SEPTEMBER 2010
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NEW YORK STATE BAR ASSOCIATION

# Journal

# Back to Business as Usual . . . Or Not?

*by Gary A. Munneke*

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(1912 – 2007)
*Editor-in-Chief*, 1961–1998

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STEPHEN P. YOUNGER

# Honoring Steven C. Krane: A Legacy of Service, A Lawyer of Integrity

Our 104th President, Steven C. Krane, loved to quote Winston Churchill's words: "We make a living by what we get. We make a life by what we give." This past summer, we sadly said an untimely good-bye to Steve – who was a dear friend and colleague. When judged by Churchill's words, my what a life Steve lived.

While he was taken from us far too soon, Steve left behind an incomparable legacy of service to the public and to our profession. Steve's legacy will live on in each one of us, as we pay tribute to his dedication to giving back and his commitment to integrity. After all, it was Steve who reminded us shortly after the tragic events of 9/11 that "we have the power as a profession to make this world a far better place." That was the optimism in Steve, and only one of the many lessons that can be gleaned from his incredible life.

## A Legacy of Service

Steve's life is a lesson in service. Steve loved the Bar Association. He threw himself into every bar activity he could find, and used each opportunity to serve the profession and the public. From promoting access to justice for the poor to securing loan assistance for public interest lawyers answering the call of duty in the aftermath of 9/11, Steve challenged us all to do more for our communities.

From the moment he joined the State Bar, Steve's appetite for bar work was endless. There was hardly a committee that did not receive the benefit of his hard work and expertise. To Steve, making new friends through bar work was itself enough of a reward.

In his first State Bar President's Message, Steve told us that when he first entered State Bar headquarters, he felt he had found "a long-lost family." This was his theme throughout his presidency. In characterizing his role as "leading our family" of lawyers, he set the example by working tirelessly to promote volunteerism.

It was in that vein that he conceived SLAPI (Student Loan Assistance for the Public Interest), a committee dedicated to offering loan assistance to public interest lawyers, who often graduate nearly $100,000 in debt. In his memory, The New York Bar Foundation is supporting this program with a memorial fund bearing Steve's name. Those wishing to make donations can do so at www.tnybf.org.

Steve's spirit of giving was perhaps never more critical to our Association – indeed to the world – than in the aftermath of the horrific events of 9/11. Under his incredible leadership, the State Bar joined with the Governor and the Chief Judge to answer the call to assist the thousands of people affected by the terrorist attacks.

Steve created a toll-free number for 9/11 victims seeking answers to law-related questions and for clients seeking information about attorneys who worked near Ground Zero. Steve rallied the State Bar to help lawyers who had been displaced from their offices. Due to his mobilization efforts, calls came in from all across the nation with offers of pro bono assistance, temporary office space and office equipment.

Steve frequently recounted how etched in his mind were the faces of the numerous attorneys who stood on line to offer pro bono help to 9/11 victims, and who gave so unselfishly during one of our nation's darkest hours. As Steve said, this was "the best the legal profession has to offer" and was "a time to be proud" of the lawyers everywhere who came forward to help in the true spirit of pro bono service and volunteerism.

In October, we will celebrate our second annual National Pro Bono Week. We will honor the thousands of our members who do the public good through pro bono service. As we recognize the good that we do, let us remember the heritage of service that we, as a family of lawyers, inherited from one of our great leaders, Steve Krane.

## A Lawyer of Integrity

Steve's life is also a lesson in integrity. He was a pioneer in the field of legal

STEPHEN P. YOUNGER can be reached at syounger@nysba.org.

ethics. He chaired our committees on Legal Fee Regulation, Cross-Border Legal Practice and Multi-Disciplinary Practice. For many years, he chaired our Committee on Standards of Attorney Conduct, which helped bring New York's ethics rules into the modern era. (Of course, when he presented the revised rules to our House of Delegates, he had to wear his favorite Red Sox hat.)

No study of the profession was complete without Steve's imprimatur. Just last year, Governor David Paterson tapped Steve to serve on the Commission on Public Integrity. With confidence in our government institutions at an all-time low, who better to call on than Steve to help restore trust in the pillars of our democracy?

As a member of the American Bar Association's Board of Governors, Steve was instrumental in the creation of the ABA Commission on Ethics 20/20, which is looking at how our ethics rules need to adapt to our global, technological world.

Steve was always willing to share his extensive knowledge with others. He taught professional responsibility at Columbia Law School and gave countless lectures on ethics issues. He was a passionate mentor to many young lawyers who would seek him out for advice. Steve himself had wonderful mentors, but he paid back that debt many times over.

We are so fortunate to have benefited from Steve's efforts to shape our profession through his service and integrity. He set an enormous example for us all to follow. Steve reminded us that not only do we, as a profession, have the power to better the world around us, we also have "an obligation to use that power to advance the cause of justice and freedom throughout our state and our nation."

During his term, Steve challenged each State Bar member to choose one project "that would improve the law, our legal system or our society." He urged each of us to choose something of importance to us and to dedicate ourselves to it. Imagine the difference that could be made if each of us accepted that challenge today. In the words of Steve Krane, "I exhort each of you to go forth and give." ■

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September 29 Long Island
October 8 Buffalo
November 4 New York City

**Protecting Your Practice**
September 15 New York City

**Representing the DWI Defendant From Arraignment to Disposition**
September 23 Long Island
September 24 New York City
September 30 Buffalo
October 28 Albany

**2010 Law School for Insurance Professionals**
September 28 New York City; Syracuse
September 29 Albany
October 1 Buffalo; Long Island; Westchester

**Practical Skills: Basic Matrimonial Practice**
October 6 Albany; Buffalo; Long Island
October 7 New York City; Syracuse; Westchester

**Bridging the Gap**
(two-day program)
October 13–14 New York City (live session)
Albany (video conference from NYC)

**Expert Testimony – What You Need to Know in New York**
October 15 Buffalo; New York City
October 22 Syracuse
November 5 Albany; Long Island

**Practical Skills: Probate and Administration of Estates**
October 19 Albany; New York City; Rochester
October 20 Buffalo: Long Island; Syracuse
October 21 Westchester

**Jim McElhaney's Day in Discovery**
October 19 Long Island
October 21 New York City
November 10 Albany

**Litigating Forensic Evidence in New York Courts**
October 21 New York City

**Counsel Fees, Relocation and Ethics**
(9:00 am – 1:00 pm)
October 22 Long Island
October 29 Buffalo
November 19 Syracuse

**Emerging Issues in Environmental Insurance**
(9:00 am – 1:00 pm)
October 29 New York City

**Practical Skills: Purchases and Sales of Homes**
November 2 Albany; Long Island; New York City; Rochester
November 3 Buffalo
November 4 Syracuse; Westchester

**Update 2010 – Live Session**
November 5 Syracuse
November 12 New York City

**Advanced Real Estate Practice**
November 8 New York City

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November 8 New York City

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# Is It Back to Business as Usual . . . Or Not?

**By Gary A. Munneke**

**Gary A. Munneke** (GMunneke@law.pace.edu) is a professor of law at Pace Law School in White Plains, New York, where he teaches Professional Responsibility, Law Practice Management, and the Legal Profession. Professor Munneke is Chair of the New York State Bar Association's Law Practice Management Committee.

Beginning in 2008, the marketplace for legal services underwent the same downward spiral that struck the rest of the American, and to some extent the world, economy. Although the big headlines focused on the near-collapse of the housing and mortgage industries, the collapse of major banking institutions, and the bankruptcy of American automakers General Motors and Chrysler, the effects of multiple economic crises trickled down through nearly all segments of the American economy. Joblessness was up; company profits were down; new construction projects dried up. Some commentators even dared to utter the "D" word in their assessment of the economy.

Trends in the legal marketplace tracked the economy in general. As business declined, the amount of legal work correspondingly constricted. Corporate clients trying to cut costs often viewed legal services as a target for cutbacks, affecting both in-house and outside counsel. Law firms representing individuals found that people who are out of work, or who have less disposable income, are less likely to seek legal assistance for planning activities and preventive legal services. They might still hire a lawyer to defend them in a DUI case, but they are more likely to put off estate planning, and be willing to represent themselves *pro se* in lieu of retaining legal counsel. Real estate work – both commercial and residential – all but dried up, along with many other practice areas. Only the bankruptcy and workout lawyers were doing well, it seemed.

In law firms, as business declined, profits, and *ergo* partner compensation, declined. To reduce costs, firms explored the feasibility of outsourcing legal and support work. They reduced the size of summer associate programs; laid off lawyers and staff at every level; some firms even de-equitized less productive partners. The pace of law firm mergers slowed, as capital to expand evaporated and partners became more risk averse. Planned expansions were replaced by unforeseen diasporas, as some firms went out of business, leaving the former lawyers to fend for themselves, and other firms lost partners and practice groups who departed for greener pastures.

Amidst this upheaval in the law firm world, the job market for law school graduates disintegrated. Not only were there fewer jobs, but job offers for some grads were rescinded, and others were told to postpone their starting dates. According to the National Association for Law Placement, the percentage of lawyers employed nine months after graduation declined from 91.7% in 2007, to 88.3% in 2009. It is not readily apparent, but these figures include an increase (from 3.3% to 5%) in the number of graduates hanging out a shingle and a whopping 25% who described their jobs as "temporary." In addition, some of these temporary jobs were created by law schools to help former students bridge the gap between temporary and permanent employment; only 70.4% indicated that they needed a JD degree in order to be hired in their current job. To top off this toxic cocktail, a backlog of unemployed and underemployed graduates from the Classes of 2008 and 2009 will compete with the Class of 2010 *and* a host of laid-off associates looking for work in the recovering economy.

Haven't we all heard enough of those stories? So this column is not about the recession; it is about the recovery and the perplexing quandary posed in the title: "Is It Back to Business as Usual . . . Or Not?" Are all the changes in forms of practice, alternative billing proposals, hiring patterns and shifts in the marketplace products of a downturned national economy, or do they represent a sea change in the way lawyers deliver services to clients? Did the recession precipitate these changes by starting a chain reaction that will continue during the recovery, or did the recession mask forces that were already at work in the legal profession before the economic downturn? As the economy improves will law firm lawyers go back to organizations that were just like they were in 2007, before the fall, or will they discover that even the new good times will not slacken the transformation of law practice into something they scarcely recognize?

The future is not easy to predict, and honestly if I were any good at it, I would not be writing this column. Yet, as the saying goes, change happens. We can ignore it and hope it goes away, or rush to retire before it uproots our comfortable status quo. We can react to it, relying on lightning-fast intellects to fashion feasible responses on the fly. We can try to create contingency plans for situations that may occur, so that we can be prepared when the time is right. Or, we can explore alternative futures and choose a course that actualizes the future we want for ourselves.

Lawyers, for the most part, fall into the first two categories: they either think that they can outlive the changes that they do not want to face, like the senior partner who has never touched a computer keyboard, much less a BlackBerry, and never will; or they assume that whatever happens, they have the smarts and the kismet to make the right decisions and land on their feet. The annals of business failure are replete with stories of individuals and organizations that chose to roll the dice and bet that they would be spared the fate of others swept away by the tsunami of change, that their corner of the beach would prove to be a safe harbor against the waves.

The question is not whether change is afoot, but how much will change – that is, will the profession experience an evolution or a revolution?

Really, the question is not whether change is afoot, but how much we will change – that is, will the profession experience an evolution or a revolution? Looking back over the past 50 years, it is apparent that the practice of law has changed dramatically. Some of these changes, in no particular order, are:

- Diversity. The legal profession has evolved from a bastion of old white males to a younger, more diverse mix including women, African Americans, Latinos, gays, and other underrepresented groups.
- Technology. It has not only permeated every facet of the practice of law, it has revolutionized a variety of legal processes, changed the relationship between lawyers and clients, and produced a host of problems never imagined by a lawyer graduating from law school in 1960.
- Legal education has evolved from a totally Socratic experience to one that includes clinics, skills courses, internships and externships, and distance learning. A bevy of new law schools have proliferated, dramatically increasing the number of graduates and practicing lawyers.
- Firm size and firm structure. Firms have gotten bigger and bigger, and they have experimented with a variety of new models, including branch offices, non-equity partnerships, non-hourly billing, and the outsourcing of legal work, to name a few. Small firms and solo practitioners sometimes feel like endangered species surrounded by the growing BigLaw community. Few lawyers spend their entire professional lives in one organization.
- Clients' needs. Their needs have shifted and their demands have become louder. Corporate clients

resist paying for the training of new associates and scrutinize bills more carefully than ever. They are willing to change law firms when they are not happy with the work, and often dole out legal work to a variety of firms to avoid becoming too dependent on one firm. Individual clients are much more willing to question the decisions of their lawyers and increasingly choose to represent themselves *pro se* or use self-help forms instead of a lawyer to resolve legal problems.

- Competition. The practice of law has become more competitive, not only internally, but externally. Since 1977, lawyers have been allowed to advertise their availability to provide legal services to potential clients (an issue addressed by the Second Circuit in March of this year in New York in *Alexander v. Cahill*). Nonlegal service providers vie openly with lawyers for a variety of professional services, and some lawyers entered the gray area of affiliating with these providers.
- Practice horizons. The practice of law has become increasingly multijurisdictional, and in many cases multinational. Before 1960, most lawyers practiced in a single county, city or even village. Statewide and nationwide practices were not unheard of, but were not common either. Today, globalized business activities, worldwide transportation links and the Internet have created a vast interconnected web in which lawyers from one place can work on legal problems thousands of miles away.
- Professional standards. Standards, values and liability have evolved, through two revisions of our ethics codes – the ABA adopted the Model Code of Professional Conduct in 1969 and replaced it with the Model Rules of Professional Conduct in 1983 (New York adopted its version of the Model Rules in 2009). The practice of law is viewed by many as increasingly business-oriented, and other long-standing professional mores have arguably undergone erosion. Clients unhappy with the services they receive are increasingly willing to sue their lawyers for professional liability or file a grievance with a disciplinary committee.

These changes affect the way lawyers manage their firms, their work and their professional lives. Paradoxically, lawyers have the tools to make their lives easier, but many complain that quite the opposite has happened. As the sun begins to peek out from the recessionary clouds that have darkened the skies for the last two years, we may find ourselves emerging into a land that does not feel altogether familiar. Like Dorothy in the classic movie *The Wizard of Oz*, whose house is swept



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up in a tornado, and when she opens the door discovers that she's not in Kansas anymore, lawyers are opening the door to a brave new world, rich with new sights and opportunities, and fraught with new dangers and challenges. The big difference is we cannot click our heels together three times and return home. That home is no longer there. We are, if not stuck in Oz, certainly in a world that is new and different and still changing under our feet.

In this issue of the *Journal*, the editors have assembled a collection of articles that address not so much speculation about the future *per se*, but thoughtful reflections on how lawyers can practically, realistically and successfully cope with the change that is all around them. These authors offer a post-downturn perspective on managing a law practice in such an environment.

> Lawyers are opening the door to a brave new world, rich with new sights and opportunities, and fraught with new dangers and challenges.

In Part One of her article, "Training Lawyers for the Real World," Dean Rachel Littman explores the conundrum of preparing new lawyers for the practice of law. If law schools do not teach students practice skills, but law firms expect new lawyers to be practice-ready when they arrive for work, how will neophyte lawyers be trained and who will do it? This month, Dean Littman will examine the problem; next month, in Part Two, she will offer readers practical solutions.

Dr. Silvia Hodges takes on the ambivalent attitude of lawyers and the legal profession to marketing their services in "But We Don't 'Do' Marketing." She observes that the legal marketplace is a competitive one, makes the case for the necessity of marketing and assesses what marketing involves. The article goes on to describe the forces that drive marketing decisions generally, concluding with specific advice for law firms as to how to respond to these forces in the practice of law.

In his article "A New Philosophy for Managing Partners and Law Firm Structure," consultant Joel Rose notes that "law firms, large and small, are questioning long-standing views about firm management and structure." Mr. Rose focuses on the need to have a management philosophy, to build a rational structure around that philosophy, and to develop the leadership to implement that philosophy and structure, even as law firms evolve with the changing times.

Dr. Mark Sirkin, a consultant with Hildebrant Baker Robbins, explores the lessons that lawyers can learn from neuroscience in "Managing Your Brain – A User's Guide." Although we understand that the brain is critical to effective lawyering, many of us do not know how the mechanics of the brain affect the things we do and the decisions we make. Understanding the science of the brain can help us practice more effectively.

Shifting gears, Kim Swetland tackles the ubiquitous topic of procurement. To the unsophisticated, this means getting the stuff you need to be able to practice law, when you need it, at the right price. An apocryphal story recounts the three-hour debate at a partners' meeting at a large Texas firm over what kind of legal pads to buy; it doesn't have to be that way, and Ms. Swetland will show you how. Her article, "Everything You Need to Run Your Office," adapted from *Best Practices in Legal Management* (NYSBA 2010), offers practical advice on everything from purchasing to RFPs, in clear concise language even lawyers will be able to understand.

In "Up Close and Personal with New York's Engagement Letter Rules," lawyer Devika Kewalramani dissects New York's engagement letter rule (Rule 1215 of title 22 of the N.Y.C.R.R.), and offers advice on the requirements and pitfalls inherent in the rule. This is a must read for every lawyer who is retained by clients and subject to the rule.

If, as many observers believe, the transformation of the legal profession is a work-in-progress and not a *fait accompli*, we all need to be thinking about how we will survive the challenges that accompany change, fit into the emerging landscape, and fulfill our professional aspirations. *To be continued . . .* ■

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BY DAVID PAUL HOROWITZ

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# Enjoyment of Life

## Introduction

The second paragraph of the Declaration of Independence, in language still inspiring more than two centuries later, begins with the ringing phrase:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The pursuit of happiness, the desire and right to enjoy life, is recognized in New York as an item of damages in cases involving personal injury and wrongful death.

## Loss of Enjoyment of Life

The Court of Appeals, in *McDougald v. Garber*, explained the claim of loss of enjoyment of life and its relationship to pain and suffering:

> There is no dispute here that the fact finder may, in assessing nonpecuniary damages, consider the effect of the injuries on the plaintiff's capacity to lead a normal life. Traditionally, in this State and elsewhere, this aspect of suffering has not been treated as a separate category of damages; instead, the plaintiff's inability to enjoy life to its fullest has been considered one type of suffering to be factored into a general award for nonpecuniary damages, commonly known as pain and suffering.[1]

At issue in *McDougald* was the level of awareness in order to recover for pain and suffering and, hence, loss of enjoyment of life, as well as whether loss of enjoyment of life was a category of damages to be considered separately from pain and suffering.[2]

Explaining the level of awareness necessary in order to permit recovery, the Court stated:

> [C]ognitive awareness is a prerequisite to recovery for loss of enjoyment of life. We do not go so far, however, as to require the fact finder to sort out varying degrees of cognition and determine at what level a particular deprivation can be fully appreciated. With respect to pain and suffering, the trial court charged simply that there must be "some level of awareness" in order for plaintiff to recover. We think that this is an appropriate standard for all aspects of nonpecuniary loss. No doubt the standard ignores analytically relevant levels of cognition, but we resist the desire for analytical purity in favor of simplicity. A more complex instruction might give the appearance of greater precision but, given the limits of our understanding of the human mind, it would in reality lead only to greater speculation.[3]

The Court next addressed whether loss of enjoyment of life was a claim separately compensable from pain and suffering:

> The advocates of separate awards contend that because pain and suffering and loss of enjoyment of life can be distinguished, they must be treated separately if the plaintiff is to be compensated fully for each distinct injury suffered. We disagree. Such an analytical approach may have its place when the subject is pecuniary damages, which can be calculated with some precision. But the estimation of nonpecuniary damages is not amenable to such analytical precision and may, in fact, suffer from its application. Translating human suffering into dollars and cents involves no mathematical formula; it rests, as we have said, on a legal fiction. The figure that emerges is unavoidably distorted by the translation. Application of this murky process to the component parts of nonpecuniary injuries (however analytically distinguishable they may be) cannot make it more accurate. If anything, the distortion will be amplified by repetition.
>
> Thus, we are not persuaded that any salutary purpose would be served by having the jury make separate awards for pain and suffering and loss of enjoyment of life. We are confident, furthermore, that the trial advocate's art is a sufficient guarantee that none of the plaintiff's losses will be ignored by the jury.[4]

Accordingly, in New York State, loss of enjoyment of life is compensable, and an element to be considered by the jury, in making an award for pain and suffering. In fact, there is a New York Pattern Jury Instructions (PJI) charge specifically for loss of enjoyment of life:[5]

> In determining the amount, if any, to be awarded plaintiff for pain

and suffering, you may take into consideration the effect that plaintiff's (decedent's) injuries have had on plaintiff's ability to enjoy life (have had on decedent's ability to enjoy life up to the time of death). Loss of enjoyment of life involves the loss of the ability to perform daily tasks, to participate in the activities which were a part of the person's life before the injury, and to experience the pleasures of life. However, a person suffers the loss of enjoyment of life only if the person is aware, at some level, of the loss that (he, she) has suffered.

