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NEW YORK STATE BAR ASSOCIATION

Journal

A Special Issue on

Law Practice Management: What Does the Future Hold?

Understanding the perils and opportunities in 21st-century law practice

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LAW PRACTICE MANAGEMENT: WHAT DOES THE FUTURE HOLD?

BY GARY A. MUNNEKE

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DEPARTMENTS

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BERNICE K. LEBER

"Helping Lawyers, Helping Clients": Protecting Client Rights, Enhancing Our Image

The freedom from indefinite and unlawful imprisonment lies at the very heart of our Anglo-American judicial system and the "Great Writ" of Habeas Corpus has long been recognized as the vehicle vindicating that right.[1] Habeas corpus, literally meaning "that you have the body," is an ancient writ employed to bring a person before a court. From its inception, its purpose was to guard against indefinite and unjust detention by the King.[2] On June 12, 2008, in *Boumediene v. Bush*,[3] the United States Supreme Court held that indefinite and potentially unlawful detention without trial instills the courts with a right to review the detention of enemy combatants at Guantanamo and, further, that the designation of Guantanamo detainees as "enemy combatants" and procedures for review are not an adequate and effective substitute for habeas corpus. In light of our House of Delegates' support for the *Boumediene* decision in a resolution adopted at the June meeting held recently in Cooperstown, I decided to devote this column to this issue. In particular, I want to highlight the fine "Report on Executive Detention, Habeas Corpus and The Military Commissions Act of 2006" (the "Report")[4] prepared by our Committee on Civil Rights, chaired by Fernando A. Bohorquez, Jr., that resulted in that resolution. The Report underscores the importance of our Association continuing to address issues that affect our clients, the public and our profession.

Habeas corpus has played a traditional role as a bulwark against arbitrary and unlawful detention. The modern day habeas has its roots in 13th century England, specifically Clause 39 of the Magna Carta. During this period, "prisoners started initiating habeas [corpus] proceedings to challenge the factual and legal basis of their detention."[5] The Habeas Corpus Act of 1679 codified the writ in order to stem the abuses of power by King Charles I and his ministers; it came to be known as "the second magna carta, and stable bulwark of [British] liberties."[6] However, the English Parliament recognized that there were certain times when the writ should be suspended: (1) for periods less than one year; (2) when adopted in response to conspiracies against the Crown or all out rebellions; and (3) when limited to suspected crimes of treason. Interestingly, at early English common law, courts "exercised habeas jurisdiction over writs filed by enemy alien detainees."[7] In a series of cases, the courts determined that non-citizens had the right to challenge the legality of their detention on habeas review, not only in court in England but also overseas.

Closer to home, here in the 1600s early colonists also claimed a right to habeas corpus, for example, for refusing to issue a guilty verdict against William Penn and William Meade for their "criminal" participation in Quaker worship. Bushell was eventually released by writ of habeas corpus, "when the court decided that jurors must be free to return verdicts based on the evidence and un-coerced by the courts."[8] Accordingly, the Constitution preserves the writ but also suspends it in times of national security. Under the Judiciary Act of 1789, the courts have statutory authority to issue writs of habeas corpus.

One might ask when the writ of habeas corpus has been suspended. The Report addressed that issue, and more: since 1789, the writ has been lawfully suspended four times in the approximately 230 years of the United States – twice within the continental U.S. (when Congress authorized President Lincoln to do so in order to advance the Civil War and later on, to assist President Grant in dealing with the emergence of the Ku Klux Klan). Congress also authorized suspension of the writ twice outside the U.S. in areas within U.S. jurisdiction (when Congress granted power to the governor of the Philippines during a rebellion there and in 1942, immediately following the bombing of Pearl Harbor).[9] Notwithstanding the limitations of the Suspension Clause, Congress can still deny the privileges of habeas corpus so long as it creates an adequate and effective habeas substitute. The Supreme Court has taken a hard look at attempts to create these substitutes and held that it must provide the same rights and remedies commensurate with traditional habeas corpus review.[10]

Today, more than 260 detainees are kept at Guantanamo Bay, only 20 of whom have been formally charged with a crime.[11] With the Authoriza-

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tion for Use of Military Force (AUMF) that empowers the President to use all necessary force against those he determines "planned, authorized, committed or aided terrorist activities on 9/11," and the Defense Department establishing the Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo Bay were "enemy combatants," certain detainees who deny membership in al Qaeda moved for a writ of habeas corpus in *Boumediene v. Bush*.[12] The Federal District Court for the District of Columbia denied the writ. The District of Columbia Court of Appeals affirmed the ruling. While the detainees appealed the decision, Congress passed the Detainee Treatment Act (DTA) which eliminated writs of habeas corpus from the federal courts and gave the D.C. Court of Appeals exclusive jurisdiction to review CSRT decisions. After the Supreme Court held that the DTA did not apply to cases pending when it was enacted,[13] Congress responded with the Military Commissions Act of 2006 and (again) denied federal courts jurisdiction regarding habeas corpus actions by detainees since 9/11.

The U.S. Supreme Court held in *Boumediene*[14] that § 7 of the Military Commissions Act of 2006 was unconstitutional because detainees have a right to challenge the legality of their detention by means of habeas corpus. They were not barred from seeking the writ or invoking the Suspension Clause's protection because the CSRTs designated them as enemy combatants. The Suspension Clause in the Constitution may, moreover, only be read to apply when public safety requires it in times of rebellion or invasion. Thus, § 7 of the Military Commissions Act of 2006 operated as an unconstitutional suspension of the writ. Citing the need for the "delicate balance of governance,"[15] the Court decided that it could not allow the political branches of government to switch the Constitution on and off at will, where they (not the Court) say "what the law is."[16]

The House of Delegates of our Association considered the Report and formally resolved that important issues remain open after *Boumediene*, among them the standards applicable to the habeas proceedings concerning detainees; the specific rights that must be afforded them in the proceedings against them; and the rights of non-citizens detained as "enemy combatants" in other extraterritorial locations under the de facto control of the United States.[17] However the issues are ultimately resolved, this much is clear: lawyers for detainees – many of them New Yorkers who work tirelessly, *pro bono* – raised and will continue to raise serious constitutional issues over the terms of their clients' confinement, the meaning of due process of law and the right to effective assistance of counsel. While no one would question the importance of our Government proceeding with trials in Guantanamo that preserve these fundamental rights, we have been called upon to consider the impact and propriety of law on our clients, every day we work and wherever we work. As lawyers who toil in the trenches every day, the issues raised by the statutes and in the *Boumediene* decision are ones which we must continue to invoke for our clients, both as lawyers and as members of the State Bar, for our profession and our future if we are to remain a just society, true to our constitutional principles. ■

A Note From the President

Assisting our members – especially our solo and small firm practitioners – with the challenges of law practice management in this increasingly difficult economic climate is, as you know, a theme of mine in "Helping Lawyers, Helping Clients." To that end, Robert Ostertag, one of our former Bar Presidents, is chairing the Special Committee on Solo and Small Firm Practices that I formed when I took office in June. The Task Force will be reporting on issues that affect the small and solo practice.

On a similar note, Prof. Gary Munneke, who heads our Committee on Law Practice Management, specially designed this month's *Journal* on the future of law practice management. It gives me great pleasure to invite you to read this extraordinary issue, dedicated exclusively to the various facets of law practice management, including leadership and business plans, the use of online resources and more effective utilization of associates and paralegals. It is a singular tribute to the hard work and dedication of our Law Practice Management Committee and Gary. Most important, it is only one example of the tremendous resources offered by this committee and the State Bar. I urge you to visit Gary's committee's Web site at www.nysba.org/lpm. Finally, please write to us if you have any thoughts on how we can better help you help your clients. Your e-mails are always welcome at bleber@nysba.org.

1. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–55 (2004) (Scalia, J. dissenting).
2. Black's Law Dictionary, definition of habeas corpus (8th ed. 2004).
3. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).
4. http://www.nysba.org/HabeasReport.
5. Report on Executive Detention, Habeas Corpus and The Military Commissions Act of 2006 by the Committee on Civil Rights at 12.
6. Report at 13 (citing 1 William Blackstone, Commentaries 133 (1765)).
7. Report at 15 (citing *Rasul v. Bush*, 542 U.S. 466 (2004)).
8. Report at 17 (citing Max Rosen, *The Great Writ – A Reflection of Societal Change*, 44 Ohio St. L.J. 337, 338 (1983)).
9. Report at 20–27. During World War II, two detainees (one German, one Japanese) also challenged the right of the President to try them by military commission. In those cases, the United States Supreme Court affirmed that aliens could challenge both the construction and the validity of the statute and underlying basis for detention and question the existence of a "declared war" – whether within or outside the United States. The Court held, however, that while aliens have the right to a full and fair hearing prior to sentencing, they do not have qualified access to U.S. courts.
10. Report at 37 (citing *Sanders v. United States*, 373 U.S. 1, 14 (1963)).
11. Demetri Sevastopulo, *Ban Detainess from US, Urges Attorney-General*, FT.com, July 22, 2008. *See* Report at 3 (citing Jeffrey Toobin, *Camp Justice*, New Yorker, Apr. 14, 2008 at 32).
12. 128 S. Ct. 2229 (2008).
13. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
14. 128 S. Ct. at 2240.
15. *Id.* at 2235 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)).
16. *Id.* at 2259 (citing *Marbury v. Madison*, 2 L. Ed. 60 (1803)).
17. The 100+ page Report was issued prior to the U.S. Supreme Court ruling, but the debate was held on June 21, nine days after the Court decided the case.

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September 17 Albany

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September 19 Canton

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October 2 Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

Retirement Accounts in Elder Law Planning
October 3 Albany
October 31 Syracuse
TBD Long Island; New York City; Tarrytown

Update 2008
October 10 Syracuse
October 24 New York City

Handling DWI Cases in New York
October 16 Buffalo
October 23 Long Island
October 24 New York City
November 13 Albany

Business and Family Entities: What the Divorce Lawyer Must Know
(program: 9:00 am – 12:45 pm)
October 17 Buffalo
October 24 Long Island
November 14 Tarrytown
November 21 Syracuse
December 5 Albany
December 12 New York City

Risk Management for the Solo/Small Firm
(registration: 12:30 pm; program: 1:00 pm – 5:00 pm)
October 21 Buffalo
October 28 Albany
November 6 Westchester
November 20 New York City

Practical Skills Series: Probate and the Administration of Estates
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October 23 Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

Article 9 of the UCC
(program: 9:00 am – 1:00 pm)
October 28 New York City

Practical Skills Series: Basics of Bankruptcy
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October 28 Buffalo; Syracuse
October 30 Albany; Long Island; New York City

+Update 2008 (video replays)
October 29 Albany; Binghamton
October 31 Rochester
November 5 Buffalo; Utica
November 6 Ithaca; Plattsburgh; Saratoga
November 13 Jamestown
November 14 Canton
November 18 Long Island; Suffern
November 21 Watertown; Tarrytown
December 3 Poughkeepsie
December 5 Loch Sheldrake

Emerging Issues in Environmental Insurance
(program: 9:00 am – 1:00 pm)
October 31 New York City

Tenth Annual Institute on Public Utility Law
November 7 Albany

Update on Landlord/Tenant Practice
(program: 9:00 am – 1:00 pm)
November 13 New York City

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November 14 New York City

Practical Skills Series: Basics of Mortgage Foreclosures and Workouts
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Gary Munneke (gmunneke@law.pace.edu) is a Professor of Law at Pace Law School in White Plains, New York, and is Chair of the New York State Bar Association's Law Practice Management Committee and a regular contributor to the New York State Bar Association *Journal*. He also serves as a member of the Board of Governors of the American Bar Association, and Co-Chair of the New York Fellows of the American Bar Foundation. Professor Munneke is a graduate of the University of Texas at Austin and the University of Texas School of Law. The views expressed in this article are solely those of the author and do not represent the views or policy of the American Bar Association, its Board of Governors or House of Delegates.

Law Practice Management: What Does the Future Hold?

By Gary A. Munneke

All lawyers need to be effective managers, even if they do not serve as managing partners or members of the management committee of the firms where they work. Information about practice management is relevant to lawyers of every age, practice setting, and status. It is important to remember that law practice management is not the academic discipline of studying how law was practiced circa 1950, or 1900 (although as a professor, such historical inquiry is intriguing). Management of the law firm and the delivery of legal work, as well as the development of personal manage-

ment skills is a subject that lives best in the present and future tense. Becoming the best possible lawyer (or law firm) should be an everyday activity, and no examination of present competence should ignore the constant imperative to improve – to find ways to thrive, not just survive. This issue of the New York State Bar Association *Journal* takes a look at some of the trends that will affect the practice of law in the near term, and offers suggestions as to how lawyers and law firms should plan for and respond to the changes that these trends will bring in the future.

It is just as important to appreciate the trends that will drive law practice management as it is to understand the nuances of practice management in the present. Ample evidence supports the proposition that the practice of law has changed dramatically in recent decades, as has the management of law firms. Although it is not possible to predict the future with certainty, those lawyers who make thoughtful, informed guesses about what the future holds will be more likely to weather the winds of change than those who simply wait for events to overtake them. Those who study the future (futurists, as they call themselves) often speak in terms of "alternative futures." To them, the future is not cast in stone; rather it is influenced over time by countless variables of less-than-certain predictability. While some factors may operate beyond our control as humans, we have the ability and opportunity to affect others, and thereby move in the direction of a future we consider favorable.

For example, take global warming: A variety of scientists have presented evidence to show that the average global temperature is rising, and that such warming will have a profound effect on climate, eco-systems, and human economies. Some pundits suggest that there is not enough information to know for certain whether global warming is a long-term trend or a cyclical pattern. An individual who accepts the reports that global warming is real may be able to act in ways that will contribute to ending or ameliorating global warming, like reducing the consumption of bio-fuels by taking public transportation. The same person might protect against certain risks associated with global warming, such as a rising sea level, by not buying beachfront property likely to be inundated if the direst predictions come to pass.

Lawyers and law firms also have the opportunity to look at the future of law practice, and make decisions about how they manage the office, staff, clientele, services, and economics of the organizations where they work. If they can identify those trends that may have an impact on their practice, they may be able to make decisions that will influence the trends themselves or increase the likelihood of favorable outcomes in the future. If they simply wait until events unfold, they may find the only decisions left to them are how best to cut their losses.

The articles in this issue of the *Journal* are intended to provoke thought about future directions in the field of law practice management, which will in turn lead readers to think strategically about ways to mold their own management practices. A short preview of the articles may be useful.

Richard Granat, co-chair of the American Bar Association's eLawyering Task Force, discusses the evolution of online legal services in his article, "eLawyering: Providing More Efficient Legal Services With Today's Technology." Having created a Web-based law firm himself, Granat speaks from experience. He points out that while the number of law firms with some kind of online presence has increased dramatically, most do not offer sophisticated interactive services for clients. Some firms, as well as non-legal service providers, now offer a variety of legal services online, and most observers believe that growth in this sector will continue. For law firms that still do not have Web sites, as well as those with purely informational sites, questions about how online services will impact the marketplace for legal services abound. For those firms that want to make the move to eLawyering services, decisions about how to structure and manage such non-traditional services may be daunting.

The articles in this issue are intended to provoke thought about future directions in the field of law practice management.

Thinking back to the changes in law practice that were triggered by the introduction of personal computers in the 1980s, Susan Raridon Lambreth, a well-known consultant to law firms with Hildebrandt International, in "Practice Group Management: Passing Fad or Permanent Part of Our Future?", examines how practice management has evolved as firms have become larger and more dispersed. Lambreth argues that the more de-centralized firms become, the more critical it is to have effective management to ensure a strategic position in the marketplace and to integrate practice groups, branch offices, recruiting, marketing and resources. It is not enough today to think of the organization as a monolithic entity, but rather as a collection of distinct practice groups, with particular

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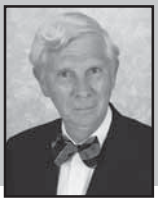

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management needs. Although this model demands greater management resources and attention, the investment of time and dollars in the management of these functions, Lambreth concludes, translates directly to bottom-line profitability.

A related issue for law firm management is the often-overlooked topic of leadership. Managers are not necessarily leaders, and a firm's management team may lack the vision or the ability to communicate its vision to the rest of the organization. In "The Changing Nature of Leadership in Law Firms," Roland Smith and Paul Bennett Marrow, reporting on their research for the Center for Creative Leadership (CCL), postulate that leadership involves a set of skills related to producing change, and that these skills can be studied and learned within the law firm context. Only by exercising this transformative leadership, Smith and Marrow argue, will law firm leaders be able to successfully surmount the challenges of the increasingly complex law practice environment.

This author provides a different look at practice management in "Managing and Marketing a Practice in a Globalized Marketplace for Professional Services." Adapted from the 2008 Presidential Summit on "Globalization and the Practice of Law," which was inspired in part by the *Journal* article "Economic Globalization and Its Impact Upon the Legal Profession," by former NYSBA President James Moore.[1] In addition to Moore, the panelists included Dean Mary Daly, James Duffy, Calvin Johnson, and Professor Laurel Terry; it was moderated by former NYSBA President and Chair of the Committee on Standards of Attorney Conduct, Steven Krane. This article moves the discussion from the general principles of globalization to the more specific topic of how law firms should manage their resources strategically to compete effectively in the global marketplace. Economic globalization will touch every law practice in New York and the rest of the United States, not just a few large firms in Manhattan and Los Angeles (as many lawyers would like to believe).

Arthur Greene and Sandra Boyer get down to nuts and bolts in an article titled "Professional Staffing in the 21st Century." Greene, the author of several ABA books on law office organization, staffing and financial management, and Boyer, an experienced consultant and advisor on law office human resources, note that the delivery of quality legal services requires recruiting and sustaining a quality staff, including both associates and support staff. One trend from recent decades, which Greene and Boyer predict will continue to expand, is the use of paralegals to handle routine legal work, allowing lawyers to concentrate on more complex, high-level tasks. Paralegals will not replace associate attorneys, but rather permit neophyte practitioners to work in different ways. The authors provide a five-step program for more effective utilization of associates and discuss when to hire paralegals and when to hire lawyers. In a related article, NYSBA Law Practice Management Committee member Alan Feigenbaum provides an overview of bar ethics opinions on outsourcing legal services and summarizes the ethical mandates that U.S. lawyers face before sending their work overseas.

In addition, NYSBA President Bernice Leber offers her thoughts on the importance of practice management for New York lawyers, and regular *Journal* contributor David Paul Horowitz, in his column *Burden of Proof*, examines the role of differentiated case management in the litigation process and urges lawyers to make the system work for both themselves and their clients.

Collectively, these articles and columns raise a host of practice management issues for law firms large and small. An impressive panel of authors offers a variety of insights as to how lawyers will have to manage their practices differently in the coming years. The legacy value of traditional lawyer-client relationships and delivery models has diminished over the past two decades. The thrust of these articles seems to be that new, innovative and more efficient practice models will supplant older, traditional, inefficient ones. There will be winners and losers in this Darwinian environment, and the demise of centuries-old firms in recent years is testimony to the reality that history is no guarantee of continuity.

It would be foolhardy to think that the articles in this issue represent all the emergent issues for the future of practice management, or perhaps for the future of law practice itself. The Law Practice Management Committee is committed to an ongoing effort to provide useful information to lawyers on how to stay ahead of the curve. The Committee will continue to disseminate useful information through a regular column and other articles in the *Journal*. The Committee will also deliver shorter articles and links in the *State Bar News*, *The Complete Lawyer* (circulated to all NYSBA members), the Committee Web page at http://www.nysba.org/lpm, and a *Vendor Resources Guide*. The Committee will sponsor on an ongoing basis live, downloadable online tele- and video-conferenced continuing legal education, and books from the State Bar and other publishers. In May, the Law Practice Management Committee introduced an electronic newsletter, which is circulated to members quarterly. We also provide up-to-date information on CLE programs, publications, and resources on law practice management that you can use in your practice. For more information on the work of the Law Practice Management Committee, feel free to contact the NYSBA Staff Director of Law Practice Management, Pamela McDevitt, at pmcdevitt@nysba.org, or Committee Chair, Professor Gary Munneke at gmunneke@law.pace.edu. ■

1. James C. Moore, *Economic Globalization and Its Impact Upon the Legal Profession*, N.Y. St. B.J. (May 2007) 35.

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BY DAVID PAUL HOROWITZ

David Paul Horowitz (dhorowitz@nyls.edu) practices as a plaintiff's personal injury litigator in New York City. Mr. Horowitz teaches New York Practice at New York Law School, is a member of the Office of Court Administration's CPLR Advisory Committee, and is a frequent lecturer and writer on the subject.

