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Hidden Transformation of the Legal Industry

By Richard Sander

PART ONE OF A TWO-PART SERIES ON THE STATE OF THE PROFESSION

Although the American legal industry is enormous—accounting for close to $200 billion in economic activity and employing nearly 2 million people—almost no one is responsible for monitoring its health. Because law firms are always privately held, there are no publicly traded stocks that tell us whether the "law business" is up or down. And because the legal industry is thought capable of taking care of itself (unlike, say, the farming business), there is no federal agency charged with tending to its needs. There is a legal press, but publications such as *The National Law Journal* and *Legal Times* tend to pay close attention only to the world of big law firms. As a result, almost no one has noticed a remarkable change. The legal industry as a whole—after a long and phenomenal boom—is in the midst of a serious and prolonged recession.

During the first two-thirds of the twentieth century, the American legal profession was extraordinarily stable. The number of lawyers per capita barely budged from one decade to the next, and most lawyers enjoyed predictably comfortable livings. The larger law firms were growing, but even the largest firm in 1960 had annual revenues of well under $10 million. As late as the mid-1950s, over half of all lawyers were solo practitioners.

Around the mid-1960s, for a variety of reasons too complex to enumerate, all of this changed. Legal activity in the United States began to increase rapidly, and the "legal industry" accelerated into a twenty-five year boom. The proportion of American gross national product (GNP) accounted for by lawyers' offices tripled between 1967 and 1992. The number of students graduating from American law schools nearly quadrupled. By the end of this era, the largest law firms were approaching half a billion dollars in annual revenue. The number of lawyers leapt from 250,000 to nearly 850,000. By 1992, solo practitioners accounted for only about one-tenth of all lawyer revenues.

For the legal industry as a whole, growth began to decelerate in the late 1980s. The share of American economic activity accounted for by the legal industry peaked in 1992 at 1.55 percent of GNP; today, the share is around 1.45 percent. The percentage of lawyers in the American workforce peaked around the year 2000. And since 2004, according to the latest census data, the absolute number of people listing "lawyer" or "attorney" as their primary occupation has been falling. Yet the production of new lawyers by law schools exceeds—by a factor of three or four—the number of lawyers reaching retirement age. Therefore, a declining lawyer population means tens of thousands of attorneys are exiting the profession in their prime.

Almost no one has noticed this trend because so far it has not had a visible impact on the nation's largest law firms. The revenues of the top firms, even after adjusting for inflation, roughly tripled between 1992 and 2006. The number of lawyers they employ, starting salaries for associates, and average take-home pay for partners have all continued to rise. Given an overall pattern of contraction, the continued growth of the big firms means that the pain felt elsewhere in the law business is all the more severe. For example, the average income of a solo practitioner in the United States in 2004 was less than $46,000—about a 30 percent decline, in real dollars, compared to the previous generation.

Normally, if an industry hits hard times, the schools that supply those industries are among the first to know because entry-level positions dry up and school enrollments drop precipitously. But law schools are enjoying enormous prosperity, with new schools opening and tuition rising rapidly. How can this be?

In large part, it is due to the unusual up-or-out structure of law firms. During hard times in most industries, employers tend to lay off newer employees and avoid hiring new workers. But the long-standing tradition of law firms is to fire nearly all senior associates who fail to win promotion to partnership. The result is that the demand for new law graduates is in many ways greater than the demand for lawyers who have been out of school for ten years. Even so, a large number of new lawyers are ending up in comparatively low-paying jobs.

Prospective law students, on the threshold of spending six figures on a legal education, need much better information about their future prospects in the law. So do young associates in firms. Law schools, the legal media, and the American Bar Association all have an important part to play in creating a better tracking system for the economic fortunes of our industry.

