the YOUNG LAWYER

American Bar Association
Young Lawyers Division

Volume 14 ▪ Number 1
October 2009

The Nuremberg Defense?

By H. Clay Smith III

You have landed your first real job out of law school. You have been with the firm for less than a year, and you actually enjoy the work. The partners and senior associates are giving you substantial responsibility for the cases you are working on. This is where you want to be for your entire legal career. Then it happens . . . .

A civil action that is filed by a popular partner at the firm is dismissed, without prejudice, due to her failure to effect timely service of the complaint. The partner asks you to assist her in reinstating the case.

She tells you that the client is one of the most important to the firm but is very demanding and scrutinizes the firm's work product with a fine-tooth comb. She confides that she does not intend to disclose the dismissal of the civil action to the client and has no intention of filing a motion to reinstate the case with the court. Instead, the partner instructs you to prepare a new civil complaint, to carefully copy the client's signature onto the pleading, and to refile it with the court.

> The partner has given you specific instructions. You ask yourself, will the Nuremberg Defense work for you?

You have all of the respect in the world for the partner and are flattered that she confided in you and is seeking your assistance. You are sure that by helping the partner you will be advancing the interests of the client, the firm, and your prospects for tenure. (Indeed, if you don't follow the partner's instructions, you may find yourself seeking a new employer.) On the other hand, the partner's strategy for reinstating the case doesn't feel quite right to you.

You remember your law school ethics teacher rambling about a lawyer's duty to communicate even adverse events to a client (under the general umbrella of the duty to keep the client informed found in Rule 1.4 of the ABA Model Rules of Professional Conduct (Model Rules)). You remember him saying that signing a legal document on behalf of a client without his or her knowledge and consent is dishonest (and misconduct under Model Rule 8.4 (c)) or may even constitute the criminal act of forgery (possible misconduct under Model Rule 8.4 (b)). Consequently, by assisting the partner in reinstating the case, you could be subject to discipline by your state bar.

Despite your misgivings, you remember that following World War II, a number of German soldiers defended themselves against war crime charges in Nuremberg by asserting that they were "just following orders." This became widely known as the "Nuremberg Defense." Here, the partner has given you specific instructions. You ask yourself, will the Nuremberg Defense work for you?

Model Rule 5.2 describes the ethical obligations of a subordinate lawyer in such a dilemma:

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervising lawyer's reasonable resolution of an arguable question of professional duty.

If the answer to your dilemma is still not clear, you might consider taking a refresher course on ethics.

To resolve your dilemma, you should decline the partner's entreaty to withhold information from a client, to forge the client's signature on a pleading, and to file such pleading with the court. There can be no "reasonable resolution" to these clear violations of the rules of professional conduct. Moreover, should you learn that the partner engaged in such conduct, notwithstanding your refusal to help, Model Rule 8.3 (a), requires that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority." You also should consider reporting the partner's misconduct to another partner at the firm, which can allow the firm to mitigate in a timely manner any possible liability it might face.

H. Clay Smith III is an assistant bar counsel with the District of Columbia Office of Bar Counsel and an adjunct professor of law at Howard University School of Law. He can be contacted at smithc@dcobc.org.

Diversity: A Look at the Federal Judiciary

By Shawna J. Wilson

The federal judiciary consists of judges from Article III courts (the U.S. Supreme Court, courts of appeals, district courts, and bankruptcy courts) and Article I courts (U.S. Court of Military Appeals, U.S. Tax Court, and U.S. Court of Veterans' Appeals). With the recent confirmation of Justice Sonia Sotomayor to the U.S. Supreme Court has come renewed discussion of diversity on the federal bench.

According to the Federal Judicial Center's History Office, only one-quarter of Article III judges are female, and only 1 percent identify themselves as Asian Americans. When comparing these percentages to the U.S. Census Bureau projections of the U.S. population for 2008, the federal judiciary appears to not accurately reflect American society as women constitute 50 percent of the U.S. population and Asian Americans constitute almost 5 percent of the population.