Help Is Here, Whether You Want It or Not

Introduction

The September *Journal* is devoted to issues of law practice management, a topic of ever-increasing importance for most attorneys. After all, who among us, looking back at bygone law school days, does not rue the fact that we were not taught something, anything, about time management, accounting or human resources? In retrospect, most of us would gladly have sacrificed studying the Law Against Perpetuities or the Rule in Shelly's Case for something a bit more practice-minded and practical. Taught to "think like lawyers," many of us failed, during our legal spawning, to develop an appreciation for those non-sexy, non-stimulating, and generally non-remunerative (in the immediately gratifying sense) skills of law practice management.

Then, newly minted and proud as peacocks and peahens, we eagerly arrived at our first jobs where our bosses railed against our lack of business acumen, constant re-invention of the wheel, and all-around naiveté. Of course, those now seem to be the good old days, since advancement in the profession inevitably brings the pressure of increased responsibility and, eventually, individual case management responsibility.

Moving a civil case from timely commencement to the point where it is ready for trial in our New York state court system involves many challenges, not least of which is the need to proactively move cases forward in the face of competing cases and clients. All too often we spend all or most of any given day putting out fires and responding to the demands of adversaries, clients, and the court system. Then, just when it's time to leave for the two-hour commute home (often, the best part of the day), we realize we have done nothing to advance the individual cases we are responsible for.

Now, the general purview of this column is disclosure and evidence. For readers, depending upon their practice area or areas, day-to-day case and office management issues will vary significantly and don't necessarily lend themselves to uniform systems or solutions.

However, there is one constant for the civil litigator in New York state courts that can provide help in managing and moving civil cases forward. It doesn't cost anything, requires no fancy equipment, and is guaranteed to move cases along, with or without effort on the part of the attorneys involved. I am writing, of course, about Differentiated Case Management (DCM), and its built-in scheme of preliminary, compliance, and pre-trial conferences.

Differentiated Case Management

Pursuant to Uniform Rule § 202.19–Trial Courts,[1] enacted in 1999, DCM was implemented statewide. DCM applies to categories of cases, as well as to counties, courts or parts of courts, as may be designated by the Chief Administrator. While the manner of its implementation throughout the state has not been uniform, there are certain characteristics shared by courts in all counties where the program is in effect.

DCM has transformed the court system during the disclosure phase from a time during which parties only appeared in court to resolve disclosure disagreements, to one in which nearly every facet of disclosure is regulated and supervised. DCM has also, as it is evolving in many counties, meant the effective end of the Individual Assignment System (IAS) model, although some counties, such as New York County, have struggled to maintain a "pure" IAS system, while operating within the time limitations imposed by DCM. Once a request for a preliminary conference is filed, many counties now assign all cases in the county to a centralized "intake part," when the initial scheduling order (the preliminary conference order) is drafted by the attorneys, to the extent they are able to agree. The case is then conferenced, and issues in dispute are resolved either by agreement or by the court. If a law secretary conducts the conference, the parties have a right to see the judge for a final determination of any disputed issue or may consent to have the law secretary decide the issue or issues in dispute.

Cases falling under DCM are assigned to one of three "tracks," each corresponding to the perceived complexity of the case and each with its own time frame for completing disclosure. The first track, "expedited," requires that all disclosure be completed within eight months.[2] The second track, "standard," requires that all disclosure be completed within 12 months.[3] The third track, "complex," requires that all disclosure be completed within 15 months.[4] Uniform Rule § 202.19(b)(2) requires compliance with the time frames unless they are

"shortened or extended by the court depending upon the circumstances of the case."[5] As with any court rule, except when expressly prescribed by law, "upon such terms as may be just and good cause shown," the court may extend a DCM time frame.[6]

Thus, at the time of the first conference, when a case is assigned a track, the parties know how much time they have to complete disclosure. In fact, since the assignment of a particular case to a particular track is usually preordained, litigants will know, from the outset of a case, how much time will be allotted for disclosure.

Although many aspects of DCM are inflexible, there is an element of flexibility when it comes to the assignment of a case to a particular track. For example, if the case would typically be assigned to an "expedited" track, and the parties have reason to believe that disclosure cannot be completed in the allotted time, a request can be made at the preliminary conference to have the case assigned to the "standard" track, thereby obtaining, at the outset, four additional months for disclosure.

Another area of flexibility is where, in the course of conducting disclosure, it becomes clear that a case assigned either to the "expedited" or "standard" track will not be ready for trial within the allotted time. In this situation, a request can be made at a compliance conference to have the case re-assigned to a longer track, *i.e.*, from "expedited" to "standard," or "standard" to "complex." In this way, the parties obtain additional time for disclosure without the case running afoul of the court's deadlines.

The parties obtain additional time for disclosure without the case running afoul of the court's deadlines.

Scheduling

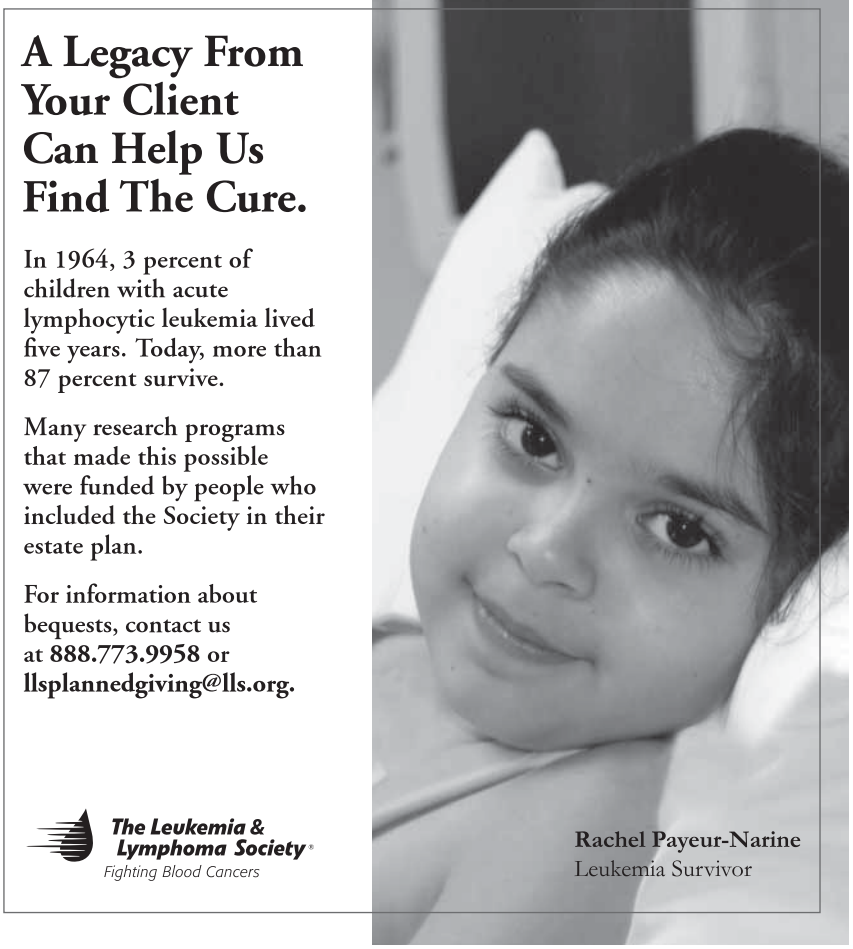
Uniform Rule § 202.19 sets forth the schedule for conferencing a DCM case. It provides the following:

1. A preliminary conference shall be held within 45 days of filing a request for judicial intervention (RJI).[7]
2. A compliance conference must be scheduled no later than 60 days before the date set forth in the preliminary conference order for completion of disclosure.[8]
3. A pretrial conference must be held within 180 days of the filing of the note of issue.[9]
4. At the pretrial conference, a trial date must be set, which is to be no later than eight weeks after the pretrial conference.[10]

While the scheduling of preliminary and compliance conferences in DCM courts generally occurs as set forth in the rules, many courts are not able to schedule the pretrial conferences as required or, if they do hold the conference as required, set a trial date within eight weeks. In that case, the pretrial conference becomes merely the "first" pretrial conference and subsequent conferences spread over varying periods of time, are typically scheduled before a "real" trial date is set.

At the preliminary conference, parties devise a disclosure schedule, subject to approval by the court. The Uniform Rules specify five matters for consideration at the preliminary conference:

1. simplifying and narrowing factual and legal issues;
2. establishing a timetable for the completion of all disclosure proceedings, within the time frames set forth in Uniform Rule § 202.12(b) (non-DCM cases) or Uniform Rule § 202.19(b)(2) (DCM cases);
3. adding necessary parties;
4. settlement;
5. removal to a lower court; and



6. any other matters that the court deems relevant.[11]

Compliance conferences are designed to monitor the progress of discovery prior to the deadline for filing the note of issue. Required in DCM courts, they may also be held in non-DCM courts. In addition to enabling the court to monitor the progress of the parties in completing disclosure, the compliance conference provides an opportunity for parties to expand, revise, and otherwise tailor and refine the scope and manner of disclosure. Most important, they provide an opportunity to resolve disclosure disputes in a less formal, and far less time-consuming manner than the making of a motion.

Pretrial conferences are required in DCM cases[12] and non-DCM cases.[13] The pre-trial conference is an opportunity to discuss with the court any outstanding issues, including any new issues arising since the time of the last court contact, to address potential trial issues, and to explore the possibility of settlement.

While DCM conferences may involve long waits in very busy centralized parts, the opportunity to regularly sit with adversaries and the court to hash out disclosure and other issues, when properly done, can hasten the time for completion of disclosure as well as provide a forum where, among other things, case resolution can be discussed. Of course, making these conferences work requires preparation on your part, as well as preparation and the active participation on the part of your adversaries and the court.

To ensure that cases are moving in a timely manner through the DCM system, the court must hold a compliance conference no later than 60 days before the deadline established for the completion of disclosure. At the conference, among other things, a deadline for filing the note of issue must be set, if not already set at a prior conference or in a prior order.[14]

It is important for practitioners to know the manner in which conferences are scheduled, and deadlines enforced, in the particular county in which an action is pending. Of paramount importance is ascertaining whether or not the court issues a notice pursuant to CPLR 3216 at any of the conferences and, if so, whether uniformly throughout the county or on a case-by-case basis. Failure to do so may result in a dismissal "for failure to prosecute" which, although subject to vacatur on a proper record, will not permit re-commencement under CPLR 205(a).

Conclusion

Many members of the bar do not like the strictures imposed upon them and their clients by DCM. There is certainly a valid debate to be had, at another time and place, over the extent to which case "disposition" has supplanted case "resolution" as a result of DCM in some courts.

Nonetheless, with DCM approaching its 10th birthday, and, for the foreseeable future, here to stay, my recommendation to my colleagues is: "Don't fight it, embrace it." Make the system work for you and your clients. For every one of us who procrastinates, gets sidetracked, and cannot see the forest for the trees, DCM has imposed a roadmap and timetable for arriving at a conclusion in civil cases.

One inescapable fact for most cases in most counties is that the time from commencement to trial has decreased in the DCM era. For every plaintiff's lawyer who has bemoaned delays in getting to trial to obtain justice for a client, and for every defendant's lawyer who has demanded vindication for a client at trial, this change has been beneficial.

So, learn the rules of the DCM system, use them to advantage, and a once-unattainable goal can be realized: A trial date for civil cases that broadly satisfies the "speedy" mandate of CPLR 104.[15] ■

1. 22 N.Y.C.R.R. § 202.19(a).
2. 22 N.Y.C.R.R. § 202.19(b)(2)(i).
3. 22 N.Y.C.R.R. § 202.19(b)(2)(ii).
4. 22 N.Y.C.R.R. § 202.19(b)(2)(iii).
5. 22 N.Y.C.R.R. § 202.19(b)(2).
6. CPLR 2004.
7. 22 N.Y.C.R.R. § 202.19(b)(1).
8. 22 N.Y.C.R.R. § 202.19(b)(3).
9. 22 N.Y.C.R.R. § 202.19(c)(1).
10. 22 N.Y.C.R.R. § 202.19(c)(2).
11. 22 N.Y.C.R.R. § 202.12(c).
12. 22 N.Y.C.R.R. § 202.19(b)(1).
13. 22 N.Y.C.R.R. § 202.26.
14. 22 N.Y.C.R.R. § 202.19(b)(3).
15. "The civil practice law and rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every civil judicial proceeding."

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eLawyering: Providing More Efficient Legal Services With Today's Technology

By Richard S. Granat

The phenomenon of eLawyering has swept through the legal world with amazing speed. Until recently, lawyers practiced law the same way that generations of lawyers before them had practiced. The tools of the trade, such as they were, tended to be passed down from experienced lawyers to newer lawyers without much change. The computer revolution, which began in the 1980s, however, has changed the way lawyers work in dramatic and fundamental ways. Today, lawyers in every field of practice, every geographic locale, and every type of organization use technology to improve their efficiency, productivity and profitability in countless ways.

The Internet

The Internet deserves special attention because of its singular potential to transform the way lawyers deliver legal services to clients. The advent of eLawyering provides unprecedented opportunities for enhancing the productivity of all lawyers, but particularly those in solo and small law firms. In addition to service delivery, smaller organizations are discovering enhanced opportunities for marketing online legal services to consumers and small businesses.

Although this article focuses primarily on the needs of solos and small firms, larger organizations are adopting eLawyering models as well. However, because the legal profession is highly stratified – large law firms tend to serve large corporate clients, while solos and small law firms generally serve consumers and small businesses – it is difficult to make generalizations about these two different worlds. By and large, large law firms compete for a finite number of large corporate clients, whereas the markets for consumer legal services are constantly shifting, with some practice areas contracting, such as Chapter 7 bankruptcy, while other practice areas, such as immigration, are expanding. Consumer markets can be segmented by type of substantive practice area and also by client demographics. For example, one specialist in divorce law may serve primarily a middle-income clientele while another divorce practitioner may represent very wealthy clients with vast assets. Yet, a large proportion of the consumer market remains underserved by

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the legal profession because of affordability and access issues. It is this consumer market in which eLawyering offers the greatest prospect for meaningful change in the delivery of legal services.

The Changing Legal Landscape

Since 2000, a new category of non-lawyer/legal information Web sites has emerged, which sites offer direct-to-consumer, very low-cost legal solutions. The legal information industry of self-help books and forms has gone online. The solo and small law firm segment of the legal profession is squarely in its sights. Because legal information solutions can often substitute for the professional services of an attorney, legal information sites present a new reality, which lawyers generally, and solos/small firms in particular, will need to address.

There are now literally hundreds of Web sites that provide legal resources and information, in areas such as wills, divorce, adoption, bankruptcy, business incorporation, child support enforcement, living trust creation, debt counseling, immigration, trademark search, copyright registration, patent registration, and landlord-tenant law. Sites such as these offer Web-enabled legal forms, legal information services, advisory systems, law guides, FAQ guides, and other tools for legal problem resolution, short of delivering what could be called "full legal services."

These new alternatives are capturing or acquiring clients from both the "latent" market for legal services and from existing law firms. And these Web sites are very efficient. Once content is published to the site there is little else that the publisher has to do to generate cash flow, except to market the site on the Internet and provide customer support. Consumers pay with a credit card. Cash goes directly into the publisher's account within 48 hours of purchase.

The revenues from the purchase of legal form content, whether the legal forms are automated or not, can be viewed as a royalty stream that continues to flow to the publisher, for as long as the product is available for sale. There is a cost in maintaining the currency of legal form content, but it is relatively insignificant. Many legal forms are stable in terms of content and do not change greatly from year to year.

The effect of the legal information Web sites on solos and small law firms is just beginning to be felt, but they are already having an impact. For example, in the area of no-fault divorce, sites, such as www.completecase.com, www.legalzoom.com, www.selfdivorce.com, www.divorcelawinfo.com, www.divorcenet.com, www.docupro.net, and www.uslegalforms.com, have processed more than 50,000 online divorces in the past 18 months. If the average legal fee for an uncontested, no-fault divorce is about $1,500, then approximately $75 million in legal fees have been drained from lawyers' practices nationwide.

Very little accurate market research data exists on the opinions of U.S. consumers and their view of the legal profession.

More significantly, this is an amount that will continue to increase – at the expense of practitioners. As legal information sites become more sophisticated and incorporate more rule-based, intelligent Web applications that substitute for the judgment and the labor of an attorney, they will thrive. Because of their private corporate structure, these companies have access to more capital and superior management resources than the typical small law firm. While utilization of an "intelligent" legal form is not a substitute for the services of an attorney, for many consumers smart legal forms and supporting legal information content provide a result that is "good enough" and evidently is proving satisfactory to thousands of consumers.

What Consumers Want

Why do consumers look for alternatives to lawyers? The answer is not always obvious. Consumers will avoid using a lawyer unless they really must because:

- They cannot afford lawyers, who may typically charge from $200 to $500 an hour, or more.
- They do not trust lawyers to always represent their best interests.
- They believe that lawyers are inconvenient and inefficient to use.
- They dislike paying hourly rates.
- They perceive lawyers as high risk in terms of benefits versus cost.

Consumers will sub-optimize and seek the assistance of an independent paralegal, for example, rather than the full services of an attorney in the interest of economy, even though it is far from the perfect solution. Thus, crafting marketing strategies for law firms that serve consumers and small businesses requires a deeper understanding of what consumers want and why they are seeking alternatives to lawyers.

Very little accurate market research data exists on the opinions of U.S. consumers and their view of the legal profession. For good, in-depth research on this issue one may look to the United Kingdom. An organization called *Which?*, the largest consumer organization in Europe and the equivalent of our Consumers Union, has extensively studied consumers' opinions of lawyers. Its most recent findings show that

- 29% of consumers reported that legal services were poor value for their money;

- 23% said their solicitor did not listen to their opinion;
- 30% did not feel well informed about charges;
- 40% said that despite being unhappy with the service, there was no point in complaining because the Law Society would not do anything anyway; and
- 63% thought it would be a good idea to get legal services at supermarkets or retail banking institutions.

For these and other reasons the United Kingdom is in the process of de-regulating the legal profession. The goal is to promote greater consumer choice and create the framework for introducing modern methods of management, modern technology, and capital into the delivery of legal services. Sometime in 2009 the following reforms will take effect:

- independent regulation through a Legal Services Board that is not dominated by the legal profession;
- independent complaints handled by a new Office for Legal Complaints;
- authorization of alternative business structures that would permit non-lawyer entities to invest in and develop law firms and create new legal service delivery structures;
- abolition of the prohibition against splitting fees with non-law firms in order to encourage more innovative marketing arrangements; and
- narrowing of the prohibition against unauthorized practice of law that enables non-lawyers in many areas to provide legal advice and create legal documents for consumers.

It will be a long time, if ever, before similar reforms happen in the United States, but it will be interesting to see what happens in the United Kingdom during the next few years as these reforms take effect. The U.S. legal profession can learn from the experiments that are being carried out in the United Kingdom and the impact of these experiments on consumer choices.

What do consumers want? *Which?* has also conducted extensive research on what consumers seek from their lawyers. The dominant theme is better customer service. Consumers want

- information about what their case is going to cost;
- an idea of how long their case will take;
- progress updates on their cases;
- prompt response to letters and phone calls;
- prompt responses to their complaints.

Which? also reports that consumers want legal advice and legal services to be delivered

- online, by phone and even by text;
- beyond usual business hours;
- linked to related services, such as the purchase of a home;
- together with unbundled and do-it-yourself (DIY) legal services.

Because consumers of legal services in the United Kingdom are not greatly different from consumers in the United States, there is much to be learned from this research. From consumers' perspective, the system for delivering legal services must be re-designed to address their needs by creating a new value proposition; eliminating the necessity of meeting at the lawyer's office; increasing the speed of the transaction; and offering services at a flat fee.

Lawyers need to devise models that meet the needs of consumers, or else the migration of consumers to less valued, and often less effective, alternatives will continue unabated. But lawyers can address this trend by doing the following:

- Increasing the transparency of the transaction between client and lawyer by moving away from hourly pricing towards fixed pricing and/or pricing by result. The lack of transparency in lawyer pricing creates tremendous anxiety on the part of consumers. A consumer can obtain a fixed price from a home builder to build a $1 million home (with allowances for unforeseen circumstances), but cannot receive a fixed price from a lawyer for a relatively simple divorce.
- Improving productivity of the legal transaction and passing the savings on to the client. Consumers suspect that lawyers are using information technology to increase their productivity by automating more

routine legal tasks such as document production. They resent the fact that productivity enhancements are not passed along to the consumer in terms of lower prices. Without competition from other kinds of providers, the legal profession has no incentive to lower prices. Instead, legal fees tend to increase over time. Full service stock brokers were impacted by online discount stock brokers, resulting in price reductions. A competitive economic environment for legal services would have the same result.

