

# NEW JERSEY LAWYER

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# PRESIDENT'S PERSPECTIVE

RALPH J. LAMPARELLO

## Politicization of the Courts Poses Critical Threat to Judicial Independence



New Jersey residents beware.

An arms race is on between the executive and legislative branches of the New Jersey government to politicize the judicial branch and subordinate its co-equal status. Despite the clear language of Article III of the New Jersey Constitution of 1947, and more than 237 years of unequivocal state history, we are

today confronted with an assault that threatens the viability of the third branch of government.

Make no mistake. Continued attacks on the Judiciary denigrate the separation of powers and the independence of the courts, resulting in a blatant attempt to instill mistrust in the court system, mislead the public, influence the judicial process and ultimately subvert the judicial branch.

We have reached a dangerous tipping point where, as Justice Barry T. Albin so eloquently put it when he recently addressed attendees of the New Jersey State Bar Association's Annual Meeting, judges must today be concerned that "doing justice is a bad career move."

Consider the evidence.

First, our Governor broke over 60 years of tradition and refused to reappoint for tenure Justice John Wallace, despite his being the Court's only African-American and his record as a pragmatic jurist, pointing to an "out of control" bench. Next, he attacked Justice Albin who dared to question the school aid funding formula for the state's poorest students. He accused former Mercer County Assignment Judge Linda Feinberg, a role model for thoughtful jurisprudence, of "cronyism" when she ruled against the state on the issue of judicial compensation. Now, the Governor has lobbed a grenade at the Court's top spot, our untenured Chief Justice.

Recently, after the Supreme Court ruled 5-2 against the Governor's plan to unilaterally eliminate the state Council on

Affordable Housing, he labeled the opinion written by Chief Justice Stuart Rabner as "activist" and the decision as an arrogant failure of the Court, all while renewing his vow to remake the Judiciary. The result of those words is rampant speculation that Governor Christie will make the historically unprecedented move of refusing to reappoint Rabner when he comes up for tenure next year.

While the Governor has a First Amendment right—and perhaps the political obligation—to express his disagreement with Court decisions, he has made it a habit to espouse hostile rhetoric coupled with a not-so-veiled threat of retaliation. That is simply unacceptable. To paraphrase Justice Albin, judges cannot be looking in their rearview mirrors when rendering an opinion.

But, sadly, our Governor is not the only one to blame in this unique brand of political interference. The legislative branch, too, is at fault as it has repeatedly allowed senatorial courtesy to obstruct appointments and has refused to hold confirmation hearings for judicial candidates, leaving court-houses around the state struggling with record numbers of judicial vacancies.

Most egregious is the outright refusal for months to hold hearings on the two candidates nominated by the Governor to fill vacancies on the New Jersey Supreme Court. While the Legislature has expressed a legitimate concern that the Governor's appointments will shift the traditional balance of power on the Court, the language of the New Jersey Constitution is clear—"the Governor shall nominate and appoint" the Justices of the Supreme Court. The Senate has a commensurate constitutional obligation of "advice and consent."

The New Jersey State Bar Association believes in the strength and integrity of our justice system. Its integral role in our republic is unquestioned and should not be undermined by politics. We defend what former United States Supreme Court Chief Justice William Rehnquist called the "crown

jewel” of our democracy.

As citizens, we should all be worried about what is happening in the political sphere. These attempts to intimidate the courts and unduly influence the judicial process are unwarranted and irresponsible. The role of the courts is to protect every citizen’s rights. And they provide a critical and necessary balance in our government.

Our judges are not issuing sweeping decisions based on their preferences. Rather, they are closely examining the facts of each case, applying the law in a fair and even-handed manner, and issuing reasoned decisions. That is all we can ask of them. That is all we should ask of them.

The courts are accountable to the Constitution, the Bill of Rights, and the laws of our great state. We cannot stand by and allow them to be subject to the whims and vagaries of political battles.

We must learn from the lessons of history. In order to stop an arms race, reasonable people must come together, reexamine their entrenched positions and recognize the truth. This battle must end so that our strong and independent Judiciary—the third and co-equal branch of government—is preserved. ∆∆

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## MESSAGE FROM THE SPECIAL EDITOR

Every so often, the *New Jersey Lawyer Magazine* dedicates an issue to a topic that resonates most with a subset of the larger membership of the New Jersey State Bar Association. While the title of this issue might suggest this particular issue is only for young lawyers or members of the Young Lawyers Division, that is simply not the case. As with any issue of the magazine, the topics covered are suitable for the casual reader irrespective of age, and several articles venture into significant detail to warrant dog-earing and follow-up with the authors.

Jeffrey C. Neu opens the issue with an article that explores the value of a membership with the New Jersey State Bar Association, and relays his own story of a skeptic who rose to become the Young Lawyers Division's current chair and to serve as a member of the state bar's Nominating Committee. Next, Engy Abdelkader discusses the importance of advancing the interests of others, as articulated by Wharton Business School Professor Adam Grant in *The New York Times* bestselling book *Give or Take: A Revolutionary Approach to Success*, and ties Grant's hypothesis to the continuing collaboration of the state's specialty bar associations to advance the interests of all attorneys in the state. In a commentary, Jhanice V. Domingo—the president-elect of the Asian Pacific American Lawyers Association of New Jersey—raises important questions about the state of diversity in the state's Judiciary and bar. According to Domingo, given our state's diversity, New Jersey lawyers have a unique opportunity to effectuate a fair reflection of that diversity on the Judiciary.

Moving to the practical aspects of the



ASAAD K. SIDDIQI

practice of law, Victoria A. Mercer writes about the newly approved revisions to the *bona fide* office rule, which has served to bring New Jersey current with the speed of doing business virtually over the Internet. Continuing with the virtual trend, Joseph A. Bahgat discusses the ease with which one can transform an outdated paper-based law firm to a search-friendly electronic-based practice. Indeed, the question of going paperless is no longer driven by inquiries of *why* should one go paperless, but rather how *quickly* can one go paperless? Closing out the theme of transforming a law firm to match today's business practices, Rachel G. Packer discusses the ethical considerations for attorneys who use cloud services to practice law, including communicating with clients and retaining client files.

Whether you are young or not, one cannot be successful without a keen sense of business. David M. Delinko discusses the importance of breaking through and establishing yourself as being indispensable in the eyes of others. Underscoring those points, Andrew Bolson relays the lessons of Joe Flom, a Jewish-American lawyer who became a hallmark name by handling client matters (corporate proxy fights) the "white-shoe" firms would not touch decades ago, and how Flom's tribulations serve as a point of inspiration and comparison for today's young attorneys confronting the ever-decreasing odds of success in the legal profession. Next,

Joshua F. Cheslow pulls out his crystal ball to look into the future of the legal profession and explores four burgeoning areas of law that require experts to take up residence and to begin pushing the boundaries of black-letter law. Thereafter, Ksenia V. Proskurchenko and Michael Tomasino write about the rise of the boutique firm, where successful attorneys from large firms seek to start their own firm in niche practice areas while retaining their large-firm clientele.

Closing out the issue is a personal exploration of work-life issues faced by one young attorney, whose struggle to find a balance between career and family life finds commonality in many households today. Rebecca Hughes Parker writes about her experience as a young mom and litigator in a large firm on the partnership track, whose husband dutifully served as Mr. Mom. Just like many of her contemporaries, Parker blazed a path that was uniquely hers, and did so successfully. Her story should be a source of inspiration for all of us. Parker's success reminds us to take a moment to note that the profession has made legitimate strides over the past few years toward supporting attorneys who want to have families without sacrificing their careers. To that end, the handful of employers in the state that have promoted attorneys who took nontraditional routes ought to take a bow (and so should the trailblazing nontraditional attorneys). Indeed, many law firms have realized it is not the sheer quantum of hours billed that matters most, but the value of the client-relationship that was nurtured by the nontraditional attorneys, as viewed from the perspective of the increasingly harder-to-retain client. That is the direction our profession is headed, and the young generation of attorneys and clients know it.

Each author has earned a well-deserved thank-you for their efforts. This issue would not have been as comprehensive as it is without their extraor-

dinary work product. Also, Jeffrey C. Neu deserves a special thanks for his assistance in developing this issue. ♪

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# A Personal Perspective on Growing Your Career as a Member of the Young Lawyers Division and the New Jersey State Bar Association

by Jeffrey C. Neu

**F**or junior attorneys who want to expand their reach, both personally and professionally, the Young Lawyers Division of the New Jersey State Bar Association is an excellent launching point.

You might ask, what is the point of getting involved with the NJSBA at a young age? What benefits will I derive by investing my time in the NJSBA now, as opposed to later in my career, when I have more time? How do I get involved, given my junior status? To answer these questions and others, let me provide some brief highlights of my experience with the New Jersey State Bar Association and, in particular, the Young Lawyers Division.

## How to Get a Foot in the NJSBA's Door and Make an Impact

As a newer lawyer, the ability to learn about the legal practice and professional and networking opportunities within the state of New Jersey appears limited. The opportunities most people think of involve the people we work with on a daily basis. The New Jersey State Bar Association, and in particular, the Young Lawyers Division, provides considerable opportunities.

My involvement with the Young Lawyers Division began nearly six years ago, and it has been educational, fun and one of my most professionally rewarding experiences to date. My first experience with the Young Lawyers Division came shortly after I started my own firm. Having launched a new firm, I made the decision that networking was important to my career and the success of my practice, and because of my practice area (corporate law) I was more likely to find the most professional benefit on, at a minimum, a state level. So, I went to an executive committee meeting of Young Lawyers Division, knowing no one in the room. During and after the meet-

ing, I met some fantastic lawyers, who I have come to greatly respect, and they welcomed me warmly.

Shortly thereafter, I joined the executive committee, and when Kimberly Yonta became the chair, she took a risk on me—a lawyer who knew very little about the NJSBA but was willing to do some work—and asked me to head a community outreach project called the Law Day YouTube Project. I took on the project and worked with the NJSBA staff, and the results and response from the community were extremely positive. The support from not only the community, students, and teachers, but also the Department of Justice, the Supreme Court justices, and fellow attorneys has been phenomenal, and has led to the project's continued success.

This experience, and learning a lot about how the NJSBA worked, has led to a variety of other opportunities, including being chair of the Internet and Computer Law Committee; serving on the Nominating Committee; becoming an officer in the Young Lawyers Division; and myriad of speaking, writing, and leadership opportunities, as well as getting to know and becoming friends with some of the most recognizable names in the practice of law in the state of New Jersey.

For me, it all started by attending one meeting, and it just blossomed from there. Your presence at NJSBA events can jumpstart an active membership, where the opportunities are limited only by how much you wish to participate. There are a significant number of service and community projects; fundraisers; speaking, publishing and leadership opportunities; and events where you can receive training, educate others, and get to know some of the best lawyers in New Jersey.

## Keys to Success

Some essential keys to being successful in the Young Lawyers Division, and in my opinion the NJSBA as a whole, are as follows:

1. Volunteer,
2. Actively forge and develop relationships, and
3. Have fun

One of the keys to getting the most out of the Young Lawyers Division is volunteering. A snag many newer attorneys experience is they tend to sit on the sidelines and analyze the situation, perhaps even waiting to be asked to participate in something, and are slow to engage. I wholly recommend just rolling up your sleeves and jumping in feet first. Most lawyers, particularly in the Young Lawyers Division, are sensitive to the fact that we all have demanding schedules, including young families, and rarely have a lot of free time. From that point of view, rarely will you be specifically asked to do something. Instead, opportunities that are available will be brought up on the YLD's listserv or in a meeting, followed by a request that anyone interested in helping out should feel free to volunteer.

The Young Lawyers Division provides myriad of opportunities to get involved, and hopefully you'll find one that interests you. From a community outreach and volunteering perspective, the YLD sponsors programs such as Wills for Heroes, the Law Day Video Contest, and Earth Day service opportunities. (Wills for Heroes is a program that provides wills and medical directives to emergency first responders, an outgrowth from all of the first responders who died serving their community in the aftermath of the attacks on 9/11.) In addition, there are a variety of committees that need help and support in both the Young Lawyers Division and the NJSBA as a whole.

The Young Lawyers Division also provides attorneys with the ability to educate and be educated. Throughout the year, the Young Lawyers Division offers a variety of legal seminars and continuing legal education events, such as How-to

Tuesdays, which provides a sort of Intro. 101 on a variety of different topics and practice areas. These are often presented by young lawyers and offered to the bar association at large, through webinars and in-person presentations. Not only can you learn from them if you decide to tune in, but they provide an opportunity for young lawyers to make a name for themselves with the bar at large.

Additionally, the Young Lawyers Division provides a variety of ways to publish written articles. The Young Lawyers Division publishes the newsletter *Dictum* on a regular basis, which provides young lawyers the opportunity to contribute articles of both a substantive and whimsical nature, and is distributed to all members of the YLD. Also, the Young Lawyers Division has a great relationship with the *New Jersey Lawyer Magazine*, which is distributed to thousands of New Jersey attorneys.

If you don't find an opportunity that appeals to you, meets your interests, or coincides with the amount of free time you have, suggest one. The Young Lawyers Division leadership is not omniscient, and welcomes ideas and suggestions about new things to do. More likely than not, if you have an idea you'll be allowed to run with it.

If you ever find yourself unsure of what to do in a certain situation or how to accomplish a specific task, there are people in the Young Lawyers Division or New Jersey State Bar Association with the right experience, who will be able to offer advice or assistance. The people you ask for help may end up being some of the best lawyers and potentially some of the best friends you could find.

There are great people participating in the NJSBA, and there is a fantastic sense of loyalty among the Young Lawyers Division. Colleagues in the Young Lawyers Division are extremely willing to help you achieve whatever it is you are trying to accomplish, whether it is figuring out how to do something

with the Young Lawyers Division or NJSBA, finding a new job, coordinating an event, getting published, or anything else.

The Young Lawyers Division hosts a variety of social events that provide opportunities to develop stronger relationships, get to know more people, and have some great times. Some of the events held in the past include attending baseball and hockey games, wine and beer tastings, and the annual Brew Ho-Ho. The YLD's biggest event of the year is the annual party at the NJSBA's Annual Meeting in Atlantic City. I highly recommend attending; it's always a great time.

### Closing Thoughts

Involvement in the NJSBA, and more specifically the Young Lawyers Division, provides a host of professional and personal development opportunities, and offers you the ability to get your name out there, and show you can contribute and are responsible and dependable, two of the most important characteristics in a lawyer.

Taking that first step might seem daunting, but once you do, getting involved in the Young Lawyers Division is easy. All that's required is a willingness to join in and have some fun as part of the team. ☺

**Jeffrey Neu** is the managing member of the law firm *Kuzas Neu*, a small boutique technology law firm. He is also the chair of the *New Jersey State Bar Association's Young Lawyers Division*.

# Advancing the Interests of Others

by Engy Abdelkader

According to Wharton Business School Professor Adam Grant, the author of *The New York Times* bestselling book *Give or Take: A Revolutionary Approach to Success*,<sup>1</sup> the contemporary path to achievement is paved with a demonstrated record of advancing the interests of others.<sup>2</sup>

At first glance, Grant's proposition appears counterintuitive. How does facilitating the success of others facilitate one's own distinction?

In his line of analysis, Grant broadly identifies three workplace personality types: the takers, the givers and those who match.<sup>3</sup> Takers work to acquire as much as they can in pursuit of success, whereas matchers give as much as they get.<sup>4</sup>

In contrast, givers focus on helping others, winning supporters in the process while concurrently growing their professional networks.<sup>5</sup> The significance of those networks is increasingly more pronounced. Grant opines that the most successful among us are those who have contributed the most value to others.<sup>6</sup>

In the United States, men and women who choose to pursue a career in the law are frequently overachievers on a determined career course to professional accomplishment. In light of the changing dynamics of the business of serving clients in today's economic environment, Grant's observations may prove worthy of reflection and contemplation for newly minted lawyers transitioning from academics to the practice (and business) of law.

This article reviews how service to the state's bar associations can serve to advance the interests of all attorneys. In fact, New Jersey's legal community provides a number of meaningful service opportunities encompassing membership in the New Jersey State Bar Association, as well as myriad specialty bar organizations.

## What are Specialty Bar Associations and How Can They Help Launch Your Legal Career?

By way of background, specialty bar organizations are comprised of lawyers with a common practice area, such as the

American Association for Justice (formerly the American Trial Lawyers Association or ATLA). They also include associations of attorneys with shared individual characteristics, experiences or ideologies. With the increasing support of the New Jersey State Bar Association, this latter category represents a unique aspect of the professional landscape in New Jersey, home to an ethnically, racially and religiously diverse population.

From the New Jersey Muslim Lawyers Association to the Asian Pacific American Lawyers Association of New Jersey (APALA-NJ) to the Garden State Bar Association (GSBA) to the Hispanic Bar Association of New Jersey (HBANJ) to the New Jersey Women's Lawyers Association (NJWLA), the state's specialty bar associations serve a significant and frequently intersecting purpose for New Jersey attorneys and the New Jersey State Bar Association.

In their most primal form, every bar association strives to meet the needs and interests of their respective constituencies. Specialty bar leaders, however, design varied educational and other initiatives to address challenges confronting respective community members and to advance and protect the rights of their lawyer members. They facilitate networking and mentoring opportunities and encourage members of religious, ethnic, racial and other minority communities to pursue a career in the legal profession.