If you find that plaintiff (decedent), as a result of (his, her) injuries, suffered some loss of the ability to enjoy life and that plaintiff (decedent) was aware, at some level, of a loss, you may take that loss into consideration in determining the amount to be awarded to plaintiff for pain and suffering to date.[6]

Having located a useful charge, practitioners know to consult the commentary immediately following the charge in order to delve into the nitty-gritty of the case law underlying the pattern charge. Hence, it is no doubt confusing that the commentary following PJI 2:280.1 does not mention loss of enjoyment of life. Instead, the cases discussing the elements constituting the claim of loss of enjoyment of life are found in the commentary following the preceding charge, PJI 2:280, "Injury and Pain and Suffering." That charge reads:

If you decide that defendant is liable, plaintiff is entitled to recover a sum of money which will justly and fairly compensate (him, her) for any injury and conscious pain and suffering to date caused by defendant. [If there is an issue relative to the level of plaintiff's awareness, the following should be charged.] Conscious pain and suffering means pain and suffering of which there was some level of awareness by plaintiff (decedent).

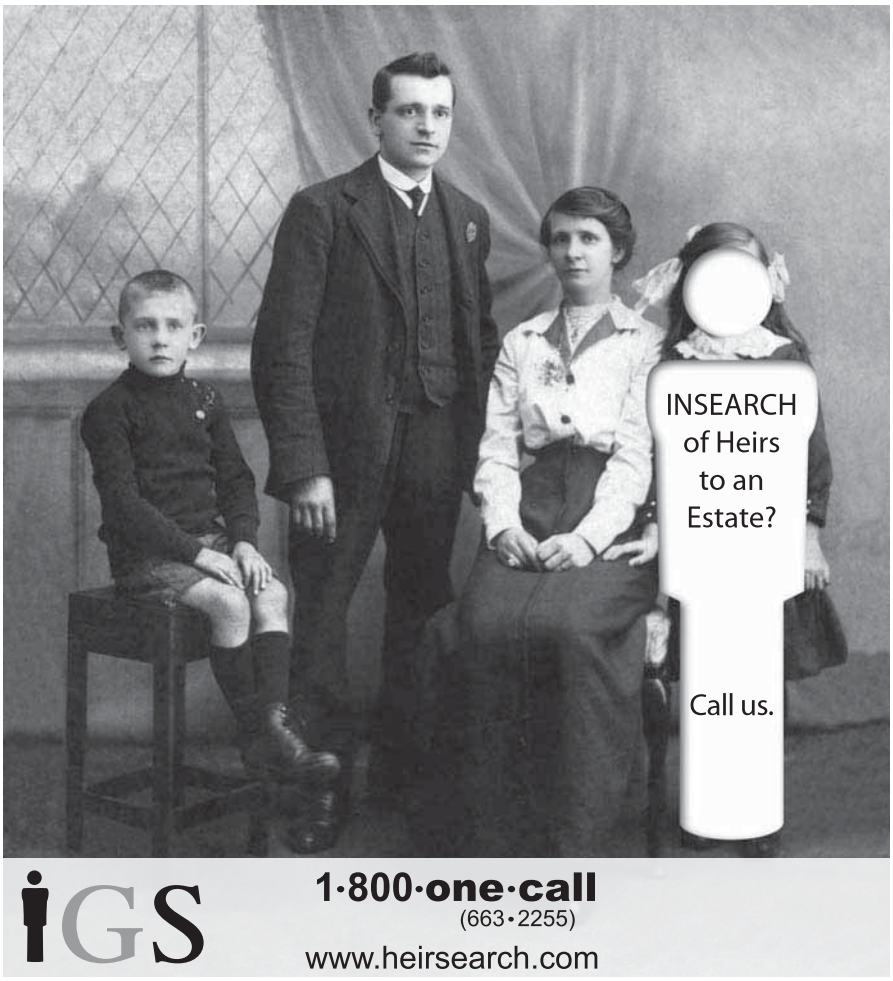
Interestingly, there is no mention of loss of enjoyment of life in the general pain and suffering charge. However, the commentary that follows offers a detailed analysis of the claim and consists largely of a discussion of *McDougald* and its companion case, *Nussbaum v. Gibstein*.[7] The commentary also states "[l]ikewise, 'mental suffering' is not an item of damage distinct from 'pain and suffering,'" citing *Lamot v. Gondek*,[8] a 1990 Third Department case.

## Scope of Disclosure

When a plaintiff brings a personal injury suit there is a waiver of the physician-patient privilege, but the waiver is not absolute, and the limitations on the waiver relate to the injuries and conditions claimed in the lawsuit:

By bringing or defending a personal injury action in which mental or physical condition is affirmatively put in issue by the party holding the privilege, a party waives the physician-patient privilege. The waiver of the privilege by a plaintiff is limited to those parts of the body, and those injuries conditions claimed to have been caused or, for pre-existing injuries or conditions, to have been exacerbated or activated by the conduct of the defendant. It does not extend to unrelated injuries, illnesses, or treatments (once the plaintiff withdrew his claims for psychological injuries his psychiatric records were no longer subject to disclosure). This limitation on the waiver extends to medical malpractice actions, (in

Loss of enjoyment of life involves the loss of the ability to perform tasks.



dental malpractice action, hospital and physician records for unrelated illness or treatments were not discoverable), (By commencing a medical malpractice action, plaintiff waives the physician-patient privilege with regard to his "relevant past medical history. However, a party does not waive the privilege with respect to unrelated illnesses or treatments.").[9]

> The burden is on the party seeking disclosure to demonstrate that the individual's physical and mental condition is in controversy.

In considering the extent of the waiver of the physician-patient privilege, the burden is on the party seeking disclosure to demonstrate that the individual's physical or mental condition is in controversy:

The initial burden of proving that a party's physical condition is "in controversy" is on the party seeking the information and it is only after such an evidentiary showing that discovery may proceed under the statute.

Once this preliminary burden is satisfied, however, discovery still may be precluded if the requested information is privileged and thus exempted from disclosure. The statutory scheme, by expressly providing an exception for privileged information, clearly contemplates that certain information, though otherwise material and relevant to a legal dispute, "shall not be obtainable" where it is shown to be privileged. Physician-patient communications, privileged under CPLR 4504, may therefore be shielded from discovery and when it has been established that the requested information is subject to discovery under CPLR 3121(a), the burden shifts to the person claiming the privilege to assert it by seeking a protective order pursuant to CPLR 3122. Once the privilege is validly asserted, it must be recognized and the sought-after information may not be disclosed unless it is demonstrated that the privilege has been waived.[10]

## Conclusion

To what extent does the assertion of a claim for loss of enjoyment of life waive the physician-patient privilege? The answer, albeit muddled, will be in the next issue's column. ■

1. *McDougald v. Garber*, 73 N.Y.2d 246, 255–56, 538 N.Y.S.2d 937 (1989).
2. *Id.*
3. *Id.* at 255.
4. *Id.* at 257.
5. Practitioners are familiar with the general charge for pain and suffering, PJI 2:280, but some are unaware that a few pages on PJI 2:280.1 exists.
6. PJI 2:280.1.
7. 73 N.Y.2d 912, 539 N.Y.S.2d 289 (1989).
8. 163 A.D.2d 678, 558 N.Y.S.2d 284 (3d Dep't 1990).
9. David Paul Horowitz, New York Civil Disclosure, LexisNexis Answerguide 2010, § 8.13(2)(a) (citations omitted).
10. *Dillenbeck v. Hess*, 73 N.Y.2d 278, 287, 579 N.Y.S.2d 707 (1989) (citations omitted).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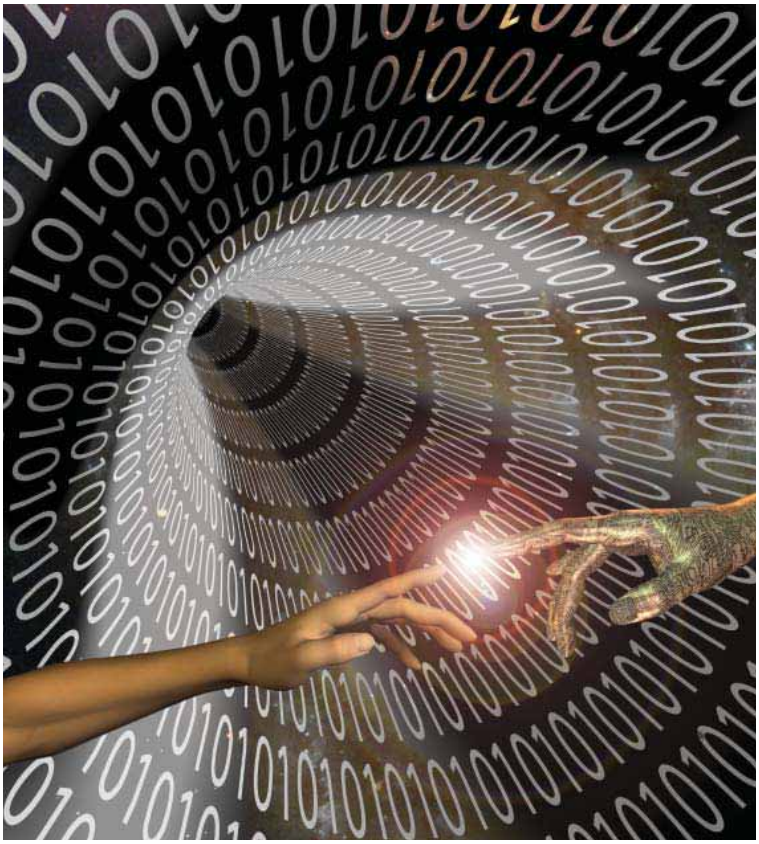

# Training Lawyers for the Real World

## Part One

**By Rachel J. Littman**

### Introduction

New attorneys are expensive, inefficient, unable to write, and lack the basic business sense and professional skills necessary to function immediately as value-adding, practicing attorneys. That is some of the sentiment being expressed in the legal industry these days. Everyone from professional development directors at major international law firms and general counsel at Fortune 500 companies to attorneys in small upstate practices are venting their frustration with the current system of legal education and training. And the law schools that produce these new attorneys are the main targets. Historically operating in a pedagogical environment with a steady stream of inputs and outputs, law schools are being openly criticized for the high cost of tuition, lack of transparency when it comes to the realities of job prospects, and complaints from lawyers and legal employers that their output model is not efficiently aligned with the real world of practice.

The economic recession has put pressure on all components of the legal market, including the teaching and training models. Law school applications are relatively flat but not as high as one would expect from a counter-cyclical market. Prospective students are taking a harder and longer look at the return on a $140,000 investment. Many law schools are realizing that they need to re-brand themselves if they want to stay competitive and continue to draw tuition-paying students, high-caliber and productive faculty who can help them increase their reputation in the legal market, and alumni donations.

Legal employers are finding themselves caught between the law schools they draw from and the clients they serve. In-house counsel at corporate law departments have been very clear that they do not want to pay for the exorbitant starting salaries of junior associates their outside counsel has hired. Small and regional law firms, which lack formal professional development resources, must either spend a great deal of time training new lawyers or outsourcing training to CLE providers, or do no training at all. Students themselves, many of whom come to law school for lack of any other career path, find later that law schools do not prepare them well for the practice of law.[1]

This two-part article will provide an overview of the current issues and debates surrounding development and training of new lawyers and then explore some of the creative options various market participants are or could be utilizing to train new attorneys. In Part One, I will explore the traditional legal education and training models, discuss current market pressures and expose problems and innate benefits. Part Two will explore some

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of the innovative programs several law schools and law firms are implementing and recommend courses of action to help to move towards a better system of training new lawyers.

## The Traditional Model

### Law Schools

Law schools are the first participatory constituent in the legal market. They have been educating students in the same Langdellian generally accepted Socratic and lecture method for the past 100 years. It wasn't until starting in the early '90s that the McCrate and then Carnegie and other reports[2] brought to light some thoughtful examination of the method of legal education and explored and recommended a more experiential learning-based approach geared towards teaching law students how to think *and* act like lawyers. A few schools, discussed in Part Two, have adopted changes or have tinkered at the edges of their curriculum. For the most part, however, the almost 200 law schools in this country are still teaching and graduating students using the same basic model, regardless of the diversity of the inputs (student body) and outputs (where graduates are placed).

Law schools are in a unique and comfortable spot. They have historically been able to fill their ranks without too much difficulty. While many schools require an essay as part of the application, and others use an interview component, most law schools rely solely on academic indicators to create their admitted class, such as LSAT scores and undergraduate GPAs, occasionally giving some weight to the caliber of undergraduate institution or major. When the students arrive at law school, they are told essentially to strip away any preconceptions about what they know or think they will need to know to be a lawyer. Law school will teach them "how to think like a lawyer." Some students do take part in law school sponsored hands-on teaching experiences like clinics, trial simulation courses, and moot courts. The majority of students, however, gain their real education about what it means to be a lawyer on the job.

Inertia and lack of market pressure are partly to blame for the lack of industry-wide innovation. An ingrained tenure system that is based more on scholarship than on teaching effectiveness or a competency- or outcomes-based learning model heavily influences the status quo. Even schools that are on the cutting edge of legal education curricular reform have no corollary emphasis or reward for faculty to expand the methods of their teaching styles beyond the traditional. Washington and Lee, for example, has adopted a new third-year experiential and professional development–based curriculum[3] and has adjusted teaching loads, but has not correspondingly adjusted tenure scholarship production requirements. Of course, many professors teach very hands-on, innovative problem solving–based courses, but as "there's no market pressure to change,"[4] they could drop the course or their time-consuming teaching methods with no ramifications to reputation or compensation.

The American Bar Association (ABA), the nation's law school accrediting authority, plays a clear role in maintaining the status quo. The accreditation standards, for example, limit the number of courses that may be taught by adjuncts, who are often practicing attorneys who can bring practical and diverse methods of teaching to the classroom. The ABA and *U.S. News & World Report* also monitor – and, in the latter case, rank – student-to-faculty ratio, supplying more downward pressure on the ability of law schools to teach to smaller classes or use a greater variety of teaching resources. Even the details of outcomes-based learning and practice proficiency as mandated by ABA Standards are left to individual schools. Other than a few common core classes and upper level topical or experiential learning requirements for graduation from an accredited law school, the main and only hurdles to being allowed to practice law is passage of a standardized, individual state administered bar exam and admission to that state's bar, which is based mostly on references, recommendations and background checks. There is little systemic consensus or requirement on what is or should be required for anyone to be able to practice law.

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**Law Firms**

Law firms represent the traditional legal employer, the consumer of law school outputs. Large law firms dominate the recruiting market, but are a bit of an anomaly as compared to other professional services fields. These firms recruit at the best schools they can for students with the highest academic indicators – GPA and law review membership. Few firms have any core-competency-based recruiting system. They essentially look for raw, bright talent. Large law firms traditionally recruit students after their first year of law school and fill their summer internships with high-caliber students to whom, in better economic times, they virtually guaranteed full-time, high-paying jobs after graduation two years later.

Traditionally, training of new attorneys occurs after law school. Firms with the resources have terrific formal in-house training programs, with off-site trial simulations, weekend deposition retreats, and full-time professional development staff. Most large law firms are accredited CLE providers and can ensure that junior lawyers are at least exposed to the specific and practical legal issues they will encounter in their fields at their particular firm. Large law firms have been able partly to pass along the costs of training their highly paid new attorneys through firm-wide high billable hour requirements and rates and a lock-step progression and pay scale system for associates. When the economy has slowed down enough to reduce the workload at these law firms, they have simply laid off scores of associates, preserving the golden profits-per-partner bottom line.

Not all firms, though, follow the large legal employer recruiting, hiring and training model. Even in boom years, the large commercial law firm market absorbs only about 25% of all law school graduates. The other 75% go into small-to-midsize law firms with varying specialties, judicial clerkships, and a host of government positions at the local, state and federal level. These smaller firms follow more of an apprentice model for training new hires. They also often have the advantage of being able to hire law clerks while they are in law school as a low-cost means to gradually train and test the students before hiring them as full-time attorneys. Of course many firms do throw new lawyers right into the pit – with little or no supervision or formal training.

## Market Pressure Exposes Problems

So, the era in which law schools and law firms have enjoyed a relative lack of market pressure, and the inertia that goes along with it, has come to an end. The market recession and an increase in client and prospective law student savviness now requires that all players in the legal industry – law schools, legal employers, clients, the ABA – take a fresh look at the way they have been doing things.

Several concurrent factors require law schools and legal employers to re-think how they train new attorneys. First, major corporate clients, the largest consumers of legal services, are balking at costs and are becoming savvier about the components of their required legal services. Second, law students and lawyers themselves are noting the increased costs in legal education and the increasingly difficult and competitive legal market, which demands better, faster and greater proficiency in practical skills. Third, the nearly 200 law schools in this country cannot all possibly succeed at teaching and outputting to the same business model.

So, the era in which law schools and law firms have enjoyed a relative lack of market pressure, and the inertia that goes with it, has come to an end.

**Corporate Clients**

Clients, as the consumers of the legal services, are the ultimate arbiters. Most of the pressure they have exerted has been on the large commercial firms. But, eventually, the pressure will come down to the law schools to participate more in the process that ultimately delivers legal services. This is already true for corporate clients.

Corporate clients make up the financial bulk of legal services consumers and are very focused on the efficiency and value of the services delivered. They not only pressure their outside counsel, they are mindful of law schools' role in the legal services supply chain and have cautioned that legal educators should be thinking more about the ultimate consumer.[5] Such legal services consumers are well aware that law students are not being taught about business realities and need training in financial and business literacy.

Corporate law departments also see a lack of practical training in the experienced attorneys they hire from law firms. One general counsel noted that lawyers who come to his company after several years' experience lack the "executive level communication skills" necessary to operate in the business environment. For example, business professionals and most corporate clients do not use or even read the long memos most attorneys are used to

writing under the billable hour model; they write emails, preferably less than a page long. Many new attorneys don't realize that legal advice needs to relate to the client's ultimate business problem;[6] they need a better understanding of the business or other non-legal issues facing the client to provide effective analysis and legal advice.

Many corporate clients are trying to destroy the traditional billable hour model, putting efficiency pricing and service modeling pressure on their outside counsel – primarily the law firms that annually hire classes of incoming associates. They are disgusted with a system whereby law firms overpay what one general counsel described as "totally worthless" junior associates and then write off large portions of their recorded time. That kind of pressure will undoubtedly trickle down to all types of legal practitioners and to the law schools.