- Changing the structure of the relationship with clients. The lack of transparency of lawyer-client transactions and the increasing level of fees compound the inconvenience of communicating and working with a lawyer. While it is necessary to appear in a doctor's office for a physical examination, it is not necessary to be physically present in a lawyer's office in order for the law firm to do its work. Yet the prevailing mode of doing business often requires that the client give up half a day of work or more and travel to a lawyer's office for advice at the lawyer's convenience, not the consumer's.

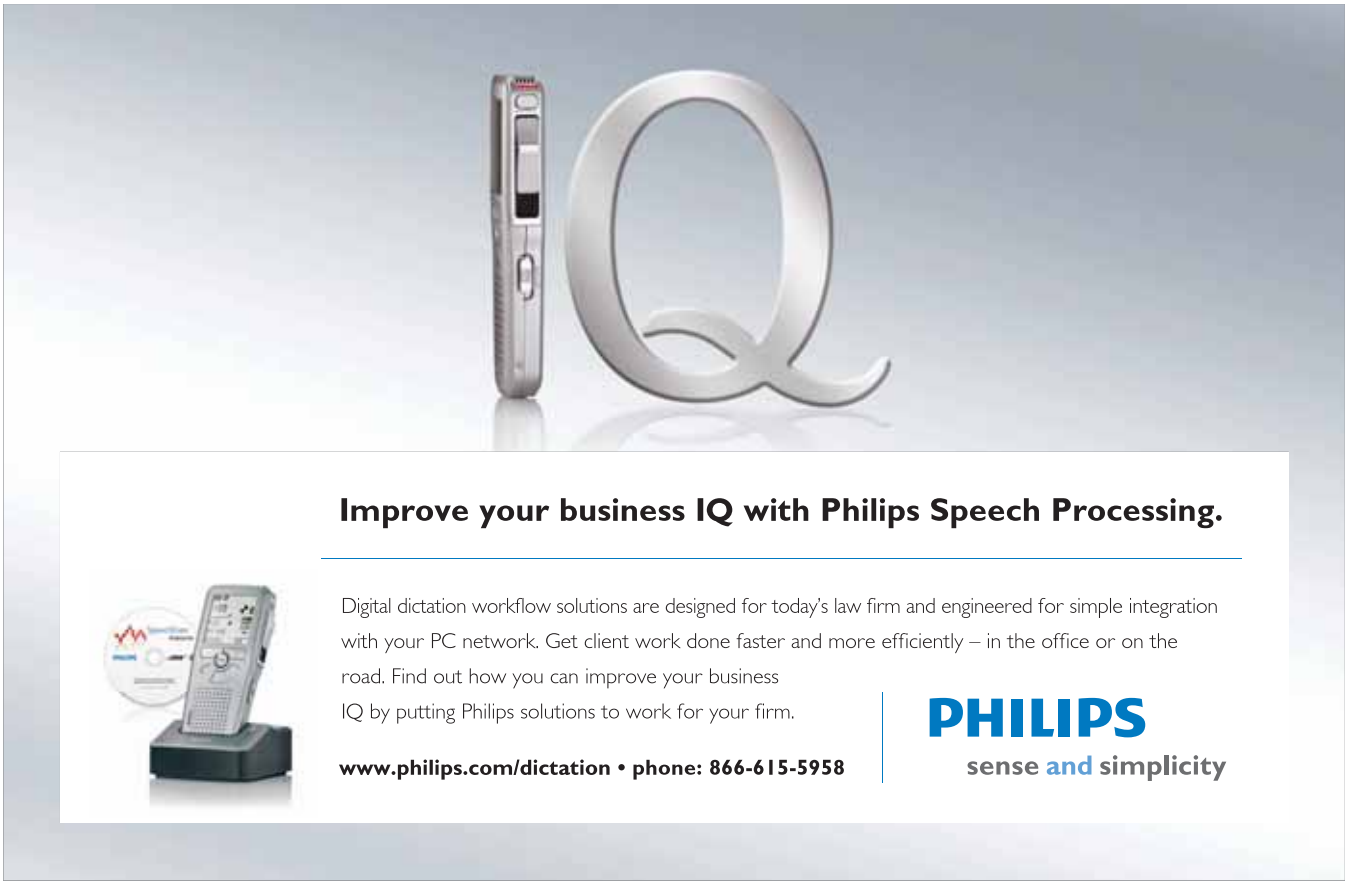
The Connected Generations

The pressure to change the way legal services are delivered to consumers will increase dramatically in the next few years, as the "connected generations" come of age. The size of the connected generation born between 1970 and 1986 is approximately 76 million. Whatever trends are now in place will accelerate over the coming years as these people mature and come into the age at which they require legal services. They have grown up with computers and look to the Internet first, before checking the Yellow Pages, reaching for a telephone, or consulting with a professional face-to-face.

Moreover, for those in the generation born since 1986, a defining cultural-historical characteristic is that they spent their formative years in the Internet era. This "iGeneration" has no memory of (or nostalgia for) a pre-Internet history, which greatly differentiates them from older generations that had to learn to adapt to "new" technologies. The iGeneration takes the Internet for granted. Sites launched since 1998, such as MySpace, YouTube, iFilm, Internet forums, Wikipedia and Google are part of the global cultural ecosystem.

Connected consumers use the Internet for business and social networking, shopping, product research, and finding a mate. They value:

- innovation;
- immediate results;
- authentication and trust;



- interactivity; and
- a high level of customization.

Online consumers behave differently from consumers of prior generations:

- They look to the Internet as the first place to go for information.
- They use comparison sites as a tool for decision making.
- They want to try before they buy.
- They look for communities of interest where opinions and information can be exchanged (see, for example http://www.avvo.com).
- They seek digital spaces that are interactive.
- They will interact with a Web site before talking to a professional.
- They may consult with a professional, but only following digital exploration.

The connected generations want to do business over the Internet with attorneys. They intuitively understand eLawyering concepts, even if most lawyers do not.

What Is eLawyering?

The concept of eLawyering can be traced to the beginnings of the Internet, when early law firm Web sites such as http://www.visalaw.com first appeared. In January 2000, William Paul, then president of the American Bar Association, created the ABA eLawyering Task Force, and the idea of eLawyering was formally recognized as a way of delivering legal services. Paul's vision was that lawyers would be able to use the power of the Internet to serve clients of moderate means who have been priced out of the legal market.

Undoubtedly, eLawyering will grow in importance in coming years, just as shopping online has experienced year-to-year growth. Marc Lauritsen, co-chair of the eLawyering Task Force of the Law Practice Management Section of the American Bar Association, in an article in *Law Practice* magazine,[1] succinctly defined eLawyering as

> all the ways in which lawyers can do their work using the Web and associated technologies. These include new ways to communicate and collaborate with clients, prospective clients and other lawyers, produce documents, settle disputes and manage legal knowledge. Think of a lawyering verb – interview, investigate, counsel, draft, advocate, analyze, negotiate, manage and so forth – and there are corresponding electronic tools and techniques.

This is a good beginning for understanding the concept and attitude of eLawyering. At its core is a law firm Web site that incorporates interactive and Web-enabled applications that support interaction between lawyer and client along a number of dimensions.

Creating an eLawyering Practice

The first step is to build a "strategy map" that identifies who and where your existing and potential clients are and how you can serve them more effectively over the Internet. A highly localized and neighborhood-based practice serving lower income families may find that, in fact, the Internet is less relevant to its client base. On the other hand, a law firm that serves small businesses in a specialty area such as intellectual property, immigration or employment law, and is seeking to expand its practice from a single city to statewide, will find the Internet quite relevant and useful.

Time, pricing, convenience, the degree of emotional hand-holding needed, the possibility of unbundling transaction components, the degree of specialization that is required, and the degree to which the transaction lends itself to self-help approaches, are all factors to take into account in creating a strategy map for adding an eLawyering dimension to a practice.

A law firm that serves small businesses in a specialty area and is seeking to expand its practice will find the Internet quite relevant and useful.

In order to develop a competitive strategy, it is necessary to think like a disrupter. The growth of companies like Southwest Airlines, the University of Phoenix, and Wal-Mart follows a common pattern. Each of these companies started with a solution that made it easier, simpler and more affordable for customers to solve a critical problem in their lives. Each of these companies then identified a group of customers that typical suppliers in the industry considered insignificant and then adopted an approach that made it difficult for traditional suppliers to respond.

As Clayton M. Christensen[2] points out, when Sony entered the consumer electronics market, it didn't compete with the leading tabletop radio providers by making better radios. Instead, it introduced a portable and inexpensive transistor radio that was designed for teenagers who wanted to listen to ball games or music without being supervised by parents. When Apple introduced the iPod, it didn't compete with the Sony Walkman. Instead, it created a unique platform so that this same demographic could carry their music libraries in their pocket.

The lesson here is that non-clients of your law firm can become great clients if you figure how to reach them with an alternative offering that meets their needs. Sometimes, the best target customers or clients are those that lack the skills, wealth, success or time to consume existing products or services. Removing barriers to consumption can create a pathway to growth.

Once you figure out what kinds of clients you want and how you will serve them, you can translate the strategy into a Web site development plan. This plan will estimate investment costs, revenues, and the intangible benefits that result from the creation of a Web-based legal service delivery system that is a platform for interactive Web-enabled applications.

This is key. Many law firms have what could be called "first generation" Web sites that consist of little more than an expanded Yellow Pages advertisement. A much smaller number of law firms have "second generation" Web sites that provide rich, substantive content and legal information. A still smaller number of law firms actually provide applications that help clients solve their legal problems over the Internet in a way that is both satisfying and price competitive. Examples of Web-enabled law firm sites include:

- www.illinoisdivorce.com,
- www.mdbankruptcylaw.com,
- www.visalaw.com, and
- www.mdfamilylawyer.com.

These are true eLawyering Web sites that offer legal solutions directly to middle-income consumers. The number of such sites is on the rise, although not all sites are operated by lawyers.

A law firm that has a first-generation Web site is not engaged in eLawyering. Such sites do not provide any interactive applications and are little more than brochures in digital format. Often these sites exist within a larger law firm directory and the firm has no control or access to the Web site itself in order to be able to add interactive applications. They are not "interactive service" sites. For these firms, the practice of law is business as usual.

On the other hand, a law firm Web site that is based on eLawyering concepts goes beyond presenting flat legal content and helps clients collaborate with their lawyer and do legal tasks over the Internet. These Web-based, interactive applications save lawyer time, often increase lawyer productivity and profit margins, and provide a more satisfying experience for the client.

The law firms that are moving into this next stage may be described as "Web-enabled." They are committed to using the power of the Internet to change the way they practice law by creating highly interactive Web sites. For these law firms, the Web site becomes the primary way in which the law firm relates to its clients and manages the flow of legal work. To accomplish this objective, a Web-enabled law firm should consider the following applications.

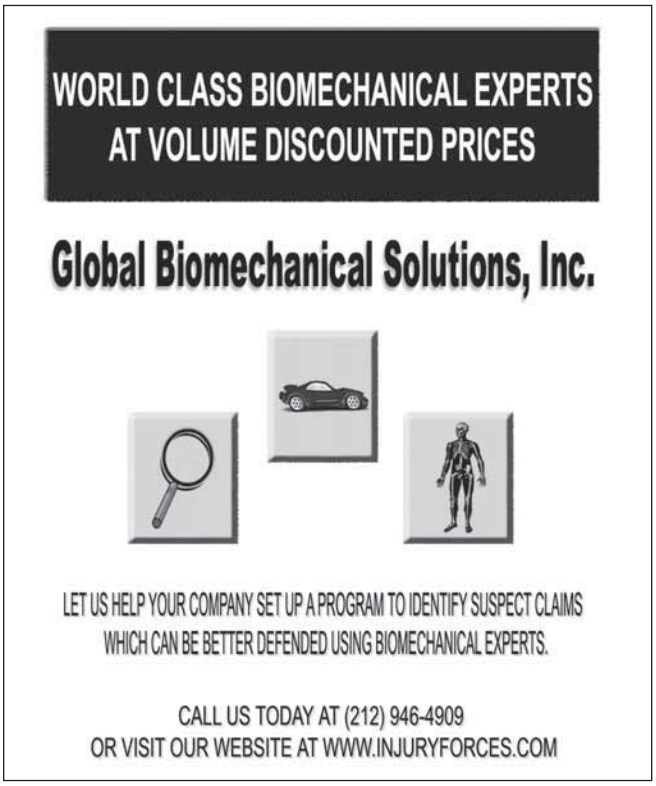
Client Extranets

A client extranet is a secure and private space for each client, where the client can communicate with his or her attorney securely, documents can be archived, the client can check the status of the case or matter, and legal fee billings can be presented and reviewed, if not actually paid electronically. A client extranet permits personalization of the client experience; security of communication; and the convenience of having all of one's documents and transactions with the attorney documented and in one private and secure Web space.

A client extranet can be costly to create if you program the entire application yourself. Few lawyers possess this level of programming skill, so a more practical alternative is to create a client extranet around applications that are hosted by third parties, such as Findlaw, Microsoft's Sharepoint, and WebEx Web Office. These are easy to set up and reduce the cost of entry substantially, as no custom programming has to be done.

Web-Enabled Document Automation

Within a secure extranet client space, clients can provide data through an online questionnaire. The data can be used to create documents through the use of Web-enabled document assembly solutions such as HotDocs Online and Rapidocs Online. The client enters data directly into



an online interview; this reduces the time that the attorney must spend on the interview process, and results in an instantaneous generation of a draft ready for a lawyer's more detailed review.

Traditionally, document automation has been used by lawyers within the office environment to speed up the production of documents of all kinds. This is important, but it does not have as dramatic an effect on the law firm work process as client-centered and Web-enabled document automation. By moving the document automation process onto the Web and enabling the client to provide data online – without initial lawyer intervention – a major increase in lawyer and client productivity occurs.

Creating automated document templates that work on the Web is not a trivial undertaking.

The Next Step

The next step involves productizing the legal service – that is, systemizing the production of the service rather than custom crafting the service every time you produce it. Often this means integrating a digital application with the production of the legal service. Unlike the "DIY" legal form companies discussed above, a law firm must still provide a human service, but the time required can be greatly reduced by using online software applications. By shifting a portion of the legal work to the client, attorney time is released for more complex matters or other pursuits. In many industries, the customer as a co-producer of a service or product has resulted in great leaps of productivity and efficiency.

Creating automated document templates that work on the Web is not a trivial undertaking. All of the major document automation systems require some skill in the use of a scripting language. If the firm has already automated documents that have been used on the desktop, the task of importing these documents for use on the Web is made much easier. DirectLaw, Inc. already has large inventories of state-specific, automated legal documents which can often be used with minor adjustments. These predefined document templates can be used to generate first drafts, which are then further customized by the attorney.

Other kinds of online digital applications save attorney time and increase law firm productivity. Below are some examples.

Online Calculators

Online Web interview forms can be used to collect financial data that is the basis for a calculation and offers the client an immediate, useful legal result. Examples include the child support calculator at http://www.mdfamilylawyer.com Web site and the Chapter 13 eligibility calculator at http://www.mdbankruptcylaw.com.

Client Appointment Scheduling

Clients can make appointments to see their attorney directly through the Web site using third-party applications such as Microsoft's Appointment Scheduler and other Web-based scheduling applications. This reduces the amount of time spent playing telephone tag.

Client Data Intake

Clients can provide data through online forms that are the basis for an office consultation. Providing the data in advance enables the lawyer to fully prepare for the office consultation and often reduces the time required for the in-house consultation. Although in this case the forms themselves are not being created, there is still a major saving in attorney time; the attorney has all of the client's financial data at hand when the client walks through the door for their first meeting.

Interactive Legal Advisors

Some law firms are creating interactive legal advisors. Like online document assembly, the client answers questions through an online questionnaire, but instead of a legal document being created, the intelligence engine generates a legal answer by manipulating a series of "if-then" statements that offer a legal answer to the client immediately.

While these interactive legal advisors are not easy to program, they can be used for a long time without major revision. Interactive legal advisors can be designed with a trap door to alert the lawyer of potential problems that require more sophisticated analysis and direct legal advice. (The U.S. Immigration Service has several such legal advisors on its site that determine, for example, the immigrant's eligibility for U.S. citizenship.) Attorney time is saved, and some attorneys have figured out how to monetize such applications by either charging a small fee or generating advertising revenues to offset development costs and make a profit. In these cases, the firm is functioning more like a legal forms company than a law firm, but with a properly designed "trap door," the user is guided to the attorney when a complication arises.

The New Billable Hour

The only way to get out from under the endless chore of keeping track of hours and billing clients in six- or 15-minute increments is to devise automated applications, such as using Web-enabled document automation and Web advisors, and then monetizing those applications by charging clients either on a subscription basis or a transaction basis – independent of the time factor involved to use the application itself. The price must be set at a level that reflects added value to the client, perhaps less than you would charge on an hourly basis, but given sufficient volume levels, resulting in a net profit that is greater than what you would secure if you charged by the hour.

Online Legal Advice
Lawyers are providing legal advice by telephone and e-mail, publishing both the questions and the answers to a client's secure Web space for future reference by the client. Often such legal advice is offered at a fixed price per incident – see, for example, http://www.dcselfhelplaw.com and http://www.dcdivorceonline.com. This is a convenient service for clients who have relatively narrow questions and want a quick answer. Lawyers can answer these questions during times of the day when they are not busy, maximizing use of time that normally has marginal billing utility.

Online Case Management
Data about and within cases can also be made available over the Internet for clients to view and analyze. Information that clients see can be restricted to certain fields when they log in, at the same time keeping clients up-to-date on the progress of their cases. This will bond the client to the law firm in the same way that a consumer bonds with an online brokerage firm – by using it regularly. All of the major case management software vendors are, or will soon be, offering Web-enabled versions of their desktop applications, which can be made accessible to clients through a client extranet.

Online Dispute Settlement
Video- and Web-conferencing applications can also support forms of online dispute settlement and mediation. An online dispute settlement space can be set up easily by renting Microsoft Sharepoint Application and dedicating it to a particular case or controversy. The application contains, within a single and secure Web space discussion group, functions, document uploading and archiving, calendaring, and e-mail notification, which provide all of the elements for asynchronous conversations.

Multimedia

Communicating with the connected generations should not be limited to textual material. An interactive law firm Web site utilizes the maximum advantage of the benefits of multimedia. Educating clients about their legal situation can be done using multimedia programming that engages the client or prospective client in ways that plain text cannot.

Some law firms are integrating video and podcasting into their Web sites to complement the textual explanations. Web sites, blogs and podcasts offer unprecedented opportunities for reaching connected clients in unique ways. You must determine what sets you apart and convey your differentiated message consistently using the media of the online generation. That way, clients will get to know you in an authentic and compelling way before they even set foot in your office.

The Future

Figuring out how to incorporate interactive technologies into law firm business models will be both a challenge and an opportunity, particularly for firms that offer personal legal services to the broad middle class. The initial outlook is promising that law firms and the legal profession will rise to the challenge of offering services on the Web as they move toward experimenting with delivering legal services over the Internet.

The future belongs to law firms that learn how to use Internet technology to disrupt their competition by offering a client experience that is both low cost and high quality. The Internet is changing the way legal services are delivered to moderate and middle-income individuals and small-business entities. Combining digital applications with traditional human service is a way to increase small law firm profit margins without increasing the amount of time that the attorney spends on each transaction. For many attorneys, liberation from billing on a time basis, together with the capacity to practice law anytime and in any place, is a dream come true. ■

1. Marc Lauritsen, *The Many Faces of E-Lawyering*, L. Prac. 36 (Jan.-Feb. 2004).

2. Professor at Harvard Business School, author and co-founder of Innosight.

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Practice Group Management: Passing Fad or Permanent Part of Our Future?

By Susan Raridon Lambreth

Most law firms have implemented new practice group structures or have made significant changes to their existing structures in recent years, as they have realized that centralized firm management *alone* is not the most effective way to manage the multi-million dollar businesses that law firms have become. Law firm management can take the firm to a certain level of efficiency, effectiveness and profitability. But then, reaching the next level – and sustaining profitability – requires decentralizing some aspects of management back to the practice groups and their members.

If your firm does believe that strong practice group management is important, how can you achieve it? Practice group management requires six key elements to succeed, each of which will be addressed below.

A Brief History

In the 1950s or later, depending upon the market, law firms began to create loose administrative groups, often called departments or sections, built around broad areas of substantive law or powerful partners (key rainmakers or founders). These groups were usually simply an administrative convenience. In some firms, they also provided a place for powerful partners not otherwise in firm management to have a formal management role, *e.g.*, rainmakers or key senior lawyers. In most, if not all, firms, however, the role was at best reactive and was internally focused.