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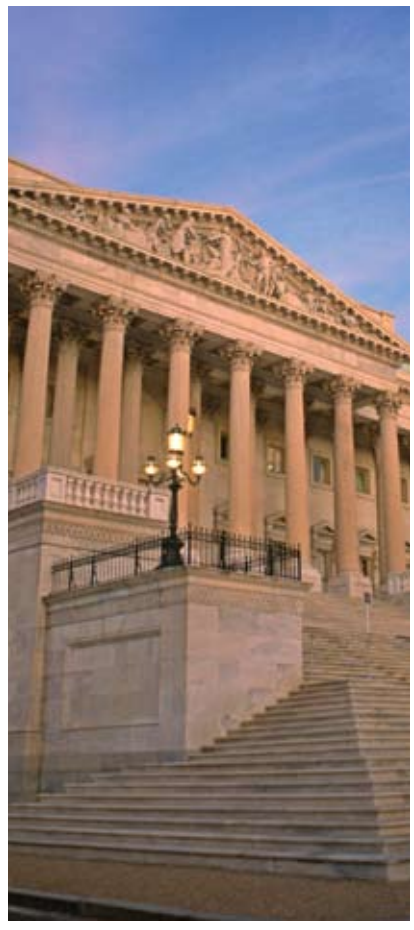
Look for an analysis of rising student loan debt v. hiring salary trends in next month's issue of TYL.

Regulatory Disputes Resolved Through Government Mediation

By Jennifer M. Gartlan

Attorneys often refer clients to private mediators to resolve commercial and legal disputes. One frequently overlooked mediation tool is federal administrative programs that offer subject-matter-specific services at little or no cost to parties. Like their private-sector counterparts, government mediators are capable of addressing commercial and legal remedies that are otherwise unavailable through administrative litigation. The following includes practical suggestions on government mediation programs in regulatory disputes.



Neutrality and Confidentiality

Parties considering government mediation often worry that information that is shared with a government mediator will be passed on to the forum agency. The federal Alternative Dispute Resolution Act imposes confidentiality requirements on government neutrals, which prevents such disclosure. A government neutral will not break confidentiality unless a court orders disclosure based upon manifest injustice, violation of law, or prevention of harm to public health and safety. Government programs have interpreted "violation of law" as a violation of criminal law. This means that information regarding civil regulatory violations will be protected by confidentiality.

Parties may fear that a potential regulatory violation will negatively impact a mediator's perception of the case. It is important to remember that the mediator is a "neutral," meaning that he or she is barred from siding with either party. If a party has questions regarding a mediator's actual neutrality, counsel should discuss such concerns directly with the mediator. In the event that a genuine conflict between a party and mediator cannot be resolved, the party may, and should, request a different neutral.

Timing Considerations

When should parties request mediation? Some agencies will order parties into mediation as part of the litigation process; other agencies may require parties to seek mediation services within a specified period. Forum agencies may dictate timing if litigation has been filed.

That said, parties are not

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Communications Law

HOT TOPICS AND PRACTICE TIPS

By Peter Shields and Bryan Tramont

Five years ago, there was no YouTube or Slingbox, and no one knew what a Nano was. Yet from cell phones to streaming Web video to text messaging to landlines and beyond, the way we connect with each other is changing at broadband speed. Here and globally, communications law is forming the policies behind our communications marketplace. And communications lawyers have a front row seat for all of the action.

The practice

Communications law is a true mix of legal, policy, and advocacy work on behalf of companies ranging in size from Fortune 10 telecommunications and media companies to mom-and-pop broadcast station owners. Communications attorneys practice before the Federal Communications Commission (FCC), the Department of Commerce, and other federal agencies, as well as courts across the country, Congress, and state public utility commissions. Young lawyers in this area are often introduced to a variety of practices within a few short years.

What's hot

Digital Television Transition (DTV). By February 17, 2009, all analog television signals must be converted to digital. Government and communications companies are spending time, money, and resources to ensure that American consumers, particularly rural, elderly, and other populations who require extra assistance, are educated properly about this crossover. The federal government will issue coupons to help subsidize converter boxes (*see* http://DTV.gov) to ensure everyone makes the transition. But the process is complex, and the next year will be dominated by efforts to ensure everyone gets this message.

