package.
5. Last, he told me to begin applying for credit in the name of my law firm, separately from myself. This is a process that can take some time, but is well worth it and if done right can get you a whole lot of money to grow your business without any of it personally guaranteed.
 - a. If you have not already incorporated your business, this would be a great time to start because you are going to want to apply for business credit using your business Tax ID number, not your own Social Security number.
 - b. After you've incorporated, make sure you've got all the right city licenses in place and begin registering your business with the business credit reporting agencies, such as Dun & Bradstreet.

I'll be honest with you, all of this was difficult to do. It was difficult from a paperwork perspective, but it was also difficult emotionally.

The entire time I was going through the process of applying for the line of credit through the SBA, I was full of feelings of embarrassment and shame. I can't tell you why: I can only tell you I felt it, and, as I've talked with other business owners, they've expressed that they've felt the same during the process. So, don't be surprised if you do. And, more importantly, don't let those feelings hold you back from getting the money you need to finance the growth of your business and grow big. It's totally worth it!

During this process, it can be helpful to have guidelines to consider when making projections about income and expenses. I created a comprehensive business plan for my law firm that you can have to review. To get access to it, go to <http://www.LawBusinessRevolution.com> and join the revolution. I'll send you the business plan as well as a whole lot of other free practice-building gifts that I created for my law firm that will give you a much bigger vision of what's possible for your business.

Alexis Martin Neely built her law firm from nothing to more than a million

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- . Home
- . Family Law
- . Business Law
- . Litigation
- . Real Estate
- . Practice Management
- . Young Lawyers

- . Download 
- . About GP|Solo
- . Feedback

Family Law

. **Financing Your Law Business: How to Find All the Money You'll Need to Go It Alone and Grow Big »**

By Alexis Martin Neely

. **Grow Your "A" List**

By Cheryl Lynn Hepfer

. **Hiring an Expert »**

By Melvyn B. Frumkes and Jack A. Rounick

. **A Moving Case for Staying Put »**

By David N. Hofstein, Ellen Goldberg Weiner, and Scott J.G. Finger

Grow Your "A" List

By Cheryl Lynn Hepfer

How to target your "ideal clients" and then cultivate them.

Rainmaking takes planning and follow-through. Begin by deciding what kind of clients you want. In general, look for clients with two qualifications: those who can afford your fees and those whose cases interest you.

The three steps to successful rainmaking are:

1. Identify the client sources. Where do your best clients come from? Most of our best clients have been referred to us by former clients and professionals in

• **Past Issues**

the community—other attorneys, social workers, psychologists, accountants, and the like.

2. Design a marketing plan for those potential clients. Think of the best way to reach those you would like to represent. Primarily, this requires getting your name out in the community to those who refer cases.

3. Implement the plan. Follow up on your plan at least once a month. You may have a fabulous marketing plan, but if you do nothing to facilitate it, there will be no benefits to your having it.

Prioritize to whom you plan to market. Make a list of former clients and professionals you believe to be your best potential sources of clients. This “A” list will consist of as few as ten or as many as fifty. You may, of course, have a “B” and a “C” list as well, and opt to spend less time, energy, and financial resources on those referral sources during the year.

Next, develop your plan. Distinguish yourself from other family law attorneys. To accomplish this, maintain your CV. This may seem insignificant, but it is not. Your CV sets forth your reputation and accomplishments. In addition to the basics that are on every CV, track important cases you have handled, the articles you have written, and the speeches and lectures you have given. In addition to your formal CV, maintain a file of stories, jokes, and tales that are appropriate to share with an audience when you are invited to speak. You may think that you will always remember these stories, but keeping them in a computer file makes them readily accessible as you outline your speech.

Although we all make decisions regarding Yellow Pages and community newspaper advertising, self-directed advertising may be much more beneficial. Tailor an advertising plan to meet your needs. Newsletters and holiday cards are another form of advertisement and can be readily mailed to your A, B, and C lists at minimal expense. Since a main source of referrals is former and current clients, sending out closure letters and surveys at the conclusion of the case is an ideal way to cement that relationship.

Spend the greatest amount of time and energy on your A list. This group is composed of your best clients, lawyers in other jurisdictions who may refer cases to you, and lawyers who practice in other fields that complement family law, such as estate and trust and tax attorneys, as well as psychologists, social workers, accountants, and business valuation experts.

Seek to Speak

Offer to speak to small organizations or write articles for local newspapers. Don't wait to be invited. Contact publications and groups with potential articles and areas of interest. Offer to speak to social and religious organizations. They are always interested in speakers on a variety of subjects in the realm of family law.

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Some current “hot” issues are virtual visitation, relocation, and same-sex marriage. Not every subject is of interest to all groups, so identify your audience and determine which areas of interest are best. Then acquaint yourself fully with the subject, the applicable law, current trends, etc. When writing an article or outlining a speech, keep in mind that you are not teaching first-year law students. The information must be of interest, of course, but your speeches also must be engaging and your writings articulate, well-organized, and tailored to your audience.

I find speaking more rewarding than writing, because I can interact with the audience and evaluate how things are going during the presentation. If you are not a practiced lecturer, don’t take on the task until you have observed some gifted speakers and perhaps taken a public speaking course or two at a local community college, which, in fact, you may use as another networking opportunity.

The best speakers are engaging and entertaining, as well as informative. Have a number of short stories, funny lines, and quotes to use where applicable. Although you are not attempting to be a comedian, humor can make a serious topic more approachable.

Practice, practice, practice. Video yourself and use that as a tool or have a number of friends listen to your presentation and critique it. As with any other skill, your presentations will improve over time.

Market With Handouts

When you do lecture, be prepared. Have handouts that include your address, email, website, and other relevant information. Include a short bio that is flattering and informative and accompanied by a professional photograph. If you don’t have a professional photo, get one. You will never look better than you do now! This also is an optimum time to hand out pens, rulers, pocket calendars, etc.

In less formal settings, make the most of every opportunity to market yourself. When you introduce yourself for the first time, restate your first name, so that it’s easy to remember. “Hi, I’m John, John Smith.” When you hear the name of the person to whom you are being introduced, use his or her name in the discussion. “It’s nice to meet you, Jane.”

Don’t just hang around with folks you already know. Walk up to strangers and introduce yourself. Be prepared to say something more than just your name—something relevant to the situation. Tell, in two sentences, what you do for a living that separates you from others in the room and makes you memorable. When you walk away, you want them to remember that you are an attorney and someone they want to know. Your presence as the speaker gives you a unique opportunity to engage everyone in the audience in a private discussion before or

after your presentation.

When you meet someone new, gather information about the person. If it's someone with whom you think you can network, think about how to succeed in doing that. Get the person's business card and send a note or give him or her a call within a week to pass along some relevant information.

Stay in touch with former clients and, during the conversation, let them know that you routinely speak to groups and would welcome an invitation to address organizations to which they belong. Many of them belong to clubs that welcome speakers on a variety of subjects. Be prepared to suggest topics that may be of interest to their groups.

I generally call clients and business professionals on my A list between Thanksgiving and New Year's Day. It's more memorable than a holiday greeting card. You cannot call everyone on all of your lists, so use your resources wisely. Offer to speak to business professionals who have a natural relationship with family law, such as social workers, psychologists, accountants, business valuation experts, estate and trust and tax lawyers. Many of their professional organizations would be interested in knowing more about areas of family law that may impact them professionally. When having a conversation with such professionals, express your willingness to speak on a subject that may be of interest or to write an article for their professional publications.

If you expect to get referrals from attorneys who do estate planning, refer your clients to them. If those to whom you refer don't reciprocate, start referring to another attorney who will.

Once again, a marketing plan is only successful if you use it and follow through. If you are not able to do that on your own, consider hiring a marketing coach who will prod you along on a regular basis. Everyone you meet should know what you do and that you are good at what you do. Convey enthusiasm for the practice of family law, and be proud of the success you have achieved. Confidence in yourself is contagious and is the best way to market your practice.

Cheryl Lynn Hepfer practices family law in Rockville, Maryland. She is president of the American Academy of Matrimonial Lawyers, vice president of the International Academy of Matrimonial Lawyers, and a diplomate in the American College of Family Law Trial Attorneys. She is listed in Best Lawyers in America.

Note

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

. Home

. Family Law

. Business Law

. Litigation

. Real Estate

. Practice Management

. Young Lawyers

. Download 

. About GP|Solo

. Feedback

Family Law

. **Financing Your Law Business: How to Find All the Money You'll Need to Go It Alone and Grow Big »**

By Alexis Martin Neely

. **Grow Your "A" List »**

By Cheryl Lynn Hepfer

. **Hiring an Expert**

By Melvyn B. Frumkes and Jack A. Rounick

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Hiring an Expert

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Finding a wise, knowledgeable, experienced, credible, affordable, and available pro.

Experts possess special training, skill, or knowledge in a given area beyond the capabilities of the trier of fact. An expert is permitted to give opinions and draw inferences as to particular issues that are in controversy in an effort to assist the trier of fact in making decisions. However, the expert's opinions are not binding on the trier of fact.

Initially the court has discretion to determine if the witness offered is qualified to testify as an expert. An expert needs no special degrees to be qualified in a

• Past Issues

particular area, but can be qualified by experience, skill, and independent study. In hiring an expert, determine schools attended, degrees achieved, continuing education acquired, papers prepared and published, lectures given, memberships acquired, and so on.

Obtain a Written Resume

Generally, an attorney suggests the use of an expert to the client; however, input from the client also can be helpful. Other attorneys are a good source of expert referrals.

In screening potential candidates, review the expert's experience in the particular area or areas for which services are being sought. Peruse articles written and lectures given and examine the expert's prior testimony. Before retaining an expert, ask how many times the expert has been employed in similar cases, is the expert's service limited to forensic work, has the expert been qualified by courts in the past, and has the court relied on the expert's opinions and conclusions?

In qualifying an expert, some courts look to whether the witness has any reasonable access to specialized knowledge on the subject under investigation. The court ascertains whether the witness has sufficient skill, knowledge, or experience in the field to aid the trier of fact in a search for truth.

The expert must be knowledgeable as well as available to the attorney. Ask specifically whether the expert has the time to devote to the matter, whether there are any limitations on when he or she can be contacted in the office or at home, and whether the expert will come to the attorney's office for consultations throughout the case.

The expert must be a credible witness; be able to communicate in clear, concise, and simple terms; and be well spoken. He or she must be able to make the complex sound straightforward, logical, and uncomplicated. Of utmost importance, the expert must be able to maintain his or her composure and position under strenuous cross-examination.

Journalist David Margolick in his book *Undue Influence: The Epic Battle for the Johnson & Johnson Fortune* wrote:

You needed people who [are] not just erudite, but persuasive and likeable. You also [need] people who [are] fresh enough to testify with conviction, and hungry enough, whether for recognition or intellectual excitement or kicks, to work at it rather than wing it.

There is no question that the use of experts will boost the cost of litigation, and not every case will warrant such use. Whether to hire an expert is a judgment call that must be based at least in part on cost effectiveness. When property values in question do not merit the cost of hiring an expert, the owner of the asset can

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testify to its value if sufficient basis for making such a conclusion exists. However, if the nonowner spouse refuses to agree to that value, an expert may be necessary to present the nonowner's appraisal of value.

Sometimes the court will appoint its own expert, or the parties may agree to use one expert and share costs as the court shall decide. This procedure will undoubtedly minimize expenses and enhance settlement possibilities. At minimum, it will decrease the time required for trial. However, if things go awry, one may be locked into that expert's opinion, and he or she cannot later be part of your case preparation.

Note that the effective expert will not be an advocate, except as to his or her opinions and conclusions. Advocacy of the client's positions is the attorney's province. An expert with a biased opinion loses credibility. The most persuasive expert is one who appears as an assistant to the court, rather than an advocate for the party for whom the expert was called.

The Expert's Role

If an expert or experts are to be used, retain them early in the case and incorporate them into your team. An early analysis by the expert will help in formulating your theory of the case and may assist the client in maintaining realistic expectations.

Encourage the expert's active participation by requesting a list of documents and other materials that should be requested of the opposing party. Such a list of treatises and other authorities upon which the expert will rely, and especially upon which the opposing attorney should rely, can be of immeasurable help to counsel.

Your expert also will be an invaluable resource in preparing for the opposing expert's deposition and testimony. Your expert can help frame questions ahead of time and during the opposing expert's presentation be a savvy listener to not only what is said but what is left unsaid. Likewise, when the case is fully prepared, the presence of the expert at the settlement conference or mediation can contribute to a meeting of the minds. Sometimes if counsel or the parties reach an impasse during such sessions, a meeting of the experts alone can go a long way toward resolving issues.

During Trial

If settlement fails, trial is the next step at which the experts play an essential role. The expert should sit at counsel table whenever the court is addressing the issue for which he or she has been hired. Although there is a rule of exclusion of witnesses from the trial unless testifying (allegedly so that the witness will not be tainted by the testimony of others), more frequently than not, courts will allow

experts to remain so as to assist counsel. Such assistance is not only helpful during the direct examination of witnesses, but also throughout cross-examination, especially of the opposing expert.

Having the expert present throughout the trial is the preferred method, especially if he or she has a winning personality and convincing manner. His or her presence throughout the trial allows the trier of facts to see and hear the expert and observe how testimony on both direct and cross comes across to the expert. However, costs may limit this approach. Where financial resources are limited, most jurisdictions permit the testimony of such witnesses by deposition, preferably by video deposition. Also an expert's telephone deposition is frequently permitted, especially when the expert is in another jurisdiction or foreign country. A telephone deposition may be preferred when the expert must testify as to a discrete subject.

In cases involving significant issues and where the parties can afford it, retaining an expert is not a luxury but is essential. The challenge is to hire the right expert who is independent as to opinion but a team player in preparation.

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Note

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

. [Home](#)

. [Family Law](#)

. [Business Law](#)

. [Litigation](#)

. [Real Estate](#)

. [Practice Management](#)

. [Young Lawyers](#)

. [Download !\[\]\(dcbc5fab1d1aed50d45ce3e946bf9106_img.jpg\)](#)

. [About GP|Solo](#)

. [Feedback](#)

Family Law

. **Financing Your Law Business: How to Find All the Money You'll Need to Go It Alone and Grow Big »**

By Alexis Martin Neely

. **Grow Your "A" List »**

By Cheryl Lynn Hepfer

. **Hiring an Expert »**

By Melvyn B. Frumkes and Jack A. Rounick

. **A Moving Case for Staying Put**

By David N. Hofstein, Ellen Goldberg Weiner, and Scott J.G. Finger

A Moving Case for Staying Put

By David N. Hofstein, Ellen Goldberg Weiner, and Scott J.G. Finger

Opposing relocation at trial.

First Step—The Law

Although the facts will be critical, the first step is to understand the statutory and case-law background of your jurisdiction. Only after the law is understood can the facts be placed into context. Presumptions can be determinative for or against relocation, what relevant weight is given to those presumptions by courts in your area, and which party bears the burden of proof? For example, in your court, the child's best interests may be considered closely aligned with the custodial

Past Issues

parent's interests. In other courts, the emphasis may be on maintaining meaningful substitute custody arrangements with the nonrelocating parent. For a helpful discussion of these various presumptions, see *Baures v. Lewis*, 167 N.J. 91, 770 A.2d 214 (2001), and *Bates v. Tesar*, 81 S.W.3d 411 (Tex. Civ. App. 2002, *no petition*).

The stage of custody during which the relocation issue develops also may be relevant. If no custody order has yet been entered, the standards applied by the court may be very different than if one parent has already been awarded primary custody. Because relocation cases are so fact-specific, it is particularly important to understand the approach utilized by your particular judge and the county in which he or she presides. Now that most jurisdictions have legal periodicals and computer databases covering local decisions, this task has become much easier.

Psychological Support

After understanding the law, and before turning to the facts, review relevant psychological research. Perhaps the most cited psychological commentator in the area of relocation and its effects on children is Professor Judith S. Wallerstein. See, for example, *In re Marriage of Burgess*, 13 Cal. 4th 25, 913 P.2d 473, 51 Cal. Rptr. 2d 444 (1996), and *Stout v. Stout*, 560 N.W.2d 903 (N.D. 1997). (Please note: The authors neither advocate nor criticize Dr. Wallerstein's work, but merely address the application of these studies to a relocation matter.)

Wallerstein's work has been described as presenting the view that "what is good for the custodial parent is good for the child." *Baures v. Lewis*, 167 N.J. at 106, 770 A.2d at 223. In particular, Wallerstein connects the psychological adjustment of the custodial parent to that of the child and concludes that there is no evidence that "the frequency of visiting or amount of time spent with the noncustodial parent over the child's growing-up years is significantly related to good outcome in the child or the adolescent." Judith S. Wallerstein and Tony J. Tanke, "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce," 30 *Fam. L.Q.* 305 (1996).

Wallerstein's work, however, while oft cited, has its critics. In opposing relocation, it is important to be aware of Wallerstein's studies and to be prepared to present the opposing view as addressed in social science research and scholarly articles. For example, in the recent case of *Cisneros v. Dingbaum*, 2005 WL 697577 (Texas), the testifying experts criticized Wallerstein's work as being based on old psychological research, being gender biased, and considered by the "vast majority of researchers in the field" to have overreached in its conclusions. Additional critiques or opposing views have been presented in James, "Custody Relocation Law in Pennsylvania: Time to Revisit and Revise *Gruber v. Gruber*," 107 *Dick L. Rev.* 45, 56-60 (2002); Richard A. Warshak, "Social Science and Children's Best Interests in Relocation Cases: *Burgess* Revisited," 34 *Fam. L.Q.* 83, 84-87 (2000); Marion Grindes, "The Psychological Effects of Relocation for Children of Divorce," 10 *J. Am. Acad. Matrim. Law.* 119, 132 (1998); and Joan B. Kelly & Michael E. Lamp, "Using Child Development Research to Make

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Appropriate Custody and Access Decisions for Young Children,” 38 *Fam. & Conciliation Cts. Rev.* 297, 309 (2000), among other articles and studies.

In addition to understanding the relevant psychological and social science studies, and if funds permit, a custody evaluation, whether court ordered, by mutual agreement, or independently obtained, may prove helpful. This psychological expert can focus on the strength of the relationship between the nonrelocating parent and the child, the child’s connections to the geographic area (e.g., school, friends, or relatives living in close proximity), and other relevant factors that could affect the court’s decision (for example, if the child has difficulty adapting to new situations or in making friends).

Having this psychological support could alter the court’s perception in the nonrelocating parent’s favor. For instance, instead of being viewed as obstructive, the nonrelocating parent could be viewed as interested in putting the child’s interests first (particularly where the relocating parent is moving to meet his or her own needs and desires).

Highlight the Facts

The third and often most critical component in opposing a relocation request is organizing the facts to support the client’s contention that relocation does not serve the child’s best interests. In deciding a relocation case, the court is engaged in a balancing test: weighing the relative needs of each parent to succeed as individuals, the needs of the child to grow up in as normal and stable an environment as possible, and the needs of each parent to maintain a relationship with the child. See, for example, *Gruber v. Gruber*, 400 Pa. Super. 174, 583 A.2d 434 (1990), setting out a three-prong test for assessing these competing needs. Facts should be presented in a manner that highlights how they affect the relevant prong or test being considered by the court. If warranted by the circumstances, some relevant facts to highlight include:

1. The strong bond between the nonrelocating parent and the child. It will be essential to demonstrate that a strong bond already exists between the nonrelocating party and the child. Otherwise, the parent’s motive in resisting the move will be suspect. To show this bond, document activities that the parent and child do together on a frequent and consistent basis. This can be anything from coaching sports, driving the school car-pool, consistently assisting with homework, and taking part in extracurricular activities, to jointly participating in religious services. The emphasis should be on regularity and why these activities cannot be replicated if the child relocates. If the contact is frequent, prepare a schedule showing the extent of that contact, including the level of participation in the child’s activities. Or present an actual calendar documenting the level of involvement of the nonrelocating parent.

