The Future of Our Profession

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“Those who cannot remember the past
are condemned to repeat it.”
—George Santayana

To paraphrase Mr. Santayana, those who do not realize that the practice of law has changed rapidly over the past two decades are not going to understand, or be able to cope with, the changes that will occur over the next two decades.

I. Lawyers: Professionals or Business Persons? Or Both?

Focus first on the status of lawyers in private law firms, gigantic, large, medium, or small, whether situated in one state, in one region, in the United States, or everywhere (it seems) in the world.

Are lawyers, whether referred to as associates (rising to a more exalted status or permanent associates), partners (equity or non-equity), or counsel (permanent or on the way to or from partner), simply “employees at will”? Kimm Alayne Walton, in her book What Law School Doesn’t Teach You . . . But You Really Need to Know,1 articulated the reality all lawyers face after a few years in practice. In Chapter Two (“ECON-101 - The Business of Law”), she notes three lessons for all lawyers to learn and remember. First, as in all businesses—and we MUST remember that, like it or not, law today is a business—those who bring in the clients are worth more than those who do the work. In other words, finders (that is, those who bring in the clients) will, in most firms, be paid more than grinders (or worker bees). And, unfortunately, in way too many law firms, yesterday is quickly gone, and the lawyer has to produce all over again today and tomorrow, and tomorrow, and tomorrow. Everyone who wants to look back to a prior year to justify this year’s or next year’s compensation needs never to forget the old saying, “That was then, and this is now!”

Second, the law firm must make money on a lawyer to justify what he or she is paid. This means that the person who does not bring in business must, in the not-too-long run, develop an expertise in a field that makes the person incredibly valuable to his or her professional firm or other employer. But we must remember two key concerns—how narrow does the field of expertise need to be (such as tax planning for real estate versus tax planning for REITs,

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or tax planning for U.S. companies abroad versus tax planning for U.S. companies doing business in Kazakhstan) and what if the person's field of expertise is no longer in demand or has diminished substantially.

Third, no matter what the party line may be, with very few exceptions (most of which are found in large firms with a person or persons dedicated to pro bono matters), billable hours count much, much more than nonbillable hours. Assume that an associate is earning $240,000 in a calendar year and that the firm expects to realize 40% overhead and 60% profit. Assume further that benefits and other costs attributable to that associate are 25% of compensation or $60,000. The associate is costing the firm $300,000, and in order to achieve 60% profitability, the firm must be receiving “good” billable hours from the associate in an aggregate total of at least $750,000. Thus, if the associate is billing $400 per hour, that means 1,875 “good” billable hours, and if the associate is billing $500 per hour, that means 1,500 “good” billable hours. How does the associate have time for learning and for marketing? And, more importantly, how does the associate achieve a balanced life?

In a Wall Street Journal article captioned Law-Firm Partners Face Cuts, the author focused on a Nashville, Tennessee law firm and reported that,

When the recession caused business to sag, the . . . firm overhauled its partnership structure. Managers recalibrated pay and assigned specific hour and revenue goals to partners at the . . . firm.

Over that time [the firm] went from almost 85 equity partners to about 55. . . . [There were] a lot of hard conversations, and so some people left.

Those who stayed . . . became much more engaged in developing new lines of business.2

As can be seen, not only associates are at risk of losing their jobs, but partners are also at risk. Whereas at one time attaining partnership in a law firm meant having a position and income in good or bad times because partners with thriving practices helped support those without the same (illustratively, when mergers and acquisitions were up, bankruptcy was down), that is certainly no longer the case. As was noted in the Wall Street Journal piece,

Even before the downturn, some law firms were starting to trim low performers. For many firms, selective partner culls [became] . . . good housekeeping.

[The cuts occurring over the past few years have] come[] as productivity among the highest-paid tier of a firm’s lawyers remains stubbornly low, with some partners billing less than 1,300 hours a year, down about 30% from the prerecession industry benchmark of 1,900 hours.3

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3 Id. (internal quotation marks omitted).
And so, in the current business world, how does one assure survivability in the average professional firm—whether a law firm, accounting firm, or consulting firm? Paul Sax noted that “[r]arely mentioned among lawyers is the regularity with which we are required to refit, retool, and recommence in order [simply] to maintain ourselves in our careers. Law firms disappear with frightening suddenness.”