**Legal Employers**

Both legal employers and attorneys themselves acknowledge that new lawyers entering the profession are ill-equipped to practice law. Complaints from employers about new lawyers generally fall into three categories: (1) lack of basic writing skills, (2) inability to discern important facts and issues and deliver a single solution, and (3) no general business knowledge relating to the clients and the world in which they operate.

Many small-to-midsize firms lack a professional development staff, so the attorneys work closely with new lawyers from the beginning and on a daily basis. When a managing partner said that new attorneys "can't write," the partner emphasized that it was not just issues with legal writing, but basic grammar, spelling, and sentence and paragraph structure. That lack of fundamental writing skills required the partners at the firm to spend a great deal of time editing individual assignments – well beyond what they would expect to do to train new lawyers in their field of practice.

Legal employers are also concerned about law students' lack of common sense – in the real world real clients need real answers, not a law school memo. Keith Goldstein, a principal at Lavelle & Finn, LLP, noted that law schools could better prepare new attorneys to meet the demands and realities of practice by teaching students not just why a course of action is risky or what the legal implications or relevant rules are, but how that knowledge can help a client come to a decision or resolve a conflict. Goldstein partly faulted law schools for teaching students to be too risk averse and to think only about how to find solutions that are 100% risk free, an often costly proposition. Business people, he noted, are comfortable with, and often need to make, decisions with an 80% risk-free assurance. It is virtually impossible to remove all risk, so why should clients pay for rounds of edits of a memo that lays out more possible solutions than are necessary? Law schools should re-think why they keep teaching to a model that is inconsistent with the realities of practice.

**Law Schools**

Many experts in the legal industry agree that the future of legal practice is changing, and it is likely that legal education will – or should – follow. There is and will be less need for traditional ranks of associates at high-level law firms to bill prodigious amounts of hours on complex cases or matters. One industry consultant sees a future need for more "highly trained legal technicians" – specialized, knowledgeable, experienced practice-ready law school graduates. That kind of specialty education and training will fit with the new business approach to unbundled legal services (clients parsing out what they truly need lawyers to work on and what they can outsource to low-cost non-lawyer alternatives) and more efficient and low-cost solutions.

For better or worse, law schools really are "an element of the supply chain" for the development of lawyers and delivery of legal services to clients.[7] While there are many different kinds of legal services consumers and providers, most law schools teach to one traditional model. Law schools could do better to teach to and develop systems to different output models – large commercial law firms, small labor law firms, public legal services and all the other kinds of legal environments in which lawyers practice. "It would be far better if law schools would specialize," opined Joe Altonji, a consultant with Hildebrandt Baker Robbins, at the joint Harvard-New York Law School Future Ed Conference this past spring (FutureEd). Unfortunately, he noted, the majority of the law school outputs (i.e., graduates) are not going into the kind of legal services organizations (large commercial law firms) that the schools are essentially designed to serve.


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We offer you the best professional legal services in Brazil in all areas ranging from international corporate & commercial Law to family Law cases. We are specialized in enforcing US court judgments by the Brazilian courts ("exequatur"). We also do registration of patents & trademarks with INPI and registration of products and companies with Anvisa (Brazil's FDA). We negotiate and draft successful joint venture agreements for our clients. Our fees are fair and reasonable established on a time sheet basis commensurate with the complexity of the case.

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National placement data for law school graduates support the argument that not all law schools should be using the same model. The legal market has shed thousands of jobs over the years and jobs – particularly full-time, permanent legal jobs – are getting harder and harder to secure. Many law school graduates are entering the Age of Gigonomics,[8] having to gain legal experience in part-time volunteer or pro bono positions while living off of other non-legal paying jobs. Salary data collected for years have consistently shown that starting salaries cluster around a bi-modal distribution. Almost half of all graduates receive starting salaries in the $50,000 range and less than 25% of each year's graduating class lands in the top 75th percentile with a starting salary of $160,000.[9] Only a small portion of the almost 200 accredited law schools in this country are outputting to the top salary distribution curve, yet almost every school and most law students aspire to be there.

Many law school graduates are entering the Age of Gigonomics.

Recent placement data indicates an even more difficult job market for graduating law students and one that calls for more localized and specialized education modeling. For the class of 2009, the salary and firm-size clusters still fell along a bimodal distribution, skewed by the higher percentage of graduates at 500+ attorney law firms who reported their $160,000 starting salaries. The reality is that most lawyers around the country practice in small, private law firms of two to ten attorneys. The number of graduates pursuing advanced degrees increased by almost 30% this past year (presumably due in part to the dearth of legal employment options), the biggest jump since at least 1985, and employment at nine months after graduation dropped from 89.9% to 88.3%, the lowest it has been in years. Other survey data indicate that the overall placement number may in fact only be masking how bad the legal employment market really is, and is expected to be for several more years.[10] The percentage of students finding employment in the state in which they went to law school has always been around 65% (a number telling in and of itself about the localized nature of most law schools), but that number jumped this past year by a full percentage point. Yet law schools continue to accept and graduate thousands of students a year without much adjustment in whom and how they recruit and educate. Perhaps it is time for law schools to start training and teaching to the reality of the outcomes.

**Other Influencers**

*U.S. News & World Report* currently publishes the most influential ranking system of law schools. Unfortunately, it bases the largest component of a law school's overall rank (25%) on academic peer reputation, a factor that has little to do with actually educating or training law students to enter the profession. Surveys gathering academic peer reputation are sent to only a handful of academics at each ABA-accredited law school: the law school dean; the dean of academic affairs; the chair of faculty appointments; and the most recently tenured faculty. They are asked to rate schools on the basis of "the academic quality of their J.D. program," which includes consideration of "curriculum, record of scholarship, quality of faculty and graduates." While there is no scientific proof of correlation, there is anecdotal evidence to show that those schools with higher levels of faculty scholarship (by volume and prestige of placement) often receive the highest academic reputational scores and, thus, higher overall rankings. There is clear systemic pressure to allocate faculty and financial resources to the academic reputation factor. *U.S. News* also factors in and weights professional reputation, but with only a 26% survey response rate from hiring partners of law firms (mostly AmLaw 200 firms), state attorneys general, and selected federal and state judges. Other factors like entry class selectivity (undergraduate GPA and LSAT scores) are part of the overall ranking, but the outcome-based or teaching strength success is measured only by an overall placement number at nine months following graduation.

Another external factor influencing the status quo of the legal education model includes the top-level consumers of legal education products – the largest and most prestigious 200 or so law firms around the country and the world. They consume in aggregate less than 25% of all law school graduates and only from the top law schools, yet they represent clients that produce the largest financial portion of legal services consumers. That system has not changed for decades. The prevailing thought at these kinds of firms is that they want the best and brightest thinkers (as previously weeded out by admission to select law schools and then law school academic achievements) to train in their own models. Until now, there has been little pressure on those firms to change how they recruit, hire and train, and, in turn, they have put little pressure on the schools from which they recruit.

In the next issue of the *Journal*, I will explore how some law schools and law firms are implementing new and innovative approaches to teaching and training new lawyers. ■

1. *See* Dr. Bentley Coffey, South Carolina Lawyers: The State of the Profession, A Report on the Confidential Survey Commissioned by The Professional Potential Task Force of the South Carolina Bar, April 30, 2009, *available at* http://www.scbar.org/public/files/docs/profpotential.pdf (showing data on how many attorneys only a few years into practice feel that they were not "adequately trained for the work" they were doing).

2. ABA Section of Legal Education & Admissions to the Bar, Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development – An Educational Continuum (July 1992); William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law, A Carnegie Foundation Report (2007). Also in this camp is the Clinical Legal Education Association's Best Practices for Legal Education: A Vision and a Road Map (2007) by Roy Stuckey et al.

3. *See* Message from Dean Rod Smolla, Washington & Lee University, "Washington and Lee's New Third Year of Law School," *available at* http://www.law.wlu.edu/deptimages/The20%New20%Third20%Year/thirdyearprogramcommunicationsdocumentfinal.pdf. The program is currently in a three- to four-year optional phase-in period.

4. Comment from Prof. Gillian Hadfield, Richard L. & Antoinette S. Kirtland Professor of Law & Professor of Economics, University of Southern California, at Future Ed Conference, New York Law School (April 9, 2010) (FutureEd Conference), *available at* http://bit.ly/futureedwebcasts.

5. See comments from Chester Paul Beach, Jr., Associate General Counsel, United Technologies Corporation, at the FutureEd Conference.

6. *Id*.

7. Joe Altonji, Consultant, Hildebrandt Baker Robbins, FutureEd Conference.

8. *See* Tina Brown, "The Gig Economy: Now That Everyone Has a Project-to-Project Career, Everyone is a Hustler," The Daily Beast Blogs & Stories (Jan. 12, 2009, 5:34 a.m.), *available at* http://www.thedailybeast.com/blogs-and-stories/2009-01-12/the-gig-economy.

9. *See, e.g.*, National Association for Law Placement (NALP), Findings on the Class of 2008, *available at* http://www.nalp.org/classof2008; Comments and slides presented by Prof. William D. Henderson, Professor of Law and Harry T. Ice Faculty Fellow, Indiana University Maurer School of Law, at the FutureEd Conference, *available at* http://nyls.mediasite.com/mediasite/SilverlightPlayer/Default.aspx?peid=11c4b60a82cc4af6a5dad0bdc29c2e9e1d.

10. NALP, Employment for the Class of 2009 – Selected Findings, *available at* http://www.nalp.org/uploads/Class_of_2009_Selected_Findings.pdf.


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*Counseling Content Providers in the Digital Age* was written and edited by experienced media law attorneys from California and New York. This book is invaluable to anyone entering the field of pre-publication review as well as anyone responsible for vetting the content of their client's or their firm's website.

**Table of Contents**

Introduction; Defamation; The Invasion of Privacy Torts; Right of Publicity; Other News-gathering Torts; Copyright Infringement; Trademark Infringement; Rights and Clearances; Errors and Omissions Insurance; Contracting with Minors; Television Standards and Practices; Reality Television Pranks and Sensitive Subject Matter; Miscellaneous Steps in Pre-Broadcast Review.

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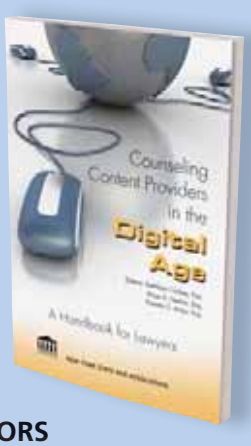


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# But We Don't "Do" Marketing

## The Development of Marketing in Law Firms

**By Silvia Hodges**

I have made it a sport to ask lawyers what they do in terms of marketing their services. Most answer that they do not "do" marketing. Marketing is for toothpaste or soft drinks, but it can't possibly really be appropriate for the legal profession. While the most recent recession may have influenced the point of view of some, many lawyers have long withstood the idea of marketing. Although marketing is a normal and accepted discipline in the corporate world, only in the last few decades has marketing gained a foothold in the legal arena.

Marketing a law firm is different from marketing toothpaste or soda. In order to market effectively, firms need to aspire to have a marketing culture embedded in the values of their firm culture. This requires top management support; good marketing professionals; education; and a marketing structure within the firm. In addition, it also requires a measure of behavior modification in the sense of an understanding that, for marketing to succeed in a professional firm, every lawyer must participate and understand the competitive advantages of participating. Effective measurement processes need to be in place to help drive behavioral change. "What gets measured gets done" and "what gets measured and rewarded gets done even more," particularly when the measures are directly related to the firm's strategy – and remuneration.

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## All About Regulation

The legal services sector has a long history of self-regulation that had been largely untouched until recent revisions of the legal and ethical framework. Restrictions against the use of advertising, solicitations, competitive bids, and other promotional tools have essentially disappeared in the last 20 years, following the 1977 decision of the U.S. Supreme Court in *Bates v. State Bar of Arizona*.[1] While many marketing activities were never forbidden by professional codes, advertising and personal solicitation of legal service were prohibited. In the legal services sector, marketing was often confused with advertising or sales. Advertising, however, constitutes only a fraction of the possible marketing activities of any organization, and typically has little influence on the buying decisions of (corporate) clients. The Court's decision to allow advertising contributed to eradicating a barrier to law firm marketing.

Since the 1980s the global marketplace and many countries individually have begun to shift away from regulation towards more open competition. Deregulation advocates argue that by removing, reducing or simplifying restrictions, efficient operation of markets is encouraged. Fewer and simpler regulations will lead to an elevated level of competitiveness, higher productivity, more efficiency and lower prices, as well as new competition from outside the traditional law firm world, such as LPOs (legal process outsourcing).

## It's the Economy!

The recent recession has made it very clear: Changes in economic and competitive conditions affect how easy or difficult it is to be successful and profitable at any time. These conditions affect capital availability, costs, and demand for products and services, which are ultimately crucial for the probability of marketing activity. While no single organization can dictate how the economy will operate, competition among many organizations can influence its direction. Competition in an industry is neither a matter of coincidence nor bad luck; nor does it only depend on the immediate competitors but rather on the collective strength of the "Five Forces" – Rivalry; Threat of Substitutes; Buyer Power; Supplier Power; and Barriers to Entry. These forces determine the profit potential in an industry and thus the attractiveness of a market, which in turn, contributes to the likelihood of marketing. Changes in any of the forces require an organization to re-assess its position. Let's examine these five forces in the context of the legal marketplace.

### Force 1 (Rivalry/Industry Concentration)

The legal services sector has experienced tremendous increase in rivalry within the profession as a whole, which goes beyond a firm's failure to demonstrate its unique value to clients. Oversupply conditions are prevalent in terms of both the increased number of practicing lawyers in most Western countries and per capita numbers. The number of newly qualified lawyers in many jurisdictions multiplied during the last 30 years and is growing with the still continuously increasing output of law schools. When supply exceeds demand, there will be more competition for clients. Insufficient demand for their services is leading many lawyers to intensify their efforts to attract clients.

The legal services sector has experienced tremendous increase in rivalry within the profession as a whole.

At the same time, consolidation is increasing in the legal sector. The growing size of individual firms has contributed to lawyers having to treat the practice of law as a business. While the growth in law firm fee income has been impressive for many years, the volume and nature of legal work is increasingly retained in-house. Since the downturn in the economy, many firms have seen their fee income decrease sharply. In addition, other aspects of concentration are present in the legal services sector, such as higher fixed costs, lower switching costs and lower levels of service differentiation. All these changes contribute to a higher likelihood that firms will engage in marketing activities in order to improve their competitive position in the marketplace.

The continuing trend towards globalization is having an effect as well. By reducing barriers to trade, the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) paved the way, and during the last two decades of the 20th century a global marketplace emerged. Although the globalization of world markets has increased opportunities for marketing services internationally, at the same time it has significantly increased competition. For law firms, there have been several consequences. Clients are more likely to have new needs for international legal advice, which might result in additional work if the firm is able to provide and communicate such international legal skills. At the same time, clients might be under additional competitive pressures due to globalization (in particular due to the bad economic situation in many countries), and thus need to closely monitor or even cut legal costs. Another consequence of globalization is that, just as domestic law firms advise companies abroad, new competitors from other countries – foreign law firms – are advising clients in the domestic market, opening offices and offering services to domestic clients, thus increasing competition. The combination of globalization and technology can be the basis of new, possibly more competitive (or profitable) models of business, such as online legal services and legal process

outsourcing (LPO) firms. Finally, globalization may affect the organization of law firms, which also potentially influences a firm's competitive advantage and profitability. Just like other businesses, law firms can outsource (parts of) their operations as well as legal support work to less expensive domestic or foreign locations, such as India or the Philippines.

**Force 2 (Threat of Substitutes)**

The legal sector has seen increasing competition from outside its immediate core. For example, paralegals are entering fields where they are able to provide services that in the past were provided only by qualified lawyers. Modern technology and recent regulatory changes also contribute to the blurring of boundaries – not only do certain professions compete heavily internally, they also face new sources of competition from outside their traditional boundaries – for example, some accounting firms employ more lawyers than the largest law firms. New competitors to traditional law firms are law firm franchises, national chains providing low cost legal services for an annual fee; other professions, such as tax advisors and chartered accountants, which market themselves as "one-stop shops" to clients; and competitors from outside the legal sector's traditional boundaries, such as banks, insurance companies, consumer interest associations, and online legal services. Rising cost pressure in companies has increased the inclination of many clients to accept such substitutes and to shop for price (e.g., some clients even use e-tendering).

**Force 3 (Buyer Power)**

Ever-increasing cost pressure in companies has shifted the power from the law firms to the clients. Lawyers today no longer receive cases from their former college friends or maintain "cozy" relationships, as in the past. Today's clients shop around and want more value for their legal budget. They also demand greater financial accountability from the law firms they hire.

Long-term relationships marked by mutual loyalty between lawyers and clients have broken down. Clients have become customers, expecting and demanding quality service delivered on time. More and more, their main driver is price. Whether we like it or not, clients today treat lawyers as vendors of legal services. This is particularly true in large companies with respect to the rising influence of procurement practices.

In addition, clients have become more sophisticated; they are buyers who clearly understand their own needs. Companies are increasingly employing former private practice lawyers; and there is the wide availability of comprehensive legal information on the Internet.

Over the past 25 years, the legal market has matured from a relatively inefficient market with great asymmetry of information and little information regarding price, quality or efficiency of service to an increasingly robust and efficient market with lots of information and sophisticated clients. The result is diminished client loyalty, increasing use of formal competitive processes and changed expectations in terms of service. With clients becoming more demanding and less loyal, firms increasingly have to compete to attract and retain clients. Marketing can help focus attention on service delivery and offerings in chosen market segments.

While there seems to be too many qualified lawyers for the volume and value of work available, law firms have often found it difficult to attract and retain "good" people.

Buying power and spending behavior are two factors related to the economic cycle that may drive or hinder marketing in organizations. The special nature of legal services signifies that the effects of the economic cycles are not unequivocal in the legal services sector. Some legal services such as transactional mergers and acquisitions (M&A) work or employment contracts generally move with the economic cycle. Other legal services, such as insolvency law and redundancies, tend to be countercyclical: they are required more during a recession or depression. Many law firms painfully noticed that this, however, was not the case in the most recent recession. And some legal services enjoy a relatively constant pattern of demand, such as environmental law, as demonstrated by BP's spill in the Mexican Gulf.

**Force 4 (Supplier Power)**

The primary resource in legal services is human talent, so "supplier power" may be seen as the market for legal talent for which firms are competing. While there seems to be too many qualified lawyers for the volume and value of work available, law firms have often found it difficult to attract and retain "good" people. In the past, despite the increasing numbers of law school graduates, "good" lawyers were spread among too few law firms and were often out of the price range of many firms. This

resulted in a war for talent that may be seen as a driver for marketing among firms competing for new hires. In addition, competition for talent from outside the legal market intensified the situation. The reverse is true in the current economic climate, particularly since the vast majority of law firms have significantly reduced the level of new hiring.

**Force 5 (Barriers to Entry)**
Recent regulatory changes, such as the loosening of restrictions on lawyer advertising, significantly intensify the competitive situation for legal services providers by removing many of the former barriers. Such changes are likely to be a driver for marketing activities. In highly competitive markets, it is important to build mutually beneficial relationships ("win/win situations"), because such relationships may erect barriers to entry for potential competitors and help maintain long-term customer retention – and ultimately greater profitability. Switching costs can also act as barriers to competition. Clients may face a number of obstacles to leaving one legal services provider and beginning a relationship with another. Such obstacles usually revolve around investments of time, money, or effort, such as setup costs, search costs, learning and contractual costs.