A sampling of specialty bar activities includes an annual Iftar dinner during the Muslim holy month of Ramadan, where NJMLA members break an obligatory fast in a collegial atmosphere; an annual gala where APALA-NJ members mix, mingle and celebrate the accomplishments of colleagues and respected leaders; a Sun, Surf and Seminar retreat for HBANJ members in Costa Rica; GSBA's famed Scholarship and Awards Gala; and NJWLA's Fore Ladies Only Golf Outings.

Significantly, these groups are committed to ensuring the state's diversity is also represented throughout all branches of government, including the state and federal judiciaries as well as in local and county government and municipal courts. Ensuring diverse representation in the state's Judiciary is a significant organizational policy priority for specialty bar associations as well as for the New Jersey State Bar Association.



As an initial matter, the Judiciary's diversity often impacts public perceptions concerning representation, neutrality and fairness. To many, diversity reflects the distribution of power within the justice system, reaffirming the ideal that all groups have an opportunity to participate in society regardless of personal characteristics. Indeed, the liberal values underlying democratic societies require greater inclusivity, as articulated by Yale Law School Professor Judith Resnik:

In the contemporary world, where democratic commitments oblige equal access to power by persons of all colors whatever their identities, the composition of a judiciary—if all-white or all-male or all-upper class—becomes a problem of equality and legitimacy.<sup>7</sup>

Further, some commentators have observed that experiences related to an individual's identity—such as gender, religion, race and ethnicity—may impact perspectives and outlooks, thus informing case decisions and the eventual trajectory undertaken by the law.<sup>8</sup>

Former U.S. Supreme Court Justice Sandra Day O'Connor's concurring opinion in *JEB v. Alabama ex rel. T.B.*,<sup>9</sup> an appeal questioning the exclusion of women from juries, exemplifies this view:

One need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case...Individuals are not expected to ignore as jurors what they know as men—or women.<sup>10</sup>

In addition, a lack of diversity on the bench can reinforce false assumptions and stereotypes concerning the competency and intellect of members belonging to historically under-represented, disadvantaged groups.<sup>11</sup>

For all of these reasons, specialty bar leaders focus on securing successful appointments to the bench that reflect the diversity of the state. The New Jersey State Bar Association is often a key supporter in those efforts, as well as efforts to ensure an independent Judiciary that issues rulings based on the law and the facts, and not the political winds of the day.

The specialty bar is also committed to ensuring the collective success of minority lawyers in all segments of the legal market, from large firms to in-house counsel to state government appointments.

Moreover, membership and meaningful participation in the state bar and specialty bars provides an opportunity to cultivate new personal, as well as professional relationships, in addition to those formed during law school. For those attorneys working in a private or corporate legal setting, such relationships may translate into a much-coveted book of business; those lawyers practicing in furtherance of the public interest can also use contacts in connection with community outreach initiatives. Involvement with bar associations may also help raise a firm's or nonprofit's profile and presence in racial, ethnic and religious enclaves. And that means better results.

Further, a demonstrated record of noteworthy contributions to a bar association, the legal profession and surrounding community may translate into a leadership position. It is interesting to note that those roles help young professionals leverage 'social proof' in furtherance of career advancement.

In a recent blog post for the *Harvard Business Review*, strategy consultant and author Dorie Clark elaborated on this concept, as well as the professional significance of eventually assuming a leadership position within an organization:

Basically, it means that people look to

others around them to judge the value of something. (If a book has 1,000 five-star Amazon reviews, it must be good.) So how can you leverage this heuristic to help your career? If you're going to bother getting involved with a professional organization, you should make it a point to take a leadership role, because the social proof of being seen as a leader will have exponential benefits.<sup>12</sup>

In fact, after serving at the helm of their respective associations, many specialty bar leaders have gone on to increased involvement in the New Jersey State Bar Association and the American Bar Association, not to mention assuming positions of public authority and decision-making as elected officials and judges.

As Clark maintains in her post:

The visibility naturally accrues to you, and even though you don't seek it out, people come to you for interviews and advice. Your visibility grows and your brand grows.<sup>13</sup>

## Conclusion

Returning to Grant's thesis and its relationship with the practice (and business) of law, the new paradigm suggests building your legal career is achieved by advancing the interests of others while concurrently enhancing the status of the entire legal profession. The stated goal of the state's bar associations is to advance (and protect) the interests of all their members (and non-members). Bar membership, and eventually (in the instance of extraordinary service), leadership, provides invaluable opportunities to build a professional network and leverage evidence of solid career potential.

In other words, it's a win-win situation, an arguably rare occurrence in the arduous practice of law. 🙏

## Endnotes

1. See Best Sellers, *The New York Times*, May 12, 2013, [www.nytimes.com/best-sellers-books/combined-print-nonfiction/list.html](http://www.nytimes.com/best-sellers-books/combined-print-nonfiction/list.html).
2. See Givers vs. Takers: The Surprising Truth about Who Gets Ahead, Knowledge@Wharton, April 10, 2013, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=3224>.
3. Adam Grant, *Give or Take: A Revolutionary Approach to Success* (2013).
4. *Id.*
5. *Id.*
6. *Id.*
7. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure* (2005). Faculty Scholarship Series, Paper 75, [http://digitalcommons.law.yale.edu/fss\\_papers/759](http://digitalcommons.law.yale.edu/fss_papers/759).
8. See Barbara Kellerman and Deborah L. Rhode, *Women and Leadership: The State of Play and Strategies for Change*, Ed. (2007).
9. See *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994).
10. See *Id.*
11. See *Women and Leadership: The State of Play and Strategies for Change*, Ed., Barbara Kellerman and Deborah L. Rhode (2007).
12. See Dorie Clark, How to Get Others to See Your Potential, *Harvard Business Review*, May 16, 2013, [http://blogs.hbr.org/cs/2013/05/how\\_to\\_get\\_others\\_to\\_see\\_your\\_potential.html](http://blogs.hbr.org/cs/2013/05/how_to_get_others_to_see_your_potential.html).
13. See *Id.*

**Engy Abdelkader** serves as the U.S. representative to the Advisory Panel of Experts on Freedom of Religion or Belief with the Organization for Security and Cooperation in Europe. She presently serves as chair of the American Bar Association's Committee on National Security and Civil Liberties and was a co-founder and first president of the New Jersey Muslim Lawyers Association.

She has also been appointed to serve on the New Jersey Supreme Court Board on Continuing Legal Education, New Jersey Supreme Court Committee on Minority Concerns and the New Jersey State Bar Foundation's Respect Editorial Board.

## Commentary

# Seeking Greater Diversity in New Jersey's Bench and Bar

by Jhanice V. Domingo

This commentary focuses on the importance and benefits of diversity in the legal profession and why all attorneys should not only be supportive of diversity initiatives, but also proactively work together to advance greater diversity in New Jersey's bench and bar.

Diversity in the legal profession is a pressing issue that requires our collective attention. The American Bar Association Presidential Initiative Commission on Diversity articulated four rationales regarding the importance of creating (and retaining) greater diversity in the legal profession:

- **The democracy rationale:** Lawyers and judges have a unique responsibility for sustaining a political system with broad participation by all its citizens. A diverse bar and bench create greater trust in the mechanisms of government and the rule of law.
- **The business rationale:** Business entities are rapidly responding to the needs of global customers, suppliers, and competitors by creating workforces from many different backgrounds, perspectives, skill sets, and tastes. Ever more frequently, clients expect and sometimes demand lawyers who are culturally and linguistically proficient.
- **The leadership rationale:** Individuals with law degrees often possess the communication and interpersonal skills and the social networks to rise into civic leadership positions, both in and out of politics. Justice Sandra Day O'Connor recognized this when she noted in *Grutter v. Bollinger* that law schools serve as the training ground for such leadership and therefore access to the profession must be broadly inclusive.
- **The demographic rationale:** Our country is becoming diverse along many dimensions and we expect that the profile of LGBT [lesbian, gay, bisexual and transgender] lawyers and lawyers with disabilities will increase more

rapidly. With respect to the nation's racial/ethnic populations, the Census Bureau projects that by 2042 the United States will be a "majority minority" country.<sup>1</sup>

We attorneys play a critical role in developing legislation that affects and shapes the debate on politics, economics and society. Attorneys, naturally, play a significant role in addressing complex issues of equality, fairness and justice, among other things. More importantly, all attorneys—regardless of race, color, or ethnicity—have a professional obligation and civic duty to ensure the legal issues important to all groups of people are adequately addressed both in the legal community and the public at-large.

Proponents of diversity recognize that in order to truly administer justice and advocate for litigants in a multicultural society, the representation of all backgrounds, ethnicities and cultures in the bench and bar is mandatory. "[A] long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."<sup>2</sup> A diverse bench and bar will only further strengthen the interests of a diverse society.

### Diversity Initiatives in New Jersey

According to the 2010 census, New Jersey's population consists approximately of 8.8 percent Asian Pacific Americans, 14.6 percent Blacks and 18.1 percent Hispanics/Latinos. New Jersey, already a highly diverse state, will soon join Hawaii, New Mexico, California and Texas, to become the next majority-minority state in the country. Yet, New Jersey's bench and bar do not fully reflect the vibrant constituencies of our state.

On Dec. 10, 2012, New Jersey Governor Chris Christie nominated Monmouth County Superior Court Judge David F. Bauman to a seat on New Jersey's Supreme Court. If confirmed, Judge Bauman would be the first Supreme Court Justice of Asian Pacific American descent in the history of New Jersey.

That nomination, unfortunately, has languished. In the history of New Jersey, there have only been two Black and one Hispanic/Latino justices of the New Jersey Supreme Court, and no Asian Pacific American has ever served on our state's highest court. This under-representation of minorities is prevalent not only in our state's Supreme Court. While there is a critical need to advance diversity in different sectors of our country's legal profession, it is especially lacking in the courts and law firms of New Jersey, where Asian Pacific Americans, Blacks, and Hispanics/Latinos collectively represent 41.5 percent of the population.

The American Bar Association Presidential Initiative Commission on Diversity recognized that a diverse bench is important because it instills an invaluable sense of legitimacy and credibility for the Judiciary in the eyes of the community it serves. A diverse bench ensures the Judiciary reflects the diverse communities over which it presides. Democracy demands a government by the people, for the people and *of* the people. New Jersey's Judiciary, in order to properly administer justice, must reflect New Jersey's entire constituency. Jurists shape public policies that impact the entirety of New Jersey's population, and it is essential that jurists have an understanding and appreciation of the practical consequences of their decisions and the far-ranging effect of their rulings on our multicultural society as a whole.

In her opening statement to the Senate Judiciary Committee during her confirmation hearing, the first Hispanic U.S. Supreme Court Justice, Sonia Sotomayor, aptly stated "the process of judging is enhanced when the arguments and concerns of the parties to the litigation are understood and acknowledged."

Diversity in law firms is also critical. The business rationale for greater diversity, as described by the American Bar Association Presidential Initiative Commission on Diversity, requires law firms

to respond to the needs of diverse clients, which can be achieved by creating a legal workforce made up of attorneys from many different backgrounds. From a pragmatic business vantage point, globalization demands the inclusion of attorneys of all races, colors and ethnicities in the legal workforce. Employing a diverse group of attorneys allows a law firm to compete for and provide full service to its diverse clients, resulting in greater access for all to the system of justice (and enhanced financial productivity for law firms, always an important consideration).

A diverse bar achieves a balance in the legal workforce by promoting reflection and dialogue about different perspectives and life experiences, all of which promotes understanding of client needs and shapes public policy. As attorneys, we are trained to look at all sides of an issue and all possible arguments and defenses in every case, because by doing so we can more effectively advocate for our clients. Indeed, a diverse bar provides the necessary exchange of different opinions, perspectives, ideas, and experiences. 'Business as usual' should mean efforts to make diversity a priority in recruitment and advancement policies (some even having diversity committees within law firms). Despite good stated intentions, there is still much more work that needs to be done.

### **Opportunities Through the NJSBA and Specialty Bar Associations**

The New Jersey State Bar Association (NJSBA) and New Jersey's specialty bar associations, in particular, recognize—and indeed all communities should recognize—the critical need for and many benefits of diversity in the legal profession. One of the ways attorneys can work toward greater diversity in New Jersey's legal profession is by becoming actively involved in the NJSBA and various specialty bar associations of New Jersey.

One of the NJSBA's missions is to fos-

ter an inclusive and diverse bar association through its programs and services. Through its Diversity Committee, the NJSBA works on various diversity initiatives alongside New Jersey's specialty bar associations, including, among others, the Asian Pacific American Lawyers Association of New Jersey (APALA-NJ), the Hispanic Bar Association of New Jersey (HBA-NJ), and the Garden State Bar Association (GSBA).

The NJSBA, APALA-NJ, HBA-NJ and GSBA, along with several other specialty bar associations, have a longstanding history of working together to support the advancement of minorities in the legal profession, and remain fully committed to continuing their joint efforts. This past April, the NJSBA, along with New Jersey's specialty bar associations, co-sponsored a seminar titled "Nuts & Bolts of the Appointment Process," which provided a detailed explanation of the appointment process for the New Jersey Judiciary, state boards, commissions and authorities. The goal of the seminar was to expand attorneys' understanding and appreciation of the complex nature of the legal and political aspects of judicial and prosecutorial appointments and other positions in state and federal government. The seminar addressed statutory requirements for such positions and provided practical information regarding the process. The panel included members of the Governor's Appointments Office, as well as attorneys and other individuals who are knowledgeable about the appointment process.

The NJSBA, APALA-NJ, HBA-NJ and GSBA also each have a Judicial and Prosecutorial Appointments Committee (JPAC) tasked with facilitating the appointment of qualified candidates to the Judiciary and other appointed positions in state and federal government. For many years, the specialty bar associations' JPACs have worked closely with New Jersey's elected officials to identify highly qualified minority candidates.

Opportunities for leadership are also abundant within the NJSBA and New Jersey's specialty bar associations. Attorneys are leaders by nature, and active involvement in bar associations provides a platform for us to be effective leaders in the legal profession and in our community. As attorneys, we have a professional responsibility to serve our clients well, and we also have an obligation to serve our community. Our oath is to support the Constitution of the United States and the New Jersey Constitution. We are the protectors of everyone's civil liberties.

### The Challenge for Attorneys

Long work hours, heavy caseloads, considerable client expectations, demanding work responsibilities, personal and family commitments—these are only some of the things attorneys of any background must juggle daily. With the pressure of trying to balance professional and personal responsibilities, who has time for anything else? Attorneys often find there are just not enough hours in the day to get our work done, let alone volunteer our time to other endeavors. But as challenging as it is to balance work and family, active involvement in our legal community and the public at large is of paramount importance and key to our success as a diverse profession. As attorneys in a diverse state such as New Jersey, we not only have a special opportunity but also the responsibility to lead and support diversity initiatives.

In addition to providing opportunities for attorneys to help achieve greater diversity in New Jersey's bench and bar, there are many other benefits to active involvement in the NJSBA and specialty bar associations.

To paraphrase an old adage, "No person is an island." This is especially true in the legal profession. Attorneys need to take charge of their career from day one, if they want to succeed and achieve their goals. In order to thrive as an attorney, it

is critical to have a network of mentors who can provide guidance and wisdom, and peers with whom to share experiences and ideas. Mentors should be of diverse backgrounds, coming from different segments of the attorney population—former and present judges, partners and senior associates at other firms, partners and senior associates in your office, etc. For minority attorneys, it is especially important to have a base of mentors who can share the benefit of their experiences and wisdom when handling issues unique and personal to minority attorneys. Such mentors can serve to assist in avoiding the potential landmines that are unique to minority attorneys.

Active membership in the NJSBA and New Jersey's specialty bar associations provides the opportunity to make connections and develop important relationships that are targeted to help launch an attorney's career. Ask any successful attorney—he or she did not get to the next level in his or her legal career without the help of a mentor or the support of his or her peers. The NJSBA and New Jersey's specialty bar associations have several experienced and diverse members, who are ready to serve the interests of nurturing the careers of attorneys. It hardly needs to be said that a mentor for a minority attorney need not also be a member of a minority community. After all, we are all in this together!

For those of us in private practice, building a client base from which to derive business is essential. Our book of business impacts our livelihood. Bar associations can be a fruitful referral source for business. Our unique backgrounds serve us well in developing business in our respective communities, too. Targeted marketing efforts—done personally and through trusted emissaries—go a long way toward developing market traction and success. Wins are important in litigation and getting to yes-yes in transactional negotiations are too when it comes to developing a leading reputa-

tion of service and excellence.

It is also important for attorneys to hone our craft. Bar associations provide valuable educational resources, such as continuing legal education seminars that help us sharpen our area of practice. The law is ever changing, and it is vital that we continue to educate ourselves, build our knowledge and sharpen our skills.

### Conclusion

For minority attorneys (and indeed for all attorneys) the message is clear: We achieve the best for our clients, communities, families and ourselves when we promote and participate in bringing diverse and multicultural persons and talents to the fore, using the variety of sources and experiences to forge innovative solutions to the problems facing our society. Our differences should not divide us, but rather unite us and make us a better legal community and society. We all need to do our part. A lot of good work has been done, and while a lot of work remains to be done, the future remains bright. ☺

### Endnotes

1. Diversity in the Legal Profession: The Next Steps, Report and Recommendations, American Bar Association Presidential Initiative Commission on Diversity, April 2010.
2. *R vs. Sussex Justices, Ex Parte McCarthy*, ([1924] 1 KB 256, [1923] All ER Rep 233).