Paul’s summary brings us back to what is raised above and must never be forgotten, “How to prepare? Don’t overspecialize. Keep several subspecialties going at all times. Be proactive in seeking out new opportunities. There is always room for the new, the interesting, the different.”

II. The Future of “Tax Counsel”

Let us put aside the question of whether the tax profession has a future by assuming that indeed it does. This assumption leaves us wondering where tax lawyers will be situated, what form will the practice take, and how important it will be in a business world. Often, one hears that “tax is the tail that wags the dog.” Is it more likely that tax will be the tail wagged by the dog, or even just a set of hairs on the tail of the dog?

Will the tax lawyer be a specialist in a law firm, serving the clients of others, or be seen as a source of business for the firm? Will tax lawyers be important parts of local, regional, national, or international law firms; or will they be gathered into tax law boutiques; or will they all be working for accounting firms or consulting firms?

Will tax lawyers become key in-house personnel in business enterprises—small, medium, large, or enormous? Will they find more satisfaction working within the federal or a state government; or in a nonprofit; or teaching; or in many other positions? Or, to allow a horrible thought to come to the surface, will tax lawyers become superfluous and end up waiting on tables or selling shoes on the internet?

And so, assuming that the tax profession has a future, we must focus on saving ourselves from the downward spiral of a decreasing need for lawyers nationally by looking at what we can, and must, do for ourselves and the generations to come.

III. The Need for “Business Acumen” and “Common Sense”

In a recent study by University of California, Berkeley Professors Schultz and Zedeck captioned Identification, Development and Validation of Predictions for Successful Lawyering, 26 competencies were identified as forming the basis for effective lawyering. Of the 26 competencies, only a few could be seen as

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5Id. at 275.
tying success to the traditional factors used by many law firms to determine who will be hired (and thus who is likely to succeed at the firm). These factors are legal research, analysis and reasoning, and writing.

The bulk of the other competencies focus on business acumen, common sense, and networking. These include, inter alia, creativity and innovation, problem-solving, practical judgment, questioning, influencing and advocating, listening, strategic planning, organizing and managing one’s own work, negotiation skills, networking, providing advice and counsel, building relationships with clients, passion and engagement, stress management, community involvement and service, and self-development. In other words, less emphasis in hiring should be placed on LSAT scores and undergraduate and law school grade point averages and more weight should be placed on the other competencies noted and the ability of newer lawyers to reflect those competencies.

IV. Mentors to the Next Generation

Finally, as we focus on the future of tax law as a profession, we must ask ourselves some critical questions. Are we truly sharing our knowledge and experience with younger persons? Are we helping them to learn and, we hope, grow? At such groups as the Tax Section, or state or local bar associations, do we key in on persons to bring forward? Are we networking or limiting our focus at bar association and similar meetings to our “old friends?” Do we encourage calls from others for information and advice? Are we teaching in law schools, business schools, or elsewhere?

In fact, is there value to an LL.M. in tax? If so, is it more or less valuable than an MBA? Is it more or less valuable than learning on the job? Should there be more “practical” courses and less theory in the LL.M. and J.D. law programs?

As previously noted, most law firms are either downsizing or not growing. In view of that, how do we attract the best persons to our profession? Who do we want to attract? How do we compete with the accounting firms or the in-house positions for the top persons, either initially or after the “midlife crisis” at the law firm—four or five years after joining?

V. Summary

The tax law profession clearly has a role in the future. Yet, today no one knows how relevant or important it will be in the overall legal profession, particularly because the legal profession does not know where it is going (and, unfortunately, the legal profession has many “leaders” who are focused on protecting or enhancing their personal, often stratospheric income, rather than protecting and enhancing the profession for the future). To quote from the song I’m On My Way in Lerner and Loewe’s musical Paint Your Wagon, “Where am I going, I don’t know. When will I get there, I ain’t certain. All that I know is that I’m on my way.”