the YOUNG LAWYER

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Young Lawyers Division

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Sign Up for Project Salute

YOUNG LAWYERS SERVING VETERANS

The American Bar Association Young Lawyers Division (ABA YLD) invites you to join forces with us to implement our year-long initiative, "Project Salute: Young Lawyers Serving Veterans." Our goal is to help as many veterans as possible in all fifty states obtain their well-deserved federal benefits for serving our country.

Why help veterans obtain federal benefits?

Currently there are **23 million veterans** in the United States. Under Title 38 of the United States Code, veterans are entitled to a broad range of services provided by the Department of Veterans Administration (VA). But many veterans are unaware of these programs or require assistance in obtaining their benefits and don't know where to turn.

According to the U.S. Census Bureau in 2009,

- **2.2 million** Americans or more have served in **Iraq and Afghanistan** since 9/11.
- **9 million** veterans were **over the age of 65**;
- **10.3 million** served in the **Korean or Vietnam Wars**;
- **2.3 million** served in **World War II**; and
- **5.6 million** more have served in **peacetime**.

According to a Department of Housing and Urban Development study:

- Veterans comprise nearly **one-fifth of the homeless population**;
- about **45 percent** of these vets need help **finding a job**; and
- **37 percent** need assistance **obtaining housing**.

Join the effort to support our veterans!

The ABA YLD has partnered with the University of Detroit Mercy School of Law (UDM) to implement Project Salute. To participate, a volunteer attorney must:

- Become VA accredited and complete a 3-hour training session. Complete a VA Form 21a. Accreditation can take up to sixty days.
- After accreditation, attend the necessary training session at an ABA YLD Conference or via a scheduled live webinar.
- Once accredited and trained, volunteer at an ABA YLD free legal clinic.
- Young lawyer organizations affiliated with the ABA YLD can hold free legal clinics to help veterans.

Please visit our website at ambar.org/yldservingveterans for more information about how to get involved.

Supreme Court Limits Primary Liability under Federal Securities Laws

By Erin E. Rhinehart

On June 13, 2011, in a 5–4 decision, the United States Supreme Court reversed the Fourth Circuit Court of Appeals and limited primary liability under the federal securities laws. *Janus Capital Group, Inc., et al. v. First Derivative Traders*, No. 09-525, 564 U.S. ___ (2011). In particular, the Court ruled that Janus Capital Group, Inc. (JCG) and its wholly owned subsidiary, Janus Capital Management LLC (JCM), could not be held liable for false statements made in prospectuses issued by Janus Investment Fund (JIF), a business trust owned by mutual fund investors. Significantly restricting shareholders' private right of action under SEC Rule 10b-5, the decision may have far-reaching implications.

Under SEC Rule 10b-5, it is unlawful for any person "[t]o make any untrue statement of a material fact in connection with the purchase or sale of securities." 17 CFR § 240.10b-5(b). Whether a person "made" the statements was the focus of the majority's analysis: "To be liable . . . [JCG and/or JCM] must have 'made' the material misstatements in the prospectuses." Reasoning that neither JCG nor JCM "made" the misstatements in the prospectuses, the majority relied on the following reasons: (1) the narrow scope that must be given to an implied private right of action (Congress did not expressly authorize a private right of action under SEC Rule 10b-5); and (2) the Court's prior decisions, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994) (persons cannot be held liable in a private action under SEC Rule 10b-5 for aiding and abetting another person's fraud), and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165–67 (2008) (expanding *Central Bank*'s protection of secondary actors).

Importantly, the majority found that "[o]ne 'makes' a statement by stating it." "For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." Preparing or publishing a statement on behalf of another is not, according to the majority, "making" a statement under SEC Rule 10b-5.

JCG and JCM argued that, notwithstanding the overlap of officers of the entities, the statements made in the prospectuses were made by JIF, an investment fund that was a separate legal entity. Neither the parent company nor its subsidiary was responsible for the prospectuses, and they could not be held liable. The Court agreed. Although the majority acknowledged the intimate relationship between a mutual fund and its investment advisor, including the fact that in the case at bar all three entities' officers were the same, JIF "maintain[ed] legal independence," i.e., its respective board of trustees was independent (only one member overlapped with the other Janus entities).