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# Creating a Virtual Law Firm to Meet the Needs of Today's Lawyer

by Victoria A. Mercer

*"[I]n today's world, I do not think it is effective or productive to force your employees one way or another."*<sup>1</sup>

SIR RICHARD BRANSON  
FOUNDER AND CHAIR, VIRGIN GROUP

The above quote is from an article by the serial entrepreneur Richard Branson in response to a recent debate on telecommuting sparked by Yahoo! CEO Marissa Mayer.<sup>2</sup> Branson further proclaims that "offices will be one day a thing of the past."<sup>3</sup> While it is unlikely that Branson's prediction will ever extend to include the entire legal industry, the decades-long debate on working from home and 'elawyering'<sup>4</sup> has turned a corner in New Jersey. As of Feb. 1, 2013, New Jersey practitioners are no longer required to have a physical office location under New Jersey Court Rule 1:21-1, in New Jersey or elsewhere, as long as they arrange their practice so they are accessible to their clients and the court system. Although this is clearly a victory for solo practitioners, there are many more attorneys—particularly those who are tech-savvy—who stand to benefit from this change.

This article will discuss New Jersey Court Rule 1:21-1(a) (also known as the *bona fide* office rule), the limitations and complications caused by requiring a *bona fide* office, and the current language of Rule 1:21-1. This article will also share some of the technologies available to attorneys to assist them in complying with the amended Rule 1:21-1, and provide suggestions on how to remain part of the legal community when working outside the office.

## What is a *Bona Fide* Office?

The *bona fide* office rule was perhaps one of the most significant regulations on law practice management before it was pared down earlier this year. A number of factors (the recession, scarce employment opportunities, broadband Internet) eventually forced its contraction, but more importantly, it sig-

nifies a change of attitude by the New Jersey bar toward non-traditional work environments. Not surprisingly, such a significant change in the rules has been met with mixed reviews, with one side applauding the New Jersey Supreme Court for recognizing the impact and breadth of secure and reliable technology on the practice of law, and the other questioning the change as an affront to the brick-and-mortar approach that has long been associated with providing high-quality and reliable legal services.

Prior to the amendment of Rule 1:21-1(a), in order to practice within the state lawyers were required to maintain a *bona fide* office, which was defined as:

a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time...a *bona fide* office may be located in this or any other state, territory of the United States, Puerto Rico, or the District of Columbia.

The rule's prior mandate of an "attorney or a responsible person acting on the attorney's behalf" that "can be reached in person and by telephone during normal business hours" had an especially disparate impact on solo practitioners, smaller firms, and those who did not practice full time. The number of affected individuals was substantial. In 2011, 36,647 attorneys indicated they were engaged in the private practice of New Jersey law, of which 33 percent (10,645) practiced in sole proprietorships. Of the 36,080 who indicated the size of their law firm, 9.9 percent (3,574) worked in two-person firms and 14.3 percent (5,166) belonged to firms of three to five attorneys.<sup>5</sup> Also, of the 36,647 private-practice attorneys, 20.2 percent practiced part-time and 16.2 percent engaged in practice occasionally (defined as less than five per-

cent of their time).<sup>6</sup> In light of these numbers, nearly 20,000 attorneys practicing within the state of New Jersey stand to benefit from a rule that permits nontraditional work environments.

Another complication caused by the prior version of Rule 1:21-1 was that attorneys working from home were required, as a result of Attorney Advertising Guideline 1, to include their home address on all attorney letterhead, websites and other advertisements.<sup>7</sup> For those attorneys operating home offices, particularly for family law and criminal law practices, that kind of exposure was worrisome.

### **Virtual Offices and Home Offices as *Bona Fide* Offices**

With many attorneys seeing the potential benefits of incorporating cloud-computing services, smartphones, tablets, and other emerging services into their practice, an inquiry was sent to the Advisory Committee on Professional Ethics (ACPE) on whether such tools could comply with the *bona fide* office rule. Surprising to those hoping the ACPE would embrace these technological advances, the March 2010 joint opinion of the ACPE and Committee on Attorney Advertising (CAA) concluded a virtual office *did not* qualify as a *bona fide* office for the practice of law under Rule 1:21-1(a).<sup>8</sup>

Relying heavily on a 1994 opinion of the CAA, the committees took an extremely limited view of a ‘virtual office’ as a “type of time-share arrangement whereby one leases the right to reserve space in an office building on an hourly or daily basis.”<sup>9</sup> The committees held that due to the nature of a virtual office, as they defined it, the attorney is not present during normal business hours but only when he or she has reserved a space at an office building. Furthermore, the receptionist in such an arrangement would not qualify as a “responsible person acting on the attor-

ney’s behalf’ who can ‘answer questions posed by the courts, clients or adversaries,’” as the receptionist “would not be privy to legal matters being handled by the attorney.”<sup>10</sup> The committees also expressed a concern that prospective clients attempting to reach an attorney or law firm may assume the receptionist is an employee of the firm and disclose confidential and sensitive information.<sup>11</sup>

The joint opinion did clarify that attorneys may list satellite and virtual offices on letterhead, websites, and other advertisements, provided the listing of these office locations is accurate, not misleading, and state “by appointment only.”<sup>12</sup>

The committees went on to state there was no prohibition on the use of a home as a *bona fide* office if the home office satisfied all other requirements, including client confidentiality.<sup>13</sup> However, the joint opinion warned an attorney who is regularly working outside of his or her home office during normal business hours must have a responsible person present at the *bona fide* office.<sup>14</sup>

### **Accessible and Accountable**

Following the release of the ACPE/CAA March 2010 joint opinion, the New Jersey legal community took action to seek a change to Rule 1:21-1.<sup>15</sup> On Jan. 15, 2013, the New Jersey Supreme Court adopted amendments to Rule 1:21-1 put forth in a 2010-2012 report of the Supreme Court Professional Responsibility Rules Committee (PRRC).<sup>16</sup> The new rule became effective Feb. 1, 2013.

Under the amended Rule 1:21-1, the Court abandoned the definition of a *bona fide* office and shifted focus from the location of the *bona fide* office to the responsibility of the attorneys and law firms to ensure attorneys were accessible and accountable in their practices. The new Rule 1:21-1(a)(1) provides:

an attorney need not maintain a fixed

physical location, but must structure his or her practice in such a manner as to assure, as set forth in RPC 1.4, prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice, provided that an attorney must designate one or more fixed physical locations where client files and the attorney’s business and financial records may be inspected on short notice by duly authority regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served on the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto.

These changes removed the tether between attorneys and their offices and replaced it with cellular towers and broadband Internet connections. The impact of this amended version of Rule 1:21-1(a)(1) is significant. As long as the standards of RPC 1.4 are met, and attorneys and law firms maintain a physical location where client files can be kept and where process and other mail can be received, attorneys can structure their law practice in a manner of their choosing, which now includes a virtual office.<sup>17</sup>

The flexibility of the amended Rule 1:21-1(a)(1) also goes toward making attorneys and law firms more productive and effective. Technology often promises increased productivity—whether it is the ability to edit files on a tablet while waiting at the courthouse or track litigation progress for several clients. The ability to work outside of an office translates to getting more work done, which makes for a more effective legal practice. Any lawyer, not just the solo practitioner, will benefit under the amended Rule 1:21-1 because it allows each lawyer to choose the environment best suited to his or her capacity and preferences. For an attor-

ney who is more productive earlier in the day, instead of wasting precious morning hours commuting to an office, he or she can simply wake up and start working at home. For those who contend work doesn't happen at work because of the distractions of coffee breaks, meetings and even coworkers, simply being able to work at home, rent an office down the street, or even head to the local library can make all the difference.<sup>18</sup> The flexibility afforded under amended Rule 1:21-1 creates a win-win for law firms and attorneys.

One of the potential concerns of no fixed physical location is that an attorney, or even his or her law firm, may miss important notices. The Court has addressed this by amending Rule 1:21-1(a)(2) to require an attorney who "does not maintain a fixed physical location for the practice of law in this State...[to] designate the Clerk of the Supreme Court as agent upon whom service of process may be made...in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court."

With the appreciation of the widespread effect of the amended Rule 1:21-1(a) on the other rules, the Court continues to update the rules to better align them with this change. For example, the Court requested the public submit its comments to the proposed changes to the Attorney Advertising Guidelines through April 30, 2013. In its proposed form, Attorney Advertising Guideline 1 provides:

In any advertisement by an attorney or law firm, the advertisement shall include contact information for the attorney or law firm in the form of a *bona fide* street address, mailing address, telephone number, or email address.<sup>19</sup>

## The Technology

Technology is changing the way people work, and there is an assortment of

tools on the market to ensure "prompt and reliable communication."<sup>20</sup> While there is currently available technology that may assist attorneys and law firms in meeting this communication standard, these products and services have not yet been properly evaluated by any agency or body charged with regulating the legal profession in New Jersey. Nonetheless, the technology exists and should be evaluated in the near future.

Document-sharing services are likely to be evaluated for their use in the legal profession. There is a highly competitive market for document-sharing services, many of which will keep files neatly organized, searchable, accessible from multiple devices, and backed by a secure server (or two). One of the biggest companies in this market is DropBox, which offers free and premium-paid services that allow online file sharing with authorized individuals, with local storage on a laptop, desktop and mobile device.<sup>21</sup> Since files are backed up on the cloud, they are accessible to anyone with the right credentials from any device. A particularly helpful feature of DropBox is the automatic sync. Files stored on a local DropBox folder, usually located on your desktop, are automatically synced to Dropbox on the Internet and on other shared devices. That way, even being away from an office will not prevent access to important documents. DropBox is ideal for sharing files within the firm, but there is an option to share just one file or folder, with a 'get link' that will open the document within a web browser while not identifying the account name or holder.

A top priority for any law firm, whether everyone is working out of one physical location or through a virtual office, is staying informed on each other's progress. Trello is a free project management application available online.<sup>22</sup> Trello users are given a 'board,' which is essentially an online dry-erase board for a project. Each board has a

series of columns, and each column contains a list of tasks required to complete a project. Each task is on an electronic sticky note (a card). Cards can be passed through lists as each task goes through a stage of production. For example, if an attorney is preparing to file a trademark application (the project), the first task is to conduct a trademark search. The attorney would create a card in the "To Do" column that reads "conduct trademark search." When the attorney begins the trademark search, he or she can then drag that card to the "Doing" column. Then, when the attorney completes the trademark search, he or she can drag the card into the "Done" column and move onto the next task. As he or she is working, other attorneys who have access to the board can track the progress, and even make modifications to the board or send the attorney a message. In Trello, it is also possible to create checklists and add labels and due dates to cards.

There are also services available that are shaping the way attorneys meet face to face with clients. Rule 1:21-1(a)(4) requires attorneys to "be reasonably available for in-person consultations requested by clients at mutually convenient times and places." Although solo and small firm practitioners may elect to meet with clients in their home office, there are companies like The Regus Group that offer a variety of virtual office packages.<sup>23</sup> Businesses can lease private office space and conference rooms with support staff. Attorneys have been using Regus and other similar services for years in other states.<sup>24</sup>

## In-Person Collaboration

Yahoo's Marissa Mayer argued that people who were not working within the office were losing out on "collaborative community," and that "working at home is not working together." However, the office is not the only place, or even the best place, to collaborate with



peers. There are still plenty of opportunities to put in ‘face time’ with firm associates and other counsel. Scheduling a time to grab lunch, joining a bar association, or shadowing an attorney in court are places where any young attorney can learn from his or her more seasoned colleagues.

## Conclusion

The *bona fide* office rule has been on the New Jersey law books in some form or another for over 30 years. For the last 20 years, technology has drastically changed the way people are working, and the recovering economy has added its own restraints. Moreover, attorneys have the additional responsibility of ensuring their businesses operate in compliance with the various regulations. In this dynamically shifting environment, attorneys and law firms are faced with business models and technology not previously available, which promise to increase productivity and add value to clients. With the amended Rule 1:21-1, New Jersey practitioners now have greater assurance and additional guidance that embracing technology in a responsible manner does not jeopardize client services. Surely the virtual law office can co-exist with the more traditional law firm office, and today the legal industry needs both. ♪

## Endnotes

1. Sir Richard’s Blog, [www.virgin.com/richard-branson/one-day-offices-will-be-a-thing-of-the-past](http://www.virgin.com/richard-branson/one-day-offices-will-be-a-thing-of-the-past) (March 4, 2013).
2. In February of this year, Yahoo! CEO Marissa Mayer sent an internal memo that stated: “To become the absolute best place to work, communication and collaboration will be important, so we need to be working side-by-side. That is why it is critical that we are all present in our offices.” The memo goes on to say “speed and quality are often sacrificed when we work from home.” One Yahoo! employee commented to online tech news website All Things D, that the move is “outrageous and a morale killer.” Kara Swisher, “Physically Together”: Here’s the Internal Yahoo No-Work-From-Home Memo for Remote Workers and Maybe More, All Things D, Feb. 22, 2013, <http://allthingsd.com/20130222/physically-together-heres-the-internal-yahoo-no-work-from-home-memo-which-extends-beyond-remote-workers/>.
3. Sir Richard’s Blog, [www.virgin.com/richard-branson/one-day-offices-will-be-a-thing-of-the-past](http://www.virgin.com/richard-branson/one-day-offices-will-be-a-thing-of-the-past) (March 4, 2013).
4. E-lawyering is a form of legal practice that is dependent on the use of software as a service or SaaS, a form of cloud computing. Attorney-client communications occur through a secure online client portal accessed via a website.
5. Office of Attorney Ethics, State of the Attorney Disciplinary System Report, pp. 64-65 (2011).
6. Office of Attorney Ethics, State of the Attorney Disciplinary System Report, pp. 64 (2011).
7. “In any advertisement by an attorney or law firm, the advertisement shall include the bona fide street address of the attorney or law firm.” Attorney Advertising Guideline 1, effective Sept. 4, 1990.
8. ACPE Opinion 718 / CAA Opinion 41 (2010).
9. CAA Opinion 19 (1994).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. The New Jersey State Bar Association formed a subcommittee of its Solo and Small-Firm Section and Professional Responsibility and Unlawful Practice Committee to examine whether Rule 1:21-1(a) achieved its intended goals of assuring attorneys are accessible and accountable. The subcommittee unanimously concluded “a fixed, physical office location, regularly staffed during normal business hours was not the only reliable way to achieve the accessibility and responsiveness necessary to fulfill an attorney’s professional obligations.” Craig M. Aronow, David H. Dugan III, David B. Rubin, *The Bona Fide Office Rule: Will Virtual Office Be Allowed?*, *New Jersey Lawyer*, 2012 N.J. Law. 30 (2012).
16. Notice to the Bar: Supreme Court Adoption of Amendments to Rule 1:21-1(“Bona Fide Office”), [www.judiciary.state.nj.us/notices/2013/n130122b.pdf](http://www.judiciary.state.nj.us/notices/2013/n130122b.pdf).
17. The New Jersey Rule 1.4 of Professional Conduct requires that “(a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer; (b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; (c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; (d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer’s conduct.” NJ Rules of Prof’l Conduct R. 1.4. (1984).
18. Jason Fried: Why Work Doesn’t Happen at Work (TEDxMidWest 2010) (available at [www.ted.com/talks/jason\\_fried\\_why\\_work\\_doesn\\_t\\_happen\\_at\\_work.html](http://www.ted.com/talks/jason_fried_why_work_doesn_t_happen_at_work.html)).
19. Notice to the Bar, Supreme Court Committee on Attorney Advertis-

ing—Proposed Amendments to Attorney Advertising Guidelines 1 and 2, [www.judiciary.state.nj.us/notices/2013/n130318c.pdf](http://www.judiciary.state.nj.us/notices/2013/n130318c.pdf).

20. Rule 1:21-1(a)(3) describes “prompt and reliable communication” as being achieved “through maintenance of telephone service staffed by individuals with whom the attorney is in regular contact during normal business hours, through promptly returned voicemail or electronic mail service, or through any other means demonstrably likely to meet the standard enunciated in [Rule 1:21(a)(1)].”
21. [www.dropbox.com](http://www.dropbox.com).
22. <https://trello.com>.
23. [www.regus.com](http://www.regus.com).
24. A small sample of states that have used Regus services include: California, Louisiana, Minnesota, Illinois, Colorado and North Carolina. Posting of Regus to Slideshare, [www.slideshare.net/REGUSmedia/girgis-final](http://www.slideshare.net/REGUSmedia/girgis-final) (Nov. 28, 2012); Posting of Carl Falstrom to webCLE American Immigration Lawyers Association, [www.aialawebcle.org/resources/Resources%20for%2003-01-12%20Seminar.pdf](http://www.aialawebcle.org/resources/Resources%20for%2003-01-12%20Seminar.pdf) (March 1, 2012); Dan Heilman, *Keeping Up Appearances*, Minnesota Lawyer, Jan. 5, 2009, at B1, available at [www.hq.com/assets/en-us/Minnesota\\_Lawyer\\_Keeping\\_Up\\_Appearances\\_January2009.pdf](http://www.hq.com/assets/en-us/Minnesota_Lawyer_Keeping_Up_Appearances_January2009.pdf); Margaret Graham Tebo, *Virtual Offices in Real Space*, *ABA Journal Magazine*, Aug. 1, 2007, available at [www.abajournal.com/magazine/article/virtual\\_offices\\_in\\_real\\_space/](http://www.abajournal.com/magazine/article/virtual_offices_in_real_space/); Divorce Discourse, [http://divorcediscourse.com/2012/06/11/office-space-dealbreaker/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+divorcediscourse+%28Divorce+Discourse%29](http://divorcediscourse.com/2012/06/11/office-space-dealbreaker/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+divorcediscourse+%28Divorce+Discourse%29). For two examples of Regus’ direct pitches to attorneys and law firms, see Regus Blog, [\[tumblr.com/post/4041964483/law-and-new-order-regus-office\]\(http://tumblr.com/post/4041964483/law-and-new-order-regus-office\) and Terri Bell, \*The Virtual Law Office\*, ABA GPSOLO Magazine, Jun. 2007, available at \[www.americanbar.org/content/newsletter/publications/gp\\\_solo\\\_magazine\\\_home/gp\\\_solo\\\_magazine\\\_index/virtualoffice.html\]\(http://www.americanbar.org/content/newsletter/publications/gp\_solo\_magazine\_home/gp\_solo\_magazine\_index/virtualoffice.html\).](http://regusblog.</a></li></ol></div><div data-bbox=)

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# Paperless Manifesto

## A Primer on the Value of a Paperless Practice and Three Steps to Making It a Reality

by Joseph A. Bahgat

**N**o conversation about law practice technology can begin without first assuming a paperless practice. Why not? Because a paper-based practice is the antithesis of law practice technology. Advances in law practice technology are designed to increase access to data, decrease the cost of accessing it, and at the same time get it to us faster. Practitioners running a paper-based law practice cannot even avail themselves of most of the technology that's available to the legal community today. Much of that technology revolves around *the cloud*, which, for all intents and purposes has made traditional filing cabinets obsolete. Even for those who are cloud-averse, however, buying a 64 GB USB thumb drive for as little as \$40 allows for the storage of data equivalent to 250 file boxes (as scanned, searchable PDF files)<sup>1</sup> in one's pocket.

