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NEW YORK STATE BAR ASSOCIATION

Journal

NYSBA

Maybe Mom and Dad Were Right

Musings on the Economic Downturn

by Gary A. Munneke

Special Issue on Law Practice Management with Articles by

Rachel J. Littman
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Forms on CD

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Practitioner's Handbook for Appeals to the Court of Appeals, Third Edition

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PN: 4017 / **Member $48** / List $57 / 234 pages

Public Sector Labor and Employment Law, Third Edition (2008)

It's the leading reference on public sector labor and employment law in New York State. Everyone will benefit from its comprehensive coverage, whether they represent employees, unions or management. Practitioners new to the field, as well as seasoned attorneys, will benefit from the book's clear, well-organized coverage of what can be a very complex area of law.
PN: 42057 / **Member $150** / List $185 / 1,568 pages

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New York Lawyer's Deskbook, Second Edition (2008–2009)

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BY GARY A. MUNNEKE

DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media.

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The New York State Bar Association health insurance program is administered by USI Affinity.

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MICHAEL E. GETNICK

Solos and Small Firms: Survival 101

It may surprise you that solo and small firm attorneys constitute nearly 60% of State Bar membership. And, given the widely reported trend that a growing number of attorneys are starting their own firms as a way to survive the economic downturn, we fully expect – and hope – to see this segment of our membership grow.

Those of you who have been flying solo for years know that it can be extremely difficult to manage your practice, even when the economy is thriving. Those of you transitioning from large law firms and stepping out on your own for the first time are likely finding that hanging a shingle is a huge undertaking. It requires start-up funds, and loans may be hard to secure in this financial climate; and there is an increased exposure to risk that comes from broadening practice areas, which may be required to run a successful solo or small firm business.

Whether you have been a solo practitioner for two months or 20 years, the State Bar has tools that can help you succeed. We're adding to our current offerings – which already include our online Solo and Small Firm Resource Center, located at www.nysba.org/solo, and the blog Smallfirmville.com – so I am taking this opportunity to update you on our progress and share some new resources that are especially relevant to solo and small firm attorneys.

Solo/Small Firm Report Approved

At its June meeting in Cooperstown, the House of Delegates approved the report and recommendations of the Special Committee on Solo and Small Firm Practice. This key report set forth several short-, mid- and long-term recommendations, which we are already implementing. The recommendations include making improvements to our Web site to ensure ease of access to our resources and tools; creating a permanent institutional home for solo and small firm practitioners within the State Bar; coordinating with our Law Practice Management Committee to develop a comprehensive database of print and online resources and to boost support in the areas of technology and risk management; investigating opportunities for discounted or free electronic legal research; and increasing the volume of educational programs and publications tailored to solos and small firms. I am grateful for the committee's work and its willingness to continue on for another year to oversee the realization of its recommendations. Rest assured that this report will not sit on a shelf and collect dust. Indeed, we have already made some progress.

Check Out New Benefits

For starters, we have added a new and timely online member resource: the revised Power of Attorney form. On September 1, the Power of Attorney legislation becomes effective, requiring the use of a revised form. Earlier this year, we advocated for the extension of the effective date, which was originally set for March 1, 2009. The extra time has allowed lawyers to become educated about the change in the law and provided us with the opportunity to create a Power of Attorney form, which members can now download for free at www.nysba.org/poaform. The new form comports with the new law. It also contains some useful clauses, at the suggestion of our expert members who have reviewed the form, which can be added if needed. We continue to monitor the Legislature's ongoing consideration of several technical amendments to the statute, and we will modify the form pursuant to those changes as necessary.

In addition, as I write this message, we are in the process of negotiating an exciting member discount on legal research from Westlaw. Beginning in September and running through the end of 2009, members at firms with one to five attorneys who do not currently subscribe to the Westlaw service will be able to save up to 50% off the current retail rate – a savings of up to $100 each month. We are also in the process of negotiating legal research benefit offers with other vendors, including LoisLaw. Reduced-cost legal research is one of the benefits members have requested, documented in the Solo and Small Firm Report noted above, and I am pleased that we can offer this benefit in 2009. Solo and small firm members are urged to take advantage of this benefit. The savings you realize will more than cover the cost of your dues.

MICHAEL E. GETNICK can be reached at mgetnick@nysba.org.

Bring in New Business

In the report cited above, the committee noted that the task of marketing and acquiring new clients is the number two challenge faced by solo and small firm practitioners. Marketing is costly, and it is often difficult to discern whether the advertising dollars you spend are a good investment. So, why not let the State Bar take on some of the marketing costs? Our Lawyer Referral and Information Service is here to help. Now available to attorneys in 41 counties after the recent addition of Warren County, the LRIS makes nearly 3,000 referrals each year. Our participating members advise us that the LRIS is an important referral source for their firms, especially during this economic downturn. And many are finding that the LRIS is helping them to expand their practices. The LRIS can be a particularly valuable resource for solo and small firm practitioners. I hope you are taking advantage of this low-cost avenue to generate business.

For only $75, members can join the referral service, and the State Bar provides TV, radio and phone book advertising. Receiving just one referral will more than pay for the membership fee. Last year, one referral panel attorney received $200,000 for an individual case. Moreover, the LRIS provides a public service. Potential clients call the State Bar because they know they will be referred to a qualified and credible attorney. With the LRIS, everyone wins. To sign up, go to www.nysba.org/joinlr.

Get Help With Your Transition

Our Committee on Lawyers in Transition is continuing its terrific, free Webcast series that provides expert guidance to lawyers who have recently lost their jobs or are transitioning into new practice areas. The programs offered this past spring and summer include networking, updating a resume, interviewing and marketing your talents in a down economy, exploring alternative careers and networking through social media. Fall programs include finding employment opportunities at small law firms, marketing your firm in a tight economy and reaching out to the Lawyer Assistance Program. All of these valuable programs will be made available for free downloading and viewing from our Web site at www.nysba.org/lawyersintransition.

Do Pro Bono

Many of our members who do pro bono report that it not only makes them feel good to help others, it also provides them with additional experience and contacts that, in turn, help them to expand their business. Our Pro Bono Department is co-sponsoring several CLE programs in the areas of bankruptcy, wills and health care proxies, and mortgage foreclosures. The courses are free to attorneys willing to accept a minimum of three pro bono cases annually, in each area in which they receive training. For more information on these free courses, visit our Pro Bono Department Web site at www.nysba.org/probono or contact our Pro Bono Department at probono@nysba.org.

In addition, if you have donated 50 or more hours this year to pro bono service, be sure to apply for the Empire State Counsel designation. In 2008, more than 1,300 members qualified for this honor, collectively donating more than 65,000 hours of legal services to the poor. The designation comes with a certificate, lapel pin, and listing on our Web site. All designees are honored during the Justice for All luncheon, held each year during Annual Meeting week. Help us top last year's record participation.

The NYSBA Is Here to Help

Whether you take advantage of one or a combination of these member benefits, it is our hope that the end result will be that you can do more with less, boost your bottom line and move from surviving to thriving, even in this tough economy. And, we want to ensure that financial hardship does not prevent our members from accessing these benefits. If your financial circumstances do not allow you to afford the full dues amount, be sure to contact our Membership Department at membership@nysba.org and ask about our dues waiver program. Everyone can afford the benefits of membership.

Lawyers helping lawyers! The NYSBA is your ally and your best resource tool. We are all about you. ■

Law Practice Management

This issue of the *Journal* is dedicated to providing you with advice, tools and resources to help you survive the down economy and position your practice to thrive when the economy rebounds. Covered topics include navigating the job market, boosting your profits by getting more bang for your buck, and marketing your practice. I am particularly grateful to Gary Munneke, chair of our Law Practice Management Committee, who has not only contributed a thoughtful article to this issue, but also has moved full speed ahead on my challenge to provide even more practice management assistance to our members during this tough time. Remember, if you like what you see on these pages, there's much, much more on our Web site: www.nysba.org/LPM.

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Tentative Schedule of Fall Programs *(Subject to Change)*

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

New Section 457A
September 17 — New York City

Bridging the Gap – Fall 2009
(two-day program)
September 23–24 — New York City (live session)
Albany; Buffalo
(video conference from NYC)

Practical Skills: Basic Matrimonial Practice
October 5 — Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

New York Appellate Practice
October 8 — Albany
November 5 — Long Island
November 13 — Westchester

No Fault – What You Need to Know in New York
October 9 — New York City
October 14 — Long Island

Representing Licensed Professionals
October 15 — Long Island
November 5 — New York City
November 12 — Albany
November 19 — Syracuse

Public Utility Law
October 16 — Albany

Law School for Claims Professionals
October 16 — Buffalo; New York City
October 23 — Long Island
October 30 — Albany
November 6 — Syracuse

Medical Malpractice
October 16 — Syracuse
November 4 — Buffalo; Long Island
November 18 — Rochester
November 19 — Albany; New York City

Practical Skills: Introduction to Estate Planning
October 19 — New York City
October 20 — Albany; Buffalo; Long Island; Rochester; Syracuse; Westchester

Update – 2009 (live session)
October 23 — Syracuse
October 30 — New York City

Practicing Matrimonial and Family Law in Chaotic Economic Times
(9:00 am – 12:45 pm)
October 23 — Buffalo
November 6 — Long Island
November 20 — Syracuse

Limited Liability Companies
October 27 — Westchester

Using Powerpoint at Trial
November 4 — New York City

Practical Skills: Purchases and Sales of Homes
November 10 — Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

Securities Arbitration
November 12 — New York City

Ethics and Professionalism
(9:00 am – 12:35 pm)
November 12 — New York City
November 13 — Albany
November 17 — Long Island

†Update – 2009 (video replay)
November 13 — Albany; Rochester
November 18 — Binghamton
November 19 — Ithaca; Long Island; Saratoga
November 20 — Canton; Utica; Watertown

Handling Tough Issues in a Plaintiff's Personal Injury Case
November 13 — Buffalo; New York City
November 20 — Albany; Long Island

The Contested Accounting Proceeding in Surrogate's Court: The Law and Techniques You Should Know
(9:00 am – 1:00 pm)
November 17 — Buffalo
November 20 — Westchester

Practical Skills: Civil Practice – The Trial
November 18 — Albany; Buffalo; Long Island; New York City; Syracuse; Westchester

†Corporate Counsel Institute
(two-day program)
November 19–20 — New York City

†Seventh Annual Sophisticated Trusts and Estates Institute
(two-day program)
November 19–20 — New York City

Construction Site Accidents
November 20 — Buffalo

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

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Maybe Mom and Dad Were Right

Musings on the Economic Downturn

By Gary A. Munneke

I grew up in the Prosperous Fifties, when the American economy was strong, people who wanted to work almost always could, and tomorrow promised to be better than yesterday. My parents, however, did not take this state of affairs for granted. Their formative years were spent in the Roaring Twenties, a period of economic expansion in this country following the end of the War to End All Wars. By the time they reached their teenage years, the nation was deeply mired in the Great Depression, and the hope for world peace dwindled with each passing year. By the time they graduated from college, a Second World War had engulfed the globe, and their fledgling marriage in 1942 was interrupted by military service for my Dad. Scrimping and saving out of economic necessity turned into scrimping and saving out of patriotic duty, but the record is clear: by the time my parents were re-united in 1946, they had spent over two-thirds of their lives scrimping and saving.

Mom and Dad never forgot the lesson that prosperity can be fleeting. No matter how good times are, tomorrow could turn on a dime. Their response was to live their lives doing what they knew best to be ready for the proverbial rainy day: scrimp and save. We didn't live in the biggest house or drive the fanciest car. We didn't vacation in the most exotic spots, and when we got to our destination, we didn't stay in the most luxurious hotels. We didn't eat out all that much, and my mother stretched the food budget by finding countless ways to reconstitute leftovers into some new dish that disguised the original contents.

This lifestyle was not because we were poor. Au contraire! My father had a good job as a tenured college professor, supplemented by consulting gigs with companies that were expanding with the economy. By the time my sister and I were teens, my mother had gone back to work as a speech pathologist, a career she had put on hold to have a family. Even when they retired in the mid-1980s, they watched their pennies. Although they traveled the world and owned a second home, it is safe to say that the word "frivolous" was not in their vocabulary.

My sister and I had a different experience. Baby Boomers, children of the '50s and the Cold War, we never witnessed the global meltdown of the Great Depression. There were, to be sure, periodic recessions, which incon-

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venienced us more than overwhelmed us. We had to sit in lines during the '70s to get gasoline, and in the early '90s we lost a little spare cash on a tech penny stock that didn't pan out. The Soviet Union collapsed and the Berlin Wall fell, just because President Reagan said, "Mr. Gorbachev, tear down this wall." Or so it seemed.

We never carried on the tradition of scrimp and save. We always thought our parents were a little bit eccentric for looking over their shoulders to discern signs on the horizon of the coming meltdown. They both passed away before our current economic woes began to escalate, so they never had the opportunity to look us in the eye and say, "Aha, we told you so!" Not that they would want us to suffer, but if they were here now, they would feel justified in their lives of moderation.

ing like grasshoppers in the Year of the Ant. Maybe Mom and Dad and those now-retired senior partners from, how can I say it, the Greatest Generation were right. Maybe a little more scrimping and saving and a lot less excess would have placed us in a better position than we find ourselves in.

All is not lost. Undoubtedly, some firms are stronger than others, and they will survive. Other firms may figure out that it is time to change before it is too late. All firms can count on the fact that the economy will turn around again, and that the key for many of them is to hold on until better days arrive. All is not lost.

This issue of the *Journal* takes a look at the legal profession as it confronts the most serious economic downturn since the Great Depression, but the focus is not on what

It should come as no surprise that Boomers and Xers, ensconced in their law firm castles, believed like Prospero that they could keep the Red Death at bay.

My children, members of the so-called Gen X, may be less prepared for the economic downturn than their Boomer parents. Their experience has taught them to expect the best. While my Mom and Dad were conservative in their finances, and quick to warn of the risks of profligacy, my children grew up with every convenience, protected from the vagaries of economic instability. Like Prince Prospero in Edgar Allen Poe's short story "The Masque of the Red Death," where the prince gathers up all his friends and family, ensconcing them in his impenetrable castle, only to learn that the Red Death knows no walls, we chose to protect our children rather than prepare them for bad times.

Boomers and Xers now populate law firms and legal departments in 21st-century America. The current crop of law students and young lawyers may hail from a new generation, Gen Y, but the focus of these comments is on the Boomers and Xers, who represent the decision makers in the legal profession today. The Boomers may have been warned by their predecessors at the helm of law firms that the good times might not always be good, that what goes around comes around, and that in the old fable of the ant and the grasshopper, it is better to be the ant than the grasshopper. We didn't listen particularly well. The Gen Xers emerged on the scene with a blithe expectation that things would work out for them, because someone had always provided a safety net to protect them from harm.

It should come as no surprise that Boomers and Xers, ensconced in their law firm castles, believed like Prospero that they could keep the Red Death at bay. The economic meltdown of 2008 and 2009 has proven that lawyers and law firms are not immune from the consequences of living

went wrong, or why. The articles in this issue examine how lawyers and law firms can survive, and thrive again when the economy improves.

Assistant Dean Rachel Littman, of Pace Law School, takes a look at the job market for lawyers in the 2009 economy, exploring not only how the job market for lawyers has eroded, but also where opportunities exist for job hunters. A constant barrage of stories in the legal press might be discouraging to anyone looking for a legal job, but Dean Littman makes it clear that this is no time to give up.

Arthur Greene, a legal consultant and former law firm partner, examines how lawyers can squeeze more profit out of less income by frugally managing various aspects of internal law firm operations. Perhaps as much as any other article, Greene's message is the same as my Mom's and Dad's: scrimp and save, get the most out of what you have, and you can survive this recession intact.

Anthony Davis, a New York lawyer whose practice focuses on law firm risk management, and David Elkanich, of Portland Oregon, discuss particular management issues that can lead to professional liability. They note that in times of economic crisis clients may try to shift the burden of loss to counsel. For example, if a company has lost money on a deal that threatens the economic well-being of the company, it may consider suing its law firm (insured for malpractice liability) for advice provided by the firm in the course of the transaction that produced the loss.