There are broad implications of this decision. Liability of other secondary actors under the securities laws, including accountants, investment advisors, attorneys and even separate legal entities related to those with "ultimate authority," may be limited under *Janus*. In turn, this limit on private actions may result in increased allegations of control person liability under section 20(a) of the Securities Exchange Act of 1934, as well as enforcement actions by the SEC.

> *Janus* may stimulate Congress to reconsider section 10(b) of the Securities Exchange Act of 1934 and related securities fraud legislation.

Further, *Janus* may stimulate efforts of Congress to reconsider section 10(b) of the Securities Exchange Act of 1934, related securities fraud legislation (e.g., Private Securities Litigation Reform Act), and other legislation. In any event, *Janus* is a significant decision that has altered the landscape of securities law.

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BACK TO BASICS PRACTICE REMINDERS FOR ATTORNEYS OF ALL EXPERIENCE LEVELS

Guidelines for Success at Initial Client Meetings

By Kaveh Kashef

No matter how long an attorney has been in practice, initial client meetings are always a balance of two kinds of stress: nervousness and excitement. Both can be managed and overcome by following a few simple guidelines.

All attorneys have their own styles, characteristics, strengths, and weaknesses, which dictate client interaction. Like snowflakes and judicial temperaments, every initial client meeting is unique, with its own set of facts, personalities, and circumstances. Therefore, each should be treated uniquely. However, many of these guidelines are universally applicable and useful when preparing for initial client meetings.

Your clients are people, not parties

It is easy to forget this point. Although the client sitting in front of you may soon become "Plaintiff X" or is already "Defendant Y" in litigation, or is soon to be "Party of the First Part" in a corporate transaction, an initial client meeting should not begin by diving directly into the legal issues, but by getting to know the client on a much more basic level.

I am not suggesting that the meeting begin like the application process for the latest online dating service: "What are your favorite bands . . . What do you like to do on rainy Saturday afternoons?" Still, the meeting should not begin with questions like "Do you deny that, as the president of your company and its 40 percent member, you breached your fiduciary duties when you diverted the corporate opportunity away from your company and sent it to your brother's competing entity?"

After making initial introductions, it is always a good idea to get to know each other before engaging the client on the substance of the legal matter. The fact that the client has already walked through your door is a good sign of trust, yet undoubtedly both the attorney and client will have questions about one another that go beyond the scope of the legal issues. Discussions about the client's business (e.g., what are your annual revenues, how long have you been in business, how many employees and offices do you have, what is your company's annual revenue) or about your professional background (e.g., where did you go to law school, what are your areas of expertise, what are your professional affiliations) will help both of you relax prior to engaging in discussions about the case.

Preparation leads to confidence, confidence leads to calm

To make the best impression on the client, never begin an initial client meeting in a vacuum. Try to obtain at least a little information before having the first meeting with the client, even if the meeting takes place on the phone. Before the initial meeting, depending on the matter, ask the client for the complaint, the relevant agreements, photographs, or even a short e-mail with a factual synopsis to review.

This initial preparation will result in a more efficient client meeting and convey your genuine interest in the client's issue. It will communicate that you are interested in having the most efficient (i.e., cost effective) meeting possible. The preparation will also give you an opportunity to analyze the facts, perform some research, and create a basic meeting agenda. Importantly, a little early due diligence will make you confident and calm.

Manage your client's expectations, and formulate an initial plan

It is not unusual for a client to expect answers by meeting's end. Unsurprisingly, many clients expect only favorable answers; while common, it is unrealistic. The attorney should insure that by the meeting's conclusion the client is given realistic expectations. At first, clients may have difficulty with answers that are unfavorable to their cause. After all, they came to you because you are the "expert," and they expect you to have all the answers. Additionally, some clients believe that they have not "done anything wrong," so the issue should be resolved in their favor. Therefore, having a discussion with the client regarding potential pitfalls, alternate methods of resolution, "the unknown," and other factors that may influence the final result is appropriate. However, be mindful of the aggressiveness with which the devil's advocate position is conveyed—while a candid and honest discussion is important, putting the client on the defensive from the outset is dangerous, as it can adversely affect not only the client's trust in your abilities, but whether the client will be honest with you about the facts of the case. This is where individual styles, characteristics, and manners are very much at work and the attorney has to trust his or her instincts.

