

December, 2010

## WHAT'S HOT AND WHAT'S NOT IN THE LEGAL PROFESSION

This is our 22<sup>nd</sup> annual report on what's going on, not only in the United States but also in other parts of the world, in an increasingly globalized legal profession. It is longer than our previous reports and, like all of them, is based on information we compile throughout the year from many sources including discussions with firm management. Some of our findings are obvious but must be included. Others are not obvious. And still others are contrary to the Conventional Wisdom. Nevertheless, this is the picture at the beginning of 2011.

### PRACTICE AREAS

#### Red Hot

- **Regulatory.** Federal and state. Particularly in health care, banking, pharmaceutical, energy.
- **Health Care.** Covering many areas and all types of providers.
- **Alternate Dispute Resolution (ADR).** Both mediation and arbitration due to the high costs of litigation and delays in the courts. But Commercial Litigation is Hot. See below.

#### Hot

- **White Collar Crime.** Due to investigations into financial fraud and violations of the Foreign Corrupt Practices Act (as we first reported two years ago).
- **Bankruptcy.** Although business caseloads have been declining, consumer filings are still increasing.
- **Energy.** Particularly oil, gas and nuclear as well as, in a few firms, "clean energy".
- **Labor & Employment.** Fueled by wage-and-hour actions and government investigations in the health-care industry. Compliance-training programs are the best defense.
- **Public Finance.** Most states need the money!
- **Litigation.** Almost every type in most firms. Complex cases and construction litigation are Red Hot. School-based litigation is Getting Hot.
- **Immigration.** Was Cold a year ago. Arizona is just the tip of the iceberg.
- **Emerging Companies.** Even some BigLaw firms are developing this practice. In addition, UpstartLegal.com, a website to give entrepreneurs the legal documents needed to start and run a business, has been launched. And Kaplan University's Concord Law School has launched a web-based, LLM program on small business practice.

#### Getting Hot

- **Corporate.** Transactional work, particularly IPOs and M&A, is heating up.
- **Financial Services.** Due to Dodd-Frank which could create work beyond banking and other financial institutions. Private equity and hedge fund firms face increased regulatory requirements including registration with the SEC.

#### Cool

- **Patent Prosecution.** Was heating up a year ago, then started to cool off.
- **Patent Litigation.** However, according to Law360, a federal appeals court ruling, which invalidates patents on two genes linked to breast and ovarian cancer, "Could have wide-ranging implications for gene patent law and the biotechnology industry." And, in another development, some plaintiff firms are taking cases on a contingency basis and hiring lawyers from BigLaw firms to handle them.
- **Gaming.** Casino revenues are down and there is little expansion except in Pennsylvania and the few other states where gambling is still relatively new.
- **Real Estate.** However, retrofitting of old buildings and leasing are Hot for a few firms. Also, a few residential developers have built up their cash and are buying up sites at bargain prices.

### Cold

- **Tax, Trust & Estate Planning.** Until congress acts or doesn't. Then will be Hot.
- **Elder Law.** Still reeling from the recession.

### **GEOGRAPHIC MARKETS**

- **Sao Paolo.** U.S. and European firms continue to open offices there. However, the Sao Paolo Bar Association recently issued an advisory that foreign firms operating in alliance with local firms breach local practice rules.
- **Singapore.** At least three more major firms are opening offices or planning joint ventures there.
- **Luxembourg.** Baker McKenzie and Stibbe recently opened there.
- **Chicago.** Outside firms, emphasizing their lower rates, continue to open offices here.
- **Texas.** National firms plan to open offices in Dallas, Houston, Austin. One reason: Energy.
- **BRIC countries (Brazil, Russia, India, China).** They are regarded by global firms as major growth opportunities although obstacles must be overcome in India and China.