In an article on marketing in a down economy, consultants and authors Sharon Nelson and John Simek suggest that lawyers and law firms need to redouble their efforts to reach potential clients through innovative marketing methods. They especially encourage lawyers to utilize

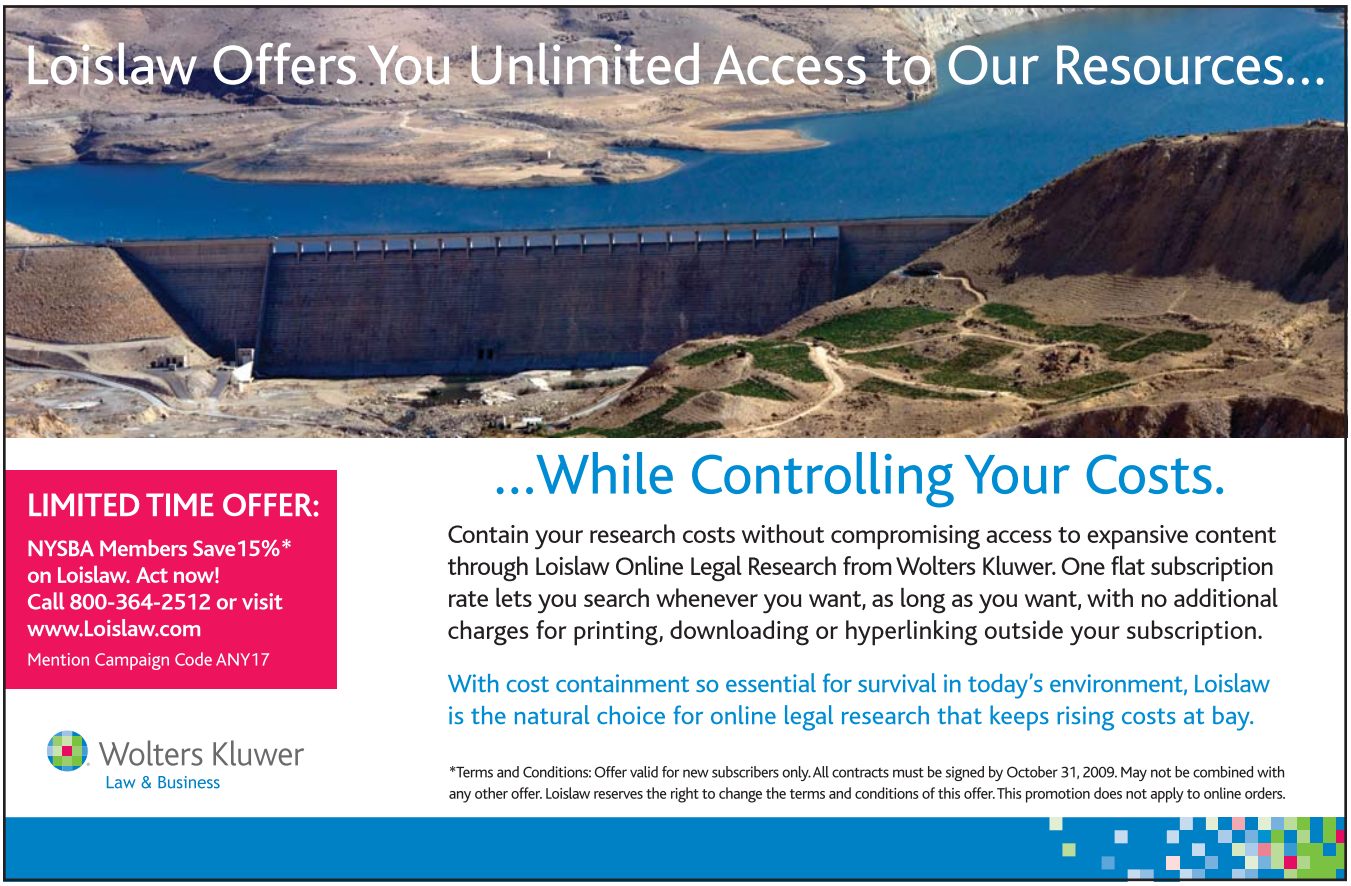
technology to get the word out about what services they provide and to whom.

Together, these articles provide a blueprint for addressing and lessening the impact of the recession. Although much of the press coverage of the recession with respect to the legal profession has swirled around the largest law firms, variously referred to as "BigLaw" or the "AmLaw 100," the problems generated by the economic downturn are not limited by firm size or location. Large firm practice may be more visible and easier to study because of the availability of data upon which to draw inferences. What happens on Wall Street may portend trends in the profession that extend to Main Street. The lessons learned from the demise of leading law firms might make good case studies for Business School and Law School classes on law practice management.

In the end, large firms are just one segment of a large and diverse profession. Some of the problems that large firms have encountered are endemic to any recessionary period; some are attributable to this particular recession; and some are different in various ways from the problems faced by smaller firms and solo practitioners. The key is for law firms to sort out what is important to them in their unique practice settings. All firms, regardless of size, need to think strategically, operate economically, work efficiently, and deliver services effectively. These are the best guarantees for surviving the current downturn and enjoying the economic upswing, whenever it comes.

Although much of the press coverage of the recession with respect to the legal profession has swirled around the largest law firms, the problems are not limited by firm size or location.

For Baby Boomers and Gen Xers, it may not be as easy as it ought to be. We have a lifetime of living like grasshoppers, just as Mom and Dad spent a lifetime living like ants, even when they could have abandoned their ant-ly ways. Law firm leaders of today still have the opportunity to learn from Mom and Dad to scrimp and save, both personally and professionally. If today's law firm leaders do not learn from their predecessors, they may find themselves marginalized in the legal marketplace, or forced into early retirement. Interestingly, the new associates in our firms, the representatives of Gen Y, may know the answer: we need to leave a smaller footprint, by practicing sustainably, or the recession of '08–'09 will look like nothing compared to what is to come. ■



BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org or david.horowitz@brooklaw.edu) practices as a plaintiff's personal injury lawyer in New York and is the author of *New York Civil Disclosure* (LexisNexis), the 2008 Supplement to *Fisch on New York Evidence* (Lond Publications), and the *Syracuse Law Review* annual surveys on Disclosure and Evidence. Mr. Horowitz teaches New York Practice, Evidence, and Electronic Evidence & Discovery at Brooklyn, New York and St. John's Law Schools. A member of the Office of Court Administration's CPLR Advisory Committee, he is a frequent lecturer and writer on these subjects.

Not[e] Bene

The volume of mail in response to May's column, "It's the Note of Issue, Stupid," exceeded that of all prior columns. Many readers took exception to what they perceived to be the slight I visited upon the note of issue, together with its sidecar, the certificate of readiness. To those readers, and the "Note" itself, I offer a heartfelt apology. To prove no slight was intended, I devote the entirety of this column to explaining this oft-maligned and misunderstood document. So, *nota bene*,[1] the note of issue.

The note of issue is the subject of CPLR 3402, which must be read in conjunction with Uniform Rule 202.21 that, in turn, contains the requirement that a certificate of readiness accompany the note of issue.[2] Rule 202.21 also contains model forms for both documents,[3] and procedures for demanding a trial by jury,[4] for obtaining a waiver of the requirement that all pretrial proceedings have been completed,[5] and for both vacating[6] and reinstating[7] the note of issue, along with special rules for certain medical malpractice,[8] municipal,[9] and matrimonial actions.[10] Finally, Rule 202.21(h) provides that a new note does not have to be filed when a substitution of a party occurs.[11]

The filing of the note of issue, generally undertaken by the plaintiff, was designed to, and in some locales still does, signal the court that pretrial proceedings have been completed and that the action is ready for trial.[12] The steps to accomplish this task are threefold: drafting, serving, and filing. First, the attorney[13] must draft the required documents – the note of issue and, since 1986, the certificate of readiness, both of which must be signed pursuant to Rule 130-1.1. Second, the attorney must serve copies of the documents upon the parties to the lawsuit. Third, the attorney must file, within 10 days of the date of service, the original and one copy of the note of issue and certificate of readiness, with proofs of service where service is required, with the county clerk, and file a duplicate original with any required proofs of service with the clerk of the court,[14] together with payment of the calendar fee required by CPLR 8020 (unless application is made as a poor person).[15]

Where deadlines are measured from the filing of the note of issue,[16] it is the successful filing of the note of issue with the court that is the required act. Service without filing, or service before but filing after the deadline, will not suffice. The party serving and filing the note of issue is required to serve and file as well a statement of readiness to accompany the note of issue, and is required to indicate in that document, *inter alia*, that all disclosure is completed or waived,[17] although the certificate of readiness may be waived by order of the court upon motion supported by affidavit if disclosure cannot be completed.[18]

Where the party filing the note of issue seeks a special preference[19] and/or demands a trial by jury,[20] care must be taken to make both applications contemporaneously with the filing of the note of issue. Unless the court orders otherwise, CPLR 3403(b) requires that a party serving and filing the note of issue and claiming entitlement to a special preference serve a notice of motion requesting the preference with the note of issue.[21] The same rule requires a party, other than the party filing the note of issue, that claims entitlement to a special preference to serve a notice of motion within 10 days of service of the note of issue.[22] An exception contained in CPLR 3403(b) permits a motion to be made at a later date where a party attains the age of 70 or is terminally ill.[23] CPLR 4102(a) requires that the party filing the note of issue who wants a jury trial make the demand in the note of issue.[24] The same rule requires a party served with a note of issue that does not contain a demand for a jury trial, who wants one, to serve and file in the same court a demand for a jury trial within 15 days of service of the note of issue.[25]

In recent years the practice has developed in certain counties, primarily downstate, whereby the plaintiff is directed to file the note of issue by a deadline set by the court, whether or not all pretrial proceedings, including disclosure, have been completed. This practice is designed to ensure that all actions pending in the county are placed on the trial calendar within the deadlines established by Differentiated Case Management[26] (D.C.M.) and, if they are not timely calendared, they are dismissed.

In these counties, courts acquiesce in the filing of a certificate of readiness that, rather than signifying that disclosure has been completed or waived, states that certain disclosure remains to be completed, and goes on to enu-

merate the outstanding disclosure. This practice obviates the intended function of the note of issue: to signal the court that the action is ready for trial and can thus be placed on the calendar to progress in an orderly and fair manner, with other trial-ready cases, to trial. The practice can also wreck havoc with other aspects of the court's control of its calendar, such as when a case progresses on the calendar to trial with outstanding disclosure issues remaining, as well as when summary judgment motions, whose service is measured from the filing of the note of issue,[27] are served on the eve of trial, with the post-note disclosure providing the good cause shown.

The remedy for a prematurely filed note of issue, vacatur of the note on motion by a party to the action,[28] is, more often than not, resolved by a stipulation, generally entered into less than willingly by the moving party, whereby the outstanding disclosure is provided by a subsequent deadline set by the court, during which time the action remains on the trial calendar. Alternatively, the practice in at least one county is, for all practical purposes, to bar the filing of motions to vacate notes of issue pending a conference with the court to resolve all outstanding disclosure issues, invariably resulting in the same type of stipulation. Thus, while the necessary outstanding disclosure does get exchanged, however tardily, the motion is mooted and the case continues its progression towards trial on the court's trial calendar.

Thus, the note of issue, upon whose filing (and shoulders) a great deal is often at stake. The filing of the note of issue can signal a beginning, as in beginning the time a case must wait on the trial calendar. It can signal an end, as in the end of disclosure. And it can signal the beginning of the end, as in starting the ticking of the clock winding down the time a party has, of right, to move for summary judgment. For the signal to be clear, however, it must be clear what the filing of the note of issue signifies. When it is no longer clear that the note of issue signifies, *inter alia*, the completion of pretrial proceedings, including and primarily disclosure, the signal cannot be clear. Hence, the potential for mischief and mayhem outlined in May's column. ■

It must be clear what the filing of the note of issue signifies.

1. "L[atin] observe well . . . usually written N.B." Webster's New Twentieth Century Dictionary, Unabridged (2nd ed.).
2. 22 N.Y.C.R.R. § 202.21(a).
3. 22 N.Y.C.R.R. § 202.21(b).
4. 22 N.Y.C.R.R. § 202.21(c), and referring to CPLR 4102 and CPLR 8020.
5. 22 N.Y.C.R.R. § 202.21(d).
6. 22 N.Y.C.R.R. § 202.21(e).
7. 22 N.Y.C.R.R. § 202.21(f).
8. 22 N.Y.C.R.R. § 202.21(g).
9. *Id.*
10. 22 N.Y.C.R.R. § 202.21(i).
11. 22 N.Y.C.R.R. § 202.21(h).
12. A note of issue and certificate of readiness is not required to be served and filed where application is made for court approval of the settlement of a claim for an infant, incompetent, or conservatee. 22 N.Y.C.R.R. § 202.21(a).
13. Or party *pro se*.
14. 22 N.Y.C.R.R. § 202.21(a).
15. 22 N.Y.C.R.R. § 202.21(c).
16. *See, e.g.*, CPLR 3212(a).
17. 22 N.Y.C.R.R. § 202.21(b).
18. 22 N.Y.C.R.R. § 202.21(d).
19. CPLR 3403(b).
20. CPLR 4102(a).
21. CPLR 3403(b).
22. *Id.*
23. *Id.*
24. CPLR 4102(a).
25. It is, of course, problematic that the reaction time for attorneys served with a note of issue varies, with 10 days to make a motion for a special preference, and 15 days to accomplish the less arduous task of serving a demand for a jury.
26. 22 N.Y.C.R.R. § 202.19.
27. CPLR 3212(a).
28. 22 N.Y.C.R.R. § 202.21(e).

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Finding the Silver Lining: The Recession and the Legal Employment Market

By Rachel J. Littman

The economic recession has affected the legal market as much as any other industry. The news media is replete with references to and articles on law firm layoffs and corporate legal department budget cuts. Those with a prurient interest and a sense of schadenfreude can check daily the Layoff Tracker (http://lawshucks.com/layoff-tracker), a running list of law firm layoffs provided by Law Shucks, an online legal tabloid. AboveTheLaw.com also provides a daily e-mail feed for the latest legal industry gossip, internal law firm memos, misdirected and astonishingly unprofessional associate e-mails, and other up-to-the-minute scoops on law firm life.

Revising the Legal Landscape

Not all the news is bad, though. The legal industry is now taking a serious look at how it recruits, hires, trains and retains its lawyers. This introspection means the profession is paying serious attention to how best to provide efficient and valuable legal services for clients as well as create legal service businesses that comprise talented and committed lawyers.

It is important to note that the media attention has primarily been bestowed upon large law firms, namely the top 100 firms ("BigLaw") as ranked annually by *The American Lawyer*, most of which are concentrated in major metropolitan areas like New York City, Los Angeles, Philadelphia and Chicago. In the once-conservative world of law school recruiting, these firms are now rescinding offers or granting paid deferrals to recent law school graduates to whom they offered permanent post-graduate positions. To address the slowdown in work and in an attempt to retain their best talent, they are also offer-

ing paid furloughs to associates in slow practice areas. Many of those firms who still have summer associate programs this year have indicated that they do not expect to give offers to each law student, making for a highly competitive summer. Some firms have even indicated that they expect to defer the start date for next year's incoming class, leaving everyone to question the efficacy and future of law firm recruiting methods. Coupled with an almost zero level of voluntary attrition – 16% by the latest National Association for Law Placement (NALP) Foundation research – as compared to the more robust times of earlier years, the legal industry as we know it is poised for a change.

Public interest lawyers and the organizations in which they work are also feeling the direct hit of the down economy. Most state and local government departments and agencies are facing budget cuts and hiring freezes. Public interest organizations, like those that provide direct legal services to the disenfranchised and low-income members of society, are experiencing fewer and lower amounts of donations, grants and financial support, making it harder for them to provide their much-needed services. Many public interest legal organizations are reaping the benefit of free legal help from deferred law firm associates, but they have limited resources to sufficiently train and utilize these new lawyers. Resentment is building not only among the entrenched public interest lawyers at these organizations as they try to figure out how to be year-long repositories of BigLaw lawyers, but also among the deeply committed public interest law school students and graduates who have been working their entire careers to secure coveted public interest positions – the same positions that are now being taken by questionably prepared colleagues with funding at twice the average $44,000 starting salary.[1]

Finding a full-time legal job has been and will continue to be a challenging process. There are handfuls of 2008 graduates who have been scraping by with temporary or non-legal positions since their graduation last year. Job prospects continue to look dim for the Class of 2009 and for the next year or two of law school graduating classes. Law school graduates who are waiting for bar exam results and have not yet secured full-time legal employment may not have the option of sustaining themselves with temporary contract work the way their predecessor graduates did. Many placement agencies do not have access to the work into which they could place law school graduates awaiting bar results. The types of clients and law firms that traditionally supplied the kind of legal work that lent itself to teams of contract attorneys are keeping it in-house. Or, in the case of large merger or litigation matters, the work is simply not happening.

Some sectors of the legal employment market are faring rather well in this economy. Many small and midsize firms are finding it more economical to hire on a contract or as-needed basis, which is often mutually beneficial to the firms and the many attorneys who would otherwise have no work. Law schools are also producing savvier graduates. Many new lawyers were still finishing their legal education when the economic downturn started in late 2007; they have had the time to prepare themselves for the new economy and develop attitudes of realism and flexibility rather than one of panic.

The Delayed and Trickle-Down Effect

The down economy has affected not only the top law firms but their clients and their local outside counsel as well, not to mention each year's class of graduating law students. As a result of the deferrals, stagnant voluntary attrition, forced layoffs and the down economy, there is a glut of highly qualified new and experienced lawyers in the market. Lower recruiting and hiring rates by top law firms at top law schools mean there is a trickle-down effect for the rest of the legal market. Law students in suburban or rural communities or from lower ranked law schools are now having to compete with graduates of top-tier schools and experienced lawyers who have been let go from BigLaw firms. The upside for employers, particularly smaller ones, is that they are receiving resumes from levels of talent and experience that they could only have dreamed of acquiring at the salaries they can afford to pay. Firms with practices in bankruptcy, restructuring, and bank regulatory work – particularly related to TARP (the federal government's Troubled Asset Relief Program) and other economic stimulus initiatives – have been holding steady, providing a constant and even recently increased need for lawyers.

In-house legal departments (*i.e.*, the clients) are also feeling the economic pinch. Often beholden to their shareholders and their bottom line, companies are looking to cut costs and receive as much value for their legal dollar as they can.[2] In-house legal departments, too, have had to let some of their attorneys go; not subject to the overinflated hiring practices of their outside counsel, however, they have been able to do so at a lower rate and in a more surreptitious manner than law firms. The silver lining for corporations and their outside counsel is that many in-house legal departments are saving money and creating valuable opportunities by shifting some legal work from large, expensive law firms to more local firms.

Market watchers have been tracking layoffs and recruiting reductions for over a year now, though it is generally agreed that the legal industry has not yet felt the full effects of the down economy. The initial U.S. unemployment claims may have started to level off – albeit at record high levels – at the end of May this year, but the number of people entering and staying in the job market has been increasing at a rate faster than the creation of new jobs. Based on statistics from the NALP and the American Bar Association, the 200 ABA-approved law schools in the United States add around 42,000 students each year to the legal market. Not all of those graduates are looking for employment, but add those numbers to the 4,426 attorneys laid off between October 2008 and May 2009 alone,[3] and the steady increase in law school enrollment each year,[4] and we have the makings of an unsustainable state of affairs.

Where Is the Market Likely to Go?