But race is only one component of diversity. The range of professional backgrounds of federal judges also is limited. According to a recent report by Russell Wheeler of The Brookings Institution, only 36 percent of President George W. Bush's district court judge appointees were from private practice, and only 13 percent were from the public sector (e.g., government attorneys and public defenders). Law professors have not fared very well in the federal appointment process, except during the Carter and Reagan administrations where they made up 14 percent and 13 percent of the appointees, respectively.

There are several factors that contribute to the current composition of the federal judiciary. One of the biggest factors is life tenure, as new judges are only appointed when current judges take senior status, resign, retire, or die. Lifetime appointment of judges has slowed diversifying the federal judiciary, but it is not an insurmountable obstacle. For example, President George W. Bush nominated seventy-one women who were confirmed to the federal judiciary, and President Bill Clinton nominated 106

women who were confirmed. These numbers dwarf the numbers attributed to the previous two presidents: collectively, President George H. W. Bush and President Ronald Reagan nominated sixty-six women who were confirmed to the federal judiciary.

Another factor that impacts the composition of the federal judiciary is the selection process of judges. While the White House devotes significant time and

■ continued on page 2

Effective Communication Tips for Young Lawyers

By Neil J. Dilloff

Perhaps the most important skill for a young lawyer to develop is effective communication. From the initial job interview to the courtroom or conference room, almost everything an associate does involves some form of communication. Even when you're not speaking, you're still communicating through body language. To communicate effectively and create a positive impression on your listeners, whether they are partners, judges, clients, opposing counsel, or assistants, consider the following tips.

1. Be courteous to all. Some new lawyers appear to be instantly taken with their new status—the big salary, the (relatively) big office, the prestige—and, as a result, they develop something else that is big—a big head. Stay humble. Be kind to your secretary, don't forget to celebrate Administrative Professionals Day (Wednesday of the last week of April), say hello to the nighttime janitorial staff when they come to empty your trash, be courteous to the guy from the mailroom, and be nice to anyone else whom you need to survive. One day, you may need someone to make copies for you so you can make it to a deposition on time. Or, what if you need a light bulb changed in your office late Friday afternoon or a dead mouse removed from behind your bookshelf (as a result of eating at your desk or stashing food in your drawer)? Don't let your good fortune at landing a high-paying job make you pompous because "here" today may be "gone" tomorrow, especially in today's legal market.

2. Less is more. Young associates who write fifty-five-page memos when ten pages suffice do themselves and their clients a disservice. Clients are paying for your time. Don't beat around the bush—get to the point. The history of contracts is not necessary background to explain why the defendant breached a contract. You will impress your boss with pithy ideas and short, to-the-point suggestions rather than long-winded, Latin-filled speeches or memos. This technique might have worked in law school, but Dorothy isn't in law school in Kansas anymore. Welcome to Oz.

3. Speak English. Just as less is more, clearer is better. Unless a Latin phrase is essential to your memo or oral report, don't try to impress anyone with your command of a language that no one else speaks and that most partners never took in college. If your boss must look up a term in *Black's Law Dictionary*, either he is "over the hill" or you are in trouble for trying to unduly dazzle him. Which one do you think he will conclude? When writing, short, clear sentences are best. If you have three or more commas in a sentence, take another look and see if they are all really necessary.

4. Adopt the good communication habits of your boss or successful senior associates. Everyone needs a role model. The person who evaluates you and decides how much money you are going to make is a good choice. Read what your boss has written, pay attention to her red markings on your drafts, and copy her vocabulary or word choices (e.g., she never sees "problems" only "challenges"). If done properly, copying another's style and phrasing is an effective form of flattery. It will be hard for your boss to criticize your word choices or grammar if you pretty much sound like her. However, don't be obvious or obsequious about it. If you have another role model or mentor, such as a senior associate, use that person as a sounding board.

5. Clarify instructions. The biggest communication problems arise from either a total lack of communication or miscommunication. When I was an associate, I would confirm my understanding of an assigned task in writing to the partner to avoid later misunderstandings. Today, with e-mail, such confirmation is even easier. So do it. Keep a copy of the confirming e-mail as a reference. Moreover, if the partner communicates back to you confirming your understanding, terrific; if you haven't properly understood, you will be corrected before you spend sixteen hours and thousands of dollars on Westlaw. Similarly, put your important directions to others in writing.