2. If the move is intended to interfere with the parent-child relationship, establish that for the court. A parent’s decision to move

primarily to interfere with the other parent's relationship with the children is strongly disapproved of by courts. See *Leach v. Santiago*, 20 A.D.3d 715, 798 N.Y. S.2d 242 (2005). Although it may be difficult to show that the relocating parent is in some part motivated by a desire to keep the children away from the nonrelocating parent, it will be helpful to present any e-mails, letters, or other communications in which the relocating parent has attempted to alienate the children. Providing examples of instances in which the relocating parent has denied the other parent's reasonable requests for additional custodial time, as was the case in *Santiago*, may demonstrate that the proposed relocation is intended to keep the nonrelocating parent away from the children and that the relocating parent certainly will not facilitate a continued relationship with the other parent.

3. Show that a substitute visitation schedule is not feasible. Present evidence of the difficulty in constructing a realistic visitation schedule for the nonrelocating parent. Where there are limited financial resources, demonstrate that, as a result of the costs associated with the required travel and accommodations to be incurred by the nonrelocating parent, your client would be unable to pay for both child support and the additional costs and might, therefore, have to forgo visitation rights.

Examine the child's activities to determine if they lend themselves to the proposed alternate visitation schedule. If the child will have to miss a favorite activity, such as weekend basketball, soccer, or scouting to travel or be in the nonrelocating parent's custody, point that out to the court. Demonstrate the losses the child will incur by having to relocate and be subject to the substitute visitation schedule, particularly losses that would not be suffered if relocation is denied.

In this post 9/11 era, it also is appropriate to share with the court the logistical difficulties of alternative travel arrangements, such as data regarding the amount of travel time from one parent's home to the other, particularly if air travel is required. Depending on the ages of the children, additional evidence might include the relevant airline's policy regarding unaccompanied minors. With this approach, the practitioner will present both the advantages of the current schedule and the disadvantages of relocating.

4. Point out any instability or uncertainty with the relocating parent. Where the nonrelocating parent has consistently provided a stable environment and the parent who desires to move has had fluctuating living arrangements or involvement in volatile relationships, the court may favor the nonrelocating parent. See, for example, *Tener v. Tener-Tucker*, 2005-Ohio-3892, Ohio App. 12 Dist., WL 1798273 (2005). In addition, where the relocating parent cannot provide proof of a stable living situation and at least comparable accommodations to the child's current situation, the balance will likely again weigh against relocation.

To challenge the relocating parent's assertion that he or she has the ability to

maintain a stable living situation and obtain adequate employment, demonstrate either that the relocating parent has failed to “do his or her homework” or that reasonable accommodations do not exist in the proposed community. Question the relocating parent as to the existence of any formal employment contracts, leases, contact with any real estate agents, and suitable day-care facilities, etc. When there is an issue as to the viability of employment opportunities that will provide sufficient income for both the parent and children, it may be helpful to bring in a Qualified Rehabilitative Consultant (QRC) as discussed in the Separated Parenting Access & Resource Center’s article, “Fighting Relocation with Children,” cited at www.deltabravo.net/custody/relocation.php.

5. Assess the benefits of the relative schools. Where the child performs well academically in the current school and there is reason to believe that he or she will not perform as well academically if relocation is allowed, the court may again be reluctant to grant relocation. In such a case, it is helpful to have report cards and, if possible, the testimony of teachers and friends. As many school authorities are reluctant to allow their teachers to testify without a subpoena (and, even if they do testify, they may be hostile), records should be obtained. If the child has special needs, including being gifted, emphasize that the current location is best-suited to meet those needs, including the proximity of doctors, special schools, or other forms of assistance or relevant programs. See *Wild v. Wild*, 13 Neb. App. 495, 696 N.W.2d 896 (2005).

Be prepared to present information comparing the strengths of the current with the proposed school. In addition consider hiring educational experts to testify.

6. Demonstrate the child’s strong ties to family and friends in the current location. The effect that relocation has on the relationship between the child and the noncustodial parent clearly is a major consideration in any relocation analysis. However, other relationships also will be considered in the ultimate decision. In *Brown v. Brown*, 260 Neb. 954; 198, 621 N.W.2d 270 (2000), the court believed that it would “be remiss not to consider the relationship of children to younger siblings.” This is especially true in those jurisdictions where there is a presumption against dividing siblings. Where a strong relationship is found (between siblings, grandparents, or other extended relatives), it can weigh heavily against removal. Thus, particularly while the relocation petition is pending, advise your client to maintain those relationships with extended family and others.

7. Highlight any safety issues with the proposed relocation. Where one parent expresses a desire to relocate with a child to what might be perceived as an unsafe living situation, courts may be reluctant to approve relocation. In *Racsko v. Racsko*, 91 Conn. App. 315, 881 A.2d 460 (2005), the court rejected a mother’s petition to relocate the children to Israel due to the unsafe conditions in Israel at the time. The court reasoned that, despite the cultural and educational opportunities Israel presented, the dangers involved with living in a country that had experienced recent terrorist attacks sufficiently outweighed the benefits of the move.

One of the simplest tools to use in determining the relative safety of a foreign locale is the [United States Department of State website](#), which lists travel warnings, consular information sheets, and public announcements. Within the United States, a wealth of data is available comparing different geographic regions on everything from schools, crime, and cost of living to weather.

Parting Words

Discovery, if available in your jurisdiction, can be a very useful tool. The easiest approach is to seek from the other side all of the reasons asserted to support relocation and all of the evidence, including witnesses and documents, to be presented on the issue. If time allows, this can be done through interrogatories, requests for production of documents, and even requests for admissions. (Even if the practitioner is required to obtain court approval of discovery in custody cases, a cogent argument can be made for obtaining that material.) If time does not allow, consider utilizing a subpoena or notice to attend for the hearing.

At trial, ask the court's permission to make an opening statement, particularly if your reasons for objecting to relocation are strong. This allows the court to become sensitive to your position before hearing the relocating parent's case in chief.

In the end, remember that in most jurisdictions the standard for reversal is an abuse of discretion, and credibility findings are not going to be overturned. For these reasons, it is critical to remain focused on the issues that are relevant to your particular judge. Know and apply the law and the psychological issues, but it is the facts that will make or break the case.

The No-Go Checklist

1. Demonstrate the strength of the relationship between the nonrelocating parent and the child.
 - Use calendars and photographs.
2. Demonstrate that the move will interfere with the nonrelocating parent's consistent contact with the child.
 - Illustrate the absence of a feasible alternate visitation schedule.
 - Include figures to demonstrate high costs, the increased distance between the two homes, etc.
 - Provide a comparison between the time the child currently spends with the nonrelocating parent and the inevitable potential decrease resulting from the move.

3. Provide evidence of uncertainty associated with the move and any instability in the new location.

- Demonstrate the lack of preparedness on the part of the relocating parent.
- Compare statistics of the two locations, including crime reports, median incomes, changes in population, etc. See www.moving.com/Find_a_Place/Compare2Cities/ or [www.homestore.com/Move/Tools/CityReports.asp?poehome store](http://www.homestore.com/Move/Tools/CityReports.asp?poehome%20store)

4. Discredit the proposed future school and emphasize the strengths of the current school.

- Check websites that compare schools, such as www.schoomatters.com or www.greatschools.net.

5. Emphasize how the move will force the child to break strong ties to the community and extended family.

- Show that the child has developed a stable routine, the interruption of which will be detrimental to the child.

6. Use discovery to discredit the motives of the moving parent.

- Provide any written evidence to show a history of parental alienation on the part of the relocating parent.

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Note

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- **Business Law**
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

Business Law

• **Representing Religious Organizations**

By Lisa A. Runquist

• **The Patent Lawyer's Mission—Isolate the Inventive Concept**

By Ronald D. Slusky

• **Retroactive Repeal of Rights for Corporate Directors »**

By Steven H. Goldberg and Michael B. Jacobson

• **The SEC Enforcement Manual—An Aid to Combat SEC Investigations »**

By James V. Masella III and Ryan Cronin

• **Survival of Arbitration Clauses After Termination of Contract »**

By Kenneth J. Ashman & Neal D. Kitterlin

• **Attorneys Who Prolong the Life of Insolvent Corporate Clients Do So at Their Peril »**

By Kenneth J. Ashman and Neal D. Kitterlin

Representing Religious Organizations

By Lisa A. Runquist

Many attorneys wish to assist their favorite religious organization by providing legal advice. And often the religious organization would prefer to be represented

• Past Issues

by someone from their congregation, because such an individual is not only sympathetic to their concerns, but also does not have to be educated about the organization and operation. The problem, of course, is figuring out what the law is concerning these organizations, when the volunteer attorney can help, and when expert advice needs to be obtained.

Knowing the general law of a particular area is important, because much of the law that applies to other entities also applies to religious organizations. For example, a real estate attorney is likely well qualified to advise the organization when it enters into a lease agreement or purchases a building, although the attorney will also have to understand what property tax exemptions are available under state law. And most contracts can be drafted by an attorney familiar with basic contract law, although again there may be specific concerns, such as how entering into a joint venture will impact the exempt status of the organization. Litigation, of course, should be handled by an attorney who is familiar with the court system, although again there might be special rules that apply, especially if the religious organization is a part of an hierarchical type of structure that has its own method of resolving disputes.

But other areas of law have unexpected pitfalls. Not only are there special rules that impact nonprofits, but being a religious organization adds another layer of complexity. For example, employment law applicable to businesses typically also applies to nonprofits, although how volunteers fit into the picture complicates the matter. But employment law applicable to religious organizations contains many other differences: They may be able to discriminate on the basis of religion, may be exempt from unemployment insurance, have special laws that apply to their ministers (such as parsonage allowances, inclusion in SECA rather than FICA, and no withholding requirements), and have special retirement options. Knowing the intricacies of these differences will go a long way toward keeping the organization out of trouble. For example, although a church may discriminate on the basis of religion, it cannot discriminate on the basis of sex. And a religious organization that is not a church may be able to discriminate on the basis of religion only if it is a bona fide occupational qualification.

With regard to tax law, a crucial question is whether the organization is a “church,” as there are special benefits available to such an entity under the Internal Revenue Code. Although “church” is not defined, it clearly includes mosques, synagogues, temples, and similar entities. If the organization is a church, it is exempt without actually having to first establish its exempt status with the IRS, it is exempt from the annual informational filing (Form 990), it can clearly pay a parsonage allowance to its minister(s), and it can force the IRS to comply with the Church Audit Procedures Act (Section 7701 of the IRS) before it can be audited. Any organization wishing to fit into this category should carefully review the 14 factors considered by the IRS in making this determination. The 14 factors are:

- A distinct legal existence
- A recognized creed and form of worship

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- A definite and distinct ecclesiastical government
- A formal code of doctrine and discipline
- A distinct religious history
- A membership not associated with another church or denomination
- An organization of ordained ministers
- Ordained ministers selected after completing prescribed studies
- A literature of its own
- Established places of worship
- Regular congregations
- Regular worship services
- Sunday schools for religious instruction of the young
- Schools for the preparation of ministers

No factor is controlling, and most churches do not have all 14; however, I would recommend that the church establish which factors it meets and why, in the event it is ever an issue. The most important factor appears to be having a regular congregation.

An organization may also qualify under the Internal Revenue Code as a “convention or association of churches,” or an “integrated auxiliary of a church,” in which case many of the benefits available to churches will continue to be available. Religious organizations that do not qualify for special consideration will be subject to the regular filing requirements.

Fundraising is another area that has its own religious organization issues. For example, the deduction of significant contributions to several churches recently has been challenged by the IRS, on the basis that the receipts did not state that the church provided only “intangible religious benefits” to the contributor. Another ongoing concern for many religious organizations is the deductibility of contributions made to benefit a particular employee of the organization (among other things, the organization must exercise control over the funds received and must pay the employee the agreed upon salary regardless of the amount of funds actually received).

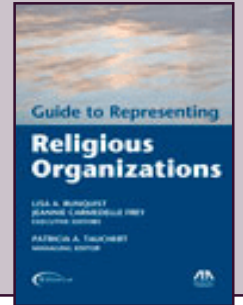
Tort liability also continues to be an area fraught with potential for trouble. The cases involving abuse of children by clergy have been widely publicized, but are only one facet of this area. How the organization treats its volunteers, what steps it takes to protect children in its care, when a religious organization can be held liable for counseling, and how to avoid defamation claims all have special concerns that should be addressed by the advising attorney.

Lisa A. Runquist is a principal of the Los Angeles firm of Runquist & Associates, emphasizing nonprofit organizations. She can be reached at Lisa@Runquist.com, or 818-609-7761. Ms. Runquist is a member and past chair of the California State Bar Nonprofit Organizations Committee, the ABA Business Law Section Committee on Nonprofit Corporations, its Religious Organizations Subcommittee, and the Section of Taxation Exempt Organization’s Subcommittee on Religious Organizations. Ms. Runquist is also the author and editor of

numerous publications, most recently a principal author and editor of *Guide to Representing Religious Organizations* (ABA 2009). She is also the author of *The ABC's of Nonprofits* (ABA 2005) and is a frequent speaker at seminars on nonprofit organizations.

Guide to Representing Religious Organizations

Did you find this article helpful? Do you need more information on representing religious organizations? To provide some basic assistance in this area, we are pleased to introduce the *Guide to Representing Religious Organizations*. This book should provide attorneys with some basic knowledge that will allow them to guide their religious organizations along the path toward legal enlightenment. It can be purchased at: <http://www.abanet.org/abastore/>



Note

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- **Business Law**
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

Business Law

• **Representing Religious Organizations »**

By Lisa A. Runquist

• **The Patent Lawyer's Mission—Isolate the Inventive Concept**

By Ronald D. Slusky

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By Kenneth J. Ashman and Neal D. Kitterlin

The Patent Lawyer's Mission—Isolate the Inventive Concept

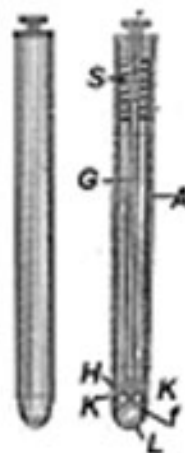
By Ronald D. Slusky

• Past Issues

For most people, an invention is something tangible. One thinks of mechanical devices like the zipper or manufactured substances like tetracycline. Even process inventions, like pasteurization, evoke the physical reality of the milk being heated.

For patent lawyers, however, an invention is not something physical, but a concept. Indeed, the patent attorney's primary mission is to discover the inventive concept underlying the specific "embodiment" that the inventor designed, and then to articulate that concept in what is called a patent "claim." To fail in that mission is to open the door for a competitor to take advantage of the inventor's contribution to the art while avoiding liability under the patent.

Consider John Loud's invention of the ballpoint pen, patented in 1888.¹ Loud's "embodiment" is shown in the figure. The ball L is held against the contracted mouth *f* of tube A by spring S, which pushes against rod G, bearing H and antifriction balls K. The spring yields when the ball is pressed against paper, thereby regulating the flow of ink onto the ball and from there onto the paper as the pen is moved.



John Loud's ballpoint pen

Here is a patent "claim" defining Loud's ballpoint pen

1. A pen comprising a tube having a contracted mouth and adapted to hold ink, a spheroidal marking point projecting from the mouth, and an ink regulator for resiliently holding the marking point against the mouth.

It is desirable for a claim to be as broad (think "terse") as possible because a patent covers a competitor's product only if that product meets every word of the claim. If there's something in the claim that the competitor's product doesn't have, the competitor is free of liability under the patent, even if the competitor's product clearly takes advantage of the patentee's underlying teachings or discovery. On the other hand, there must be something new in the claim in order for the patent examiner to accept it. Thus if Loud's patent application had presented a claim like

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2. A writing implement having a tip that transfers ink from an ink reservoir to a writing surface

the patent examiner would have rejected it because claim 2 not only defines, or “reads on,” Loud’s ballpoint pen, but also “reads on” the theretofore already invented fountain pen. Claim 2 is inappropriately broad; it doesn’t define anything new.

So claim 1 seems pretty good. Desirably, the claim even reads on the pen empty of ink because the claim calls for a tube adapted to hold ink, but does not include the ink itself as an element of the patented subject matter. As such, the claim reads on pens in their manufactured form and could be asserted against manufacturers who might have sold the pen without ink, like fountain pens of the day.

Yet claim 1 would be of little value if Loud’s patent were still in force. Modern ballpoint pens do not have anything like Loud’s “apparatus for resiliently holding the marking point against the mouth.” Instead, the ink is kept from leaking out by virtue of a tight fit between the ball and its socket and by using an ink having just the right level of viscosity.

Granted, it would have required a visionary of considerable insight to have anticipated the advent of the technology required to manufacture today’s modern ballpoint pens. However, it does not require a visionary to recognize that advances do occur. Indeed, the patent attorney’s task is to draft claims that preserve a patent’s value *despite* such advances if improved devices embody the inventor’s original work.

Loud’s attorney, William Dowss, was, in fact, up to the task. Claim 1 is not Dowss’s claim, but was written by the author for purposes of our discussion here. If the Loud patent were still in force, Dowss’s claims would command a royalty for every ballpoint pen on the market because Dowss successfully isolated—in a ten-word claim—the concept that underlies every ballpoint pen:

3. A pen having a spheroidal marking-point, substantially as described.

There are myriad ballpoint pens on the market. Yet each implements the concept that Loud was the first to embody in a pen and that Dowss was skilled enough to claim. Loud’s embodiment did not have a replaceable cartridge, a plastic barrel or a retractable tip. The technology needed to create the tiny balls and tight-fitting sockets used in modern fine-line ballpoint pens probably did not exist in 1888. Today’s metals, plastics and ink compositions were not available. Nonetheless, every ballpoint pen produced since Loud’s original embodies a concept that transcends these embodiment details—the concept of a pen “having a spheroidal marking-point.”

It is easy enough now to recognize the shortcomings of claim 1. But how would one know that it is not the broadest definition of the invention? How did patent attorney Dowss have the insight to foresee in 1888 that future pens would not need claim 1's spring-loaded "ink regulator?"

Dowss may not have had that insight. But Dowss's claims clearly evince his understanding that implementational details—like an ink regulator or a tube with a contracted mouth—were irrelevant to the essence of Loud's invention.

How did Dowss come to that understanding? And how can the practicing patent attorney today know when the inventive concept has truly been found and properly claimed?

The path to the inventive concept begins with the problem that the inventor solved. The inventive concept is the inventor's solution to that problem, when broadly articulated at a conceptual level. Given any detail in the inventor's "embodiment"—a physical element, a method step, a particular functionality or a specific relationship among these—one can ask whether that detail is essential to solving the problem to at least some extent. If not, that detail is not intrinsic to the inventive concept.

The problem Loud addressed was that existing (fountain and quill) pens could not write on rough surfaces, such as wood or leather. Central to his solution is the ball itself. Problem solved. Claim 1's ink regulator tells how such a pen could be constructed, not about how the problem of writing on rough surfaces can be solved. If the ink could somehow regulate itself, we would still have a pen of the type Loud envisioned. Never mind that Loud probably never considered whether such an ink could exist. It is possible to formulate a statement of something new—a pen with a spherical marking-point—without having to describe how such a pen might be constructed.

Perhaps somewhat more subtle is the question of the contracted mouth of the pen barrel, which one might think is absolutely required. How else could the ball be held in place?

It doesn't matter.

Imagine a tiny genie whose job is to hold the ball in place. Loud's spherical marking-point pen would still be a novel writing implement, even with that genie hanging on for dear life as the pen wiggles across the paper. Distinguishing Loud's pen from those that came before it does not require that the pen has a contracted mouth or an ink regulator. Advantageous or not, these are only implementational details not going to the essence of solving the problem of writing on rough surfaces.

In short, whether something seems required to *implement* an inventive concept is irrelevant to the task of *claiming* it.