The general consensus in the legal community is that law firm layoffs will likely continue deep into 2009 and possibly into 2010. Associate salary pay structure – particularly at BigLaw – is not sustainable and has already started to change at some firms. It is unlikely that big-city law firm starting associate salaries will ever return to the heretofore expected six-figure levels ($160,000 for the entering Class of 2008). Already, some of these highest-paying firms have taken the leap and cut associate salaries to $125,000. Some may even go to $100,000 or below – particularly those firms bold enough to try to implement an apprenticeship-type system for the first few years of practice. Small and midsize firms whose partners barely break the six-digit salary level are not having to make as drastic cuts; many of them have had a pay structure closely tied to what they can realistically afford to pay their attorneys (and charge their clients) without the pressure of a competitive market, thus cushioning themselves against the recession.

As a result of the deferrals, stagnant voluntary attrition, forced layoffs and the down economy, there is a glut of highly qualified new and experienced lawyers in the market.

The structure of how law is practiced, particularly at large Manhattan firms, will likely change. Permanently. Hildebrandt, a professional services consulting and research firm,[5] noted in its *2009 Annual Report to the*

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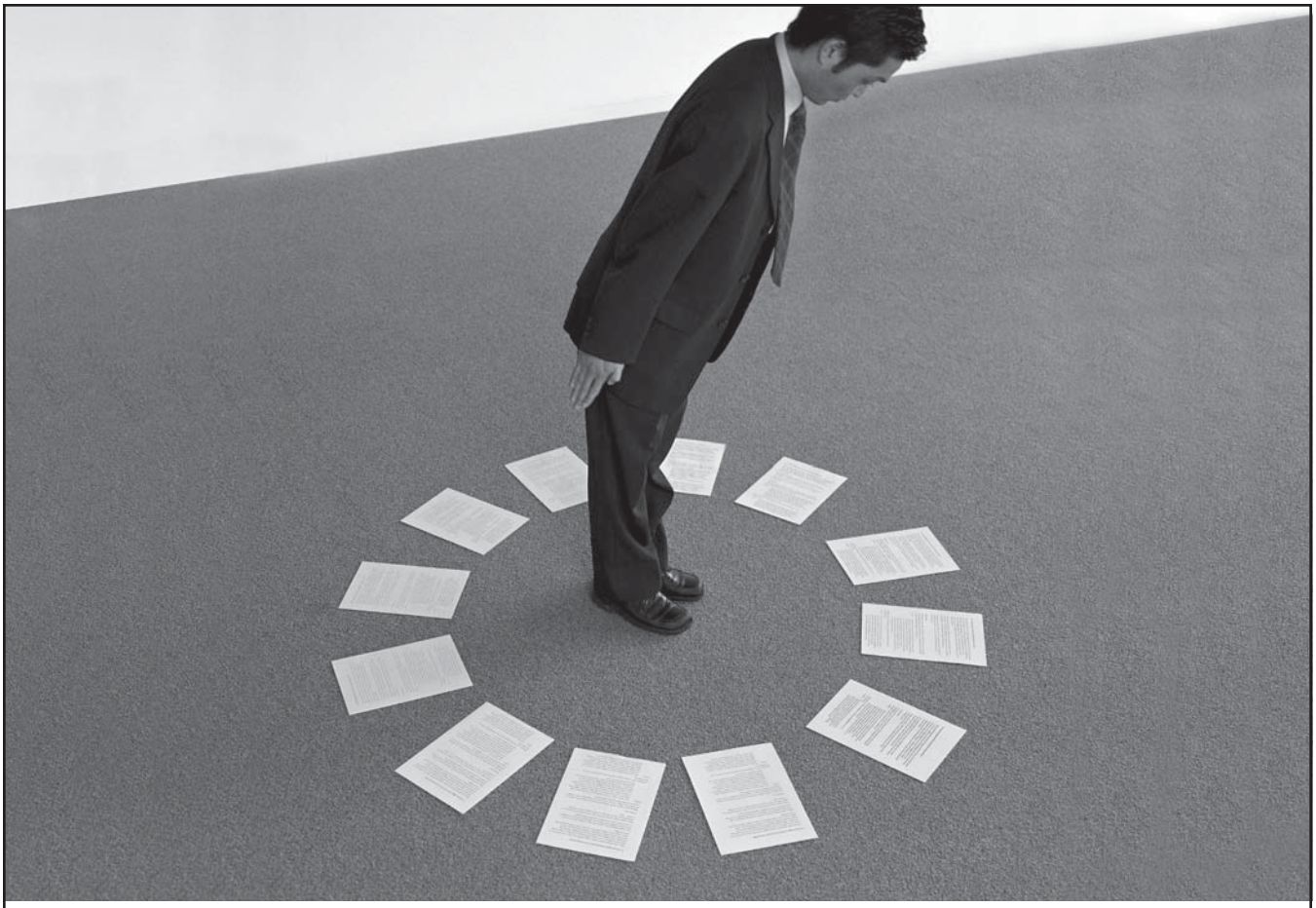

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Legal Profession that law firms are under tremendous economic pressure to change the structure of how they operate, including re-thinking the billable-hour model, using an alternative lawyer structure with more contract attorneys, outsourcing certain services, creating eDiscovery businesses and providing bundled legal services. Contract attorneys, eDiscovery specialists, of counsel and lawyers in other "nontraditional" legal roles, which have until now been relatively underutilized and kept on the fringe of law firm practice, may find more opportunities. Economic pressures are real and law firms, like any business, need to implement real changes in order to survive.

Law firms being what they are, skeptics note that attempts to change the way law firms operate failed before in the '80s after the fall of Drexel Burnham Lambert and are likely to meet headwalls again. A recent study of chief legal officers showed a relatively low amount of confidence in law firms' seriousness about changing their model for delivering legal services, in spite of growing pressure from the economy, the clients, and the law schools.[6] Post hoc conclusions about the legal market will be based upon a comprehensive review of the next year's recruiting, hiring and firing statistics, and the measure of success will be determined one law firm at a time. We will just have to monitor, wait and see.

Employers with the financial means can redirect their delayed staff to support pro bono needs of local legal direct services organizations and similar nonprofits.

The Silver Lining

The economic recession does have some positive points of hope for many legal industry stakeholders. Employers with the financial means can redirect their delayed staff to support pro bono needs of local legal direct services organizations and similar nonprofits. The economy also forces law firms and other employers to winnow out underperformers. To retain their best talent, law firms may also look to use part- or flex-time arrangements, as suggested by Deborah Epstein Henry of Flex-Time Lawyers LLC,[7] or adapt the mission of the Balanomics™ work/life balance initiative.[8] It remains to be seen, however, whether the majority of law firms will actually implement these kinds of initiatives or simply pare down to a lean and highly productive workforce.

As noted earlier, small and local law firms and legal employers are reaping the benefits of the down economy in two main ways. Talent is reaching beyond its normal boundaries. Partners at local law firms in smaller cities and suburbs outside major metropolitan areas have stated that they are seeing hundreds more resumes than they usually do and are overwhelmed by the depth of talent. The NALP Foundation for Law Career Research and Education reported in June 2009 that law firms with 101–250 attorneys had increased their 2008 lateral hiring by 11% over the previous year. As long as they have the work to support new hires, these small to midsize firms will be able to acquire some top talent over the next year. With respect to the level of work, the small and local firms seem to be faring relatively well in the economy. Those corporate clients that are shifting some of their legal work from BigLaw to lower-cost local firms are adding a marginal boost to regional economies. Used to operating on a margin and with a bare-bones staff, local and small law firms operate relatively efficiently and have not been forced to trim their ranks. The attorneys in this market also seem more resilient and adaptable to the changes in the economy and the types of legal work demanded, even if it means the partners must draw less salary, which is not much of an issue for firms whose reputations do not hinge on annual profits-per-partner rankings.

For experienced lawyers who find themselves in a situation of change or recent graduates looking urgently into their legal employment future, there is hope. There are many positive points in this legal market storm. Consider some of the following:

It's Not *All* Bad

Read the legal industry news with a grain of salt. All the media attention is going to BigLaw firms. Based on annual NALP surveys, around 80% of law school graduates each year typically go to firms with fewer than 100 attorneys; one-third or more of those are in small to solo practices. Based on the most recently available comprehensive survey of the legal profession, almost half of all attorneys in this country practice in solo settings, no matter the age, gender or location of the attorney.[9]

Expand Your Search

Many corporate clients are re-evaluating how they dole out and pay for legal services and are turning to local and smaller firms to handle their outside legal work. That is good news for the majority of lawyers around the country

that practice in small to midsize firms outside of major metropolitan areas. Attorneys currently looking for a job should make sure to expand the search to less competitive markets. Opportunities may lie in geographic areas where corporate headquarters are clustered, like northern New Jersey for pharmaceutical and manufacturing industries, and Westchester and Fairfield Counties for a variety of corporate industries.

Avoid Oversaturated Markets
Lawyers who want to stay in New York should seek opportunities in areas of the state where there is less competition for jobs.

Be Mobile
Lawyers who have some mobility may want to use U.S. Labor statistics and other demographic data to identify areas with low unemployment rates. Some of these places are regularly featured in magazine surveys of "Best Places to Live" and have lower costs of living than the Empire State.

Be Direct
Remember that you are your own best resource. As discussed earlier, placement agencies are not being given access to the kind of big deals and cases that fueled the contract attorney world. Law firms and companies no longer want to pay placement fees to recruiters, particularly with the high volume of top talent coming directly to them. The best advice is to go directly to a desired employer.

Network
Networking is key. Job seekers should go to as many events, panel discussions, CLEs, informational meetings and interviews as they can afford in cost and time. A strong, extensive network of supporters can endorse your work and character and pass a resume along to friends and colleagues. The key to securing employment is not just who you know, but who knows *you* and is willing to take an extra step for you.

Re-educate
For those coming out of law school and unable to find a desired legal position, or experienced attorneys who have either lost their jobs or whose area of specialty is now nonexistent, this may be the time to develop new skills or learn new practice areas. Those who are still employed should seek first to switch practices within their current firm, even if it means losing a year or two of seniority. Senior attorneys should talk with the partners about what areas the firm might want to develop or what legal services clients have been requesting. One of the greatest assets lawyers have is the ability to teach themselves new skills and learn about new areas of law. It is hard to start over, particularly after spending years developing a specialty, but it is possible.

Follow the stimulus plan money.

Learn New Skills
Attorneys can develop new skills or hone other ones by participating in pro bono programs or clinics. Start with the NYSBA Web site, a local bar association, or http://www.probono.net. Another option may be a one- or two-year specialty LLM program in tax or environmental or climate change law. CLE courses are another great way to learn about new areas of law and to network with other practicing attorneys. Many CLE providers offer discounts or fee waivers for attorneys who are out of work.

Be the Boss
This may be a great time to start a business or legal practice. *USA Today* noted that 16 of the 30 companies on the Dow Jones Industrial Average were started during a recession.[10] There is also an interesting piece on the Web that lists various well-known companies that were started during economic slumps.[11] Other business magazines and Web sites like *Entrepreneur* and *BusinessWeek* (through its online affiliate "Business Exchange") promote "recession entrepreneurship" through articles, polls and special features. The NYSBA Law Practice Management Web site has terrific resources for solo and small firm practices. Be careful and thoughtful when designing a business plan for a business or legal practice; there are dozens of companies that close and fail – particularly during a recession – for every one that succeeds.

Follow the Money
There are jobs out there. Follow the stimulus plan money. Local and federal governments do have positions and will hire, even if they note a "hiring freeze." For example, in late May 2009 New York City Mayor Michael Bloomberg, with U.S. Secretary of Labor Hilda L. Solis, announced that the city will use millions of dollars of federal stimulus funds received under the American Recovery and Reinvestment Act to provide training and job placement for 10,000 New Yorkers as part of the city's Five Borough Economic Opportunity Plan and programs offered through the city's Workforce1 Career Centers.

Expand Your Field
Other fields where there might be work include bankruptcy, regulatory work (financial and securities industry,

environmental, banking), and areas related to infrastructure at federal, state and local levels.

Use Every Resource

Use every available resource. Many law firms will call the career services office at the local law school when they need immediate help with litigation or other matters. Employers seem to be turning to law schools (which have free job-posting sites and eager staff) rather than fee-based legal recruiters. All lawyers should think of their law school alma mater and career services office as a major, free, job-searching and career-development resource. Bar association, law school and other online job-posting sites are also places where opportunities may be found. USAjobs.com is the central job search database for federal positions. At the state level, candidates must complete the New York State Civil Service Exam (go to http://www.cs.state.ny.us/announ/cr_announcements/20-131.htm) to be eligible for certain state jobs. Make sure your resume gets into the hands of as many people as possible, particularly at these government institutions for when positions do open.

In short, lawyers who are willing to put in the time, think about the options with a degree of open-mindedness, and persevere in the search will find a variety of opportunities. There are resources to assist those who are taking the time to look for them.

Conclusion

The current economic readjustment period is likely to last for a while. The legal industry, like most service industries, was one of the first to be hit big and hard and will be one of the last to recover and readjust. Remember that a law school degree and legal training are still valuable and adaptable assets and skills. Lawyers are a thoughtful and resilient bunch; with a positive attitude, a little creativity and flexibility, any lawyer should be able to make it through these times. ■

1. Karen Sloan, *Public-Interest Sector Getting a Little Crowded: Law Graduates Who Trained for Public-Interest Jobs Must Compete With Deferred Associates*, Nat'l L.J., June 1, 2009.
2. *See* Association of Corporate Counsel Value Challenge *at* http://www.acc.com/valuechallenge.
3. *See* http://www.lawshucks.com.
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Managing to Survive: Boosting the Bottom Line in Tough Times

By Arthur G. Greene

The question many lawyers are asking in 2009 is this: How are law firms managing to survive in these tough times? The answer is not a simple one. Only the problems of the largest firms seem to be covered in the legal press. Every month, dramatic stories about law firm layoffs paint a troublesome picture of a profession on the brink of crisis.

Headlines tell us that many of the world's largest firms are facing serious trouble. In terms of a financial model, those firms are ratcheted up pretty tight. A number of factors contribute to this situation:

- Large numbers of associates.
- High associate salaries and benefits.
- Oppressive overhead expenses.
- Large billable hour demands.
- Aggressive cash flow requirements.
- Changing patterns of client loyalty.

When this perfect storm of conditions occurs, positive cash flow evaporates as a result of reduced workloads and reduced billings. Caught in a downward economic spiral, the large firms find that they cannot afford to support highly paid associates. Layoffs come quickly in an effort to preserve the financial health of the firm and partner profits. These stories, however, do not tell us how other law firms are doing. That inquiry may be more important to understanding the economic health of the practice of law than what happens to the AmLaw 100. We all know that lawyers in large firms are only a small percentage of the profession. What about the rest of us?

For many lawyers in small and midsized firms, the economy is having a less dramatic effect. Yes, we all know solo practitioners with a real estate practice who are in big trouble. Some are going out of business. Others, who remember the 1990s, are better prepared this time, having put some money aside for a rainy day. And, let's not forget the bankruptcy lawyers who are happy that business is so good.

For the majority of small to midsized firms, revenue may be off 10% or so, and the work, looking forward, is a bit soft. The challenge for these firms is manageable, provided they do not ignore the tools available to them to make adjustments, and take some logical steps to get their firms through the downturn. In fact, taking the right steps now will have the added advantage of creating a stronger firm for the post-recession economy.

Guiding Principles

It might help to consider a few guiding principles, which should assist law firm leaders in small to midsized firms as they address financial issues associated with an economic downturn.

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1. Don't Panic

Lawyers often say they love serving clients, but they hate the business aspects of practicing law. Those lawyers are particularly vulnerable in an economic downturn, because they do not have the tools to evaluate their condition and take remedial action. Panic is a typical response. But the better course is to recognize the importance of calm leadership that is open to making changes and to embrace management issues in a deliberate fashion.

Immediate Steps

Start by taking some steps that are most likely to result in instant improvement in revenue flow. Addressing problems in accounts receivable, for instance, may produce immediate results if delinquent clients pay past due bills. Once those actions have been taken, look at strategies that may take a longer time to show positive results. Here are some tips for improving cash flow in the short term. Consider implementing one or more of these suggestions:

> Address the issues presented with both common sense and a willingness to challenge the firm's business procedures and practice methods.

2. Do Something

Don't ignore the emerging issues. Too many lawyers in small firms tend to practice the same way they did the day before – day after day after day. As this continues over years, many firms lack the wherewithal necessary to address new and emerging issues, and move the firm to a higher level or position it for greater success in the future. For these firms, the important thing is to take the steps necessary to understand how the economy is affecting the firm. Then, address the issues presented with both common sense and a willingness to challenge the firm's business procedures and practice methods.

For example, some firms are moving away from hourly billing and focusing instead on the predictability of value billing for their clients. Others are utilizing contract or virtual lawyers to round out the legal services team and reduce overhead. In many instances, these changes go to the heart of the firm's historical business model. However, firms that have made the most dramatic changes are often the ones that seem to be thriving and growing, even in this economy.

3. Take a Balanced Approach

No matter what the issue, take a balanced approach. Make no decision without weighing both the short-term advantage and the long-term effect on the firm. Layoffs, if necessary, should be limited to those marginal lawyers and other personnel who are not serving the long-term success of the firm. To the extent possible, hold on to core people critical to the long-term success of the firm. Conversely, a recession may be the best time to downsize marginal or unneeded employees, switch to using part-time or contract workers, or try outsourcing certain legal work or administrative functions. Although change may be in order, don't act precipitously or without careful planning.

1. Fee Deposits

Consider a more comprehensive use of fee deposits with all new clients. Fee deposits held in a trust account allow lawyers to take a fee to pay a bill without waiting 30 or 60 days. Some firms make fee deposits attractive to clients by offering a 10% discount on any fees that are paid from fee deposits.

2. Timely Payment Discounts

In circumstances where you are not working with a fee deposit, consider a 10% discount for payments made within 10 days. This policy can be implemented with your next billing cycle.

3. Receivables

A growing receivables number is often an early indicator of a recession. For those firms that have not been good at collecting outstanding receivables, adopt a policy of having clients called after 30 days. Waiting until 60 or 90 days to address delinquent accounts sends the wrong signal.