6. Confirm in writing important agreements with opposing counsel. A corollary to my fifth communication tip is to make sure that all important agreements and understandings with opposing counsel are confirmed in writing. It is quite common for lawyers to forget, misinterpret, or intentionally misconstrue oral communications. To avoid future problems, confirm everything important in an e-mail or letter with the other side. (Take a hint from juries: if it is in writing, it is pretty much a fact; if it isn't, it is suspect. Does "If it was so important how come it wasn't put in writing?" sound familiar?)

7. Keep a hard copy of all important communications and documents. Call me old fashioned, but I like paper as opposed to electronic impulses that disappear with the combustion of a battery or the loss of electricity. It is wise to create and retain hard copies of all important key documents, agreements, and e-mails to which you need reliable and unfailing ready access.

8. Make sure that your assistant knows where you are at all times during the business day. The legal profession is a service-oriented business. It is important that clients, potential clients, and your superiors and coworkers can find you as necessary. I suggest that you provide your secretary with a duplicate copy of your schedule on a daily basis and update changes in meeting dates, times for conference calls, and other events to keep your secretary informed as to where you are. If your secretary needs you and can't find you, it can not only frustrate her and your boss, it can also cost you an opportunity for an interesting engagement or assignment.

None of these tips are law-specific. They represent common-sense practices in the working world, whether you are a lawyer, doctor, or any other service provider. Following these suggestions will enhance your chances of success in the legal profession or any other.

More tips for effective communication are online at www.abanet.org/yld/publications.

Neil J. Dilloff is a senior partner in the Baltimore office of DLA Piper LLP (US) and an adjunct professor of law at the University of Maryland School of Law. He can be contacted at neil.dilloff@dlapiper.com.

Federal Judiciary

■ continued from page 1

resources to selecting a Supreme Court justice, it looks for outside help in nominating individuals to district courts and courts of appeals. The selection process varies throughout the United States. A significant number of states use judicial nominating commissions, and some states rely solely on U.S. senators to compile a list of potential candidates to forward to the White House. The judicial selection process affects diversity because the process of judicial selection is not always clear. For example, there can be varied differences in qualities or qualifications the commissions look for in judges, state qualifications, and how applications are assessed by commissioners.

Many commentators believe that diversity in the federal judiciary is essential because it currently does not reflect our nation's demographics. Others voice strong concern about the appropriateness of looking at the race or gender of potential federal judges because they believe that the only real test for fitness to serve on the bench is knowledge of the law and ability to fairly interpret it. There is a view that is broader: The core value of our American legal system is "truth and justice for all." What can you do as a young lawyer to help make the federal judiciary more diverse? The answer is simple: become aware and become involved.

- Find out if your state uses federal judicial nominating commissions, and, if so, learn how you can become involved in the process;
- Write to your U.S. senator if you support an individual who is nominated to a district court in your state or a court of appeals in your state's circuit;
- Attend a circuit judicial conference in your region, which is a meeting of prosecutors, attorneys, and judges to discuss pressing legal issues; and
- Continue to be involved in professional associations.

Shawna J. Wilson is a former Supreme Court Fellow assigned to the Federal Judicial Center in Washington, D.C. She can be contacted at wilsonshawna@hotmail.com.

NEXT STEPS

- ABA Commission on Racial and Ethnic Diversity in the Profession's *2009 Minority Counsel Program*—Oct. 28–30 in San Francisco. www.abanet.org/minorities/mcp/

Get It Write: Retainer Agreement Do's and Don'ts

By Dolores Dorsainvil

The retainer agreement is by far one of the most important documents that you will use in your legal practice. It also is a deceptively simple concept. Well-written retainer agreements can help minimize risk of misunderstandings in attorney-client relationships and provide protections for attorneys and clients. Retainer agreements that conform to ethical rules also can mean the difference between harmonious attorney-client relationships and possible state bar complaints.

Remembering the following list of do's and don'ts can help your practice and help ensure that you are in compliance with the ABA Model Rules of Professional Conduct (Model Rules).