Starting in the late 1970s to early 1980s in most markets, many firms established smaller business units, often called "practice groups," underneath the larger administrative groups (often called departments). These practice groups were formed to respond to client and market

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pressure for specialists in legal and industry knowledge, and generally had primarily a marketing and business development role. In some firms, the practice groups had two main functions: marketing and associate management. Yet, they were still largely reactive, other than in their marketing activities.

For the most part, however, the firm itself was still either centrally managed by firm management or there was strong democracy, *i.e.*, partner autonomy, particularly at the practice level. Thus these early practice group structures failed in most, if not all, firms. The larger departments played an almost entirely administrative role, if any, and were not fulfilling many of the responsibilities of practice management. In fact, in some firms, these groupings were merely "titles" of power and influence or, worse, became fiefdoms for powerful partners. Even if the department leaders had been fully empowered to run the departments as "business units" of the firm and there was partner buy in to "be managed," these departments were too large and diverse for the department leaders to lead and manage effectively.

The smaller practice groups also typically failed because their roles were too narrow to be effective or they had too little authority. The groups were not responsible or accountable for many areas including their work intake, their profitability, and their workload management. Without these key roles, the groups could not effectively fulfill their stated functions in marketing or associate management because all these areas are highly interdependent. For example, if a practice group leader did not control intake, a partner in the group (or even in another group) could bring in work that was inconsistent with the group's strategy; this would have a negative effect on all the efforts the other group members had been making to enhance the group's market position.

Each of these historical models and the variations on them were unable to effectively delegate the functions of practice management to the practice group level. The practice groups were not able to manage the work, the people and the clients. In many firms, the structures either existed mostly on paper or had so little authority they could not perform the functions of running a business unit of the firm. As a result, partners in some firms became somewhat cynical about the potential of any practice group structure.

The management of a law firm must evolve as it grows. What worked when the firm had 150 lawyers in two offices most likely won't work with 800 lawyers in 10 offices or 2,000 lawyers in 20 offices and four countries. While there are certainly elements of good management that are consistent across firms of any size, the range of application of these management principles, and the time that is required to put them in place, will usually increase as firm size and scope increases. Many large firms historically were able to compete successfully by using strong firm management, with little management below that. Today, however, operational management at the business unit level is critical to any large or multi-office firm that hopes to compete in the war for talent or the race for higher profits per equity partner or that simply wants to capitalize on its growth.

As background, the elements below apply to firms regardless of their practice management structure. Most large firms (more than about 200 lawyers) have a matrix

The management of a law firm must evolve as it grows.

structure with two levels of practice management, such as departments with practice groups reporting to the department leaders, and offices, client and industry teams as part of the secondary matrix structure. Most small and mid-sized firms have only a one-level structure, typically consisting of practice groups. There is not a need for departments in these firms, as having two levels of practice management would only cost more in management time and would mean needing more people to fill the leadership roles (and there are rarely enough strong leaders for all the roles anyway).

1. Firm Strategy

Many firms today have had limited success implementing practice group management because they did not start with a clear vision for the firm or a strategy that set forth the goals and objectives they were trying to accomplish. Without a strategy that differentiates the firm from many other similar firms, a practice group structure and effective management can only take the firm so far. The buggy-whip manufacturers of years ago may have managed their companies well, but they lacked a strategy that reflected market changes, namely changing modes of transportation.

Practice management is not a "magic bullet" or panacea that can substitute for a strategy. On the other hand, for the strategies that most law firms have – which typically involve enhancing their market position in selected practice areas, attracting better clients and retaining top talent – practice management is usually critical to achieving their strategy.

If a firm has a clear strategy, and is striving for a definable position in the marketplace, then practice group management is often one of the keys to achieving the strategy. The three overall objectives of practice group management are

- to help the firm implement its strategy;
- to build firm competitiveness; and
- to manage the work, the people and the clients effectively.

Each of these can be achieved if you implement all the key elements required for effective practice management.

2. Compensation System

The second element critical to successful practice group management is compensation. One psychologist we work with in our leadership training says the research shows that despite the articulated goals of your strategic plan, if there is *any* disconnect (we stress *any* disconnect) between the plan and your compensation system, your compensation system *is* in actuality your firm's strategic "plan." The point is that if you hope to implement strong practice group management, then your compensation system must be aligned to support that. In fact, anything that you have in your strategic plan or firm-values statement that you hope to achieve must be incentivized in your compensation system or it is unlikely to be accomplished.

Many firms are making fast strides away from individualistic systems toward a practice group-driven system (in those firms, however, partners may even be penalized for a purely individualistic focus that undermines group activity). Firm management needs to define for the lawyers what constitutes valuable non-billable or investment time. This can include client relationship management, matter management, firm and practice management, new product development, target client plans and implementation, credibility builders (*e.g.*, well-placed articles and keynote speeches), pro bono matters, professional development and training, associate mentoring and associate supervision and training.

Second, there must be significant compensation to motivate and reward the practice group leaders (PGLs) for spending substantial amounts of time performing their roles. While the time demands of PGLs will vary by the maturity and competitiveness of the market, the size of the group and the "personality" issues in the group, most practice leaders in large firms spend between 400 and 800 hours in this role. In smaller firms with relatively small practice groups, they usually spend 300 to 400 hours.

There must be incentives for partners to contribute to group activities instead of focusing primarily on building their individual practices.

The compensation system must value non-billable or "investment" time for activities that are necessary for strong practice groups, including time developing and implementing practice group business plans. This includes valuing the effort and time that practice group leaders *and* other lawyers devote to their practice groups. Aligning your compensation system to support practice management involves several components.

First, all the lawyers in the firm, but particularly the partners (because associates and others look to them as role models), must believe that their compensation is based in part upon how they contribute to the practice group's activities. For one partner, this might mean heading up a new practice group mentoring program. For another, it might mean helping others in the group land new business. There must be incentives for partners to contribute to group activities instead of focusing primarily on building their individual practices.

Most significantly, a portion of the partner's compensation should be based on his or her contribution to the group. There should be an expectation that all group members contribute to group goals and activities (in most firms, this means at least 300 hours per partner invested in his or her primary practice group). If the firm allows "secondary" memberships, a secondary group member usually contributes at least 50 hours (and usually much more) to that group. In many firms, providing this incentive poses one of the most difficult challenges because their compensation systems primarily focus on individual origination and production.

Investment time (often referred to as "non-billable" time) for good management must be highly valued. According to a survey we conducted in 2005, in "AmLaw 200" firms with strong practice management, between 10% and 50% of a practice group leader's individual compensation is based on how well he or she performs the job. But, a practice group leader's contribution to the firm is not measured simply by his or her non-billable time on practice group management. Success in the role, as measured by many economic and qualitative metrics is a key factor.

Third, the practice leaders must have input into the compensation of all members of their group. Organizational psychologists will tell you that managers or leaders will not be effective in their jobs if they do not have input into the compensation of the people they manage. In most law firms currently implementing *strong* practice group management, the PGLs have lengthy meetings with firm management, providing detailed input about each of their people. On the other side, each partner, in his or her compensation interview, is asked about the colleagues he or she worked with firmwide and particularly in the group, as well as the practice group leader. Later in the compensation process, the practice leaders should be

involved in the post-compensation feedback sessions for each partner in their group. It is not feasible for practice leaders to manage their people without knowing what messages firm management is giving them at compensation time.

3. Partner Buy In

The next element is partner buy in or, as some firms describe it, a "willingness to be led or managed." This becomes even more critical if the firm does not have (1) a clear strategy, or (2) a compensation system that promotes the desired behaviors to implement the firm's strategy and support practice management.

Partners must accept the importance of management, both at the firm level and at the practice level. Unless the individual partners are willing to relinquish some (though not all) of their autonomy and accept individual and group accountability, effective practice group management will not be successful. Many firms have developed structures and appointed the right people to be leaders of the practice and compensated them for their roles, but these firms have still had very limited success from their practice groups because the partners have not bought into the importance and benefits of practice management and agreed to be held accountable.

"Buy in" means that partners in the firm value the management of the firm and the practices and are willing to put the interests of the firm and their practice group above their personal practice. In some instances, lawyers will need to sacrifice what is in their best interest for the greater good of the firm or the group. For example, a partner might have an opportunity to bring in a new client for the firm and get "credit" for the business generation. But, in firms with strong practice management, the practice group leader typically reviews and approves new matters for intake (subject to firm review after that approval). The practice group leader might not approve that partner's matter because the matter might result in a "strategic" or "positional" conflict with other work that members of the practice group are pursuing. Reining in individual partner autonomy regarding intake is often difficult and can meet with resistance, but intake approval is a critical part of the job if a practice group leader is to be effective.

Another factor that affects individual partner autonomy is work assignment. A partner might want to use a favorite associate on the next transaction he or she brings in, but the practice group leader might ask (or "tell") the partner to use a different associate so the second associate gets experience on that type of project. Without control over work assignment, it is difficult, if not impossible, for a practice group to be able to provide the right developmental opportunities to all its associates.

When firms appoint practice group leaders and expect them to start functioning without firm leadership having first obtained partner buy in, our experience is that most practice group leaders will end up either "burning out" or "burning bridges." Then, at some later point when firm management realizes the need to obtain buy in and does so, many of the best candidates for practice group leader are not willing or able to do the job.

For practice management to work, partners must function like "owners" and major contributors of the group. This demands a significant contribution of investment (non-billable) time to the firm in the form of associate management, recruiting, training and development; research and development; business development; knowledge management; and so on. In many firms today, partners are expected to devote about 700 hours a year *in addition* to billable time. They are also expected to participate in group activities, work in a cooperative and collaborative way, and integrate their practices into that of the firm (rather than act as solos under the firm's "roof").

4. Accountability and Support From Firm Management

Practice management requires that firm management hold the practice leaders and the group members accountable and provide real support, rather than mere lip service. This means taking steps such as the following:

- The firm managing partner or executive committee must regularly meet with the practice leaders about their group plans and their progress on their goals and the metrics that have been set for their group. Typically, at least twice a year, there is a formal meeting with one or more members of firm management with each department chair or practice group leader (depending on the firm's structure).
- Firm management must spend time providing guidance to the practice group leaders on firm strategy and holding them accountable for their group's activities and performance.

Goals of Practice Management

- Inspire and motivate/create an excitement about practicing at the firm.
- Enhance sense of ownership and belonging.
- Continually improve service, work and competence.
- Allocate expertise to matters in the most effective manner for client and firm/group objectives.
- Attract more profitable, value-added and challenging work and clients.
- Develop real teamwork and integration.
- Improve morale and retention of all professionals.
- Continually improve profitability – at the source where profit is created.

- The members of firm management who decide on compensation must appreciate effective management of the practices and send clear messages to both the practice leaders and the members of the group that investment time for practice group activities is valued.

Members of firm management must be role models for the behavior they want their partners to exhibit.

5. Leaders With Clear Authority and Responsibilities

The role or job description of your practice group leaders needs to be defined and clearly and widely communicated. It is amazing how many law firms set up practice groups, and even appoint leaders, yet have no clear job description detailing what the practice group leaders should do strategically and operationally. A key characteristic of successful organizations is role clarity – people know what is expected and what the "roles" are.

Thus, the practice group leaders need a clear job description that vests real authority. At a minimum, practice group leaders must have authority in the areas of intake; workload management and staffing; profitability, pricing and budgeting; planning and business development; and significant input into the compensation determinations of their group members.

Then, firm management must appoint as practice group leaders those strong individuals who are willing and able to put their role as practice group leader above their personal practice and who will be accountable for the success of the group. Just as a managing partner must treat the firm as his or her most important client, the group should be the most important client to the practice group leader. Note that practice group members should *not* elect their respective practice group leaders; this typically results in the selection of those who are either rainmakers they depend upon for business or a partner who is weak or non-confrontational who will not "rock the boat" or hold them accountable.

6. Firmwide Practice Groups and Primary Assignments

The sixth element required for strong practice management is having firmwide, not office-by-office, practice groups and primary assignments. Office-oriented practice groups (such as the real estate group in the New York office) typically result in internal competition, balkanization and a lower external market profile.

In addition, all lawyers should have one primary practice group assignment. This is critical to internal accountability, group performance, *i.e.*, group members contribute significant time to their primary group and, in the long term, market position. In most firms, lawyers can also have one or more secondary groups. The number depends on the firm's desired market position (being known as experts externally), the number of practices the firm offers and what they are, *i.e.*, how much synergy there is between practices, how insulated they are from economic or other downturns, and how sophisticated and specialized the work the firm handles is.

In some firms (about 40% of large firms), associates are given a primary assignment to a department in their first one to three years, rather than a practice group. However, to prevent the historical problems with associate "pools" and lack of meaningful mentoring and supervision of associates, the department typically has active management of the associates' workload and professional development, through its assignment partners or practice management professionals, until the associates select or are assigned into a practice group after about three to five years.

Conclusion

Practice management is critical, whether you are in a firm of 100 or 2,000 lawyers, to really take advantage of your firm's platform. The larger and more diverse and dispersed a firm becomes, the more attention must be focused on effectively managing the firm. Growing a firm requires a significant investment, in both time and actual dollars (for recruiting, for integration, for marketing activities, etc.).

The investment in effective management, especially practice management, will help ensure that the firm gets a significant return on the investment in growth. This return can be measured by increased profitability, but it can also be measured by factors such as the firm's market position, acquisition of new clients, and retention of key lawyers and other talent.

If your firm implements each of these key elements, practice management can enable you to achieve many important benefits and, in particular, can provide your firm with significant advantages vis-a-vis its competitors. ■

The Changing Nature of Leadership in Law Firms

By Roland B. Smith and Paul Bennett Marrow

At its most fundamental level, leadership is about producing change, while management focuses on creating processes to produce predictable results. This article explores the practice of leadership in law firms today and discusses what will be necessary for law firms to succeed and thrive in the future. It draws heavily on early returns from research that spans hundreds of attorneys in large, global and midsized U.S. firms, conducted by the Center for Creative Leadership (CCL®).[1] These initial findings provide a foundation for a deeper discussion about what constitutes effective leadership. Subsequent articles will feature a case study involving a large global law firm, a discussion of practical and tactical strategies and actions, and a summary of our final research findings.

Need for a New Practice Model

Today's law firms operate in a climate increasingly characterized by complexity, economic turbulence, growing and varied competition, and accelerated change on every front. In short, the landscape is changing in new and radically different ways. Simply ensuring high levels of technical and professional expertise is no longer sufficient. Attorneys must adopt new and enhanced leadership skills as well. The well-worn, familiar, tried-and-true methods and lessons of the past are, and will be, inadequate.

Additional factors are also in play: the expectations of incoming junior associates and even seasoned rainmakers and specialists are shifting rapidly in a highly competitive talent market; clients are demanding a new quality of *advice and counsel* and are pressuring attorneys to compete for fees.

The traditional practice model is under pressure. This model is based on the following assumptions: partnership means lifelong stability; an associate, often from an elite school, who proves to be a star, will move up to

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partner, become an owner and remain so until retirement or death; any associate not making partner after a certain time will be expected to move on; lateral entry at the senior level is very uncommon; growth isn't a measure of success; mergers are rare; clients are loyal to a firm, not a specific individual.

In recent years, a new practice model has gained a foothold.[2] The number of owner-partners has decreased and ownership power has become more concentrated. Growth now comes from many sources, including mergers and lateral entry of new attorneys. Clients are less inclined to remain loyal to a firm and more likely to follow an individual attorney who moves from one firm to another. The market for lawyers has become global, with competition coming from many new areas. Any firm interested in long-term survival must be able to cope with the loss of high-performing partners and their support teams.

The number of owner-partners has decreased and ownership power has become more concentrated.

Individual partners and practice groups now are evaluated on the basis of hours billed and fees collected, which leads to internal competition. The winners typically claim firm resources and higher incomes. One consequence is that lawyers operating at even the highest levels are positioned outside the policymaking cadre of the executive committee, which brings into question the power of the firm to exercise ultimate control.

Law firms must deal with an assortment of competing external *and* internal pressures; moreover, economics has replaced culture as the glue holding firms together. As a result of such changes, firms are beginning to recognize the need for a new leadership dynamic.

What is the context in which partners operate today, and what challenges can they expect to face in the future? How have some firms' practicing senior and managing partners worked to develop leaders who can navigate this new world?

The Case for the Lawyer-Leader

Industry consolidation, increased client demands, competition for lawyers, the emergence of non-traditional competition and a softer global economy: strategic leadership is imperative if firms are to survive and thrive.[3]

Strategic lawyer-leaders can make all the difference. They are able to create a vision for the future, design a competitive strategy, build an agile, flexible and inclusive culture, and attract, retain and develop a top-flight, committed talent pool. Unlike administrative operations such as finance and human resources, these core leadership responsibilities simply cannot be delegated to non-attorney staff members.

A recent article in *American Lawyer* points to the types of complex issues these strategic lawyer-leaders face as organizational models shift.[4] In less than 20 years, the total number of lawyers practicing has almost tripled – growing from 25,994 in 1986 to 70,161 in 2005.[5] Though gross revenue is expanding, some firms are finding that it isn't keeping pace, leading to a dilution in revenue per partner or lawyer.

Although large-firm lawyers represent only 10.5% of the U.S. legal profession, their impact and influence on the practice of law globally are significant.[6] During the last decade, larger law firms have begun migrating to a more centralized corporate model for managing certain business functions, such as accounting, marketing, human resources, training and development – freeing lawyers to focus on what they do best in the interest of the client and the profession. Many midsized and smaller firms are now following suit.

As a result of such changes, there is growing recognition that the practice of law is not only a noble profession, but also a competitive business.[7] That means leaders must be skilled in clarifying strategic direction and in influencing and aligning various constituencies to achieve commitment to the firm's objectives.

The Current State of Change Within the Industry

In 2005 and again in 2007, we conducted surveys to determine the nature of the complex challenges faced by organizational leaders around the world. Of the 350 leaders participating, 93% believed the challenges they face are more complex than those of five years ago, while 85% believed the definition of "effective leadership" has changed in the same time frame.

Similar research is now under way to determine the changing nature of leadership unique to law firms. To date, we have interviewed or surveyed more than 150 partners in leadership positions from multiple firms with significant operations in the United States and around the world. Further in-depth interviews are planned with 300 lawyer-leaders from 20 firms.

Representative, verbatim responses from our interview database show lawyers are struggling with a host of issues.[8] The challenges they face include the following.

Building Strategic Leadership Skills

- Leading in times of change.
- Developing a clearer understanding of what being a leader means.
- Finding guidance about how to be a managing partner.
- Developing the tools that will help me meet my challenges in making effective change in my office.

- Improving teamwork and collaboration in client service and business development are challenges for our firm.
- Becoming an excellent communicator is a challenge.
- Developing the courage to take unpopular positions.
- Understanding the firm's long-term vision. Ability to bring groups of people together with different views, foster a healthy respect for different views and manage in a way that people feel included.
- Working more effectively and efficiently – ability to prioritize and manage time and to delegate effectively at all levels.

Managing Talent and Promoting Sustainability

- Understanding the new generation of attorneys coming along and how they look at the world differently. They don't want to work as hard but want to make as much money. How can we sensibly accommodate them in order to keep the good ones?
- Succession planning/leadership development.
- Improving firm culture to secure talent.
- Creating the right environment in which such recruitment (the recruitment of targeted laterals) and retention can take place.
- Finding new attorneys that fit our economic model.

Making Decisions and Setting Strategic Direction

- Spending too much time on building consensus; being too slow as a result.
- Developing a consensus on who we want to be, what's our future direction, what areas of practice do we want to be involved in. How do we achieve growth goals – gradually or through acquisitions? Growing too fast may corrupt the corporate culture and we want to maintain the culture we have.
- Getting partners that are focused on their practice to think strategically.
- Implementing the strategic plan and managing expectations relative to revenue.
- Repositioning assets and finding alternatives where core competencies are sluggish (due to the soft economy).

Retaining Clients and Promoting Client Satisfaction

- Clients expect more today and want costs contained.
- We need to continue to ratchet up the quality of service in order to retain clients.
- We need to achieve internal cohesion and client satisfaction.

Managing Growth, Developing New and Existing Markets and Practice Areas

- Integrating mergers and maintaining revenue and profits per partner.
- Maintaining market share and recruiting/integrating talent are our challenges.
- Growth in keys areas is a challenge, agreeing on the key challenges is another challenge.
- Marketing our culture.
- Deciding with whether or not to expand. We are caught in the middle between the trend toward becoming a mega-firm or a niche firm. We are struggling with where and how much to grow. With that comes the problem of keeping the firm's culture intact, especially as we grow globally.