4. Accommodation for Troubled Clients

Good clients in financial trouble may need some accommodation. Support and understanding in these times will buy the firm a lifetime of loyalty going forward. For old receivables with former clients who will have no further relationship with the firm, offer a discount for payment.

5. Client Communications

Make sure clients are always kept current on the status of their matter and any changes that occur. Increased communications help manage the clients' expectations. Recognize that failed client expectations are a prime reason for receivable issues. Keep in mind that, regardless of whether the issue is the progress of the case or the payment of fees, increased communications and candid

discussions will improve the client relationship and your cash flow.

6. Credit Cards
Payment by credit card will reduce the payment lag time, which is often 30 to 60 days or more. While useful with clients who have limited resources, you will also find that some of your better-off clients will be motivated to use a credit card by the frequent flyer miles or other benefit program. Collecting receivables from clients can be more successful if the firm offers credit card payments for clients who need to finance the cost of the legal service. In most matters, there is no logical basis for clients to expect their lawyer to finance the cost of their legal matter. When the call is made, offer to put overdue charges on a credit card. Consider including the concept of putting any overdue legal bills on a credit card as part of the intake meeting and/or the fee agreement.

7. Recording Time
Make sure all timekeepers are recording their time on a daily basis. It is not uncommon for lawyers to lose 20% to 40% of their billable hours due to delayed recording of time until the next day or the end of the week. Also, be attentive to the possibility that a smaller amount of work is expanding to make timekeepers feel as busy as ever. This false feeling may disguise softness in the firm's business. Encourage lawyers to process work at normal speed and use the extra time for marketing efforts.

8. Practice Group Leaders
For firms with practice groups, assign practice group leaders the responsibility of analyzing the productivity and revenue production of all individuals in their practice group. The practice group leaders are in the best position to manage resources and lead their group to better financial results. The managing partner and the administrator are at least one step removed from the revenue-producing aspects of the lawyers' work.

9. Performance Issues
Evaluate the work of your associates, paralegals and members of your staff. Offer constructive suggestions and provide clear and direct information about the firm's expectations. Do not tolerate continued poor performance. Take the necessary actions to remove poor performers from the firm. In this economy, no firm can afford to support unproductive people.

10. Modify Schedules
Consider a temporary work reduction. Offer extra days off without pay. Cut schedules to four days a week temporarily, with reduced compensation. In many workplaces, employees are receptive to reduced schedules in order to avoid the layoff of one or more of their colleagues.

11. Partner Draws
Temporarily reduce partners' draws as a means of preserving the critical aspects of the firm and not compromising the firm's long-term strategy. Do not borrow to fund partner draws on an ongoing basis. Never finance partner draws with credit cards. These approaches just do not work.

Long-Term Strategies

The most effective strategies for dealing with the recession may take some time before showing results. Having adopted some of the tips for short-term results, don't stop in your effort to make needed changes. Have in mind that these long-term strategies will be the ones that endure and position your firm to succeed in the post-recession economy.

1. Management Tools
Managing partners of small firms need to have the right tools to manage the firm. For example, be sure your financial software can provide the reports necessary to evaluate all aspects of revenue and expenses. Have a budget and track expenses against the budget on a monthly basis. Have revenue reports that provide more than billable hours, billings, and cash receipts. Know how to run realization rates for each lawyer and each practice area.

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Calculate billing and collection turnover rates. Examine the trends at play – revenue per lawyer, overhead per lawyer – and track the volume/price analysis from year to year. The lack of meaningful reports necessary to address financial issues causes many small firms to fail to make the meaningful judgments necessary to improve the firm's financial performance.

2. Predictable Fees

For at least 15 years, hourly billing has been under attack as being often unfair to lawyers and clients alike. Over that time, there has been a trend away from hourly billing in favor of more predictable fees for clients. While this trend has been slow, it is interesting that firms offering predictable fees are using that as a marketing tool to attract clients who are troubled by the uncertainty of hourly billing.

> Have the foresight to see emerging practice areas and get in at the early stages.

3. Flat Fees

Flat fees for a scope of work are on the increase, even in litigated matters. Monthly retainers for a certain level of work are now offered to small businesses and other clients. Firms with a comprehensive strategy for moving away from hourly billing are improving revenues and succeeding, even in this economy. And, again, many firms are utilizing the predictability factor in their advertising. The trend away from hourly billing will emerge as more financially successful than the hourly-billing method.

4. Combination Fee Methods

In the move away from hourly billing, combination fees have become more popular. For example, how about offering a discounted hourly rate with a contingency based on result? Or, a flat fee plus a contingency based on result? Or, charging by the hour for the first phase of the work, and when the scope of the work is clear, performing the balance based on a flat fee? Each of these combination methods provides an opportunity for lawyers and clients to reach an agreement on a fee in circumstances where the lawyer is not prepared to handle the matter on a contingency and the client is not prepared to pay the full hourly rate. In a bad economy, combination fees provide an opportunity to get work that would otherwise be unavailable.

5. Innovative Marketing

The firms that succeed without a marketing strategy have been reduced to a precious few. Waiting for the telephone to ring is no longer enough. The need for a marketing strategy is even more compelling in a troubled economy. Certain practice areas are in serious decline, some temporarily and others permanently. In some practice areas the decline is because potential clients are simply choosing to defer an expense. Perhaps the estate plan or the divorce needs to wait.

Marketing takes time, energy and ideas. Advertising takes money. In today's marketplace, both are necessary. A review of law firm marketing books will reveal lists of ideas for promoting a firm. While there are no bad ideas, in today's economy there are some concepts that work better than others.

Focus on differentiating your services, whether by method of practice or how you charge for those services, and get the word out that your firm is different. Exceptional client service and client convenience are increasingly important; networking and one-on-one contacts are critical.[1]

6. Practice Area Lifecycles

Some practice areas don't change, while others come and go, get hot and/or slip into decline. Have the foresight to see emerging practice areas and get in at the early stages. Those lawyers who get in at the front end of an emerging practice area do better than those who wait until the practice area is considered "hot."

7. Compensation Systems

Your partner compensation system will drive behaviors. A compensation system should reward desired behaviors and penalize unwanted behaviors. In many small firms, the system of compensation does not encourage the behaviors the firms need most. In some firms, the partner compensation systems encourage behaviors that undermine the financial success of those firms.

Take a similar look at your associate compensation system. Does it reward exceptional performance? Does it encourage origination of clients? Is your system consistent with the behaviors you would like to encourage in your associates?

8. Culture

Successful firms tend to have strong, healthy cultures. Firms with negative or weak cultures often are the firms that are struggling financially. Although not often diagnosed in these terms, the importance of building or maintaining a strong, healthy culture cannot be underestimated. In difficult economic times, there is always the risk that the stresses at all levels of a firm will result in a deteriorating culture. Firm leadership needs to be attentive to issues of culture; it must lead by example and adopt policies that will protect or bolster the firm's culture.

Long-term approaches to economic difficulties may not produce immediate results or visible outcomes. It may be more difficult to persuade lawyers and staff that long-term solutions are as important to the firm's ultimate health as short-term fixes. This is where leadership and vision come into play.

Conclusion

Times are tough for most of us, but successfully managing a well-run firm through this recession is a realistic objective. So don't panic. Offer calm but decisive leadership. Implement some steps designed to have an immediate effect on the firm's financial status. Then look to some long-term strategies. The changes that are necessary are those that will implement important management techniques that will ensure the health of your firm, in good times or bad. Once your firm gets to the other side of the recession, it will be in a stronger position to achieve increased success in the years ahead. ■

1. For more information on the subject of marketing your firm in a recession see "Legal Marketing in Turbulent Times: Keeping Your Practice Afloat," by Sharon Nelson and John Simek, in this issue of the *Journal*, at page 33.

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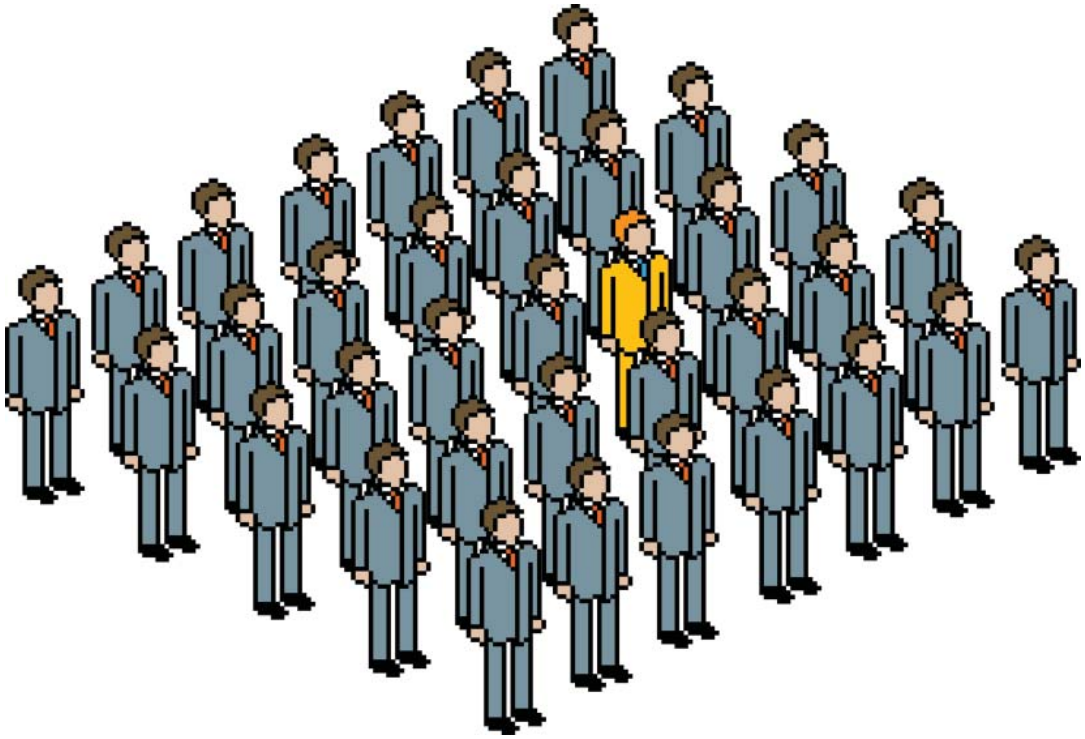

Identifying and Managing the Increased Risks Law Firms Face in a Recession

By Anthony E. Davis and David J. Elkanich

Unique problems – and risks – can arise in an economic downturn, when lawyers have time on their hands and not enough to occupy them within their normal sphere of practice and competence. A recently reported case from Bronx County, *MC v. GC*,[1] exemplifies this. There, a lawyer, referred to as "Ms. Smith," who at the time was an associate at a major New York law firm, was assigned to work on a pro bono matter, in this instance a divorce case, a practice area in which she had no prior experience.

As it turned out, after both parties signed a settlement agreement, Ms. Smith's client moved to vacate the settlement, alleging that she did not understand key terms and the agreement did not contain terms she had discussed with Ms. Smith. The judge vacated the settlement and restored the case to her calendar, finding that the lawyer made "careless and inaccurate" statements to her client and was inadequately supervised by her firm. The court added that the lawyer did not have the "appropriate training and supervision" to know whether her statements to the client were correct.

Anthony E. Davis (New York) and **David J. Elkanich** (Portland, Ore.) are members of the Lawyers for the Profession® Practice Group of Hinshaw & Culbertson LLP. The information, examples and suggestions presented in this material have been developed by the authors for CNA, but they should not be construed as legal or other professional advice. CNA accepts no responsibility for the accuracy or completeness of this material and recommends the consultation with competent legal counsel and/or other professional advisors before applying this material in any particular factual situations. This material is for illustrative purposes and is not intended to constitute a contract. Only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All products and services may not be available in all states and may be subject to change without notice. CNA is a registered trademark of CNA Financial Corporation.

What is important about this case, which involves an otherwise-experienced lawyer, is that the risks inherent in every lawyer's and law firm's practices are amplified during an economic downturn. Even in the best of times, lawyers face risk every day as an inevitable part of their practices. But in a down economy lawyers also face the likelihood of a reduced amount of business, which creates both income and overhead – particularly headcount – concerns. At the same time, lawyers and law firms are likely to face an increase in the number of malpractice claims, as well as claims brought by third parties alleging breaches of a fiduciary duty and fraud, and, possibly, claims by partners for management liability. Lawyers and law firms are often viewed as the last "deep pockets" when deals fail or formerly "good" clients go bankrupt.

This article will focus on a number of areas of risk that merit special attention during an economic downturn and will suggest ways in which lawyers and their firms can prepare for and manage these heightened risks. Specifically the article will address the following critical topics:

1. Client Selection and Client Intake Management
2. Practice Management and Troubled Clients
3. Maintaining Appropriate Financial Controls
4. Due Diligence in Lateral Hiring
5. Firm Management During an Economic Downturn

Develop and Maintain Appropriate Client Intake Procedures

Client selection and intake are two related areas with the potential either to increase risk, or, if properly managed, to enhance profitability. Careful consideration of which clients are appropriate for the firm is enormously important in determining whether a law firm: (1) has the ability to handle a particular client matter effectively and to the client's satisfaction; (2) will be paid for the services rendered; or (3) will possibly face litigation at the conclusion of the matter. All of these factors assume heightened significance during an economic downturn. Choosing the right clients is never more important than when clients are scarce. Firms may feel tempted to take clients they would not otherwise accept, because new clients may be few and far between. But such thinking may lead to unfortunate outcomes if the firm is unable to represent such clients effectively. The intake process involves the preliminary information gathering that both lawyers and clients need to determine whether the representation should proceed. Law firms should therefore assess how well they are dealing with the following principles of effective client intake management.

Sufficient Information

Does the firm gather sufficient information *before* deciding whether to accept a prospective client? In particular, is the firm assessing whether (1) the client's matter falls within one of the firm's areas of practice; (2) the client has realistic objectives that are obtainable; and (3) the client is both willing, and able, to pay appropriate fees? Taking the time to gather the information necessary to answer these questions significantly reduces the risk that firms will take on work that they are not qualified to handle, and also ensures that clients and their lawyers are on the same page with respect to strategy and analysis.

Appropriate Level of Expertise

Does the firm carefully allocate and assign work to lawyers with the appropriate level of expertise? In difficult economic times, many firms and, within firms, many individual lawyers face the question of whether to branch out into unfamiliar areas of practice to make up for the loss of business in other areas. "Dabbling" creates multiple risks, including the heightened danger of errors and omissions, the temptation to bill clients for the "learning curve," which can lead to messy fee disputes, and the concomitant risk that the new work will be unprofitable.

> Does the firm insist upon adequate retainers prior to accepting engagements from new clients?

Independent Partner-Level Review

Does the firm *require* independent partner-level review (*i.e.*, review by someone other than the lawyer seeking to introduce the client or matter) of the information assembled prior to acceptance of new clients? It is – or should be – axiomatic that individual partners should not be allowed to decide which clients or matters to accept without prior firm approval. With the exception of solo practitioners, all lawyers have and should use the opportunity to have someone other than themselves conduct this sort of review.

Adequate Retainers

Does the firm *insist* upon adequate retainers prior to accepting engagements from new clients? A prospective client's objection to paying a retainer is a red flag that this client is likely to be unwilling (or unable) to pay appropriate fees. Lawyers should affirmatively choose their pro bono cases rather than having them forced upon them.

A firm that addresses these four fundamental issues before undertaking a client representation is much more likely to prevent disputes with clients that could lead to liability claims. In economic terms, the cost of implementing these procedures is minimal in light of the risk that may be avoided.

Practice Management and Troubled Clients

A firm's obligation to review and analyze the appropriateness of its clients does not end once it accepts a new client. Firms need to establish a system of practice oversight that evaluates the status of all open matters, and clients' payment history, as an ongoing process. Good practice management ensures that every client is receiving high-quality service at all times. On the other hand, permitting individual lawyers – however experienced – to manage "their" clients entirely unsupervised ensures only that if or when a problem develops, the firm will have been unaware of the warning signs of impending trouble.

Solo practitioners and very small firms face particular problems when it comes to financial controls.

During economic downturns there is a greater risk that a formerly "good" client will become a "bad" client. When this happens, disputes may arise between the firm and the client regarding the quality of, and the amount to be paid for, legal services. In addition, these situations may also generate claims by non-client third parties, such as investors and trustees in bankruptcy. For example, a client whose business fails may file for bankruptcy or otherwise cause its creditors and investors to lose money. In consequence, the client's investors and creditors may assert that the lawyers failed to properly advise the client so as to prevent or mitigate losses or that the lawyers actively assisted the directors/principals to commit fraud and/or a breach of fiduciary duty.

Good practice management can help individual attorneys identify these problems and deal with them, starting with documenting the advice being given, thereby establishing the necessary record to refute such claims. Among the indicators that a hitherto good client may be evolving into a high-risk client are the following:

1. the client is having financial difficulties;
2. the client, who has historically paid its bill on a regular basis, is now slow to pay or stops paying fees altogether;
3. any sign of improper or unlawful activity by the client or its management; and
4. client complaints regarding the quality of services being provided or increasing hostility from a client who has previously complained.

Accordingly, practice group leaders need to monitor all client matters systematically and regularly in order to help lawyers identify warning signs as soon as they appear. Firm leaders must be ready to intervene to ensure the firm is giving and documenting appropriate advice, or even, when necessary, requiring that the firm withdraw from engagements. In smaller firms, the leadership should take time at regular case meetings to address these issues; solos should monitor clients for the warning signs in order to take appropriate, timely action.