The prophecy that there would one day be paperless offices is actually not a new one. In fact, many sources credit the origination of the concept to advertising campaigns by the IBM Corporation, and a 1975 *Business Week* article, "The Office of the Future."<sup>2</sup> Perhaps because of significant advances in photocopier technology, paperless law offices finally started to become prevalent roughly 30 years later.

### The Beginning of the Paperless Law Firm Era—Getting New Jersey Up to Speed

Since 2009, Minnesota business lawyer Sam Glover, who co-founded the popular website *Lawyerist*, has been writing about his paperless law practice, which he claims to have established three years earlier.<sup>3</sup> The San Diego law firm Sullivan Hill Lewin Rez & Engel also claims to have embarked upon establishing a paperless law firm in 2006. Colorado attorney David Masters was considered a paperless pioneer prior to the release of his 2008 book *Lawyer's Guide to Adobe*

*Acrobat*.<sup>4</sup> And since at least 2008, the paperless law practice has been a staple topic at ABA Techshow, which is revered as the "world's premier legal technology conference."<sup>5</sup> Many states have now made electronic filing mandatory, and most, if not all federal courts require electronic filing. So it shouldn't come as a surprise that Orange County, California, litigator and tech author David Sparks's book *Paperless: A MacSparky Field Guide™* was one of the bestselling books of 2012 in the iTunes bookstore.<sup>6</sup>

Despite those trends, however, New Jersey appears to be lagging behind. Current court rules require attorneys to file virtually everything (except special civil part pleadings and notices of appeal) the old-fashioned way—*i.e.*, printed, in duplicate, and then either mailed, hand carried, or couriered to the clerk's office.<sup>7</sup> Perhaps that's one reason why many New Jersey attorneys don't even list an email address on their letterhead or business cards. There are obvious reasons why judges might not want to release their email addresses to the general public, but in New Jersey it's nearly impossible to find an email address for a judge's law clerk or staff, not to mention the court clerk's office or the assignment office. As a result, attorneys are often forced to use archaic methods to accomplish something as simple as an adjournment request.

But even though attorneys are often forced to use less-desirable or less-efficient means of communication when dealing directly with the Judiciary, that doesn't mean practitioners should ignore commonsense when it comes to the way they communicate with one another. Just as the *bona fide* office rule eventually went by the wayside, the Rules Governing the Courts of New Jersey will eventually catch up with the Federal Rules of Civil Procedure, and the Judiciary's communication practices will eventually catch up with those of the rest of the industrialized world. Even if that doesn't happen next week or

next month, it's no excuse for attorneys to be ignorant of the processes practitioners in other regions have been using for years to increase the quality, efficiency, and profitability of practicing law.

Implementing a paperless practice is the first step in that direction, and for reasons that will become more evident as this article progresses, going paperless won't just improve business—it can also improve quality of life. Thus, the purpose of this article is to examine what is already known about implementing a paperless law practice, then apply it to the New Jersey Court Rules, and present it in a manner that's tailored to the New Jersey lawyer. The ultimate (and perhaps ambitious) goal of this article is to provide all New Jersey attorneys with enough technological know-how to be able to implement some basic paperless concepts into their practices right away, to the extent they are comfortable, and perhaps more importantly to the extent these concepts can improve efficiency, client service, and maybe even the bottom line.

Rules 1:4 and 1:5 notwithstanding, there are no rules that require attorneys to retain a physical copy of the papers filed. Not surprisingly, however, many attorneys do. A Dec. 2012 FindLaw study revealed that 28 percent of all law firms nationwide are either paperless now, or have plans to be paperless within five years.<sup>8</sup>

So what about the other 72 percent? The copies of pleadings get filed in folders alongside copies of correspondence sent to and from opposing counsel, copies of expert reports, deposition transcripts, client invoices, and any other document that's in any way related to that matter, up to and including electronic cases and statutes printed from Westlaw or Fastcase, while doing online research for the case. In the unlikely event the case goes to trial, the lawyer drags all of those paper files to court, often requiring the assistance of

one or more able-bodied associates or paralegals, who are being charged out to the client at an hourly rate or being paid by the law firm, with their salaries absorbed as overhead. And even if the case settles, all of those paper files will indefinitely continue to occupy space in the attorney's office—at up to \$100 per square foot in the New Jersey market—usually until the attorney moves, or hires somebody to store files offsite.

### **Why Go Paperless Right Now?**

Attorney David Sparks recalls his paperless epiphany came when he was doing discovery in a case in which he had 60 boxes of documents that belonged to his client, and the cost of duplicating those documents for opposing counsel came to just over \$17,000, which, at the time would have paid for “a pretty nice car.”<sup>9</sup>

Paperless law offices benefit everyone, from the senior partner to the paralegal, the junior law clerk, and even the client, because they bring increased staff productivity and efficiency; decreased costs of materials, storage, waste, and even postage; and ease of sharing data and communications between team members and clients. In addition to these economic benefits, a paperless law office is better for the environment, and is better positioned to survive both manmade and natural disasters.

On April 15, 2013, the entire business district surrounding the Boston Marathon finishing line was evacuated after alleged terrorists detonated man-made pressure-cooker bombs on Boylston Street. Law firms, state and federal buildings, and courthouses were among those evacuated. On that following Friday, a citywide manhunt shut down nearly all businesses in Boston.<sup>10</sup> Courthouses were, of course, closed as well.<sup>11</sup>

Regardless of whether or not you acknowledge global warming, the disruption caused when Superstorm Sandy struck New Jersey on Oct. 29, 2012, is

undeniable. Many of New Jersey's county courthouses were closed for up to two weeks. In some areas of New Jersey, homes and businesses were without electricity for just as long, or even longer.

Roads were closed, and mass transit was crippled, especially the PATH trains, and NJ Transit service to and from Manhattan. To make matters worse, the gasoline shortage kept people from driving anywhere that wasn't absolutely essential. So, even if Sandy didn't physically touch and concern a law office, there was a good chance there was limited access to the files and records kept there. But for those lawyers who run paperless law practices, with adequate backup procedures in place, the only thing that stood between them and their mission-critical data was electricity. Even those without electricity or generators could still access their data using laptops, iPads, smartphones, or other wireless computing devices.

For example, the Matawan, New Jersey, office of immigration firm Fragomen, Del Rey, Bernsen and Loewy, LLP was closed for over a week, but during the closure, Fragomen attorneys and staff were able to continue operations working remotely or from their homes.<sup>12</sup> As of the date of this writing, however, because of flooding caused by Sandy, Fragomen's New York City office at 7 Hanover Square has still not reopened.

But if the courts were closed for two weeks, how important was it to have access to key files anyway? Well, although New Jersey state courts were closed during the aftermath of Superstorm Sandy, the federal courts were not out of service for nearly as long; in fact, the federal CM/ECF filing system never went down, and for attorneys who had cases pending in other states or federal districts, for example west of Pennsylvania, it was business as usual, and they were expected to meet all existing and ongoing filing deadlines. A United

States district judge for the Southern District of Ohio denied a New Jersey attorney's *first* request to extend discovery in a case where the attorney had difficulty scheduling the deposition of a key witness who also happened to live in an area of Pennsylvania that was ravaged by Sandy.

### Three Steps to a Paperless Workflow

There are three steps to a paperless workflow, and three essential tools needed to make it happen. They are, of course, interrelated.

1. The first step for the paperless workflow is *capture*, to convert the data contained in tangible paper documents into digital media. The tool used to capture is called a document scanner.
2. Step two is *process*. After the data is converted, it has to be processed, organized, and filed so it can be located when needed. In many ways, processing is more important than capturing, because of the amount of data most people already receive digitally (*e.g.*, documents received by email, electronic fax, or on a CD or portable disc drive). Storing digital documents on a computer or server does not automatically guarantee a practitioner will be able to find relevant documents when they are needed. In order to make those documents searchable, a process known as optical character recognition (OCR), which requires special software, must be performed. Although there are a few software options on the market, Adobe Acrobat is the only serious application lawyers should consider using.
3. The third step and the third tool are almost one and the same, because after documents have been captured and processed, the only thing left to do is to use them. This is the reward—when an attorney schleps to

a deposition in a document-intensive trade secrets misappropriation case worth \$1 million wielding nothing but a trusty iPad. (No, the iPad isn't the third tool.) The third and final tool is a paperless *plan*. A plan is nothing more than a set of instructions, directives, or standard operating procedures, which dictate how the attorney is going to implement his or her paperless office. Perhaps it's counterintuitive to associate the plan with the third step of the process, but for many reasons it's difficult to formulate a plan before embarking on a paperless workflow.

### The Scanner

There are hundreds of scanners on the market, but there are only two basic types of desktop scanners: flatbed scanners and multi-feed or document scanners. The former are best used for scanning artwork, and odd-size, oversize, or fragile items. Flatbed scanners will scan one thing at a time. This is *not* what an attorney wants for the office. Scanning capabilities may already be integrated with the office's multi-function laser printer, but although it is possible to get by using a multi-function scanner in a pinch, or for a small job, it's not something to rely on to power a paperless office. What lawyers (and their staff) need to power a paperless law office is a dedicated document scanner.

Most of the top printer manufacturers—Canon, Epson, Brother—also make dedicated document scanners. Each has its own pros and cons, but they are all capable machines. There is one scanner manufacturer, however, that stands out, and has earned its place as the premier machine in its class: Fujitsu ScanSnap. Anyone who reads legal technology publications or browses the Solosez archives for scanner recommendations will see the Fujitsu name come up time and time again. The latest iteration of the ScanSnap, the ix500, works on both

Macs and PCs; scans in duplex mode at up to 25 pages per minute (*i.e.*, it scans both sides of the page after just one pass), color or black and white; scans paper up to 34 inches long; and the document feeder tray holds up to 50 pages. Oh, and by the way, this latest ScanSnap iteration is wireless too.<sup>13</sup>

Another enormous benefit of the Fujitsu ScanSnap is that it performs optical character recognition by default. This means every document it scans will be saved as searchable text. This is a huge time saver. It also comes with its own software, which works on both Macs and PCs. The ScanSnap Manager software makes life easy because it lets the owner preset scanning preferences for different types of scanning jobs; the operator can specify the resolution of the scan, simplex or duplex scanning, select the save destination, and even turn off automatic OCR (power users sometimes like to turn off OCR because it speeds up the physical act of scanning even more, and the OCR process can be set to happen automatically, later, when the computer is not in use). After setting up the ScanSnap profile preferences, all it takes to scan a document is to place it in the feeder tray and press the blue button.

The ix500 retails at just under \$500, but can routinely be found on sale at Costco.com, Amazon.com, MacMall.com and other online stores at around \$425 (with free shipping, and sometimes without sales tax). Admittedly, \$400–500 seems like a lot to spend on a machine that only does one thing, but once ScanSnap is in use, it becomes indispensable.

### Adobe Acrobat

To understand the importance of Adobe Acrobat, it is necessary to know the history of PDF, or portable document format. Adobe Systems invented the portable document format in 1993, and for years it was proprietary to Adobe. In years since, however, Adobe

made use of the format available to other developers, which led to its increased popularity. PDF is now the standard for electronic document exchange maintained by the International Organization for Standardization (ISO).<sup>14</sup> Although there are other file formats capable of being used for digital documents (e.g., TIFF (tagged image file format)) PDF has emerged as the most versatile and universal file format.

The advantage to using PDF is that when documents, forms, graphics, and web pages are converted to PDF, they look onscreen just like they would if they were printed. Unlike printed documents, however, PDF documents can contain clickable links and buttons, form fields, and even audio and video.

Needless to say, PDF is a universal file format, but there's something else about it that makes it even more valuable to sharing and distributing legal documents: PDFs can't be altered or edited in the same way that word processing files can (e.g., .docx, .doc, .wpd).<sup>15</sup> So when emailing a PDF letter to opposing counsel, representing a third request for documents he or she claims to have already produced, the practitioner can rest assured there will be no trouble proving to the court compliance with the meet-and-confer requirement of filing a motion to compel discovery.

Naturally, Adobe Systems is the original developer of PDF software; its flagship application is Adobe Acrobat, now in its 11th version. With Acrobat it is possible to create PDFs; merge two or more PDFs into a single file; edit PDFs, including rearrange pages, correct text, annotate, and apply custom stamps and signatures; create and analyze forms; and protect/encrypt documents to prevent others from tampering with them. There are other makers of PDF software on the market, but when using any application other than Acrobat there is a risk documents sent may not be secure. For example, if legal forms are down-

loaded from [www.njcourtsonline.com](http://www.njcourtsonline.com) and filled in using software other than Adobe Acrobat, it's possible the forms will appear blank if the recipient views them using Adobe software. On the other hand, when completing forms using Acrobat, they will always appear exactly the way they did on the original computer display.

Do not confuse Adobe Acrobat with Adobe Reader (frequently known as Acrobat Reader). The difference between them is significant. Adobe Acrobat is professional software; it has all of the capabilities described above (and more). It does not come pre-installed on any computer. Adobe Reader is a free program that simply allows for *viewing* of PDF documents on any device. Reader will also allow form fields to be filled, provided the document already has form fields in it.<sup>16</sup> With Acrobat, by contrast, form fields can be created/inserted into a document. Full control over PDFs is available by purchasing Adobe Acrobat. The retail price of the most recent version of Adobe Acrobat Pro is \$449. Adobe Acrobat is also available bundled with the purchase of a new ScanSnap scanner, for around \$425. Since the scanner itself retails for \$495, this is essentially like getting either the scanner or the software for free.

### The Plan

Once the ScanSnap scanner is set up and Adobe Acrobat is installed, all that is needed to get started is a paperless plan. Initially, the plan just needs to identify how the paperless workflow will be implemented. Will everything that comes through the door be scanned? Will everything be scanned together or in large batches, or will documents be scanned one at a time? Each method has its advantages and disadvantages.

Perhaps the most important part of the plan is file-naming conventions. Without getting into a philosophical

file-naming discussion unto itself, there now seems to be a general consensus among paperless practitioners for naming documents in a law firm environment. The simplest way to name documents so they can be found quickly is to use this formula: date (in YYYYMMDD format) + document description. That's it. Any date separators desired can be used, or none at all, but it's important to name every document beginning with its year/month/day (if preferred, a two-digit year can be used instead). "Putting the date first guarantees your documents are date sorted no matter what platform they land on."<sup>17</sup> After the date, some lawyers use the client's name as the very first word to describe a file. The kind of document can also be used as the first descriptive term (e.g., motion, certification of \_\_\_\_\_, otsc or order, letter to \_\_\_\_\_, etc.).

After deciding what to name documents, it is time to decide what to do with the documents after they are scanned (more on document retention later). And finally, a paperless manifesto is not complete without a failsafe backup plan.

### Optional/Recommended Tools to Start a Paperless Office

Although not required, if and when it's decided to go paperless, consider investing in either an oversize computer display, or dual monitors, since "in a paperless practice, screen size is critical. Don't skimp on the screen real estate."<sup>18</sup> A decent shredder and a written data retention policy are also important.<sup>19</sup>

### Paperless Mantras

**Mantra No. 1: Paperless doesn't mean zero paper.**

*Disclaimer: What you can and cannot keep after scanning is a moving target subject to the whims and folly of places like the Internal Revenue Service (IRS), the courts, the government, and other people with*

scary amounts of authority.