Broadband. Just as the devices and methods we use to communicate change, so, too, do the modes of content delivery. Given the media-rich possibility of broadband, the increase in Web publishers, and the rise of new social computing avenues, broadband will be at the forefront of media policy. Broadband is an essential ingredient for advances in economic development, education, health care, homeland security, and the political system. Essential questions in this area will be how to ensure Americans are fully connected and what are the responsibilities of network owners and application providers.

Wireless spectrum auctions. The FCC recently completed the $19.6 billion 700 MHz spectrum auction with many of the largest wireless communications providers winning new spectrum blocks (groupings of radio frequencies that are made available for licensing) to enhance existing technologies and facilitate new ones. This new spectrum "fuel" is likely to spur additional mobile broadband deployment and even greater connectivity around the country. Considerations in this area include whether there is enough spectrum for all of the intended uses and how government can use this vital resource most effectively for homeland security.

Keys to success

As a young attorney, it can be daunting to enter a field as specialized and diverse as communications law. Nevertheless, some basic tips will start you on the path to success.

Stay ahead of the curve. New attorneys can excel quickly where they become the first to know and use the technologies that shape the legal questions yet to come. An adept attorney will keep abreast of the latest trends affecting their clients.

Know the key players. Become an expert not only in the

key institutions (e.g., Congress, the FCC, and courts), but in the processes, policies, and objectives that drive their decisions. Where young attorneys may not have a mastery of subject matter, they should add value by knowing the process and tending to every detail.

Find a mentor. At one point, everyone was a junior attorney. Utilize your local bar association or the Federal Communications Bar Association to identify a communications attorney that may be willing to mentor you.

Build a reputation. The communications bar is still a relatively small bar association, so it is essential that you build a strong reputation and then protect and advance that reputation in everything you do.

Don't forget the public interest. Government agencies, including the FCC, are driven to serve the public interest. Do not lose sight of this in your advocacy.

One of the great attractions to communications law is that the issues change as quickly as the technologies. So if you love the latest gadgets, this is a great practice area for you.

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Missing the Mark on Client Needs

By Hanna Hasl-Kelchner

When a business client sent a proposed storage tank installation manual to its law firm for review, it expected to receive a marked-up manuscript and revised language with an eye toward reducing legal liability. What the firm sent back instead was a well-researched memorandum of law that explained rudimentary product liability and the risk exposure that would result from distributing such a manual. Publishing equaled liability, and liability was bad. The memorandum was accompanied by a four-page cover letter. They both echoed the same sentiment and ended with the same recommendation: do not issue the manual.

The firm's advice was ultimately useless. It was not because it was wrong but because it was inappropriate. The question posed was not "How do we make sure we can win a lawsuit?" It was "How do we minimize the risk of being sued?" Therefore, from the client's perspective, the firm delivered the wrong product. The client already knew there was some legal risk associated with issuing the manual. The issue was not whether the manual would be published but how to publish it with the least, not zero, amount of exposure. To the company, the manual was a value-added service for its customers, and the overall business advantage outweighed the legal risk, provided the legal risk was managed properly. To the law firm, it was a legal albatross.

The law firm missed an important opportunity by not recognizing that the manual was going to be issued with or without them. As a result, they created more problems than they solved: the inappropriate advice meant someone else had to review the document, publication deadlines were missed, and the manual was brought to market later than expected. Worst of all, their advice was viewed by their client as obstructionist.

In any given matter, whether it is a storage tank installation manual review, a contract, or some form of litigation, start by finding out what your clients' goals and objectives are. Your idea of what constitutes a winning result may be different from your clients. If, for example, a client's goal in a lawsuit is to position itself for settlement, you may have different advice to provide than if the client is determined to go to trial. When you are reviewing or drafting a contract, it is impossible to know whether the terms of the deal expressed in the contract are adequate without understanding the underlying transaction specific to the parties.

Good communication and common courtesy are also essential to staying in synch with your clients' business objectives throughout projects or cases. It sounds simple, but it is easy to slip up.