Maintain Appropriate Financial Controls

Law firms and their individual partners are responsible for ensuring that their firms' financial controls are adequate to enable their firms to weather the economic downturn. To that end, law firms should:

1. Arrange for their outside accountants to review the firm's internal controls to determine whether those controls are adequate.
2. Require, at a minimum, that two lawyers sign *all* checks and withdrawals from client and escrow accounts. No non-lawyer should ever be allowed to have signatory authority over client or escrow accounts.
3. Ensure that client funds are deposited in designated client accounts that are federally insured. Although the FDIC has, for now, agreed to insure all client funds held in law firms' client or trust accounts, it will be important going forward to monitor the continuation of this unlimited insurance and, should the policy change, for firms to spread client funds in accounts at different banks limited to the amounts that are covered by FDIC insurance.
4. Require regular, monthly reviews of client and escrow account bank statements by firm management to ensure that (a) all client funds are being appropriately managed; (b) clients are provided an accounting for trust account receipts and disbursements; and (c) the client and escrow account ledgers balance at all times. These safeguards are important in times of prosperity, but they take on extra significance in times of economic hardship. While law firms themselves and their individual employees may both be experiencing financial pressure, it is vital that firms designate senior lawyers to oversee all of these elements of account management in order to avoid both deliberate and inadvertent violations of the duties owed to clients and to the firm itself.
5. Actively manage deteriorating receivables, which may be the first warning sign of a "good client turning bad," described above.

As in the other areas discussed, solo practitioners and very small firms face particular problems when it comes to financial controls. There may be fewer employees and it may be easier to keep an eye on things, but in smaller organizations people may work more independently

with less oversight, thereby raising the risks described above. In a solo practice there is no one to look over the solo's shoulder. Whether a firm is small or large, however, the message is the same: When the economy is tight, it is critical to maintain rigorous financial controls within the law firm.

Due Diligence in Lateral Hiring

In an economic downturn, the lateral hiring of lawyers may appear especially attractive. However, lateral hires are often risky investments. While the firm seeking to hire a particular prospective lateral may view the attorney's book of business and experience as a short-term investment for a potentially significant long-term return, the lawyer seeking to join the firm may be a potential "Trojan horse," importing serious problems into the unsuspecting firm. Among the due diligence steps firms should consider are the following.

Review the Client List

Thoroughly review the lateral's client list for potential conflicts of interest with the firm's current and former clients.

Investigate and Verify Credentials

Investigate and verify the lateral's credentials. Even where the prospective lateral is "known" to others within the firm, the firm should check the veracity of the lateral's qualifications, bar memberships, and criminal record, and should conduct a bankruptcy and credit check (with permission, of course).

Avoid Ongoing Disputes

Identify – and avoid hiring – laterals who are likely to have ongoing disputes with their former firms, because these will detract from the lawyers' attention to serving clients. Similarly, to the extent possible (and subject to confidentiality obligations) seek to establish whether the prospective lateral hires will be leaving their former firm in a weakened financial condition. If a new hire's prior firm fails or dissolves following the lawyer's departure, the lawyer may be faced with potential significant personal liability or with significant claims for unpaid compensation or return of capital. Again, to the extent that those loose ends are unresolved before the lawyer leaves the prior firm, there is an increased risk that the lateral's time and energy will be diverted from serving clients after the lateral joins the firm.

Set Realistic Compensation

Set compensation in relation to actual collected dollars with no (or minimal) guarantees, other than a draw to cover the lateral's initial period of time with the firm. Guaranteeing earnings to new laterals can put a strain on a firm's working capital, and end up causing the firm to experience a loss if the lateral's promised billings do not materialize.

Establish the Infrastructure

Establish the necessary infrastructure to integrate the lateral's practice and clients into the firm, and to oversee the work of the lateral. It is not sufficient simply to give a laterally hired lawyer an office, a computer and a secretary, and leave the lawyer to meet (often inflated) billing targets. For every lateral hire, the firm needs to develop a plan that continues to be carefully managed after the lateral arrives. This should be a whole-firm commitment – the firm's existing lawyers, practice group leaders and support staff must be willing to give their time and energy to accomplish the integration of the lateral and his or her clients into the firm. The need for these efforts is every bit as important, and may be significantly more burdensome, when firms bring on entire specialty or practice groups.

Firm Management in an Economic Downturn

Lawyers and their firms can take a number of management steps to assure their continued strength when confronting economically difficult times. These include the following.

Partnership Agreement

Review the firm's partnership agreement. An inadequate or unclear partnership agreement can pose a significant problem in the event of lawyer departures (whether voluntary or involuntary). If it becomes necessary to terminate partners, the agreement should define the terms of separation. In an economic slump a departing partner's buyout could easily produce a dispute with the remaining partners. A firm that dissolves should have partnership terms prescribing the dissolution process, and partners should be familiar with these arrangements. If the agreement is not adequate in these areas, it may make sense to amend the agreement before a crisis erupts, when it may be difficult or impossible for partners to come to terms.

Capital

Make sure that the firm is adequately capitalized, and reduce debt, in order to ensure the firm is properly funded.

Budget

Engage in a thorough, effective and continuing budgeting process that addresses both costs and revenues.

Compensation

Review and, if necessary, adjust the firm's compensation structure so that it is appropriately focused on collegial goals, rather than encouraging individuals to develop their own practices. An "eat what you kill" culture does

little to foster collective goals, and a system that puts the interests of individual lawyers over the interests of the firm creates significant risk that lower-quality clients may be accepted.

Law firms are business organizations, created not only to deliver legal services, but also to provide compensation to the partners, as well as firm employees. Economic hardship may undermine the sustainability of the institution. A management structure that worked in good financial times may be ineffective or even counterproductive in more difficult times. By regularly reconsidering the relationship among partners and addressing ambiguities or policies that threaten the long-term viability of the firm, law firms can reduce the risk that they will experience serious disputes or collapse.

Conclusion

Law firms, like every other economic enterprise, are confronting the realities of economic recession. In such times, firms need to be diligent in resisting the temptation to "cut corners" in the ways in which they operate and practice. Firms intent on practicing law over the long haul need, instead, to take extra care to identify the increased risks of practicing during hard economic times and to take the necessary steps to manage those risks. ■

1. 76148/07, N.Y.L.J. (June 18, 2006); 76148/07, 2009 Slip Op. 29260 (Sup. Ct., Bronx Co. May 22, 2009).

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Keeping Your Practice Afloat

Legal Marketing in Turbulent Times

By Sharon D. Nelson and John W. Simek

Introduction

These are wretched times for lawyers and law firms. We've seen the highs and lows of practicing law, but we've never seen the practice of law as battered as it is now. In the month of January 2009, more than 1,500 legal jobs were lost (lawyers and staff). That number doubled in February. In 12 months, more than 21,000 legal jobs were lost, according to the *ABA Journal*. Virtually every day, the legal press reports on the carnage at another law firm – sometimes multiple law firms. Entire law firms have vanished from the landscape, including the once-mighty Heller Ehrman (650 lawyers) and Thelen Reid (400 lawyers). And yet we still react with shock and awe at watching it happen. Firm implosions have caught, and held, our collective attention.

If you like reading obituaries, you're going to love the Layoff List compiled by Law.com,[1] or the Layoff Tracker.[2] According to the latter, as of July 5, 2009, there have been over 10,837 layoffs (4,055 lawyers/6,782 staff) in 2009 and 12,829 layoffs since the beginning of 2008 (4,985 lawyers, 7,844 staff).

If your law firm is still afloat in these violent seas, congratulations. How do you steer your firm toward calmer waters and fair winds? This dilemma affects not only existing firms, but also new firms and solo practices, formed when lawyers suddenly found themselves refugees from BigLaw. The question for all these lawyers and law firms is: How do we survive?

Smart law firms are looking closely at the financial, marketing and technology aspects of the practice to improve their chances at survival; this article focuses exclusively on legal marketing in a down economy. Abandoning your marketing efforts altogether in order to save money is clearly a recipe for disaster, but even those firms that recognize the importance of continuing to market their services in recessionary times may need to rethink and retool their previous marketing strategies in order to address economic realities.

> *Turn off your computer. You're actually going to have to turn off your phone and discover all that is human around us.*
> – Google CEO Eric Schmidt at a 2009 graduation ceremony

Some of the best advice is short and sweet. As is often said, business is war, and never more so than in a bad economy. So prepare yourself for battle. Onward.

Utilize Your Real-Life Network

In the days of social networking, real-life networking seems so old school, but the truth is that it still works. Whether you are shaking hands at the PTA, the Lions Club or your local bar association, you are creating a network of contacts who know you. Although the authors are creatures of the ether, they also know the value of meeting people outside of the virtual world and make concerted efforts to do so.

That firm handshake, quick smile and keen interest in someone else is memorable in a way nothing else can be. Make sure that you DO in fact remember to ask questions of anyone you meet. No one is less interesting or memorable than people so self-absorbed that they talk only about themselves. And no one is more charming or memorable than people who express a sincere and active interest in the person with whom they are conversing.

Repeat this mantra: do not sell, do not sell, do not sell. Overly aggressive salespeople are anathema in a social setting, and this includes lawyers. However, conversations do meander and talking about the economy is natural enough anywhere these days. It is easy enough to slip in a comment about how you have changed your practice in light of the economy – and then be sure to ask the people you're speaking with how their business has changed.

Go armed with your business cards and always, always bring along a smile, prepared to make new friends. Friends are not only potential clients but an excellent source of referrals.

> *In Network Marketing, the NETWORKING always comes before the MARKETING.*
> – Silke Stahl

Get Up to Speed on Social Networking

For those who have wondered whether business does come in through social networks, the answer is that it does – but it takes some effort to get there. LinkedIn, Facebook, Twitter, Plaxo: These are the major vehicles of social networking, though there are many others. The joy of these networking tools is that they take time, not money. The downside is that you must get a return on your investment in exchange for your commitment of time, so don't over-participate if you are not seeing results.

Most experts believe that Facebook has won the war as THE social networking site, so perhaps you want to start there. Facebook has more than 160 million active users – an amazing number, considering that it did not exist five years ago. More than half its users are college graduates and professionals. LinkedIn, which often is seen as more professional than Facebook, now has more than 840,000 lawyers using the site. If the more social world of Facebook doesn't appeal to you, LinkedIn may be a good alternative.

Wherever you choose to network, make yourself a go-to person. Take the time to engineer your image, cultivate friends in your areas of practice to keep abreast of new developments and make friends in other areas of practice in your geographic area who might refer clients to you. Ask questions to get conversations started. Exchange tips and information – and always give more than you get.

Remember also that social manners matter in cyberspace just as they do in the physical world. Get back to people promptly if they contact you. Try not to be rude or dismissive. If people are helpful to you – perhaps introducing you to someone in their network or agreeing to talk to you for 10 to 15 minutes about the services you provide – make sure to write and thank them.

It is critical to have a polished and comprehensive profile. This is the first thing that people will check out when they connect with you. At the same time, a good profile is not enough if you remain a passive presence on networking sites. Look to join or to start networks or groups, post content that demonstrates your expertise, interact with others (essential) and, most important, once you've started a relationship within Facebook, take it outside of the virtual world and make it real if geography permits. There is a Facebook page just for blogging lawyers: http://www.facebook.com/group.php?gid=2375454341 will help get you started.

Many lawyers remain unfamiliar with Twitter (http://twitter.com). Twitter is a free platform that allows users to post "tweets" (online messages of up to 140 characters) visible to those who choose to follow them. The brevity of the messages has led some observers to refer to Twitter as a micro-blog. If you use Twitter and your reserves of posts grow, you will find that if you post useful content people will find you and follow you. Of course, you can follow others as well, though it is wise to be wary of that time investment too. The site itself is very easy to understand and use, so take a look. This is not the place to indicate what kind of pizza you had at lunch or what clever thing your toddler said. If that is your approach, people will soon stop following you. If, however, you are a California divorce lawyer and you constantly post tweets about developments in family law, current cases, new statutes, etc., in California, pretty soon folks who have an interest in that sort of information will follow you.

If you are thinking of joining Twitter, find a few reputable people you know who are on Twitter and watch how they use it. You will get the hang of it very quickly. The best users are those who share information, posting a brief message such as "Congress passes anti-terrorism bill by slim margin: (insert link)." This allows others to

scan for the stories that interest them among the postings of people they are following. The best users also ask questions and begin conversations, which sometimes move offline. Can you actually get business this way? Absolutely – requests from reporters for interviews as well. From a marketing perspective, this is all good.

For a beginner's guide, see http://online.wsj.com/public/article/SB122826572677574415-rXaM5BTzeRQMfvAuP3_4gjVJm_A_20091203.html?mod=rss_personal_technology. On http://www.law.com, look for two excellent articles by noted legal commentator Bob Ambrogi: "Sixteen Reasons to Tweet on Twitter" and "Tools on the Web to Let Twitter Sing." Do not, however, allow yourself to become obsessed with social networking, which can be a huge, counterproductive time drain. It is always important to find a balance between electronic networking and the real thing. Nothing replaces a friendly smile and a warm handshake.

This here's Miss Bonnie Parker.
I'm Clyde Barrow. We rob banks.
– from the movie *Bonnie and Clyde*

Be Careful What You Do and Say on Social Networking Sites

Some things just do not need to be said online, where their lifetime is, approximately, forever. Even if you have a restricted Facebook page, you have no control over what your "friends" do with what is posted there. It is, of course, a good idea to restrict access to your social networking sites, but do not think that simply restricting access necessarily solves all problems. Likewise, if you use Twitter, you can be sure your "tweets" will live on. As far as experts can tell, Twitter keeps them indefinitely.

Hear the meaning within the words.
– William Shakespeare

Perfect Your Elevator Speech

A good elevator speech and e-mail are pivotal to making an initial impression. This is often the first step toward securing a client. For those of you who missed Marketing 101, your elevator speech is a 15- to 30-second rendition (the time span for a typical elevator ride, hence the name) of who you are and what you do. Tailored to this economy, it can be a brief but memorable advertisement for your services. Reduce it to e-mail, too – and remember where you saved it! You will find yourself trotting it out again and again.

For example: "Hi, I'm Jill Smith. I practice family law in Oshkosh. My practice has really changed recently in light of the economy. I'm doing a lot collaborative divorce and arbitration these days to help clients save money at a time when they need it most." Maybe, if the conversation continues, this lawyer will get to mention that she is working a lot with clients who have negative equity in their homes, and how she handles those cases. The key is to make the opening short, although in these times, make sure you get the economy in there somehow. "It's the economy stupid" really is the key component for legal marketing these days.

The voyage of discovery lies not in finding new landscapes but in having new eyes.
– Marcel Proust

Contemplate Alternative Billing (and How to Use It in ALL Your Marketing Efforts)

"Kill the Billable Hour" was the title of an article published in *Forbes* magazine in January 2009. The author, Evan R. Chesler, a presiding partner at Cravath, Swaine & Moore LLP, a prestigious New York City law firm, states, "Clients have long hated the billable hour, and I understand why. The hours seem to pile up to fill the available space. The clients feel they have no control, that there is no correlation between cost and quality. . . . In truth, most of the lawyers I know don't like the billable hour either." He adds, "The billable hour makes no sense, not even for lawyers. If you are successful and win a case early on, you put yourself out of work. If you get bogged down in a land war in Asia, you make more money. That is frankly nuts."

Yet, no matter how many times its imminent demise is predicted, the billable hour still holds a firm place in the U.S. legal landscape. It may well be that the current economic crisis will finally be the "tipping point" that causes a true re-examination of this pervasive practice.

In an increasingly competitive business environment, businesses are trying to cut costs and limit risks. A proposal for alternative billing on legal work may seem like the proverbial music to the potential client's ears. Perhaps there are elements of your practice that you can flat fee. You might consider task-based billing, using a case plan so that a client can see what costs will be, depending on what happens in the case. You may choose to bill on a contingency basis. If the client changes the scope of work, you could document what the change will cost. Perhaps you offer task-based billing in combination with an additional fee if there is a successful result. Law firms have become very innovative in approaching the subject of billing.

Advertising that your firm offers alternative billing may also yield significant results. Displaying your alternative billing methodologies on your Web site is a great way to let potential clients know what they all want to know: "What will this cost me?"

For more information on this topic, you might want to read *Winning Alternatives to the Billable Hour: Strategies That Work* (3rd edition 2008) by Mark A. Robertson and James A. Calloway, which is available from the American Bar Association Law Practice Management Section, at http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5110660.

Keep your friendships in repair.
– Ralph Waldo Emerson

Take Good Care of Current Clients

Clients are hard to get and expensive to replace. And current clients are among your best sources of referrals.

Have meetings with clients, especially the important ones. Assure them that you will not raise rates. If you have determined to change your billing structure, let them know. Give them useful advice for their business, given the current economic climate. How can you collaborate with them to help them and to save them money? Do they have any suggestions for you? Are they happy with your services? If not, address their concerns. It is critical in a bad economy that you are perceived as providing exceptional client service. Think long and hard about how to create that perception.

This is a very good time for a modest outing, some bonding time and the forging or reinforcement of the relationship between you and your client. This is not the time for swanky parties and retreats. Clients, even if they are invited, are apt to see large social expenses through the prism of the economy – and let's face it, they know that they are ultimately paying. In a small firm or solo practice, a couple of beers and pub grub at a local establishment may be all that is needed to cement a relationship or nurture a friendship. Taking care of current clients may not be what you think of as marketing, but indeed it is. Current clients are the most likely to bring you new matters – and to refer others to you. Find a way to touch them often enough so that you will immediately come to mind should they hear of someone who might need your services.

Your Web Site Is Probably Your Most Powerful Marketing Vehicle

If you have limited funds to spend on marketing, your Web site is the first place to spend them. These days, more than 65% of people begin their search for a lawyer on the Internet. Not only should you be there, but you should look good in comparison to your competitors' Web sites. Prospective clients can and will compare, so make sure you keep that in mind as you work on your site.

Make it simple. Make it memorable.
Make it inviting to look at.
Make it fun to read.
– Leo Burnett

If you want to improve the value of your marketing efforts, put money and time into your Web site and search engine optimization. As long as you are not squandering your resources by doing foolish things, work on your Web site is going to have more return on investment (ROI) than almost anything you can do. If your site is tired and you have not been updating it, this is a good time for a redesign. Concentrate on deepening and broadening your site, and commit to making this an ongoing project. Content is still king.