## What Would Our Clients Do?

Societal forces can significantly impact not only the need for legal services and thus potentially drive marketing, but also clients' expectations regarding the delivery of the services. These forces encompass non-economic criteria and demographics such as structures and dynamics of individuals and groups, the issues that engage them and their priorities; the long-term interests of society; and living standards/quality of life. Over the last few decades, the U.S. population has been steadily increasing, which is likely to translate into more transactions, more litigation, more clients and, ultimately, more business for law firms – more people mean more potential issues, more potential conflicts, more potential commercial activity. Consequently, one would expect the market for legal services to gradually increase.

**Affluence**
Although this may be a less important factor in the current economic climate, affluence as a societal factor affects what people do in terms of health care, investment, and leisure activity. The ability to move home more often, to acquire second homes, to take more (expensive) holidays, or to spend money on consumer goods affect the market for legal services. "Affluent" activity can directly lead to the need for legal services (e.g., international real estate transactions) or result in needs for legal services (e.g., traffic- or vacation-related litigation). In addition, if only incrementally, increased affluence also possibly influences the expectations of the way services are provided and the level of service. Marketing might help law firms find ways to reach such a clientele, understanding and anticipating their needs to best cater to this group.

**Effective Marketing**
Effective marketing requires an understanding of cultural influences and variations. In terms of cultural values, the United States would classify as a culture with a small power distance, a prevalence of individualism and a masculine tilt; it ranks relatively low on uncertainty avoidance and high on short-term orientation. This means its citizens assume equality between people, have a preference for "accessibility" of others, generally welcome innovation, and expect quick results. Wanting to be "best" is considered normal. Expressing disagreement or criticism is not unusual. Task usually prevails over personal relationships. Relationships of trust are preferred in business dealings.

In the lawyer-client relationship context, this might suggest that clients demand an open and steady flow of communication, and close involvement in the decision making regarding their legal issues. Trust may be embodied in the professional who links the client to the firm (a personal relationship between lawyer and client, or the lawyer as a "trusted advisor"), while in other situations trust is embodied in the organization itself. Only if clients develop trust in organizations, will law firm "brands" be established. An individual professional does not necessarily receive respect owing to his or her position, but must earn the client's respect by demonstrating expertise. At the same time, the professional must show trustworthiness by knowing and admitting limits when not possessing the requested knowledge. Competitiveness and a certain aggressiveness (albeit not openly emotional) when promoting one's services are likely to be accepted as normal in such achievement-oriented societies. Business contracts in individualist cultures tend to be longer than in collectivist cultures as they have a strong preference for spelling out in detail rules between businesses and individuals. This suggests comparatively huge demand for law firms. The masculine tendency to "fight things out" might suggest a predisposition towards litigation, which again can translate into relatively high demand.

**Education**
A higher level of education is likely to influence the expectations clients have for the delivery of legal services. In the past clients tended to look to the learned professions for help and assistance. The barriers created by years of training made the public dependent and unquestioning. Clients have become generally less tolerant of the air of mystery with which professional advisers historically sought to cloak their craft. Clients' new expectations of open communications drive the need to use marketing as

a means of communication with existing and prospective clients. During the last decades, corporate clients, in particular, have become more sophisticated buyers and consumers of legal services. Such clients have often received the same training as external legal services providers, and they increasingly question and challenge the views of those outside providers. They want to be involved in the process, understand what is going on and why, be kept informed of their options, be kept up-to-date on progress, and tend to be relatively less loyal. Firms need to proactively address this new situation. Once they are aware of the issue, it is likely that it will have to be addressed through marketing.

Corporate clients have become more sophisticated buyers and consumers of legal services.

The rise of the knowledge society on the back of the information revolution has impacted the consumption and provision of knowledge-based services. As the knowledge gap has started to decline, this "professionalization" of clients means that fewer services are being bought as if they were "unique," suggesting an increasing commoditization of legal knowledge.

This has led to the creation of volume businesses. Procurement departments are increasingly in charge of buying legal services and ask firms to participate in formal (or even electronic) tendering. At the same time, firms manage legal work in bulk through IT systems where the work is carried out by paralegals, legal executives and chartered insurers, and is only overseen by qualified lawyers. Such structural changes move legal services away from the core profession to services businesses, also likely to drive marketing.

## Technology 2.0

The Internet-driven information revolution is widely perceived as having transformed the way businesses and consumers operate. While technology has not reached its full potential in the legal services sector, advances profoundly affect the practice of law, transforming both the supply side and the demand side. Technology has revolutionized lawyers' communication and information-seeking habits and created greater efficiency and lower costs. While in 1987 two-thirds of the profession did not use computers, less than 40% had word processors and just over 4% a fax, by the turn of the millennium, the Internet had firmly established itself as the main form of communication between lawyers and their clients; by 2004, every partner and large firm associate had a BlackBerry to ensure availability. Now, in 2010, constant availability is the norm. No one is ever off-duty, or off-call.

Technology provides lawyers with new ways to (better) serve their clients and has driven marketing into firms. Technology also potentially enhances client relationship management through sophisticated contact management systems that enable lawyers to leverage relationships held by other lawyers in the firm as well as to monitor the satisfaction of key accounts and leverage the firm's knowledge about its client relationships. However, changing lawyer attitudes about sharing contact information is critical. Given that a law firm's business is concerned essentially with the retrieval and dissemination of information, electronic technology offers an opportunity to improve service provision. Any form of technological advancement that enhances these key components is an essential part of a lawyer's toolkit. A number of large firms have launched extranets for their clients with online "deal rooms," where lawyers from both sides of a deal can exchange and manage documents and conduct secure, private conferences, particularly useful in major merger and acquisition and corporate finance matters.

Also e-commerce (or "e-lawyering") has the potential to fundamentally change the way in which lawyers operate and compete, and how they deliver their services. The information available online (e.g., articles, "do-it-yourself" books, and "legal kits") as well as the scope for interaction (e.g., virtual discussion forums and consumer communities) have impacted former informational asymmetries, and empowered clients by increasing their knowledge.

Technology that enables firms to "export" their services has had divergent effects on law firms. While some firms send aspects of their legal work (e.g., due diligence) to lawyers overseas, large companies also increasingly outsource legal services to low-cost providers in India, the Philippines or similar locations. Lawyers should reflect on how much of their work is or could be conducted through a screen and a telephone, as technology has the potential to substitute people and places. What is worse, the increased use of technology can lead to a substitution of capital for labor, thus potentially increasing the output of each lawyer, which again might raise the level of competition. On the other hand, IT platforms might bring efficiencies to firms that could enable these new players to significantly out-perform the market as transactions now run at unimaginable speeds and complexity compared to 20 years ago.

## Let's Think About This, Seriously

Clients today have many choices, and they are aware of it. Lawyers' advice is critically questioned, fees are under close scrutiny. Lawyers who think that marketing is a waste of time for their practice have not understood what marketing means, nor have they grasped the power

of effective communication to promote their services to existing and potential clients. Assumptions that clients will return for more and that new clients will walk through the door are both naïve and dangerous. There is a clear need for lawyers to actively market the services they offer. While personal contacts still have an important role to play, there is no question that proactive marketing offers more opportunities than the limited "old school tie" network. A basic notion of marketing is that perceptions drive choices, and perceptions can be influenced, which would be unwise to ignore. A failure to be able to articulate clearly why one's services are better in terms of client needs than the competitors' hinders the application of marketing and means that one will end up competing primarily on price.

In times past, lawyers used to practice the law without having to worry about a steady flow of business. Typically, one or two lawyers in a firm were known in the marketplace, and they brought in enough business for the entire firm. More recently, however, dramatic changes in the macro-environment have significantly influenced the legal services sector, both on the demand side as well as the supply side. Few legal services providers have the luxury of ignoring the changes. The drivers include demographic, economic, social, technological, legal, and political forces. Changing professional standards, such as changes in the advertising regulations incorporated in the codes of ethics, a downturn in the economy, the increased expectations of clients, new information technology and a growing global marketplace, together with decreasing client loyalty, make marketing increasingly important. These factors contribute to more competition in the marketplace, just as they allow new ways to compete with one another. ■

1. 433 U.S. 350 (1977).


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# A New Philosophy for Managing Partners and Law Firm Structure

**By Joel A. Rose**

Countless law firms, large and small, are questioning long-standing views about firm management and structure. Yet, the sources of their concern are not new. After years of analyzing the personal and professional styles of lawyer managers of successful (and not so successful) law firms, three inescapable conclusions are readily apparent:

1. The authority of lawyer management is derived from the willingness of partners to be managed;
2. Partners in most law firms perceive themselves as being owners of the firm, having certain prerogatives and independence, not as employees to be "managed"; and
3. Law firms have their own personalities and cultures; management techniques that may be effective in one firm may be only marginally effective or even unsuccessful in another.

## Why a Management Philosophy Is Needed

One of the most basic tenets of law firm practice is that joining together will achieve benefits for each partner, which would be less possible if he or she were to practice individually, i.e., income, workload, coverage, ultimate withdrawal benefits, and similar considerations. To obtain the benefits of an organized practice, law firm leaders need to know that individual lawyers will subordinate their individual judgment to a select few, however chosen, in order to allow for a comprehensive and more holistic oversight approach to firm management. Absent that mindset, management will have a difficult, if not impossible, struggle to succeed.

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Since philosophical cohesion is a prerequisite to effectuating a structure by which partners will agree to be bound, great care must be taken (1) to determine what the partners want lawyer management to be/not to be, i.e., strong leadership, consensus builders, visionaries, functional managers, etc.; and (2) to engage in extensive discussion about the partners' respective expectations for individual involvement in decision making in defined areas, paying particular attention to those areas likely to challenge the natural independence of lawyers who have already successfully achieved partnership.

Given partners' natural predilection for debate, the areas of firm decision making in which partners expect to be involved must be defined and must be fairly identified. Some common areas of collective input and decision making are:

1. Admission to and termination from partnership;
2. Establishment and implementation of firm policies, which, as to partners, must include compensation;
3. Strategic initiatives; and
4. Professional liability issues affecting any partners and/or the firm.

When defining the partners' expectations about their involvement in decision making, firm leaders need to discourage partners' desire to expand the number of items requiring partner approval before action is taken, because this has a tendency to render impotent the firm's management. Partners should make every effort to achieve unanimity or at least consensus on issues that affect the firm's ability to make management decisions quickly and efficiently. Although certain issues deserve to be carefully deliberated, not every management decision needs to be considered by all partners before implementation.

A majority, or a defined super-majority, of the partners will undoubtedly be sufficient to implement most management objectives. Yet, the firm's philosophy is key in establishing a firm's culture, and all hands should be on the table. Partners must feel clearly that decision making will be in firm but fair hands and that each partner will be treated with courtesy and respect.

During the formative process if one or more partners strongly resist or refuse the call for individual subordination, the other partners must give serious thought to how the dissident partners should be treated before a structure is finally determined. For example, they may require participation in the management in order to ensure their "buy-in" or, failing acceptance after significant effort, they may best be subject to separation. Isolation is an unacceptable alternative, since it leads to non-cooperation, exclusion and simply delays dealing with a problem partner.

## Selecting the Management Structure

Once a management philosophy has been identified and agreed upon, it is incumbent upon the firm to determine the form that management will take. Good practice and experience dictate that it will not work to allow partners (or members/shareholders) to exercise autonomy on all matters affecting the firm. Traditionally, many firms name a single managing partner (director/shareholder) and a management committee, i.e., an executive committee. Decisions of consequence relating to structure, which must be made, include:

1. What exactly are the roles and responsibilities of the partners, managing partner, the executive committee and department chairs?
2. How do they interact and what is the reporting responsibility of each to the other(s)?

In some firms, one partner assumes the leadership role naturally, either because the individual is a founding partner or controls a significant client base. In firms where the partners are relatively young and inexperienced, however, this process of natural selection may be more difficult (if not impossible). In firms where no partner surfaces as a natural leader or no one wants the job, the firm must take aggressive action if it wishes to grow and satisfy its members' professional, economic and personal objectives.

The firm must make some hard-and-fast decisions about the kind of leadership required and what the members are willing to accept. Should a managing partner be elected by the general partnership? Or should this individual be appointed by the management committee?

Sometimes the firm's size will preclude this particular dilemma. The smaller firm is in a position to establish a democratic form of governance that includes all the partners in a leadership role. But when this is not practical, the partners face a difficult choice and risk setting up two power centers – and consequent divisiveness – if the general partnership elects both the management committee and the managing partner. To avoid this debacle, in some firms, the management committee selects the managing partner.

## Qualities of an Effective Leader

What kind of person makes a good managing partner? Generally, lawyers are not recruited to a law firm on the basis of their interest or skills in management. They are rarely trained by the firm in management skills. Consequently, lawyers' skills and levels of interest in management frequently leave something to be desired. Regardless of training or experience, however, some important characteristics of successful managing partners include the following:

- The leader must possess respect and support, and have the clout and the willingness to wield it when necessary.
- The leader's skills must combine judgment, commitment, vision.

- He or she must possess a sense of humor, be reasonably "thick-skinned" and be a "people person."
- He or she should possess a vision about what the firm should be and a good sense of timing for when and how to discuss and implement initiatives.

The most successful managing partner is not necessarily:

- the best lawyer;
- the biggest rainmaker;
- the "workaholic" partner, the senior partner;
- the "idea" partner or;
- the "willing" partner.

What partners expect of managing partners:

- Leadership . . . but not dictatorship.
- Financial knowledge.
- Address the problem . . . but pick your battles.
- Be a visionary . . . but a realist.
- Be decisive . . . but build consensus.
- Be an example . . . but admit your mistakes.
- Delegate . . . but be in the know.
- Treat everyone fairly . . . but know the "buttons."
- Know key clients/be visible in the community.
- Be a risk taker . . . but be accountable.
- Listen to all points of view . . . but make the call.
- Expect the best . . . but tolerate mistakes.
- Be accessible . . . but you must get away.
- Communicate.
- Communicate.
- Did we mention . . . *communicate.*

## The Type of Leadership

Any management committee will include some attorneys who are good managers and some who are not. This is not an obstacle. Management skills are not necessarily the only factors that qualify an attorney to serve on a management committee. It may be equally important that each of the groups of lawyers that constitute the firm be equitably represented on the management committee. Furthermore, some committee members will have strengths that balance the weaknesses of others, and vice versa.

The managing partner must keep the objectives of the firm in proper perspective. He or she must be able to rise above the "self" and understand that the good of the firm comes first. The managing partner must be able to make decisions and have them stick. Perhaps most important, the managing partner must want to manage the firm.

Many partners want a great deal of say in firm operations, but stop short of following up on their advice or opinions with recognizable action. Such "management by debate" leads many management committees down a blind alley of endless discussions and meetings. It can be generally agreed that the members of the management committee and the managing partner, as lawyers, want primarily to practice law. The amount of time available for management is limited and must be used wisely.

Collaboration is the best way to generate ideas and options for managing the firm. In the most successful firms, much gets done by teams of partners pulling together. The firm, not the leader, becomes the star; the leader serves primarily as the one who articulates the firm's goals and plans for accomplishing its objectives. Small firms may have an advantage in this respect, because they do not have as many people pulling in different directions, so it is often easier to coalesce around common goals and collaborate on finding solutions to problems.

Some management functions, however, should be performed by the management committee or the managing partner, and should not be delegated. Other tasks may be performed by either the committee or the partner, but also may be performed by individual members of the management committee or other lawyers in the firm. The managing partner and the committee should be charged with those functions that require their specific talents and energy. In placing responsibility for other tasks, it is important to make certain that the management committee and the managing partner have the time to perform the functions that only they can perform.

In assessing his or her function, the managing partner should realize that attorneys' expectations regarding the practice of law may well be different from the expectations attorneys held 10 years ago. These expectations may have changed in regard to hours of work, specialization, income, risk, independence and ethics. Attorneys have a greater desire to know the reasons behind decisions and to participate in decision making.

The managing partner might consider how the social, educational and economic backgrounds of the new crop of attorneys have changed, and how these changes may be reflected in their attitudes, needs and expectations. Ultimately, these changes will be reflected in the firm's recruiting activities, turnover, work product and fields of specialization.

In the final analysis, it is the work that binds and unifies the various components of the firm – that is, the attorneys. The prudent managing partner will recognize the need to chart a course that mediates between the requirements of the practice of law and the needs of those who perform the work.

The managing partner's duties include implementing all decisions of the executive committee and policies established by the partners and monitoring standing and ad hoc committees established by the executive committee.

1. The managing partner should require periodic reporting of all committees and be empowered to reconstitute committees.
2. The managing partner should monitor and supervise the firm's administrator in the performance of his or her functions and deal with individual partners when conflicts arise.

3. The managing partner should render financial and management reports to the executive committee and the firm in a systematic manner and as may be requested from time to time.
4. The managing partner should chair firm and executive committee meetings. He or she should compile and distribute an agenda in advance of partnership and executive committee meetings and report for the executive committee at partnership meetings.
5. Any policy matter intended to be submitted for a vote at any partnership meeting, as well as items affecting the business and substantive sides of the practice, should be clearly identified in the meeting agenda.

## Providing Firm Leadership

The greatest and often most frustrating challenge many managing partners face is how to provide leadership to their firms. Central to this conflict is whether to lead by consensus or decree. In reality, an astute lawyer-manager must achieve the appropriate balance of building consensus among the partners versus managing as an autocrat and which works best, and under what conditions.

> An astute lawyer-manager must achieve the appropriate balance of building consensus among the partners versus managing as an autocrat.

In today's highly competitive environment, authority for managing the firm's administrative and substantive activities needs to be centralized, at least to some extent, in a managing partner and/or an executive/management committee. It is no longer feasible or desirable for attorneys to exercise their independence on virtually every issue. Partners must be willing to subordinate their prerogatives as owners of the firm for the good of the firm. To achieve this level of acceptance it is incumbent upon lawyer management to answer these questions as they apply to their respective firms:

1. What specifically should be the role and responsibility of the partners, the managing partner and department heads for
   a. policy determination and implementation;
   b. long-range planning, including practice development;
   c. recruiting and training lawyers;
   d. practice management and quality control;
   e. confronting underachievers?
2. How to improve the quality of communications between and among the partners and associates and staff for substantive and administrative matters, including
   a. the types of issues/matters partners and associates would like to be kept apprised of regularly; and
   b. how these issues/matters should be brought to the attention of partners and associates, by whom and at what frequency?
3. What specifically should be the role and authority of department heads (coordinators) and individual partners for
   a. accepting work from clients;
   b. assigning work to other attorneys;
   c. overseeing billing, and collecting fees and disbursements;
   d. developing plans for marketing legal services to existing and potential clients; and
   e. providing for an interdisciplinary approach to serving clients?

## Time Devoted to Management and Learning to Manage

A significant majority of managing partners who maintain a client base, supported by an experienced law firm administrator, spend one-third to one-half of their time or more managing. It is not unusual to find that managing partners attain and maintain their power base within their firm as the result of their work in business development, client maintenance and fee production rather than their management skills. Additionally, most of these managing partners possess outstanding interpersonal skills combined with their business sense and their ability to "do the right thing" as key elements contributing to their success as lawyer managers.

It is not unusual for a managing partner to devote a year or longer to learning the job, even if he or she served previously as a member of the firm's management committee. Virtually all managing partners learn their job while doing it. Several managing partners said they learned what not to do by observing the mistakes of their predecessors and listening to the comments and criticisms of other partners. Those few partners who obtained their positions by dint of their strong personalities confided to the author that they perform certain management functions by decree and others by consensus – as long as they agree with the consensus.