Do's

- Do communicate the terms of compensation for your legal services in your retainer agreements pursuant to Model Rule 1.5(b). It is your obligation as an attorney to ensure that clients understand how you are to be paid regardless of how your "basis or rate of fee" is determined. For example, your fee could be contingent upon the outcome of the representation, a flat fee, an advanced fee that is earned based on an hourly rate, or a combination of these fees.
- Do clearly communicate "the scope of the representation," in your retainer agreements. You should describe as clearly and plainly as possible your legal services to clients. This portion of your agreements also may mention legal services that are not provided. For example, if you are an immigration lawyer and you are retained only to assist with filing application forms and representing a client at a hearing before the immigration court, you should state clearly in your retainer agreement with the client that your representation does not include any appellate work arising from the case. This can eliminate any confusion if such a client is denied requested relief.

Don'ts

There are some agreements that you should *not* have in your retainer agreements because they may represent ethical violations:

- Do not attempt in your retainer agreements to negotiate literary or media rights to a portrayal based on information related to representation. (Model Rule 1.8(d)). We see more and more high-profile cases that are made into movies and television programs. As an attorney, you have an ultimate duty of loyalty to your clients, and any attempt to "sell their story" is not only a conflict of interest but also a breach of confidentiality.
- Do not attempt to prospectively limit your malpractice liability in your retainer agreements. Malpractice liability limitations in your agreements could violate Model Rule 1.8(h). This Rule is designed to ensure that attorneys do not take advantage of clients who do not seek independent legal counsel to evaluate the desirability of an agreement to settle a malpractice claim *before* a dispute arises. For example, you could be subject to discipline for having a provision in a retainer agreement that generally prohibits a client from filing a civil action against you.
- Do not make an agreement with clients that can improperly curtail or terminate your services to the clients' detriment. For example, under Comment [5] of Model Rule 1.5, it is improper to enter into an agreement to provide legal services up to a stated dollar amount if you know that more extensive services will be required to fulfill a client's objectives. Although under Model Rule 1.2, you may reasonably limit the scope of representation with your client's consent, you do not want to be in a situation where you request to withdraw from representation during a crucial point of litigation and leave your client to fend for himself.
- Do not make an agreement with clients where you divide the fee with another attorney who is not in the same firm without the client's consent. Such an agreement would violate Model Rule 1.5(e). For example, if you are retained to do transactional work and later discover that litigation is necessary, you must consult with your client and obtain client consent prior to the entry of co-counsel. Failure to perform this simple task would violate client trust that you would not disclose confidential information.

■ continued on page 4

YLD CALENDAR & CONFERENCES

OCT. 15	HEALTH LAW FUNDAMENTALS TELECONFERENCE SERIES **Fundamentals of Physician Representation**
OCT. 16	GP SOLO YOUNG LAWYER INSTITUTE | LOS ANGELES, CA
OCT. 21-23	BANKING LAW BASICS | BOSTON, MA
OCT. 22-24	YLD FALL CONFERENCE | BIRMINGHAM, AL
OCT. 23	RAISING OUR HANDS: CREATING A NATIONAL STRATEGY FOR CHILDREN'S RIGHT TO EDUCATION AND COUNSEL | CHICAGO, IL
OCT. 28-30	INVESTMENT MANAGEMENT BASICS | BOSTON, MA
NOV. 3	YLD TELECONFERENCE SERIES **Anatomy of an Appeal Part II: Persuasion**
NOV. 4-7	THE FUNDAMENTALS TRACK OF THE ABA SECTION OF LABOR AND EMPLOYMENT LAW 3RD ANNUAL CLE CONFERENCE | WASHINGTON, DC
NOV. 5	FUNDAMENTALS OF CONSTRUCTION LAW | BOSTON, MA, DENVER, CO, FT. LAUDERDALE, FL, NASHVILLE, TN, AND SAN DIEGO, CA
NOV. 20-21	MS. JD'S 3RD ANNUAL CONFERENCE ON WOMEN IN THE LAW: AVENUES TO ADVANCEMENT | CHICAGO, IL

Visit the ABA YLD Calendar for additional information:
www.abanet.org/yld/meetings.html

AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION
321 N. Clark Street
Chicago, IL 60654-7598
www.abanet.org/yld

the YOUNG LAWYER

Volume 14
Number 1
October 2009

THE YOUNG LAWYER IS PROVIDED FREE TO ALL ABA YOUNG LAWYERS DIVISION MEMBERS.