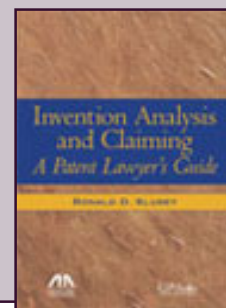
Endnote

¹ United States Patent No. 392,046

Ronald Slusky mentored dozens of attorneys in “old school” invention analysis and claiming principles over a 31-year career at Bell Laboratories. He is now in private practice in New York City. This article is adapted from his book *Invention Analysis and Claiming: A Patent Lawyer’s Guide* (American Bar Association 2007). His monthly column, *Invention Analysis and Claiming*, appears in *Intellectual Property Today*. Slusky also teaches a two-day seminar based on this book (www.sluskyseminars.com). He can be reached at 212-246-4546 and rdslusky@verizon.net.

Invention Analysis and Claiming: A Patent Lawyer’s Guide

Did you find this article helpful? Do you need more information regarding inventions or patent law? To provide some basic assistance in this area, we are pleased to introduce the *Invention Analysis and Claiming: A Patent Lawyer’s Guide*. This book should provide attorneys with some basic knowledge that will allow them to get started with preparing patent applications. It can be purchased at: <http://www.abanet.org/abastore/>



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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- **Business Law**
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

Business Law

• **Representing Religious Organizations »**

By Lisa A. Runquist

• **The Patent Lawyer's Mission—Isolate the Inventive Concept**

By Ronald D. Slusky

• **Retroactive Repeal of Rights for Corporate Directors**

By Steven H. Goldberg and Michael B. Jacobson

• **The SEC Enforcement Manual—An Aid to Combat SEC Investigations »**

By James V. Masella III and Ryan Cronin

• **Survival of Arbitration Clauses After Termination of Contract »**

By Kenneth J. Ashman & Neal D. Kitterlin

• **Attorneys Who Prolong the Life of Insolvent Corporate Clients Do So at Their Peril »**

By Kenneth J. Ashman and Neal D. Kitterlin

Retroactive Repeal of Rights for Corporate Directors

By Steven H. Goldberg and Michael B. Jacobson

A recent Delaware Chancery Court decision has arguably significantly eroded the protection of fee advancement and indemnification rights provided to directors

• Past Issues

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in company bylaws. The decision in *Schoon v. Troy Corp.*, 948 A.2d 1157 (2008), opens the door for companies to terminate unilaterally such rights afforded to corporate directors. Prior to this decision, it was commonly understood that indemnification and advancement rights vested upon a director's tenure and could not be terminated unilaterally by the director's corporation. Delaware corporations often include fee advancement and indemnification provisions for directors in their bylaws to provide extra security to directors in the event claims are asserted against them. These provisions promote board service and ensure that directors will not be held personally liable for their actions on behalf of the corporation. However, directors who have departed corporations with these bylaw provisions may not be nearly as protected as they would presume or would like. Any Delaware director with standard fee advancement and indemnification rights is at risk to lose these protections by subsequent bylaw amendment.

Troy Corporation (Troy) had originally provided these rights to both present and former directors, but then amended its bylaws in November 2005 after director William Bohnen retired, eliminating Troy's obligation to advance fees to and indemnify former directors, Bohnen included. Prior to the bylaws' amendment, Bohnen reasonably would have assumed that his rights to fee advancement and indemnification were to extend beyond his tenure as a director for Troy. This understanding is based on a 1992 Delaware Superior Court case where the court invalidated a Delaware corporation's attempt to rescind a corporate director's indemnification fees by amending its bylaws after the director was sued and the company started advancing his fees. *Salaman v. Nat'l Media Corp.*, 1992 WL 808095 (Del. Super. Ct. Oct. 8, 1992). Troy thereafter sued Bohnen, alleging breaches of fiduciary duty during his service as a director, and refused to advance fees to defend the suit. The court upheld the refusal and wrote that Bohnen's rights did not vest by virtue of his directorship, but only upon his being named a defendant in a proceeding at a time when the bylaws provided for fee advancement and indemnification.

Schoon arguably gives Delaware corporations greater flexibility than was thought to exist in structuring the fee advancement and indemnification rights they provide to directors, and serves as a warning to directors that these rights may not endure. Corporations could amend their bylaws to limit advancement and indemnification rights for extant, but not-yet-discovered or litigated, wrongdoing. Such amendments, and the subsequent threat to directors of having to pay their own legal fees, may serve as a boon for corporations suing their former directors and could lead to better settlement terms in favor of the corporation.

Current and future directors should seek to ensure their fee advancement and indemnification rights in light of *Schoon* and in the shadow of elongated statutes of limitations pertaining to corporate malfeasance. As Sarbanes-Oxley has lengthened the statute of limitations of securities claims against a director or officer from three years to five years, and with state limitations periods extending perhaps even longer, directors now more than ever need to review their corporate documents and take appropriate preventive steps.

Companies seeking to cement rights to fee advancement and indemnification for events occurring during a director's tenure can amend their bylaws to make clear that current bylaw provisions will apply to those events, regardless of any future bylaw amendments, when those events are discovered or when a proceeding is commenced. Companies can also cement these rights by providing fee advancement and indemnification provisions in their charters, requiring shareholder approval for amendment. However the most reliable solution to this issue is for the director and corporation to put these rights into an indemnification and advancement contract signed by both parties, so that it can not be rescinded unilaterally. Directors appointed by financial sponsors or strategic investors can also cement these rights through transaction agreements providing for indemnification and third-party beneficiary rights. Delaware corporate directors should ideally enter into or be the beneficiary of an agreement that provides indemnification and fee advancement rights separate from those contained in corporate bylaws or charters.

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Note

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- **Business Law**
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

Business Law

• **Representing Religious Organizations »**

By Lisa A. Runquist

• **The Patent Lawyer's Mission—Isolate the Inventive Concept**

By Ronald D. Slusky

• **Retroactive Repeal of Rights for Corporate Directors »**

By Steven H. Goldberg and Michael B. Jacobson

• **The SEC Enforcement Manual—An Aid to Combat SEC Investigations**

By James V. Masella III and Ryan Cronin

• **Survival of Arbitration Clauses After Termination of Contract »**

By Kenneth J. Ashman & Neal D. Kitterlin

• **Attorneys Who Prolong the Life of Insolvent Corporate Clients Do So at Their Peril »**

By Kenneth J. Ashman and Neal D. Kitterlin

The SEC Enforcement Manual—An Aid to Combat SEC Investigations

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• Past Issues

The public's trust in securities markets has diminished to historic lows as fraudulent investment schemes are exposed with rising frequency. President Obama will face mounting pressure to respond with increased regulation. As strong Democratic majorities in both houses of Congress are likely to support these policies, it is no longer a question of if but when. Such a climate is likely to spawn an increase in the number of investigations conducted by the Securities and Exchange Commission (the commission).

Fortunately, securities lawyers are now better equipped to represent clients subject to such investigations. For the first time, the commission has released its enforcement manual. (See SECURITIES AND EXCHANGE COMMISSION DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL (2008), www.sec.gov/divisions/enforce/enforcementmanual.pdf.) Previously unavailable to the public, the manual lays out various policies and procedures that must be followed by the commission's Enforcement Division when conducting an investigation.

Historically, commission staff enforcement policies varied among regional offices. There was little or no transparency with respect to applicable procedures. As a result, no uniform standard was applied.

The publication of the enforcement manual changed all that. Transparency has now been provided with respect to each stage of an investigation. Concurrently, by publishing the standards the commission staff must follow in reaching various decisions during the course of an investigation, the manual provides defense counsel with an outline of arguments to make in order to prevent an "informal" investigation from becoming "formal," or charges from being brought or sustained.

First, the manual sets forth an analytical framework that the staff must follow before commencing an informal investigation. The staff must now first determine "whether the known facts show that an enforcement investigation would have the potential to address conduct that violates the federal securities laws," and the manual sets forth various matters that must be considered in reaching this decision. Although this threshold is low (because the purpose of commencing an informal investigation is to gather facts to determine whether a violation may have occurred), by specifying the analytical framework that must be followed before an investigation is commenced, the manual may somewhat limit the number of new informal inquiries.

Second, multiple provisions within the manual provide parties subject to investigation with protection and predictability they could not previously rely upon. The manual, for example, creates stricter requirements for the approval to issue a "Wells notice." (A Wells notice advises the subject of an investigation that the staff is considering recommending that charges be brought against him or her, and affords the subject an opportunity to make a submission arguing that charges should not be brought.) Among other things, a deputy director is required to approve the issuance.

Historically, the Wells process was unpredictable in another way. The discretion to allow a Wells notice recipient to examine "non-privileged portions of the

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investigative file” was applied inconsistently among commission offices. Section 2.4 of the manual now sets standards upon which staff in every office must base this decision. Together, these provisions take large strides toward greater consistency in the Wells process. These standards also provide a platform from which a skilled practitioner can argue for disclosure.

Third, the manual’s procedures with respect to various privileges and immunities provide protection for parties under investigation. The manual states that the staff “must respect legitimate assertions of the attorney-client privilege and attorney work product protection. . . . As a matter of public policy, the SEC wants to encourage individuals, corporate officers and employees to consult counsel about potential violations of the securities laws.” It further provides that the staff “should not ask a party to waive the attorney-client or work product privileges and is directed not to do so.” In recent years, as a result of statements made by various government officials, a request for waiver of the privilege became pro forma. A subject of an investigation who declined to waive the privilege was deemed “not cooperative,” which often led to charges being brought and other negative consequences. As a result, subjects of investigations came to view waiver of the privilege as not only desirable, but necessary. The manual completely eviscerates that practice, dictating instead that there is no requirement to waive the privilege and waiver will not be requested. This represents a sea change in practices and parallels similar policy changes that have been implemented by the U.S. Department of Justice with respect to criminal investigations.

At the same time, if a party decides that it would be advantageous to disclose privileged communications or documents—for example, in a situation in which an employee engaged in insider trading—it remains free to do so. In that case, the staff is permitted to enter into a “confidentiality agreement” with the party where the staff “agrees not to assert that the entity has waived any privileges or attorney-work product protection by producing the documents.” This is important to companies that face the prospect of civil litigation, either concurrently with or subsequent to a commission investigation. Although there is a question as to the extent to which a nonwaiver agreement will be respected by the courts, their availability creates some comfort for the practitioner and his or her clients.

Additionally, the manual states that an investigation is to be closed “as soon as it becomes apparent that no enforcement action will be recommended.” This provision applies even if “every investigative step has not been completed.” In determining whether to close an investigation, the manual provides standards for the staff to consider. By making these standards publicly available, the manual provides defense counsel with tools that may be used in order to effectively argue that a given investigation should be closed and no charges brought.

Finally, the procedures set forth in the manual centralize key decision making in Washington at the deputy director level. This is done in two ways. First, staff must now obtain the approval of one of two deputy directors of the Enforcement Division before opening an investigation. Second, the manual requires deputy director approval for the issuance of a Wells notice. Placing these important decisions at the level just below the director will increase consistency.

The importance of the manual to a skilled practitioner cannot be overstated, particularly in light of the likelihood of increased commission activity under the Obama administration. It not only places another arrow in the defense lawyer's quiver, it also provides defense counsel an entirely new quiver from which to draw arrows.

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Note

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- **Business Law**
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

Business Law

• **Representing Religious Organizations »**

By Lisa A. Runquist

• **The Patent Lawyer's Mission—Isolate the Inventive Concept**

By Ronald D. Slusky

• **Retroactive Repeal of Rights for Corporate Directors »**

By Steven H. Goldberg and Michael B. Jacobson

• **The SEC Enforcement Manual—An Aid to Combat SEC Investigations »**

By James V. Masella III and Ryan Cronin

• **Survival of Arbitration Clauses After Termination of Contract**

By Kenneth J. Ashman & Neal D. Kitterlin

• **Attorneys Who Prolong the Life of Insolvent Corporate Clients Do So at Their Peril »**

By Kenneth J. Ashman and Neal D. Kitterlin

Survival of Arbitration Clauses After Termination of Contract

By Kenneth J. Ashman & Neal D. Kitterlin

Your client, a large widget manufacturer, comes to you with a commercial dispute

• Past Issues

with one of its main suppliers of raw materials. Upon review of the governing contract, you notice that it contains a procedure compelling arbitration for any dispute that arises under its terms. You also notice, however, that the contract expired four years ago. When you ask the client about this fact, he confirms that the contract technically expired then, but says that the two companies “just kept doing business together like we always had under the contract.” Because the parties continued to behave as if the contract were still in effect, must your client initiate arbitration in order to resolve its dispute? According to a recent federal court decision, the answer is no.

In *Vantage Technologies Knowledge Assessment, LLC v. College Entrance Examination Board*, 2008 WL 5264908 (E.D.Pa. Dec. 18, 2008), the court ruled that parties are not bound to submit to arbitration absent a written agreement compelling arbitration. In *Vantage*, the parties entered into a written contract in May 1998, under which Vantage agreed to oversee the online administration of the College Board’s proprietary writing assessment tool, “WritePlacer.” The terms of the contract included an agreement that all disputes arising out of or relating to the contract would be subject to arbitration. The contract expired in 1999, but was retroactively renewed by a further written agreement in 2001, which also contained an arbitration clause. In 2002, this agreement expired, and a draft agreement which included the same arbitration clause as that found in the parties’ previous agreements was circulated, but never agreed to. Despite the parties’ inability to agree on the terms of a new agreement, Vantage and the College Board continued to do business with one another without a written contract. In July 2008, the parties entered into a new contract that did not contain an arbitration provision.

In August 2008, the College Board initiated arbitration seeking a declaratory judgment with respect to unpaid amounts claimed by Vantage. In September 2008, Vantage filed an action in Pennsylvania state court (later removed by College Board to the Eastern District of Pennsylvania) alleging unjust enrichment, breach of contract, fraud in the inducement, negligent misrepresentation, and false prosecution of an arbitration claim. In deciding the College Board’s motion to stay the proceedings before the federal court, as allowed by the Federal Arbitration Act, the court analyzed whether the parties had agreed to submit the dispute to arbitration, characterizing the issue as “whether the parties continued to be bound by the arbitration clause of an expired commercial contract when the parties have continued to do business after that contract’s expiration.”

In answering the issue in the negative—the arbitration provision did not survive the contract’s termination—the court distinguished the case of *Luden’s Inc. v. Local Union No. 6 of Bakery, Confectionery and Tobacco Workers’ International Union of America*, 28 F.3d 347 (3rd Cir. 1994), relied upon by the College Board, holding that the determination there that the arbitration clause survived applied only in the labor context. The *Vantage* court noted that labor contracts include arbitration clauses for the express benefit of labor, in exchange for a promise not to strike. The *Vantage* court found no such exchange to be present where “two

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sophisticated commercial entities mutually decide to continue their relationship on a day-to-day basis in the absence of an agreement signed by both.” It also relied on a New Jersey district court case, *Bogen Communications, Inc. v. Tri-Signal Integration, Inc.*, 2006 WL 469963 (Feb. 27, 2006), which reached the same conclusion under a set of similar facts.

Finally, the *Vantage* court noted that, while federal law favors arbitration and requires any doubt about the scope of coverage to be resolved in favor of arbitration, a court may not invoke federal policy to “create an arbitration provision in a contractual relationship where no such provision exists.” Thus, under the *Vantage* ruling, a court will not imply the continued existence of an arbitration clause based on the conduct of the parties, but will require that such a clause be part of an express agreement in order to be enforced.

As a notable caveat, not all courts may follow this approach, and it may instead turn on the intent of the parties. For example, the authors litigated a similar case last year, and, in an unreported Illinois lower court decision, the court ruled that an expired contractual provision providing for the shifting of attorneys’ fees to a prevailing party in a dispute was nonetheless enforceable after the contract’s expiration because the parties continued to behave as though the contract was still in force, under a contract implied-in-fact theory. It would be no tremendous leap of logic to apply the same analysis if the contractual provision at issue were an arbitration provision rather than a fee-shift provision, so although the *Vantage* decision provides support for one side of the dispute, it does not resolve the question definitively.

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

[. Home](#)

[. Family Law](#)

[. Business Law](#)

[. Litigation](#)

[. Real Estate](#)

[. Practice Management](#)

[. Young Lawyers](#)

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[. About GP|Solo](#)

[. Feedback](#)

Business Law

[. Representing Religious Organizations »](#)

By Lisa A. Runquist

[. The Patent Lawyer's Mission—Isolate the Inventive Concept](#)

By Ronald D. Slusky

[. Retroactive Repeal of Rights for Corporate Directors »](#)

By Steven H. Goldberg and Michael B. Jacobson

[. The SEC Enforcement Manual—An Aid to Combat SEC Investigations »](#)

By James V. Masella III and Ryan Cronin

[. Survival of Arbitration Clauses After Termination of Contract »](#)

By Kenneth J. Ashman & Neal D. Kitterlin

[. Attorneys Who Prolong the Life of Insolvent Corporate Clients Do So at Their Peril](#)

By Kenneth J. Ashman and Neal D. Kitterlin

Attorneys Who Prolong the Life of Insolvent Corporate Clients Do So at Their Peril

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Past Issues

With the current economic climate, attorneys may be called on to prolong the life of corporate clients that are already insolvent—and they do so at their peril. A relatively new doctrine, known as *deepening insolvency*, creates a measure of damages for the deepening insolvency of a corporation, as its name implies. Deepening insolvency is an issue for those who otherwise breach or aid in the breach of duties to an insolvent corporation—such as board members, attorneys, accountants, and the like—because the measure of damages for such a breach may include the worsened financial position of the company that these third parties caused over the company’s financial condition in the absence of wrongdoing. Thus, no longer is it a valid defense to assert that no harm was caused because the company was insolvent anyway. This article focuses on recent developments in the state of deepening insolvency claims under Delaware law.

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Initially, one unclear aspect of deepening insolvency theory was whether it stood as an independent cause of action or merely as a theory of damages. In *Trenwick America Litigation Trust v. Ernst & Young, L.L.P., et al.*, 931 A.2d 438 (Del.Supr. 2007), the Delaware Supreme Court affirmed the Delaware Chancery Court’s opinion that deepening insolvency is not an independent cause of action, where the lower court unequivocally and harshly rejected the concept of deepening insolvency, stating that the term has the “kind of stentorian academic ring that tends to dull the mind to the concept’s ultimate emptiness.” 906 A.2d 168, 204 (Del.Ch. 2006). In affirming this decision, the court reasoned that there was no affirmative duty for a corporation to cease operations when it became insolvent, and that a corporation’s board could pursue, in good faith, strategies to maximize the company’s value. If the strategy resulted in continued, or even worsened, insolvency, no claim against the board arises, the *Trenwick* court reasoned. The *Trenwick* court also took care to point out, however, that the board of an insolvent corporation was not completely insulated from liability, as a plaintiff could still assert the “traditional toolkit” of claims for breach of fiduciary duty and fraud.

It seemed as if the matter was settled firmly against the deepening insolvency theory, until the issuance of a more recent decision by the Bankruptcy Court for the District of Delaware, *Miller v. McCown De Leeuw & Co. (In re The Brown Schools)*, 386 B.R. 37 (Bankr. D. Del. 2008). In *The Brown Schools*, the court reiterated the ruling in *Trenwick* that deepening insolvency is not a separate cause of action, but also ruled that deepening insolvency can be a valid theory of damages.

In *The Brown Schools*, the bankruptcy trustee filed a complaint against a number of entities, including companies that had provided consulting services to the debtor and an attorney for the debtor, alleging breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent and voidable transfers, deepening insolvency, civil conspiracy, and declaratory relief. Although the court dismissed the deepening insolvency claim, it allowed the claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, corporate waste, and civil conspiracy to stand, despite the defendants’ argument for dismissal on the basis that the trustee did not plead any actual damages other than deepening

insolvency. In response, the trustee argued, in part, that the amounts it sought were not exclusively based on deepening insolvency.