Most managing partners keep abreast of their job by reading management publications. Many of them attend management seminars and informal, periodic meetings of managing partners. Others meet informally and

exchange management ideas during bar association and other professional meetings. Obviously, no one discusses their firm's "dirty laundry" with other managing partners; however, the problems of other firms that may have been reported in the legal press and elsewhere are often discussed, but usually in terms of how to prevent similar situations from occurring. Inherent in these discussions is the moral support that managing partners receive from one another.

### Changing Values Affect Management Styles

Some managing partners opine that as their law firms have evolved, the values and the culture of their partners have also changed. Consequently, a majority of partners valued different factors as being important and necessary for their firm's development. These evolving cultural changes can make what was more of a family-like relationship among the partners into what is now characterized as a business relationship.

> The executive committee should serve as a counselor to the firm.

Unless the managing partner is capable of "taking the partners' pulse" and keeping in touch with the other partners, the firm will experience serious difficulties, regardless of how much money the partners earn. It was stated by the managing partner of a 55-lawyer firm, "For each year we continue to exist and partners achieve their personal and professional goals within the broader firm context, those of us on the executive committee feel that we have accomplished some sort of miracle."

### Executive Committee

The executive committee's roles are varied and must include planning and policy making; its vision frequently gives rise to firm discussions and decision making on critical issues. It should have oversight, with the assistance of the department chairs and the firm's administrative managers, to assure policy implementation and profitability. The executive committee should serve as counselor to the firm. Issues raised about those partners who may serve as members of the executive committee should include the extent to which they possess the qualities and abilities necessary to provide

- ethical leadership,
- fiscal leadership,
- practice group oversight,
- qualitative practice leadership,
- client relations leadership, and
- human relations leadership.

Depending upon the size of the firm and the number and location of its offices, it is good to have different departments and ages represented so as to assist in liaison and mentoring duties. Further, there should be among members of the executive committee lawyers who are prepared to succeed to continually greater management roles.

### Practice Group Leaders/Department Chairs

An increasing number of law offices have introduced and implemented practice management activities to ensure partner coordination, control and accountability over fields of law, areas of practice and client matters. Practice group leaders/department chairs are generally responsible for overall practice management and communications within each substantive practice area or department.

Generally, under plans and policies established by the managing partner, each practice group leader is charged with planning, organizing, and overseeing the proper and profitable handling of work in the practice area falling within his or her jurisdiction. A major function of the practice group leader is to ensure the timely completion of client work in a cost effective and quality manner. Central to this activity is the assignment of work to associates or other partners. Practice group leaders may delegate assignments directly to attorneys within their field of law or who may be available or possess the expertise to perform the required work.

Practice group leaders should be responsible for quality control and cost effectiveness of work performed in their area. Each practice group leader should be available to discuss fees and oversee billings and collection of bills in his or her jurisdiction, as requested, and within the framework established by the managing partner. This individual may be expected to coordinate the planning for business development or the systematic sharing of client relations within the practice area.

Within the established system of the office, the practice group leader should ensure implementation of agreed-upon policies on billings, collections, retention, and indexing of legal forms, memoranda, opinion letters, and important legal efforts for the practice area.

The practice group leader should be consulted about, and should direct as may be required, the continuing legal education efforts for the work under his or her jurisdiction. Each practice group leader should communicate with the executive committee and the managing partner about the quality, client service, and the economics of professional services rendered by the attorneys within the designated work area, as well as ideas for the improvement of such services.

Each practice group leader should advise, when requested or when considered appropriate, on the acceptance of new business, considering such aspects as conflict of interest, ethics, merit and strength of the

case, time required, ability of lawyers to handle the work, economics of the case, and value to the office. If the leader is uncertain whether to accept a case, he or she should consult the managing partner or executive committee.

The generic functions performed by each practice group leader should be determined by the managing partner for the major areas of the office's work in terms of managing problems in work assignment, coordinating staffing, setting objectives and reviewing data to appraise results, ensuring ethics and quality control, and cooperating with the executive committee. Each practice group leader should be encouraged to develop a personal style in accomplishing these objectives within the general guidelines of the office.

Weekly, practice group leaders should receive a written notice from the office administrator describing every new matter within the practice area that has been accepted during that week. These reports will advise the practice leader of the existence of new matters within their jurisdiction, along with the identity of the originating partner.

Each practice group leader should meet with the partners and associates working on matters within the practice area to briefly discuss individual workloads, problems in producing work in a timely manner, schedule conflicts, and other matters, as required. To facilitate this review, each leader should access the calendars and dockets for statute of limitations dates, other key filing dates, status reports or supplemental miscellaneous information and a record of every matter by the "handling attorneys."

To the extent that the practice group leader has doubts about the ability of the originating attorney to perform the work (within the coordinator's practice area), whether due to lack of expertise or work overload, the leader should discuss the matter with the originating attorney. All client assignments with related questions between the practice group leader and the originating attorney that cannot be resolved by the leader should be referred to the managing partner.

The practice group leader should review, on a lawyer-by-lawyer basis, client work that is not being performed in a timely or quality manner or work that can afford more lawyer time. He or she should review lawyer production reports monthly, or more frequently as required, to determine the extent to which lawyers are producing the work. Following this review, the leader may assign or suggest reassignment of work to other attorneys who are not being utilized effectively. It is especially helpful for the leader to review all write-downs and write-offs of time and accounts receivable beyond certain dollar limits by the billing attorney to determine the reasons and justifications for such action. If partners are writing off too much time, it should be questioned.

## Conclusion

In the final analysis, individual needs of attorneys have to be balanced with individual partner independence to be responsive to the firm's organizational patterns and policies. Applying management techniques to practice areas may introduce to the firm a new take on methods for enhancing profitability. ■


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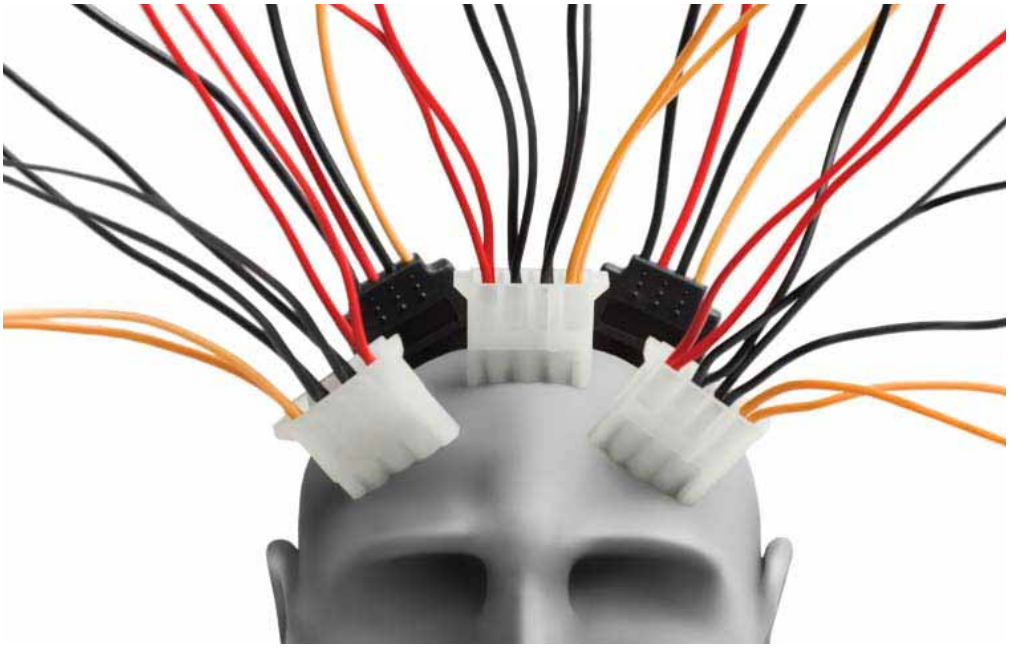

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# Managing Your Brain – A User's Guide

## By Mark I. Sirkin

Information about the human brain has increased dramatically over the past 10 to 15 years, radically changing our understanding of its functions and its capabilities. Since lawyers rely on their brains (as opposed to specialized instruments and tools) more than most professionals, this knowledge is particularly relevant to them. What follows is a "user's guide" or primer about neuroscience for the practicing lawyer.

The brain is, far and away, the most complex organ known to man. Some estimates suggest that there are more potential connections in the brain than there are stars in the universe.[1] That's a large number. Even more fascinating than the mere quantity of connections is the way the brain interconnects its systems and subsystems.

One reason the brain is so complex is that several different systems operate simultaneously in living brains. The brain can be understood from an anatomical perspective, a biochemical perspective, and an electrical perspective. Anatomy rules the brain; understanding the place, or position, of its parts is critical to understanding brain function. If you know the topology of the brain, that is, where things are located, you are well on the way to understanding many of its functions. This principle is true even on the cellular level, where the placement and growth of axons (the antennae that bring information into the cell) and dendrites (the transmitters that send information out of the cell) dictate brain function and growth at the micro-level. The biochemical perspective or system deals with the neurochemistry of the brain – the relevant neuroanatomy here concerns the tiny gaps between axons and dendrites that are filled with chemicals, called neurotransmitters, that excite or pacify the receiving neuron. This is the level at which pharmaceuticals operate. Finally, and perhaps least understood, the brain is an organ of electrical transmission, where brain frequencies (referred to by the Greek terms *alpha, beta, theta, delta*, and *gamma*) facilitate or reflect certain states of preparedness, awareness, and learning. Although well documented, these brain waves are not well understood and their function (for example, are they cause or effect?) is still a mystery. Rather than focus on neuroanatomy or neurochemistry, however, let us examine the brain *in vivo*, that is, how the brain functions as it is being used. This article will discuss three areas that warrant special attention: information overload, emotional reactivity, and working with others. But first, what's changed about what we know?

### What's New?

When you were in high school or college, you probably were taught that while other parts of the body regenerate naturally, the brain does not regenerate new brain cells. This is no longer considered gospel. The brain does regenerate new cells, as well as rewire and remap existing connections. This is called *neuroplasticity* and the discovery of

this phenomenon lies at the heart of our changing ideas about brain function. Another breakthrough that has changed the way we think about the brain is the fact that new technology, such as functional magnetic resonance imaging (*f*mri), has allowed us to actually see the brain at work. So what have we been learning?

- We Think in Maps – Every idea is a group of interconnected neurons that we call maps. Every thought, concept, or idea represents a group of neurons or map. Complex ideas, or concepts built from a number of discrete pieces of information, are larger maps that interconnect smaller maps into a unitary thought. This is how many points in the brain can become interconnected, and a single idea or set of neurons can participate in more than one map. Thinking is the process of creating new maps, and we create millions of new maps every second. A memory, while once thought to be a single idea residing in a single place in the brain, is now known to be made up of many discrete impressions (residing in multiple regions of the brain) all brought together in the single act of remembering.
- Up Close All Brains Are Different – The brain changes with experience. This is the essence of neuroplasticity. Your brain has been impacted by your unique experiences which have affected your brain, which permanently reflects everything that has happened to it since birth. Even identical twins have different brains due to their unique experiences beginning *in utero*. Everything that has happened to you has affected your brain, for better or for worse. The nanny who gave you ice cream, that professor in law school that influenced you so much, your first case, all have impacted your brain more or less permanently. While we always knew that experience mattered, we never knew that it mattered at such a deep level. The brain is literally shaped by experience; brain cells live or die, and pathways are created and reinforced by repetition. Gerald Edelman, a winner of the Nobel Prize in Medicine, called this phenomenon "neural Darwinism." The brain literally changes as a function of where an individual puts his or her attention. Professionals in different fields think differently; their brains are different because of their training and their day-to-day mental activity.
- Multi-tasking Is a Myth – The brain is an excellent sequential processor of information, but attention is like a spotlight that can be focused only on one thing at a time. The brain requires some degree of sustained concentration to process information, first into short-term, or working, memory, then into long-term memory. Multi-tasking is actually a rapid sequencing from one task to another and it is a very inefficient process.[2] (For example, drivers using cell phones are four times more likely to get into accidents; they are the functional equivalent of drunk drivers because of the brain's inherent information-processing limitations.) In addition, the brain stores new information into short-term memory or working memory, which is quite limited. In our information society, working memory gets filled quickly. When working memory is overloaded, the brain does not function efficiently – we become forgetful, inattentive, and frustrated.
- The Brain Prefers Certainty – In some respects the brain is a "difference" engine; it spots and resolves differing or incompatible inputs. When a discrepancy arises, the brain strives to resolve it. This is why we are inveterate problem solvers, even for fun (think crossword puzzles and Sudoku). Established maps are preferred because the brain tends to do things the way it has done them before. Like the law, the brain is inherently conservative. Existing maps (or expectations, to use common parlance) influence the way new information is processed. Conflicting maps irritate, so we are motivated to resolve discrepancies between overlapping maps. Changing old wiring in the brain is difficult, if not impossible, and the more we focus on an idea, even a wrong idea, the more we set it. The good news, however, is that *new* maps are relatively easy to lay down. New ideas, or new maps, are easier to adopt than re-learning or changing an old idea. This may seem to fly in the face of logic, a favorite mode of thought for lawyers. Logic leads to certainty, which neuroscience tells us the brain prefers. Logic has its place; it leads to certainty, which the brain craves. But if you are trying to convince someone of something, it is easier to teach that person a new idea than to get the person to give up an old one.

## Attention and the Myth of Multi-tasking

We live in a wired world where new information comes flowing in – fast and furious. This is no longer your father's law practice with libraries down the hall and an *eminence grise* in the next office who knew everything there was to know about a particular law or client. The amount of information processed by the average lawyer today is many times what it was just a few years ago. Moore's law describes the phenomenon that lets us squeeze more and more data into smaller spaces ever more quickly. This discovery has changed the lawyers' world permanently, forever changing the way law is practiced. What has not changed as quickly, however, is the brain that processes all this information. As lawyers juggle cell phones, BlackBerrys, emails and the like, more and more input is bombarding their brains. It's true, the technology gives us the ability to file and access information more efficiently than ever, but simply trying to

remember what is there, while juggling several things other tasks at the same time, may strain the brain beyond optimal functioning.

Most of the brain's informational inputs reside in working memory which, as we said, is limited. This presents a problem. A complicating factor is that most people believe they can multi-task without degradation of quality or inefficiency. But the brain research disagrees: the brain can focus primarily on one thing at a time, and that's the limit. While it can switch rapidly from one task to the other – called "serial attention" – some information is always lost in the switching back and forth. And most people will notice what you are doing and that you are not concentrating fully on the task at hand.

When the limits of working memory are reached, several things can happen. First, information gets lost; there is simply no place to store it effectively, and either the new input gets dropped or the new information pushes out the old. How many of us have had the experience of being told something quite clearly and plainly; we listened, but then got distracted and now we can't remember what it was we just heard. This is not only a common phenomenon, it is becoming more and more common with consequences that range from annoyance to malpractice. In addition, this type of overload has emotional consequences. It is frustrating and stressful to have so much information coming at us at once. Forgetting can be embarrassing, which creates further emotional stress.

What can be done? Here are several suggestions, taking our current knowledge about brain functioning into account, that can help with the problems related to information overload.

1. Care and Feeding: Brains do best on seven to eight hours of sleep each night – get enough sleep. Caffeine is not food; make sure your brain is well fed with a minimum of carbohydrates and a maximum of protein. Alcohol and the use of other substances do not contribute to the efficient functioning of your brain – use them sparingly. If you need these substances, including sleep medication or other pharmaceuticals to help you function, you may need a lifestyle change that fits better with the brain you have. In addition, exercising the body may be the single best thing to do for your brain – it increases blood flow and keeps the brain systems working at peak efficiency.
2. Train the Brain: Working memory can be trained. Although the brain is not a muscle, it behaves like one at times; it improves and gets stronger with practice. Psychologists have been developing games and other methods to help working memory function more efficiently. Some sites that provide brain training are: www.positscience.com, www.lumosity.com, and www.cogmed.com/program.
3. Learn to Relax: Stress is the enemy of efficient brain functioning. The fight-flight mode is activated when the brain is stressed. While this may prepare you to run away or fight someone, it is not effective in today's professional world. Also, stress pumps hormones into your bloodstream that further distract you. There are, however, a number of mind-body disciplines that all contribute to better brain functioning through focused relaxation. Among these are yoga, tai chi, meditation or mindfulness, and biofeedback, to name just few. Try one that interests you, learn the discipline, and then practice it regularly to control your body's reaction to stressful events and information overload.

## The Role of Emotions and Emotional Intelligence

If absorbing and using information was a purely cognitive exercise that involved filing and retrieval, modern life would be hard enough. But research shows us that most, if not all, inputs and memories get tagged with an emotional association as well. These emotions, it seems, enable us to process and retrieve information more effectively.

> Most people believe that they can multi-task without degradation of quality or inefficiency. But the research disagrees.

Let's start with some basic brain anatomy. In the 1960s and 1970s we made the exciting discovery that the left brain was primarily analytic, specializing in fact-based and sequential information processing. The right brain was more emotional and holistic, and processed gestalts most effectively. We have moved beyond the left brain = analytic/right brain = emotion dichotomy. Psychologists now believe that there is more than one type of intelligence. IQ, or what is called cognitive intelligence, is what most people traditionally think of when they say someone is smart. However, recent findings indicate that emotional intelligence, sometimes called EQ, is distinct from, and is not correlated with, cognitive intelligence. But EQ is correlated with strong interpersonal relationships, leadership skills, and positive client interactions. The good news for lawyers, based on preliminary findings by my colleague Dr. Larry Richard at Hildebrandt Baker Robbins, is that lawyers tend to have higher IQs

than the average person. The bad news, however, is that their EQ scores tend to be lower.

Lawyers live in a world where they are taught, and reminded every day, that logic is good and emotions are bad; careful, non-emotional reasoning should trump emotion every time according to this old-school way of thinking. Indeed the law is based on this sort of reasoning. Emotions, if noticed at all, ought to be factored out. But not so fast! Emotions are fundamental to the way people, and their brains, operate. Here are some things scientists have recently concluded about emotions that should give every lawyer reason to pause:[3]

- Emotions are information.
- We can try to ignore emotion, but it doesn't work.
- We can try to hide emotions, but we are not as good at it as we think.
- Decisions must incorporate emotion to be effective.
- Emotions follow logical patterns.
- Emotional universals do exist, but so do specifics (i.e., individual and cultural differences).

As with any life skill, some people are better at using emotions than others (i.e., are born with a higher EQ). And like any other life skill, learning how to use it and practicing it will improve the ability to recognize, use, and track emotional information.

Emotional intelligence, according to one definition, is the set of skills we use to read, understand, and respond effectively to the emotional signals sent to us by others and by ourselves. These skills allow us to understand and adjust our reactions to events and people, and they enable us to anticipate and influence others.[4] If none of these skills and capabilities is important to you then no need to worry about emotional intelligence . . . but check your pulse because you may not be a fully functioning human. Interacting with others requires the use of emotional intelligence. The better you are with it, the more you will be able to anticipate, affect, and utilize your own emotions and those of the people with whom you interact.

According to the literature, the four branches of emotional intelligence are:[5]

1. Perceiving and Identifying Emotions – Knowing your own emotions and reading the emotions of others accurately.
2. Using Emotion to Facilitate Thought – Understanding how mood affects you and affects situations, and how to create moods to achieve your goals.
3. Understanding Emotions – Making accurate inferences; predicting emotional reactions in others.
4. Managing Emotions – Choosing emotional expression appropriate to time and place.

Tests have been developed to assess your own emotional intelligence and diagnose the areas that need strengthening. As with IQ, you can be good at some aspects and not so good at others, thus impacting your overall EQ. But the good news is that, as with any life skill and a good assessment, you can determine what you need to work on and improve.