Questions

While most attorneys clearly possess the ability to make sense of challenges and make choices based on available information, implementing those choices *in a timely manner* is often a challenge. Firms need to be more agile to survive and thrive in the future. But making the change may be an uphill battle. Here are four questions that indicate why speed and business agility may be a struggle for the majority of attorneys:

1. How receptive are most attorneys to change?
2. In general, are attorneys risk takers or are they more risk averse?
3. Are most attorneys easy to influence or hard to convince?
4. In general, are attorneys "high trust" or "low trust" individuals?

Defining Leadership Within Law Firms

In discussions with lawyer-leaders, we have found a lack of consensus and clarity about the definition of leadership and the role of the leader-lawyer within the firm. Part of the disparity may be attributed to an inability to differentiate leadership from management. Managers produce a degree of predictability via a set of processes, which may include planning, business development, budgeting, staffing, organizing, resource allocation and other functional roles. In many cases, these functions can be delegated to non-lawyers.

Leadership is about producing change, often to a dramatic degree, and with an extremely useful outcome. *Creative* leadership is the capacity to think and act beyond the boundaries that limit our effectiveness. While non-lawyers can provide insight, help to integrate change and help to accelerate the process, leadership is the responsibility of the lawyer-leader.

Leadership is not currently taught in any significant manner in law school. In fact, many leading schools and academics do not see it as part of their charge. In a recent article, Ben Heineman, Jr., Distinguished Senior Fellow at the Harvard Law School Program on the Legal Profession, states:

> But today, law schools and professional associations may not have a broad vision of lawyers as leaders – or may be ambivalent or muted about it.[9]

Heineman was speaking more broadly about the role of lawyer as leader in a social context, but his comments have implications within the firm as well. He outlines several "qualities of mind" that are consistent with leadership success when he states:

> We are seeking lawyers who are not just strong team members, but who can lead and build organizations: create the vision, the values, the priorities, the strategies, the people, the systems, the processes, the checks and balances, the resources, and the motivation. Working on teams and leading them are interconnected: much of leadership today is not command and control of the troops but persuasion, motivation, and empowerment of teams around a shared vision.[10]

While the passage from law school to lawyer may be difficult and may require support**,** the journey from lawyer to lawyer-leader may be even more treacherous; it requires self-awareness, flexibility and the acquisition of new skills, knowledge and experiences.

Many firms have turned to business schools to learn the business side of managing a professional services firm. While these programs have been effective in providing awareness, discipline and methodology relative to business practices, they have not provided enough insight into how law firms can effectively use their existing leadership capital to leverage success and transform their operations.

In a recent survey of independent law firms,[11] managing partners identified the following competencies needed to lead their organization effectively into the future:

- Adaptability
- Building and mending relationships
- Building effective teams
- Change leadership
- Coaching
- Collaboration (working across boundaries effectively)
- Credibility
- Decisiveness
- Driving innovation
- Influence
- Leveraging differences

These competencies reflect the higher levels of emotional intelligence needed for effective leadership. Daniel Goleman[12] identifies four main emotional intelligence constructs:

1. *Self-awareness* – the ability to read one's emotions and recognize their impact while using gut feeling to guide decisions.
2. *Self-management* – the ability to control one's emotions and impulses and adapt to changing circumstances.
3. *Social awareness* – the ability to sense, understand and react to others' emotions while comprehending social networks.
4. *Relationship management* – the ability to inspire, influence and develop others while managing conflict.

How many of these competency areas did you study in law school? How many are effectively taught within your firm? Does mastering these competencies count toward billable hours?

Our recent law survey is consistent with a study conducted in 2005 that explored the make-up of top-performing lawyers. That study indicated that top performers are more visionary, provide their teams with much-needed perspective, and engage associates and peers in critical discussions and decisions. They are effective coaches and provide long-term development and mentoring. The study also found that a flexible leadership style that varies with the specific situation generates the best results.[13]

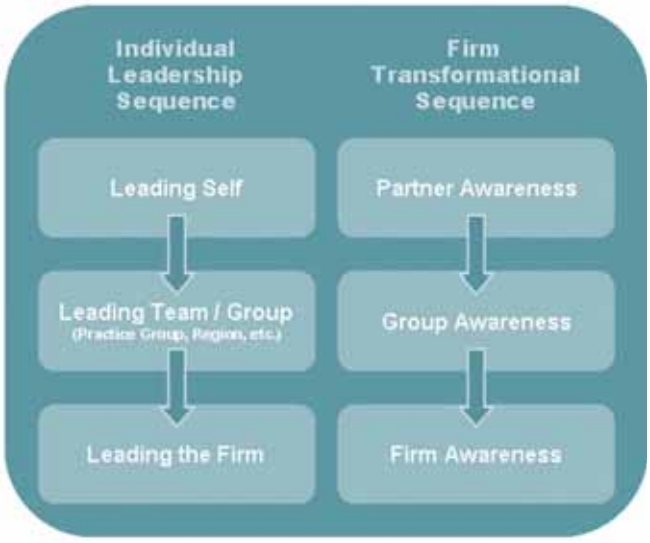
This research confirms that, although technical excellence and intellect are critical factors for success as a lawyer, emotional intelligence is the differentiating factor for successful leadership.

This research is consistent with other historical studies on leadership impact. It confirms that, although technical excellence and intellect are critical factors for success as a lawyer, emotional intelligence is the differentiating factor for successful leadership.[14]

Accelerating Firm Transformation

Based on several decades of leadership research and work with individual leaders, we believe that people can learn, grow and change, and that self-awareness is both the cornerstone for individual development and the foundation for group and organizational success. In general, attorneys tend to place less significance on self-awareness when starting a development journey.[15] The most effective leaders, though, are able to systematically gain more self-awareness and make adjustments based on an assessment of their strengths and vulnerabilities. Those leaders with the highest probability for success create a plan for development, share that plan and receive feedback (both internally and externally). Partners with a higher level of

self-awareness and mastery are better prepared to positively impact both their group and the broader firm.



CCL maintains a database of results from Benchmarks,® a 360-degree assessment tool that measures how individual leaders are performing against the skills and perspectives most critical for success. You can personally begin (or accelerate) the process of self-discovery around leadership effectiveness and emotional intelligence by asking yourself how well *you* perform against key factors from the Benchmarks® database.

How would you say you are doing relative to

- participative management,
- putting people at ease,
- self-awareness,
- balance between personal life and work,
- straightforwardness and composure,
- building and mending relationships,
- doing whatever it takes,
- decisiveness,
- confronting problem employees and
- change management?

How would your peers, your leader or those working for you say you are doing in these same areas?

The development of individual leadership skills and competencies will require a dedication to leadership development not previously displayed in most of the firms participating in our research. Development initiatives must address the current senior leaders of the firm, who set the context within which the development of other leaders will occur, and the upcoming generations of new leaders. In short, developing effective leadership skills will require moving from a heroic, individual and *independent* model in which attorneys achieve greatness through their own efforts, to an *interdependent* model that emphasizes both individual and collective input and accomplishment.

We refer to senior leaders as "talent orchestrators" because their actions determine the direction and speed of leadership development activities among the others in the firm. Talent orchestrators must champion investments in leadership development; they must act as coaches, mentors, role models and developers of future leaders. Specifically, senior leaders must undertake the following actions:

- Developing a leadership strategy that complements the strategy of the firm. The leadership strategy specifies how many leaders are needed to implement the firm's strategy within a given time frame – and with what skills, abilities and experiences.
- Assessing the gap between current leadership capabilities and those required by the firm's strategy.
- Sanctioning investments in leadership development that will close the gap between current leadership capabilities and those required.
- Taking part personally in mentoring younger leaders, presenting content in leadership development programs, reviewing talent and selecting future leaders.
- Leading transformations in the firm's systems, policies, technologies and business practices, while simultaneously engaging younger leaders in these activities to develop their understanding of how the firm must change to meet competitive challenges.

Some senior leaders may require individual coaching in these activities, or the senior team collectively may require coaching as it works through the various tasks associated with its new role in the development of future leaders. The senior team may seek assistance from human resource professionals inside the firm – individuals we refer to as "talent accelerators" since they provide the systems and processes required to accelerate leadership development. Because leadership development is a new activity for most law firms, many may require external support to help them:

- assess current leadership talent;
- create a leadership strategy;
- review and align talent management systems, including succession planning;
- develop a comprehensive approach to leadership development for the firm that addresses current and future leaders;
- offer specific courses in leadership customized to the needs of the firm
- provide individual coaching for current or high-potential leaders; and
- assist senior leadership in combining organizational change and leadership development.

While there is much work to be done, the good news is that law firms can draw liberally upon the experience of corporations, nonprofits, the military and other governmental organizations, and others that have been involved in leadership development activities for some time. As

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late adopters rather than early movers in this arena, law firms can benefit from the latest techniques, which have demonstrated both greater impact and faster results than earlier approaches to leadership development. For example, it is now widely recognized that classroom learning is necessary but not sufficient to produce leadership capabilities and alignment among leaders at the top of an organization. Instead, on-the-job learning that involves real challenges, teamwork and coaching produces more desirable results than classroom learning alone.

With the benefit of such knowledge, the challenge for most law firms is not the design of leadership programs that can produce desired results, but rather gaining the commitment of senior partners to make the investments required. A changing environment makes leadership development an imperative, though. Firms can no longer assume that leaders will simply emerge from the ranks of senior partners. Moreover, they can't assume that individual leaders, no matter how exceptional, can create the shared direction, alignment and commitment required to undertake new strategies and the organizational transformations they imply. Attention to the development of a new body of aligned future leaders will be required, as has been the case in more complex organizations in the public and private sectors. As in these organizations, progress in developing leadership begins with senior leaders who understand the competitive advantage superior leadership provides. In the next article in this series, a global law firm will highlight its journey through this development process and expand on its approach and methodology. ■

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Managing and Marketing a Practice in a Globalized Marketplace for Professional Services

By Gary A. Munneke

The subject of globalization is fairly new to most practicing lawyers. Even as transnational commerce increased in recent years, and revolutions in transportation and communication birthed an unprecedented interconnectedness throughout the world, most lawyers practiced within narrow jurisdictional boundaries of geography, licensure and the needs of local clients. A few so-called "international" law firms dominated the international commercial arena, but most lawyers were unaffected by transnational and cross-border commerce.

Those days are over. From Main Street to Wall Street, lawyers of every practice area, every size of firm, and every jurisdiction are affected by globalization. It may involve a dispute between a foreign supplier and a local grocery store; it may be a testator's ownership of foreign real estate; it may be a company's efforts to sell its products in an emerging market like China. The list could go on and on, but the message is clear: this is not the legal profession we inherited from our parents.

Kate Madigan, then-President of the New York State Bar Association, believed strongly that members of the bar need to understand and appreciate this globalization. She organized a Presidential Summit, at the New York

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This article is adapted from materials prepared for the New York State Bar Association Presidential Summit on "Globalization and the Practice of Law," held on January 30, 2008, at the Marriott Marquis in New York City. The summit was organized under the leadership of NYSBA President Kathryn Grant Madigan and included Steve Krane as moderator, and Dean Mary Daly, Professor Laurel Terry, James C. Moore, James Duffy and Calvin Johnson as panelists.

The views expressed in this article are solely those of the author and do not represent the policy or views of the American Bar Association, its Board of Governors or House of Delegates.

State Bar Association's Annual Meeting in January 2008, to explore questions of globalization as they affect the practice of law in the United States – particularly New York. The Summit addressed issues that will influence the economic competitiveness of American law firms in the coming decades. It was the goal of the panel to provide practical guidance for lawyers to deal with globalization in the management and marketing of their practices. Certainly, the legal profession in New York is diverse in terms of practice settings, firm size, clientele, resources, and involvement in international legal practice. Yet, regardless of where lawyers and law firms are located or what they do, a common thread running through the Summit was that globalization will have an impact on us all.

For many years, thinking about a global marketplace for goods and services was largely the domain of academics and visionaries.

Preliminarily, it may help participants to focus on what the term globalization means. As early as the 1960s, author Marshall McLuhan described the emergence of a global village where nations, cultures and people were instantaneously and continuously interconnected with each other. A variety of other futurists have weighed in on the subject, but for many years thinking about a global marketplace for goods and services was largely the domain of academics and visionaries. Meanwhile, in the real world, globalization proceeded apace.

New York Times columnist Thomas Friedman, through his books *The Lexus and the Olive Tree* and *The World Is Flat*, has perhaps contributed more to the popularization of conversations about globalization than anyone. In an article he wrote for the *New York Times Magazine*,[1] Friedman described the timeline of globalization:

> Globalization 1.0 (1492 to 1800) shrank the world from a size large to a size medium, and the dynamic force in that era was countries globalizing for resources and imperial conquest. Globalization 2.0 (1800 to 2000) shrank the world from a size medium to a size small, and it was spearheaded by companies globalizing for markets and labor. Globalization 3.0 (which started around 2000) is shrinking the world from a size small to a size tiny and flattening the playing field at the same time. And while the dynamic force in Globalization 1.0 was countries globalizing and the dynamic force in Globalization 2.0 was companies globalizing, the dynamic force in Globalization 3.0 – the thing that gives it a unique character – is individuals and small groups globalizing.

While some of Friedman's analysis may be subject to criticism, the basic premise that globalization is trickling down from governments to companies, to work groups and individuals, is unassailable. Nor is the corollary that a new economic environment will require new responses in order for participants in the global marketplace to become and remain competitive. And this will apply to lawyers and other professional service providers as well as to producers of commercial products and services.

Because most lawyers have not had to deal with globalization in the same way that businesses engaged in international trade have had to come to grips with the need to change, these lawyers have not thought a great deal about what globalization means to them. Interestingly, a 1999 American Bar Association conference on the future of the legal profession, titled *Seize the Future: Forecasting and Influencing the Future of the Legal Profession*, addressed economic globalization among a variety of other issues affecting lawyers. In their article titled "The Territory Ahead: 25 Trends to Watch in the Business of Practicing Law,"[2] which was based on a survey of practice management experts, authors Simon Chester and Merrilyn Astin Tarlton described the number one trend as

> *The global practice*. Large firms are opening offices throughout the world to follow the internationalization of capital, clients, and cultures. Others ask why they need the real estate. The Internet allows a lawyer in Tucumcari, New Mexico, to practice in Bali. Instantaneous communication powers a practice, with scant regard for time or place.

The issues associated with globalization are multifaceted and complex. It would be a mistake to try to "boil the ocean," by addressing all aspects of globalization. Summit panelist James Duffy points out:

> As a general proposition, globalization can be found in five different areas: economic, cultural, political, religious, and social systems. [The Summit Panel addressed] only a small portion of the economic aspects of globalization, namely, the provision of legal services. [It did] not have time to discuss, let alone defend or criticize, the entire concept of economic globalization let alone cultural, social systems, etc., issues.

To further clarify the focus, panelist James Moore, author of an earlier article on globalization, which appeared in the New York State Bar Association *Journal*,[3] described a short list of topics that fall within the ambit of economic globalization in the legal profession. He raises eight questions, and a number of sub-points under some of the questions.

Question 1: What are we talking about when we discuss economic globalization? Can you give some concrete examples of this phenomenon? What are some of the factors causing this phenomenon to occur? It is a political issue in the United States. What about elsewhere? Are there any forces which might slow it?

Question 2: What are some of the specific ways in which economic globalization is affecting the delivery of legal services?

- Multi-jurisdictional practice
- Outsourcing of legal services
- Dispute resolution
- Ethical considerations
- *Pro bono*

Question 3: What are some of the ways in which cross-border contracts are being affected by economic globalization?

- Dispute resolution
- Choice of law
- Venue
- Damages

Question 4: What skills will be valuable for attorneys practicing in a global economy?

Question 5: Within law firms, how will economic globalization affect lawyer recruiting? Lawyer retention? Lawyer compensation?

Question 6: Today, standards for lawyer conduct are established by the political state. In a global economy, which entity will establish and enforce standards for lawyer conduct?

Question 7: In a globalized world economy, will some services presently provided by lawyers be provided by non-lawyers? If so, what services will remain for lawyers to provide?

Question 8: Why would economic globalization be important to a lawyer or law firm practicing real estate, trusts and estates, and personal injury litigation in upstate New York?

In addition to asking questions, the Summit panelists engaged in detailed discussion of the topics addressed, including the following:

- Dean Mary Daly discussed the off-shoring and outsourcing of legal and law-related services.
- Professor Laurel Terry offered her thoughts about the impact of globalization on the practice of law and professional responsibility, noting the importance of understanding global and comparative perspectives.
- New issues in law firm staffing. The global marketplace presents an entirely new set of problems that do not exist in traditional domestic hiring, such as labor laws in foreign jurisdictions, competition with foreign law firms and other service providers, and cultural differences between American and non-U.S. employees.

At the end of the day, lawyers all need to gain greater insight into the challenges that globalization brings to the practice of law, and they need to do more than think about what to do – they need to feel compelled to act. Lawyers tend to be reactive, using their analytical skills and ability to think on their feet and to respond to whatever crisis comes along. Yet, in times of change, this approach may not be enough. Thinking proactively means anticipating and preparing for both the threats and the opportunities in this competitive marketplace; and lawyers who anticipate how globalization will affect who their clients are, how they will market their services to clients, and how they will deliver services to clients, have the greatest likelihood of succeeding in the evolving globalized practice environment.

In order to translate insights about potential impacts on the practice of law, lawyers need to think strategically about what this means for their own firms. It is not enough to make generalizations about what might hypothetically happen in the future; it is more productive to sit down with partners in a retreat or in a series of conversations or even in an online discussion to develop a strategic agenda based on the best available information. Because information is constantly in flux, this agenda should be updated periodically over time.

When a strategic agenda is created, it cannot be relegated to a back shelf until the next partners' retreat. It needs to be communicated to the entire firm, including associates and support staff if they were not engaged in the process, although some firms bring all employees into the planning loop. To the extent that the agenda requires changes in policy, staffing, resources or client relationships, firm leaders need to take steps to follow through to implement the changes.

With respect to clients, many law firms recognize that in a competitive, essentially de-regulated marketplace for professional services, relationships with clients are on shifting sands, at best. The firm that thinks strategically should be able to assess its client base and ascertain how to enhance its position in the market. This may mean re-working the firm's marketing plan, or creating one if none exists. In simple terms, marketing is communicating to the clients you want to represent what specific

services you seek to deliver and why you are the most capable entity to deliver those services. Many lawyers are uncomfortable about marketing, more than 30 years after the landmark case of *Bates v. State Bar of Arizona* declared that lawyers had a constitutional right to truthfully communicate their availability to potential clients. *Bates* dealt with advertising legal services, although advertising is really a sub-set of marketing, *i.e.*, one of a number of ways to build a clientele. In reality, lawyers have always engaged in marketing, even when they were not allowed to advertise. Then, as now, the most successful marketers were the most successful practitioners, and the lawyers who could bring in new clients and keep old ones were the rainmakers.

What does this mean in the globalized marketplace? First, it means that the old marketing plan may not work in the global environment. At the very least, it should be re-examined to determine its validity. Second, competitive pressures increase as the number of potential competitors multiplies. Law firms no longer compete with other firms in their city, or state, or nation, but with law firms and other providers around the world. Third, the stakes are higher. It takes more resources to operate on the global stage. Law firm capitalization will be more critical in assembling the resources to become and remain competitive in the emerging multilateral environment. Fourth, expertise will have increasing currency. It will not be enough for lawyers to be generalists; they will have to have special knowledge, special skills, and special contacts to stand out from the crowd. Fifth, lawyers will need to leverage technology. Most law firms trail the cutting edge in technology, compared to other industries and professions. Sixth, law firms will have to become more entrepreneurial and less institutional. They will have to find ways to build business without sacrificing professionalism. Seventh, and finally, lawyers will need to be expert managers to streamline their organizations to reduce costs, improve productivity, enhance quality, and assess performance in order to prosper.

This may seem like a daunting list, but it is achievable for those organizations committed to succeeding in the new globalized world. The work involved in thinking strategically about building a 21st-century practice is not unlike disaster planning, which involves identifying potential risks, developing realistic plans for coping with those risks, and implementing plans sufficiently to assure consistent readiness for the time when disaster strikes. As in the case of disaster, it is too late to plan when the storm is bearing down on your office. And like disaster planning, many firms put off addressing issues about the future, because too many pressing demands always seem to get in the way.

Change begets opportunity for those who prepare to seize the day; those who wait to respond may find themselves marginalized in a professional world they do not know or understand. In either case, the future is here. ■

1. Thomas L. Friedman, *It's a Flat World After All*, N.Y. Times Mag., Apr. 3, 2005.

2. Simon Chester & Merrilyn Astin Tarlton, *The Territory Ahead: 25 Trends to Watch in the Business of Practicing Law*, L. Prac. Mgmt. (Jul./Aug. 1999).