### **MARKETING & BUSINESS DEVELOPMENT**

- **Growth Strategies.** Expense cuts have gone about as far as they can go so, to increase profits, firms must now focus on increasing revenues if the demand for legal services remains soft, as some experts predict. If their predictions are right – and they may not be – growth will then have to come by increasing market share i.e., taking business away from other firms.
- **Chief Value Officer.** Reflecting its commitment to the ACC's Value Challenge, Drinker Biddle & Reath recently became the first U.S. firm to create this position and appointed Kristin Sudholz. She and CMO John Byrne have equal oversight roles in the firm's enlarged and restructured marketing department.
- **Chief Marketing Officer.** The position is vacant in a number of major firms and few of them are recruiting a replacement. Instead, some of these firms are naming Marketing Partners to oversee separate marketing and business development functions. A few firms have appointed partners as full-time Business Development Officers with no billable hour requirements. On the other hand, MidLaw and some SmallLaw firms are hiring CMOs.
- **Business Development Coaches.** Firms are still retaining them. Some have backgrounds in industry but not with professional service firms.
- **Client Interviews.** More firms are either conducting them themselves or retaining experienced outside consultants to conduct them. The findings are used for strategic planning and also for developing action plans for specific clients.
- **Marketing Department Audits.** At least two BigLaw firms have hired a consultant to audit their marketing department.
- **Radio Advertising.** One firm in a major sports city is now running ads on sports talk radio, not to promote specific services but to raise the firm's name recognition.
- **Social Media.** It's here to stay and hotter than ever. LinkedIn is generally considered best for lawyers for business purposes and Facebook for personal purposes – and now perhaps for advertising. Legal marketing guru Larry Bodine states that "Facebook is the ideal place for law firms who are looking to get more 'bang for their advertising buck.'" Apps are getting hot too. However, in many firms the results from social media are mixed. Several experts comment emphatically that "It is over-hyped." Also see Other Trends & Issues.
- **Regulating the Internet.** The ABA is starting to explore regulating marketing on the Internet. This is meeting much opposition, as it should.
- **Web Site Bios.** Recognizing that web bios have become increasingly important in clients' selection of outside counsel, some firms such as Ballard Spahr are dedicating more resources to updating and improving them.
- **LawyerBid.com.** Houston attorney Chad Pinkerton has launched a new web site that allows people to post a summary of their legal cases online at no charge and then have lawyers bid to represent them.
- **Lawyer Rankings.** They're not new of course. And there are a number of them. But, in October *U.S. News & World Report* (remember that publication?) joined the crowd with its ranking of law firms. Who will be next – *Town&Country*?

## OTHER TRENDS & ISSUES

- **Social Media.** Issues are arising. Clients are increasingly asking for counsel on employees' use, and the management, of social media. Firms are now recognizing the need to develop electronic and social media policies for themselves. There are ethics considerations. There are challenges for lawyers in maintaining the confidentiality of client information. And there are many issues with respect to the use of social media in litigation. One report may have summed it all up: "The law has significantly lagged behind social networking."
- **Alternate Fee Arrangements (AFA).** They are increasing, mostly in the form of fixed or capped fees. But the sound and fury continues ("signifying nothing"?). The fact is that many GCs are still not raising the issue and most law firms, even if willing to discuss AFAs, are not raising the issue either unless the client does. What is lost in all the discussions about value – and how to define it – are two other issues that are important to many clients: Transparency, which hourly billing addresses, and Predictability, which fixed or capped fees address.
- **Mergers.** While U.S. mergers were down sharply the first three quarters of the year, they will get Hot again. Some had merely been put on hold. In other cases, firms see mergers as part of their strategy to increase revenues. Although a few much-discussed trans-Atlantic mergers were called off, at least two were finalized. Look for one or two more to occur in 2011.
- **Outsourcing.** Most reports indicate it is increasing, both by law firms and by corporate legal departments (which have been outsourcing for years). However, many firms won't discuss the subject because of concerns and misconceptions about the ethical implications.
- **Sustainability.** This is defined by some experts as "The ability to maintain and improve economic, environmental and social performance." A long-time issue in many companies, it is now becoming an issue with law firms and includes responsibility for diversity and *pro bono* work. Some corporations are now inquiring about law firms' sustainability programs.
- **Rates: Rising or Falling?** Some BigLaw firms have resumed their historic habit of raising rates. However, some MidLaw firms report that a few of the large firms, in their responses to RFPs, are "Cutting their rates below what we're at."
- **Secondments.** A British Army term referring to officers assigned temporary duty in other regiments. We reported in our 2008 Midyear Update that a growing number of U.S. firms were lending lawyers to the legal departments of major clients. This appears to have started up again, along with the question, "Do we bill the client and, if so, how?"
- **Dropping the baton.** "Passing the Baton", Bob Denney's article in the September/October issue of *Law Practice*, discussed a few firms that are electing or announcing their new leaders a year or more in advance. However, most firms are still not planning for the transition of management or client responsibility. One reason is that older partners are not retiring.
- **Firm Management.** Various surveys and conferences report that over 70% of the managing partners do not have a job description and that most partners do not know what their MP does. In addition, in firms of more than 100 lawyers, only 10% have full-time managing partners. Question: What business with revenues of \$40 million or more would have a part-time CEO and also not have a job description for the position, whether it's full-time or not?
- **Practice Organization and Management.** Has dropped to a lower priority in many firms. Yet the need for growth strategies, as discussed above, requires renewed and increased attention in this area.
- **Retreats.** Many of the firms that had stopped holding them the last two years are now scheduling them again. More are also using outside consultants to plan and facilitate them.
- **Strategic Planning.** Because the legal market has dramatically changed, firms need to either up-date their strategic plans or develop new ones. Some firms – but still too few – are doing so. However, the changes in the profession necessitate expanding the planning process to include more external input, such as through client interviews (discussed above), market research and competitive analysis. Then, in addition to marketing and business development, strategy development must also address internal issues including firm structure, fee structure, firm and practice group management, project management, profitability and lawyer recruiting and development. The resulting plan must state action steps with responsibility and include metrics to monitor implementation and indicate if the goals and objectives are being achieved.