How can emotional intelligence be improved? Some of the sensitivities required for higher emotional intelligence do not come easily and may be hard to learn. But practice and diligence will pay off. Here are a couple of suggestions:

1. Facial expressions are the key to reading the emotions of others. Practice reading faces and body language, and think about whether there is a match or mis-match between the two. Use the information that is often written on the faces of others. Dr. Paul Ekman (www.paulekman.com) has been studying emotional expressions for his entire career and has developed methods for teaching this skill to others. As an added bonus, if you take his course, you may be able to spot when people are lying to you; emotionally intelligent people will often pick up subtle but real and reliable clues.
2. Keep an emotions journal – start to study your own emotional reactions to events and their consequences. This does not mean writing down every emotion you have during the day, but rather journaling one stand-out event during the day that engaged you or someone close to you emotionally. Try to do this every day. By writing about it, you will be teaching yourself to be more sensitive to emotional cues and learn how your emotions are connected, one to the other. Remember, focus changes the brain; so, by thinking about your emotions, you are re-wiring your brain to be more emotionally astute.

## Motivating and Influencing Others

While it's important to understand the role of emotions in interpersonal interactions, brain science is teaching us things about motivation and influence that we never knew with such certainty before. For example, by reading *f*mris when people are exposed to various situations, we can tell what they like and how they react. We can recognize a perceived threat as it impacts the brain, regardless of what an individual says or knows about himself or herself.

Remember, the brain is, first and foremost, a difference-analyzing engine. It makes mental maps which are predictions based on expectations based on past experience. If the predictions don't match, the brain sends out an alert that causes the difference to be analyzed until it is understood or resolved. But the brain does not function in a vacuum: we are social creatures that must negotiate a social world whether that is a courtroom, a law firm, or a family home. Research suggests that there are intrinsic, built-in motivators that all humans strive to attain.[6] Having these motivators enhanced or achieved is rewarding, while having them frustrated or diminished is intrin-

sically de-motivating. Although the list below may not be complete, these well-documented social motivators must be taken into account in every social situation:

- Status
- Certainty
- Autonomy
- Relatedness
- Fairness

These motivators are easiest to remember as the acronym SCARF, although this is not necessarily in their order of importance. To the extent that you can enhance any one of the SCARF elements – for yourself, your firm, or your client – it will be experienced as a social positive or good.

As humans, we enjoy status, the more the better, and it is part of the warp and woof of most social organizations.

We are programmed by thousands of years of evolution to seek certainty – and the other elements of SCARF as well. The brain seeks certainty; the brain really likes predictability. That the world, or events, can be anticipated with (a degree of) certainty is intrinsically calming, just as an unpredictable environment typically creates anxiety.

Status is next. We are primates and, as primates, social hierarchies are literally a part of our DNA. As humans, we enjoy status, the more the better, and it is part of the warp and woof of most social organizations, including law firms. Or think of the courtroom, with all the built-in status cues that reinforce the authority of judges. When we want to reward someone, we heighten their status, elevate them so to speak. Status-seeking behavior often motivates professionals, and men especially, to a strong degree.

Professionals tend to over-value autonomy, another intrinsic SCARF motivator. Overlapping a bit with status, autonomy refers to the freedom to act as one chooses with no constraints. The greater the constraints, the more autonomy is diminished.

Relatedness, another intrinsic motivator, is sometimes at odds with status and autonomy. People like to feel connected to each other and this motivates us to be part of a firm or a profession. Interestingly, significant gender differences are emerging from the research, indicating that women place a higher value on relatedness while men seek status more.

Finally, fairness seems to be an intrinsic motivator, which should come as a reassurance to those who practice law. Primates, and even many mammals, seem to have an innate sense of what is fair and what is not. This may well be the biological and evolutionary basis for the importance of the legal system in civilized societies.[7]

The SCARF model has significant ramifications for how people lead and manage others.

- Compensation systems are usually more about fairness and status than money. What matters most is how people are treated in relation to others of similar status.
- Relatedness is a primary motivator. Firms should be looking for ways to enhance it as it is among the best predictors of efficiency, profitability, and teamwork.[8] Men, and male-dominated organizations, tend to over-emphasize status and under-emphasize relatedness.
- When mentoring or managing others, attend to the SCARF factors. Good mentors naturally seek to enhance SCARF. Notice individual differences; some SCARF factors are more important to some than others (you will improve your skills by working on your emotional intelligence!).
- Reading your emails or scanning or inputting on your BlackBerry while interacting with others has an impact – it is "de-statusing" and thus not a good relationship enhancer. And considering the limits of working memory and the myth of multi-tasking, it may just push your overflowing brain over the edge. Simply put, it's bad manners and bad neuroscience.

Although there is much more to say about the confluence of neuroscience and the practice of law, attending to the simple facts and suggestions above should give the average lawyer plenty to think about and much to improve. ■

1. John J. Ratey, A User's Guide to the Brain: Perception, Attention, and the Four Theaters of the Brain (NY: Vintage 2002).

2. Harold E. Pashler, The Psychology of Attention (Cambridge, MA: MIT Press 1998).

3. David R. Caruso & Peter Salovey, The Emotionally Intelligent Manager (San Francisco: Jossey-Bass 2004).

4. See, e.g., the work of David R. Caruso and John Mayer.

5. Note that there are different approaches to emotional intelligence in the psychology literature. In this article we are focusing on the theories of John Mayer, Peter Salovey, and David Caruso. Others psychologists who have written extensively on this topic include Reuven Bar-on and Daniel Goleman, both with different theories.

6. David Rock, *SCARF: A Brain-Based Model for Collaborating With and Influencing Others*, NeuroLeadership J., Vol. 1 (2008) pp. 44–52.

7. Brain regions associated with primary rewards – food, pleasant touch or pleasant memories, money, a picture of a loved one – those same regions were active when people received fair offers, compared to unfair offers of equal level. (*cf.* Golnaz Tabibnia & Matthew D. Lieberman, *Fairness and Cooperation Are Rewarding: Evidence From Social Cognitive Neuroscience*, Annals of the N.Y. Acad. of Sci., 1118, 90–101 (2007)).

8. David Sirota, Louis A. Mischkind & Michael Irwin Meltzer, The Enthusiastic Employee (Philadelphia, PA: Wharton School Publishing 2005).

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# Everything You Need to Run Your Office

**By Kimberly A. Swetland**

## Introduction

The subject of procurement is one that lawyers do not often use in regular conversation, but it is something that every law firm engages in all the time. Whether they have a name for it or not, lawyers have to secure the equipment, furniture, supplies and other fixtures in order to practice law. Procurement is a necessary element in the operation and management of every law office. Whether it is handled by a law firm administrator, the managing partner, or a senior secretary, it goes without saying that when a firm runs out of legal pads, all hell breaks loose. Furthermore, uncontrolled purchasing can have an undesirable effect on overhead expenses, which can reduce a firm's ultimate profitability. This article covers several important aspects of procurement: purchasing and inventory control, the use of requests for proposals (RFPs), the decision to lease or buy and negotiations strategies.

## Purchasing and Inventory Control

The legal services industry is facing an increasingly competitive marketplace and the additional pressure of clients expecting more for less. How can a law firm increase profitability while simultaneously focusing on growth and exceeding client expectations? Firms will increase profitability by recognizing that strategic initiatives focused on procurement (i.e., buying services) are as important as the initiatives focused on selling legal services.

The firms that are succeeding in bridling their spending habits and managing expenses are those that are implementing strategic procurement best practice initiatives. These initiatives focus on producing long-term, sustainable results, which will ultimately have a direct, positive impact on the firm's bottom line. The following discusses three procurement best practices that will deliver financial benefits and enhance profitability.

### 1. Establish Preferred Vendor Relationships

Consolidating purchases with fewer preferred vendors will provide your firm with greater leverage to negotiate both favorable pricing and additional value-added terms and conditions such as service-level commitments and penalties, extended warranties, expedited delivery schedules, favorable return policies and advantageous payment terms.

As a general rule, the fewer the suppliers, the better. However, a firm's ability to forge long-term relationships with a select number of preferred vendors will depend on the products involved and the degree of purchasing centralization that the firm is willing to sanction. Many organizations choose to implement a hybrid solution, whereby the purchasing activities for products and services that are used firm-wide (e.g., technology hardware and software, office equipment, office services, supplies, employee benefits, library databases, etc.) is centrally administered, while purchasing for specific office needs (e.g., recruiting, event planning, facility services, local transportation, catering, etc.) is handled at the local level.

Building relationships with vendors is the way to ensure that your office is adequately stocked and pricing is controlled. Critical to the vendor relationship is timely

and accurate order fulfillment and the ability to respond quickly for last-minute or emergency supplies. Because of the costs involved, many firms do not maintain a large inventory; instead, they employ a just-in-time delivery approach with a cooperating vendor. Developing a relationship with a supply vendor who comes through in an emergency is key to keeping costs under control while maintaining ready access to the supplies you need when you need them.

Be aware that the lowest price is not always the most critical aspect of working with a vendor. A company that understands the needs of your office, the quality of product you require and the time constraints necessary to provide service to you are equally important factors to consider.

The e-procurement system also serves as an information repository for all purchasing activity.

**2. Promote Employee Spending Through Preferred Vendors**

Establishing relationships with preferred vendors will not by itself yield maximum financial benefits unless employee spending is channeled to those vendors. "Maverick spending" or overspending occurs when employees make firm purchases from suppliers of their own choosing, resulting in an item or service purchased at a higher price without the benefit of negotiated discounts or value-added terms and conditions. Overspending is often facilitated through alternative methods of purchasing that are available to employees, such as credit cards, check requests and petty cash vouchers.

One way to combat unnecessary spending is to simplify the process by which employees procure goods and services by developing simple, easy-to-use, procure-to-pay processes that steer employees toward pre-established vendor relationships. On the other hand, procurement policies and procedures must be flexible enough to support purchases of nonstandard or emergency items and services. Changing employees' buying habits is one of the more challenging aspects of strategic purchasing and requires clearly defined purchasing policies and procedures.

**3. Automate Procure-to-Pay Processes**

Many effective e-procurement systems are available in the marketplace, which can be used to automate a firm's purchasing. These systems simplify the ordering process by creating the path of least resistance, thereby reducing maverick spending. Some of the benefits that e-procurement systems provide include online ordering, catalog management, electronic approval routing and receiving, and invoice-matching capabilities.

The e-procurement system also serves as an information repository for all purchasing activity. An effective purchasing database will enable users to query the status of their orders and provide management with analytical capabilities for strategic planning purposes. The e-procurement system is the primary gateway for the flow of information between the firm and its preferred vendors. Therefore, the gateway should provide a variety of methods for the electronic inbound receipt of vendor quotes, invoices and credit memos and the outbound transmission of purchase orders and payments. Automating procure-to-pay processes provides firms with a great opportunity to achieve significant bottom-line savings while simultaneously improving the quality and effectiveness of internal procurement processes.

## Request for Proposal (RFP) Process

As legal service providers, law firms focus on being the resource for clients needing sophisticated legal talent and advice. Lawyers examine clients' legal issues and problems and work in partnership with clients to help them achieve their goals. When it comes to engaging vendors to do business, look for the same level of partnership your firm provides to clients by establishing preferred vendor relationships. The best way to understand the marketplace and to enhance your vendor partnerships to obtain the best value and services is through the request-for-information (RFI) and request-for-proposal (RFP) process.

An RFP invites multiple vendors to provide the firm with a bid on specific products or services. An RFP can start with an RFI, which is used primarily to limit the number of vendors that will participate in the full-scale RFP process. An RFI is less comprehensive than an RFP and compares vendor company backgrounds, qualifications, financials and referrals.

## Analyze Current Expenditures

Begin by analyzing your firm's spending and reviewing current contract timing and terms. Determine your goals and then choose an area where you can achieve the greatest impact. (Compensation, taxes and rent are relatively fixed firm expenses with limited opportunities for change.) Fluctuating firm expenses might include the following:

- benefits
- insurance
- technology and telecommunications systems/equipment
- duplicating costs

- office services (e.g., vending, car service, plants, etc.)
- office supplies
- office furniture
- recruiting
- library publications and research services
- professional services

Itemize your annual spending levels in each area over the last five years. Analyze the current terms of existing contracts and note value-added items you receive from each vendor. Determine inventory levels if appropriate.

## Decide If, When and How to Issue an RFP

Once you amass the information on firm expenses, analyze the data and prioritize firm objectives and decide if an RFP should be prepared. The best time to conduct an RFP is when first purchasing services or products, but RFPs are also prepared at contract renewal time or when there is dissatisfaction with current vendor pricing or service.

Insurance and employee benefit RFPs and negotiations are typically handled through an insurance broker. A few months before your benefit or insurance contracts expire, ask your broker to go to the marketplace with an RFP to facilitate the contract renewal negotiations.

Depending on the scope of the job, you may want to consider engaging a consultant or broker to handle the RFP for you. Fee structures for consultants vary – you can negotiate a flat consulting fee, a fee based on the percentage of dollars saved in the negotiations or a fee based on a percentage of the contract value. In the legal industry, an emerging trend in small and mid-size firms is to forgo the consulting fees and have RFPs handled by internal staff or lawyers.

Once you have identified the targeted expense areas and who is responsible for managing the process, identify the industry experts and vendors to include in the RFP. Evaluate vendors who can meet your specific business needs. Below are some questions you might consider:

- Do you have multiple offices?
- Is the vendor located in each office area?
- Do you have a specific/unique business need?

Depending on your business needs, you might choose a cross-section of small, mid-size and large vendors. Include your current vendor in the RFP process and obtain vendor referrals from colleagues and associations like the ALA.

## Elements of the RFP Document

As with any standardized document, the model RFP document will contain a common format, generally accepted order, and predictable information. This way both organizations seeking proposals and vendors making proposals operate in a medium that everyone understands. The following list provides an outline of an RFP:

- Introduction and firm information
- State the purpose of the RFP
- The RFP is being issued for the purpose of obtaining bids for _____ [see examples below]:
  - health insurance benefits
  - malpractice insurance
  - technology and telecommunications systems/ equipment
  - duplicating costs
  - office supplies
  - office furniture
  - library publications and research services
  - office services
  - professional services
- Indicate goals and objectives
- The goals and objectives of this RFP selection process are to _____ [see examples below]:
  - ensure continued excellent service quality
  - reduce costs
  - leverage unified buying volume
  - enhance services
  - consolidate vendors
  - improve internal administrative procedures/ processes
  - maintain flexibility to adapt to business changes
  - initiate innovative business practices
  - simplify ordering and/or invoicing process
  - retain services for a specific objective
- Designate the firm's contact person
- Establish that the firm's contact person is the one and only contact person throughout the RFP process. Indicate that by contacting partners or others in the firm, a vendor will be disqualified from the process
- Communicate the intent of the RFP
- The intent of this RFP is to:
  - confirm the basic stability, qualifications and performance abilities and guarantees of the vendors and the services they provide
  - understand how each vendor business is organized, its philosophy and approach to all elements of its business
  - obtain detailed financial information for each vendor
  - review the services and offerings provided by each vendor and determine the creative value-added possibilities each vendor offers
  - understand why each vendor would be most compatible with your firm

The message should be clear that it is the intention of the firm to make a commitment to a single vendor for services as a result of the RFP. Potential vendors are unlikely to take the time to produce an RFP if the purchasing entity is not willing to make such a commitment to follow through.

## Analyze RFP Responses and Rank Vendors

Once the RFP responses are received, prepare a side-by-side analysis of the responses. A helpful tool is to rank and weight each response category and then rank the informational components of each vendor response to review the quantitative and qualitative aspects. To assess the subjective cultural and relationship fit between the firm and each vendor, invite your top three candidates to make a presentation to key decision makers. Upon completion of the presentations, the firm's internal team of decision makers can assess and rank the vendors. Simultaneously, vendor references should be checked.

Having completed the RFP process, you can extend any offer to the winning vendor, thank the other vendors for their participation in the process and develop a contract detailing the terms of the agreements.

## Vendor Contract Development

Having completed the RFP process, you can extend an offer to the winning vendor, thank the other vendors for their participation in the process and develop a contract detailing the terms of the agreements negotiated. When developing a contract with a vendor you have selected to handle any aspect of your firm's business, conduct due diligence as you would advise your clients to do before signing a contract. Vendors often prefer to use their standard, prewritten contracts, which may contain language or automatic renewal dates and termination requirements that are not clearly spelled out. Tell the vendor you prefer to create your own contract for goods and services. Again, pay particular attention to automatic renewal terms and cancellation requirements to avoid getting caught in an expensive cycle.

## Lease or Buy

There are many important factors to consider when a firm begins the equipment acquisition process. Consider and conduct the following assessments before committing to a decision regarding your purchase or lease:

### Needs Analysis

A firm must first conduct a needs analysis to determine current and potential needs and total monthly costs related to the equipment, including lease, maintenance, supplies, ancillaries and any possible outsourced jobs. Identifying the expiration dates of all current equipment leases is critical. When tracking your lease expiration dates, also track the lease's notification period, which gives you maximum control over your leased equipment – you must notify a lessor in writing during the notification period to avoid automatic contract renewal.

### Equipment and Vendor Selection

The next step is the vetting process for equipment and vendor selection. The goal is to produce a cost-benefit analysis that identifies the most advanced technological equipment that best satisfies your current and potential needs at a competitive cost. Vendor selection is just as important as equipment selection. Vendors should possess expert knowledge on their own product line so that they can recommend the proper equipment configurations. Vendors should also be knowledgeable about competitors' models so they can help you to compare and contrast similar features and benefits. All equipment will require periodic maintenance; it will not operate properly if it is not maintained and supported by a reputable vendor. Many firms prefer to work with vendors that manufacture, market, service and support their own equipment rather than with independent dealers that sell another company's equipment. Manufacturers train and employ experienced service technicians who can respond quickly to service requests to keep equipment performing optimally. Dealing directly with the manufacturers, which typically are financially sound companies, can also provide more peace of mind than working with an independent dealer.

### Methods of Acquisition

Following equipment and vendor selection, the next step is to evaluate which of the following three methods of acquisition best suit the firm's equipment acquisition strategy:

- *Lease*. A third-party leasing company (lessor) purchases the equipment from the manufacturer and leases the equipment to the firm (lessee). The lessor owns the equipment, and the lessee uses the equipment for a specified term and pays the lessor a stream of periodic payments.
- *Loan*. The bank (or leasing company) finances the equipment to the firm under an installment purchase contract. The firm owns the equipment at the end of the contract term.
- *Outright cash purchase*. The firm purchases the equipment directly from the manufacturer and typically pays the invoice within 30 days.

### Lease vs. Purchase Analysis

The firm's capital structure will dictate whether the firm should seriously consider the purchase alternative

since a significant outlay of cash will reduce earnings. Because many firms want to maintain a certain amount of liquidity, they are more likely to exercise the leasing or loan option than to purchase the equipment outright. However, the lease versus buy decision involves much more than simply comparing debt-service levels. Technology obsolescence, tax benefits, as well as other quantitative and qualitative factors must be considered because they equally affect the lease or buy decision. Skill, strategy, product industry knowledge and your accountant's advice will work to achieve the best result.

**Benefits of Leasing**

Leasing is the most common equipment acquisition method, for a number of reasons, discussed below.