No matter how prepared, confident, and thorough you are during an initial client meeting, it is unusual for the meeting to end with all questions answered and an agreed-upon plan of action. It is important to instruct the client that whatever course of action you and the client agree to moving forward, it is an initial plan, and it is not only subject to future changes based upon the circumstances, but it *will* change.

Follow through on your promises

A little-known, yet ubiquitous secret about first impressions between attorneys and clients is that the process of the initial client meeting never truly ends—nor should it. Cases will develop, projects will work through completion, and the client and attorney will have countless meetings. If the relationship is solid, attorney and client likely will work together on issues in the future. However, no matter how long the relationship endures, in the back of his or her mind, the attorney should always presume that the initial meeting is continuing and that the attorney is still being interviewed. The client should never be taken

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What Every Young Lawyer Should Know about Client Protection

By Selina Thomas

New lawyers generally have a basic understanding of professional responsibility law from their law school's professional responsibility course and the "Berlitz" version used to prepare for the Multistate Professional Responsibility Exam (MPRE). They also may have a vague notion of the concept "client protection" but little understanding of what it is beyond lawyers' broader mandate to "protect" or act in the interests of their clients.

But client protection is more than a concept. Client protection programs exist in every U.S. jurisdiction and are based on three simple premises: the practice of law is a profession, professionalism is a fundamental obligation of lawyers, and protection of client interests is at the heart of professionalism. Client protection plays a part in the everyday practice of all lawyers. Young lawyers, and those with more experience, would benefit from a better understanding of client protection mechanisms and their effect on the public, individual lawyers, and the profession.

To have an accurate understanding of client protection, one must first understand what it is not. It is neither an admonishment of the profession nor an assumption that lawyers are somehow prone to behave badly. In truth, most lawyers are honest professionals who provide clients with competent representation. But client protection does acknowledge that even a single bad actor can cause catastrophic damage to clients and the reputation of the profession.

Client protection mechanisms have three primary objectives: (1) to help honest lawyers understand their professional obligations (prevention); (2) to provide a remedy to clients who have been harmed by dishonest lawyers (remediation); (3) and to help preserve the client-lawyer relationship (maintenance).

Prevention. A large number of disciplinary claims brought against lawyers are not the result of the intentional mishandling of client funds, but rather the lack of a clear understanding of best practices when managing those funds. Every jurisdiction requires lawyers to maintain complete records of client funds held in trust and to render a full accounting for the receipt and distribution of those funds. The ABA Model Rules for Client Trust Account Records provide practical guidelines to help lawyers satisfy those requirements and avoid disciplinary action.

A lawyer following correct trust accounting procedures should

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How Tending Bar Can Help You to Better Serve the Bar

By Syeda Davidson

By day, I'm an associate practicing family law. Due to the economy, it took almost two years to find my position. Like many recent law school graduates, for two years I was a solo practitioner. And like many recent graduates, I also have an obscene amount of student loan debt. That's why at night I work as a bartender.

I make fancy drinks, simple drinks, shots, and retrieve beer and popcorn. I get to see amazing local and national artists where I work. I met Dick Dale and Gilbert Gottfried, and I saw Tracy Morgan and Blanche for free. I go into work at 7 p.m. and get home at 3:30 a.m.

If this sounds like something you might consider doing to pay down your student loans, first carefully consider the potential conflicts and ethical dilemmas for lawyers. For example, placing yourself on court-appointed counsel lists is a great way to gain experience in criminal law while supplementing your income. But what if your other job is in a bar or a restaurant? How will you react to learning that your new drunk driving client was drinking at your establishment on the night in question? Worse, what if you served the drinks?