The trustee further argued, however, that, even if it did seek damages solely on a deepening insolvency basis, such damages are nonetheless recoverable. In so arguing, the trustee distinguished the holding of a Third Circuit case, *Seitz v. Detweiler, Hershey and Associates, P.C. (In re CitX Corp.)*, 448 F.3d 672, 677–78 (3d Cir.2006), which held that deepening insolvency was not a viable theory of damages in a legal malpractice case. The trustee argued that CitX did not hold that deepening insolvency could not be a valid measure of damages for any cause of action, and should be limited to the legal malpractice context. The trustee also cited another decision, *Alberts v. Tuft (In re Greater Southeast Cmty. Hosp. Corp. I)*, 353 B.R. 324, 333 (Bankr.D.C.2006), which held that deepening insolvency was a valid measure of damages for a breach of fiduciary duty. The *The Brown Schools* court was persuaded by the trustee's arguments, and declined to dismiss the case based on a failure to plead actual damages, explicitly agreeing with the holding of the *Tuft* court.

Thus, under Delaware law, any potential liability by professionals for causes of action such as breach of fiduciary duty or aiding and abetting breach of fiduciary duty could result in the award of deepening insolvency damages. As such, the fact that a company is already insolvent will be no bar to a damage award. Indeed, parties breaching a duty to an insolvent company could be liable for large sums for further harm caused to that company and its creditors.

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

. Home

. Family Law

. Business Law

. **Litigation**

. Real Estate

. Practice Management

. Young Lawyers

. Download

. About GP|Solo

. Feedback

Litigation

. **How to Handle a Workers' Compensation Case**

By Bryan C. Ramos

. **What Do You Do When You Get a Call in the Middle of the Night From a Family Member Or Friend of a Potential Client Who Has Been Arrested? »**

By Darryl A. Goldberg

. **Preparing Your Client for a Video Deposition »**

By Michael A. Vercher

How to Handle a Workers' Compensation Case

By Bryan C. Ramos

The handling of a workers' compensation claim can be deceptively complex. As with other forms of litigation, preparation will be the key to your success. Although the local rules and laws may change, there are some unassailable truths that apply in most jurisdictions. The purpose of this article is to provide you with a few considerations that are often overlooked.

Use the Initial Intake Session to Answer Future Discovery Requests

At the intake session, you begin to see the skeleton of the case. I recommend you take this opportunity to put "the meat on the bones." As a litigator, you have propounded and answered hundreds or thousands of interrogatories. You know more or less the questions opposing counsel will propound in the interrogatories. If you do not, simply review the mass of interrogatories you have answered in the last six months. The parlance and scope of the questions will be remarkably similar. Spend the extra time to get this information at the outset. It will save you

• Past Issues

hours in the process.

I would also recommend you review the “common” items found in the requests for the production of documents. At the end of the intake form, provide your client with some homework to secure whatever documents they can obtain.

Lastly, I recommend you give your client a short preview of the upcoming deposition. By going over the interrogatory questions and then transitioning into a “mock deposition,” your client should become more comfortable with verbalizing his or her potential testimony. As many clients are intimidated with the deposition and formality of the proceeding, I firmly believe that they will perform better the more times you simulate the conditions upon which their testimony will be given. In fact, I recommend you set a “dress rehearsal” for a later time, if time and your resources permit.

Be Active With the Medical Treatment Plan Being Rendered

If you summon back to freshman chemistry, ATP (adenosine triphosphate) is known as the powerhouse of the cell. Similarly, in most workers’ compensation cases, the authorized treating physician (ATP) will likely determine the outcome of your case. I recommend that at the outset of the case, you secure a firm grasp of the past medical treatment and the recommended prognosis. This may involve some medical research on your part. Also, I would seriously consider which doctors are providing the treatment. Not all doctors have the same disposition, temperament, skill level, and attitude. I recommend you develop a form letter you can send to the physicians introducing yourself and outlining your role in the process. I would include the medical release as well and request that you be copied on any records or communication sent or received concerning the claimant. There is nothing worse than being blindsided by a medical record that completely undermines your theory. By being active in the medical treatment, you will reduce these types of unsavory surprises.

Remember, start preparing your case for trial at the intake session.

Be Proactive With Your Client Communication

The most common complaint from clients stems from the lack of communication. In the field of workers’ compensation, the hearings are often postponed. I have heard of one instance where the client was not informed of the postponement. The client showed up and had an interesting discussion with the judge. In turn, the judge had an interesting conversation with the attorney, and then with the state bar. It was not a good day for anyone. On the other hand, I have heard (and experienced) some clients who call every hour with “new information” or the “latest emergency.” These clients may call every day for months. How do attorneys strike a balance between these extremes?

It is a practice in our office to send a piece of written correspondence *and* make a personal phone call to our clients every 30 days at the very least. By scheduling these calls and letters, the clients are informed and they can gather their questions accordingly. I have taken this model from the doctors’ offices that treat

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their patients in the same fashion.

Remember, your client does not mind litigation, even if it may be against you.

Know Your Judicial Audience

In many jurisdictions, the judges presiding over your hearings are administrative law judges (ALJs). These judges are generally political appointees with ranging biases and prejudices. This is the unfortunate reality in having a single person act as the complete finder of facts and “decider” of laws. We are all human, and it just comes with the territory. Although ALJs strive to be “impartial,” it is wise to realize that they are human and subject to the same biases that we must face.

Knowing that, I recommend you do your research on the presiding judge. In our office we attack this issue as if we are evaluating a jury pool. Is it not the same analysis? Where did the judge go to school? Did he *ever practice law* before coming onto the bench? Does the judge play golf with opposing counsel? What is his reputation around the bar? Is she a stickler for procedure? Are there any particular practices that the judge requires in her courtroom? Will the judge be actively involved in the trial by asking questions, or will he simply wait for the transcript?

Remember, the ALJ is the judge and jury.

In handling the workers’ compensation case, speed and efficiency are paramount. The flow or stoppage of your cases will greatly depend upon your case management skills, business systems, and proficiency. *Embrace technology and case management software*. The utilization of technology will help you organize the intake sessions, discovery, form letters, and databases that may assist you in keeping clients (and in most instances your sanity).

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

. Home

. Family Law

. Business Law

. **Litigation**

. Real Estate

. Practice Management

. Young Lawyers

. Download 

. About GP|Solo

. Feedback

Litigation

. **How to Handle a Workers' Compensation Case »**

By Bryan C. Ramos

. **What Do You Do When You Get a Call in the Middle of the Night From a Family Member Or Friend of a Potential Client Who Has Been Arrested?**

By Darryl A. Goldberg

. **Preparing Your Client for a Video Deposition »**

By Michael A. Vercher

What Do You Do When You Get a Call in the Middle of the Night From a Family Member Or Friend of a Potential Client Who Has Been Arrested?

By Darryl A. Goldberg

It was a long day at the office and you drift asleep, only to awake to the phone ringing in the middle of the night. Is everything alright? Who could be calling at this hour? Is it your little brother at college? How about your parents back at home? Some of you may moan to yourself, "What now!" When you pick up the telephone you start to breathe again. But before you can sigh with relief, you realize your answering service has connected you with a nervous, and inquisitive, person on the other end. Someone was arrested: how do you handle the call?

Although nothing but experience can prepare you for the barrage of questions that will be hurled at you, this checklist may provide some of the fundamentals that will allow you to answer those burning questions without later realizing that you had no idea what you were talking about, especially those who didn't take an

• Past Issues

introductory criminal procedure course in law school. Of course, please keep in mind that every jurisdiction has its own unique rules and procedures.

•**Booking:** “We heard Johnny was taken to the local police station, but nobody has heard from him; what’s going on?” Routinely, after a suspect is arrested, they are usually *booked* or *processed*, and this can take quite some time. Typically, this will include gathering personal information such as a name, address, and date of birth, but also will include fingerprinting, photographing, and searching the suspect. Almost all law enforcement agencies have an inventory system where the suspect’s personal property (i.e., a wallet, currency, keys, cell phone, etc.) is confiscated and documented, to be returned upon the suspect’s release from custody. Sometimes, the property will be released to family members or friends, with the suspect’s consent of course. So when Johnny’s father is wondering when he can get his car back, he should know that his car and keys may be released. However, there is an exception: his car may be impounded and seized because it was allegedly used in the commission of a crime. Sometimes the booking process is prolonged because the suspect’s fingerprints may not “clear,” or they *redline*, which simply means that the booking officer did not get a good enough exemplar to enter into the database to compare the suspect’s prints against those with outstanding arrest warrants or detainers of any kind.

•**Questioning:** “So are they putting Sam in that little room like they do on television and asking him all sorts of questions? Can’t you go down and talk to him?” Certainly law enforcement officers will take advantage of an opportunity to question a suspect, but you won’t necessarily have access to your now potential client. In 1986, in the case of *Moran v. Burbine*,¹ the Supreme Court of the United States held that the police do not need to notify a suspect that his lawyer is at the police station requesting to speak to him or her. However, in some jurisdictions (such as Illinois), the legislature mandates that a lawyer must be given access to his client at the station. Of course, in the event that the accused requests a lawyer, all questioning must cease until the accused has had an opportunity to consult with an attorney. If your prospective client actually gets you on the line, or the police officers let you speak to him or her (as required in most jurisdictions), there is nothing impermissible or obstructive of justice to simply tell your client-to-be *not* to speak to the police. A confession is the most powerful piece of evidence for the prosecution. What you see on TV certainly rings true in almost every case: whatever you say can and will be used against you.

•**Bail:** “Adam was just arrested. When will he get out?” you’re asked. Generally, after a suspect is booked, the suspect will usually be entitled to reasonable bail, as guaranteed by the federal and state constitutions. Often, for some relatively minor or misdemeanor offenses, a suspect may be released on their own recognizance when they promise in writing to appear in court, or allowed to post bail (money given in exchange for the suspect’s release from custody) at the police station, which is also accompanied with the promise that the suspect will appear in court for any and all proceedings that will follow. However, in most

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cases, a suspect will not be allowed to post bail at the police station, and a judge will decide whether to allow release on bail and under what conditions. In some jurisdictions, the bail amount is predetermined through a codified “schedule,” or simply through judicial process where a judge takes into account the seriousness of the crime, the nature of the evidence, but most importantly other factors including but not limited to the suspect’s: 1) ties to the community; 2) risk of flight; and 3) criminal record (or lack thereof). Certainly, the more serious the charge, the higher the bail amount will be, and under certain circumstances bail can be denied. For example, under the Bail Reform Act, there is a rebuttable presumption that defendants charged in federal court for certain drug trafficking crimes are presumed to be a flight risk and a danger to the community and thus must be detained pending trial.

•First (or Second) Appearance: “After the judge sets bail, when will Jake be back in court?” Assuming that the defendant is booked and the judge sets bail, the next time he or she comes to court will be for a preliminary hearing or an arraignment, depending on the jurisdiction. The term *arraignment* is sometimes used synonymously with “initial appearance,” but a “formal” arraignment usually takes place after a preliminary hearing in which a judge has found probable cause (enough evidence) to force the defendant to stand trial. So, generally, the preliminary hearing will be held to determine whether the prosecution has enough evidence to bring the charge, but at this point there is *not* a determination as whether the prosecution can prove the defendant guilty beyond a reasonable doubt. Alternatively, the prosecution may seek a grand jury indictment, where a group of citizens make up the grand jury and determine whether a case should proceed to trial based on narrowly tailored information presented by a prosecutor in closed proceedings.

•Bond: “Well, I don’t get it: what’s the difference between bail and bond?” Once the bail amount is set, “bond” will usually be posted if friends and family can gather up enough money or collateral to post. In some jurisdictions, 10 percent of the bail amount is typically required as bond, which accompanies a written guarantee that the full bail amount will be paid if the suspect fails to appear. Bail bond agencies are available in some jurisdictions that will post the bond in exchange for a fee (usually about 10–15 percent of the bail), and usually require some collateral (in addition to the fee) because they will be liable for the full bail amount if the suspect is released and fails to show up in court as promised. In federal court, it is common to post real property to secure a defendant’s release from custody pending trial. In certain instances, such as in drug trafficking, robbery, and theft cases, the prosecution will ask for a “source of funds” hearing, also referred to as a *Nebia* hearing, before bond can be posted. If the judge grants the prosecution’s request, the person posting bond must prove that, more likely than not, the source of the bond is legitimate, that is, the money is not the proceeds of a crime. One of the simpler ways to accomplish this task to have the defendant’s family or friend refinance a home and use the proceeds of the loan as funds for the bond. Another way is prove that the money used to post bond is legitimate is to take it from a long-standing bank account that has maintained a

balance in excess of the bond for some time before the defendant allegedly committed the crime charged.

•**Visiting hours:** “What if I can’t raise the 10 percent to bond him out—when can I go see him?” Assuming that bond has been set, and the friends and family can’t raise enough money to bond out the defendant, how can they visit him or her? Every county jail or detention center has unique rules and regulations regarding visiting hours and even the type of attire visitors can wear to the jail. Before advising anyone about when and where they can visit the defendant, check with the county jail or local law enforcement agency responsible for overseeing the jail. Much of the pertinent information is available online, via the Internet, and often has detailed information such as the bail amount and the defendant’s next court date, in the event that the suspect is still incarcerated pending trial.

•**Time frame:** “From start to finish, how long does this whole process take?” Many people who have no past experience with the criminal justice system have very unrealistic expectations of how fast the system works. One thing is almost universally true, no matter the jurisdiction: The wheels of justice spin slowly. That’s easy for me to say, because the felony courts in Cook County have been backed up for years, and the county jail is routinely overcapacity. It has gotten to the point where the Chief Judge of the Criminal Courts is considering implementing a case management program where cases are to be disposed of in a relatively short period of time after arraignment (sixty days), barring any unusual circumstances. Other courts throughout the country have followed this approach, but major metropolitan areas seem to have a backlog of cases. Of course, every defendant is entitled to a speedy trial and guaranteed by the United States Constitution, but not every state seems to enforce it. What I mean by that is, sometimes delay that is occasioned to the court and simply the backlog of cases is not counted against the prosecution and the speed in which they must bring a defendant to trial. For example, I know of one case in the Commonwealth of Massachusetts, where the defendant has demanded trial, and his case was placed in a trial “pool” and set for trial in the beginning of 2006; as of October 2006, the case had not been tried simply due to the overwhelming number of cases set for trial in that jurisdiction. More importantly, every client and their family and friends must understand that the only way to get results is to be prepared, and that takes time. The prosecution is immediately at an advantage that a defendant must try and overcome, through thorough investigation and a complete understanding of the prosecution’s theory of the case.

•**Guilt beyond a reasonable doubt:** “Well, but you don’t understand, he didn’t do it, this should be a piece of cake!” Although your potential client may truly be innocent, it is often a daunting task proving it. You may be wondering if I’m crazy, because one thing you learned while studying for the bar exam, or even watching *Law and Order* reruns, is that the prosecution must prove a defendant’s guilt beyond a reasonable doubt, and the defendant never has to prove his innocence. Although that constitutional adage packs some weight

behind its punch, innocuous conduct has a way of being misconstrued by a jury or molded into something more incriminating by a trained prosecutor. Make sure your client understands right away that even for the most talented defense lawyer in the simplest cases, gaining an acquittal for your client is never a piece of cake.

•Advice: “So now what do I do? Timmy is stuck in jail, you tell me to be patient, but you can’t guarantee when or if he is ever coming out!” Clearly the ABA’s Model Rules of Professional Responsibility (which are adopted by most, if not all states) clearly forbid you from guaranteeing an acquittal for your client in a criminal case. But don’t be surprised if a potential client or their loved ones ask for a guarantee. Kindly explain you are forbidden from guaranteeing any result, but that you’ll do whatever it takes (within the bounds of the ethical rules) to successfully defend your client-to-be. Of course, that’s if you’re up to the task. “Dabbling” in a criminal legal practice is dangerous; it can be devastating for both you and your client. Proceed with great caution and care.

This elementary checklist may help you answer a few of those burning questions in the middle of the night, and might stave off some embarrassment of appearing ignorant of basic criminal defense, but one thing must be understood: Leave it to the criminal defense bar. There is nothing demeaning about being upfront with your potential clients about your inexperience; in my opinion, there is nothing nobler. Remember, you are dealing with a person’s liberty. But if you’re determined to jump into the ring, make sure you have your gloves on, and all the protective equipment you need: a mentor or trainer in your corner that can at least try and prepare you for the fight.

Endnotes

¹ 475 U.S. 412 (1986) (case where court held accused validly waived Fifth Amendment right against self-incrimination after being read rights per *Miranda* and signing written waivers, without requesting an attorney, even though he was never informed his attorney was at police station and requested to meet with him before police interrogated suspect).

² 725 ILCS 5/103-3; 725 ILCS 5/103-4.

³ *Edwards v. Arizona*, 451 U.S. 477 (1981).

⁴ In federal court, after a defendant’s initial appearance, a preliminary hearing must be held within 10 days if a defendant is in custody, after his or her initial appearance where a magistrate judge advises the accused of his/her rights. See Fed. R. Crim. Pro. 5.

⁵ *Nebbia v. United States*, 357 F.2d 404 (2d. Cir. 1966).

⁶ For a defendant in federal custody, check the Bureau of Prisons website at www.bop.gov for links and information regarding local correctional centers where inmates are held pretrial. However, understand that, due to overcrowding, the federal government has contracts with many county jails that also house federal prisoners.

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Note

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

• Home

• Family Law

• Business Law

• **Litigation**

• Real Estate

• Practice Management

• Young Lawyers

• Download 

• About GP|Solo

• Feedback

Litigation

• **How to Handle a Workers' Compensation Case »**

By Bryan C. Ramos

• **What Do You Do When You Get a Call in the Middle of the Night From a Family Member Or Friend of a Potential Client Who Has Been Arrested? »**

By Darryl A. Goldberg

• **Preparing Your Client for a Video Deposition**

By Michael A. Vercher

Preparing Your Client for a Video Deposition

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Recent studies show that jurors rely heavily on nonverbal communication like eye contact and body language to judge the veracity of a witness. In response, savvy litigators are using with greater frequency a powerful discovery tool, the video deposition. In addition to the “standard” rules applicable to the traditional stenographically recorded deposition, care must be taken to prepare your client for the nuances of having her or his testimony recorded on video.

•If the video testimony damages your case, your opponent will attempt to use it at trial. Approach the preparation of your client for a video deposition understanding that any part of it may, if permitted, be shown to the jury at trial by your opponent. The rules for preparing your client for a video deposition are therefore similar to preparing them for trial testimony. If your opponent is spending the money to take a video deposition, they are taking it seriously, and you should too.

• Past Issues

•**Consider objecting to the video deposition.** If you are in federal court, Rule 30 of the Federal Rules of Civil Procedure (as amended effective December 1, 2007) clearly permits recording the deposition by “audio, audiovisual, or stenographic means.” Many state rules still require that video depositions be conducted in a manner to replicate the presentation of evidence at trial. Some states even require that the notice of a video deposition state the reason a video recording is necessary or desirable and include other provisions to ensure that the recorded testimony will be accurate and trustworthy and that the witness will be treated fairly. Consult the rules of the applicable jurisdiction for requirements and cases that may limit or otherwise prohibit the video deposition of your client.

•**Record the questioning attorney.** Many jurisdictions require that the video deposition be conducted in a manner to replicate the presentation of evidence at trial. Implicit in this requirement is that the jury be able to observe counsel while questioning the witness. This may help keep the opposing lawyer on his or her best behavior during the deposition.

•**Prepare your client for an appealing “on camera” appearance.** If your client is a truck driver, she or he may be uncomfortable in a suit. Know your client, and make sure your client is comfortable but presents a professional appearance. Remind your client to turn off cell phones and not to look at PDAs or other electronic devices during the deposition. Ask your client to wear solid colors like blue or white without patterns. If your client is wearing a jacket or coat, remind him or her to leave it on while on camera. Taking off the coat during a break in the deposition may make it look on film like they are getting nervous.