Take, for example, the young associate who scheduled the deposition of a third party, who he knew to be a customer of his client. The case settled before the deposition date, but the associate forgot to tell the client's customer, who in the meantime was scrambling to produce documents for the deposition. That omission was inconsiderate and rude, particularly because the client had an important, ongoing relationship with the customer. As a result, instead of making a good impression on the client, the associate alienated the client. Better follow-up by the associate in winding down the case and awareness of his client's business needs would have prevented the client from receiving an irate phone call from the customer.

If you want good client relationships, keep your clients' perspectives in mind at all times and make thoroughness and follow-through your responsibility, not someone else's. Do this, and you will be a valued member of your clients' legal team. Ignore it, and you will become part of the problem, not the solution.

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Government Mediation

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precluded from seeking mediation before litigation is filed. In many instances, it is advisable to be proactive and seek mediation prior to filing administrative litigation as it may be possible to solve the dispute in real time, which allows for specific performance rather than waiting for uncertain monetary damages. Early mediation is also beneficial for smaller parties as the mediation process saves time and money and can balance inequality between larger and smaller parties, thus permitting more meaningful negotiation. Finally, in the event that mediation fails, the parties still have the option of filing litigation. From a tactical standpoint, the party requesting mediation may present itself in a more attractive light to administrative law judges, who are required to look at past attempts at dispute resolution.

Convening Mediation

After submitting a request to an agency or receiving a mediation order from an administrative law judge, a neutral is appointed. Agencies may provide parties with a list of mediators or may appoint in-house mediators. In either case, parties should obtain as much information as possible regarding selected mediators' style and methodology. Some government mediators use an *evaluative* approach, where the mediator issues an opinion regarding the merits of the case as a starting ground for mediation. While some parties find this approach helpful, it is risky and does not explore all the underlying issues and needs. In contrast, *facilitative* mediators do not express an opinion regarding the merits; they work with both parties to discuss and evaluate the issues, merits, and concerns of both parties.

Attorneys should involve clients in all preliminary discussions so they may ask questions and gain comfort with the process.

Preparation

After speaking with the mediator, attorneys and clients should work together to prepare for the mediation session. Attorneys should expect the mediator to ask the client to speak about his thoughts and concerns regarding the dispute. Therefore, attorneys should work with clients on opening statements and explain the nuances of disclosure within the context of mediation.

In addition to these basics, attorneys and clients should have meaningful dialogue regarding clients' goals and aspirations, countered with knowledge of the opposing party's positions. It is also helpful for attorneys and clients to generate questions for opposing parties as mediation is a facilitated dialogue and information exchange is essential within the process. It is equally important to prepare a proposed alternative course of action in the event that mediation does not achieve the desired results.

> Mediation is a facilitated dialogue, and information exchange is essential.

Mediation

One benefit of mediation is the ability of both parties to voice their opinions in an unbiased, non-court forum. After allowing such venting, the mediator will then refocus the parties on working cooperatively to discuss resolution. This process can eliminate built-up client frustrations and allow constructive movement toward a reasonable compromise.

Similarly, an effective technique is for the mediator to allow the clients to express emotions, wants, and needs surrounding the dispute, while the attorneys and mediator work together to create "reality checks" for the parties. The reality-check process can include everything from the ramifications of failure to resolve the dispute to the costs and benefits of proposed solutions.

Attorneys have a pivotal role in federal regulatory mediation that must include zealous advocacy for the client and the mediation process. In some instances intelligent mediation will save a client from not only extensive litigation costs with a private party, but also future adverse agency action.

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YLD CALENDAR & CONFERENCES

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JUNE 19, 2008

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www.abanet.org/yld/annual08

SEPT. 10-13, 2008

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www.abanet.org/labor/lel-annualcle/09/labor-cle08.html

OCT. 2-4, 2008

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www.abanet.org/yld/fall08/

FEB. 12-14, 2009

SAVE THE DATE

ABA YLD MIDYEAR MEETING | BOSTON, MA

MAY 14-16, 2009

SAVE THE DATE

ABA YLD SPRING CONFERENCE | NEW ORLEANS, LA

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Busy Associates Must Find Ways to Keep It Real

By Heather Davies Bernard

Isn't it great that we're finally attorneys? What's not so great is how overwhelming, exhausting, confusing, and hard it can be starting out. I have compiled a not-so-conventional top ten list of new attorney survival tips based on my experiences thus far.