3. James C. Moore, *Economic Globalization and Its Impact Upon the Legal Profession*, N.Y. St. B.J. (May 2007) 35.

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Professional Staffing in the 21st Century

By Arthur G. Greene and Sandra J. Boyer

There is a sense of unease among some lawyers. They are reading about how change in the global marketplace has begun to affect lawyers throughout the United States and in the far corners of the world. While they take comfort in being somewhat distant from the front edge of the curve, they also know there are no barriers at the state line that will protect them from the inevitability of change.

For most lawyers, the foundational issue of staffing has always been of paramount concern. One of the toughest decisions for the solo practitioner is whether to hire an associate. It can be an expensive move, and one not to be taken lightly. For the small firm, the question is whether to grow. Most firms of fewer than 10 lawyers will not grow absent an affirmative decision to do so. Firms of more than 10 lawyers tend to grow naturally unless an affirmative decision *not* to grow is made. And, for the midsized or large firm, the issue is whether the pyramid structure still works.

The question in each of these situations, of course, involves the degree of support required to provide the necessary level of service to the firm's client base. In light of changes in legal relationships, however, there are new factors to consider before making any hiring decisions.

Client Trends

In the past 10 years, the legal profession has gone from a supply industry to a demand industry. This means clients are now in control; they are insisting on quality service at a competitive price. They are taking a more active role in the management of their cases and are controlling both the practice methods and the billing practices of their lawyers. These are some of the emerging trends:

- Clients are choosing individual lawyers and not law firms when placing their business.
- Clients will pay high fees for a lawyer's expertise and experience.
- Clients are not willing to pay for associate training at client expense.
- Clients are not willing to pay for routine research.
- Clients expect their lawyers to be technologically proficient and to bring savings to their case through the use of technology.
- Clients expect their lawyer to develop a team of lawyers and paralegals that will bring efficiency and expertise to the work at a reasonable and competitive cost.

Hiring Decisions

Lawyers must recognize that there is a substantial overlap in the roles of associates and paralegals. The overlap was specifically highlighted by the original American Bar Association definition of the term paralegal (then referred to as legal assistant), adopted in 1992, which read, in part, that a legal assistant's function

> involves the performance, under the direction and supervision of an attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts such that, absent the legal assistant, that attorney would perform the task.[1]

Partners must hire skilled lawyers who can become leaders and owners of the firm.

The paralegal cannot "practice law," which means accepting cases, setting fees, giving legal advice, planning strategy, making legal decisions, and appearing in court. Under the supervision of a lawyer, however, a paralegal can perform most other work.

Any hiring decision involves answering a threshold question as to whether to hire an associate or a paralegal. In making such a decision, consider the respective skills and talents of each professional.

An associate:

- knows the law or how to find it;
- desires to learn from the partner;
- may lack experience;
- wants to be a valuable associate;
- may want to be considered for partnership; and
- can become a future leader of the firm.

A paralegal:

- has practical skills;
- knows office procedures;
- knows legal procedures;
- has case management skills;
- provides good client service; and
- understands partner expectations.

There are some key differences between associates and paralegals. Most associates are in training to become partners. They will serve in a support role for a limited period of time. A paralegal will never be a partner and career paralegals will provide long-term support. Associates will be able to cover court hearings or conduct complex legal research. If those services are needed, an associate should be hired. If the support role does not involve court hearings or complex research, however, a paralegal may be the more appropriate choice. They tend to be more thorough and detail-oriented, which means they excel at case management and client relations.

Associate Career Development

The recent associate salary increases – to over $160,000 in major metropolitan law firms – affect all firms. Financial realities require firms to provide better associate training and career development. Firms that have studied associate turnover consider the cost of a lost associate to be over $200,000. The analysis includes the cost of recruiting, unprofitability in the first year or two, time partners spend in training and losses involved in getting a new associate up to speed. Firms will need to focus on:

- meaningful mentoring;
- fast-track training;
- client development skills;
- case planning and budgeting; and
- career development and planning.

It is increasingly clear that firms must make associates more profitable, more quickly than in the past, and must avoid or at least reduce turnover. In some settings, these goals may be accomplished better by hiring fewer associates, paying them at higher levels and giving them more training and practical experience early in their careers.

It is important to understand that for the long-term continuation of a law firm, partners must hire skilled lawyers who can become leaders and owners of the firm. Many firms have become much more selective in moving associates to partner status, because the overall compensation pie may not allow it. Therefore, hiring standards, orientation, training and retention are, and will continue to be, an essential part of associate development. Effective associate development requires commitment from partners to be successful and is essential in the succession planning of a law firm.

Expanding the Role of Paralegals

The need to pay higher salaries and provide better training for associates argues for an increased role for paralegals. The highest level work should be performed by associates, but associates will be more productive with the support of well-qualified paralegals who can perform the majority of the routine work on most files. The combination can be profitable.

Expanding the role of paralegals makes sense, yet many lawyers have trouble doing it. Unfortunately, most lawyers tend to be set in their ways. They resist change. For many, their inability to break with habits of the past has prevented them from making good use of paralegals.

Lawyers who have enlarged the role of paralegals have changed the practice of law; they have also expanded their own horizons. They have become managers and supervisors of work. They are able to work at a higher level, spending a larger portion of their time counseling clients and arguing in court.

Some firms have had enormous success in the utilization of paralegals; others have struggled and question whether paralegals are in their best interest. An examina-

tion of successful firms demonstrates that the following key ingredients are always present in their paralegal programs:

- The lawyer and client have confidence in the paralegal.
- The lawyer assigns the proper work.
- The paralegal has full involvement on the files.
- The lawyer properly prices the paralegal's work.
- A set, billable hour expectation is established for paralegals.

Confidence makes all the difference. If the lawyer has confidence in the paralegal, all things are possible. If the lawyer lacks confidence, very little is possible. And clients will take their cue from the lawyer. Clients can tell whether the lawyer has confidence in the paralegal and will act accordingly.

Hiring Paralegals

Training is essential. The problem in many firms is that some individuals have been hired or elevated to the position of paralegal without the proper background or without the proper credentials. Nothing can harm a paralegal initiative more than having unqualified individuals in some of the positions.

The firm should look for individuals with good analytical abilities, good written and oral communication skills, maturity, judgment, common sense, initiative, dedication, a professional attitude and a willingness to learn and expand their skills. Lawyers need to look for qualified and mature career individuals who will inspire confidence and will get along well with the supervising lawyer.

This last is very important. The paralegal must be a good match for the supervising lawyer. Some lawyers have difficult personalities; some have large egos. When putting together a lawyer and paralegal team, some combinations will prove to work better than others. Finding the right personalities is not easy but, in the last analysis, it will have a large effect on whether the lawyer develops the necessary level of confidence in the paralegal.

If the paralegals are expected to perform "lawyer work," they must have involvement on files much like the lawyers who would have otherwise performed the tasks. The paralegals need to establish a rapport with the client, understand the issues in the case, understand the client objectives, and be generally informed of what is going on at all times. Only with a complete understanding of these matters can the paralegal effectively take on this high level of responsibility.

To achieve this, the lawyer needs to be able to accept the paralegal as a colleague. The lawyer must open up to the paralegal and share concerns and problems, which may include admitting not knowing all the answers. The lawyer needs to understand that it does not take a law degree to make a significant contribution to a case. Unfortunately, if the lawyer does not have a receptive attitude, the effort will fail.

Profitability

Properly managed and properly priced, it is possible to generate significant profits from the work of paralegals. However, it takes more than simply hiring paralegals. Make sure that the law firm manager runs an analysis and prices paralegal work at the appropriate level. It would be a mistake to expand the role of paralegals and move a greater portion of the work to them if they are operating at a loss.

While there are a number of complicated formulas that can be utilized to determine whether paralegals are returning a profit, the simplistic "Rule of Three" is a good starting point. Under the Rule of Three, the paralegal's revenues from billable hours worked should represent three times their salary. Under this concept one-third represents salary, one-third represents overhead and fringe benefits, and one-third represents profit. Consider the following:

Rate		Hours	Revenue		Salary / Profit
$80	times	1,500 =	$120,000	divided by 3 =	$40,000
$100	times	1,500 =	$150,000	divided by 3 =	$50,000
$125	times	1,500 =	$187,500	divided by 3 =	$62,500
$150	times	1,500 =	$225,000	divided by 3 =	$75,000
$150	times	1,650 =	$292,500	divided by 3 =	$97,500

Law firms start by making a profit on paralegal hours; but, in addition, to the extent a paralegal can take on a larger portion of the more routine work on a file, the lawyer can justify a higher hourly rate for his or her own work. The lawyer has a more limited role, thus there is no increase in cost to the client. The concept is significant. By shifting more work to the paralegal, the lawyer can handle more files and focus his or her time on a higher level of work at a higher hourly rate.

Better Practice Management

The management skills of the lawyer and the quality of paralegal work product are directly related. The lawyer with a talent for delegating work and motivating and supervising others will have success working with paralegals. Although there will be differences due to the varied roles of paralegals, there are important work management concepts that have general application. They include

- selecting the right team;
- avoiding excessive layering;
- balancing associates and paralegals; and
- providing adequate supervision of the paralegal.

A Five-Step Plan for the Better Utilization of Associates

A firm that makes a commitment to hiring associates always wants to get the most out of these neophyte lawyers, and to prepare them to be productive members of the

firm. This does not happen by accident. However, if the firm follows an organized plan, as described below, it can significantly improve the likelihood that associates will attain the expectations of the firm when it hired them.

Step 1: Establish Criteria by Which to Hire Associates and the Number of Associates

Firms must understand the type of associate who can be successful within their firm culture, the skills needed to practice within the firm and the expectations of associates once they are in the firm. Firms must decide on their growth strategy prior to hiring associates. Will hiring be driven by need because the workload within the firm demands it? Will it be driven by the need to fill office space and the work developed once the associate joins the firm? Or will it be driven by an established firm growth plan? Agreed-upon skills criteria and a growth strategy are both essential to long-term associate retention.

Step 2: Provide Effective Orientation and Training

A strong orientation and training program is vital, if associates are to hit the ground running earlier and more effectively and develop their productivity and profitability at an early stage. Most firms are developing and implementing a thorough lawyer orientation program that provides

- an administrative overview;
- a firm overview;
- a financial overview;
- a professionalism overview; and
- a career development overview.

The key to the success of the associate orientation program is to implement it consistently, update it as needed and communicate regularly. An effective training program should follow the orientation program. An organized training effort should be developed. All associates should participate in the effort to insure they become quality, skilled lawyers who can become productive and profitable partners. When new lawyers are deciding which firm to join, they quite often are interested in the orientation and training program. They want assurance that if they join the firm, they will have the opportunity to develop professionally.

Successful associate development is a win-win for both the firm and the associates.

Step 3: Provide a Meaningful Mentor

Whether a mentoring process is formal or informal, it is important that somebody is responsible for insuring associates develop appropriately. Successful mentoring provides several benefits, including but not limited to

- developing associates who are able to build strong practices long-term;
- developing associates who can be integrated effectively into the firm;
- assisting associates to develop practice skills and knowledge more quickly;
- building future leaders of the firm;
- building loyalty;
- enhanced client service from associates; and
- an understanding of client development and its importance.

Successful mentoring programs incorporate (1) organization and structure; (2) a mentoring manual to serve as a guide to the process, including a position description created for both the mentor and the mentee; (3) an effective pairing process; (4) regular communication; (5) regular evaluation of the process and the pairing; and (6) identified goals and objectives of the process.

Step 4: Provide Client Development Training

Associates must develop a "client development mentality" early in their careers. Their future may well depend on their ability to develop clients, not only to serve them. Many lawyers believe they are incapable of developing clients or marketing skills; however, this is not true. Firms can help associates develop these important skills in a number of specific ways:

- Teach the associates about the firm, including services offered, practices within the firm, the client base, who the lawyers in the firm are and what they do, core specialties, what type of clients to develop and areas of growth within the firm.
- Share the expectations of associates in regards to business development.
- Understand the client-development skills and abilities of the associates and focus on how to use them to develop business.
- Teach associates what clients expect from lawyers.
- Develop and use individual practice plans and base them on years in practice.
- Use internal and external resources to assist associates to develop a client development mentality early in their careers.

Step 5: Provide a Career Path for Associates

Associates want to join and stay with firms that provide a clear career path that benefits them and the firm. Create a culture where associates understand the progression toward partnership; where they can learn, develop and gain knowledge in their practice area; where they can have client interaction; where they are evaluated regularly and effectively; and where they can become part of the team.

A Five-Step Plan for Expanding the Role of Paralegals

The steps involved in expanding the role of paralegals in a firm parallel, but are different from, those required for associate development. It may seem obvious that a

generic staff development plan will not be as effective as one targeted to the special needs of associates and paralegals, but many firms do not focus on this important distinction.

Step 1: Establish Hiring Guidelines

Start by having the lawyers agree upon certain minimum standards for the hiring of paralegals. This will tend to elevate the paralegal to a higher competence level than an ad hoc hiring program. Whenever possible hire an experienced career paralegal. And, as part of the process, give attention to whether the lawyer and the applicant will make a good match.

Step 2: Provide Lawyer Education

A key to developing strong paralegals is assuring that lawyers in the firm understand their supervisory and leadership roles. To the extent necessary, firm should educate lawyers about

- the role of the paralegal as permitted under the Rules of Professional Conduct;
- the client service advantage of using paralegals;
- the cost savings to the client from expanding the paralegal role; and
- the firm profits possible from paralegal work.

Step 3: Develop Practice Management Standards

Have each practice group establish practice management policies and standards. The policies should describe how files are to be handled, including the relationship between the roles of the paralegal and the associate. In the right circumstances, it may promote the experienced paralegal as a resource for training new associates.

Step 4: Establish Written Guidelines for the Utilization of Paralegals

The firm should develop and publish written guidelines for the proper usage of paralegals. The standards can include appropriate functions and should also cover levels of involvement and communication. The firmwide standardization of the guidelines is essential to an effective program.

Step 5: Set Goals

There should be annual goals for the paralegal program, upon which progress can be measured. Without goals, it is impossible to keep momentum going for annual improvement.

Other Professional Staffing Considerations

Associates and paralegals are not the only support staff at many firms – there are secretaries, receptionists, filing clerks, and others whose jobs may vary according to the type of practice. The common thread for associates and paralegals is that they are directly involved in the delivery of legal services to clients, as opposed to performing purely clerical or administrative functions. Two other common staffing arrangements deserve mention.

Contract Attorneys

Many firms employ contract lawyers to whom they pay a salary and who have a set amount of hours to be billed. Some contract lawyers do not have a billable hour expectation but are used on an as-needed basis. Many times contract lawyers fill a need in a specific practice area. Contract lawyers can enter the partnership track if their performance substantiates it and the firm's growth plan calls for it. Work is delegated to them from partners and associates. They are not expected to develop business, but if they do, they can be compensated based on an agreed-upon amount. Some contract lawyers are permanent; others are used on an as-needed basis such as if the firm has a large litigation case or a difficult merger/acquisition.

Outsourced Support

Some firms believe that outsourcing legal work offshore is the wave of the future, and some believe that as much as $5.8 billion in wages will be sent offshore by 2015. Is this a serious consideration for law firms? There are several things to consider, such as the following:

- Will communications be an issue?
- Will clients accept that their work is being shipped out of the United States for processing?
- Can outsourcing enhance firm profitability?
- Will the time zone differences provide a benefit in turnaround time and will it outweigh the risks?
- What kind of document review will be needed by lawyers in the United States?

At this point, there may not be enough information available to make a final decision regarding the use of outsourcing, but one thing is for sure: research carefully before implementing outsourcing practices.

Conclusion

Although staffing needs for law firms have evolved over the course of recent decades and will continue to change in the future, certain fundamental principles are not likely to change. Lawyers and law firms can leverage their productivity by hiring and training qualified associate attorneys and paralegals. Moreover, the success of these staffing decisions will be enhanced by a good staffing plan. Developing a professional staffing plan will assist law firms to better meet client demands, enhance profitability and provide consistency in the growth of the firm. ■

1. ABA By-Laws § 21.12, as amended Sept. 1, 1992.

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The Ethics of Outsourcing

By Alan Feigenbaum

Outsourcing tasks to non-lawyers, whether in the United States or abroad, raises a host of issues regarding attorneys' ethical obligations to their clients. These issues have been fleshed out in advisory opinions issued by the bar associations in various states. Specifically, the New York City, Los Angeles County, San Diego County, and Florida Bar Associations have provided guidance to attorneys on the ethical considerations that must be addressed prior to outsourcing work overseas.

Each of these opinions focuses primarily on the following ethical mandates: (1) the duty to avoid aiding a non-lawyer in the unauthorized practice of law; (2) the duty to supervise; (3) the duty to preserve client confidences; (4) the duty to check conflicts; (5) the duty to bill appropriately; and (6) the duty to obtain client consent. Although each of the opinions provides that under certain circumstances an attorney may ethically outsource legal support services overseas to a non-lawyer, ensuring that the requisite ethical mandates are adhered to may prove difficult in practice.

The discussion that follows focuses on the New York City Bar Association's Opinion, taking into account any additional considerations or distinctions set forth in the opinions of the Los Angeles County, San Diego County and Florida Bar Associations.

Duty to Avoid Aiding the Unauthorized Practice of Law

First, with respect to the duty to avoid aiding a non-lawyer in the unauthorized practice of law, the New York City Opinion explicitly states that to fulfill this duty, the attorney must "at every step shoulder complete responsibility for the non-lawyer's work."[1] This means that the attorney cannot lessen his or her ultimate responsibility for the competence of the work product, but rather must "ensure its quality."[2]

Duty to Supervise

Second, the duty to supervise is inherently difficult considering the "physical separation" between a New York attorney and an overseas non-lawyer.[3] The Florida Bar Association has raised the same concern.[4] To effectively fulfill this duty, the Opinion advises attorneys to obtain background information about any intermediary employing the non-lawyer, conduct reference checks, interview the non-lawyer in advance by telephone or Webcast, and communicate with the non-lawyer throughout the assignment. There is undoubtedly an increased challenge with properly discharging the duty to supervise a non-lawyer overseas. That challenge may well require New York attorneys to spend more time supervising than they otherwise would with non-lawyers in the United States; this, in turn, might increase costs to the client.

Duty to Preserve Client Confidences

Third, assuming the outsourcing assignment will require the attorney "to disclose client confidences or secrets to the overseas non-lawyer," the attorney "should secure the client's informed consent in advance."[5] Moreover, the attorney should take measures to help preserve those confidences, including "restricting access to confidences and secrets, contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality."[6] Clients may understandably be concerned about disclosing confidences or secrets to overseas non-lawyers, and New York attorneys must adequately address these concerns before making any such disclosure. To ensure adequate protection, the Florida Bar Association recommends that the overseas non-lawyer provide assurances that "policies and processes are *employed* to protect the data while in transit, at rest, in use, and post-provision of services."[7]

Duty to Check Conflicts

Fourth, attorneys should not outsource tasks to overseas non-lawyers before doing a sufficient conflicts check. Satisfaction of this duty requires two checks. The New York attorney has to consider whether the overseas non-lawyer is performing or has performed work that

is adverse to the attorney's client. And, the New York attorney has to question the overseas non-lawyer's employer about its conflict-checking procedures to see whether it has any conflicts with handling the outsourced work.

Duty to Bill Appropriately

Fifth, because the overseas non-lawyer cannot perform "legal services," it is not appropriate for the New York attorney to "include the cost of outsourcing in his or her legal fees."[8] Unless the client has specifically agreed otherwise with the attorney, the attorney should "charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service."[9] The Florida Bar Association found that a law firm "may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead."[10] In a contingency case, however, the Florida Opinion found that it is "improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third party provider."[11]

Duty to Obtain Client Consent

Finally, the extent to which a New York attorney must obtain client consent prior to outsourcing work to overseas non-lawyers depends upon the significance of the work to be outsourced. For example, if overseas non-lawyers are expected to play a "significant role in the matter," or will be performing an "important document review," the New York attorney should obtain client consent prior to outsourcing the work.[12] The Florida Bar Association arguably takes a broader view and recommends that law firms obtain "prior client consent to disclose information that the firm reasonably believes is necessary to serve the client's interests."[13]

The Los Angeles and San Diego Bar County Bar Associations' Opinions focus more on the specific instance of outsourcing the preparation (such as drafting) of a brief. For example, the San Diego Opinion considered the extent to which a California attorney can ethically outsource a brief to India-based Legalworks.[14] The key issue addressed by the San Diego Opinion was whether Legalworks was engaged in the practice of law. In the hypothetical posed by the San Diego Opinion, the California attorney had retained "full control" over the client's representation and "exercised independent judgment" in reviewing Legalworks' brief.[15] As to whether the attorney had a duty to inform the client prior to outsourcing the work to Legalworks, the San Diego Opinion instructs that, if work to be performed is "within the client's 'reasonable expectation under the circumstances' that it will be performed by the attorney," the attorney must provide advance notification prior to outsourcing the work.[16] Most important, the attorney must satisfy the duty to act competently. To do so, "the attorney must know enough about the subject in question to judge the quality of the work."[17] Thus, for example, an attorney who has no knowledge of patent law who outsources a motion for summary judgment on infringement of a patent to Legalworks cannot satisfy the duty to act competently. Absent such knowledge of the applicable legal issues at stake, the attorney cannot possibly assess the quality of the work performed by a company such as Legalworks.