•**Remember that not all the rules of a traditional deposition apply to a video deposition.** In a stenographically recorded deposition, clients are often advised to “take as long as they want” to think about and respond to a question. On video, long pauses can appear like your client is hiding something or is being evasive. Similarly, terse “yes” and “no” responses, often recommended for the traditional deposition, can sound rehearsed on video. Some attorneys even suggest that video deponents briefly explain why they cannot recall an important fact, name or date during a video deposition.

•**Carefully observe your client’s facial expressions prior to the video deposition.** When you are preparing your client for a video deposition, pay careful attention to his or her facial expressions. Recognize and remind your client that the video will likely be taken of the face only. Facial expressions can be amplified and exaggerated when the tape is played back to the jury by experienced opposing counsel at trial. It is imperative that your client understand that they should not roll their eyes or make other facial expressions when asked a question. Remind your client to look at the examining attorney and concentrate on maintaining a pleasant facial expression while being asked a question. Advise your client not to look at you during the deposition, especially if you make an objection.

•**Prepare your client to project positive body language during the**

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deposition. Remind your client to sit up straight in the chair. Ask him or her to place their hands on the table in front of them and keep them there during the duration of the deposition. This will help maintain correct posture. For many people, eye contact signifies whether an individual is testifying truthfully. Opinions differ about whether you should have your client look directly at the camera or at questioning counsel. Whatever method you choose, make sure that your client is aware that the camera remains fixed on them at all times during the deposition, no matter who is talking in the room. Advise them not to look around while speaking or listening to others in the room.

•Prepare yourself for the video deposition. Federal Rule of Evidence 30(c) (2) requires that deposition objections “whether to evidence, to a party’s conduct, to the officer’s qualifications, to the manner of taking the deposition, or any other aspect of the deposition must be noted on the record.” The rule further states that “an objection must be stated concisely in a non-argumentative and non-suggestive manner.” The interplay between the federal rules requiring objections to be stated on the record and the reality that what you say and do during a video deposition may be replayed in front of the jury requires you to carefully anticipate and prepare your objections prior to the deposition. Even if you are not on camera, the tone of your voice and the way you present your objections will be carefully scrutinized by the jury if shown at trial. Because you most likely did not set and therefore technically do not control the deposition of your client, you need to consider the possibility that you may be on camera during the deposition. If you arrive at the deposition and find that you will be on camera, the same rules you used to prepare your witness for the video deposition now apply to you. Also remember that if you or your client have a microphone, what you say to them during a deposition may be on tape and perhaps negate the attorney-client privilege.

•Advise your client not to argue with the examining attorney. This looks worse on video than in a deposition transcript.

•Anticipate areas of possible questioning. This takes on greater importance in preparing for a video deposition because the look of surprise appears on video but not on the pages of a transcript.

Space limitations do not permit a detailed examination of all the subtle differences between preparing your client for a video deposition rather than a traditional deposition. Hopefully, this checklist will get you thinking about some differences and provide you with a starting point for effectively preparing your client for a video deposition.

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

[. Home](#)

[. Family Law](#)

[. Business Law](#)

[. Litigation](#)

[. Real Estate](#)

[. Practice Management](#)

[. Young Lawyers](#)

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[. About GP|Solo](#)

[. Feedback](#)

Real Estate

[. Final Rule on RESPA - Part II](#)

By Linda Holder

Final Rule on RESPA - Part II

By Linda Holder

The Department of Housing and Urban Development (HUD) issued its final rule in regards to changes to the Real Estate Settlement Procedures Act (RESPA) in November of 2008. Part I of this article covered changes dealing mostly with the Good Faith Estimate (GFE), which covers estimates of closing costs and disclosures about loan terms. Part II will cover tolerances in fee changes, unforeseeable circumstances that allow for changes in fees, cure provisions, yield spread premiums, new definition of a mortgage broker, and limits on origination fees. Part III covers changes to the settlement statement, the closing script, average cost pricing of settlement services, use of affiliates, and technical amendments.

In order to provide meaningful estimates of fees on the GFE, HUD has implemented the use of tolerances for differences in fees at closing from those on the GFE. The tolerances run from zero to ten percent. For example, title services have a ten percent tolerance while the loan originator's own charges have a zero tolerance. Recording fees are subject to a ten percent tolerance, but transfer taxes have a zero tolerance. If changed circumstances result in a new GFE, then the comparison is made between the final closing charges and the revised GFE. A violation of the tolerance requirements is a violation of section 5 of RESPA. The loan originator can cure such violations by reimbursing the borrower for the difference at settlement or within 30 calendar days after settlement.

The proposed rule used the term "unforeseeable circumstances" to describe the

• Past Issues

basis for revising a GFE. However under the final rule the term was replaced with the term “changed circumstances.” Market price fluctuations by themselves are not considered changed circumstances. If information about the borrower is relied upon in providing the GFE and that information materially changes or was inaccurate such that the borrower no longer qualifies for the loan quoted, then a revised GFE could be issued. Loan originators are presumed to have relied on at a minimum, namely, the borrower’s name, monthly income, property address, property value estimate, loan amount and credit report. A revised GFE can be issued based on changes in this information only if the change is substantial. If the borrower requests changes in the loan, the originator may revise the GFE to reflect the changes. Borrowers must express an intent to continue with the loan within 10 business days of receiving the original GFE, or the originator is no longer bound by its terms. If the interest rate is not locked, then interest rate-dependent charges may be revised, and once a rate is locked, a revised GFE should be issued. For new construction, an originator may provide a revised GFE no later than 60 days before closing but must provide a clear and conspicuous disclosure with the original GFE of that possibility or tolerances will be compared with the original GFE. If a GFE is revised, the originator must document the reasons for the changes and retain that information for three years after settlement.

Disclosures regarding yield spread premiums (YSP) are still required on the GFE. A yield spread premium is a fee paid outside of closing to a mortgage broker for which the borrower pays a higher interest rate. The disclosure is made on page 2 of the GFE in the section entitled “Your Adjusted Origination Charges.” Mortgage brokers are required to disclose in block 1 the amount they received for loan origination from the borrower and any payments from the lender to the broker for the origination. In block 2, mortgage brokers disclose any credits (YSP) or charges (points) to the borrower for the specific interest rate chosen which are then subtracted from or added to the origination charge in block 1 to arrive at the adjusted origination charge. Lenders are not required check these boxes about credits or charges unless they separately disclose such items for the loan or they are in fact charging points. If the disclosures are not made, then the first box in block 2 must be checked. Regarding limitations on origination fees, HUD has removed the limits on the amounts that may be charged to borrowers for originating and closing an FHA loan but reserves the right to set limits on those fees.

Finally, the definition of mortgage broker has expanded to include “a person or entity that renders origination services and serves as an intermediary between a borrower and a lender in a transaction involving a federally related mortgage loan, including a person or entity that closes the loan in its own name in a table-funded transaction.” This expanded definition includes an exclusive agent of a lender who is not an employee but provides origination services.

A more complete explanation of these changes and the reasoning behind HUD’s decisions regarding the final rule can be found at <http://www.hud.gov/offices/hsg/sfh/res/finalrule.pdf>.

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- Business Law
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

• Past Issues

Practice Management

- **Regular File Reviews or "Tickler" Systems**

By Todd C. Scott

- **Depression and Our Bodies »**

By Dan Lukasik

- **Things to Do in a Slow Economy: Investing for a Turnaround »**

By Sally J. Schmidt

- **Closing the Deal: 10 Steps to Take Now »**

By Roxana Bacon

- **Changing Gears in Economic Downturn »**

By Savina P. Playter

Regular File Reviews or "Tickler" Systems

By Todd C. Scott

A regular file review system is critical to malpractice prevention and efficient handling client matters. A file review or "tickler" system can take many forms, depending upon firm size and personnel availability. The fundamental purpose of a tickler system is to keep files out of attorney's offices and in centralized file locations (or if absolutely necessary, decentralized file drawers), until periodic review is warranted.

The advantages of a tickler system are obvious. First, a tickler system dramatically reduces the possibility of a lost file or forgotten deadline. Second, procrastination is less likely when an office is clean and the attorney has a finite number of matters to review on any given day. Third, periodic file review enables attorneys to proactively contact clients to communicate file status. Finally, greater efficiency is achieved when both support staff and attorneys know where a file is located.

The easiest and most effective method of establishing and complying with a tickler system is to integrate it with the perpetual calendar system. Case management software routinely includes automated perpetual calendar systems, but always remember that your automated system is only as good as the information that is entered into it. Some examples of current case management software available to lawyers are Amicus, Time Matters, PracticeMaster, and ProLaw. Double check (or triple check) the dates for accuracy as they are entered into your system. In a manual tickler system, regular review dates are assigned to new matters by the responsible attorney and entered into the calendar system as a docket item. On the review dates, files are retrieved from the centralized file room by the file clerk, or from decentralized file drawers, and given to the responsible attorneys for review. The attorney then has a limited number of files requiring his or her attention on any given day. If no action is required, the file is assigned a new review date and returned to the centralized file room or file drawers.

Periodic review dates should not exceed 30 days, even when activity is not anticipated for many months. This is also an excellent opportunity to send the short status report to the client and to monitor ongoing conflicts

potential.

File Tickler Basics

- When first setting up a file, automatically mark the file for review in 30, 60, and 90 days.
- Mark the review dates on both the file and a separate calendar accessible by staff.
- A file *must* be delivered to the reviewing attorney on the scheduled review date.
- All files should be reviewed at least every 30 days.
- When reviewing the file, the attorney should always add future review dates.
- No file should be placed back in the shelves without at least two future file review dates.

A tickler system, whether automated or manual, will alleviate the need to keep files stacked on attorney desk if they are not active. The system also prevents files from falling through the cracks.

The following is a list of Tickler and Calendar Systems: Suggested Dates and Deadlines.

Tickler & Calendar Systems Suggested Dates & Deadlines

- General file review (every 30 days)
- Statutes of limitations
- All appointments and meetings
- Court dates
- Dates from Scheduling Order
- Interrogatories
- Depositions
- Tax returns
- Real estate closings
- Lien notifications
- Pleadings
- Discoveries
- Subpoenas
- Corporate tax dates and stockholders' meetings
- Hearings before administrative agencies, commissions, and boards
- Due dates of the opposition on court cases
- All dates related to follow-up activities
- All dates from "area of practice" checklists
- Promises made to others or by others
- All other self-imposed discretionary deadlines

The firm's file tickler system is the thin lifeline between a successful attorney client relationship and a missed-statute disaster. There's no harm in "diary-ing" the file too much. Even if you are very diligent about file maintenance and follow-up, your docket control safety net one should take into account a potential mishap by others.

Todd Scott is the vice president of Member Services for Minnesota Lawyers Mutual Insurance Company. He is a member of the Minnesota State Bar Association, where he serves as co-chair of the Practice Management & Marketing Section, and the Nebraska State Bar Association.

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- Business Law
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

• Past Issues

Practice Management

- **Regular File Reviews or "Tickler" Systems »**

By Todd C. Scott

- **Depression and Our Bodies**

By Dan Lukasik

- **Things to Do in a Slow Economy: Investing for a Turnaround**

»

By Sally J. Schmidt

- **Closing the Deal: 10 Steps to Take Now »**

By Roxana Bacon

- **Changing Gears in Economic Downturn »**

By Savina P. Playter

Depression and Our Bodies

By Dan Lukasik

Working as a lawyer and struggling with clinical depression is a tough. I know, because I deal with both every day. In a peculiar sense, it is really like having two full-time jobs that absorb all of our time. As we know, the daily demands and stress of our jobs as lawyers are often unremitting: deadlines to meet, phone calls to return, and that motion to argue in court the next morning. We often feel that others who aren't lawyers really don't understand us and our work because they haven't "walked in our shoes."

The "job" of being depressed seems to parallel my experience as a lawyer. A

common experience of feeling depressed is feeling alone and isolated. When people who care about us reach out to help, there are times we push them away out of a sense of bitterness thinking: “You really don’t know what it’s like to be a lawyer.”

Yet, there may come a time when we might want to begin seeing depression and our vocation as lawyers a little differently. Not as two jobs, but really one. The one job is finding a way to take care of ourselves. Mother Teresa once said that what God expects of humanity is that we be “a loving presence to one another.” Taking that further, I would suggest what God equally expects is for us to be a loving presence to *ourselves*.

In any law firm, the barometric pressure of stress rises and falls frequently. Consequently, we often find it difficult to be a “loving presence” to ourselves: to eat well, exercise, get enough sleep, and nurture a support structure of good friends. The gale-force winds of stress, burnout, and depression can begin blowing and disconnect us even from this basic agenda. Yet, if we are to regain our health in the midst of depression, we must return to these basic concerns because depression afflicts our minds *and our bodies*. Our physical state—our precious bodies—get hammered by the unremitting punishment that depression dishes out. I have often described it to friends as “wet cement running through my veins.”

The biochemical imbalance that is so often a part of depression affects every part of our physical makeup: our eating, our weight, our energy level, and our ability to sleep. How can we realistically hope to “feel better,” to regain the healthy ground that depression has knocked us off, if we don’t offer a loving presence to our tired and afflicted bodies left unbalanced, weak, and fatigued in depression’s wake?

Being a loving presence to our bodies is like being a loving parent. We need to pause—and to have a support structure of people who remind us to pause—to ask ourselves what is good for our bodies. My family doctor once told me that our bodies are like giant tape recorders that remember everything we have done to them. Too little sleep, too much stress, or not enough exercise tells our body that we simply don’t care or don’t have the time for it. This pattern can have catastrophic consequences when depression hits because the body that we need to help us is not fully able to be our ally. Because it has been ignored, it is of little help to fight depression and actually participates in it. Antidepressant medication can be a way, especially in the beginning, to begin to soothe our bodies, to calm our minds enough, so that we can begin thinking of how we are going to rebuild that loving relationship with our bodies.

One of my favorite parts of the Bible comes from the Old Testament: the Twenty-Third Psalm. To me, it speaks about the journey: “Yea, though I walk through the valley of the shadow of death, I will fear no evil; for You are with me; Your rod and Your staff, they comfort me.” All humans must make this journey. We must all “walk through the valley” of a life that is certain to have its victories and times

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of happiness, but also its stunning defeats and times of deep sorrow. The shape of those victories and defeats take a particular form for lawyers, even more so for lawyers who struggle with depression. The valley can feel more like a deep trench with no way out. Our bodies can feel buried in this trench with no light or air able to penetrate depression's paralyzing weight. Yet, there are steps each of us can take to begin our climb out of this hole. In my experience, our bodies are like the ladders propped against the trench of depression. The great Psalm tenderly says to us that we are not alone: God is there with us in the deepest darkness. Yet, I would also suggest that our bodies are there for us also, waiting to assist us in our journey toward wholeness.

Dan Lukasik helped form the partnership of Cantor Lukasik Dolce & Panepinto, P.C. Mr. Lukasik is currently a partner and represents plaintiffs in personal injury cases and civil rights matters in state and federal court. He is the recipient of the Distinguished Alumni Award for Community Service from the University at Buffalo Law School Alumni Association for his work in helping lawyers with depression. In addition, he and the Erie County Bar Association were given the New York State Bar Association's Award of Merit for the creation of the Committee to Assist Lawyers with Depression in Erie County. Mr. Lukasik is the chair of that committee. Please visit his website, www.lawyerswithdepression.com. In addition, a depression blog for law students, judges, and attorneys was just launched in May 2009. It can be accessed through the website.

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- . Home
- . Family Law
- . Business Law
- . Litigation
- . Real Estate
- . Practice Management
- . Young Lawyers

. Download 

. About GP|Solo

. Feedback

. Past Issues

Practice Management

. Regular File Reviews or "Tickler" Systems »

By Todd C. Scott

. Depression and Our Bodies »

By Dan Lukasik

. Things to Do in a Slow Economy: Investing for a Turnaround

By Sally J. Schmidt

. Closing the Deal: 10 Steps to Take Now »

By Roxana Bacon

. Changing Gears in Economic Downturn »

By Savina P. Playter

Things to Do in a Slow Economy: Investing for a Turnaround

By Sally J. Schmidt

When economic times are tough, there's a distinct tendency among the affected lawyers: As their practices slow down, so do their marketing efforts. Some intentionally withdraw from activities owing to scarcer resources. For others, the retreat seems more psychological, akin to burying their heads in the sand. But instead of playing ostrich, why not put some of your extra time into low-cost marketing efforts?

I guess it's true what they say: If you live long enough, history will repeat itself. I watched as the legal profession sputtered through the early 1990s, and again after

the dot-com bust and 9/11. Over my 25 years in the industry, I've seen the waxing and waning of practice areas from antitrust to bankruptcy, bond work to products liability, and real estate to mergers and acquisitions.

Now many law firms are experiencing another slowdown or, at best, an inconsistent market for their services. Although some lawyers—such as those in immigration, intellectual property, or estate planning—still seem to be busy, others are being hit by a lag in work. There are fewer transactions and financings for corporate lawyers, and many products liability and employment lawyers are feeling the pinch.

In areas where a downward trend may be permanent (like asbestos litigation), an entirely new game plan needs to be developed, of course. But most practices are cyclical. So if you're in an area that is going through a painful yet temporary situation, what should you do? Like buying stocks or real estate at their lowest prices, the downturn offers terrific opportunities for investing in the future. Here are thoughts on some marketing initiatives that you can undertake today to position you for success when things eventually turn around.

•Spoil Your Existing Clients. Existing clients are always important, of course—but when new business is hard to find, they become an even more valuable asset. This is the time to be sure your relationships are secure and your clients are more than satisfied.

Visit their websites weekly, monitor developments that affect them, and spot opportunities to communicate with them about pending regulations, new trends, and the like. Visit every local client you haven't seen in a while. Take tours of their businesses and ask about their industries. Offer to provide free programs or workshops to their managers or employees. Ask what you could be doing better.

•Plan Other Face-to-Face Encounters. If you have some capacity in your schedule, use the time to see more people outside of your client base. The more top of mind you are, the more likely you are to get a call when someone has new legal work. Visit with accountants, lawyers, bankers or other good sources of referrals for your practice area. Plan some activities to introduce your best contacts to other people. Also, ask your contacts to make introductions for you.

•Attend Meetings. My guess is that no matter what organizations you belong to, attendance at meetings is down. Some members may want to save the money; some may fear they can't afford or justify the time; still others don't like to attend meetings when they don't have as much to talk about in their work. So by continuing or even elevating your involvement, you will be more visible to your targets, be recognized for your commitment to the area, and boost your investment in your network.

•Do Something You Never Found Time to Do Before. A little free time can be a good thing. You can finally write that article that's been bouncing around in

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your head, put together that speech, or better organize your website bio. You can also develop a list of your cases or transactions, or do some market research on a prospective client or two.

•**Explore a New Area.** On the strategic front, you can spend some time researching trends and potentially attractive market segments. For example, do you work with one company in the life science industry but would like to work with more? Then research the field: How big is the market? What are the market segments? Who represents the companies? What kinds of legal needs do they have? How can you get in front of them? What is your best opportunity?

•**Meet With Consultants, Vendors, or Other Professionals in the Desired Market Segment.** Go to some industry meetings and get the lay of the land. Use your intelligence to develop a plan to expand your share of the field.

•**Stay on Message.** If you're interested in a niche area that's currently slow but you think it will present opportunities in the future, continue to build the perception of your expertise in that area. Remember: What you market doesn't have to be limited to the work that is your bread and butter right now. In other words, even though you may be keeping yourself busy by taking on different kinds of work, you shouldn't retreat from positioning yourself in your preferred field.

•**Look for the Silver Lining.** If you find yourself in a practice area with poor prospects for the future, you may need to retool or change direction. For example, if environmental work for manufacturing entities has diminished, look for segments where environmental issues are growing, like utilities and energy providers. Although residential construction may be down, infrastructure construction is up. If discrimination lawsuits are down, market your expertise in noncompetes.