– David Sparks<sup>20</sup>

Rule 1:21-6(c) requires all attorneys, partnerships, and professional corporations that practice law in New Jersey to maintain records of the following financial and client-related documents “for a period of seven years after the event that they record:”

- an appropriate ledger book, having at least one single page for each separate trust client, for all trust accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed;
- copies of all client retainer agreements;
- copies of all statements to clients showing the disbursement of funds to them or on their behalf;
- copies of all client invoices;
- copies of all records showing payments to attorneys, investigators, etc., for services rendered or performed;
- *originals* of all checkbooks with running balances and check stubs; bank statements; pre-numbered canceled checks and duplicate deposit slips, *except that, where the financial institution provides proper digital images or copies thereof to the attorney, then these digital images or copies shall be maintained;*
- copies of all records, showing monthly reconciliations of the cash balance derived from the cash receipts and cash disbursement journal totals, the checkbook balance, the bank statement balance, and the client trust ledger sheet balances;
- copies of those portions of each client’s case file reasonably necessary

for a complete understanding of the financial transactions pertaining thereto.<sup>21</sup>

Rule 1:21-6(c) is incorporated by reference in the Rules of Professional Conduct at RPC 1.15(d) (safekeeping property). The key provisions of Rule 1:21-6(c) were amended in 2004, to correspond with the federal Check Clearing for the 21st Century Act or Check 21 Act,<sup>22</sup> which allows banks to replace original paper checks with ‘substitute checks’ made from digital copies of the originals.<sup>23</sup> Other key provisions of Rule 1:21-6(c) require New Jersey attorneys to retain copies of key client agreements, and fee-related documents, all of which pave the way for paperless law practices. Rule 1:21 has undergone significant recent revisions, most notably with the amendment of Rule 1:21-1(a) (the *bona fide* office rule) in Jan. 2013.

For documents that should not be shredded, a good rule of thumb is to keep the originals of deeds and related documentation of property ownership, stock certificates, Social Security cards, passports, birth and death certificates, and anything that has a raised seal on it. The best place to store these items is in a fire safe.<sup>24</sup> Although the Internal Revenue Service provides some guidance to individuals on what documents they are required to keep, the rules are constantly evolving.<sup>25</sup> So before deciding what documents can be safely shredded after scanning, check the rules apropos to the local or specific practice area.

### **Mantra No. 2: Always Have a Backup Plan**

There’s a mantra held by all information technology (IT) industry professionals, which stands for the proposition that one should assume every hard drive will fail; it’s not a matter of if, but rather when. Hard drives have many electronic components, but they also have moving (spinning) parts. As a

result of continuous use, over time the mechanical components of hard drives tend to break down, and are susceptible to fail. As David Sparks points out, there’s a reason most manufacturers only put three-year warranties on hard drives.<sup>26</sup> Although solid-state drives (SSDs) have no moving parts, they are still susceptible to failure. SSDs, also referred to as flash storage, are what store data on iPads (and iPhones), and they are becoming standard OEM (original equipment manufacturer) in newer, high-end notebook computers.

But just because drives fail doesn’t mean they shouldn’t be used and relied on in a practice. Consider the alternative—paper files—which can also be wiped out in minutes with a puff of smoke. As technology improves, the cost of data storage is continually dropping, which cannot be said about the cost of physical file storage.<sup>27</sup> Because drives fail, have a backup plan.

At a minimum, a backup plan should follow the three–two–one methodology:<sup>28</sup>

- Always have (at least) three complete copies of data;
- Store two of those copies on separate systems (*i.e.*, on different computers or servers)
- Keep (at least) one up-to-date copy of data in an offsite location (*e.g.*, satellite office, cloud backup provider, etc.).

A complete copy usually means a clone, which is an identical carbon copy of the entire hard drive (or server). A clone is different from an ordinary backup insofar as it is a replacement—if a desktop computer self-combusts, a clone backup could be connected to any computer (*e.g.*, a brand new one) and be up and running in just a few minutes, as if nothing had happened. In other words, when working from a clone of data, apps don’t have to be reinstalled and preferences or folder structures

don't have to be recreated. There are apps that automate the cloning process, so it doesn't even have to be thought about. For Mac users, the industry standard is *SuperDuper!* by Shirt Pocket.<sup>29</sup> For Windows, check out *Winclone*, by Two Canoes Software.<sup>30</sup>

Time Machine is a popular backup application that is exclusive to the Mac platform; it is native, which means that it is built-in to the operating system. Time Machine does exactly what its name suggests—it lets one roll back time to recover files that were later damaged, deleted, overwritten, etc. On the upside, when used with the Time Capsule hardware, Time Machine acts like a completely separate system, akin to a file server, so it satisfies the second rule of the three-two-one backup strategy. In theory, if a computer dies, the Time Capsule could be unplugged and plugged into another computer, and eventually the user would be able to pick up where he or she left off. The downside of Time Machine is that it wasn't designed for commercial use, and for that reason it tends to be inherently slow when put to task by the power user. Apple's Time Capsule doesn't have to be used to take advantage of Time Machine's features; the app can be pointed to any external hard drive that is properly formatted and has sufficient space.

The final rule of the three-two-one backup strategy requires keeping a copy of data in an offsite location, or, in the alternative, stored in a disaster-proof location or medium. The easiest solution to offsite backup is one of the cloud services, such as CrashPlan (crashplan.com), BackBlaze (backblaze.com/), Mozy Pro (mozy.com), and SpiderOak (spideroak.com). A great resource for comparing the different providers is the website [www.backupreview.info](http://www.backupreview.info). Another option is to use a cloud-based practice management application, such as Clio (goclio.com), which offers lifetime dis-

counts to members of the New Jersey State Bar Association. Clio also offers the option of maintaining an additional archive of all of the user's files on Amazon's AWS servers. As with Time Machine, there is a downside to relying solely on cloud-based backup—it, too, can be slow. In fact, depending on the amount of data and the speed of one's Internet connection, a complete data restore could take days, if not weeks to finish.

Because of the inherent limitations of restoring data from cloud backup services, it makes sense to keep an additional copy of data on an external hard drive stored in a remote location, the idea being that if one location burns down, or is ravaged by flood, or worse yet a terror attack, the offsite copy is not likely to be affected by the same disaster (unless, of course, the disaster was nuclear, in which case there would be bigger problems to deal with than data recovery). Another option is to keep a separate hard drive in a fire safe, or to use a fire- and water-resistant drive, like the ones made by ioSafe (iosafe.com), which claims to have developed disaster-proof hard drives.

(NB: If Dropbox (dropbox.com), Box (box.com), SugarSync (sugarsync.com), or some other version of file-syncing cloud-based software is being used, that's great, but those services are exactly that—file-syncing apps—thus, any data stored there should not be counted as a backup *per se*.)

## Conclusion

If going paperless sounds like a smart idea, but nonetheless seems daunting, intimidating, or downright frightening, refer back to Mantra No. 1: Paperless doesn't mean zero paper. Start with a plan. A modest plan might be to start paperless files for all new matters going forward. After becoming comfortable with that, the next step may be to work backwards and start converting active

files to paperless format. Don't be afraid to go paperless because a practice is 15 years old, and already has a few thousand square feet of file boxes in storage. Once those files are seven years old, they can probably be destroyed (or super anal practitioners can send them to be scanned before destruction). Keep in mind, for litigators, of example, excluding mass tort and class action matters, an average case lasts a year-and-a-half to three years, tops. If a practice stopped creating paper files for each new matter open, in two years the practice would be 80 percent paperless. ☺

## Endnotes

1. PDF stands for portable document format, which was created by Adobe Systems, in 1993. See Adobe Acrobat Family, About Adobe PDF [www.adobe.com/products/acrobat/adobe-pdf.html](http://www.adobe.com/products/acrobat/adobe-pdf.html) (last visited June 13, 2013).
2. *Business Week* (2387) 48–70 (June 30, 1975) available at [www.businessweek.com/stories/1975-06-30/the-office-of-the-futurebusinessweek-business-news-stock-market-and-financial-advice](http://www.businessweek.com/stories/1975-06-30/the-office-of-the-futurebusinessweek-business-news-stock-market-and-financial-advice); see Wikipedia, *Paperless Office*, <http://en.wikipedia.org/wiki/Paperless> (last visited June 13, 2013).
3. Sam Glover, Paperless Law Office Is Easier Than You Think, *Lawyerist* (July 3, 2009) <http://lawyerist.com/paperless-law-office/>.
4. Available at ABA Web Store, <http://apps.americanbar.org/abas-tore/index.cfm?section=main&fm=Product.AddToCart&pid=5110588> (last visited June 13, 2013); also available at Amazon.com.
5. See, e.g., *ABA Law Practice Magazine*, vol. 34 no. 1 (Jan. 2008), at 16.
6. See <http://macsparky.com/paperless/> (last visited June 13, 2013).
7. See, e.g., Rule 1:4-9 (Size, Weight & Format of Filed Papers), and Rule 1:5 (Service & Filing of Papers).



Except as otherwise provided by *Rule 2:6-10*, pleadings and other papers filed with the court, including letter briefs and memoranda but excluding preprinted legal forms and documentary exhibits, shall be prepared on letter size (approximately 8.5 x 11 inches) paper of standard weight and quality for copy paper and shall be double spaced with no smaller than 10-pitch or 12-point type. Both sides of the paper may be used and recycled paper should be used, provided legibility is maintained.

8. <http://blogs.findlaw.com/strategist/2012/12/going-paperless-it-may-be-your-ethical-obligation.html> (last visited June 13, 2013).
9. David Sparks, Paperless: A Mac-Sparky Field Guide™ 10 (Sept. 2012 ed.).
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13. [www.fujitsu.com/us/services/computing/peripherals/scanners/scansnap/scansnap-iX500.html](http://www.fujitsu.com/us/services/computing/peripherals/scanners/scansnap/scansnap-iX500.html).
14. See About Adobe PDF, *supra*, note 1.
15. Technically speaking, PDF files can be edited, but not in the same manner in which plain text, rich text, or word processing files can. Although professional PDF editing software (such as Adobe Acrobat) will allow

editing of PDFs, editing capabilities vary significantly from file to file, depending on the security permissions set by the document's author. Adobe Acrobat gives the author full control over whether and to what extent the document can be edited, shared, signed, or even printed.

16. For a full comparison of the features of the different versions of Acrobat vs. Reader, see Adobe Acrobat Family/Buying Guide: Product Comparison [www.adobe.com/products/acrobatpro/buying-guide.html](http://www.adobe.com/products/acrobatpro/buying-guide.html) (last visited June 24, 2013).
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18. Todd Hendrickson, In a Paperless Office, A Bigger Monitor is Better, *Lawyerist* (May 17, 2013) <http://lawyerist.com/in-a-paperless-office-a-bigger-monitor-is-better/> (last visited June 13, 2013).
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23. Check 21 was created to reduce the time, risks, and costs associated with paper check processing. See FAQ created by the Federal Reserve Bank, available at [www.federalreserve.gov/paymentsystems/regcc-faq-check21.htm](http://www.federalreserve.gov/paymentsystems/regcc-faq-check21.htm). With Check 21, banks are now able to send and receive digital images of checks electronically, eliminating the need to physically transport paper checks between banks, or between merchants and banks. *Id.*
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# The Mobile Generation

## Ethical Considerations for Practicing in the Cloud

by Rachel G. Packer

Over the last decade, significant developments in technology, the rapid rise and fall of the economy, and a substantial decline in the legal job market have changed the way law is practiced. Many new attorneys entering the practice are finding themselves laden with student loan debt and unable to find steady work, leading them to turn to temporary contract positions requiring travel and flexibility. Firms are searching for ways to cut costs, increase efficiency, and maximize productivity to earn a client's business. Enter, the 'cloud.' Providing unprecedented mobility for attorneys and remote access to programs and information, cloud computing is surely a game-changer.

But have the rules governing a lawyer's professional conduct evolved with the times? The answer is: sort of.

This article will focus on the ethical implications of cloud computing and electronic storage of client files. While the issue was briefly addressed in Opinion 701 of the Advisory Committee on Professional Ethics in 2006,<sup>1</sup> only a vague "reasonable care" standard was offered with respect to the obligation to maintain confidentiality of client information stored in the cloud,<sup>2</sup> and no subsequent opinions have been released in the years since to provide further clarification. While it may not be completely clear exactly what the advisory committee meant by reasonable care<sup>3</sup> in 2006, since Opinion 701 looks to the "technology reasonably available at the time"<sup>4</sup> when evaluating exercise of reasonable care, it certainly appears that one factor is an attorney's continuing obligation to know what technology is available at any given time.

### What is Cloud Computing?

Cloud computing refers to electronic storage of information that is remotely accessible via the Internet.<sup>5</sup> Cloud-based storage of client files and data allows attorneys to practice

more conveniently and efficiently, as they are able to access documents and information on demand from any location, and from multiple electronic devices. With the advent of the cloud, attorneys are no longer limited to working from an office, at a fixed workstation, on a particular device. Laptop computers, tablets, and even smartphones can be used to access client files, and limited storage and server capacity are now things of the past.

Cloud-based applications, called software as a service (SaaS), are cost-effective, and allow remote access to programs and software from the Internet (without the additional hardware, installation, and maintenance of traditional software at a fixed workstation), whether at home, at work, in court, or wherever there is Internet access.<sup>6</sup> Additionally, SaaS allows users to access shared information, sync multiple applications, and customize the applications to suit their needs.<sup>7</sup> Popular examples of SaaS include Dropbox, Microsoft Office 365, Google Apps, and iCloud.

Although cloud computing is incredibly convenient, efficient, and useful in today's mobile practice of law, its use also invokes substantial ethical implications for lawyers. Aside from the obvious confidentiality issues that immediately come to mind, an attorney's use of electronic data storage and remote file access also triggers ethical obligations related to competence, safekeeping of property, communication, and conduct of third parties. These obligations, while set forth generally in the Rules of Professional Conduct (RPCs), are still somewhat unclear when applied in the context of cloud computing.

### Opinion 701—Electronic Storage and Access of Client Files

RPC 1.6(a) provides that:

[a] lawyer shall not reveal information relating to representa-

tion of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as [otherwise provided by this rule].

In addition to protecting the confidentiality of client information, lawyers have a duty to safeguard client property in their possession. RPC 1.15(a) states:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.

In 2006, the advisory committee released Opinion 701, addressing the issues of confidentiality and safeguarding property related to electronic storage and access of client files.<sup>8</sup> The advisory committee noted that certain documents requiring retention of an original hardcopy would constitute "client property," and "[s]uch documents cannot be preserved within the meaning of RPC 1.15 merely by digitizing them in electronic form."<sup>9</sup> Therefore, documents such as "[o]riginal wills, trusts, deeds, executed contracts, corporate bylaws and minutes" must also be physically maintained in a separate file if an attorney makes the decision to store client files in the cloud.<sup>10</sup> The advisory committee also distinguished these essential hardcopy docu-

ments constituting client property from the remaining documents in a typical client file, and concluded that "correspondence, pleadings, memoranda, and briefs" are not considered client property within the meaning of RPC 1.15.<sup>11</sup>

Ultimately, with the exception of documents that must be maintained in hardcopy, the advisory committee found no provision of the RPCs mandating "a particular medium of archiving [client files]," or prohibiting an attorney from electronically storing them.<sup>12</sup> Therefore, the main concern with cloud storage is preserving confidentiality of client information and preventing unauthorized access to, or inadvertent disclosure of the information.<sup>13</sup>

Invoking a reasonable care standard, the advisory committee determined that RPC 1.6 requires an attorney to take "reasonable affirmative steps to guard against the risk of inadvertent disclosure," but concluded rather cryptically that "[a] lawyer is required to exercise sound professional judgment on the steps necessary to secure client confidences against foreseeable attempts at unauthorized access."<sup>14</sup> While the advisory committee acknowledged that reasonable care does not require strictly guaranteeing impenetrable protection against any and all unauthorized access to confidential information, it declined to impose specific requirements tied to the current understanding of technology.<sup>15</sup> Recognizing the rapid evolution of technology in today's computer age, the advisory committee instead suggested that reasonable care should include use of "technology reasonably available at the time to secure data against unintentional disclosure."<sup>16</sup>

In fairly general terms, the advisory committee concluded that a lawyer has exercised reasonable care if he or she comes to the "prudent professional judgment" that he or she has satisfied the following two criteria:

- "the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security," and
- "use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data."<sup>17</sup>

While these are useful guideposts for attorneys to begin an analysis of whether their own conduct satisfies the obligations imposed by RPC 1.6, there are still many complex questions left unanswered. For example, if the vendor outsources the data storage to a separate company, what are the obligations with respect to the vendor and the storage provider?<sup>18</sup> Who else has access to the information?<sup>19</sup> How is the information encrypted and backed up, and how can an attorney be assured the vendor is making use of the most secure and appropriate technology?<sup>20</sup> Does 'available technology'<sup>21</sup> necessarily require use of the latest and greatest in security and encryption, or will just any 'available technology'<sup>22</sup> suffice? How and when will the attorney be notified if there is a security breach or the data has otherwise been compromised?<sup>23</sup>

Additionally, what constitutes a 'reasonably foreseeable attempt to infiltrate the data'?<sup>24</sup> For example, what happens if the vendor is served with a subpoena?<sup>25</sup> Normally, when files are stored traditionally in a lawyer's office, the lawyer has an opportunity to review the subpoena and can file an appropriate motion to quash, if necessary. With a cloud vendor, will the lawyer be notified before the vendor hands over the information?<sup>26</sup> How can a lawyer ensure the vendor complies with any applicable statutory regulations governing disclosure of data?<sup>27</sup>

Finally, with respect to safeguarding

of client property,<sup>28</sup> what happens if the vendor becomes insolvent or files for bankruptcy, and access to or storage of the data becomes an issue?<sup>29</sup> If an attorney discontinues use of a vendor and the data can no longer be accessed, how will the data be returned and/or transferred to another vendor?<sup>30</sup> With so many variables beyond an attorney's immediate control, cloud computing within the boundaries of the RPCs can seem daunting if the attorney does not remain educated and up-to-date on the latest advances in cloud technology.