The Los Angeles County Bar Association's Opinion considered whether an attorney in a civil case can ethically contract with an out-of-state company to draft a brief.[18] Like the San Diego Opinion, the Los Angeles Opinion concluded that outsourcing of this sort is appropriate if several of the ethical duties discussed above are satisfied. Namely, the attorney must be competent to review the work, have ultimate responsibility for the brief submitted with the court, refrain from charging an unconscionable fee, protect client confidences and secrets, and ensure there is no conflict of interest with the entity hired to draft the brief. As to whether the fee is unconscionable, the Los Angeles County Bar found that "the amount paid by the attorney" for the out-of-state company's work "is not determinative on the question of whether a fee is unconscionable."[19] ■

1. N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2006-3, at 3 (2006) (N.Y.C. Op.).
2. *Id.*
3. *Id.* at 4.
4. Fla. Bar Ass'n Proposed Advisory Op. 07-2, June 18, 2008, at 2 ("Attorneys who use overseas legal outsourcing companies should recognize that providing adequate supervision may be difficult when dealing with employees who are in a different country.") (Fla. Proposed Op.).
5. N.Y.C. Op. 2006-3, at 4.
6. *Id.* at 5.
7. Fla. Proposed Op. 07-2, at 3 (emphasis in original).
8. N.Y.C. Op. 2006-3, at 5.
9. *Id.* at 5 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993)).
10. Fla. Proposed Op. 07-2, at 5.
11. *Id.*
12. *Id.* at *6.
13. Fla. Proposed Op. 07-2, at 4.
14. San Diego County Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2007-1 (2007).
15. *Id.* at 5.
16. *Id.* at 6.
17. *Id.* at 7.
18. L.A. County Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 518 (2006).
19. *Id. in* L.A. Lawyer, Nov. 2006 75, 77 (citing *Shaffer v. Super. Ct.*, 39 Cal. Rptr. 2d 506 (1995)).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

My firm represents a number of companies in the construction business, and they are frequently sued by construction workers who are injured on the job. Lately we have had several cases in which the injured plaintiffs – not employees of any of our clients – are in this country illegally. One of our clients wants to know whether it would be permissible to report both the plaintiff in this case, and his employer, to the authorities.

My client has not proposed threatening criminal charges. Instead, he proposes simply to provide the authorities with the documentation and depositions obtained during discovery. These show that the plaintiff is here illegally, obtained employment illegally, and that his employer hired him knowing about his status, or, at least, that he was hired without a required pre-employment investigation. There is no intent to threaten or to gain an advantage in the litigation, although an advantage could result.

My client feels that because he has learned what he has about this worker he should, as a good citizen, inform the proper authorities. My questions are: What is my client allowed or required to do? What am I, as the client's attorney, allowed or required to do? Would my firm or my client face any liability if either of us were to make such reports?

Signed,

Concerned Professional

Dear Concerned Professional:

Thank you for the question. It reflects the growing awareness of the impact of undocumented workers. Not many days pass without an evening news report on illegal immigration – ineffective border control, the effect on education and healthcare systems, and the practical problems and unintended consequences of strict enforcement. Recent statistics are staggering: in 2007, 280,500 persons were deported by ICE (U.S. Immigration and Customs Enforcement). Such deportations have increased each year since 2003. In the first quarter of 2008, 94,237 persons have been removed from the country and, if the trend holds, we could reach 500,000 deportations by the end of the year.

The number of illegal aliens living in this country is estimated to be between 12 million and 28 million. The Center for Immigration Studies reports that half the immigrant population in Texas (the state with the fastest growing immigrant population) is illegal. Over the past two decades, immigration accounts for virtually all of the national increase in public school enrollment. Your question, though one for lawyers and judges, is thus presented in a context that has captured the attention of many Americans.

The New York Code of Professional Responsibility provides guidance for the specific questions that you raise. The prohibition is quite generally drawn, however, and therefore leaves considerable leeway for good judgment and common sense.

DR 7-105: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."[1]

EC 7-21: "Threatening to use, or using, the criminal process to coerce the adjustment of private civil claims or controversies is a subversion of that process. . . . As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system."

DR 7-105 is very short, consisting of only one section and one sentence. It simply prohibits lawyers from using criminal charges solely to advance a civil matter. Roy Simon's Annotated Code, drawing on EC 7-21, offers a rationale for the rule. If a person has committed a crime, it ought to be dealt with by the criminal justice system. On the other hand, if citizens are allowed to threaten or to use criminal charges for leverage in civil matters, there may be a substantial "chilling effect," and thus deter the resolution of legitimate civil claims. Finally, there could be a loss of confidence in our system of justice if citizens believe that criminal charges can be bargained away in civil litigation. EC 7-21.

Several cases demonstrate the reach of DR 7-105. *Realuyo v. Diaz*, 2006 WL 695603 (S.D.N.Y. 2006) (Daniels, J.) was a matter in which the court denied fees where an attorney's discharge was based on inappropriate demand letters making flagrant and direct threats to initiate criminal charges. *In re Geoghan*, 253 A.D.2d 205, 686 N.Y.S.2d 839 (2d Dep't 1999), presented another example of extreme misconduct that predictably led to disbarment. The attorney demanded $10,000 with threats of "false and misleading testimony" that would assist a pending prosecution. *Accord Jalor Color Graphics, Inc. v. Universal Advertising Sys.*, 2 A.D.3d 165, 767 N.Y.S.2d 615 (1st Dep't 2003); *In re Glavin*, 107 A.D.2d 1006, 484 N.Y.S.2d 933 (3d Dep't 1985); *In re Gelman*, 230 A.D. 524, 245 N.Y.S. 416 (1st Dep't 1930).

While direct and extreme threats clearly invoke the proscriptions of DR 7-105, thinly veiled threats, carefully

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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crafted to evade the letter of the rule, may be "too cute by half," and provide a basis for sanctions. *Compare Revson v. Cinque & Cinque*, 221 F.3d 71, 81 (2d Cir. 2000) (attorney threats to bring civil RICO action, mentioning that other attorneys have been convicted in similar cases, was not sufficiently overt to warrant sanctions), *with* NYSBA Committee on Professional Ethics, Formal Opinion 772 (2003) ("NYSBA Op.") (threat to present criminal charges unless action is taken to remedy a civil wrong is likely to create a presumption of DR 7-105 violation).

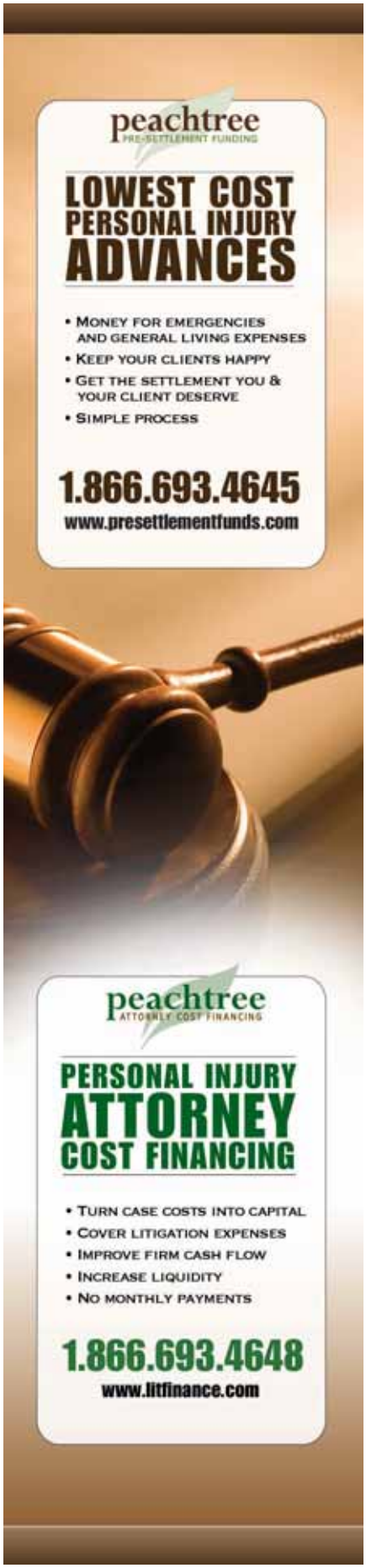
The question presented to the Forum shows your obvious awareness of the ethics rule, and perhaps a hope that reliance on the "solely to obtain" language may excuse the true objective of the client – to gain advantage in a personal injury suit initiated by an undocumented worker. The New York cases and ethics opinions recognize that there are limits to the DR 7-105 restriction on lawyer conduct. However, there also is some willingness to look carefully at an obvious attempt to cynically navigate between the letter and the spirit of the rule, which as indicated above is designed to protect the system of justice as well as the litigants. For example, linking a veiled threat of criminal prosecution with a demand for payment is likely to create a presumption of improper intent in an otherwise ambiguous communication.

As noted in NYSBA Op. 772 (2003), "intent" and "purpose" are primary considerations. When intent and purpose are at issue, resolution seldom is subject to summary determination. A decision is fact intensive and is determined case-by-case. Conduct of the lawyer and the client, timing and substance of communications, and the overall context of the proceedings will often reveal whether the use or threat of criminal charges was solely to gain an advantage, or whether there was a higher purpose. Can the attorney articulate a plausible alternative explanation for the threat? If an alternative explanation becomes difficult or strained, a bona fide, appropriate or legitimate reason may not be found. Does the threat relate to past conduct that is not likely to reoccur? If the threat relates to on-going misbehavior, there could be an argument that the intent was a legitimate desire to inhibit illegal conduct. In your case, the "good citizenship" claim may not ring true if your client also hires undocumented workers.

In response to the question – "what am I, as the client's attorney, allowed or required to do?" – the best guidance is NYSBA Op. 772 and a Bar Association of Nassau County opinion:

> Thus, DR 7-105(A) is intended to preserve the integrity of both the system of civil liability and the criminal justice system by making sure that a lawyer's actual or threatened invocation of the criminal justice system is not motivated solely by the effect such invocation is likely to have on a client's interests in a civil matter. When, however, a lawyer's motive to prosecute is genuine – that is, actuated by a sincere interest in and respect for the purposes of the criminal justice system – DR 7-105(A) would be inapplicable, even if such prosecution resulted in a benefit to a client's interest in a civil matter.
>
> NYSBA Op. 772 (2003).
>
> The inquiring attorney is not ethically required to report alleged illegal conduct testified to by an adversary party deponent. . . . [T]he mere failure to report required information to an administrative agency (such as, e.g., the Immigration and Naturalization Service or the Internal Revenue Service) . . . would not constitute the type of fraud on a tribunal giving rise to a reporting requirement under the code.
>
> Bar Ass'n of Nassau County Comm. on Prof'l Ethics, Op. 94-20 (Inquiry 536).

ABA Informal Opinion 1484 (December 1, 1981), decided under DR 7-105(A) and EC 7-21, similarly found that a "law firm may ethically continue civil litigation while at the same time assisting the clients in presenting the facts to the prosecutors for such action



as the prosecutors determine to be appropriate."

In sum, assuming that the purpose for filing criminal charges is more than the mere advancement of the client's interests in this civil matter, you *may* activate the criminal process against the plaintiff-deponent. However, you are not *required* to file, or cause to be filed, any criminal charges for illegal activity that may have been disclosed during the civil proceeding.

The follow-up concern, of course, is whether you ultimately could be liable for making a threat, or acting on it, after a report is made. In determining whether you could face liability, the answer will turn on whether the charges are invalid or questionable, whether any associated demand constitutes criminal coercion, compounding or other illegal conduct, and whether there is evidence of prosecutorial misconduct. New York City Ethics Opinion 1995-13 (identifies conduct that may cross the line and implicates N.Y. Penal Laws); ABA Informal Opinion 1484 (December 1, 1981) (citing *In re Mekler*, 406 A.2d 20 (Del. 1979); *Robinson v. Fimbel Door Co.*, 306 A.2d 768 (N.H. 1973)).

Assuming that there is no illegal conduct surrounding the threat, and that the charges are well-founded, you should not face liability for a threat or the report. In NYSBA Op. 772, the Committee concluded that "if the lawyer . . . reasonably believes that the threatened criminal charges are true and the letter only demands the [opposing party] take an action that is reasonably calculated to remedy the wrongful taking, such a letter would not be unlawful." (Not unlawful, but as indicated above, potentially unethical, since DR 7-105 does not turn on truth of the charge or correlation between the demand and the criminal act, but on the attorney's motivation.)

Finally, "what is the client allowed or required to do," by implication asks whether the attorney can be held responsible for the client's threats to an adversary. DR 1-102(A)(2) prohibits lawyers from circumventing a Disciplinary Rule through actions of another. It has been long held that the unethical acts of a client (or the client's employees) can be imputed to the attorney. *In re Robinson*, 151 A.D. 589, 136 N.Y.S. 548 (1st Dep't 1912), *aff'd*, 209 N.Y. 354 (1913). DR 1-102(A) extends to persons beyond one's law firm, and includes the lawyer's clients. If an attorney relies on the client to formulate the threat of criminal charges to accomplish an advantage in civil litigation, the attorney may be exposed to DR 7-105 sanctions by aiding and abetting the client's conduct. *Accord* ABA Model Rule 8.4(a).

Assuming that the client is not aiding or abetting you in a violation of DR 7-105, substantive immigration law and the New York Penal Law do not prohibit a reporting of undocumented workers. The client is free to report, or not report.

The Forum, by
Michael Kuhn
Bracewell & Guiliani LLP
Houston, Texas

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

My partner and I have a small law firm concentrating in matrimonial matters. Recently, my partner concluded a divorce case that resulted in a settlement yielding several million dollars for our client. Our retainer was based on an hourly rate, which has been paid in full. Our total fees amounted to $7,500.

My partner wishes to speak to our client and ask her to voluntarily pay our firm a bonus because of the exceptional result and the small fee we received. I feel very uncomfortable with his plan.

Can you help alleviate my concern?

Sincerely,

Uneasy Partner

1. Roy Simon's Annotated Code points out that the ABA Model Rules, adopted in 1983, completely dropped the DR 7-105 prohibition. ABA Formal Opinion 92-363 (1992) commented that the omission was deliberate. Courts and commentators justified the deletion of DR 7-105 as "redundant and overbroad." *Committee on Legal Ethics v. Printz*, 416 S.E. 2d 720 (W. Va. 1992) (seeking compensation instead of criminal prosecution may be legitimate negotiation); ABA Formal Opinion 92-363; Hazzard & Hodes, The Law of Lawyering, Sec. 40.4 (3d ed. 2000); Restatement of the Law 3d, Law Governing Lawyers, § 98, cmt. f (2000).

While the ABA Model Rules may place New York at odds with other jurisdictions, many states are quick to point out that misconduct under DR 7-105 would violate ABA Model Rules if the conduct is egregious. *E.g., State of Oklahoma v. Worsham*, 957 P.2d 549, 552 (Okla. 1998). For example, a threat of criminal prosecution without a basis in fact or law violates ABA Model Rules 3.1 and 4.4 which prohibit frivolous claims and threats that have "no substantial purpose other than to embarrass, delay or burden [the adversary]." ABA Model Rule 4.1 similarly imposes a duty regarding truthfulness and prohibits threats without an intent to proceed with the charges. In extreme cases, the conduct covered by DR-7-105 may violate substantive criminal laws such as criminal coercion and compounding and, thus, warrant ethics sanctions under ABA Model Rule 8.4(b).

EDITOR'S NOTE

In the July / August 2008 edition of the *Journal*, we printed an article titled "Of Keystrokes and Ballpoints: Real Estate and the Statute of Frauds in the Electronic Age." The article referred to the case of *Vista Developers Corp. v. VFP Realty LLC*, 17 Misc. 3d 914, 847 N.Y.S.2d 416 (Sup. Ct., Queens Co. 2007), where e-mail exchanges, though bearing signatures by the senders, were held not to constitute a real estate contract. The article commented that there were two arguments which were not presented to the court that, if made, might have altered the result. One was to argue that signatures to e-mails are equivalent to the typed signatures on telegrams, which do satisfy the Statute of Frauds. The other was that, under the N.Y. State Technology Law (and its federal counterpart), electronic signatures are to be treated as if they were manual signatures.

The article was wrong. Jon Schuyler Brooks, the attorney for Vista Developers Corp., has advised us that both of these arguments, in fact, had been made. The court, however, did not address either argument in its decision, which is why the article assumed, erroneously, that neither argument had been made. The *Journal* and the author sincerely apologize to Mr. Brooks and his firm for the error.

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: At least here in New England, the word *myself* is annoyingly overused in statements like, "Mary and myself are leaving." When is it correct to use *myself* in place of *I* and *me*?

Answer: It is never correct to replace *I* and *me* with *myself*. That question was also recently asked by a Harvard professor, who said that her graduate students consider *myself* to be an upscale way to avoid saying *I*; but it's neither upscale nor grammatical.

The pronoun *myself* is either an intensive pronoun or a reflexive pronoun and can never be the subject of a sentence. In the sentence the reader sent, *myself* is ungrammatical because it is used as the subject of the sentence. Standard English requires a simple *I* in the subject slot.

Myself is an intensive pronoun, a pronoun that emphasizes a previous noun or pronoun. In the statement "She herself did it," *herself* means "alone." A reflexive pronoun refers back to a noun or pronoun stated earlier in the sentence.

The following sentences show the correct use of intensive and reflexive pronouns:

> He *himself* can do it. (Intensive pronoun.)
>
> He injured *himself* playing football. (Reflexive pronoun.)

Other readers have expressed confusion about which personal pronoun to use following *as* and *than*:

> John is as tall as Joe, but Joe weighs more than (he / him).
>
> John admires Joe more than (I / me).

The correct personal pronoun for the first sentence is *he*, because the unstated verb that would follow is "does." The second sentence, as stated, is ambiguous. If the unstated verb is "do," the personal pronoun should be "I," the subject of "do." But if the unstated verb is "John admires," the personal pronoun should be "me."

> John admires Joe more than I (do).
>
> John admires Joe more than (John admires) me.

Question: Is the preposition *like* correct in the following sentence, "Like the old saying goes, if you repeat a lie often enough, people will believe it"? Erik Maza, of the New York Times Regional Media Group, made this comment on television recently.

Answer: The introduction to the "old saying" was: "*As* the old saying goes . . . "; grammatical, and probably true. But the preposition *like* has almost obliterated *as* in comparisons of this kind. Except for a minority of speakers and writers, most people use *like* instead of *as* in all such constructions. Even *Time* magazine, usually a bastion of correct grammar, permits its journalists to use *like* for *as*. In a May article, "How the Next President Should Fix the Economy," Justin Fox misused *like* for *as* twice before he got it right the third time.

First he wrote, "Every once in a while, *like* when Franklin Delano Roosevelt was elected . . . the effect can be dramatic." Then he commented, "So there's a chance that this election could turn out to be a major economic turning point, just *like* 1980's was." Finally, he put *like* in a statement where it belonged, writing, "Recessions – *like* the one in 2001 and the one we might be in now – always reduce incomes. (My emphasis.)

But *as* is still worth fighting for. Just remember that *like* is a preposition (as are the prepositions *with*, *from*, *for*, *in*, *on*) and must be followed by the objective case of a noun or pronoun. For other constructions, use *as* or *as if*. Contrast:

> He looks *like* a happy man.
>
> He looks *as if* he is happy.

Potpourri

People are not only misusing prepositions, they are deleting them. This morning news contained the statement: "The interstate was closed this morning 15 minutes." One federal administrator recently said, "I take the blame. It was a mistake made by my office, which I take all responsibility." President Bush said, "We reviewed the declaration that was agreed this morning." Scott Simon, on NPR News, commented: "Give me an idea what you're confronted." Our local airport boasts a billboard saying: "Fly Gainesville."