•**Stay Positive.** Every lawyer would like to think that by doing good work and building strong relationships, he or she will always have business. And when that doesn't happen, it's easy to get discouraged. But if you appear to be frustrated or even depressed, it will hamper your business development efforts. Clients want to work with lawyers who are enthusiastic, energetic, and positive. So give yourself a pep talk before going to an industry association conference, a one-on-one lunch, or a bar association meeting. What will you say when people ask how you're doing? What specific activities can you discuss in a positive way? How can you convey enthusiasm to your listeners?

•**Be Patient and Keep Marketing.** For many practices, it's just a matter of time before the market returns. But if you do find the need to change your service focus, realize that it often takes three or more years to build a new practice area.

Even when things seem dark, though, it's important to keep up your investment in marketing—and to remember that successful business development takes time and timing. By continuing to build your profile in an area (even if it isn't

currently filling your plate), you will be ahead of the pack when business starts to flow again.

Sally J. Schmidt, President of Schmidt Marketing, Inc., has counseled more than 400 law firm clients over the past 20 years. She was the first president of the Legal Marketing Association.

Note

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

. Home

. Family Law

. Business Law

. Litigation

. Real Estate

. Practice Management

. Young Lawyers

. Download 

. About GP|Solo

. Feedback

. Past Issues

Practice Management

. Regular File Reviews or "Tickler" Systems »

By Todd C. Scott

. Depression and Our Bodies »

By Dan Lukasik

. Things to Do in a Slow Economy: Investing for a Turnaround

»

By Sally J. Schmidt

. Closing the Deal: 10 Steps to Take Now

By Roxana Bacon

. Changing Gears in Economic Downturn »

By Savina P. Playter

Closing the Deal: 10 Steps to Take Now

By Roxana Bacon

Too often women lawyers are hesitant to take the steps that will turn a business development opportunity into an actual client. Those last few steps—asking for business and closing the deal—feel unnatural and take us outside of our comfort zone. But those steps don't have to be difficult or uncomfortable—they can fit your personal style and showcase your strengths without hype or guile. Here's how to start.

1. Take a Personal Inventory. Long before you get to the pitching stage, you need to look at the bigger picture. You can't sell a product you don't know.

Review what you like most about your practice and your client-relations style, and why. Then review what you like least. Do an external source check and ask several colleagues and clients these same questions.

2. Determine What You Want From Your Career. You don't want to close a deal and find yourself tied to a matter that doesn't fit in with your career goals. Are you looking for a short-term, intense work profile until you start a family? Are you looking for a job that has the elusive work-life balance? Are you looking to be senior partner at a high-billable hours firm? Are you looking for experience before you start your own shop?

3. Identify Your Marketing Targets. Who do you want to do the deal with? Do you want to develop clients who will have steady referrals (appropriate in transaction/corporate work), or are you looking for individual cases (appropriate for criminal defense/family law matters), or to retain existing clients, or grow them? Does your target reflect your goals as well as your firm's goals?

4. Make the Business Case. This isn't personal, even though it feels like it. How well you succeed in your business development efforts will, of course, depend on your ability to sell yourself. However, the decision to award the work will be based on whether the target sees a business reason to hire you, so concentrate on data and facts rather than emotion. This is true whether the target is a big company or an individual.

5. Learn All You Can About Your Target. Making a pitch without knowing your target's history, culture, needs, and concerns is just plain silly. Use all available resources, from the Internet to experienced lawyers in your firm, so that you go forward from knowledge, not guesses or desperation. Be ready to listen, but with smart ears, when you have your face-to-face meeting. Nothing says you care more than an intelligent question that shows you know your target's business.

6. Put Yourself in Your Target's Pumps. Why would or should they choose you for their legal service needs? You will need to sell yourself as well as your firm. You will need to tie your skills to their issues. To do this, you will have to ask great questions and listen to the answers as building blocks for your pitch.

7. Set Up the Face-to-Face Only When You Are Prepared. No one wants to be your experiment.

- What have you done to tee up the meeting? Are there materials you want the client to have ahead of time?
- What materials will you provide—on the spot and as follow-ups? Have you adjusted your materials to the target's personality?
- What is the setting for your pitch? Are you in the right place? It doesn't have to be a restaurant or office. Is it the right time of day, week, or month to be convenient for the client? Have you allowed enough time?

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8. Do a “Moot Court” of Your Pitch. This is a presentation, so rehearse. You need to get comfortable talking about yourself, especially your strengths. Ask someone who knows the client to role-play the client. Be ready for the surprise questions, and get feedback on when to quit the pitch. Aim to find your own voice, one that does not feel self-conscious or conceited but conveys the necessary facts about your skills.

9. Set Realistic Expectations. Marketing is a long-term investment. Few clients make a decision on the spot. You want to develop a relationship that can grow over time, so rushing it is counterproductive. Your plan should include strategic follow-ups, which can go on for years. But, if you do get the client right away, be ready. Make no false promises.

10. Be Confident and Creative. No one wants to hire a lawyer who is tentative or rote. Think out of the box about fees, billing, and technology, for example. Tie your innovations to the client’s needs. Always listen to your client’s issues—no one wants a hard sell. And never insult the competition. Finally, try to have fun. If you don’t enjoy the process, no one else will!

Roxana C. Bacon is executive director of Western Progress, a nonprofit think tank devoted to issues of the American Southwest. She serves on the Ninth Circuit Advisory Board and volunteers as a mentor for young women establishing their own legal practices and businesses.

Note

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- Business Law
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

• Past Issues

Practice Management

- **Regular File Reviews or "Tickler" Systems »**

By Todd C. Scott

- **Depression and Our Bodies »**

By Dan Lukasik

- **Things to Do in a Slow Economy: Investing for a Turnaround**

»

By Sally J. Schmidt

- **Closing the Deal: 10 Steps to Take Now »**

By Roxana Bacon

- **Changing Gears in Economic Downturn**

By Savina P. Playter

Changing Gears in Economic Downturn

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As the face of the economy changes, those changes are reflected in each sector and industry. The legal industry is not exempt from these rapid changes, and as lawyers face an uncertain future, they must create a shifting paradigm to manage their stress and legal costs. Even in these hard times, there are ways in which lawyers can focus on gaps in their time to forecast a more promising future.

Training

1. Attorneys can participate in bar association's continuing legal education programs, which seek to address issues related to the housing crisis. Hot topics such as bankruptcy crimes, foreclosure, and consumer debt are all areas that an attorney can add to their current practice areas.

2. Developing expertise in a new practice area may mean seeking guidance from a more seasoned attorney or representing a client on a pro-bono basis under the tutelage of a sponsoring organization. For example, the New York County Lawyers Association sponsors the CLARO Project, which is a volunteer lawyer program for litigants with consumer debt cases. This program facilitates new knowledge acquisition through training sessions and practical expertise developed by advising pro se litigants, as well as developing skills in civil court procedure. Similar projects have been established throughout the country. For example, the Clark County Legal Services and Clark County Pro Bono Project in Nevada; the Pro Bono Project in Louisiana; and, the Lee County Volunteers Lawyers Program, all focus on consumer debt, credit, and bankruptcy issues.

3. Research the possibilities of becoming a part-time administrative law judge (ALJ) for agencies such as the Environmental Control Board, Department of Finance, and the Taxi and Limousine Commission. These agencies offer a paid, flexible work schedule where an attorney can maintain a law practice while serving as an ALJ. Another excellent opportunity is through the American Bar Association National Conference of Administrative Law Judiciary, which offers a Judicial Mentor Program for attorneys.

4. Continue to build your skills and enhance your visibility. For example, become a small claims court arbitrator. Also, apply to become a guardian ad litem in housing court or guardian, court evaluator or attorney for Alleged Incapacitated Persons, pursuant to Article 81 of the Mental Health Law. These opportunities are available nationwide. For example, the Atlanta Volunteers Lawyers Association offers a program on guardian ad litem, and the court website at <http://www.utcourts.gov> provides information on becoming a guardian ad litem in the State of Utah.

5. Get "plugged-in." Visit any available bar association or court law library and catch up on recent changes in the law. Visit your law school to find out about programs. Join every list serve available to you so you can access information about free programs and connect with fellow attorneys.

6. Teach your paralegal, receptionist, or legal secretary a new skill to help you become more efficient when the market picks up.

7. If you have hopes of becoming a judge one day, volunteer your time with a political club in your area to "rack-up" some service points. Study the careers of retired and "sitting" judges. Visit the mayor, governor, and congressional offices to learn about the judicial screening process for nominations and elections on the local and statewide level.

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Marketing

8. Attorneys can create a plan of action to re-create ties or strengthen ties to past and current clients. Creating a postcard, which reminds clients of current and newly developed practice areas, as well as providing a discount rate incentive, may be objectives of this plan of action.

9. Attorneys may now be able to devote more time to market their practice. Conducting presentations at senior centers, churches, hospitals, and schools, among other entities in the community, can help to increase the visibility of the law practice and bring in new clientele.

10. Present your knowledge and expertise to fellow attorneys and laypersons by writing an article on an area of interest or assume a position of leadership. Bar association committees are frequently looking for contributing writers and attorneys interested in key positions within committees. This will enable others to learn of your expertise and refer clients to you in that area of practice.

Organization

11. Work on increasing your efficiency and effectiveness. Catch up on billing clients. Determine if you have a well-organized filing system. Is your computer software up to date? Are your computer and email folders and frequently used forms organized in a manner that is easily accessible?

Giving Back

12. With a little slack in your schedule, spend some time mentoring. Accept interns in the office, who can help you develop creative ways to market while you mentor them about the law practice. Get involved in coaching a mock trial program if one is available in your area. For example, the Thurgood Marshall Junior Mock Trial Competition enables attorneys to coach a seventh- or eighth-grade class in New York City while they learn about the legal system and various legal professional careers to which they can aspire.

13. With new knowledge of bankruptcy and foreclosure, attorneys can inquire whether a local college is interested in having them teach a class in an evening paralegal program.

14. With many nonprofits facing budget crises and possible collapse, attorneys can seek to become board members to assist in ways that generate income to help keep the organization's mission alive.

15. Attorneys can join a bar association committee to work on community service projects. For example, participate in a hotline, where attorneys assist callers on a range of civil issues such as housing, employment, divorce, and bankruptcy. For

example, in the State of Massachusetts, the Volunteer Lawyers Project of the Boston Bar Association established a hotline to deal with trust and estate issues. Similarly, the Lawyer Hotline in Wisconsin and the Legal Aid Hotline in Washington State serve the purpose of having lawyers respond to basic legal questions posed by callers.

Reconnect

16. Whether it be friends, family, or colleagues, there's someone who may be worse off than you. Moreover, because of previous time constraints, perhaps you couldn't spend as much time as you wanted with your family. Well, now's the time! Find low-budget activities such as hiking, visiting museums, church concerts, discounted GEICO/AAA movie tickets. Inquire whether you can participate in Working Advantage at www.workingadvantage.com, a program offering discounts on cultural events in some cities.

In sum, attorneys should take notice of the changes in the legal industry. However, this should not be a time for simply accepting these changes. Attorneys should choose to navigate their own path toward learning, adjusting and funneling their "gap" into building meaningful relationships, which they will treasure for years to come.

Savina Playter is an attorney with the Law Firm of Rodriguez & Fuentes, P.C. She was formerly an attorney to the Honorable La Tia W. Martin of the Bronx Supreme Court. Ms. Playter copresented CLE to the CUNY Legal Resource Network (CLRN) and is an adjunct professor at Hunter College. She lends her expertise as a small claims court arbitrator and coaches in the Thurgood Marshall Junior Mock Trial Program.

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- Business Law
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

Young Lawyers

• **The Truth About Having It All**

By Jennifer Hilsabeck

• **Hanging the Shingle: A Young Lawyer's Experiences in Opening and Developing a Solo Law Practice (Part One of a Series) »**

By Brian Annino

• **Legal Networking Advice for New Solos »**

By Adam J. Post

• **Cut Your IT Costs With Open Source Software »**

By Richard Abbott

• **Increasing Court Involvement in the Alternative Dispute Resolution Process »**

By Jeffrey A. Carr

• **Millennials: Tips for Building a Foundation for Success »**

By Lauren Stiller Rikleen

• **Sweat the Small Stuff . . . and a Handful of Other Tips to Help You Make a Positive Impression Early in Your Career »**

By Scott H. Husbands

• **How Accessible Is Too Accessible? »**

By Iram Ansari

The Truth About Having It All

By Jennifer Hilsabeck

As a full-time working mother of three, I often find myself dealing with the challenges of balancing a demanding career and a busy family life, all the while wondering if my juggling act is going to be a success. Regardless of whether or not we have children, each of us as working professionals must balance different aspects of our lives on a regular basis. The demands of a career in the law are great, and many times other elements of who we are must suffer in order to meet those demands. After all, who hasn't blown off a friend, family member, or significant other because of a heavy work load or impending deadline? Each time we do this, we tell ourselves that this is the last time and that from now on we will be better about prioritizing and managing our time, and so forth, but the truth is that sacrifices such as these are inevitable in the ongoing quest for professional success.

When I ponder this dilemma, I am reminded of an event that had a profound affect upon my life. Several years ago, I had the opportunity to speak at the National Asian Pacific Bar Association's (NAPABA) annual conference in Chicago, Illinois, through my prior work with the American Bar Association's Young Lawyer's Division. I was giving a presentation on how to recruit and retain members in local NAPABA affiliate organizations. After my presentation concluded, there was a panel of former and current NAPABA leaders who were presenting a roundtable discussion on the topic of leadership issues in general. The panel was made up of an equal part of male and female participants, as was the audience. Midway through the discussion, an audience member directed a question which at first seemed rather innocuous: "Do you think it is really possible to have it all: professional success and personal happiness?"

The panel members had a variety of answers, each in keeping with their respective personal experiences. Although each of the individuals had a different story to tell, a common theme was definitely emerging: In order to achieve the level of success that each of them had enjoyed professionally, a significant amount of personal sacrifice was required. This sacrifice included forgoing time with loved ones as well as giving up treasured hobbies and free time activities. As I looked around the room at the other audience members, I could see from the number of nodding heads that what was being said was ringing true with the majority of them, myself included.

Then an elderly gentleman quietly rose from the audience and asked to speak. He said that he had been an attorney for most of his life and couldn't remember a time when he wasn't working hard. He was working hard as a young boy to get good grades in school, then working hard as a young man to get good grades in college and in law school and finally working hard during his career in the law.

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He didn't question his motivation, which he described as desiring to be successful and which he further rationalized as being what everyone should want for themselves. He went on to explain that during his career as an attorney, he married and had a son, which only increased his desire to work hard and succeed. He asked the group aloud, as he had apparently asked himself many times during those years, wasn't it expected of him that he provide well for his wife and child?

This gentleman then shared the fact that many years later, when his son was a grown man and expecting a child of his own, he came to his father and told him of how alone he felt growing up without his father present. He told us of how his son confessed that he missed him terribly as a boy and desperately longed for them to spend time together, father and son. As this elderly gentleman was recounting this deeply private conversation, his voice began to flutter and his hands began to tremble. It was obvious that this was a man not usually taken over by his emotions and he was struggling to keep them in check. With the full attention of the room, he cautioned each and every one of us to not lose sight of what is important in our quest for success. To remember that success is not only measured by the accolades that one receives in their profession, but also by the other lives that one touches and enhances during one's short time here on earth. He closed by saying that he deeply regretted not spending more time with both his wife and son and that he hoped we all wouldn't make the same mistake.

After the panel presentation had completed, I began to ponder my own life and whether or not I was successfully balancing the demands of my career with the demands of my personal life. In all honesty, the answer to that question seems to change on a regular basis. For example, on days when work is particularly demanding, I might not make it home in time to share quality time with my family. Other days, I might have a personal obligation, such as caring for a sick child or fulfilling an ABA volunteer obligation, which renders me unable to work to the peak of my capacity. Still other days, I might be so close to burning out that I simply must take some uninterrupted time for myself before I can do anything else. Each of these days requires a different direction of focus, and yet, when I look at them together as a collective pattern, I can see that each has resulted in full attention being given to a different aspect of life in generally even rotation: career, others, and self. Therefore, the secret to having it all might be understanding that you won't necessarily have it all at the same time. As long as the rotation in focus and effort is kept even, perhaps this balancing act can work, and, over time, result in a relatively even level of success in all areas of life.

Actually keeping that rotation relatively even can, unfortunately, be easier said than done. A time during which I found the balancing act particularly challenging was when my oldest son was in grade school and I was an entry-level associate with a rather large law firm for my community's standards. It was at this time that I was also a single parent. I was under intense pressure to satisfy my billable hour requirements, yet at the same time determined not to allow the demands of my career to impede upon my obligations and desires to be a good parent. My son's school had an after-care program that ended at 6:00 p.m. sharp, and another local female attorney and I were always the last two parents racing

through the door to pick up our kids. More work nights than I would care to admit, my evening with my son consisted of picking up McDonalds through the drive-through window and then heading back to my office so that I could continue to work while he completed his homework, and eventually fell asleep in a chair until we were able to leave. In exchange for this type of work week, I made a concerted effort to stay out of the office as much as possible on the weekends and always tried to attend any field trips and performances that my work schedule would allow. Most importantly, I would never cancel a family vacation, even if it meant that we had to spend the majority of the night before our departure in my office, which honestly happened more than once. As you can imagine, the fact that I wasn't around much on the weekends did not go unnoticed by the partners at my former firm. Nevertheless, I had made a personal decision to forgo the "face time" on the weekends for precious "family time" with my son. The fact that this choice was in stark contrast to the culture of my former firm was indeed the primary reason for my seeking a change and eventually deciding to take a position as in-house counsel with a private company. My eldest son is now a freshman in college, and I feel fortunate that we have managed to remain extremely close in spite of my intense work schedule as an attorney. One can never be certain about the reason for such things, but if I had to point to a possible reason for our closeness, I would like to think that it is mainly because I frequently communicated to him the fact that he always comes first in my life, and furthermore, that the main reason I am working so hard is to give him a better life

For me personally, I've determined that the key to making this rotational approach work is being honest with myself as to which areas are worth focusing on and to what extent. With the current economic climate being less than rosy, it is tempting, if not compelling, to eschew all personal desires for happiness and fulfillment in hopes of staying firmly on the payroll. But even after making extreme personal sacrifices of time and energy in an effort to secure one's position, one can nevertheless be faced with a loss of employment, due to forces beyond their direct knowledge or control. Although I understand my method for coping may not be a universal prescription for happiness and success, I truly hope that my story has been informative, entertaining, and, if nothing else, something to ponder the next time you have a few moments to yourself in between deadlines.

Jennifer Sloan Hilsabeck is associate general counsel for American Nevada Company, a Greenspun family company that was founded in 1974. ANC is a major developer of commercial office centers, retail centers, master planned communities, and mixed-use projects in Nevada, and is currently developing new planned communities in Arizona and Texas aggregating approximately 7,000 acres. In addition, she is currently a member of the Leadership Advisory Board of the American Bar Association's Young Lawyers Division and has been appointed to serve as a Young Lawyers Division Liaison to the General Practice, Solo and Small Firm Division as well as the Business Law Section of the ABA. Within the GP|Solo Division, Jennifer also currently serves as Chair of both the Young Lawyer and the Corporate Counsel Committees.