Conflicts also can occur when your nonlawyer co-workers approach you for legal advice, which happens a lot. These can become difficult scenarios, particularly if it involves your mutual employer or events occurring while on the clock. You do not want to unintentionally create a client-lawyer relationship or even create the obligations that attach under ABA Model Rules of Professional Conduct Rule 1.18 (Duties to Prospective Client).

One moonlighting attorney remembers one such awkward situation. "One of my co-workers at my second job had been fired," she recalls. "He called me, said that he needed legal advice, and immediately launched into a tale about the place where we both worked. Once I realized where the conversation was going, I had to immediately put a stop to the conversation. I told him that I was unable to help him and that it was best for me to not even hear the rest of the story. He kept insisting on trying to tell me everything. I finally had to cut him off and hang up. I felt bad, but I couldn't risk my license." You must be aware of the potential ramifications of any conversation involving legal advice, no matter who is involved or how the discussion is initiated.

On the bright side, bartending has taught me some invaluable lessons that can be applied to my professional life. For example, law school does not train you to deal with difficult people the way that working in the service industry does. One successful attorney said of moonlighting: "No matter how difficult they can be, I've never met an opposing counsel half as menacing as some of the intoxicated patrons I had to cut off and try to prevent from driving when I was bartending. I think that prevented me from being intimidated by aggressive opposition early in my career, which, in hindsight, might have been my most notable—and maybe only—strength as a very new lawyer."

Moonlighting also fosters another valuable asset for young lawyers: stamina. An eight-hour day at an office feels like a breeze compared to an eight-hour day followed by an eight-hour night. One attorney who used to moonlight says of his current law practice, "I'm not saying I don't ever need a break and that I want to work every single weekend now, but I can do it for a while without apparent fatigue and without getting discouraged, disillusioned, or bitter."

Being willing to work a second job in these rough economic times says a lot about the kind of worker you are. It demonstrates that you are willing to make sacrifices to be successful in the practice of law and are a hard worker. When I first got my license, I was slightly embarrassed to occasionally pour a drink for opposing counsel, but I now realize that I have never met a single legal professional who looked down on me for it.

Moonlighting also can teach lawyers valuable lessons about how to treat others. Generally, I never mention that I am a lawyer while working my night job, but once, a very rude young man kept coming to my bar, flashing his bar card every time he demanded something. After the first few times I teased him a little bit, snorting, "Why do you keep showing me your bar card?" He ignored me. The next time he came up and got pushy, I finally said, "Oh yeah? I've got one of those, too." Immediately his attitude changed, and he became more respectful. That night, I decided that if I'm ever in a position where I get to hire someone the first interview will take place in a restaurant. I only want to hire people who treat others with respect regardless of their perceived importance. Take it from a "secret lawyer": Be careful how you treat people in your everyday life. You never know who they might be.

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YLD CALENDAR & CONFERENCES

OCT. 1 — LAW DAY VIDEO CONTEST LAUNCH

OCT. 13-15 — ABA YLD FALL CONFERENCE | SEATTLE, WA

Join us in Seattle this October! The Fall Conference brings together young lawyers from all practice areas, practice settings, and parts of the country for three days of learning, networking, and public service.

CONFERENCE HIGHLIGHTS INCLUDE:

- More than 20 educational sessions starting Thursday afternoon and ending Saturday afternoon
- Legal updates and practical tips from expert faculty covering client service, trial skills, e-discovery, social media use, ethics, and much more
- Speed Negotiation, a truly hands-on workshop designed for mastering the art of negotiation
- Valuable networking events, where you connect with colleagues and presenters
- Special sessions designed for young lawyer organizations and their bar leaders
- Meaningful public service and pro bono activities
- Friday Night Gala at Seattle's Experience Music Project (EMP)

REGISTER TODAY AT AMBAR.ORG/YOUNGLAWYERS2011

OCT. 14 — PROJECT SALUTE: YOUNG LAWYERS SERVING VETERANS LAUNCH

OCT. 23-29 — NATIONAL PRO BONO CELEBRATION

FEB. 2-4, 2012 — YOUNG LAWYER EVENTS AT THE ABA MIDYEAR MEETING NEW ORLEANS, LA

MAR. 1-3, 2012 — NEW PARTNER AND IN-HOUSE COUNSEL CONFERENCE PHILADELPHIA, PA

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Initial Client Meetings

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for granted, nor these initial client guidelines ignored.