Resist the temptation to let your nephew (or cousin or uncle) design your site unless he or she is a professional Web site designer. Make sure your site is engaging, with graphics that "speak" to your potential client and some kind of tag line that brands you. For instance, a criminal lawyer's site might show someone being handcuffed (which certainly speaks to someone looking for a criminal lawyer), with the tag line: "In trouble? We can help."

Search engine optimization (SEO) is a complicated subject. Most Web site designers are not SEO experts. Look at the sites a company has optimized and see how they place on Google. Without any question, design and optimize for Google. What does well on Google will generally do well on the other search engines as well.

If you are not blogging and you have time enough to do it, consider whether you can deliver useful content that may be picked up by reporters (most of whom say they quote a blogger at least once a week). Blogs can solidify your reputation as the "go-to" attorney in an area of practice – and many folks are using Google Alerts or something similar specifically to keep abreast of the area of law in which they practice. One of the best known experts on lawyers and blogging is Kevin O'Keefe. To learn more about lawyers and blogging, visit http://kevin.lexblog.com, and explore.

More technical expertise is needed to become a podcaster, but podcasts (which you can post for free on iTunes) are an economical way to get your name out there. If "podcasting" is a foreign term, you might start by checking out a panel discussion among podcasters at http://www.abanet.org/lpm/lpt/articles/tch09071.shtml.

Reach out and touch someone.
– AT&T ad

Don't Stop Marketing in Bad Times, But Look at HOW You Are Marketing

As difficult financial times force law firms to focus on their budget, particularly expenses that can be reduced or eliminated, it is often tempting to look at the marketing budget. In fact, some firms take a Sherman-like "slash-and-burn" approach to marketing, which is nearly always a mistake.

Your ongoing marketing efforts, whether robust or modest, are an investment in the future of your law practice. It is dangerous to stop ongoing marketing efforts merely for budget reasons, as they are difficult to restart and the results of these efforts often lag the outreach by a significant amount of time.

However, it certainly may be appropriate to review all your marketing efforts and make strategic changes. When there are fewer dollars to spend, the dollars you do spend need to be smart dollars.

This might be the time to pull your print, radio, TV and any other generalized forms of marketing. If you have not already disposed of your Yellow Pages ad, this may be the time to do so. At the very least, it may be time to make it much smaller. As most searches for lawyers begin online, you need to adjust your marketing budget (which has probably already shrunk) and focus on electronic marketing and targeted marketing.

Send useful information to present and former clients via e-mail or mail. Write an article and post it on your Web site. Speak to community groups. Teach CLEs. Get creative. Try guerrilla marketing to save money. (If you're not familiar with that form of marketing, just look on Amazon.com for books on the subject.)

Show me the money!
– from the movie *Jerry Maguire*

Demonstrate Value

If there is anything you need to focus on in your marketing, it is the economy and demonstrating value to your clients. Retool any print or online advertising to address the economy. Even putting the words "A value-based law firm" on your Web site can call to the tightened wallets of corporate America. And the phrase "In bad times, you need a good lawyer" gives you the opening to explain why and what a good lawyer can do to save a client money. Brainstorm with your colleagues to find the right avenues of appeal. The way to a client's heart, these days, is directly through his or her wallet.

It is not the strongest of the species that survives, not the most intelligent that survives. It is the one that is most adaptable to change.
– Charles Darwin

Keep Sniffing the Air

Competitors are weak, clients are restless. BigLaw will have to focus on their major clients. Smaller clients may be tempted to leave if they feel less valued. Clients may be amenable to an approach that indicates that they can get high-quality work done at lower costs. Write and introduce yourself. Go to bar meetings and other functions where you can talk to folks. You do not need to do the hard sell. Just socialize – but get their card. Write and remind them that you had recently met, say something personal based on your conversation and then introduce your services and prices.

Never wait for the phone to ring. The people who are in the worst trouble are those paralyzed by fear, and they seem to be legion in number. You cannot watch your revenues fall precipitously and just wring your hands. You need to go into what animal behaviorists call the "flight or fight" mode. If you truly focus on what is going on and explore each and every avenue of action open to you, your brain becomes far more acute, and you are far more likely to home in on the plans of action that may work for your practice.

Thinking innovatively is central to surviving a bad economy. Can you create more value for clients? Is alternative billing a partial solution? Can you, at this time, appeal to different clients? What can you do to set yourself apart from the crowd of other lawyers and law firms?

We now have a bailout package, and the prediction of a Son of Bailout and a Grandson of Bailout. Make sure you read the details – some of the provisions of the bailout may create work – certainly in the banking and financial services industries, as well as the health care industry. Read the papers and watch the news on- and offline; absorb the information; and consider new options afforded by the volatile economy.

Final Words

No marketing is going to work miracles overnight. But if you market for several hours a week, over time you'll certainly see results. The important thing is to start and then to keep your efforts going. In the words of the Marines, innovate, adapt and overcome. Good advice in a bad economy. ■

1. http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202425647706.
2. http://lawshucks.com/layoff-tracker.

BY EVE I. KLEIN, BRUCE J. KASTEN AND JOANNA R. VARON

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The Employee Free Choice Act – What's an Employer to Do?

The labor movement's top legislative priority, the Employee Free Choice Act (EFCA), proposes the most sweeping set of amendments to the National Labor Relations Act (NLRA) since passage of the Taft-Hartley amendments in 1947 and, possibly, in the NLRA's 75-year history. If passed, EFCA will dramatically alter the landscape of labor–management relations in favor of unions seeking to organize nonunion employers.

The EFCA proposes significant departures from three long-standing NLRA principles. First, the EFCA will either virtually eliminate secret-ballot elections, the primary method by which employees express their preference on the issue of unionization, and allow labor organizations to unionize workforces simply by directly soliciting and obtaining signatures from a majority of the employees in an appropriate bargaining unit, or condense the period from a union's filing of a representation petition to the election to five to 10 days. Second, the EFCA will force employers into "interest arbitration" for the first collective bargaining agreement if the parties fail to negotiate a mutually acceptable contract within 120 days. Third, the EFCA will fundamentally alter the remedial nature of the NLRA by imposing treble-back-pay awards and civil damages against employers for improper conduct during a union organizing drive, without any corresponding increase in penalties for union misconduct.

The chances for passage of at least some version of the EFCA this year have improved dramatically from last year, when it easily passed the House but was blocked by a threatened filibuster in the Senate. The election of President Barack Obama, who cosponsored the EFCA last year, as well as Democratic gains in the Senate last fall and Al Franken's (D-Minn.) recent victory in Minnesota – which gave Democrats control over 60 Senate seats, the number needed to overcome any Republican filibuster – increased the chances of the EFCA's passage in some form in the short term. In fact, reports have indicated that Senate Democrats have made a deal that will result in a Senate vote this fall. Supporters of the deal – spearheaded by Senators Sherrod Brown (D-Ohio), Tom Carper (D-Del.), Mark Pryor (D-Ark.), Charles Schumer (D-N.Y.) and Arlen Specter (D-Pa.) – hope it overcomes the reservations of moderate Democrats who have expressed opposition to the bill as it is presently drafted.

This article examines: (1) the representation and collective bargaining process under the NLRA; (2) how the provisions of the EFCA, as presently drafted, will make it easier for labor organizations to organize nonunion workforces and will fundamentally change the good-faith bargaining process; (3) potential revisions to EFCA; and (4) steps employers can take to be ready for the changes the EFCA is expected to have on the organizing and collective bargaining processes.

No Secret-Ballot Election

The Union Representation Process Under Current NLRA Law

The key provision of the EFCA is its virtual elimination of an employee's long-standing right to a secret-ballot election to vote for or against union representation. Under current law, the representation process begins with a demand for recognition by the union. If the employer declines to recognize the union voluntarily, the union may file a representation petition with the National Labor Relations Board (NLRB or the "Board") regional office where the bargaining unit is located. The petition must be supported by a "showing of interest," which is typically satisfied by signed "authorization cards," dated no more than one year prior to the petition date, from at least 30% of employees in an appropriate bargaining unit. As a practical matter, most unions will not file a representation petition until they have obtained signed authorization cards from at least a supermajority (60% to 70% or more) of the employees in the proposed unit. Notwithstanding a union's demand for recognition based upon its claim to the employer that it has a majority, as evidenced

by the signed authorization cards, an employer has an absolute right to reject a union's demand for recognition. For example, the employer may not be convinced that a majority of its employees have knowingly selected to be represented. If an employer declines to voluntarily recognize the union, the union files an election petition with the NLRB, and the Board schedules a federally supervised secret-ballot election during which employees have an opportunity to vote on the question of representation.

The period of time between the filing of the petition and the election (on average six to seven weeks) is the "campaign period." During this time, the employer and the union have an opportunity to advise employees about the practical implications of union representation by distributing literature and holding informational meetings. Employees discuss the issues, raise questions, and request information and answers to their questions from both their employer and the union. With unionization of the private sector currently at an all-time low of 7.6%, this campaign period has become an increasingly important time for employers to answer questions from employees who, in large part, have limited exposure to unions, little experience with union representation or the election and bargaining process, and little knowledge of their legal rights in the face of organizing efforts. The Board closely regulates the campaign process and the parties' conduct by imposing content and time restrictions on electioneering activity and by providing a forum for challenges to improper or coercive campaign efforts. Objections to conduct affecting the outcome of an election are resolved by an investigation and a hearing.

The secret-ballot election, like any election in our democracy used to select local, state and federal representatives, affords an opportunity for informed voters to determine whether they want to be represented by a union in a neutral and anonymous setting, free from judgment, intimidation or fear of reprisal. Employees who have signed authorization cards for the union nevertheless have a right to vote "no" in the election if they have changed their mind, or had signed in order to have the opportunity to learn what the union was about. Only if a union receives a majority of votes cast in an election will the Board issue a "Certification of Representative."

Representation Election Procedure Under the EFCA

The EFCA eviscerates the time-tested and democratic procedural safeguards of the secret-ballot election. Specifically, the EFCA amends Section 9(c) of the NLRA to provide that when a petition is filed by an individual or labor organization claiming to represent a majority of the employees in a unit appropriate for the purposes of collective bargaining,

> [i]f the Board finds that a majority of the employees . . . has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).[1]

In other words, the Board will issue a Certification of Representative based solely on authorization cards signed by a simple majority of the employees in an appropriate unit – with no election and no campaign period for the employer to communicate with its employees. In this regard, the EFCA effectively overturns the U.S. Supreme Court's decision in *Linden Lumber Co. v. NLRB*,[2] which held that an employer does not commit an unfair labor practice by declining to recognize a union based on a majority of authorization cards.[3]

While organized labor contends that signed authorizations provide all that is necessary to determine employee free choice, significantly, the EFCA applies a different set of rules regarding decertification elections. The EFCA explicitly restricts its application to circumstances where "no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit."[4]

Both the Board and the courts "have long recognized that the freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card check."[5] Note, however, there is no mechanism for the employees to request an election, leaving the decision entirely up to the union. A union with cards from a majority of employees is unlikely to request an election when it can "win" and be certified on the basis of the cards and avoid a challenge. Thus the EFCA's proposed sole reliance on authorization cards can pose significant dangers for the employer.

First, the legislation is devoid of any safeguards to ensure that a union will not gain representative status through coercive tactics. Union representatives and employees fervently advocating unionization have historically employed a variety of improper tactics in connection with solicitation of authorization cards, including peer pressure, misrepresentation, harassment and intimidation. It is not uncommon for union representatives to unlawfully promise that union initiation fees will be waived only for employees who sign authorization cards or to threaten that employees who do not sign cards will be terminated if the union is certified as the employees' exclusive bargaining representative. Second, there are no safeguards to prevent signatures being obtained by fraud or forgery. The secret-ballot election currently serves as an inherent check on improper organizing efforts because it allows employees who may have been improperly coerced into signing an authorization card the opportunity to anonymously vote for or against representation under the protected veil of a secret ballot. By removing this layer

of protection, there is no mechanism in place to ensure that a union's certification as a bargaining representative was achieved through proper and noncoercive efforts.

Furthermore, given the discreet – even stealthy – nature of card-signing campaigns, an employer will often have little or no notice of union efforts to organize its workforce until it is too late and will have no opportunity to campaign against organizational efforts. As a result, the EFCA actually facilitates employees' having to make a choice on such an important issue without the benefit of hearing all sides – getting the full information and answers to their questions that election campaigns provide. Since most labor contracts contain "union security" clauses that compel all employees (even those who would decline representation) to pay union dues, unions have a significant financial incentive to organize as many employees as possible. Solicitation of authorization cards under the EFCA is both easy and inexpensive, and unions are likely to increase organization efforts in nonunion workplaces and in traditionally nonunion industries. At its core, the removal of the secret-ballot election will make it easier for unions to organize employers of all sizes, across all industries.

Imposition of First Labor Contract

The Current Collective Bargaining Process Under the NLRA

Once a union wins an election, the union and the employer engage in collective bargaining. The duty to bargain is set forth in Section 8(d) of the NLRA:

> To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.[6]

The NLRA does not prescribe any specific time period within which negotiations must begin or end, and states only that the parties must "meet at reasonable times and confer in good faith."[7] The parties can negotiate indefinitely until reaching the point of agreement or impasse.[8] The NLRA does not require the parties to make concessions or agree to the demands of the other party; nor does it require participation in mediation or binding arbitration of contract disputes. Rather, the NLRA is premised on the understanding that the market forces at play will bring pressure on the parties, resulting in a resolution of the dispute.

Unlike certain public-sector labor laws (such as New York's Taylor Law) that prohibit public employees from striking and instead provide for interest arbitration or legislative proceedings to resolve impasses in labor disputes affecting essential public services – like the police, firefighting, education and the judiciary – the NLRA provides for no such impasse-breaking mandate. In fact, neither party may insist that the other agree to arbitration of contract terms as a substitute for "good-faith bargaining." Indeed, interest arbitration is not even a mandatory subject of bargaining.[9] Instead, the principles of the NLRA promote the right of employers and unions to engage in good-faith collective bargaining without any artificial restraints on free-market forces.

Collective Bargaining Under the EFCA

The EFCA once again fundamentally alters the freedom of contract reflected in the NLRA. Under the EFCA, the employer would be required to enter into negotiations within *10 days* after the union requests bargaining for an initial contract. Specifically, the EFCA would amend Section 8 of the NLRA to add a new provision, which states that

> not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in Section 9(a) . . . the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.[10]

The EFCA would also provide that, if an employer and a union are engaged in bargaining for their first contract and are unable to reach agreement within 90 days, either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS or the "Service") for mediation:

> If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.[11]

If the FMCS is unable to bring the parties to agreement after 30 days of mediation, the dispute will be referred to arbitration, and the results of the arbitration will be binding on the parties for two years. As stated in the EFCA:

> If after the expiration of the 30-day period beginning on the date on which the request for remediation is made . . . or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be pre-

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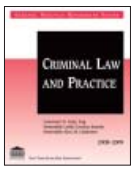

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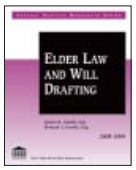

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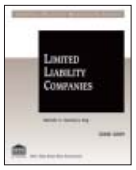

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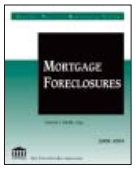

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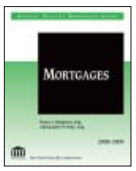

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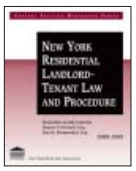

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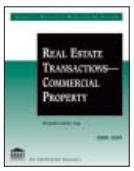

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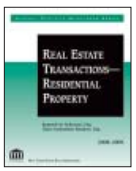

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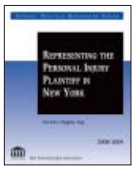

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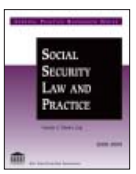

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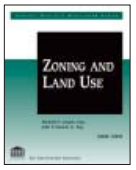

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> scribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.[12]

In other words, if an employer and a union cannot reach agreement on an initial contract within 120 days, the union can request an independent arbitrator to impose on the employer initial contract terms, including wages, benefits, hours and other economic and noneconomic terms and conditions of employment. The resulting contract would be in place for two years, and the employer would be precluded from appealing the arbitrator's ruling, regardless of the economic or organizational burden it may impose.

This change in the law is significant for a number of reasons. Currently, there is no requirement of binding interest arbitration in the contract negotiation process, and the parties must reach agreement on an initial contract through collective bargaining – a process that can take nine months to a year or even more – considerably longer than the four months provided by the EFCA. Not only does the EFCA severely truncate the collective bargaining process for the first labor contract, which serves as the foundation for all future collective bargaining, it provides for wholesale imposition of terms of employment by an arbitrator who likely has no understanding of the employer's unique business needs and challenges. For example, the arbitrator could determine that seniority, rather than merit, should determine decisions regarding promotions, transfers and layoffs; require the employer to make mandatory contributions to a union's under-funded pension plan; prohibit the employer from subcontracting certain work that can be obtained more cost-effectively from another source; or establish holiday schedules, amounts of vacation and wage premiums, such as overtime pay after eight hours a day rather than 40 hours a week. In these uncertain economic times, any one of those changes could cripple an employer's competitive standing.

As a result of these provisions, the traditional economic weapons of bargaining (*i.e.*, strikes and lockouts) would, for all practical purposes, be eliminated from first contract negotiations. This will inevitably strengthen a union's position during its card-check campaign because employees will not have to fear a period of unemployment due to potential strikes or lockouts. As previously noted, historically interest arbitration has been limited to resolving contract disputes for critical public sector services, such as the police or firefighting, where because of public safety concerns the public employees do not have the right to strike.

As drafted, the EFCA provides no substantive guidelines regarding the nature of the arbitration or the procedures to be followed. Most arbitrators have little or no experience in creating contracts, particularly first contracts and particularly those where private-sector competitive issues are involved. Yet the EFCA contains no guidelines for the exercise of this formidable arbitral authority; nor does EFCA provide a mechanism to appeal the arbitrator's determination. For example, will the arbitrator have absolute discretion to write the contract as he or she sees fit or will the arbitrator be subject to a "baseball-style" approach where he or she is forced to choose wholesale one party's contract (or a modified baseball style in which he or she may pick and choose among parties' proposals on each subject)? This gives arbitrators the ability to write collective bargaining agreements without any governing standards or guidelines, so there will be no uniformity to serve as precedential guidance for the parties.