- *Obsolete Equipment*. Most equipment today contains features that are subject to rapid technological changes, which can cause the equipment to become quickly outdated. A buyer who purchases the equipment may end up owning a *stranded asset*, whereby the equipment becomes obsolete before the end of its useful life. Leasing transfers the equipment obsolescence risk to the lessor. From the firm's perspective, it is the equipment's *use*, not its ownership, that creates profitability.
- *Cash Flow Management*. As the cost of acquiring technology increases, most firms prefer to lease rather than purchase equipment. Unlike variable rate bank financing, leasing offers affordable payments with a fixed interest rate for the life of the lease. Payments can be structured to meet cash flow and budget requirements.
- *Financial Reporting*. When a firm purchases equipment, it must capitalize the equipment as an asset on its balance sheet and record the corresponding loan as a liability. The cost of the asset is typically depreciated over its economic life and is reported as a depreciation expense on the income statement, along with the corresponding interest expense for the loan. Conversely, if a lease qualifies as an operating lease, the payments are reported on the income statement with a reference in the notes to the financial statements. Financial ratios (e.g., earnings, return on assets, debt-to-equity) may also improve.
- *Income Tax Considerations*. Lease payments are fully deductible from federal income tax and are exempt from the alternative minimum tax (AMT) penalty calculation. Conversely, purchased equipment is subject to the AMT penalty calculation because the depreciation expense is considered a *tax preference item*. Excess depreciation may trigger the AMT penalty and eliminate potential tax benefits.
- *Flexibility and Convenience*. The leasing company acts as a bank, providing 100% financing for the equipment without a down payment. This type of arrangement preserves bank lines of credit for emergencies or business needs.

## Negotiation Strategies

A few simple negotiation strategies can significantly improve the outcome of many procurement efforts. Here is a top 10 list from those who have done it.

**1. Just Ask**

Negotiating is the skill of asking for what you want and reaching an agreement between two parties to make it happen. Each negotiation is an opportunity to practice, learn and develop your negotiation skills. Studies have found that many people avoid negotiating, fearing anticipated perceptions of conflict. Change the mindset. Asking is how you can become a savvy business person and negotiator.

Studies have found that many people avoid negotiating, fearing anticipated perceptions of conflict.

**2. Understand the Marketplace**

An RFI or RFP is typically the best starting position for a negotiator, as it helps to define your product/service needs and procurement objectives and solicits valuable information that provides insight into what the marketplace has to offer, what vendors can provide, value-added items, service levels and related marketplace costs. This knowledge base can help you negotiate the best deal. Even if you do not issue an RFP, you will still need to research and understand the market to negotiate effectively.

**3. What Are Your Objectives?**

In addition to developing a broad-based knowledge of the marketplace, you need to define and rank your business procurement objectives, which will help to focus your negotiations. Having a written list of objectives that all decision makers understand and helped develop will facilitate the negotiating process and minimize the tendency to lose focus and deviate from the business objectives. Below is a sample ranking of business objectives:

- new or improved product or service
- best product or service on the market for the price you are willing and able to pay
- price, discounts and incentives
- account representative and staffing
- service-level agreements
- accountability to deliver service or products

- other considerations such as insurance, termination of services/products, ability to use other vendors, etc.
- value-added items
- financing and payment terms

**4. Educated Procurement Decisions Are Value-Driven**

Nothing is free when negotiating. Everything has a cost, which ultimately will be built into the final price paid. Vendors who offer free service have built that cost into their pricing model. Achieving the objectives of your deal requires understanding the impact and associated cost for each objective you seek. The ultimate goal is to get the best value at the best price.

**5. Pricing Is Everything**

Once you have negotiated the majority of your nonfinancial objectives, pricing should be worked out. The RFP process will give you a realistic benchmark for market costs and provide a starting point for pricing negotiations. Absent an RFP, ask the seller to provide the best product and service at the best price and use that as a baseline for the discussion. Avoid mentioning the price you think is fair or revealing your budget. Listen to what the vendor has to say first so that you are not negotiating against yourself.

**6. Investigate Multiple Options**

The best way to leverage your negotiating position is to have options. Having multiple options helps to ensure you will get the best offer, so know what competitors in the market are offering. Further, if the deal with one vendor does not work out, you will already know of another available vendor who offers comparable products or services.

**7. Multiple Decision Makers Can Be an Advantage**

When negotiating, one person should be the point person for all discussions with vendors. That person will keep the other decision makers informed of, but not directly involved in, ongoing discussions. This tactic positions the negotiator as the arbitrator, who must favorably address the objectives and concerns of all decision makers, and establishes that others will ultimately approve or disapprove the deal.

**8. It's Business; Not Personal**

All negotiations are business transactions. Even if you really want the deal, you must, as a good negotiator, be willing to walk away if your objectives are not met. When emotions or feelings come into play, you lose the ability to leverage negotiations and objectively make the best decisions or choices. It sounds simple, but when negotiations become emotional, reaching a win-win agreement or walking away from the deal becomes difficult.

**9. Remember the Relationship**

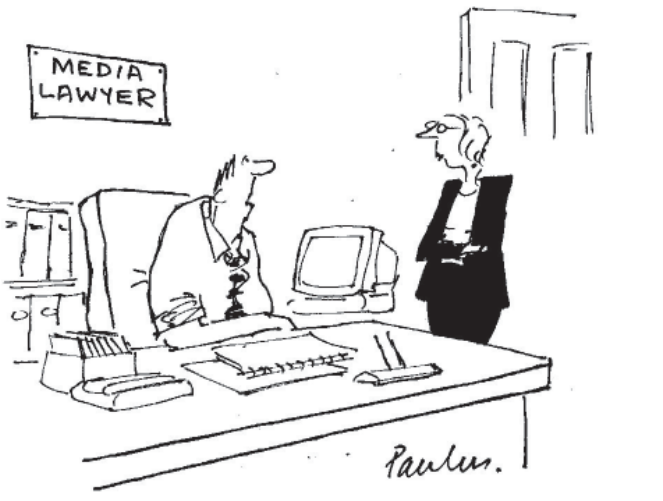
There are two sides to every deal, so it is important to understand what the other side wants from the agreement. The best negotiated deals create or enhance business partnerships and ensure that both parties value the agreement. A good deal will create a long-term relationship for ongoing services or future purchases – a win–win situation.

**10. Ink the Deal**

There is no deal until your negotiations are written on paper and signed by both parties. Negotiations are a verbal agreement until the agreement is finalized by execution. Although intent and understanding may be verbally communicated, an executed contract seals the negotiating deal and requires both parties to uphold the terms negotiated.

## Conclusion

Procurement may be a little understood and often-ignored process for many lawyers and office administrators. However, no law office can operate without leasing or purchasing the many materials and resources needed by lawyers and their staffs to deliver legal services to clients. Given the fact that procurement is ubiquitous, the more meaningful question is whether you just do it, or do it well. There is an art to procurement – to getting the best deals on all the things the firm will need in any event. A professional approach to procurement not only can improve the bottom line, it can make life easier for everyone in the office. ■




"WE NEED A RATINGS WAR — WITH CASUALTIES."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This article does not constitute legal advice or an opinion of Moses & Singer LLP or any member of the firm.

# Up Close and Professional With New York's Engagement Letter Rules

**By Devika Kewalramani**

A lawyer is asked to represent a client. After consulting the applicable rules, the lawyer promptly prepares and sends a letter to the client, reflecting the scope of services and fees to be paid. The lawyer provides services, but the client fails to pay the fee. Has the lawyer done everything necessary, at least with regard to the engagement letter, to allow recovery of the fee? Has the lawyer satisfied the ethical rules concerning engagement letters and retainer agreements?

New York's engagement letter rule (Rule 1215),[1] just a page long and more than eight years old, plays a major role in the day-to-day practice of law. It applies in most situations where a New York lawyer represents a client and expects to be paid for legal services. However, there are gray areas and gaps that it does not specifically cover.

In addition to issues of fee recovery, Rule 1.5(b) of New York's new Rules of Professional Conduct (RPC)[2] adds a disciplinary sting to Rule 1215 and to the failure to create a written engagement letter or retainer agreement when required.

This article will discuss the interplay between Rule 1215 and the new and yet untested ethics rule RPC 1.5(b), which is more stringent in some respects. In addition, this article will review recent case law on recovery of fees in the absence of an engagement letter or retainer agreement.

## Two Rules Compared

Rule 1215 is a court rule without any stated penalty for noncompliance.[3] In contrast, RPC 1.5(b) is an ethics rule requiring a minimum level of conduct below which no lawyer can fall without being exposed to disciplinary action.[4]

Rule 1215.1 requires an attorney to either provide a written engagement letter to a client or enter into a signed written retainer agreement with a client before the engagement begins or within a reasonable time thereafter. Either an engagement letter or a retainer agreement is sufficient to satisfy Rule 1215.1.[5] Rule 1215.1(c) states, "[I]nstead of providing the client with a written letter of engagement, an attorney may comply . . . by entering into a signed written retainer agreement with the client."

Rule 1215.1(b) requires the writing to cover:

1. the scope of services;
2. fees, expenses and billing practices; and
3. where applicable, the client's right to arbitrate fee disputes pursuant to Part 137 of the Rules of the Chief Administrator of the Courts (the Fee Dispute Resolution Program, or FDRP).[6]

The ethics rule, RPC 1.5(b), requires an attorney to create a writing, but only when such a writing is required by statute or court rule.[7] Since Rule 1215 is a court rule, a writing is required under RPC 1.5(b) if it is also required

under Rule 1215. RPC 1.5(b) independently specifies what such a writing must include:

1. the scope of representation; and
2. the basis or rate of fees and expenses.

Hence, it appears that the two rules may easily be satisfied with one writing.

Although Rule 1215 and RPC 1.5(b) are intertwined, the two rules have overlapping provisions that are both similar and different, leading to possible confusion as to how to comply with their respective requirements.

First: Rule 1215.1 requires that a lawyer provide an engagement letter or make a retainer agreement before or within a reasonable time after commencing a representation. Only an engagement letter can be reasonably deferred if (1) it is impracticable to get the letter done before or (2) the scope of the services to be provided cannot be determined at the time of the commencement of representation.[8] No comparable delay is expressly allowed for retainer agreements. RPC 1.5(b) has timing requirements for written communications to clients identical to Rule 1215's retainer agreements.

Second: Rule 1215.2 has four exceptions to its requirements for a writing:

1. where the fee to be charged is expected to be less than $3,000,
2. where the attorney's services are of the same general kind as previously rendered to and paid for by the client,
3. in domestic relations matters subject to 22 N.Y.C.R.R. Part 1400, or
4. where the attorney is admitted to practice in another jurisdiction and maintains no office in New York State or where no material portion of the services are to be rendered in New York.

In contrast, RPC 1.5(b) has only one exception: a writing is not required when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. The exception in Rule 1.5(b) is comparable to Rule 1215's exception for "services of the same general kind" but is narrower because it applies only to "regularly represented clients." There is a possible trap for the practitioner here: RPC 1.5(b) first says that it requires a writing only when required by a court rule, but contains fewer exceptions to the writing requirement than Rule 1215. A possible construction is that RPC 1.5(b) requires a writing only when none of the Rule 1215 exceptions applies, and that its one specified exception applies where some other rule would otherwise require a writing.

Third: Rule 1215 requires a lawyer to give a client an updated writing if there is a *significant* change in the scope of services or fee to be charged, whereas RPC 1.5(b) requires an attorney to communicate to a client (not necessarily in writing) *any* change in the scope of the representation or the basis or rate of the fee or expenses.

Fourth: While Rule 1215 requires that a lawyer must, where applicable, include in the writing to the client notice of its right to arbitrate fee disputes under the FDRP, RPC 1.5(b) does not require such notice. However, another ethics rule, RPC 1.5(f), provides that, where applicable, a lawyer must *resolve* fee disputes by arbitration at the election of the client under the fee arbitration program.

## Consequences of Noncompliance

What if a lawyer has no written engagement letter or retainer agreement in violation of Rule 1215? Will noncompliance with Rule 1215 result in an ethical violation under RPC 1.5(b), thereby subjecting the lawyer to professional discipline? What effect will noncompliance have on the right to a fee for services?

Rule 1215 is silent on penalties for failure to comply. RPC 1.5(b), by contrast, is an ethics rule, exposing the lawyer to sanctions for noncompliance.[9] There is no reported case on disciplinary sanctions against lawyers and/or law firms for the absence of a writing under Rule 1.5(b).

Much of the case law on Rule 1215 relates to fee disputes between a lawyer and a client. The typical scenario is where the lawyer renders legal services for a client solely on the basis of an oral fee arrangement. When the lawyer seeks to recover the fee, the client refuses to pay citing, inter alia, the lawyer's failure to comply with Rule 1215.

The leading New York case on the consequences of noncompliance with Rule 1215 is *Seth Rubenstein, P.C. v. Ganea*.[10] The Second Department held that a lawyer who failed to give an engagement letter or make a retainer agreement in violation of Rule 1215 could still recover the reasonable value of services rendered on a quantum meruit basis (as opposed to being able to recover the full amount of fees under an engagement letter or retainer agreement).

In that case, the lawyer had already recovered a partial fee through an award from the estate of a person subject to guardianship. The issue was payment of an additional amount, the client asserting that the absence of a writing should completely bar any additional recovery. The Second Department considered the three differing conclusions that trial courts had come to – that no fee could be collected, that the lawyer could retain whatever had been paid but recover no more, or that an award could be made in quantum meruit. The Second Department adopted the quantum meruit rule:

> Providing that Rubenstein establishes the client's knowing agreement to pay for legal fees not fully compensated by an award from the AIP's estate, Rubenstein may recover in quantum meruit the fair and reasonable value of the services rendered on behalf of Ganea prior to his discharge as counsel.[11]

The court also said that a lawyer failing to meet the writing requirement of Rule 1215.1 "bears the burden of establishing that the terms of the alleged fee arrangement were fair, fully understood, and agreed to by [the client]." However, this language appears to be inconsistent with the holding that the fee would be measured by quantum meruit rather than by the terms of the alleged fee arrangement. It may be that this language was directed to the particular issue in that case: whether the client understood that the amount awarded by the guardianship court would not be the total legal fee.

The First, Second and Fourth Departments of the Appellate Division have relied on *Rubenstein* to hold that noncompliance with Rule 1215 does not bar fee recovery on a quantum meruit basis.[12]

The question whether an engagement letter must be signed was recently addressed in *Pechenik & Curro, P.C. v. Weaver*.[13] There, an attorney sued a client for fees. The attorney had sent the client an engagement letter and discussed its contents with the client but the client did not sign and return it. The client contended that Rule 1215.1 not only requires a written engagement letter but that it be signed by the client in order to be effective. The client's motion for summary judgment and to dismiss was denied. The court considered the wording of Rule 1215 and did not find a requirement that a client must sign an engagement letter. The court held, "[T]he plain wording of the regulation supports this conclusion and also the fact that the regulation provides in the alternative that an attorney may enter into a signed written retainer agreement with the client in order to comply with the regulation."[14]

## Why Comply

So, if an attorney is permitted to recover legal fees on a quantum meruit basis despite a violation of Rule 1215, why should the attorney seek to comply with the requirements of Rule 1215?

First: The New York Court of Appeals has not yet weighed in on whether an attorney can recover legal fees from a client in the absence of an engagement letter or retainer agreement.

Second: Even if a fee may be recovered, quantum meruit and the agreed fee may be different. The *Rubenstein* court had this to say:

> Attorneys continue to have every incentive to comply with [Rule 1215], as compliance establishes in documentary form the fee arrangements to which clients become bound, and which can be enforced through 22 NYCRR part 137 arbitration or through court proceedings. Attorneys who fail to heed [Rule 1215] place themselves at a marked disadvantage, as the recovery of fees becomes dependent upon factors that attorneys do not necessarily control, such as meeting the burden of proving the terms of the retainer and establishing that the terms were fair, understood, and agreed upon. There is never any guarantee that an arbitrator or court will find this burden met or that the factfinder will determine the reasonable value of services under quantum meruit to be equal to the compensation that would have been earned under a clearly written retainer agreement or letter of engagement.[15]

Third: There is the practical problem of proving even the right to quantum meruit. In the absence of a writing, the client may contend that there was never any agreement to pay for services, written or oral, which is a requirement for a quantum meruit recovery. This is illustrated by *Barry Mallin & Assocs. P.C. v. Nash Metalware Co.*[16] There, unlike in *Rubenstein*, the client disputed even an oral agreement for legal services. The Court found that the lawyer failed to establish a meeting of the minds sufficient to create an enforceable agreement for legal services and refused even a quantum meruit award.

Finally, although there is no precedent yet under ethics rule RPC 1.5(b), no attorney should want to be the subject of the first professional discipline case under that section. ■

1. N.Y. Comp. Codes R. & Regs. tit. 22, § 1215 (N.Y.C.R.R.). Rule 1215 became effective on March 4, 2002, and was amended on April 3, 2002.

2. 22 N.Y.C.R.R. § 1200. RPC became effective on April 1, 2009, and was amended on May 4, 2010.

3. Upon adoption of Rule 1215, the Chief Administrative Judge said, "[T]his is not about attorney discipline in any way, shape or form, and we certainly do not expect in any significant degree there to be a large number of disciplinary matters coming out of this rule." John Caher, *Rule Requires Clients Receive Written Letters of Engagement*, 227 N.Y.L.J. 1 (2002).

4. *See* RPC Scope [6] published by the New York State Bar Association.

5. There are some differences between an engagement letter and a retainer agreement. First, an engagement letter is a "letter" a lawyer gives to a client whereas a retainer agreement is a signed "agreement" the lawyer enters into with a client. Second, while Rule 1215 permits lawyers, in certain circumstances (discussed below) to provide a writing to a client about the engagement after the engagement begins, it appears that only engagement letters (not retainer agreements) may be deferred.

6. 22 N.Y.C.R.R. § 137. This rule established, in 2002, a statewide fee dispute resolution program to resolve attorney-client disputes over legal fees through arbitration.

7. "This information . . . shall be in writing where required by statute or court rule." RPC 1.5(b).

8. Rule 1215.1(a).

9. *See* RPC Scope [6] and [11] published by the New York State Bar Association.

10. 41 A.D.3d 54, 833 N.Y.S.2d 566 (2d Dep't 2007).

11. *Id.* at 64.

12. *Strobel v. Rubin*, No. 570022/09, 2009 WL 2517022 (1st Dep't 2009); *Nabi v. Sells*, 70 A.D.3d 252, 892 N.Y.S.2d 41 (1st Dep't 2009); *Utility Audit Grp. v. Apple Mac & R Corp.*, 59 A.D.3d 707, 874 N.Y.S.2d 525 (2d Dep't 2009); *Chase v. Bowen*, 49 A.D.3d 1350, 853 N.Y.S.2d 819 (4th Dep't 2008).

13. No. 222877, 2009 WL 2877598 (Sup. Ct., Rensselaer Co. 2009).

14. *Id.*

15. *Rubenstein*, 41 A.D.3d at 64.

16. 18 Misc. 3d 890, 849 N.Y.S.2d 752 (Sup. Ct., N.Y. Co. 2008).

# LANGUAGE TIPS

BY GERTRUDE BLOCK

**Question:** In a recent eulogy, the late Senator Robert Byrd was described with admiration as having been "strongly opinionated." I thought that opinionated was an unflattering description, but that was clearly not the intent here. Am I wrong about the definition?

**Answer:** You are not wrong; the speaker was. The adjective *opinionated* still describes a person who holds stubbornly and unreasonably to his own opinion, even though he has been proved wrong. Such an individual may be characterized by arrogant and incorrect assertions. That definition will continue to be correct unless a majority of Americans come to agree that *opinionated* means only "holding strong opinions."

What would occur then would be a semantic change known as "amelioration" ("improvement in meaning"). The word *notorious* has recently undergone amelioration. Although careful writers continue to use it to mean "infamous" – its traditional meaning – more and more often it is now used as a compliment, meaning "famous."

Another word that has recently ameliorated is the noun *enormity*, which traditionally meant "excessively wicked." It contrasts with *enormousness* ("excessively large"). President Obama has used *enormity* to mean "something excessively large or momentous," and so have other educated speakers, boosting the respectability of the new meaning but destroying a useful distinction in meaning.