### **Competence and Communication with Clients**

The preceding questions, coupled with the reasonable care and prudent professional judgment standards referenced in Opinion 701, raise additional ethical issues related to competence and communication. In undertaking representation of a client, lawyers must provide competent representation, and a lawyer cannot handle or neglect "a matter entrusted to the lawyer in such a manner that the lawyer's conduct constitutes gross negligence,"<sup>31</sup> or exhibit "a pattern of negligence or neglect in the lawyer's handling of legal matters generally."<sup>32</sup> Furthermore, RPC 1.4 imposes a duty of communication, requiring a lawyer to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information,"<sup>33</sup> and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>34</sup>

Opinion 701 highlights the obligation to represent clients competently, noting that "a lawyer's ability to discharge those duties may very well be enhanced by having client documents available in an electronic form that can be transmitted to him instantaneously through the Internet."<sup>35</sup> Making documents available to the client through a

secure website "also has the potential of enhancing communications between lawyer and client, and promotes the values embraced in RPC 1.4."<sup>36</sup> Therefore, to the extent cloud technology enhances a lawyer's ability to fulfill the obligations of competent representation and adequate communication, the advisory committee considers it a "welcome development."<sup>37</sup>

While using the cloud may enhance a lawyer's ability to fulfill these obligations, it may also lead to the lawyer's undoing if he or she does not take appropriate steps to regularly update his or her knowledge and understanding of the latest technology. Since RPC 1.1 prohibits a lawyer from being generally negligent with the handling of legal matters, it logically follows that lawyers must exercise appropriate care in handling matters outside the scope of their knowledge and understanding.

Opinion 671, regarding activities and obligations of *pro bono* attorneys, provides some guidance regarding whether an attorney is competent to give advice in a particular situation, noting that "it is the responsibility of the individual attorney, prior to offering such advice, to make a determination whether, by some combination of education, study, reflection, experience, research and other background, he or she is able to proceed in a competent fashion."<sup>38</sup>

Additionally, in the context of cloud computing, Opinion 701 imposes a continuing obligation on attorneys to be aware of the "technology reasonably available at the time."<sup>39</sup> Therefore, before switching to the cloud, an attorney should evaluate whether he or she is sufficiently informed about the relevant issues associated with the use of current technology and competent to make the necessary decisions "to guard against the risk of inadvertent disclosure" of confidential client information.<sup>40</sup>

Realizing the need for additional language to specifically address technology

in the Model Rules of Professional Conduct, the American Bar Association (ABA) recently modified the model rules to include a provision related to use of relevant technology. The parallel ABA Model Rule to RPC 1.1 states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>41</sup> In 2012, the ABA Commission on Ethics 20/20<sup>42</sup> filed a resolution that was later approved by the ABA House of Delegates, amending the model rules "to provide guidance regarding lawyers' use of technology and confidentiality."<sup>43</sup> In particular, Comment 6 to Model Rule 1.1 was amended to state:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.<sup>44</sup>

### **Conclusion**

In order to provide clients with competent representation in the current cloud culture, lawyers must not only educate themselves on changes in the law, but also on changes in technology. Put simply, without keeping abreast of the latest advances and identification of known risks, lawyers cannot assess whether their use of cloud technology also effectively protects client data against unintentional disclosure. Furthermore, lawyers cannot reasonably evaluate the global scope of their ethical obligations to protect client data stored in the cloud without a reasonable understanding of how the cloud operates and what questions they should be asking when choosing a vendor. Until the Supreme Court of New Jersey com-

prehensively reviews and revises the RPCs to specifically address technology and related obligations, New Jersey attorneys using the cloud would be wise to remain informed about current developments and available security to protect client information stored in the cloud. ☺

## Endnotes

1. Ethics Advisory Opinion 701, 184 N.J.L.J. 171 (April 10, 2006).
2. *Id.*
3. *Id.*
4. *Id.*
5. Catherine Sanders Reach, Reach for the Cloud, *Trial Mag.* (Jan. 2012), available at <http://lpmt.chicagobar.org/wp-content/uploads/2012/02/trial-article.pdf>.
6. *Id.*
7. *Id.*
8. 184 N.J.L.J. 171.
9. *Id.*
10. *Id.* (quoting Ethics Advisory Opinion 692, 163 N.J.L.J. 220, 221 (Jan. 15, 2001)).
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12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. See Catherine Sanders Reach, Reach for the Cloud, *supra*.
19. *Id.*
20. *Id.*
21. 184 N.J.L.J. 171.
22. *Id.*
23. *Id.*
24. 184 N.J.L.J. 171.
25. See Catherine Sanders Reach, Reach for the Cloud, *supra*.
26. *Id.*
27. *Id.*
28. RPC 1.15.
29. See Catherine Sanders Reach, Reach for the Cloud, *supra*.
30. *Id.*

31. RPC 1.1.
32. *Id.*
33. RPC 1.4(a).
34. RPC 1.4(b).
35. 184 N.J.L.J. 171.
36. *Id.*
37. *Id.*
38. Ethics Advisory Opinion 671, 133 N.J.L.J. 1370 (April 5, 1993).
39. See 184 N.J.L.J. 171.
40. See *Id.*
41. ABA Model Rule 1.1.
42. ABA Commission on Ethics 20/20, [www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html).
43. See ABA Resolution 105A, Revised, [www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html).
44. *Id.*

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# The Indispensable Attorney

## What Makes You Different From the Rest?

by David M. Delinko

Every lawyer has been told at some point in their career, either by a boss, senior partner, or mentor: “You need to make yourself indispensable.” An indispensable attorney adds value to his or her client and helps to create job security at his or her firm. As much as it hurts to admit it, today lawyers are a dime a dozen. Sure, a specialty in an area of law can be attractive, and success in a specialized area of practice will help make a lawyer ‘marketable.’ But, what makes a lawyer, young or old, ‘indispensable’?

To be indispensable, an attorney must have the one thing every lawyer wants more of, but is always in short supply. No, it’s not money; it’s clients. (Of course developing a large book of business ultimately does mean more money.) But how do attorneys find clients? Where are they hiding? In this litigious world, how can it be that there are not more clients looking for attorneys?

In fact, there are lots of potential clients out there, and it is part of every attorney’s job to find them. But ask successful attorneys how they built their client base or book of business, and they would probably be hard pressed to come up with an answer. There is no magic wand; in fact, the truth is finding clients and building a book of business is a full-time job in itself.

The key is to get involved early and often in networking. Join the state bar association, county bar associations, business networking groups, and even a local chamber of commerce.

### Start Networking Now

Why is it important for a young lawyer to begin networking as soon as possible? Typically, a young lawyer’s first job entails extensive legal research for more-senior lawyers, writing motions and legal briefs, and, if lucky, appearing in court for those matters or court conferences no one else at the firm

wants. Additionally, young lawyers are required to pay their dues by working long hours in the office to meet certain billable hour requirements. As a result, young lawyers often do not have the time or energy left to get out of the office to market themselves, network, and begin building a client base. Before they know it, five years have slipped by, and while their legal skills may have greatly improved, they have no clients of their own.

With so many lawyers coming out of law school and into practice, the sad truth is that the young lawyer who has been working hard for the last five years is easily replaceable. There is no real job security in the current economy, and little market for a fifth-year associate with no clients. At that experience level, law firms are looking for an attorney who can bring clients to the firm to help increase business and profitability. Firms want an attorney who is driven and working toward partnership to help grow their firm’s bottom line. And the need to develop business does not end as attorneys mature and gain experience. In fact, it is extremely important for attorneys to continue to network and market themselves throughout their entire career.

Having a book of business is indispensable, both within a firm environment and in the event an attorney wants to start his or her own firm. At the end of the day, many attorneys want to know they will be able to make money and live the life they always imagined when they first decided on a legal career. Having a book of business and a network for referrals is the only way to create job security and indispensability.

### How to Network

Assuming a young lawyer finds time to get involved and joins the state bar association or another organization, taking things a step further is critical. It is not enough to just be a member, or even simply attend organization or association events. Rather, the young lawyer needs to be actively involved

and focused on meeting new people (and meeting the right people), who can help either direct business or refer business to him or her. Of course, many young lawyers do not know how to approach others at a networking event, particularly when so many attendees seem to know each other.

What should a young lawyer do at these events to successfully network with other attorneys? It takes a little bit of courage and confidence, but the young lawyer must make the first move by mustering the courage to walk up to 'veteran' lawyers and introduce him or herself. Approval-seeking discussions should be avoided; instead, the young lawyer's efforts should focus on asking questions and needs-based conversations. A young lawyer utilizing the approval-seeking method believes if he or she convinces other attorneys, either by example or by exaggeration, that they are great, they may score points and possibly a referral. In fact, employing a needs-based approach to conversation is the answer. For example, a young lawyer should try to elicit the needs of another attorney, or even a potential client. Discussions that start with questions as simple as: "How can I help you and your business?" can direct the conversation and lead to follow-up questions like: "Do your current clients ever ask you to help them with a secondary matter that your firm does not handle?" "Are there areas of law that your firm does not handle?"

The idea is to create trust. No attorney wants to refer a client to another firm for fear of losing that client. The key is that if the young lawyer gains trust and respect, he or she can create a relationship that can be mutually beneficial.

What else should a young attorney do to network? Sometimes the simplest answers are the best. Young attorneys forget to reach out to the people they already know: friends, family and other individuals met during a normal day.

Everyone knows someone who knows someone who needs an attorney. Young attorneys forget they have been trained to look at a situation differently than others, and a helpful suggestion or opinion from an attorney's perspective may result in a possible source of business in the future. Again, start with the needs-based approach. Remind friends, family and casual acquaintances the door is always open if legal advice is needed. At some point in everyone's life, they will need an attorney. From buying or selling a home to starting a new business, life is full of potential clients and referrals.

There are other forms of networking available as well. Bar and trade associations are beginning to utilize 'speed networking' type events. These are fast-paced, high-energy networking events where participants meet as many other attendees as they can in a given time period. Some organizations have begun to utilize structured networking event planners to help bring people together. At these events, participants pre-select the types of people they want to meet. Based upon their selected preferences, participants are matched with eight to 10 other attendees who completed the same pre-selection process. The event may last for about 90 minutes, and participants are usually able to meet individuals who may prove to be important career contacts. This type of networking event helps take the guesswork out of trying to figure out which people would be best to meet, how to start a conversation with the right people and how to reach as many people as possible in an efficient manner.

### **Experienced Attorneys Need Networking Too**

Networking is crucial at every stage of an attorney's career. Young lawyers must network to begin building a client base. Senior associates working toward a partnership must network to drive new business and demonstrate their mar-

ketability in the eyes of senior partners. Partners must continue to network to keep feeding the pipeline of business to help maintain their firm.

Even judges must network while on the bench. While this form of networking is different from that of the practicing attorney, judges may wish to continue practicing law as mediators and arbitrators after they retire from the bench. From a judge's perspective, networking is less about meeting new people and more about establishing a good relationship or a mutual respect with the attorneys who appear in their court. A judge demonstrating a degree of interest in the wellbeing of fellow bar members creates trust and respect, which can be beneficial to all parties during litigation and in the future.

### **Conclusion**

Today, networking is an important, if not critical aspect of every attorney's career. One of the only ways to be indispensable to clients and the firm is to be able to make the right connections with the right people. Building a network of contacts empowers an attorney to provide referrals, and most importantly, receive referrals. ⚖️

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# Lessons From an Outlier

## What Young Lawyers Can Learn From the Story of Joe Flom

by Andrew Bolson

The topic of success is examined in *Outliers*, the 2008 bestselling book by Malcolm Gladwell. In the book, Gladwell, a renowned *New Yorker* essayist and the author of *The Tipping Point* and *Blink*, considers the ingredients for success through a series of anecdotes, ranging from stories about Bill Gates to the Beatles. For young lawyers, one chapter of the book is of particular interest. Titled “The Three Lessons of Joe Flom,” the chapter describes a lawyer’s rise from law firm reject to one of the most successful attorneys in American legal history.

### From Rags to Corner Office

Joe Flom was born to Jewish immigrants during the Depression. While he grew up incredibly poor, Flom was able to earn a spot at one of New York’s finest public high schools, and eventually attended Harvard Law School. In law school, Flom was among the top of his class. However, after hiring season he was one of two students from Harvard Law who was not able to secure a job. Knowing that Flom needed a position, one of his professors suggested he meet a couple of guys who were starting a firm. The guys happened to be Marshall Skadden and Leslie Arps. While Skadden and Arps didn’t have any clients at the time, Flom liked the partners and decided to join the startup firm.

Although Skadden, Arps, Slate, Meagher and Flom would eventually become one of the largest law firms in the world, its success was not immediate. In *Outliers*, Gladwell quotes Flom as saying, “What kind of law did we do? Whatever came in the door!”<sup>1</sup> However, without knowing it, Joe Flom was poised for unusual success from the time he started to practice.

At the time Flom was entering the legal market, law firms in New York operated like private clubs. Gladwell detailed how “white-shoe”<sup>2</sup> law firms only looked to hire, “lawyers who are Nordic, having pleasing personalities and ‘clean-cut’

appearances, are graduates of the ‘right schools,’ have the ‘right’ social background and experience in the affairs of the world, and are endowed with tremendous stamina.”<sup>3</sup> If you were not white-shoe material, you joined smaller, second-rate firms or went out on your own.

According to Gladwell, during the 1940s and 1950s “[t]he old-line Wall Street law firms had a very specific idea about what it was that they did. They were corporate lawyers. They represented the country’s largest and most prestigious companies, and ‘represented’ meant they handled the taxes and the legal work behind the issuing of stocks and bonds and made sure their clients did not run afoul of federal regulators. They did not do litigation; that is, very few of them had a division dedicated to defending and filing lawsuits.”<sup>4</sup>

One of the areas white-shoe firms refused to dirty their hands with was hostile corporate takeovers.

Since the prestigious firms refused to participate in litigation and proxy fights, the work was relegated to the second-tier firms, the firms that happened to be populated by those who did not fit the typically Nordic profile the white-shoe firms selected. Over time, Flom became the preeminent attorney handling proxy fights, and the white-shoe law firms were regularly outsourcing clients to him. While white-shoe firms disdained proxy fights in the 1950s and 1960s, by the 1970s and 1980s hostile takeovers had become big business, and all firms wanted to get into the game. According to Flom, “[The white-shoe firms] thought hostile takeovers were beneath contempt until relatively late in the game, and until they decided that, hey, maybe we ought to be in that business, they left me alone. And once you get the reputation for doing that kind of work, the business comes to you first.”<sup>5</sup>

Flom was not only fortunate to be practicing in the right area at the right time, he benefited by being born during the early 1930s. If he had been born earlier, he would have been practicing law during the Depression. Gladwell states that



during the Depression, Jewish lawyers were overwhelmingly solo practitioners. The Depression hit solo-practitioners extremely hard, and their staple of handling wills, divorces and minor disputes dried up. It was difficult to make a living as a lawyer because the supply of attorneys well outnumbered the pool of clients, a seemingly all-too-relevant problem. Attorneys who came of age during the Depression could not invest in learning about practice areas that would not pay the bills.

The Depression also had an effect on birth rates. At the height of the Depression, in the early 1930s, the number of babies born per year dropped dramatically. As a result, when Depression-era babies grew up, they had less competition getting into prestigious schools and obtaining quality jobs.

### **The Changing Demographics of Law**

How does Flom's good fortune relate to the experience of today's young lawyers? The prevailing argument is that today's young lawyers are part of a so-called lost generation. It is widely held that the current glut of new lawyers has created an environment where jobs are scarce and competition is stiff. At first glance, it would appear this generation would have more in common with the experience of Depression-era lawyers. However, it is possible that for those young lawyers who are able to get their proverbial foot in the door, opportunity abounds.

Today, young lawyers are entering a legal market saturated with baby-boomer attorneys who are still practicing. For example, according to the American Bar Association's statistics, in 1980, 21 percent of lawyers were between the ages of 30 and 34.<sup>6</sup> In comparison, by 2005 the percent of lawyers between 30 and 34 stood at only nine percent.<sup>7</sup> It makes sense, then, that the number of attorneys practicing between the ages of 55 and 64 has risen. While

attorneys 55 to 64 represented 12 percent of the legal market in 1980, attorneys in this demographic now represent 21 percent of the legal market.<sup>8</sup>

In New Jersey, the number of attorneys being admitted to the bar is also slowing. Between 2002 and 2007, the number of attorneys in the state increased, on average, by 372 lawyers per year.<sup>9</sup> Between 2008 and 2012, the average annual increase of lawyers decreased to 323.<sup>10</sup> This is coupled with the fact that undergrads are now shying away from law school. As a result of the rising cost of a legal education and shaky job prospects, the number of law students has dropped significantly. In 2013, law school applicants fell to a 30-year low, and 2013 will see the lowest number of first-year students since 1977.<sup>11</sup>

As a result of being born in the early 1930s, Flom experienced less competition throughout his career. This proved to be highly advantageous for him. In the not-too-distant future, young lawyers may find themselves in a similar situation. With baby boomers expected to retire in great numbers in 10 to 15 years, and students increasingly staying away from law school, today's young lawyers are in a better position than previously believed.