- **Jumping ship.** Because of increased hourly rates and the loss of clients as a result, as well as increased billable hour requirements, experienced partners continue to leave large firms to join MidLaw and even SmallLaw firms.
- **“O Solo Mio”.** Lawyers from large firms are leaving and starting their own firms, often as solos. Some of the benefits they see are fewer conflicts, lower rates that appeal to more clients and that oft-mentioned “better quality of life”. As a result, the solo and small firm sections of many state bar associations have grown. Furthermore, since a growing number of law school graduates are starting out as solos, the University of Missouri-Kansas City School of Law has just started a program, the Solo and Small Firm Incubator, to help newly minted lawyers start their practices. Wonderful idea.
- **Home work.** For several reasons, including economics and a better work-life fit, a small but growing number of lawyers are moving their offices to their homes.
- **De-leveraging.** Larger firms are decreasing the number of associates – at least for now – and lowering associate-to-partner ratios, historically described as “leverage”. However, as discussed in our September, 2010 Communiqué, leverage is not dead. There is a “new leverage” which includes, not just associates, but all types of timekeepers as well as outsourcing and technology.
- **Mid-size firms.** Although some corporations continue to reduce the number of firms they retain (called “convergence”), most MidLaw firms continue to attract increasing amounts of work from major clients and are doing well. Some are thriving.
- **Law firm networks.** More important than ever because they enable small and mid-size firms to provide services through member firms in other jurisdictions and, in international networks such as LEGUS, in other countries.
- **Partner compensation.** During the recession, the spread in high-to-low partner compensation increased dramatically in many large firms. Now some of these firms are faced with the need to address the situation. This could lead to even more lateral movement of partners and splits or break-offs of high-performing practice groups. As we stated in our 2008 report, “The free agent market isn’t limited to major league baseball.”
- **Subsidiaries and joint ventures.** One of the hottest trends in the 1990s was firms forming subsidiaries to provide ancillary or non-legal services such as lobbying, public relations and foreign trade consulting. That trend cooled down but may now be heating up. Stevens & Lee and investment banking firm Griffin Financial Group are merging with an insurance consulting firm to construct and market insurance-related products for certain industries as well as state and local governments.
- **Firm structure.** As recently as three years ago, various sources estimated that over 60% of the firms with more than 150 lawyers and half the firms with 50-150 lawyers had at least one non-equity tier of partners. Since the recession began, a number of firms have abandoned the multi-tier structure. This mini-trend may now be reversing with the announcement by DLA Piper that it is putting on hold its plan to move to an all-equity structure.
- **Diversity.** Various sources have reported that the percentage of minority and women attorneys in U.S. law firms has declined. However, Building a Better Legal Profession, a student group at Stanford Law School, says the data it compiled indicates that much of the decline can be attributed to only 25% of the firms and has been due to lawyer layoffs and a slowdown in associate hiring.
- **Associate compensation.** Morgan Lewis & Bockius is now dropping its previously announced plans to adopt merit-based compensation for associates. However, other major firms including Reed Smith, Drinker and Cozen O’Connor, continue to announce they have dropped lockstep and are instituting merit-based compensation. And “across the Pond”, earlier this year Clifford Chance changed its associate bonus program to consider, not just billable hours, but also business and technical skills, client satisfaction, teamwork and community work.
- **More on firm management.** The increased pressure on managing partners and senior firm management to provide leadership and effective management has raised the level of responsibility being given non-lawyer managers i.e., COOs, Firm Administrators, HR Directors, CFOs and CMOs. Question: Is their compensation being raised proportionately?
- **Managing Partner Coaches.** Another result of the increased complexity and difficulties of the managing partner’s role is an increase in coaches for them. This coaching focuses on the process of leadership rather than on substantive management decisions.