YLD Chair—Kelly-Ann Clarke
Editor—Rachel DuFault
Issue Editor— Dolores Dorsainvil
Assistant Issue Editor— Brandi Davis
Managing Editor—Lori Lyons
Art Director—Kelly Book

THE YOUNG LAWYER [ISSN 1090-6878] is published eleven times a year, by ABA Publishing for the Young Lawyers Division, American Bar Association, 321 N. Clark Street, Chicago, IL 60654-7598. Nonmember annual subscriptions: $29.95. The views expressed herein are those of the authors and not necessarily those of the American Bar Association, its Young Lawyers Division, or the employers of the authors.

Visit *TYL* online at www.abanet.org/yld/publications.

the digital edge

An Attorney's New Best Friend: The Netbook

By Joel Braithwaite

You may have seen the commercials for Verizon FiOS® (fiber-optic television) and Comcast offering a "free" netbook for switching to their services. And, you probably asked yourself the question, "What exactly is a netbook and, as an attorney, should I get one?" Read on.

As compared to full-sized laptop computers, netbooks are similar in proportion to DVD players that kids watch in the backseat of cars or on airplanes. The critical distinction between netbooks and laptop computers is that netbooks have no DVD or CD drive (optical drives), which saves weight. Netbooks are typically half the weight of full-sized laptops and are designed to handle the majority of computing tasks for simple uses, such as Internet, legal research, word processing, and e-mail.

Netbooks browse the Internet by Wi-Fi® or with the 3G network if equipped. Because netbooks have no optical drives, users must use the Internet or USB drives, SD, MMC, and other formats of flash drives to transmit data. The operating system on netbooks varies by manufacturer, but Windows XP is very popular and Linux and Google's new Chrome OS also are available. Netbooks have voluminous hard drives; 160 gigabytes is not out of the ordinary, which is enough storage space to replace most desktops in operation today.

In some respects, a netbook is everything an attorney needs to be productive on the road minus the DVD reader. But then again, when was the last time you used the DVD or CD drive on your laptop? Netbooks are useful alternatives for attorneys who need to conduct online legal research, write client letters or briefs, review contracts, communicate with clients, or even collaborate with other attorneys while traveling. Some netbooks tout battery lives of up to 6 hours, which is sufficient for a cross-country flight from Washington, D.C., to San Diego, California, and perfect for attorneys who travel often.

The netbook really makes sense for attorneys on the run or on a budget. Did I mention that most netbooks can be purchased for around $400? Have you begun to see why they are so attractive?

Joel Braithwaite is a compliance monitor with the District of Columbia Criminal Justice Coordinating Council and is webmaster for the J. Franklyn Bourne Bar Association in Prince George's County, Maryland. He can be contacted at joel.braithwaite@gmail.com.

NEXT STEPS

- Read reviews of popular netbooks at http://reviews.cnet.com/best-netbooks/.
- Get free "FYIs: Technology Overviews" from the ABA Legal Technology Resource Center at www.abanet.org/tech/ltrc/fyidocs/.

Retainer Agreements

■ continued from page 3

Although not every jurisdiction requires you to have a written retainer agreement in every instance, the best practice is to set forth the parties' expectations in writing early on and in accordance with the guidelines offered here. This can help to ensure that both you and your clients understand your respective responsibilities, help avoid any bar complaints or grievance actions, and provide a strong foundation for a mutually beneficial relationship.

Dolores Dorsainvil is a senior staff attorney with the District of Columbia Office of Bar Counsel and an adjunct professor at American University's Washington College of Law. She can be contacted at dorsainvild@dcobc.org.

NEXT STEPS

- Professional Responsibility Reminders (YLD *101 Practice Series*) www.abanet.org/yld/101practiceseries/ethicsprofessionalresponsibility.shtml