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- Business Law
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

Young Lawyers

• **The Truth About Having It All »**

By Jennifer Hilsabeck

• **Hanging the Shingle: A Young Lawyer's Experiences in Opening and Developing a Solo Law Practice (Part One of a Series)**

By Brian Annino

• **Legal Networking Advice for New Solos »**

By Adam J. Post

• **Cut Your IT Costs With Open Source Software »**

By Richard Abbott

• **Increasing Court Involvement in the Alternative Dispute Resolution Process »**

By Jeffrey A. Carr

• **Millennials: Tips for Building a Foundation for Success »**

By Lauren Stiller Rikleen

• **Sweat the Small Stuff . . . and a Handful of Other Tips to Help You Make a Positive Impression Early in Your Career »**

By Scott H. Husbands

• **How Accessible Is Too Accessible? »**

By Iram Ansari

Hanging the Shingle: A Young Lawyer's Experiences in Opening and Developing a Solo Law Practice

(Part One of a Series)

By Brian Annino

Earlier this year, I accomplished a longstanding professional goal in opening up my own solo law practice. It has been a very rewarding experience as I have been able to connect with my clients on a new level and further develop my passion for practice of law. As is customary in starting a new professional initiative, I have learned many lessons along the way.

This article is the first of a series of articles that will discuss my initial experiences and offer ideas for you to consider in starting a new solo practice or analyzing your current practice. In this article, I discuss considerations in choosing when to start your own practice, the importance of budgeting, and how networking is crucial to developing a solo practice. Future articles will discuss additional ideas, opinions, and lessons learned from my own practice.

Choosing the Right Time to “Go Solo.” Between graduating law school in 2003 and taking the bar exam, I wrote down my professional goals that I hoped to accomplish. One of my top goals was opening my own practice. I discussed this goal with a solo practitioner whom I clerked with while in law school, and he gave me the valuable advice of putting that goal on hold until I had a few years of law firm experience under my belt. He suggested that in addition to gaining legal experience at law firms, I would also learn the administrative side of practicing law, including such tasks as managing files, billing, and client development.

I have since had the opportunity to work as an associate for two well-respected midsize law firms and also as in-house counsel for a corporation. The legal and administrative experience I gained at each position has been invaluable toward effectively developing my practice, and I am convinced that my solo experience would be much more difficult without my prior experience.

I recognize that many attorneys (particularly in this economic climate) do not have the opportunity to gain law firm experience prior to opening up a solo practice. I know several solo practitioners that “hung a shingle” immediately after being sworn into the bar. In my experience, the most successful of these solo practitioners developed a mentor-mentee relationship with other solo practitioners to help gain knowledge regarding the legal and administrative aspects of solo practice life. Regardless, I assert that an attorney must be comfortable in handling the legal and administrative sides of being a solo practitioner, and much of that comfort level comes from experience.

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Plan a Budget, Adhere to the Budget, Revisit the Budget. If we learn nothing else from the current economic downturn, it is the value of budgeting. This is particularly important in starting your own practice. Prior to making the decision to go out on my own, I sat down with my wife at the dining room table and, after a couple hours of asking “What if?” questions regarding our personal and professional lives, we developed a budget for my law practice that made sense and also reworked our personal budget to make suitable accommodations.

In formulating the law practice budget, we were careful to focus on the essentials, such as legal research costs, bar association dues, office supplies, and client development costs. After much consideration, we concluded that I would operate out of the home for the first couple months prior to seeking office space. This enabled me additional freedom to devote additional cash to other areas in my budget and provided me time to “test the waters” prior to signing an office lease. I ultimately moved into an office in April, but still enjoy the flexibility of working out of the home when convenient.

A budget is useless if it is ignored. I sit down at the end of each week and measure my weekly expenses against my budget. If my expenses are on track to exceed the budgeted allotment, I make necessary adjustments and reduce future spending. If there is a particular type of expense that consistently exceeds the budget, I revisit and rework my budget so that it matches up with my reasonable expectations.

I also consider how the products and services I have purchased within my budget match up with my expectations. If an item or service does not match up favorably, I consider the benefits and costs to my practice and budget in returning the item or cancelling the service. For example, I purchased expensive law office management software within a week of opening my practice. Within the thirty-day trial period, I determined that the software did not meet my expectations and would not be cost effective in the long-term to maintain. Therefore, I returned the software and applied a portion of the financial outlay to a more pressing budgetary need and the remainder went into cash reserves.

As income from the law practice increases, it is important to revisit the budget to factor in your salary or draws and to consider if the income should be reinvested in the law practice. In my initial months of starting the practice, I have reinvested much of the firm income back into the firm. As the firm income continues to increase, I will continue to revisit my budget and assess how much of the income I can take as a salary or draw.

I am frequently asked by other attorneys how much money should be set aside in order to start a solo practice. In my opinion, this amount will be different for every solo practitioner. What I suggest is to carefully consider your realistic monthly family and law practice expenses for the first six months of your solo practice and to have this amount (at a minimum) saved. Of course, the more you have saved, the better off you will be. However, having substantial financial resources should never replace the discipline that comes from sound budgeting.

Network in the Real and Virtual Worlds. Our profession is one that is built on a cornerstone of trust. In my experience, face-to-face meetings are crucial for developing trust among potential and current clients. Also, face-to-face meetings with other attorneys and business professionals are important for developing relationships that can lead to client referrals. As such, real world networking has been essential to the initial development and growth of my practice.

I frequently attend events sponsored by my state and local bar associations and various business associations. Local bar association events offer excellent networking opportunities to become connected with other attorneys, thereby leading to valuable information exchanges and client referrals. Local business associations (including my local chamber of commerce) offer excellent programs and events that connect businesses and professionals. I have been fortunate to receive many very good clients from these functions.

I also utilize opportunities generated through my “favorite network”: my family and friends. I have been very fortunate to have the enthusiastic support from my family and friends in opening my practice. Through their support, my family and friends have referred excellent clients to me and have an eagerness to continue to send me clients. I strongly urge that you do not underestimate the support that your own “favorite network” can provide you in building your law practice.

Virtual networking has also played a role in the growth of my practice. Although it does not take the place of the trust-building face-to-face meetings, virtual networking allows attorneys and other professionals to freely provide and exchange information and connect to potential clients and colleagues. In my experience, these connections and information exchanges lead to trust-building fact-to-face meetings that result in valuable business for my practice.

Two particular internet networking tools that I utilize at no cost are LinkedIn (www.linkedin.com) and Twitter (www.twitter.com). LinkedIn is a business networking website that is analogous to Facebook, but geared to professionals. Twitter is a “microblogging” site that allows you to share ideas with other attorneys and professionals. It is built on the concept of discussing what you are working on, thinking of, and doing in real time. I discuss below the basic mechanics of establishing an account and using each networking tool. Although much more can be written about each website, my discussion of each is simply geared toward providing you information to join each site and to begin making your own networking path.

I utilize LinkedIn to exchange information with my clients and colleagues and set up the important face-to-face meetings that lead to growth of my practice. In order to utilize the benefits of LinkedIn, you must first join and set-up a free account. From LinkedIn’s main page (www.linkedin.com), click the “Join Today” link in the top-right hand corner. The next page will request basic information about you, including your name, location, email address, and name of your firm. You will also need to select and input a password. As with other password-

protected websites, the quality of your password will help determine the security of the information you post to the website.

After you enter the information, click the “Join LinkedIn” button at the bottom of the webpage. At the next page, you may select how you will utilize LinkedIn and inform others how or why you wish to be contacted through LinkedIn by selecting from such options as reconnecting with former colleagues and accepting deal proposals. Upon clicking the “Save Settings” button at the bottom of the page, you will arrive at your very own LinkedIn webpage.

My favorite aspect of LinkedIn is the ability to create a free profile that allows you to discuss your practice areas and experience. This profile is searchable through the Google search engine (www.google.com) and accessible to the online public (even to those who are not members of LinkedIn). Potential clients and referral sources can use your profile as a resource in finding out important information about your practice. You have control over what information appears in the profile, and you can tailor it to fit your needs. My profile contains information about my practice areas, my photo (to help add a human element to the website), and a link to my firm’s website. In order to put your best foot forward, I recommend that you tailor your profile to meet your needs prior to connecting to people or groups on LinkedIn.

From your LinkedIn webpage, you can begin searching for friends and colleagues that already have a LinkedIn account and add them to your network. You may accomplish this by using the search engine located at the top right-hand corner of the webpage (wherein you can search for people and companies) or by utilizing a LinkedIn application that scans your email contacts for possible LinkedIn connections. This application can scan contacts in a web-based email account (such as Yahoo!, MSN, or Gmail) or your Outlook or Apple Mail. Once you locate an individual you wish to add as a contact, you can click the “Add to network” link. You will be asked to verify how you know the contact (which must be confirmed by the contact) before the contact is added to your network and you are added to your contact’s network. Likewise, when a prospective contact makes the initial step to add you to their network, they will have to provide how they know you and such information would have to be confirmed by you prior to being added to your network. In my opinion, the contact verification process offers a good level of protection from preventing unwanted individuals joining your network.

Another of my favorite LinkedIn features allows you to join discussion and networking groups. For example, I am a member of bar association groups, professional groups, and alumni groups. You can search for groups via the search engine in the top right hand corner of your LinkedIn webpage. Participation in these groups is a great way to reconnect with former colleagues and discuss items of interest to your practice. Participation in these groups generally involves group bulletin board postings and exchange of direct messages between group members.

I utilize Twitter to exchange ideas and legal news with attorneys and other

professionals. As a solo practitioner, I miss the exchange of ideas and information that takes place within a law firm, corporate, or government environment. Therefore, Twitter helps fill this role for me by allowing me to exchange ideas and news with people of my choosing. Of course, Twitter does not replace the value of face-to-face meetings. As such, I use this in conjunction with attending local bar events and business association meetings rather than in place of attending such events.

In order to join Twitter, go to the Twitter main page (www.twitter.com) and select the green “Get Started – Join!” icon in the middle of the page. The next page will prompt you to enter your full name and select a username. As Twitter continues its meteoric rise in popularity, desired usernames will be more difficult to obtain (as witnessed during AOL’s usage surge in the 1990s). You will also need to select a password which will be entered along with your username in order to log-in to Twitter. Finally, you will have to retype two words that appear in a white box. This is a type of verification process that is common when signing up for a new email account or making an online purchase. Upon entering all of the information, click the “Create my account” green arrow. Thereafter, you may have Twitter scan your online email account for contacts already on Twitter or you may select the blue “skip this step” link. You will then be directed to your new Twitter home page.

From here, you may enter your first “tweet” by answering the question “What are you doing?” As you will note, your “tweet” must be 140 characters or less. You should also complete your Twitter profile at this stage. This can be done by selecting the “Settings” link in the top right-hand corner of the page and completing the information on the “Account” tab on this page. As you will note, your profile is very brief and consists of a brief bio (160 characters or less), your location, and a link to your website.

At this stage, you should begin to locate people that you wish to “follow” on Twitter. Also, people may seek to “follow” you on Twitter. Be mindful that the default setting on Twitter allows the online public to “follow” you and see your “tweets” without requiring your permission. You may change this setting and require your permission prior to being “followed” by checking the “Protect my updates” box on the bottom of the page. Therefore, this feature helps you control the amount and type of interaction you want to have on Twitter.

Perhaps my favorite aspect of Twitter is the ability to share links to news articles, blog postings, and other websites. You may be wondering how this is possible within the context of the 140 character “tweet” limit considering the length of some website links. However, you may utilize a free web service such as TinyURL (www.TinyURL.com) that will shrink a lengthy URL by creating an alias URL. For example, the URL to the Winter 2009 edition of SOLO is <http://www.abanet.org/genpractice/solo/2009/vol15no1/vol15no1.pdf>. Utilizing TinyURL, the same issue can be accessed at <http://tinyurl.com/cq84xb> (a shortening of 40 characters). In fact, if you post a website link into your “tweet,” it will automatically use TinyURL to shorten the length of the link. This generally allows

you to post a link to a website while leaving enough characters to make a short comment about it. Once you start doing this, you are really on your way to discovering the value of “microblogging!”

Regardless of the virtual networking tools you utilize, you should take great care to maintain the decorum and professionalism you would exhibit in a client meeting or in the courtroom. It would be detrimental to your practice if you refer potential clients or colleagues to your Twitter or Facebook page wherein they can see pictures of you at a party excessively celebrating your alma mater’s recent football championship.

This wraps up my first article in this series. I look forward to drafting future articles that discuss my experiences in starting and building my solo law practice. In the meantime, I welcome ideas from your own practice and perspective. Please feel free to contact me at brian@anninolawfirm.com or connect with me via LinkedIn or Twitter.

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- Business Law
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

Young Lawyers

• **The Truth About Having It All** »

By Jennifer Hilsabeck

• **Hanging the Shingle: A Young Lawyer's Experiences in Opening and Developing a Solo Law Practice (Part One of a Series)** »

By Brian Annino

• **Legal Networking Advice for New Solos**

By Adam J. Post

• **Cut Your IT Costs With Open Source Software** »

By Richard Abbott

• **Increasing Court Involvement in the Alternative Dispute Resolution Process** »

By Jeffrey A. Carr

• **Millennials: Tips for Building a Foundation for Success** »

By Lauren Stiller Rikleen

• **Sweat the Small Stuff . . . and a Handful of Other Tips to Help You Make a Positive Impression Early in Your Career** »

By Scott H. Husbands

• **How Accessible Is Too Accessible?** »

By Iram Ansari

Legal Networking Advice for New Solos

By Adam J. Post

When starting off a solo practice, it goes without saying that you should focus on your network. No matter your existing network's size, you should always be looking to add to your contacts. First look to the usual sources by joining your local bar association. Pay particular attention to committees and sections in your area of practice. For example, when I started my DUI defense practice, I joined the Los Angeles Bar Association's criminal law and small practice sections. Many sections have email lists that you can join, giving you the ability to ask and answer questions from fellow solo practitioners. By participating in this manner you build your network in a practical way, making local contacts in your area to help with issues as they arise.

I recently had a question about finding malpractice insurance for my criminal defense practice. Of course I went to the Internet to do an initial search, and I found many insurance brokers who offered malpractice insurance, but I had no information from people who had actually used them. The best source of advice was my local bar association's solo practitioner email list serve. I posted my query to the group, and within minutes I had several responses from solo practitioners, local attorneys who had faced my same issue and they pointed me to several qualified insurance brokers. What was most helpful to my search was that the information response was both timely and relevant to my situation. I saved several hundred dollars on my policy. I made sure to thank those who responded, letting them know that I used the information they provided and added them to my growing network.

Make use of online networking tools such as Twitter, Facebook, LinkedIn, and Myspace. Both Facebook and Myspace offer profiles for businesses and a platform for you to post information about your practice. I recently joined Twitter, albeit a little late to the growing Twitter bandwagon, and I have connected with several criminal defense and DUI/DWI attorneys from across the country. Twitter can be used in the same way as the local bar list serve described above: simply go to Twitter.com and grab a user id that relates to your practice (I focus on criminal law and DUI defense, so mine is twitter.com/LAduidefense). Follow members with like interests and you will be amazed at how quickly your online network expands. You can also post a Twitter feed to your personal or legal practice blog, which updates your site visitors to links for your new Twitter posts. Another very smart play is to start up a blog related to your area of practice. You can use Wordpress or Blogger to get a blog up and running, giving you a platform to reach potential customers and gain exposure. Once you have your blog going, make sure you update regularly with relevant legal materials. This is important as I'm sure we all have visited unhelpful sites that have not been updated in years. You will find that the benefit of blogging regularly is

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twofold, you will learn more about your area of the law while educating your audience.

Don't forget about your offline network and opportunities that exist for making new connections at alumni mixers and CLE events. Many law schools have local mixers/events to encourage admitted students to attend or fund-raise among alumni. Use these events to meet fellow practicing alums in your local area. It doesn't matter if they don't practice in your area of the law. Keep a broad perspective of your growing network because referrals can be a huge source of business for your practice. Let's say that I am attending an alumni event in Los Angeles, and I meet a fellow alum who practices family law. One may initially think, "Great, another attorney contact outside of my practice area," but in reality this contact may be a source of future business. The moment his divorce client gets arrested for a DUI or his friend faces criminal charges, he will refer to attorneys in his network. That probably means you. That is when the shared experience of going to the same law school and the connection made at the alumni event can pay off professionally.

One of the most powerful tools in networking is a positive attitude. You must put yourself in the situation with a determined, positive mindset. This will motivate you past barriers to networking such as not knowing many people at an event or having the occasional conversation with someone who doesn't really care what you do or even forgets to remember your name. You will find that most people, when contacted in a genuine and sincere way, seek to understand who you are and where you are going professionally. This practice of seeking to truly understand and listen to another attorney's stories or advice is reciprocal and is the best way to actively network in our profession.

Additional Resources for Networking Skills

You can find John E. Kobara's blog "Adopting the Mentoring and Networking Lifestyle" at <http://jeknetwork.typepad.com/networking/>. Books to check out include: Dale Carnegie's classic "How to Win Friends & Influence People," Napoleon Hill's "Think and Grow Rich," and Og Mandino's "The Greatest Salesman in the World."

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- Business Law
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

Young Lawyers

• **The Truth About Having It All »**

By Jennifer Hilsabeck

• **Hanging the Shingle: A Young Lawyer's Experiences in Opening and Developing a Solo Law Practice (Part One of a Series) »**

By Brian Annino

• **Legal Networking Advice for New Solos »**

By Adam J. Post

• **Cut Your IT Costs With Open Source Software**

By Richard Abbott

• **Increasing Court Involvement in the Alternative Dispute Resolution Process »**

By Jeffrey A. Carr

• **Millennials: Tips for Building a Foundation for Success »**

By Lauren Stiller Rikleen

• **Sweat the Small Stuff . . . and a Handful of Other Tips to Help You Make a Positive Impression Early in Your Career »**

By Scott H. Husbands

• **How Accessible Is Too Accessible? »**

By Ms. Ansari

Cut Your IT Costs With Open Source Software

By Richard Abbott

The open source movement gains new converts every day. Everyone is sick and tired of paying for new software each and every time they buy a new computer. There was a time when open source software, especially Linux, was cumbersome and generally inaccessible for non-nerds. Those days are long gone. My grandmother now uses Linux, and she didn't pick up a mouse until she was in her nineties. There is no reason why any law office cannot also make the switch.

I cannot explain every feature and possible problem associated with each program mentioned here, but I can tell you that I use them every day and they all work. If you have questions or problems check the websites. Each has a forum full of people ready to help newcomers. Open source software packages may not be as shiny as their commercial counterparts, but the increased usability more than makes up for the lack of eye candy. And when I say free, I don't mean just "free to try." Open source is not shareware. The downloads are free. The install and use is free. There are no adds. There is no spyware. There is no registration form or survey to take. This is an actual free lunch. The people who develop this stuff want you to go out and use it. If you are at a small firm trying to scrape the money together to buy new computers, then you need this software.

OpenOffice

<http://www.openoffice.org> (~130mb download)

OpenOffice is the open source community's answer to MSOffice. OpenOffice handles any document format you will ever run into. Word processing, spreadsheets, databases, presentations, authoring .pdfs for electronic filing, spellcheck: it's all in there. It works, and it's *free*.

Truecrypt

<http://www.truecrypt.org/> (3mb download)

Need to secure your electronic client files? Truecrypt is arguably the most powerful file encryption scheme available to the general public and is a regular thorn in the side of law enforcement. Truecrypt protects files by placing them into encrypted containers sealed by whatever combination of passwords and/or keyfiles you choose. These encrypted containers are then "mounted" and appear as a new drive attached to your computer. If you are using Windows, Truecrypt can also encrypt your entire drive. That means when your laptop goes missing, you won't have to worry about any data falling into the wrong hands. Most importantly, Truecrypt is *free*.

Inkscape

<http://www.inkscape.org/> (34mb download)

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Need to put together a diagram or flow chart? Inkscape is a vector graphics editor comparable to Adobe's Illustrator. Instead of painting pictures, vector graphics editors are essentially 2d CAD programs that draw and manipulate objects rather than pixels. Complex diagrams remain easy to edit as each object is handled separately within the larger picture. Whole diagrams or individual objects can be altered, deleted, or scaled without the blurry edges associated with manipulating .jpeg images. Inkscape is also *free*.