### **Standing Out in a Crowded Marketplace**

Nevertheless, young lawyers should not simply wait for the demographics to shift in their favor. Flom was successful because he had experience in an area of the law others were unfamiliar with. Even in a future where the demand for lawyers outweighs supply, some lawyers will be more successful than others. No lawyer exemplifies this fact more than Joe Flom. The characteristics that made him successful can serve as a guide for any young attorney.

First, Flom's patience was a key to his success. It is natural for a young lawyer

to want to specialize in industries that are 'hot.' However, what is popular now may be soon out of favor.

Flom's success was not immediate. Although proxy fights would later prove to be highly profitable, it took many years for the industry to take off. Instead of switching focus, he stayed the course and developed a reputation for his skills in the proxy-fight arena. As a result, once hostile takeovers became a multi-billion-dollar business, it was Flom, who already had the experience in the field, who emerged as the industry's leader.

Beyond patience, Flom had the foresight to specialize in a relatively obscure field that was not popular when he entered the legal workforce. There is a lesson in this fact as well. While the future is unpredictable, a lawyer should be constantly questioning the *status quo* and examining trends in the law and areas for potential growth. If a lawyer wants to stay relevant, he or she must consider whether their specialty will be in demand in 10 or 15 years. Is their skill set subject to economic cycles? Is their practice vulnerable to a change in legislation? Henry Ford once famously said, "[i]f I had asked people what they wanted, they would have said faster horses." The same could be said about the law. The innovative lawyer will always be a successful lawyer. In deciding on an area to specialize in, young lawyers should be thinking not just about today, but about the needs of clients 10 or 15 years from now.

Finally, Flom was successful because he became the go-to lawyer for proxy fights. It is unlikely he got that reputation by happenstance. Instead, Flom worked hard to earn a reputation as a recognized expert in his field. If a young lawyer is to specialize, he or she should strive to become a leader in their chosen specialty. For example, young lawyers can publish articles, lecture on the topic and develop a network base that could provide future clients.

## Conclusion

Successful lawyers will continue to be patient, forward thinking and hard working. Given the demographic shift expected to arrive in the coming years, the future for young lawyers may shine brighter than previously believed. Opportunity, though, will not guarantee success. Even with the requisite traits and the potential opportunities that may come along, not all lawyers will manage to become the next Joe Flom. Flom's story is not just about opportunity and success; it is about becoming an outlier. It is about becoming a recognized expert and serving as an asset (not as a cost center) for clients. Eventually, out of the present generation of young attorneys, someone will understand the changing dynamics of the legal profession and emerge to become the next outlier. Will it be you? ☺

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# The Future of the Law

## Four Practice Areas on the Horizon

by Joshua F. Cheslow

**T**hey say the wheels of justice turn slowly, but grind exceedingly fine. The same could be said for the profession as a whole, often characterized by its slow-to-change and conventional nature. Even if that remains true today, advances in science and technology are changing the legal profession.

Of course, elements like legal practice software and email have changed the business of practicing law, just as the fax machine did in its time. But changing business practices are only one aspect of the scientific and technological transformation of the law. Practice areas too are changing. Even as lawyers are assimilating to mobile and cloud computing, the law is becoming a more science-based occupation. Several new legal genres that will change the profession are based in the science and technology fields. Natural disaster law, space law, robotics law, and privacy law are part of the leading edge of a new science and technology revolution in the law.

Scientific advances have changed law slowly but significantly over time. A half-century ago, few could have predicted that environmental rights and norms would be the subject of successful legal careers; today, the field of environmental law has spawned specific sub-genres, such as 'green' law. Twenty-five years ago, before AOL and dial-up modem connections, the novelty of the Internet did not betray a hint of its explosive impact on the field of intellectual property; today, the subject of Internet copyright protection is a subspecialty of intellectual property. Ten years ago, e-discovery was barely a legal discipline; now, it has been suggested that in modern litigation all discovery is electronic because 99 percent of the world's information is generated electronically and only a fraction is converted to paper.<sup>1</sup>

Today, young lawyers should be prepared for a more rapid expansion of science and technology practice areas. Pathways to new technologically or scientifically advanced practice areas are emerging. Expertise in these practice areas will

demand a cross-section of science-based knowledge and mathematics. This article summarizes four exciting new legal topics that have a strong possibility of fueling the burgeoning careers of today's young lawyers, as science, technology, and the law continue to converge.

### Natural Disaster Law

The slow process of climate change has combined in recent years with exceptional weather events. The volume of weather events, and the acceleration of climate change in recent years, is notable. The devastating effects of such phenomena could give rise to a legal practice area akin to natural disaster law. Climatic catastrophe has hit communities hard. Hurricane Katrina and Superstorm Sandy have made the implementation of flood prevention laws a focus for the Southern and Northeast regions of the country. In the Midwest and Southwest regions, devastating weather events like the tornado in Moore, Oklahoma, have forced cities to consider requiring local communities to build more durable structures. Also, in the face of such incredible destruction,<sup>2</sup> new organizations like the National Hazard Mitigation Association, established in 2008, are being formed, dedicated to the premise of building sustainable communities.

Lawyers are obliged to ask how this new challenge will affect the legal and regulatory future. For instance, in New Jersey the presence of dangerous and costly coastal flooding may give rise to a new regulatory architecture. Currently, lawyers may be most familiar with The National Flood Insurance Program<sup>3</sup> and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>4</sup> Both are slow-moving, bureaucratic government behemoths, the first seriously underfunded and the last only intended to assist with cleanup of the nation's hazardous waste sites (and underfunded). New natural disaster laws may help change the reactive approach.

Effective crisis management, state and interstate preparedness, and infrastructure security demand a forward-looking

response. In the Netherlands, a country built mostly below sea level, a forward-looking response has always been the best defense to flood disasters. “The Dutch ‘way of thinking is completely different from the U.S.,’ where disaster relief generally takes precedence over disaster avoidance.”<sup>5</sup> In the U.S., employing the Dutch way of thinking is likely to entail changing a legal system that does not presently account for the security concerns, delays, and cost associated with large-scale natural disasters.

The first seeds of serious international natural disaster law have already sprouted. The Red Cross has put forth the Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.<sup>6</sup> The law proposes to lift international barriers (the difficulty of aid workers to get through customs in the affected country) and provides that financial aid is to be funneled to disaster-stricken countries. The law tackles broad topics related to disaster mitigation, such as immigration and national security. Still, the law itself is built to remove obstacles to disaster reaction, after disaster has struck.

New Jersey experienced its own reactive approach to a natural disaster. After Superstorm Sandy, Governor Chris Christie declared a state of emergency on Oct. 27, 2012. At that point, a host of different provisions went into effect. Restrictions were placed on excessive price increases<sup>7</sup> (otherwise known as price gouging) under the Consumer Fraud Act. In addition, mandatory overtime restrictions on healthcare personnel were exempted.<sup>8</sup>

Unfortunately, New Jersey’s legal response was comprised solely of post-disaster relief. But, natural disaster law will have to encompass an approach that takes into account disaster prevention as well. In one discussion paper at the Red Cross conference on the model act, estimates of the effects of natural disasters include 2.4 billion affected

people and 16 percent of world gross domestic product.<sup>9</sup> These numbers show, if natural disasters are not priorities already, they will be soon, and they will be costly.

What will new comprehensive natural disaster laws look like? The rare violence of superstorms (like Sandy) can be expected to be regulated first. On barrier islands and low-lying areas, a state may seek to reformulate its eminent domain powers if owners fail to install expensive flood prevention measures. For instance, today in New Jersey the eminent domain law requires that “...no action to condemn shall be instituted unless the condemnor is unable to acquire such title or possession through *bona fide* negotiations with the prospective condemnee.” In the wake of superstorms battering the coastline, will the Legislature deem this *bona fide* negotiation element to be too restrictive for barrier towns in need of radical new flood prevention technologies?

Still just as pertinent to everyday life are the more traditional disaster relief laws that must be reformulated to deal with issues like responsible post-storm cleanup. After Hurricane Katrina, a “toxic tide” of paint, deodorant, batteries, large broken pieces of municipal sewage plants, landfill waste, and railroad cars flowed into area water supplies, a poisonous mixture that further complicated and intensified the already daunting cleanup task.<sup>10</sup> In the future, how will a state propose in advance to deal with such devastation?

Legal practices wishing to focus on natural disaster law should be prepared to weave an interdisciplinary tapestry of tort, insurance, real estate, employment, land use, construction, and environmental practices for mass client claims. Natural disasters demand a one-stop shop for clients who may have lost nearly everything. Currently, natural disaster lawyers will need to navigate the legal web for clients who may be eligible

for Federal Emergency Management Agency (FEMA) assistance, or who may qualify for disaster unemployment insurance through the New Jersey Department of Labor and Workforce Development.

In the long term, though, a focus on prevention will shift the conversation. There are legal ramifications to investing in disaster prevention, as utilitarian impulses clash with private property rights.

## Space Law

Another wave of legal innovation is space law. In the next 50 years, while space will still be controlled and funded for the purpose of scientific exploration, it will also be a place to exploit the vast natural resources in the void. Since the early days of the Cold War, the U.S. has launched vehicles into space, sending ships that have explored planets, landed on asteroids, studied comets, and even left the solar system. The exceptional speed with which man has harnessed space has, for the most part, left the law behind.

Soon, however, space travel will be accomplished as a private commercial enterprise. At that point, where will the law have evolved? Commercial activity is leading a new generation of space pioneers, seeking profit as well as scientific value. Virgin Atlantic’s founder, Richard Branson, has launched Virgin Galactic,<sup>11</sup> a firm dedicated to bringing leisure travel to the upper reaches (and for now, the upper echelon—one flight alone can cost in excess of \$200,000). Elon Musk, an Internet billionaire of Tesla and PayPal fame, founded the firm Space X, which has already been contracted by NASA to deliver and return payloads to the International Space Station, the first private firm to do so in history.<sup>12</sup>

Despite the hubbub of activity, it has hardly moved the space law needle. The seminal authority on pure space law is the Outer Space Treaty of 1967,<sup>13</sup> an aged

United Nations leftover from the Cold War era that was primarily focused on preventing the weaponization of space and preserving its heritage for all mankind.

Space is most-often discussed in broad, sweeping terms. It is generally thought of as a place for scientific discovery and little else. In the last iteration of United States policy toward space, President George W. Bush directed NASA to focus its efforts on returning humans to the Moon by 2020 and eventually sending them to Mars and “worlds beyond.”<sup>14</sup>

However, investment in space exploration will depend heavily on applying terrestrial law to the concept of space exploration in novel ways. For instance, how will basic property rights be interpreted? In *Nemitz v. United States, et. al.*,<sup>15</sup> Gregory Nemitz, an amateur astronomer, filed a complaint for declaratory judgment seeking the creation of a remedy to enforce his claims to ownership of Asteroid 433, nicknamed Eros. Nemitz had registered the discovery of Eros 433 with the Archimedes Institute of Space Property Registry in 2000. In 2001, NASA landed the NEAR Shoemaker space vehicle on Eros. When Nemitz learned of the mission, he sent NASA a \$20 invoice for storage and parking of NEAR Shoemaker on Eros, payable in installments of \$.20 per century. Nemitz asserted an inherent property right of man to own objects in outer space, and that NASA's entitlement to park its spacecraft on his property without fair compensation is tantamount to a “taking” under the Fifth Amendment. NASA filed a motion to dismiss and in its brief argued Nemitz had failed to establish a constitutionally protected compensable property interest. Judge Howard McKibben agreed with NASA and dismissed the case in 2004. The case raised a fundamental question, posed again by the latest round of asteroid exploration and exploitation by firms like Planetary Resources:<sup>16</sup> How do the

basic assumptions of property rights change in space?

In the United States, civilian space policy debates have begun to emerge over the use of land for space launches. In Texas, House Bill 1791, introduced by Rep. John Davis, would grant companies like SpaceX, a space freight carrier, “immunity from liability to any person for damages resulting from nuisance arising from testing, launching, re-entering, or landing, and exempts such an entity from being subject to any claim for nuisance arising from testing, launching, re-entering, or landing.”<sup>17</sup> Other states wishing to attract space jobs may need to compete with this type of de-regulated vision in the future.

Until now, space law in the private sector has largely been the province of the academic sphere, answering questions such as how disputes are to be resolved in space. But as man's technological prowess increases the ability to travel farther, stay longer, and do more in space, so must the legal practice blaze a new path to the stars.

### **The Law of Robotics**

Anyone familiar with author Isaac Asimov's work might view the law of robotics with some skepticism. The field of robotics law is not about the philosophical constitution of proto-human machines. Rather, the framework of robotics law is about the new age of interaction between man and machine. That interaction has already begun, and law is already beginning to evolve from these first limited interactions.

The initial phases of robotics law appear to be in the realm of driverless cars. In California,<sup>18</sup> Nevada,<sup>19</sup> and Florida,<sup>20</sup> laws have been devised to determine the type of regulatory structure necessary to allow driverless cars on American roads. Nevada's law seems to go the furthest. AB-511 revises certain provisions governing transportation in the state, specifically authorizing a dri-

ver's license endorsement for driverless cars and directing the Department of Motor Vehicles to adopt regulations related to their operation.

Some automakers believe fully autonomous automobiles may be in showrooms by 2020.<sup>21</sup> In the interim, lawmakers and lawyers alike should be thinking about the implication of driverless cars on the current body of tort law. What must insurers provide in their policies? Who is liable for auto accidents involving driverless vehicles?

For practitioners, the short term means the inevitable legality of autonomous vehicles and adapting their advice to clients and their arguments in the courtroom. For instance, the New Jersey Cell Phone Law<sup>22</sup> requires the operator of a motor vehicle using a hand-held wireless telephone keep one hand on the steering wheel. The law does not, however, require a person to actually steer the car. It is likely the advent of autonomous cars will change that analysis. Longer-term questions, such as whether non-human entities can acquire legal rights, exist mostly in the mind's eye. But, if the pace of technological progress is any indication, the reality of futuristic robotics law will begin sooner rather than later.

### **Internet Privacy Law**

A person across the street wearing lens-less frames commands his headgear to take a video of a stranger minding her own business. Moments later, the video is uploaded to YouTube. On Google, a person signs into her Google account settings, clicks on a feature called Inactive Account Manager, and plans for her demise—digitally. On Facebook, a “public” discussion of a fishing trip taken years ago with an old buddy is shared with companies selling items for outdoorsmen. Suddenly, scrolling banners selling rods and reels are inescapable. On Yahoo and Gmail, ads are generated against one's email content.

Privacy concerns abound on the Internet. It's not clear what freedoms must be enforced to keep prying eyes from personal communications, from individuals using a person's likeness without permission, or from government intrusion. New legal responses to the growing concerns over privacy on the Internet are necessary.

When the *Guardian* newspaper reported the United States has secretly been collecting electronic data on millions of electronic communications taking place within the United States every second, whose rights were violated?<sup>23</sup> Federally, the Electronic Communications Privacy Act of 1986<sup>24</sup> protects certain electronic communication and electronically stored information and prohibits certain types of electronic "tracing" devices. It was essentially an extension of the Fourth Amendment to the Internet. Electronic communication means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include: 1) any wire or oral communication; 2) any communication made through a tone-only paging device; 3) any communication from a tracking device (as defined in Section 3117 of this title); or 4) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds. Can national security preempt the Privacy Act?

Facebook announced several years ago that it was sharing members' personal information to "help improve and promote our service" and to "offer joint services." Apparently it was not in violation of the 1986 statute, although many people felt their privacy had been violated. But, at least one court has been asked to address the gap between the law and the reality of the Internet.

In *Crispin v. Christian Audigier, Inc.*,<sup>25</sup> a federal judge in the U.S. District Court for the Central District of California concluded that private communications of users of social networking sites were protected against warrantless disclosures. In a dispute over licensing rights, designer Christian Audigier served subpoenas on social media providers Facebook, Myspace, and Media Temple, directing them to produce all communications between Audigier and plaintiff Crispin, an artist. Initially, a motion to quash the subpoenas based upon the protection provided by the Electronic Communications Privacy Act was denied by U.S. Magistrate Judge John E. McDermott, but on appeal to the district court, Judge Margaret Morrow reversed in part and vacated in part, finding that the act's privacy protections at least partially applied to users' private communications on a social networking site, but that there was insufficient evidence to determine whether public wall postings and comments were also protected, and therefore precluded from discovery. This ruling provides some precedent to protect social networking providers and web hosts from producing certain communications in discovery.

In the above example of the Inactive Account Manager on Google, upon inactivity for a specified period, such as three, six, or 12 months, Google will activate the individual's account instructions, such as having his or her email and digital content forwarded or bundled to a third party, or deleted. This feature, offered by Google in April 2013,<sup>26</sup> represents a new wave of digital privacy. Everyone should contemplate what will happen to private Internet 'possessions.' But, what if Google does not abide by one's instruction, or accidentally transmits the information to the wrong parties? What is Google's responsibility to defend an individual's instructions against an attack by a fami-

ly member seeking access to his or her emails?

Surely 'estate planning' like the type offered by Google is only one area of concern. Today, companies track movements and clicks online, ostensibly targeting consumers most likely to buy their product but, in reality, invading user privacy in a way lawmakers and courts have yet to deal with comprehensively.