Increased Penalties

Current Remedial Measures Under the NLRA

Under current law, relief under the NLRA is remedial in nature, not punitive. The NLRA was designed to make the offended party "whole" for its losses. Remedies against employers for unfair labor practices are generally limited to cease-and-desist orders, reinstatement and back pay, posting of notices to employees and injunctive relief. There are no fines, penalties, compensatory damages or attorneys fees, except in extraordinary cases.

Penalties Under the EFCA

The EFCA would unreasonably strengthen the NLRB's remedies for unfair labor practices committed by employers without making any corresponding changes to remedies for unfair labor practices committed by unions.

1. Injunctions

The EFCA would *require* the NLRB to seek a federal court injunction against an employer whenever there is reasonable cause to believe that the employer has threatened, discharged or discriminated against employees or engaged in conduct that significantly interferes with employee rights during an organizing drive or first contract negotiations.

Specifically, the EFCA would amend Section 10(*l*) of the NLRA to require the General Counsel to seek injunctive relief whenever it is charged that any employer (1) "discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of Section 8"; (2) "threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of Section 8"; or (3) "engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7," either (a) "while employees of that employer were seeking representation by a labor organization" or (b) "during the period after a labor organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative."[13]

Unions could use Board-initiated injunctions as a powerful weapon to enjoin important employer plans, such as layoffs, mergers, transfers of work, changes in operations, etc., arguing that the plans are intended to interfere unlawfully with union organizing efforts. Employees getting wind of these changes could seek protection from the union, which could argue that the changes are retaliatory for organizing efforts that were actually commenced only in reaction to the planned changes.

2. Treble Back Pay; Liquidated Damages

The EFCA increases the amount an employer is required to pay when an employee is discharged or discriminated against during an organizing campaign or first contract negotiations to three-times back pay. EFCA amends Section 10(c) of the National Labor Relations Act to provide

> [t]hat if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages.[14]

3. Civil Penalties

The EFCA also provides for civil fines up to $20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing campaign or first contract negotiations. The EFCA would add civil penalties to the NLRB's remedies in certain unfair labor practice cases. The EFCA provides that

> [a]ny employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty not to exceed $20,000 for each violation. In determining the amount of any penalty under this section, the Board will consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on the public interest.[15]

4. Result of EFCA's Increased Penalties

The extreme remedies in the EFCA – including injunctions, treble damages and civil penalties – would have the effect of putting NLRA violators on par with criminal RICO conspirators. Instead of leveling the playing field, unions and employees would be incentivized to file meritless unfair labor practice charges to seek interference with an employer's planned operational changes, substantial economic settlements and/or to up the ante in terms of bringing pressure to force employers to capitulate to union demands.

Legislative History of the EFCA

The EFCA was first introduced in Congress on November 21, 2003, by Rep. George Miller (D-Calif.) and Sen. Edward Kennedy (D-Mass.). The bills died in committee in both the House and Senate, were reintroduced by the same sponsors on April 19, 2005, and once again died in committee. Representative Miller reintroduced the EFCA in the House of Representatives on February 5, 2007, and the House passed the bill (H.R. 800) on March 1, 2007, by a vote of 241-185. On March 29, 2007, Senator Kennedy reintroduced the Senate version (S. 1041) in the Senate with 46 cosponsors, including then-Senator Obama. Three months later, on June 26, 2007, the bill was pulled after the Senate failed to invoke cloture – the 60 votes required to end debate on the bill – by a vote of 51-48.

Proponents of the EFCA contend that the legislation is needed to bypass an election process that favors employers and denies employees the opportunity to self-organize and designate representatives of their own choosing. Specifically, unions contend that employers avail themselves of administrative and procedural delays between the filing of a petition and the holding of an election. Yet the length of time between the union's filing of a petition and a secret-ballot election has *decreased* over the years. Proponents also argue that the EFCA is needed to counter alleged unlawful conduct by employers during the campaign period and the inherent advantage employers have to speak with their employees during "captive audience" meetings held during working hours. Notably, however, statistics demonstrate that unions have filed objections to employer conduct in only a small number of instances. Out of the 1,850 representation elections in 2006, objections were filed in only 177 cases (a number which includes objections filed by employers against unions).[16] Moreover, it is not clear how many of those 177 objections were meritorious and resulted in an election being set aside.[17]

Significantly, unions already have a remedy for employers who engage in unfair labor practices that result in an unfair election or that undermine a union's majority. Not only can a union get the election set aside, but, in egregious cases, the union can obtain a bargaining order that requires the employer to recognize and bargain with it without a showing of majority status.[18] Given that unions won almost 67% of Board-supervised representation elections in the first half of 2008, it is unlikely that employers have an

undue advantage that must be remedied by enactment of this legislation. Indeed, the real thrust of the EFCA is that it represents an opportunity for organized labor to reverse the drastic decline in private sector unionization over the past several decades.

Year	Percentage Organized[19]
1953	35.7%
1973	24.2%
1983	16.5%
1993	11.1%
2003	8.2%
2008	7.6%

Likely Reach of the EFCA

The EFCA is likely to have far-reaching effects on employers across all industries, including those that have never before been the target of a successful union organizing campaign.

Nontraditional Industries/ Workforces

Small- and medium-sized employers would be ill advised to assume that they are insulated from organization. Indeed, more than 70% of employers involved in NLRB elections had fewer than 50 employees in the bargaining unit.

Under 10	24.7%
10–19	18.3%
20–29	12.6%
30–39	8.8%
40–49	6.1%
Under 50	70.5%[20]

In this current economic environment where workers are increasingly concerned about job security and are dissatisfied with employers' efforts to control costs, no industry is immune from union organization. Even white-collar industries that have not traditionally been the target of union campaigns may experience a card-check campaign. The prospect of significant union dues and the ease with which unions can obtain representative status without an election will create a surge in organizing efforts.

Right-to-Work States

Right-to-work laws prohibit agreements between unions and employers that mandate membership or payment of union dues or "fees" as a condition of employment, either before or after hiring.[21] Unions have traditionally limited their organization efforts in right-to-work states given the expense of running an election campaign and the unavailability of automatic dues payment from each employee in an organized bargaining unit. Upon passage of the EFCA, however, workers in right-to-work states will be just as likely as those in other states to find themselves unionized because of the ease and modest costs of a card-check campaign.

Potential Revisions to EFCA

Discussion of potential modifications to the EFCA has included the following:

- having the NLRB run secret-ballot elections, but in a substantially shortened time from petition to election (*i.e.*, within five to 10 days from the date of filing a petition);
- making employer captive-audience speeches an unfair labor practice unless the union is given equal opportunity under identical circumstances for the same;
- making any employer or union captive-audience speeches an unfair labor practice if held within 24 hours of the election (currently, an employer captive-audience speech within the 24-hour period prior to an election is objectionable conduct that can result in an employer election victory being set aside);
- making any employer or union visit to an employee's home, if related to an election campaign, an unfair labor practice;
- increasing enforcement and punitive remedies, such as imposing civil penalties for willful violations of the NLRA, treble damages for discriminatory discharges, reasonable attorney fees on a finding of bad faith, harassment or unnecessary delay and *Gissel* bargaining orders where a fair election is deemed not possible by the NLRB;
- more closely regulating the negotiating process, including mandatory bargaining commencement dates, the imposition of a bargaining schedule, costs and attorney fees to combat bad-faith bargaining and requiring mandatory mediation after a period of 120 days;
- broadening provisions for injunctive relief with reasonable attorney fees upon a finding that a party is not acting in good faith; and
- streamlining NLRB procedures.

Other possible, but unconfirmed, aspects of a potential deal include denying employers the right to require employees to attend meetings on work time to discuss unionization issues, requiring that union agents be given full access to the workplace following the filing of a petition, and the right of the union to employees' names and addresses immediately upon the filing of the petition.

Steps Employers Can Take to Prepare for the EFCA

Given the potentially significant impact of the EFCA in its current form, or even in a slightly watered-down version, nonunion employers must understand the challenges and related business costs the EFCA presents and prepare now for the union organizing efforts companies may soon face.

Conduct a Vulnerability Assessment of the Workforce

Under the EFCA, nearly all employers will be at risk of encountering an aggressive union organizing drive. Employers should examine their workforces to determine the following:

- The vulnerability of their employees to lawful union efforts, as well as unlawful organizing tactics (*e.g.*, fraud, misrepresentation, harassment, threats, coercion, etc.). Some employees may be particularly vulnerable to harassment, intimidation or coercion to sign a union authorization card. Others may be vulnerable to misleading statements by organizers,

misrepresentation or fraud. They may lack a full understanding of the significance of signing a union card – for example, due to language issues or a lack of sophisticated knowledge of their rights or the implications of unionization.
- The vulnerability of the employer and its various facilities to organizing efforts based on its operational structure, workplace practices, policies and relationships with its employees.
- The vulnerability of business plans that may impact operations and personnel and, in so doing, could be viewed as unlawful or subject to injunctive relief if implemented during an organizational campaign.

Documentation of Business Planning

In this current economic climate, many employers may be contemplating or planning discipline, changes in compensation or benefits, a transfer of work to another facility, layoffs or other restructuring. If any of these are implemented during a union organizational effort (perhaps one the employer may not even be aware of at the time of the planning), or an organizational effort is started in reaction to word of impending plans, the union may charge that implementing such plans during an organizational campaign would be discriminatory or interfere with employee rights.[22] The EFCA may require the NLRB to seek an injunction to stop implementation of the plans. Treble-backpay awards and costly civil penalties could be sought if any such changes in this period are later found to be discriminatory (*i.e.*, motivated, in whole or in part, by anti-union animus).[23] Careful documentation of personnel decisions and planned business changes, and the timing and reasons for those actions, may be critical.

Implement and Maintain Best Practices

Since unions will likely seek to organize and get employees to sign cards before employers are aware of their activity, an employer's best defense may be to create a well-run workplace, through the implementation of "Best Practices in Human Resources," so that employees will be more likely to reject unionization when approached. Employers should evaluate current personnel policies and practices to determine whether the current relationships between management and employees will make it harder or easier for unions to persuade employees to organize. Examples of Best Practices include: full compliance with applicable law ("respect for employee rights"), fair and nondiscriminatory treatment of employees, elimination of actual or perceived favoritism in personnel decisions, prompt and accurate communications on issues that affect employees, managed employee expectations, effective processes for promptly resolving disputes in-house, and competitive compensation and benefits.

Develop Response to Union Organizing Strategies

In the event employees may be subject to "mischief" by union organizers, such as noted above, employers should adopt a strategy to assist employees in dealing with this misconduct. This includes training employees on what to do if they feel harassed or coerced in any way to sign an authorization card and providing them with a source of information and a place they can go to get answers to questions they may have about their employment, the union organizing effort or related matters. Consider also adopting a strategy to manage the impact of union organizing efforts, *i.e.*, promulgating lawful no-solicitation/no-distribution rules, evaluating operational and organizational issues that affect the scope of the "appropriate" unit, and identifying those who qualify as "supervisors" and who therefore will be part of the management team to deal with organizing efforts. This team will train employees, gather intelligence on vulnerabilities to organizing and organizing activity and advocate the company position on organizing. The correct identification of supervisors will be critical if the RESPECT Act,[24] another bill backed by organized labor that is designed to narrow the classification of supervisors exempt from the NLRA, is passed.

Training of Supervisors

One important step an employer should take immediately is to train its supervisors to handle their increased responsibilities and broad role in dealing with the implications of the EFCA. That training regimen should include the following :

- Communicating Best Practices. Supervisors need to understand their vital role in implementing the employer's Best Practices in Human Resources, including developing effective communication skills and relationships with subordinates.
- NLRB Rules. The NLRB's rules governing the conduct of supervisors both before and during an organizational effort are often counter-intuitive – common sense and good motives are not enough to avoid violations. In light of the EFCA's significantly increased penalties for NLRA violations by supervisors, supervisors should be made keenly aware of the rules governing their conduct.[25]
- Warning Signs. Supervisors should be trained to recognize the earliest signs of employee unrest and union card-signing drives in order to provide the employer with the maximum amount of time to react and persuade employees on the issues.
- Training the Trainers. Human resources and supervisory personnel should be trained for their role in the training of nonsupervisory employees, as discussed below.
- Campaigning on Substantive Issues. If employers are fortunate enough to learn of a union organizing effort in sufficient time to persuade employees why unionization is not in their best inter-

ests, supervisors should be prepared to provide employees with information they need to make an informed decision and which the union will not provide to them. They should also be prepared to deliver the employer's message, to listen to the employees' concerns and answer employees' questions in a knowledgeable, confident manner. Employers are unlikely to have sufficient time to conduct this training if they wait until they first learn of an organizing drive in the workplace.

Training Employees

The EFCA gives the union a roadmap for organizing without a similar opportunity for the employer to provide information, discuss the issues or communicate its views to its workers. Thus, the EFCA puts a premium on effective action by the employer *before* an organizing campaign starts. Employers should consider training their current employees and new hires during their orientation on the following issues:

- Best Practices. Explain, even if the word "union" is never used, why the employees do not need a union. Supervisors can help employees understand and appreciate the employer's Best Practices, so that the union will have difficulty offering employees anything of sufficient value that would prompt them to sign a union card.
- Union-Free Philosophy. Explain the company's union-free philosophy and why/how that is likely to benefit the employee.
- The EFCA and Authorization Cards. Help employees understand the true legal significance of the cards and the implications of signing. Employees should know that by signing an authorization card they may be voting for a union without the benefit of information as to what they are getting themselves and the company into.
- Dealing with Harassment, Coercion, Misrepresentation, Lack of Information/Discussion. If employees may be subject to "mischief" by union organizers, the employer should prepare employees by explaining how to deal with such misconduct, how the employer can help protect them, and what resources the employer is providing to correct misinformation and answer questions.
- Campaign Issues. Review the facts and arguments on the key issues the employees can and will consider in deciding whether to sign an authorization card, or decline to do so ("campaign issues"). Since the "election campaign" as we know it may be a thing of the past after the EFCA, each employer may have to decide when the time is right to schedule this training for the employees.

Rapid Response Team

For most employers, their first awareness of a union organizing campaign will come long after the union has started the effort. Thus, the employer is most often starting from behind. Employers should therefore be prepared to respond quickly and capably to a card-check campaign. This quick response task force should be composed of a small number of trained and prepared members of the management team. That team will have worked with outside counsel to prepare a well-thought-out plan to respond to a union organizing effort in the most effective manner.

"Campaign in a Can"

Since the employer will likely need to communicate with its employees on the campaign issues and will have little time to prepare these materials, the Rapid Response Team should have a set of materials prepared and ready to go in the event an organizing effort is discovered.

Preparation for Bargaining/ Interest Arbitration

Under the EFCA, the time period for negotiating a first contract is extremely short, and employers may have little time to prepare.[26] In the likely event the union will use the availability of arbitration as leverage in negotiations, the employer will need to be prepared for "interest arbitration," *i.e.*, an adversarial hearing before an arbitrator where the arbitrator's decision will be to impose the terms of a two-year labor contract on the parties.[27] In such proceedings, the employer's preparation of its contract proposals and its documented defense of the reasonableness of those proposals are important. Bargaining strategy should be planned early on. This includes the steps the employer can take to document its exercise of management rights that will support its position that the same should not be restricted in a labor contract.

Conclusion

The EFCA is anticipated to change the labor law as we know it, making it substantially easier for unions to organize, more likely that employers will be saddled with expensive and restrictive labor agreements, and more costly to employers subject to union-filed unfair labor practice charges challenging an employer's actions. Prudent employers should take steps now to limit the likelihood of an EFCA organizing drive and to be ready to defeat one should it occur. ■

1. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 2(a) (2009) (EFCA).
2. 419 U.S. 301 (1974).
3. A secret-ballot election would still be conducted if a representative petition is filed unaccompanied by a claim that the union represents a majority of employees in an appropriate unit. Given that few unions file petitions with less-than-majority support, the practical impact of the EFCA would be to virtually eliminate secret-ballot elections, but for decertification scenarios.
4. EFCA § 2(a).
5. *Dana Corp.*, 351 NLRB No. 28, at *5 (2007).
6. 29 U.S.C. § 158(d).
7. *Id.*
8. At impasse, the employer may unilaterally implement new terms and conditions of employment reasonably comprehended by its final proposals, and the union may either walk away from the bargaining table or engage in a strike.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Please explain the meanings of *term* and *condition* in contract law.

Answer: My thanks to the New York reader who sent this first-time question, which has a surprisingly complicated answer. In a lay dictionary the word "term" has a long list of meanings. The two most common are: "a limited time during which something takes place," as in "a term of two years"; and "a word, or designation," as in "*a legal term*." These two meanings make the word inherently ambiguous.

In legal dictionaries, the most common meaning of the word "term" is "duration of time." The word "term," in a deed conveying land for a certain term, is defined as having "a determined or prescribed duration." (*Etheridge v. United States*, 218 F. Supp. 809, 812 (1963)). In contrast to *condition*, which denotes an uncertain event, *term* describes an event that is certain to take place, although it may not be known when.

But some courts refuse to distinguish between the words *term* and *condition,* treating them as synonyms. A California court decided that a rule eliminating the rights of firefighters to facilities for washing was a "term and condition of employment." An Illinois court held that parking fees concerned a "term and condition" for building service and food service employees. And a Minnesota court decided that a county sheriff department grooming policy constituted a "term and condition of employment."

A New Jersey court held the establishment of a school calendar was not a "term and condition of employment" within a statute entitling public employees to negotiate such terms and conditions. And a Florida court decided that "possible promotion . . . does not involve a 'term and condition of employment'" for members of a bargaining unit.