- **Limited Scope Services.** Several attorneys in Arizona – and perhaps elsewhere – are offering limited-scope representation to make their services more affordable for clients facing economic hardships. The services are foreclosure, divorce and bankruptcy. To-date, about 60% of the case work is family law.
- **Non-lawyer CEOs.** In our Midyear Update we reported on the first firm we knew of to name a non-lawyer, non-partner CEO. We have since been informed that there is at least one other firm – Whyte, Hirschboeck, Dudek. Could this be the start of a trend?
- **Summer associate hiring.** A number of leading law schools reported an increase in the number of interviews with 2Ls for summer associate positions. And some BigLaw firms were expected to increase the number of hires for next summer compared to this year.
- **CLE accreditation.** It is costly and confusing to wade through the maze of various states' regulations to get CLE programs certified. Tim Baran in New York saw this as an opportunity and created uMCLE, an on-line business to help law firms and companies obtain accreditation for their CLE programs. This is a great example of entrepreneurship i.e., identifying a need and filling it.
- **PPP.** In last year's report, we said reporting profits/partner doesn't make sense when clients are pressuring firms to reduce fees. Earlier this year, Ralph Baxter, chair and CEO of Orrick Herrington & Sutcliffe, announced the firm will no longer report its PPP. To our knowledge, no other firms have yet made this decision. But we wholeheartedly agree with Steve Taylor, who wrote in *Of Counsel*, "We hope that Baxter has set another trend in motion."
- **Law school applications.** The number of lawyers in the 250 largest firms declined 4% last year and has continued to drop this year. 70% of the decline is in the associates ranks. Yet law school applications increased 7% this year. What's going on here? Is a law degree replacing the MBA as the "degree of choice" as it was many years ago?
- **Law school curriculum.** Starting this fall the University of Buffalo Law School requires students to take a third semester of courses that teach legal analysis, writing and research as part of its Legal Skills Program. Professor Charles Ewing, who directs the program, says "Anybody who calls themselves a litigator has to do a trial."
- **Boutique firms.** The label stems from their focus on certain specialties, not necessarily their size. Most of them are more successful than ever.
- **Firm names.** In recent years the trend in firm names has been to shorten them. But Metz Lewis recently changed its name to Metz Lewis Brodman Must & O'Keefe – and not as the result of a merger. Is the name pendulum going to swing back in the opposite direction? We hope not.
- **Legal department budgets.** A few reports written several months ago stated that, while corporate legal departments are hiring more internal staff, for the first time in ten years they plan to spend less on outside counsel next year. However, many companies are now reporting better than expected profits. If that trend continues as the economy recovers, the predicted cuts in their outside legal spending may not occur.
- **A final word.** Yes, 2011 will begin in confusion and uncertainty for the legal profession. There will be some further change. There will be more layoffs and problems in certain major firms and demand for some legal services may remain soft. However, even in the face of continued political partisanship, above average unemployment and concerns about the global economy, there are many signs that the U.S. economy will continue its recovery – perhaps even faster than some experts predict. In law firms most major practice areas are now Hot or Getting Hot. Furthermore, most firms are now in stable financial condition and many are improving their management. These are some of the reasons why we say the legal profession and most law firms will do much better than predicted in 2011.

*Robert Denney Associates Inc. has provided strategic management and marketing counsel to law firms throughout the United States and parts of Canada for over 30 years. Recent Communiques, as well as information about our services, are posted on our web site [www.robertdenney.com](http://www.robertdenney.com)*