1. Call your mother. It is just as important to keep in touch with your family now as it was in law school. And you remember how often you called home while in law school. Well, so does your mother.

2. Do not trust spell check. Before filing a document or turning in an assignment, print the document and read it on paper. Backwards. I am not joking. Our brains are adept at filling in the blanks for us and processing misspelled words, which allows us to overlook them. If you read a document backwards, you will catch errors that you would otherwise miss.

3. Find a mentor. Whether in your office or in your community, it is invaluable to find someone who you can ask questions and who will give honest answers. It is also invaluable to learn about your mentor's career path as you define your own.

4. Stay in touch with your nonattorney friends—but for the right reasons. Conventional "new lawyer" wisdom advises staying in touch with your friends because they could become clients. My advice is to stay in touch with your friends because they are your friends, and they will help you relax and enjoy your time off. Yes, new business is important but so is friendship.

5. Do something other than law in your spare time. Nonlegal volunteer opportunities in your community can be not only personally fulfilling but beneficial to your career because they revitalize you.

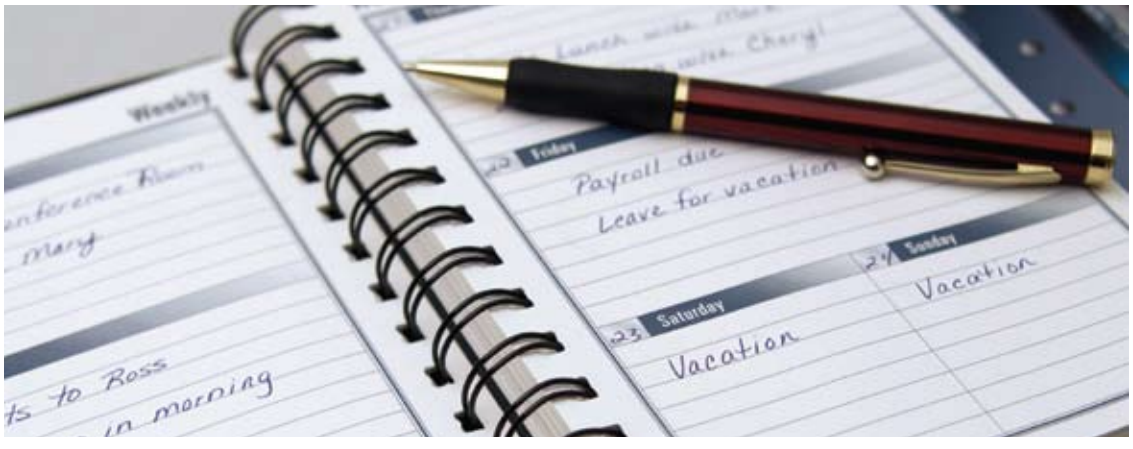
6. If you are unsure about an assignment at work, ask questions. I received praise in my first review for asking detailed questions about my assignments. I was thrilled, even though I was asking questions primarily because I was afraid of making mistakes.

7. Manage your workload. Regardless of your billing requirements, it is important to remember that clients' needs and deadlines rule. If you have too much on your plate, assess your workload and prioritize based on deadlines and the urgency of each project. Discuss that assessment with your supervisors. Supervisors will respect that you did not miss a deadline, try to hide the ball, or offer an excuse that they have probably heard before.

8. Arrive early for meetings and always be prepared. Punctuality and preparedness will pay off. And that includes bringing paper and a pen.

9. Remember that Rome wasn't built in a day. Plan for your goals, talk to your mentor, and do good work. Do not get impatient with the process of just starting out.

10. Breathe. Take a minute every day to stop, breathe, and center yourself. Remember who you are and all that you have accomplished. And then go take the world by storm!



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