Ubuntu Linux

<http://www.ubuntu.com/> (700mb download)

Do not replace that old computer because it take too long to boot up/shut down. Download and burn the Ubuntu iso file. Place the CD in your CD/DVD drive and reboot the computer. The computer will boot from the CD and let you test-drive Ubuntu without making any changes. If you like Ubuntu, you can then install it permanently. If you don't, shut down, remove the CD, and restart. No changes will have been made, and you can go back to your old operating system. Chances are that your computer will run Ubuntu faster than it ever ran Windows, but the benefits don't stop there. Linux is inherently virus-resistant, so you won't have to keep paying for antivirus protections. The most amazing aspect of Ubuntu is the vast repository of open source applications ready for install. Simply pick the program you want from the list, and Ubuntu will handle the download and install. There are no serial numbers or other DRM headaches. Choosing Linux is a big step, but it's a cheap one. You owe it to yourself to give it a try before spending good money on a new copy of Vista. Ubuntu is and will always be completely *free*.

Software Costs To Equip a New Computer

- Windows Vista business Edition: \$299.95
- MSOffice Professional (Word, Excel, Access, PowerPoint): \$499.95
- Bit Defender (Antivirus + File Encryption): \$49.95
- Adobe Illustrator: \$599.00
- Total: **\$1448.85**
- Costs for open source alternatives: \$0, nothing, nadda, zilch—*Free*.

Richard Abbott is an Oregon attorney and IT privacy consultant. Specializing in countersurveillance, Richard works with businesses and individuals trying to safeguard data from threats ranging from wiretaps to hardware theft. Richard is also a staunch supporter of Free/Open Source Software (F/OSS). He can be reached at Rabbit@shaw.ca or OregonRabbit@hushmail.com.

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- Business Law
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

Young Lawyers

• **The Truth About Having It All** »

By Jennifer Hilsabeck

• **Hanging the Shingle: A Young Lawyer's Experiences in Opening and Developing a Solo Law Practice (Part One of a Series)** »

By Brian Annino

• **Legal Networking Advice for New Solos** »

By Adam J. Post

• **Cut Your IT Costs With Open Source Software** »

By Richard Abbott

• **Increasing Court Involvement in the Alternative Dispute Resolution Process**

By Jeffrey A. Carr

• **Millennials: Tips for Building a Foundation for Success** »

By Lauren Stiller Rikleen

• **Sweat the Small Stuff . . . and a Handful of Other Tips to Help You Make a Positive Impression Early in Your Career** »

By Scott H. Husbands

• **How Accessible Is Too Accessible?** »

By Iram Ansari

Increasing Court Involvement in the Alternative Dispute Resolution Process

By Jeffrey A. Carr

In the early stages of alternative dispute resolution, most courts recognized and allowed for outside ADR, typically mediation. This occurred primarily in the area of domestic relations. This branched out into business mediation in some areas, but in most cases, these resolution attempts were arranged and managed outside the court process.

Arbitration was also available, most often through arbitrators affiliated with the American Arbitration Association. Local better business bureaus offered then and still offer arbitration that involves consumer-business disputes.

Beginning in 2003, ADR began to become more a facet of litigation, managed and even sponsored by courts. Much of this began through efforts in Florida and Maryland. Florida introduced legislation that required mediation for most local disputes prior to litigation. Maryland began advertising mediation and ADR in general to the public as a means of resolving disputes prior to the filing of claims in court. California and Illinois were close behind.

It was about this time that ADR training was taking off across the United States. Attorneys and social laypersons were being trained to provide mediation services in schools, hospitals, nursing homes, and the workplace. It seemed that the primary focus of mediators during this phase was training other mediators. In fact, there was considerable discussion at these training sessions as to whether there would be enough work for all of the mediators being trained.

Fortunately, the trend has been and is continuing to be a significant increase in the ADR process throughout the civil court system. This seems to take one of two main tracks:

1. Mediation being offered directly by the courts, utilizing mediators employed by the courts themselves. In my case, the first mediations that I performed were for the Small Claims Division of the Akron Municipal Court, in Akron, Ohio, mediating small claims cases on Saturday mornings as a mandatory part of the process for the litigants. We were able to mediate a significant percentage of the cases, providing a satisfactory result for the litigants and an efficient outlet for the court. This has blossomed into a successful mediation program being offered in all Summit County Common Pleas cases on an optional basis for civil cases. As an attorney, I have participated in a number of these mediations and now discuss ADR at the time of initial client representation as a valid and positive method to resolve the case in an efficient time and cost basis. In addition, many courts are

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utilizing settlement conferences that are part mediation, part arbitration prior to final pretrial hearings in an attempt to resolve issues. If these conferences are not successful, the primary issues and differences are clarified for all parties, including the court, prior to the trial phase of the litigation. The mediation phases of litigation also seem to persuade the attorneys to be more cooperative throughout the process, as well.

2. Arbitration is also becoming a growing trend throughout the court system. Retired judges are offering their services to act as arbitrators, inside and outside the traditional court system. With our clients, we discuss mediation, arbitration, and litigation as the three possible steps in any lawsuit. Most arbitrations are still being held outside the courthouse by former judges or experienced attorneys; however, many judges in various jurisdictions are offering bench trials that are becoming more like arbitrations and less like litigation.

These increasing trends toward ADR as a primary and no longer just an “alternate” means of resolution are altering the litigation process also. In addition to discussing ADR with our clients at the time of representation, we utilize the upcoming mediation as one of the primary functions of our trial strategy. I prefer to complete all or most of the depositions prior to any ADR sessions, including mediation. I am finding that most trial attorneys that have experience with these processes are also focused on completing discovery sooner so that they are better prepared to mediate when the time comes.

In addition, firms and attorneys that were somewhat opposed to ADR just a few years ago are now open to mediation and arbitration as a way to resolve the dispute or at least narrow the issues prior to the negotiation and settlement phase that typically occurs on the eve of trial. These preliminary attempts at ADR, even if unsuccessful, give all parties valuable information that seems to provide stipulation of the agreed facts and clarification of the strong and weak positions of the parties, enabling the attorneys to work diligently on the remaining differences prior to trial rather than begin the negotiation phase with one week to go.

The courts have also shifted their approach to these disputes, assuming at the first scheduling conference that the attorneys have begun discussions regarding the ultimate resolution of the case. This is apparent in discussions with the judges’ staff attorneys as well as the magistrates and judges themselves. This trend toward increasing ADR is continuing and growing, and needs to be a part of every trial attorney’s arsenal and strategy to securing the best possible outcome for the client.

Jeffrey A. Carr is a solo practitioner in Akron, Ohio, is licensed in OH and PA, and concentrates on construction and real estate law, primarily as a trial attorney. In addition, Jeff is certified as a mediator and divorce mediator in the State of Ohio. He also serves as a mediator for FINRA, an organization that helps settle disputes in the securities and financial services area. He has served as an arbitrator for the Better Business Bureau and a mediator for the Akron Municipal

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- Home
- Family Law
- Business Law
- Litigation
- Real Estate
- Practice Management
- Young Lawyers

• Download 

• About GP|Solo

• Feedback

Young Lawyers

• **The Truth About Having It All** »

By Jennifer Hilsabeck

• **Hanging the Shingle: A Young Lawyer's Experiences in Opening and Developing a Solo Law Practice (Part One of a Series)** »

By Brian Annino

• **Legal Networking Advice for New Solos** »

By Adam J. Post

• **Cut Your IT Costs With Open Source Software** »

By Richard Abbott

• **Increasing Court Involvement in the Alternative Dispute Resolution Process** »

By Jeffrey A. Carr

• **Millennials: Tips for Building a Foundation for Success**

By Lauren Stiller Rikleén

• **Sweat the Small Stuff . . . and a Handful of Other Tips to Help You Make a Positive Impression Early in Your Career** »

By Scott H. Husbands

• **How Accessible Is Too Accessible?** »

By Iram Ansari

Millennials: Tips for Building a Foundation for Success

By Lauren Stiller Rikleen

It is critical that young lawyers understand early in their careers the relationship between their future success in the profession and their ability to attract and retain clients.

Young lawyers entering the profession today are facing a vastly different workplace than their predecessor generations did. When the Baby Boomers entered the legal profession, a firm could be considered large if it had more than 100 lawyers. Today, global megafirms predominate the legal landscape. And where once a summer associate class might consist of a dozen young law students, today's summer classes are larger than many law firms.

Moreover, the pace of law practice today is faster and more stressful than ever before. Technology has made lawyers accessible around the clock, forever altering the rhythm of law practice and allowing firms to impose extraordinary demands on the lives of their young lawyers. Even as the physical and emotional burdens of these demands have yet to be fully understood, the current pace also leaves little time for reflective thinking about one's future career.

But it is exactly that type of reflective thinking that young lawyers must do to understand the relationship between future success in the profession and the ability to attract and retain clients. In the highly competitive legal market that exists today, a young lawyer can no longer assume an opportunity to learn and grow at the arm of a senior mentor. Young lawyers need to be savvy as they navigate their careers in a vastly changing environment.

Here are five recommendations for building the foundation of your business development success.

1. Strive for Excellence. Be sure to follow the first piece of business development advice all young lawyers receive: Be an excellent lawyer. That is one old-fashioned recommendation that will never be outdated. No matter how charismatic you are, or how vast your network may be, true success in the legal profession starts with excellence in your craftsmanship.

2. Learn From the Successes and the Mistakes of Others. Today's billing pressures have diminished the opportunities to shadow senior lawyers by attending depositions and court hearings. Moreover, clients will not pay the high rates for multiple lawyers to attend a meeting or hearing, and law firms do not encourage young lawyers to observe more experienced lawyers at their work when the time cannot be billed. Nonetheless, there are few better teaching

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moments than observing a lawyer at trial or negotiating a deal. Look for those opportunities. Even though you may not be able to "bill" your time, you will gain tremendously in developing your skills as a lawyer.

3. Make New Friends and Keep the Old. Effective business development is really all about relationships. Classmates from law school go on to become clients and sources of referral business. The same is true of your colleagues at work and other friends in the legal profession. Maintain these relationships throughout your career.

4. Help Others. The simple fact is that effective networking means thinking about ways you can help your classmates, your colleagues, and your friends meet their own career goals. Be generous with your own relationships and contacts, and you will build a large reservoir of goodwill for when you need help.

5. Work With Enthusiasm. Enthusiasm for one's work is infectious. People enjoy being around those who love what they do. Enjoy your work and share that enthusiasm in a way that lets others know that you are the perfect person to handle their future matters.

Lauren Stiller Rikleen is executive director of the Bowditch Institute for Women's Success, a partner at Bowditch & Dewey, LLP, and the author of *Ending the Gauntlet: Removing Barriers to Women's Success in the Law*.

Note

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- . Home
- . Family Law
- . Business Law
- . Litigation
- . Real Estate
- . Practice Management
- . Young Lawyers

. Download 

. About GP|Solo

. Feedback

Young Lawyers

. **The Truth About Having It All** »

By Jennifer Hilsabeck

. **Hanging the Shingle: A Young Lawyer's Experiences in Opening and Developing a Solo Law Practice (Part One of a Series)** »

By Brian Annino

. **Legal Networking Advice for New Solos** »

By Adam J. Post

. **Cut Your IT Costs With Open Source Software** »

By Richard Abbott

. **Increasing Court Involvement in the Alternative Dispute Resolution Process** »

By Jeffrey A. Carr

. **Millennials: Tips for Building a Foundation for Success** »

By Lauren Stiller Rikleen

. **Sweat the Small Stuff . . . and a Handful of Other Tips to Help You Make a Positive Impression Early in Your Career**

By Scott H. Husbands

. **How Accessible Is Too Accessible?** »

By Ms. Ansari

Sweat the Small Stuff . . . and a Handful of Other Tips to Help You Make a Positive Impression Early in Your Career

By Scott H. Husbands

Advice from seasoned practitioners plays a large role in the development of junior lawyers. In fact, the relationship between a senior and junior lawyer—that of the teacher and the student—forms the backbone of our profession.

This article does not aim to take the place of that relationship. Additionally, it will not detail the ins and outs of your first few years of practice as a young lawyer. There are many other fine articles that provide excellent practice-specific pointers. Instead, this article aims to provide a few basic tips that will help you to make a positive impression early in your career regardless of your practice. Use them as you see fit, and, for best results, adapt them to your corporate culture and specific practice. Use them well and you will develop a strong ability to issue-spot like a seasoned practitioner. What do you do with those issues once you've spotted them? The last tip will answer that question.

Sweat the Small Stuff

This should, first and foremost, be the credo of every junior lawyer. For starters, working through the details is a great learning process. Only through complete immersion can you hope to understand the big picture. More important, most senior lawyers expect junior lawyers to chase down the minutiae. Having an answer ready for a detail-oriented question will create a very strong first impression and a feeling of confidence in your abilities. So, sweat the small stuff. But do so with caution as the next tip advises.

Sweat Cautiously and Proportionately

There's a fine line between sweating the small stuff and losing the forest for the trees. In fact, an incomplete or nonexistent perception of the big picture will alter your understanding of the details and create a counterproductive learning experience. Also, sweat the small stuff proportionately in relation to the issue or assignment. In other words, don't boil the ocean to draft a one-page letter. That type of behavior displays bad judgment and will damage your reputation.

Contemplate Follow-Up Questions

This piece of advice goes almost hand in hand with sweating the small stuff.

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Think each of your issues through and anticipate follow-ups from the client and senior lawyers. Understanding the natural follow-up to an issue is the hallmark of a well-prepared junior lawyer and well-prepared junior lawyers often transform into successful junior lawyers. Proportionality is important here too.

Listen and Reflect

We all know that listening is an important skill. But do we all practice reflective listening? Reflective listening is the art of repeating what you are hearing to the speaker. It can drastically cut down on misunderstandings or miscommunications and it plainly shows the other person that you are in fact listening. Reflective listening can be particularly important when a person is communicating a question or assignment to you. And don't be bashful—most speakers will appreciate the exchange!

Take Advantage of a Blank Slate

As a young lawyer, it is critical to remember that you are working with most people for the first time. Your colleagues and clients are virtually a blank slate when it comes to your work ethic and reputation. Deadlines, accuracy, and attention to detail are critical. People will remember your performance. Work hard and do well and you will establish a reputation for quality work. Do a sloppy job and your reputation will suffer even if your reputation for quality work happened to precede you. Work hard to mold your reputation and peoples' expectations and you will enjoy a long successful career as a lawyer.

Never Assume Anything

Assume without saying and everyone loses or so the G-rated version of the old saying goes. Assumptions create a number of problems for young lawyers. Young lawyers are not often equipped with enough experience to make the proper assumptions. Additionally, those who you are working with may not want you to assume anything. If you make an assumption, it may completely alter the result or your analysis. This tip applies across the board from your work product to professional relationships. Assumptions about colleagues or clients can be the most disastrous. So, avoid them at all costs. And if you simply must assume, then follow the next piece of advice.

If You Absolutely Must Assume, Explain

It may sometimes be necessary to make an assumption or a series of assumptions. If you find yourself in this situation, explain the assumptions that you are making. This will help the other person or party to better understand your result or analysis. It will also clear up any ambiguities by defining the scope of your work. It also lets others know that your analysis contains layers that can be peeled back or added for a different result. And here's a bit of irony—if you fail

to explain your assumptions, someone else may assume you didn't assume anything, and you'll find yourself in a downward spiral headed toward miscommunication that no amount of reflective listening or follow-up questioning can resolve.

If you apply the foregoing tips to your daily routines, you'll find it easy to discover relevant issues. And when you do discover those issues, here's one more piece of advice.

Escalate Issues You Find: Do It Early and Do It Often

The practice of law is a practice in decision-making that takes years to perfect. Young lawyers often feel uncomfortable making judgment calls alone. The following advice came from a colleague of mine in the context of a due diligence assignment. Do your work and sort out the details noting any issues you discover. Bring those issues, and perhaps a suggested solution, to your senior colleagues for their perspective at an appropriate time. They will welcome the opportunity to discuss the issues with you. Let it linger, and a minor issue may become a huge problem. The worst case scenario can happen when a young lawyer fails to raise an issue that later surfaces without the lawyer's involvement. None of us want to answer a colleague or client who is asking whether we knew about the issue and if so, why we failed to act. If you do happen to find yourself answering that question, at least your answer won't be that you weren't sweating the small stuff because you assumed without saying that someone else was.

Scott H. Husbands is the current vice chair for the Corporate Counsel Committee of the ABA's Young Lawyers Division and will work as an assistant editor for *The Young Lawyer's* 2009–2010 editions. He is based in Seattle, Washington. He has two years of experience as a transactional attorney and nearly eight years of prepractice experience in litigation as a legal intern, support analyst, and paralegal.

Note

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Law Trends & News

Practice Area Newsletter



Spring 2009
Vol. 5, No. 3

- . Home
- . Family Law
- . Business Law
- . Litigation
- . Real Estate
- . Practice Management
- . Young Lawyers

. Download 

. About GP|Solo

. Feedback

Young Lawyers

. **The Truth About Having It All »**

By Jennifer Hilsabeck

. **Hanging the Shingle: A Young Lawyer's Experiences in Opening and Developing a Solo Law Practice (Part One of a Series) »**

By Brian Annino

. **Legal Networking Advice for New Solos »**

By Adam J. Post

. **Cut Your IT Costs With Open Source Software »**

By Richard Abbott

. **Increasing Court Involvement in the Alternative Dispute Resolution Process »**

By Jeffrey A. Carr

. **Millennials: Tips for Building a Foundation for Success »**

By Lauren Stiller Rikleen

. **Sweat the Small Stuff . . . and a Handful of Other Tips to Help You Make a Positive Impression Early in Your Career »**

By Scott H. Husbands

. **How Accessible Is Too Accessible?**

By Iram Ansari

How Accessible is Too Accessible?

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I heard once from a solo practitioner that it was a huge liability to be too accessible to one's client. "Always keep a distance," he said. Although I do agree in part with that idea, I also think it's important to be somewhat accessible to one's client, without giving away too much.

Some attorneys feel perfectly comfortable giving their personal phone numbers to their clients. I prefer having an answering service that screens my calls. Thus, I have a special phone line dedicated to business use. In my experience, when clients had my cellular phone number, they felt entitled to my availability at all hours. This would then intrude with my desire to maintain a healthy work-life balance, as I would respond to clients at all hours, including weekends and after hours.

Recently, I had a client who insisted on working with me, despite the fact that I was too busy to take his case. I referred him to two other solo practitioners. One gave the client an ultimatum on getting in touch with him. The other attorney called him and reached out, even though the client was hesitant. Eventually, the client chose to go with the latter, the attorney who had reached out to him. When I spoke to the client yesterday, he told me that he just didn't feel comfortable being given an ultimatum.

The same thing happened a few months ago with another client, where the client felt like he was being "talked down to" when I referred him to another attorney and was extremely grateful that I took the time to speak to him about the nature of probate and a will.

In the end, my dealing with the client depends on my gut instinct regarding the client. I have my initial screening process, which usually involves having the client leave a message on my automated service (and soon, with a receptionist, if all goes well). If I feel that the client is "price-shopping," then I will usually charge for the consultation. If, however, the client is interested in my services, I might provide a half-hour free consultation. In my practice, I simply don't have the time to work with price shoppers, and, often, the price-shoppers are the more difficult clients to deal with on the case itself.

I guess what I am getting at here is that the level of my accessibility really depends on the client. There is no hard and fast rule on lawyer accessibility when you are a solo practitioner.

As a member of both the New York State Bar and the California State Bar, Ms.

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Ansari has a broad range of legal experience. She has worked on civil litigation on numerous cases ranging from small trademark infringements to large scale corporate litigation. She also had the chance to work on a high profile criminal trial involving FBI interrogation practices. She currently manages her own law office (www.ansari-law.com) and practices tax law, with a focus on nonprofit law. She also helps clients with tax planning, business planning, estate planning and tax controversy. She is a member of the ABA Section of Taxation, Committee on Tax Exempt Organizations, the ABA Young Lawyers' Division, and the Bay Area Young Tax Lawyers.

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