Two adjectives that look almost alike but are quite dissimilar in meaning are *authoritative* and *authoritarian*. Both mean "possessing authority," but an authoritative individual has gained authority through proper channels; in contrast, an authoritarian expects and demands absolute obedience to authority, opposing individual freedom.

It is more common for words to pejorate (worsen in meaning) than to improve. The word *egregious*, for example, once meant "distinguished," being derived from the Latin preposition *ex-* and the Latin root meaning "herd." To be distinguishable from a "herd" used to be a compliment. Now, however, *egregious* means to be different from the herd by being "extremely bad" instead of "extremely good."

You may remember when the noun *attitude* was unslanted. But it has been used so frequently to mean "bad attitude" that when it appears alone, that is what it means. To "have an attitude" now suggests a "bad attitude." And commentators who daily predict the weather will often use the noun *weather* to mean "bad weather." When the "weatherman" predicts "no weather for the next few days," viewers understand that the weather will be pleasant.

The verb *stink* derives from the Middle English word *stincan*, which, in Old English (before 1100 A.D.), merely meant "to smell." When Chaucer used the phrase *swote stincan* he meant "to smell sweet." Then *stincan* expanded in meaning and began to appear as a euphemism to describe smelly items (like unrefrigerated fish or bad-smelling bugs), so it quickly began to pejorate. By mid-13th century it had gained the primary meaning of "foul-smelling." The noun *stink* also pejorated, becoming synonymous with "reek" and "stench."

So the word *stink* had to be abandoned and another word chosen to describe pleasant smells. The word *smell* seemed a good choice, being inoffensive. But it soon became tainted by bad associations like "smell a rat," and had to be replaced. And so it went: from *stink* to *smell* to *odor* and *aroma.* Perfume makers now rely on *fragrant* and *fragrance*, and so far they seem to be safe.

A "critic" had formerly been an individual who judged both the merits and faults of a performance or a work, and the verb created from that noun, *criticize* also meant "assess." But the noun has pejorated and so has the verb, which now means "to find fault with." Dictionaries list verbs like "blame, reprehend, denounce and censure" as synonyms. The adjective *critical*, influenced by the verb, is now defined as "adverse or unfavorable."

Just as "bad money drives out good money," so bad meanings drive out good meanings. Political words are particularly susceptible to pejoration: The words *liberal* and *radical* are often said with a sneer; to be called an "elitist" is a slur. What some people have called "torture," others call "enhanced investigatory techniques."

Columnist Bob Herbert collected phrases employers used to avoid the word "firing." Employees were "discontinued," "involuntarily severed," and sometimes "surplussed." All these descriptions avoided the fact of lost jobs. Fired employees were even said to have participated in "cascade bumping," which sounds like something pleasant. The word "downsizing" is an abstraction that ignores the trauma of being jobless.

Euphemism has caused our problems to disappear; but look more closely, and you will notice that the problems are still there, but now they are called *issues*. Look up the noun *issue* in a dictionary, however, and "problem" is not listed on almost a half-page of definitions. One definition of *issue* is "a solution to a problem." So when we euphemistically call problems "issues," we are defining the word *problem* as if it were its own solution. Quite a trick. If only it would work!

## From the Mailbag

Regarding the June "Language Tips" column discussing the "rule" about split infinitives, reader Karl Hormann, of Cambridge, Massachusetts, quoted the definition grammarian Henry Fowler used in his 1965 issue of *Modern English Usage*: "The English-speaking world may be divided into (1) those who neither know nor care what a split infinitive is; (2) those who do not know, but care very much; (3) those who know and condemn; (4) those who know and approve; and (5) those who know and distinguish." ■

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plaint or third-party complaint. An interpleader complaint is a defendant's pleading against another claimant; an answer will be required from the other claimant. Also, a party may serve a reply in response to an answer to a cross-claim that contains a demand for an answer.

## Other Litigation Documents

A bill of particulars is an amplification of a pleading: "Parties are required to particularize only that which they have the burden of proof."[8] Serve a bill of particulars only when one is demanded from you. As a plaintiff, you must particularize your claims. As a defendant, you must particularize your defenses, counterclaims, cross-claims, and third-party claims. A bill of particulars is meant to amplify the pleader's contentions, not to offer an evidentiary basis for those contentions.

Motions are requests for court orders. Those orders may resolve some, perhaps all, issues in the case. A court's grant of a motion might result in a final resolution of the case. Or it may resolve some aspect of the litigation, a "housekeeping phase"[9] of the litigation, while the litigation proceeds under the parameters of the court's order. Motions may be made before, during, or after trial and on appeal.

A defendant may also file pre-answer motions, such as a motion to dismiss. A party may move to strike,[10] seeking a court order to remove all or part of the opposing party's pleading. Sometimes a court will treat a pre-answer motion to dismiss under CPLR 3211 as one for summary judgment.[11]

Under CPLR 3213, a plaintiff may also bring a summary-judgment motion in lieu of a complaint. This is a quick way to bring a case based on "an instrument for the payment of money only or upon any judgment."

Parties may also file motions after an answer is filed. These include a motion for summary judgment, a motion to reargue or renew, a motion to compel disclosure, a motion to preclude evidence, a motion for a stay, and a motion for a protective order. To grant a summary-judgment motion, a court must find that no material issue of fact exists to warrant a trial. A party may also move for partial summary judgment, to dismiss a cause of action, or to dismiss a defense.

Lawyers may also draft interrogatories — questions addressed to another party — in the context of disclosure.[12] The questions must be answered under oath and returned.

Also in the context of disclosure is a notice to admit: one party requires another party "to admit stated facts, or the genuineness of a paper or document, or the correctness of photographs."[13] Use this disclosure device only when you reasonably believe no substantial dispute exists about the matter and when the information is within the knowledge of the other party or ascertainable by the other party after an inquiry.[14]

The *Legal Writer* will discuss these litigation documents in upcoming issues.

## Actions Versus Special Proceedings and Summary Proceedings

In New York, civil cases are prosecuted as actions or as statute-authorized special proceedings.[15] Examples of special proceedings include CPLR Article 75 proceedings to compel or stay arbitration, or to confirm, vacate, or modify an arbitration award; CPLR Article 78 proceedings to challenge the decision of a government agency or administrative judge; mandamus; habeas corpus; prohibitions; Family Court proceedings; and summary proceedings, such as landlord-tenant nonpayment or holdover proceedings.

## General CPLR Requirements

All New York civil litigation documents must comply with the CPLR's style and format rules. Civil litigation documents must be on 8½-by-11-inch white paper.[16] Exempt from the CPLR's 8½-by-11-inch requirement are summonses, subpoenas, notices of appearance, notes of issue, orders of protection, temporary orders of protection, and exhibits.[17] Exhibits can be any size. The writing must be "legible and in black ink."[18]

For a summons, you must use at a minimum a 12-point type; for other documents, use at least 10-point type.[19]

Be careful: Your adversary will look for flaws in your pleadings.

Each document must have a caption containing the court's name and venue, the document's title, and the index number.[20] Some courts require that you include the assigned judge's name. You must name all the parties to the lawsuit in a summons, complaint, and judgment. On all other documents, you need name only the first party on each side and then include "et al." to indicate that more parties exist.

Each document served or filed or submitted to a court must have the name, address, telephone number, and signature of the attorney[21] (or pro se litigant, if the party is appearing pro se) submitting the document. By signing the document, the attorney or pro se litigant certifies the integrity of the document.

Litigation documents must be in English.[22] If you include an affidavit or exhibit in a foreign language, you must attach an English translation and an affidavit from the translator. In the affidavit, translators must provide their qualifications and swear that the translation is accurate.[23]

Be careful: Your adversary will look for flaws in your pleadings. Although the court will disregard defects in form that don't substantially prejudice a party's rights, a party on whom a document is served will be deemed

to have waived objections to defects unless a statement of particular objections — along with the document — is returned to the serving party within two days of receipt.[24]

## Pleading Rules

Determine whether your jurisdiction is a "notice pleading" jurisdiction.[25] Knowing whether your jurisdiction is a "notice pleading" jurisdiction will affect how specific your pleadings must be. New York is a notice-pleading jurisdiction. Notice pleading requires parties to give their adversaries notice of their claims or defenses[26] even if you've given the claim a wrong name or you've drafted the pleading poorly. The "[s]ubstance [of the pleading] prevails over its articulateness."[27]

Under CPLR 3013, the "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."[28] Under the old rules, pleadings had to set forth "facts" on which a party relied, not the evidence by which they could be proved.[29] The modern rules replace "facts" with "statements."

The CPLR eliminates the common law's formality and constraints. Today, pleadings are liberally construed and less rigid. Under the common law, parties had to trade formal pleadings back and forth in the hope that the lawsuit could be narrowed to a few clearly defined factual issues.[30] The plaintiff had to state facts, but stating conclusions or evidence could've been fatal to the pleading. This led to a never-ending cycle of papers and interim disputes over the impossible distinction between fact, conclusion, and evidence.[31] Those days are gone.

CPLR 3014 provides that "[e]very pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation." This rule is meant to promote common sense and make pleadings clear. Number and state each cause of action or defense separately. Causes of action and defense may be stated alternatively or hypothetically. CPLR 3014 also provides that prior statements in a pleading are "deemed repeated or adopted subsequently in the same pleading."

CPLR 3013 and 3014 will be further discussed in the *Legal Writer*'s upcoming article on drafting the complaint.

CPLR 3017 requires that every pleading containing a cause of action (such as a complaint, counterclaim, cross-claim) contain a "demand for relief" — what the pleader seeks to obtain. Exceptions to this rule exist. For example, in personal injury, wrongful death actions, medical malpractice actions, and any action against a municipal corporation, include a general relief, not a specific dollar amount in damages.[32]

Verification,[33] "an affidavit swearing to the truth of the pleading," of pleadings is optional under the CPLR.[34] Some pleadings must be verified, including in a matrimonial action, a summary landlord-tenant proceeding, and an Article 78 proceeding. Once a pleading is verified, each subsequent pleading must be verified.[35]

## Summons and Complaint and Summons With Notice

Under CPLR 304, an action is commenced by filing a summons and complaint or a summons with notice.[36] An action is commenced on filing a summons and complaint in the Supreme and County Courts and even in lower courts like the New York City Civil Court and the district, city, town, and village courts.[37]

A summons with notice in lieu of a complaint served under CPLR 305(b) isn't a pleading.[38] It doesn't require serving an answer. In New York, you may not serve a bare summons.[39] Filing a summons without a complaint or notice will not commence an action. You may serve a summons with notice without a complaint. In the notice, state the nature of the action, the relief you're seeking, and the amount of money sought in the event of a default (except in actions for medical malpractice, personal injury, or wrongful death). A defendant served with a summons and notice may serve a demand for a complaint. With some exceptions under CPLR 320(a), a defendant has 20 days after service of the summons to serve the demand.[40] The complaint must be served within 20 days of the demand. Serving an answer constitutes an appearance. When serving your demand for a complaint, also serve a notice of appearance. A demand for a complaint doesn't constitute a notice of appearance. Likewise, a notice of appearance isn't a demand to serve a complaint.[41] Service of the demand extends the time to appear until 20 days after service of the complaint.[42] Under CPLR 3012(a), an answer or reply must be served within 20 days after service of the pleadings to which it responds.[43]

Advantages to serving a summons without a complaint include getting to the courthouse faster by avoiding drafting a lengthy complaint and settling the case quickly, without driving up legal fees.[44] One reason to serve a summons without a complaint is if you have insufficient time or information to draft an adequate complaint.

The CPLR eliminates the common law's formality and constraints.

One disadvantage is delay in joinder of issue. Issue is joined when an answer is filed. You give the defendant time to serve a notice of appearance and, if the defendant chooses, to serve a demand for a complaint. If the defendant doesn't make a demand, the plaintiff is still required to serve a complaint within 20 days after service of the notice of appearance. Another disadvantage is that it might not toll the statute of limitations. A complaint, even if deficient and inadequate, is likely to toll the statute of limitations. You may amend the complaint later. The *Legal Writer* will discuss amending pleadings in the upcoming issues. A court that dismisses a complaint because of inadequate notice dismisses the case for jurisdictional reasons. You won't, therefore, have the benefit of the six-month tolling under CPLR 205(a). Serving a summons without a complaint also delays disclosure opportunities. The defendant won't have to serve an answer until you've served the complaint. Disadvantages[45] also include applying the six-month tolling period under CPLR 205 as well as obtaining a default judgment against a defendant if the defendant fails to answer.

In the next column, the *Legal Writer* will discuss tips on how to draft a complaint. ■

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2. Barbara Child, Drafting Legal Documents: Principles and Practice 39 (2d ed. 1992) (quoting Robert W. Benson, *Plain English Comes to Court*, 13 Litigation 21, 21 (Fall 1986)).
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4. Child, *supra* note 2, at 7–8.
5. David D. Siegel, New York Practice § 552, at 948 (4th ed. 2005).
6. *Id.* § 224, at 370.
7. *Id.* § 227, at 374.
8. *Id.* § 238, at 400.
9. *Id.* § 243, at 409.
10. Fajans et al., *supra* note 3 at 86–89.
11. Siegel, *supra* note 5, § 279, at 461.
12. *See generally* Mary Barnard Ray & Barbara J. Cox, Beyond the Basics: A Text for Advanced Legal Writing 292–311 (2d ed. 2003); Roger S. Haydock, David F. Herr & Jeffrey W. Stempel, Fundamentals of Pretrial Litigation 345–83 (2d ed. 1992).
13. Siegel, *supra* note 5, § 364, at 602.
14. *Id.*
15. CPLR 103(b).
16. CPLR 2101(a).
17. *Id.*
18. *Id.*
19. *Id.*
20. CPLR 2101(c).
21. CPLR 2101(d).
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25. Suzanne M. Lewis, *Litigation 101: Drafting a Complaint*, City Bar Ctr. for CLE 227, 227 (Dec. 8, 2008).
26. Haydock et al., *supra* note 12, at 86.
27. Siegel, *supra* note 5, § 208, at 344.
28. CPLR 3013.
29. Siegel, *supra* note 5, § 207, at 342-43; *see* Michael P. Graff, *The Art of Pleading — New York State Courts*, City Bar Ctr. for CLE 1, 7 (Dec. 8, 2008).
30. Siegel, *supra* note 5, at § 207, at 342.
31. *See id.*
32. Siegel, *supra* note 5, at § 217, at 357.
33. CPLR 3020, 3022, 3023.
34. Siegel, *supra* note 5, at § 232, at 389.
35. CPLR 3020(a) (some exceptions to verifying pleadings exist).
36. CPLR 304(a).
37. Siegel, *supra* note 5, § 60, at 14–15 (supp. July 2010).
38. Graff, *supra* note 29, at 3 ("except for purposes of removal of an action to federal court").
39. *See* Graff, *supra* note 29, at 5–6.
40. CPLR 3012(b).
41. *Id.*
42. *Id.*
43. CPLR 3012(c) (some exceptions exist where service is extended to 30 days).
44. *See* Graff, *supra* note 29, at 5–6.
45. *Id.*

NEW YORK STATE BAR ASSOCIATION

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## MEMBERSHIP TOTALS

**New Regular Members**
**1/1/10 - 7/19/10 _____ 7,295**

**New Law Student Members**
**1/1/10 - 7/19/10 _____ 557**

**Total Regular Members**
**as of 7/19/10 _____ 69,433**

**Total Law Student Members**
**as of 7/19/10 _____ 2,269**

**Total Membership as of**
**7/19/10 _____ 71,702**

## *Foundation Memorials*

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

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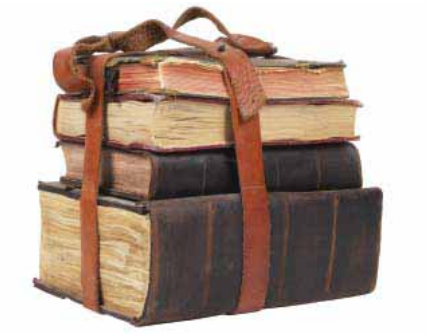

# Drafting New York Civil-Litigation Documents: Part I — An Overview

Good litigation drafting is a hallmark of good advocacy.

Some attorneys believe that drafting litigation documents means pulling out a form book and filling in the blanks. Other attorneys think that cutting and pasting new information into an old document is good lawyering. Neither option produces a good product. It's easier to devote yourself slavishly to forms than to draft documents from scratch. But attorneys who draft their own litigation documents are more successful than attorneys who use forms. Carefully prepared documents — not cut-and-paste jobs — elicit favorable settlements and win cases.

Forms might be a starting point when drafting litigation documents. They help the novice attorney understand how a particular document should look and what that document should include. In the short run, forms have their advantages. Forms are generic, though, and each lawsuit presents unique facts and circumstances. Forms can't be easily tailored to fit your case. "[B]y definition . . . [forms] are general, abstract, and sometimes even ambiguous."[1] Many forms, moreover, promote legalese over plain and clear writing. No matter how diligently the attorney modifies archaic forms to fit new facts, the form's stilted legalisms will inevitably mar the effort. To some, legalese makes the document impressive and attorneys seem intelligent. But "judges who know about good writing suspect that beneath your legalese lurks linguistic, and perhaps legal, incompetence."[2]

In this multi-part series on writing civil-litigation documents, the *Legal Writer* will discuss drafting complaints in plenary actions and petitions in special proceedings. In the coming months, the *Legal Writer* will continue with drafting techniques for, among other documents, answers, bill of particulars, interrogatories, motions to dismiss, and motions for summary judgment.

The rules governing the form and content of litigation documents vary across jurisdictions, courts, and causes of action. That's why you must "know your local rules."[3] The *Legal Writer* will focus on New York rules.

## Pleadings Distinguished From Other Litigation Documents

Pleadings are documents in which a party to a lawsuit alleges facts setting out causes of action or claims for relief. Pleadings are also documents in which a party responds with admissions and defenses; defenses are made up of denials and affirmative defenses. You may deny as untrue allegations your adversary makes; you may also raise affirmative defenses: defenses a defendant must plead and prove at trial. Some pleadings request affirmative relief; some pleadings are defensive or responsive.[4] CPLR 3011 sets out the documents that are considered pleadings.

The pleadings that request affirmative relief include a complaint, a petition, a counterclaim, a cross-claim, an interpleader complaint, and a third-party complaint. A petition is the initial pleading in a special proceeding; it's the equivalent of the complaint in an action.[5] A counterclaim is a claim the defendant interposes against the plaintiff.[6] A cross-claim is a claim one defendant brings against another.[7] An interpleader complaint is a pleading by the defendant against another claimant. A third-party complaint is a pleading against someone who's not yet a party. These complaints are also known as "impleaders."

Defensive or responsive pleadings include an answer and a reply. A party may submit an answer in response to the following pleadings: complaint, petition, counterclaim (against a plaintiff), cross-claim (against a defendant), interpleader complaint (defendant against another claimant), and third-party complaint (against a third party). The answer gives you the opportunity to admit allegations that are true and to deny allegations that are false. An answer also allows you to raise affirmative defenses and counterclaims. Affirmative defenses under CPLR 3018(b) include arbitration and award, collateral estoppel, discharge in bankruptcy, illegality, fraud, the defendant's infancy or disability, payment, release, res judicata, the plaintiff's culpable conduct under the comparative-negligence rule, statute of frauds, statute of limitations, and standing to sue.

A party may serve a reply in several circumstances. A reply is appropriate in response to an answer that contains a counterclaim or an answer that contains an affirmative defense. In your reply, you give a legal excuse or exception to an affirmative defense. A party may also serve a reply in response to an answer to an interpleader com-

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