Your clients should be treated with respect, and true interest should be given to their endeavors. You should always be as prepared as possible for client meetings to insure that the time together is as productive and efficient as possible. Client expectations and case-management strategies should remain in the back of your mind as a matter progresses and be revisited from time to time to insure that your advice and actions comport with both.

In short, client trust is earned, and should never be assumed. Keeping these guidelines in mind for the initial client meeting and meetings thereafter will help both you and the client get off on the right foot and have a strong and healthy business relationship into the future.

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Client Protection

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never have an overdraft on a trust account. If an overdraft does occur, it is either because the lawyer or bank has made an innocent error or the lawyer is acting dishonestly. Trust account overdraft notification programs provide notice to disciplinary counsel when a lawyer's trust account has been overdrawn. In the case of the lawyer who has made an inadvertent error, overdraft notification provides the opportunity to reassess and correct internal procedures to avoid repeating the error in the future. However, overdraft notification also serves as an early warning system to disciplinary counsel when a lawyer is engaged in trust account theft.

Another method of ensuring that lawyers are engaged in proper trust accounting and recordkeeping procedures is a random audit program. The random audit of lawyer trust accounts provides an opportunity for those most educated in trust accounting procedures to review lawyer or law firm trust account-related books to determine if proper procedures are being followed and to provide direction to improve internal procedures. Similar to overdraft notification, random audit has the added benefit of highlighting patterns of dishonest behavior.

When a third-party liability claim is settled, the client/payee is sometimes the last to know. Payee notification programs provide that the client be given notice when a payment has been distributed to the lawyer. Because payee notification requires insurance companies to forward the notice to the client, payee notification is often enacted by statute or insurance commission regulation. The reasoning behind payee notification is simple: if the client knows the money is there, the dishonest lawyer is less likely to forge an endorsement on the settlement check and misappropriate the funds. In fact, jurisdictions with payee notification have reported a marked decline in lawyer theft of insurance proceeds.

Remediation. Despite the profession's best preventative efforts, a few lawyers will still misappropriate client funds, leaving the client with little recourse for recovery. Unfortunately when this happens, it taints the reputation of the entire profession. In response, every state and the District of Columbia has established a lawyers' fund for client protection (lawyers' fund) to reimburse losses to clients following lawyer misappropriation. Most lawyers' funds are financed through mandatory assessments of the members of the bar.

Lawyers' funds recognize the fundamental principle that the protection of client interests is the obligation of all lawyers. Lawyers should be especially proud to belong to one of the only professions that has established a method to reimburse clients who have suffered financial losses due to the conduct of its members.

Maintenance. Client protection extends beyond the prevention and remediation of the misappropriation of client funds. Fee arbitration and mediation programs provide the client and lawyer with the opportunity for fair, fast, and inexpensive resolution of disputes involving legal fees, instances of alleged lesser misconduct, or simple misunderstandings that may impede the ability of the client and lawyer to proceed. Dissatisfaction with legal fees is consistently one of the most frequent causes of complaints registered against lawyers (along with the oft-related "failure to communicate").

Client protection initiatives prevent and, when necessary, address harm caused during the practice of law. It is in all lawyers' best interests to learn about the client protection programs in their jurisdictions. For more information on these and other client protection programs, visit the ABA Standing Committee on Client Protection website at http://ambar.org/ClientProtection.

Selina Thomas is associate client protection counsel for the ABA Center for Professional Responsibility. ETHICS QUESTIONS? Contact the Center for Professional Responsibility complimentary "ETHICSearch" service, at 1-800-285-2221 (Option 8) or ethicsearch@americanbar.org.