Google Glass (the video-taking headgear) has been preemptively banned in Caesar's casinos, based on the fact that recording equipment is already banned from gaming areas and inside show arenas.<sup>27</sup> Google spends money launching media campaigns intended to deflect criticism and dissent from the privacy concerns.<sup>28</sup> The FBI has been taken to task in Arizona for triangulating cellular user movements with devices that mimic the ubiquitous tree-costumed cell phone towers. It seems that for practitioners in this field, the future is now.

Even so, technology is always moving forward. The Samsung Galaxy IV smartphone contains eye-tracking technology for controlling screen scrolling and screen brightness. This seems harmless enough. But, how will eye-tracking research be handled? Should the outward signals of one's thoughts be monitored?

## Conclusion

The business of lawyering grows more congested in New Jersey each year, contributing to increased competition in the traditional practice areas. For young lawyers in the state seeking room to grow, it is time to consider where the law is evolving, and in the process, perhaps have the opportunity to build the foundation for these new practice areas.

Law firms now compete for Internet search results related to traditional practice areas, and in a crowded space, it is not easy to be heard. In the future, the same competition will also take place for these new practice areas. Today,

young lawyers should consider starting their own website and becoming an expert in one of these new practice areas, or any other field where scientific advances come into contact with everyday life.

Some of the practice areas described may be further in the future than anticipated. Still others may never come to fruition. Areas of law that are now underdeveloped, or unknown, may emerge over the next several decades to have more prominence. In time, each practice area will become modernized with new legal mechanics.

Young lawyers must try to anticipate new opportunities in the legal profession without being overwhelmed or deterred. The risk that there will be no clients seeking legal services for these practice areas is a real one. But, each new practice area is also an opportunity to be on the cutting edge of legal thinking, to apply the law in innovative ways, and to invest in the future today. ♪

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# The Small Firm Shift

by Ksenia V. Proskurchenko and Michael Tomasino

In recent years, there has been an influx of attorneys stepping away from large-firm life to pursue the American dream—owning their own business. For most, this transition is far from subtle, often requiring attorneys to trade large-firm luxuries, such as extensive travel accounts and massive service departments, for the bare necessities. However, the allure of succeeding as a solo or at a highly specialized boutique continues to attract slews of attorneys, even those who charge \$1,000 per hour.

Attorneys may leave larger firms for myriad reasons: to dodge big-firm politics, to have more free time, or even to seek employment in a more ‘casual’ atmosphere. Whatever the aim, ditching the midtown office to set up shop in the suburbs requires a leap of faith familiar to few large-firm lawyers. Ultimately, leaving a national powerhouse is an individual decision requiring endless planning and analysis.

## The Challenges of Going Smaller

Many newly self-employed attorneys learn that operating a small office is not as glamorous as anticipated, and struggle to deal with the lack of instant gratification. For the first time, many of these corporate practitioners are forced to perform administrative tasks such as scheduling appointments and ordering supplies. Moreover, attorneys accustomed to considerable staff support, copy centers, and law libraries must redefine their research methods—aligning them with their newly limited resource pool.

In addition to newly discovered legal dilemmas and administrative monotony, these attorneys face financial challenges from all angles. Like other businesses, opening a law office involves steep start-up costs, monthly expenses, and insurance. Furthermore, solo practitioners should set aside a financial cushion for unsuspected expenses and anticipate the worst-case scenario—struggling to find clients and initial difficulty establishing their businesses. Legal malpractice presents its own financial challenges. A successful legal malprac-

tice claim may financially cripple a small firm. Therefore, it is of the utmost importance that new firms purchase affordable, yet inclusive, insurance.

On a more personal level, new solo practitioners typically struggle to adjust to differences between living on their large-firm salary and the just-getting-by lifestyle that accompanies newly opened businesses. To make matters worse, solo or small-firm practitioners often work as many hours at their new firm as at their previous one, and are forced to handle various non-attorney tasks as well. For example, new presidents and CEOs must serve as debt collectors—chasing down clients who refuse to pay for services rendered.

## Why Do Attorneys Go to Smaller Firms?

Though leaving large-firm life has its obvious drawbacks, there are ample explanations for why attorneys decide to ditch the midtown office for breakaway boutiques. First, there’s the cash. Though many small-firm attorneys initially take a pay cut, they have far higher earnings potential. Large firms typically receive two-thirds of the revenue generated by each partner annually. Self-owned firms and boutiques eliminate this skim. Second, small firms lack the conventional large-firm formality. This frequently provides small-firm attorneys with the ability to dress in business casual, work from outside the office, and avoid roundabout in-house communication stemming from the bureaucratic nature of legal powerhouses.

Additionally, small firms often lack office politics. Fewer attorneys and more tasks involving great deals of interaction and creative freedom tend to make the small office atmosphere less tense and internally competitive than their larger counterparts. Solo practitioners even have the ability to choose which cases they will accept—cases they work on from start to finish. Ultimately, these freedoms add to the allure of small-firm practice.



## **Making a Successful Jump to a Smaller Ship**

Though the reasons why individuals leave their large-firm offices and extensive benefits packages are endless, a common nucleus of business-savvy maneuvers seems to underline most successful small-firm practices. The first occurs well before opening the door of a new office: Leave the large firm on good terms. This seems like commonsense, yet an astonishing number of attorneys depart from their large firms spitefully. A disagreeable departure crushes any chance of a previous employer supporting the departing attorney's initiative, or more importantly, referring clients.

The second, and most common, pre-commencement error made by new owners is underestimating the amount of capital needed to open and operate a successful small business. However, this too can be avoided. The first year is always the toughest—anticipate it. Furthermore, calculate finances accurately and attempt to cut unnecessary expenses, such as extensive traveling and over-staffing. These cutbacks may mark the difference between a successful small firm, and having to beg to be rehired by the large firm. Many successful small offices attempt to keep costs down in other small ways as well, for example by purchasing used furniture and computers, keeping the office as paperless as possible, and not printing in color.

Next, network, network, network! Building a client base is vital—especially if the practitioner was unable to bring accounts from his or her previous firm to the new location. Furthermore, understand the differences between marketing a small office and a legal powerhouse. Have a strong presence in the local community—a majority of the small-firm practitioner's new clientele will live there. Additionally, do not overlook technology's importance in modern marketing. The Internet, particularly social media, provides a cost-effi-

cient medium reaching large numbers of prospective clients.

Small-firm networking extends far beyond advertising to clients; in fact, reaching other attorneys is just as essential. Befriend as many attorneys as possible—industry recognition and peer rapport go a long way. Attend conferences, bar association meetings, and any other events where large numbers of lawyers will be present. If possible, expand existing hobbies to include activities other local attorneys enjoy. Who knows, shooting a few rounds of golf may help relieve stress and improve business. Ultimately, the goal of networking with other attorneys is to receive referrals. However, to maximize the number of referrals received, refer clients to others. Do not hesitate to refer clients seeking services the firm does not provide to attorneys specializing in those areas. Don't forget the old adage: One hand washes the other.

Next, keep clients' best interests in mind. Quality customer service is an integral part of developing any business—especially in a small law firm. Courtesy, respect, and punctuality help convert new clients into repeat customers. Be respectful, and make each individual feel like his or her case is as important as *Roe v. Wade*. Make legal services affordable, and attempt to aid clients whenever possible. This may be as simple as giving return clients a free 15-minute consultation. In the end, the only thing better than a satisfied client is a repeat customer.

Building a strong client base is far easier said than done. One way to attract customers is to diversify the firm's practice area. Many attorneys leave large firms to break the monotony of handling only niche-specific cases. Consider handling cases similar to those previously practiced. For example, bankruptcy litigators may consider handling tax claims, or even general litigation. If a practitioner devoted his or her large-firm

career to trusts and estates, why not voyage into elder law? Such subtle transitions allow small firms to tap into additional markets.

## **The Appeal of Highly Specialized Boutique Law Firms**

Ultimately, the aforementioned tactics aid the growth and development of newly launched small firms and solo offices. But what about attorneys who want to ditch their elongated partner tracks, without giving up the opportunity to handle multi-million-dollar cases? There's a solution for many of these counselors as well—highly specialized boutiques. Boutiques, commonly referred to as big-firm breakaways, consist of roughly a dozen to 50 attorneys working in highly specialized, normally litigation-heavy, areas. But the name can be misleading: These 'small firms' handle big cases. More importantly, they provide big-firm opportunity without the general practice mentality and excessive hierarchal structure.

The recent influx of boutique law firms has given international mega-firms a run for their money. Typically, boutiques charge lower rates than large firms, and allow their attorneys to keep a higher percentage of the revenue they generate. Furthermore, boutique firms tend to hire only specialists in complex legal arenas, such as immigration and white-collar litigation. Moreover, these attorneys tend to focus on local law, as opposed to international matters—matters often irrelevant to highly specialized cases.

In addition to renowned expertise, boutiques have mastered the art of customer service. They provide big-firm results, while giving clients the individual attention offered by small offices. For example, clients have a far higher likelihood of speaking with managing attorneys at boutiques because these attorneys typically are not consumed by the committee meetings and administrative



responsibilities that plague large-firm higher-ups. To bring the process full circle, boutique lawyers typically have more creative freedom than large-firm attorneys, and in many cases take the initiative to address clients and keep them informed about their case's progress.

### **Conclusion**

Whether ditching a billable hour requirement to go solo, work at a small firm, or practice a highly specialized area at a boutique, it is important to understand the lifestyle change accompanying the decision. Though the initial transition is often a struggle, do not forget the anticipated benefits, and the drawbacks of big-firm life. An initial pay cut and increased responsibility are easily outweighed by increased autonomy and personal time. Do not forget, many attorneys have discarded their large-firm lifestyles for the satisfactions provided by ownership and the promise of a more meaningful livelihood. ⚡

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# A Personal Perspective on Work/Life Balance

## The Unsteady Rise of the Power Mom and the Diapering Dad

by Rebecca Hughes Parker



“The most important career choice you’ll make is who you’ll marry,” Sheryl Sandberg, the ubiquitous Facebook COO and author of the *Lean In* book (and social movement), tells women.<sup>1</sup> She advocates marrying someone who will do 50 percent of the “second shift,”<sup>2</sup> freeing women to go full-force in their careers, and allowing those stubborn low numbers of women in leadership positions to finally rise.

If a man does all the work a woman traditionally does, as my stay-at-home husband happily does, is the problem solved? Did I manage to reverse the gender roles and be the ‘father’ who goes to work? Fresh out of law school, I expected I would; but it wasn’t so straightforward.

Eight years after the birth of our twin daughters, and two years after the birth of our third daughter, my husband has

truly been the hands-on parent. We have never had anything resembling a nanny or a housekeeper. He did it all himself, from the twins’ rocky beginning after two months in neonatal intensive care through the terrible twos of our third daughter. He has never asked me to come home earlier, or do any household chores. I am slightly embarrassed to say that I am not entirely sure how to work our washer and dryer; I find my laundry folded on my dresser. And yes, our apartment is pretty clean and our children are pretty good kids due, in large part, to his excellent parenting.

During my first few years as a litigator, I drove myself crazy with guilt. If I was not billing hours for the firm or seeing the twins, I was doing something wrong. I turned down almost all non-mandatory work and social events in the evenings. I had

to make it to every pediatrician appointment. The twins took the earliest ‘gym’ class offered in our neighborhood so I could attend part of the sessions and run to work late. I felt compelled to squeeze in a few drop-ins at their ‘mommy-and-me’ preschool, although all I remember about it is answering emails on my BlackBerry and the vision of my husband, his six-foot-four-inch frame looking out of place, crouched by the play kitchen among the moms and nannies.

Eventually, I realized trying to do all this while working full-time as a big-firm litigator was tearing me apart. I needed (wanted) more time with my kids. I swallowed my ego, and asked for a reduction in my hours (and pay) at the firm to 80 percent, which made it slightly easier on me emotionally and physically, though not financially. This was something that, pre-twins, I would have never thought of doing.

Anne-Marie Slaughter, Princeton professor and former high-level aide to Secretary of State Hillary Clinton, hadn’t written her seminal piece about why she left her prestigious job at the State Department in *The Atlantic* yet, but I could have been someone who embodied her experience:

[T]he proposition that women can have high-powered careers as long as their husbands or partners are willing to share the parenting load equally (or disproportionately) assumes that most women will *feel* as comfortable as men do about being away from their children, as long as their partner is home with them. In my experience, that is simply not the case.<sup>3</sup>

Many feminist commentators say it is just social norms, hardened over generations, that make us feel this way, not biology; and I wanted to agree.<sup>4</sup> I reread *The Feminine Mystique* to remind myself about “the problem with no name” that

plagued preceding generations. But we are 50 years removed, and I was certainly *not* taught that a woman should stay home and take care of the kids. It made it all the more difficult to deal with that uncomfortable feeling described by Slaughter.

In the PBS documentary *Makers*, Abby Pogrebin, the daughter of Letty Cottin Pogrebin, who co-founded *Ms. Magazine* with Gloria Steinem, said she was clearly not prepared for the “ambivalence of motherhood and having a career.” As a child in the 1970s, the younger Pogrebin starred in the feminist TV special “Free to be You and Me.” But as an adult, she asked: “I am free to be a mother and I am free to have a career, but how do I reconcile both?”<sup>5</sup> She is well-educated and ambitious, but motherhood took her by surprise. “I don’t think my mother ever really laid out how complicated that was going to become. So when I hit it, and pretty much every friend in my life did too, I felt like I had been hit by a truck and I hadn’t been given the tools to respond.” Legal scholar Joan Williams calls it “the maternal wall,” and says women hit that wall before they encounter the glass ceiling.<sup>6</sup>

The first time I told a senior partner I wanted to reduce my hours, he said, immediately: “Are you still serious about your career?” I defended myself to him—of course I am, my husband is home with my twins, the firm has been happy with my work, I am responsible, I enjoy being a lawyer—it all came tumbling out as I tried to remain poised.

That moment haunted me, and I’m sure it haunts many in my generation. My colleagues thought the question was callous and sexist. The hours I worked at the firm over the next few years were what most would call full time. But didn’t working even slightly less than my colleagues mean that I was less serious about my career? I did not want to sacrifice my career; I just wanted to change

the traditional career arc to ease my motherhood conflict.<sup>7</sup>

Abby Pogrebin is a successful writer now; it seems she was able to make a career while giving in, at least a little, to the “maternal imperative.”

To be sure, fathers feel substantial guilt as well about working too much and missing kids’ events; balancing work and family is not just a woman’s issue. They want to make it home for their kids’ bedtime too. But do they feel a physical need to be with their children the way I do?

One day, during the first few weeks I was back at the firm after having my third daughter, I was sitting on a subway train headed to court. A woman sat down next to me with a baby around the same age as mine on her lap. The baby smiled at me, and I had to turn away. I missed my baby so much my stomach hurt. I had never felt something that raw before.

Author (and self-described critic of contemporary feminism) Christina Hoff Sommers argues in *The Atlantic* that different life choices for men and women may be “a phenomenon not of oppression, but rather of social well-being”—that is, when women are free to choose their own paths, gender differences can be more apparent. She cites a 2008 study that found the greatest differences between gender roles in the more liberated, wealthier societies—even when both parents worked, the women and men were less alike than when the mother stayed home.<sup>8</sup>

I am not ready to discount the physical process of pregnancy, labor and nursing. I am the one with the breasts, after all, that were designed to nourish the baby I birthed. We are not penguins or seahorses; it is the woman who carries the baby and is uniquely equipped to feed it.<sup>9</sup>

Perhaps the physical need, which may wane as kids get older, was biological, and the guilt I constantly felt was

imposed by cultural norms. Maybe those norms could change if more people had a stay-at-home husband. The trend is certainly toward my situation—a Pew study released in May 2013 revealed that in four out of 10 households with children under 18, the mother is the primary breadwinner. That's up from 11 percent in 1961. Many of these women are single mothers, but a significant number are not (37 percent of the breadwinning moms are married).<sup>10</sup>

More women with children under 18 now want to work full time (37 percent in a March 2013 Pew study versus 20 percent in 2007). But like me, women value flexibility more than men: "Fully seven-in-ten working mothers with children under age 18 say having a flexible schedule is extremely important to them," the Pew authors said. "Only about half (48%) of working fathers place the same level of importance on this."<sup>11</sup> If, in valuing flexibility, women are perceived as less serious about their careers, cultural norms will change at a glacial pace.

I am still the breadwinner with a demanding and challenging job, but I now have more control over my hours as the editor-in-chief of a legal publication. With more autonomy and more years of working motherhood under my belt, I have tamed most of the guilt that comes at me from both sides. I know that working outside the home is best suited to my personality, and what I need to be fulfilled. My job now allows me to get to enough school events that missing one is a non-issue. My toddler goes to the same afternoon mommy-and-me program the twins did with my husband. I don't make it there much, but I don't feel as if I need to. We spend many early mornings cuddling and watching *Sesame Street* together.

Some guilt and conflict remains. While my new work arrangement is more flexible, I sometimes still feel like I did after that partner questioned my

career goals—that I should be earning more money for the family, and, more selfishly, gaining more career recognition. At other times I feel as if I work too much and wish I could help the twins with their homework and bake cookies in the afternoon.

Using Sandberg's rubric, I probably chose the right husband for my career. My circumstances were optimal to step right into a traditional man's shoes. However, I found the shoes entirely comfortable for me. It's not always an even exchange when you swap a power mom for the traditional breadwinning dad. Breadwinning moms, even those with stay-at-home husbands, need to make it work their own way. It's the new frontier, and we're adapting and improving to meet the needs (and demands) of the ever-changing modern family. ♪

#### Endnotes

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