But while we are dropping needed prepositions, we are also adding unneeded words. Sentences start with phrases like *And so*, or *But yet*, and the ornate *Nevertheless* and *Notwithstanding*. The Animal Rescue people talk about animals that need *adopting out*. We request, "Please report *back* to me"; and "return *back* the book I lent you." We open *up* new lines of communication. We excise *out* errors, when we discover where they're *at*; and in the South we advertise "an umbrella with a substantial handle *to it*."

Finally, two errors that should have been "excised out":

A journalist for the local newspaper, in praising a coming event, wrote: "There won't be many seminars during the two-day Spring Garden Festival at Kanapaha Botanical Gardens this weekend, but the ones scheduled are worth nothing." (Take out that *h*.)

And, in a failed attempt at a metaphor to show that money spent had not been wasted, a New York senator said, "You can look at the trees and see many things that should have been done better. But if you look at the forest, it's a large and unprecedented sum of money that's basically being used in the way it was intended." (Trees, things, and a forest of money, all in one mixed metaphor.) ■

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section.[12] The theme is the brief's unifying idea. It allows the reader to view the client's case favorably. It reinforces the advocate's view of the story behind the case. It dictates which facts are selected, where they are placed, and whether they are emphasized or de-emphasized.[13] Use only people, places, and dates that directly relate to your or your adversary's theme. Including unnecessary information wastes space and burns the reader's brain cells.

There are several ways to choose the theme. The theme can be based on moral or philosophical ideals, policy considerations, or precedent.[14] For example, the theme of a brief about an employment case could be about the immorality of discrimination. Look to the reader's preferences in choosing the theme. The theme must appeal to, and be understood by, a smart high-school senior. Select the theme before writing. Choosing the theme during the writing process is ineffective.

There are three basic categories of facts. First are legally significant or determinative facts.[15] They help determine the reader's decision. If different facts would result in a different decision, those facts are determinative facts.[16] The second category is explanatory facts. These piece together and make sense of the determinative facts.[17] The third category is the coincidental or irrelevant fact. Although these facts relate to the case, they are irrelevant to the theme of the brief or memorandum.[18] They add only color and background.

A useful way to decide which facts are necessary is by comparison to the argument section. Go back and forth between the facts and argument section to decide which facts are necessary for the brief or memorandum. If a fact isn't argued in the argument section, omit it in the fact section. If a fact isn't in the fact section, it should be cut from the argument section.

Include every fact that supports and advances your client's or your adversary's theme.[19] All legally significant facts must be included in the fact section, regardless whether they favor or disfavor your client. Withholding legally significant facts might be unethical and may violate court rules.[20] Advocates should also include all the opposition's legally significant facts as a straw man. By presenting the opposition's facts, the advocate can later contradict them or argue their irrelevance in the argument section.

If the brief is a meal, the fact section is a first course that sets the tone for the rest of the meal.

The fact section should not be a summary of witness testimony, a list of facts witness by witness, or a series of lengthy quotations. These methods never persuade. What persuades is storytelling.

Once you choose which facts to use, the selected facts must be positioned to maximize persuasiveness. Improperly placing facts will damage the fact section's persuasiveness. Fact sections are organized most often in one of two ways: chronologically or by issue. Chronological order, the more common organizational method, emphasizes clarity.[21] Sometimes important facts that require emphasis appear only at the end of the chronology. When that happens, present these facts at the beginning of the section.[22]

Some writers organize facts by issue when two or more legal questions are involved.[23] Use an introductory paragraph to set out all the issues and the order in which they will be discussed.[24] Each issue should be introduced with a topic heading to separate them. Separate the fact section into categories like evidence, witnesses, and testimony.[25] In a criminal appeal, the categories could be the arrest, the trial, and the sentence.

Three categories form the structure of the brief's fact section: the beginning, the middle, and the end.

Grab the reader's attention at the beginning of the fact section to make a lasting impression.[26] The beginning is where the writer sets up the rest of the fact section. Identify important people, places, and dates. Introduce the most important characters here so that the reader will identify with them immediately.[27] Present favorable facts and those deemed worthy of emphasis at the beginning to force the reader to analyze the facts from your perspective.[28]

> *Example:* A man you have already described as a community leader and a good father is accused of theft. The reader will infer that he is innocent. When you later argue he is innocent, the reader might agree with you.
>
> *Example:* A man you have already described as deceitful and depraved is accused of theft. The reader will infer that he is guilty. When you later argue he is guilty, the reader might agree with you.

Unfavorable facts, which should be de-emphasized, belong halfway to two-thirds through the fact section.[29] All legally significant facts, even those unfavorable to the client, must be stated in the brief. But you can control where they are placed and how persuasive they are. By placing bad facts halfway to two-thirds through the section, their damaging impact is minimized.

The end of the fact section is where the advocate must place the facts that the reader should remember the most. Facts read at the end will be fresh in the readers' minds when they read the argument section.[30]

In objective memorandums, the procedural history goes at the beginning to provide context for the rest of the document. All procedural history should go at the end of the fact section in a persuasive brief. In a persuasive brief, procedural history strengthens the merits of your case. For example, if a lower court ruled in the client's favor on a particular aspect of the case but against the client in general, discuss in the appellate brief the favorable part of the ruling and point to facts or omissions that affect the unfavorable part.

You're not arguing law. You're setting out procedural facts in a compelling, factual way.

Introducing the Characters

In selecting the theme for the fact section, the advocate also selects the characters through whom the theme applies. An effective fact section begins with the characters with whom you want the reader to identify and sympathize.[31]

The first major character introduced is usually the protagonist, not the villain.[32] Think of how characters in a good movie are introduced. Lead with the villain only if your story tells how the villain becomes a protagonist, if the villain is downright awful, or if you want to fool the reader about how the protagonist is really the villain.[33] Select the proper character to introduce first. The character need not be your paying client. The reader will analyze the facts through this character's perspective.[34]

Communicate your position. How you refer to your client and your adversary has a subtle yet important impact.[35] Refer to your client by name rather than as Appellant or Respondent. Calling your client Appellant or Respondent can be confusing, and the reader will not identify with the client.[36] Referring to your adversaries as Appellant or Respondent will, however, dehumanize them.

> *Example:* In an abortion case, the opposing parties can use different terms to refer to the unborn. Pro-choice advocates might refer to the unborn as a fetus. Anti-abortionists might use "child." The two terms have different connotations.[37]
>
> *Example:* Compare how the parties were presented in the case of Paula Jones against Bill Clinton. The fact section of Mr. Clinton's brief makes it obvious that he is the President of the United States. Ms. Jones's fact section describes her as a $6.35-an-hour government employee and Mr. Clinton as the former governor of Arkansas.[38]

Humanizing some clients is difficult. Corporate clients and criminal defendants might not garner the reader's sympathy. Investigate the corporation's goals to find information associated with human emotion like philanthropy or employing hard-working individuals.[39] Present this information at the beginning of the fact section to show the corporate client's human side. For example, "XYZ Corporation, which employs 45,000 people and has provided automobiles for 3.5 million families, is a Delaware corporation with an address of 2345 Main Street, Wilmington, Delaware."[40] This makes the corporation likable. Focus on specific individuals when the corporation must defend against allegations of wrongdoing.[41] If a senior manager was responsible for an error that cost investors a lot of money, portray the corporation as a victim.[42]

One tactic to humanize criminal defendants is to make them a proxy for an ideal so that, for example, "holding against the client is a holding against the Fourth Amendment."[43] Another technique in the appropriate case is to villainize the complaining witness or police or to portray the client as involved in a "Man Against Self" struggle.[44] In the case of a drug addict, depict the defendant as a victim of drugs, a nemesis that becomes a character in the story.[45] Viewed in this light, the criminal defendant becomes the protagonist and the drugs the bad guy. The audience will hope that the defendant's better nature will triumph.[46]

The Legal Writer will discuss other issues about the fact section in Part II, including writing style, visual aids, and ethical considerations. ■

1. Carole C. Berry, Effective Appellate Advocacy: Brief Writing and Oral Argument 84 (2d ed. 1999) (noting that "[t]he law arises out of the facts").
2. Mary Barnard Ray & Barbara J. Cox, Beyond the Basics: A Text for Advanced Legal Writing 167 (2d ed. 2003); Berry, *supra* note 1, at 83–84. The fact section has different names. It's called the Statement of the Case (Petitioner) or Counterstatement of the Case (Respondent) in United States Supreme Court briefs.
3. Ray & Cox, *supra* note 2, at 167.
4. John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 896 (1940) (quoted in Berry, *supra* note 1, at 83–84); *accord* Wesley Gilmer, Jr., Legal Research, Writing & Advocacy 183 (2d ed. 1987).
5. Gilmer, *supra* note 4, at 183–84; Raymond T. Elligett, Jr. & John M. Scheb, *Stating the Case and Facts: Foundation of the Appellate Brief*, 32 Stetson L. Rev. 415, 417 (2003).
6. Ray & Cox, *supra* note 2, at 151.
7. Berry, *supra* note 1, at 90–91; Ray & Cox, *supra* note 2, at 155.
8. Ray & Cox, *supra* note 2, at 151.
9. *Id.* at 153; Berry, *supra* note 1, at 90.
10. Ray & Cox, *supra* note 2, at 180.
11. *Id.* at 180–81.
12. Berry, *supra* note 1, at 66, 85.
13. *Id.* at 66, 84–87.
14. *Id.* at 66.
15. Berry, *supra* note 1, at 90; Ray & Cox, *supra* note 2, at 168–69.
16. Richard K. Neumann, Jr., Legal Reasoning and Legal Writing 207 (5th ed. 2005).
17. *Id.* at 208.
18. *Id.*
19. *Id.*
20. Mario Pittoni, Brief Writing and Argumentation 32 (3d ed. 1967); Berry, *supra* note 1, at 84.
21. Pittoni, *supra* note 20, at 32; Berry, *supra* note 1, at 87; Ray & Cox, *supra* note 2, at 153.
22. Elligett, *supra* note 5, at 422.
23. Berry, *supra* note 1, at 87.
24. *Id.*
25. Elligett, *supra* note 5, at 421.
26. Berry, *supra* note 1, at 88.
27. Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write a Persuasive Fact Section*, 32 Rutgers L.J. 459, 468 (2001).
28. Berry, *supra* note 1, at 88.
29. Ray & Cox, *supra* note 2, at 171.
30. *Id.*
31. Foley, *supra* note 27, at 468.
32. *Id.*
33. *Id.*
34. *Id.*
35. Berry, *supra* note 1, at 88.
36. Gertrude Block, Effective Legal Writing 176 (5th ed. 1999).
37. Berry, *supra* note 1, at 90.
38. Pittoni, *supra* note 20, at 30–31; Berry, *supra* note 1, at 90–91.
39. Foley, *supra* note 27, at 474.
40. *Id.* at 475 (emphasis deleted).
41. *Id.*
42. *Id.*
43. Elizabeth Fajans et al., Writing for Legal Practice 188 (2004).
44. Foley, *supra* note 27, at 470.
45. *Id.* at 473.
46. *Id.* at 470.

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Williams, Bryan R.
Yates, Hon. James A.
Yavinsky, Michael J.
Younger, Stephen P.
Zulack, John F.

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Adler, Roger B.
Bonina, Andrea E.
Branda, RoseAnn C.
Cohn, Steven D.
Golinski, Paul A.
Hernandez, David J.
Kamins, Barry
Romero, Manuel A.
Sunshine, Hon. Jeffrey S.
Sunshine, Hon. Nancy T.
Szochet, Diana J.

THIRD DISTRICT
Breen, Michael L.
Casserly, Timothy E.
Costello, Bartley J., III
Davidoff, Michael
DeFio Kean, Elena
Doherty, Glen P.
Farley, Susan E.
Fernandez, Hermes
Gold, Majer H.
Greenthal, John L.
Higgins, John Eric
Higgins, Patrick J.
Kretser, Hon. Rachel
Lally, Sean P.
Liebman, Bennett M.
Meislahn, Harry P.
Millock, Peter J.
Miranda, David P.
Moy, Lillian M.
Nachimson, Steven G.
Netter, Miriam M.
Powers, John K.
Privitera, John J.
Roberts, Christina L.
Salkin, Prof. Patricia E.
Schofield, Robert T., IV
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* Williams, David S.
* Yanas, John J.

FOURTH DISTRICT
Breedlove, Brian H.
Burke, J. David
Coffey, Peter V.
Cullum, James E.
Ferradino, Stephanie W.
Haelen, Joanne B.
Lais, Kara I.
Rider, Mark M.
Rodriguez, Patricia L.R.
Stanclift, Tucker C.
Sterrett, Grace

FIFTH DISTRICT
Fennell, Timothy J.
Gall, Erin P.
Getnick, Michael E.
Gigliotti, Louis P.
Gingold, Neil M.
Greeley, Kristin B.
Hartnett, Elizabeth A.
Hayes, David M.
Howe, David S.
Larose, Stuart J.
Longstreet, Ami S.
Mitchell, Richard C.
Pellow, David M.
Peterson, Margaret Murphy
†* Richardson, M. Catherine
Stanislaus-Fung, Karen
Virkler, Timothy L.

SIXTH DISTRICT
Cummings, Patricia A.
Denton, Christopher
Egan, Shirley K.
Fortino, Philip G.
Gorgos, Mark S.
Lewis, Richard C.
†* Madigan, Kathryn Grant
May, Michael R.
Sheehan, Dennis P.
Tyler, David A.

SEVENTH DISTRICT
Brown, T. Andrew
Buholtz, Eileen E.
Burke, Philip L.
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Castellano, June M.
Gould, Wendy L.
Harren, Michael T.
Kukuvka, Cynthia M.
Kurland, Harold A.
Lawrence, C. Bruce
Lightsey, Mary W.
* Moore, James C.
* Palermo, Anthony R.
Schraver, David M.
Smith, Thomas G.
Tilton, Samuel O.
* Vigdor, Justin L.
* Witmer, G. Robert, Jr.

EIGHTH DISTRICT
Brady, Thomas C.
Chapman, Richard N.
Convissar, Robert N.
Doyle, Vincent E., III
Edmunds, David L., Jr.
Fisher, Cheryl Smith
* Freedman, Maryann Saccomando
* Hassett, Paul Michael
Lamantia, Stephen R.
Manias, Giles P.
McCarthy, Joseph V.
Meyer, Harry G.
O'Donnell, Thomas M.
O'Reilly, Patrick C.
Porcellio, Sharon M.
Sconiers, Hon. Rose H.
Subjack, James P.
Young, Oliver C.

NINTH DISTRICT
Amoruso, Michael J.
Burke, Patrick T.
Burns, Stephanie L.
Byrne, Robert Lantry
Campanaro, Patricia L.
Cusano, Gary A.
Dohn, Robert P.
Fontana, Lucille A.
Goldenberg, Ira S.
Gordon Oliver, Arlene Antoinette
Gouz, Ronnie P.
Kranis, Michael D.
Lagonia, Salvatore A.
Lau-Kee, Glenn
Markhoff, Michael S.
Marwell, John S.
Miklitsch, Catherine M.
* Miller, Henry G.
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Selinger, John
†* Standard, Kenneth G.
Strauss, Barbara J.
Thornhill, Herbert L., Jr.
Van Scoyoc, Carol L.
Wallach, Sherry Levin
Welby, Thomas H.
Wilson, Leroy, Jr.

TENTH DISTRICT
Asarch, Hon. Joel K.
Austin, Hon. Leonard B.
Block, Justin M.
* Bracken, John P.
Buonora, John L.
Cartright, Valerie M.
Chase, Dennis R.
Clarke, Lance D.
Cooper, Ilene S.
Fishberg, Gerard
Franchina, Emily F.
Gann, Marc
Good, Douglas J.
Gross, John H.
†* Levin, A. Thomas
Levy, Peter H.
Luskin, Andrew J.
Mihalick, Andrew J.
* Pruzansky, Joshua M.
Purcell, A. Craig
* Rice, Thomas O.
Robinson, Derrick J.
Steinberg, Harriette M.
Stempel, Vincent F., Jr.
Walsh, Owen B.
Winkler, James R.

ELEVENTH DISTRICT
Cohen, David Louis
Dietz, John R.
Gutierrez, Richard M.
James, Seymour W., Jr.
Lomuscio, Catherine
Lonuzzi, John A.
Nizin, Leslie S.
Terranova, Arthur N.
Vitacco, Guy R., Jr.
Wimpfheimer, Steven

TWELFTH DISTRICT
Bailey, Lawrence R., Jr.
* Pfeifer, Maxwell S.
Quaranta, Hon. Kevin J.
Sands, Jonathan D.
Schwartz, Roy J.
Summer, Robert S.
Weinberger, Richard

OUT-OF-STATE
Bartlett, Linda G.
Brown, Geraldine Reed
Cahn, Jeffrey Barton
Elder-Howell, Andrea M.
* Fales, Haliburton, II
* Walsh, Lawrence E.

† *Delegate to American Bar Association House of Delegates*
* *Past President*

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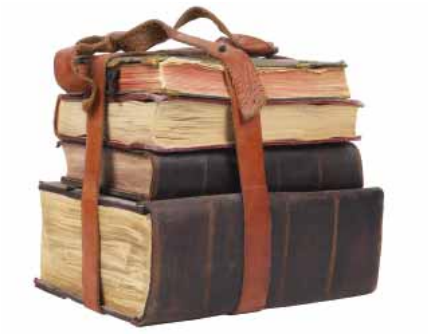

Fact vs. Fiction: Writing the Facts — Part I

Crafting fact sections in persuasive briefs and objective memorandums is an essential skill all lawyers must learn. A case is never decided on the law alone but rather on how law applies to fact.[1] Given the relationship between law and fact, many judges, professors, and attorneys believe that the fact section is the most important part of a brief.[2] In a persuasive brief, the fact section "tells the story that makes the fairness of your client's position evident."[3] Objective memorandums, prepared as intra-office documents, neutrally present the legally relevant facts before offering a recommendation. This two-part column offers some tips to writing persuasive and objective fact sections.

Importance of Facts

According to John W. Davis, the 1924 Democratic presidential candidate, "the statement of the facts is not merely a part of the argument, it is more often than not the argument itself. A case well stated is a case far more than half argued."[4] The fact section, which is read immediately before the brief's argument section, becomes the lens through which readers view the argument.

A well-written fact section has a natural progression. It emphasizes the client's humanity and communicates legally significant and determinative facts. Because judges are, or will become, familiar with the pertinent law, the advocate must demonstrate how the unique facts of the case apply to the law.[5] If the brief is a meal, the fact section is a first course that sets the tone for the rest of the meal. A bland fact section will make readers lose their appetite.

Briefs and Memorandums

The persuasive brief and objective memorandum both follow the same general format. Both have questions presented, a fact section, and a discussion. But facts in briefs and memorandums are communicated differently.[6]

State the facts neutrally in an objective memorandum. Take sides in a persuasive brief. In a persuasive brief, some facts are emphasized and others de-emphasized, depending on the theme. This tactic shouldn't be used in objective memorandums.[7] In objective memorandums, the reader shouldn't know from the facts alone what the lawyer will recommend. In persuasive briefs, writers shouldn't go two sentences without making it obvious which side they represent. In determining which facts to include in the objective memorandum, don't consider whether the fact is favorable to the client but whether the fact itself is necessary to determine how the case or issue should be resolved.[8]

> *Example* (objective memorandum): "The defendant appeared at the plaintiff's house six times over the course of two weeks."
>
> *Example* (persuasive brief): "The defendant harassed the plaintiff for two weeks by showing up at her home six times."

Be aware of emotion-laden facts. Facts carrying emotional weight must be dealt with carefully, especially in objective memorandums, and should be included only when they will affect how the case is handled.[9] In persuasive briefs, stir the readers' emotions to help them remember the facts.[10] Choose words with slightly positive or negative connotations rather than with exceedingly strong undertones.[11]

> *Example* (objective): "The elevator was poorly maintained. There was no warning it was going to break."
>
> *Example* (persuasive): "The poorly maintained elevator broke without warning, leaving the eight-year-old child stuck in it for three hours."

What persuades is storytelling.

The structure of persuasive and objective fact sections also differs. Objective memorandums should begin with the procedural history. Persuasive briefs must first introduce a character with whom the reader can identify and end with the procedural aspects of the case. In neither document should the drafter argue facts or reach a legal conclusion in the fact section. Arguments and conclusions are reserved for the argument section.

Presentation of Facts

A strong fact section will appeal to readers immediately and keep them interested throughout. Selecting which facts to present and their subsequent order is important for the brief's persuasiveness. Because the fact section is best told as a story, develop a theme that can be carried throughout the fact

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