Courts have also struggled over the words *term* and *tenure*. A North Dakota court commented that while "tenure" and "term" are not strictly synonymous, "they are frequently so used by legislative bodies." Furthermore, sometimes *term* is a synonym of *session*, and sometimes it isn't. A 1909 Oregon court said that the word "term" signified the space of time permitted to hold a "special session." Later, however, the same court said that the word *session* did not mean "term" but referred only to the court's next temporary sitting. But with reference to the phrase *next term*, an Alabama appeals court said that the words "term" and "session" were synonymous as applied to holdings or sittings of a court.

So it seems that the question is one that courts have struggled to answer for years. Their decisions provide no consensus, only the need for it.

Not surprisingly, Justice Oliver Wendell Holmes, Jr. wrote (in 1918): "A word is not crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstance and the time in which it is used." (*Towne v. Eisner*, 245 U.S. 418, 425 (1918)). Poet Emily Dickinson said it even better: "A word is dead when it is said, some say./ I say it just begins to live that day."

Question: When I called a local store that had advertised a "promo," I asked how long the sale would last. The voice at the other end indignantly responded that the advertised event was not a "sale," and it was limited to a single day. So does a "promo" differ from a "sale" in that it has a definite time limit?

Answer: I gather, from your experience, that at least the individual you spoke to thinks that "time-limitation" signals the difference between a promotion and a sale. More interesting, however, is the clerk's use of the clipped form *promo* instead of promotion, the original word. Our word-stock is expanding rapidly as a result of technology that requires new words for new things. It is, however, also shrinking because of "clipping" – English speakers' tendency to shorten words already in the word-stock by cutting off parts, usually their beginnings or ends, the word *promo*, for "promotion" being an example.

The clipped word *vet* results from two clippings, the earlier, from *veteran*, the name for persons who have previously fought our wars. A more recent clipping is *vet* from "veterinarian," which comes from a more circuitous process. A veterinarian, of course, is an individual trained medically to care for animals. As part of his or her practice a veterinarian must learn and assess an ill animal's medical history.

That assessment of the animal's medical background by a "vet" is the basis of the meaning of the new verb *vet,* which has expanded to its current meaning, "to determine and assess an applicant's background in order to decide his or her fitness for employment." The clipped form *prep*, which comes from the prefix *pre-* ("to prepare") can refer to making a patient ready for surgery, making a student ready for college, or making an athlete ready to compete. As an adjective it can refer to the ninth-to-twelfth years of school ("prep school").

Another relatively new clipping is the verb *morph*, clipped from the middle of the noun *metamorphosis.* A metamorphosis is an alteration or change of form, the affix *morph-* meaning "change." True to its name, the clipped verb *morph* causes change to occur. Some readers will recognize the verb *synch* (a clipping of *synchronize*) from its use in the compound verb *lip-synch*, "to move one's lips in synchronization with the lyrics of a song."

Another new clipping is *dis*, from the word "disrespect," which began as

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GERTRUDE BLOCK is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I've been a New York litigator for almost 40 years, and in those decades I've seen, heard, and thought a lot about the litigator's role. But just last month, I was shocked by what I heard at a CLE ethics presentation about the new New York Rules of Professional Conduct ("Rules") that became effective on April 1, 2009 – litigators are now supposed to "rat out" their clients if they testify falsely! This is so completely contrary to the New York litigator's traditional role as a zealous advocate that I wondered whether I had just heard an April Fool's Day joke.

Unfortunately, however, this was no joke. Rule 3.3(a)(3) provides that "[i]f a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(b) provides that "[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) then says that the duty to remedy such false testimony or misconduct applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6," the Rule regarding the lawyer's duty not to reveal or use client confidential information (*i.e.*, what the old Code of Professional Responsibility ("Code") used to call "confidences" and "secrets"). In effect, Rule 3.3 requires lawyers to disclose confidential client information to a tribunal – and that includes arbitrators as well as judges – if such disclosure is necessary to remedy any false testimony or intentional misconduct by a client related to the proceedings.

In my view, Rule 3.3 represents a paradigm shift for New York litigators. When I began my practice in 1970, New York had just adopted the Code, and there was some concern about the uneasy relationship between a lawyer's duty to maintain the sanctity of client confidences and secrets and a lawyer's duty of candor to a court. Like the ABA Model Code on which it was based, the New York Code did not expressly resolve that conflict: while Disciplinary Rule (DR) 7-102(B)(1) required a lawyer who knew about a client's fraud upon a tribunal – for example, perjured testimony – to rectify it by, if necessary, revealing the fraud to the tribunal, DR 4-101(B) prohibited a lawyer from revealing or using client confidences or secrets to anyone, including a tribunal.

Those of us who believe wholeheartedly in the adversary system of justice took the position that partisanship shaped the very nature of the litigator's role and that, therefore, a litigator should never be forced to dilute the zeal with which he or she represented a client by pointing out perjured testimony. In our view, the duty of confidentiality trumped the duty of candor and it did so because, as litigators, our most important duty was to our client. In the now-famous words of Lord Brougham: "[A]n advocate, in the discharge of his duty, knows but one person in the world, and that person is his client." In other words, zealous representation made the adversary system work, and if opposing counsel was not good enough at cross-examination – in Wigmore's words, "the greatest engine ever invented for the discovery of truth" – to demonstrate my client's false testimony, well, then, shame on him.

History shows that the profession agreed with our view. In 1974, the ABA House of Delegates amended DR 7-102(B)(1) to resolve the conflict. It qualified the lawyer's duty to "reveal the fraud to the . . . tribunal" by adding the proviso "except when the information is protected as a privileged communication." This amendment to DR 7-102(A)(1) made it clear that the duty of a lawyer to preserve a client's confidences and secrets prevailed over the duty to reveal to a tribunal client fraud or perjury.

Shortly thereafter, the New York State Bar Association (NYSBA) agreed. In 1976, NYSBA's House of Delegates adopted virtually the same proviso to DR 7-102(B)(1), confirming that the duty of confidentiality was more important to the adversary system of justice than the duty of candor. *See* NYSBA Op. 454 (1976). In fact, it was so important that in 1980, when the NYSBA Committee on Professional Ethics considered whether DR 7-102(B)(2), which required a lawyer to reveal to the court client confidences or secrets in order to rectify the fraud of a non-client upon a tribunal, but lacked the proviso, the Committee overrode that omission by reading the proviso into DR 7-102(B)(2). NYSBA Op. 523. That Committee reasoned that in New York "the balance is struck by favoring the personal interest of the client in preserving his confidences and secrets against the relatively impersonal obligation of the lawyer to secure the system of justice against fraud."

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

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I realize there were litigators and other lawyers across the country who did not agree with this resolution of the conflict between the duty of confidentiality and the duty of candor to a tribunal, and that they won out in 1983, when the ABA adopted its Model Rules, including Rule 3.3. But New York lawyers – litigators and others – always preferred the New York Code and, among other matters, the priority it gave to the duty of client confidentiality. In 1985, the NYSBA House of Delegates rejected a proposal to adopt the Model Rules. Even when the Code underwent wholesale revisions in 1990 and 1999, incorporating provisions and concepts from the ABA Model Rules, New York lawyers did not alter the priority of client confidentiality preserved in DR 7-102(B)'s proviso.

In short, New York lawyers consistently have chosen that litigators should not betray their clients' trust by identifying them as perjurers or fraudsters if they testify falsely or commit other intentional misconduct in proceedings before a tribunal. The extent of that loyalty to a client, reflected in the lawyer's duty to preserve client confidentiality, has been a constitutive element of a New York litigator's identity since well before I started litigating. *See* ABA Formal Op. 287 (1953). Why are we changing that now?

Respectfully submitted,

A Longtime Litigator

Dear Litigator:

You are correct that the adoption of Rule 3.3 marks a significant change for New York litigators, in effect reversing the NYSBA House of Delegates decision in 1985 not to adopt the Model Rules, including Rule 3.3. Rule 3.3(C) does subordinate the duty of client confidentiality to the duty of candor to a tribunal, thus marking a change in a litigator's relationship with a client. However, that shift is not nearly as unprecedented as you suggest.

The inviolability of the duty of client confidentiality has never been absolute and has been whittled away in the years since you became a litigator. Critics of lawyers have often observed that the duty of client confidentiality has always been subordinate to a lawyer's own self-interest. For example, when New York adopted the Code in 1970, the duty to preserve the sanctity of client confidences and secrets was subject to exception when "necessary to establish or collect [a] lawyer's fee or to defend [himself or his] employees or associates against an accusation of wrongful conduct." DR 4-101(C)(4).

Besides that general exception protective of all lawyers, DR 4-101(C), as adopted in 1970, contained two other exceptions inconsistent with unqualified loyalty to the client. DR 4-101(C)(3) allowed a lawyer to reveal "the intention of a client to commit a crime" – such as perjury – "and the information necessary to prevent the crime." DR 4-101(C)(2) allowed a lawyer to reveal "confidences or secrets . . . required by court order." Except for modifications to make the language gender neutral, those two provisions remained unchanged during the Code's hegemony. DR 4-101(C)(3) permitted a litigator to make the same disclosure to a tribunal when a litigator learned that a client intended to testify falsely, as Rule 3.3(B) now requires.

Moreover, in 1990, New York adopted DR 4-101(C)(5), the so-called "noisy withdrawal" provision, based upon ABA Model Rule 1.6, comment 14. DR 4-101(C)(5) permits a litigator to reveal client confidential information "to the extent implicit in withdrawing a written or oral . . . representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the . . . representation was based on materially inaccurate information or is being used to further a crime or fraud."

The implicit disclosure of client confidential information that DR 4-101(C)(5) permitted has been considered by at least one ethics committee to become mandatory in the event of client perjury or misconduct that falls within the ambit of DR 7-102(B)(1). *See* NYSBA Op. 797 (2006); NYSBA Op. 781 (2004). For example, in NYSBA Op. 781 (2006), the NYSBA Committee on Professional Ethics opined that a matrimonial litigator is required to withdraw the lawyer's certification of a client's financial statement once the litigator discovers that the statement contains a material omission of substantial client assets. Although, as emphasized in NYSBA Op. 797 (2004), the litigator is not authorized by DR 4-101(C)(5) to explain the reasons for withdrawal of the certification or the facts regarding the client's assets, the act of withdrawal surely sends a signal to opposing counsel and the court about both the reason for withdrawal and the fact that the previously provided information was false.

Finally, despite the proviso regarding DR 7-102(B)(1) noted above, the New York Court of Appeals has ruled that when confronted with a client's perjured testimony, a litigator may notify the trial court of even the client's *past* perjury. *See People v. Andrades*, 4 N.Y.3d 355, 357, 361 n.3, 795 N.Y.S.2d 497 (2005). In *People v. DePallo*, 96 N.Y.2d 437, 729 N.Y.S.2d 649 (2001), the Court denied an appeal based upon a claim of ineffective assistance of counsel when a criminal defense lawyer advised the court that his client intended to commit perjury and, in a chambers conference after his client testified, informed the court that his client's testimony was false. The Court described the ethical dilemma facing defense counsel in terms of the familiar "competing considerations – duties of zealous advocacy, confidentiality and loyalty to the client on the one hand, and a responsibility to the courts and our truth-seeking system of justice on the other."

Citing to the United States Supreme Court's decision in a similar case, *Nix v. Whiteside*, 475 U.S. 157 (1986), the *DePallo* Court stated that "an 'attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response.'" It then observed that "[t]his approach is con-

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Attorney Professionalism Forum
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sistent with the ethical obligations of attorneys under New York's Code." The *DePallo* Court's observation was clearly shaped by its view, shared with the *Whiteside* Court, that "a defendant's right to testify at trial does not include a right to commit perjury and the Sixth Amendment right to the assistance of counsel does not compel counsel to assist or participate in the presentation of perjured testimony." This has implications for the civil side as well. If in the constitutional context of representing a criminal defendant (as stated by the *DePallo* Court, again quoting *Whiteside*) "an attorney's duty to zealously represent a client is circumscribed by an 'equally solemn duty to comply with the law and standards of professional conduct . . . to prevent and disclose frauds upon the court,'" then, in the civil context, there is an even stronger argument that, at least since the *DePallo* decision in 2001, a litigator may reveal client perjury, notwithstanding the proviso to DR 7-102(B)(1).

In short, when you consider the developments described above, which took place prior to the adoption of Rule 3.3, you might agree that things have not changed as much as you think. Even under the Code, the duty to maintain client confidentiality has never been absolute, just as the litigator's duty of loyalty to a client has never been absolute. Under *DePallo*, a litigator arguably is permitted – even if not required – to reveal client perjury. Thus, while Rule 3.3 does effect a change in the litigator's relationship to a client, that change is not nearly as dramatic as you believe. It may further complicate the relationship between litigator and client, but the Court of Appeals seems to have struck the right balance in reminding litigators that no client has the right to testify falsely. The adversary system of justice depends upon litigators helping to preserve its integrity. According to *DePallo* and now Rule 3.3, a litigator's duty of loyalty and client confidentiality is circumscribed – that is, limited and qualified – by an even greater duty to prevent the corruption of the adversary system of justice through perjured testimony.

The Forum, by
James Altman
New York City

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I have read your column for the last two years. I must confess that I do not have a clear understanding of the difference between ethics and professionalism. And where does civility fit into the picture? Thank you in advance.

Sincerely,
Confused

MEMBERSHIP TOTALS

New Regular Members
1/1/09 - 7/15/09 _____ 7,108

New Law Student Members
1/1/09 - 7/15/09 _____ 387

Total Regular Membership
as of 7/15/09 _____ 69,159

Total Law Student Membership
as of 7/15/09 _____ 2,751

Total Membership as of
7/15/09 _____ 71,910

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Language Tips
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a noun and then expanded to a verb. Still slang, the verb *dis* is considered a rebuke and often an insult, especially in the context "He dissed me."

Other clipped forms are standard English and so familiar that few recall their origin. They include *mob* (from Latin *mobile vulgus* (meaning "fickle crowd"); *blitz* (from German *blitzkrieg*); *bus* (from *autobus*); *cab* and *taxi* (both from *taxicab*); and *bunk* (from *bunkum*).

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9. *See Sheet Metal Workers Local 59 (Employers Ass'n of Roofers & Sheet Metal Workers, Inc.)*, 227 NLRB 520 (1976).
10. EFCA § 3.
11. *Id.*
12. *Id.*
13. EFCA § 4.
14. *Id.*
15. *Id.*
16. *See* Seventy-First Annual Report of the NLRB for the Fiscal Year Ended Sept. 30, 2006, http://www.nlrb.gov/nlrb/shared_files/brochures/Annual%20Reports/Entire2006Annual.pdf.
17. There are no NLRB statistics regarding the percentage of union objections that were meritorious.
18. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) ("We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status.").
19. Mackinac Center for Public Policy, http://www.mackinac.org/article.aspx?ID=2324; Union Membership and Coverage Database, U.S. Census Bureau Current Population Survey, http://www.unionstats.com; U.S. Department of Labor, Bureau of Labor Statistics 2009.
20. NLRB Annual Report 2006.
21. The following states have right-to-work laws: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana (applicable only to school employees), Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming.
22. EFCA § 4(a)(1).
23. EFCA § 4(b).
24. Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) Act, H.R. 1644, 110th Cong. (2007).
25. *See* EFCA.
26. *See generally* EFCA.
27. EFCA § 3.

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or twice and reread the first and last paragraphs. Then they should address five questions:[18]

- Does the lead give a roadmap, also called a thesis? The lead tells the reader what will be covered and in what order. The lead should tempt the reader to continue. The lead establishes the document's tone and direction. Legal writing is an inverted pyramid, with conclusion coming first and the details afterward. The lead is the conclusion. If the reader reads nothing else, the lead should be enough.
- Does each paragraph make only one point? A paragraph with more than one point should be broken down to keep ideas together.
- Is each concept discussed once and in one place? Organize thoughts into sections. Each section should address one large issue. By grouping thoughts together, writers can move through topics without repetition.
- Do transitions connect ideas, people, places, things, and time? Transitions establish logical connections between sentences, paragraphs, and sections. Transitions are segues that allow a logical, coherent argument. Transitions allow writers to present essential information and then create relationships between the information and the argument.

Repeating key words and concepts is an effective transitional device. Deliberate repetition bridges gaps. Used incorrectly, repetition is obtrusive and boring. Used correctly, repetition creates rhythm and enhances readability.

Pronouns are useful transitions to refer to something earlier in the text. *Example:* "The lawyer was current on the law. His ability to recall cases made him a good litigator." The pronoun "his" forces the reader to refer to what "his" relates to: The lawyer. Other transitions include "it," "they," "this," and "them." *Example:* "Some lawyers research only online. This method is inadequate." When using transitions, writers must avoid vague referents. If the transition might refer to more than one word, repeat the word.

Another transitional device is to use little conjunctions like "and," "but," "for," "nor," "or," and "yet" and conjunctive adverbs like "nevertheless" or "on the other hand." Little conjunctions come naturally to writers. They're distracting when overused. A balance between little conjunctions and conjunctive adverbs promotes readability.

- Does the concluding paragraph reach the desired destination? The concluding, or thesis, paragraph should summarize the document's main points, suggest results, evoke images, or call for action.[19] The concluding paragraph shouldn't discuss ideas not mentioned previously.

Small-Scale Organization

Organization on the small scale focuses on organizing ideas within paragraphs, the building blocks of writing. Every paragraph needs a focus to enable the reader to move through the paragraph.[20] Paragraphs must also connect to the information around them. To do so, paragraphs should begin with a transition sentence — a sentence that connects one paragraph to the next — or a topic sentence.

The topic sentence is to the paragraph what the lead, or roadmap, is to the document. Every sentence after the topic sentence should relate to the paragraph's focus. Topic sentences are not restricted to the paragraph's first sentence. Experienced writers who want to emphasize earlier examples or details might put the topic sentence in the paragraph's second slot.[21]

Create a topic sentence by imagining that the paragraph has a title or theme. The title or theme is the topic sentence.

A thesis sentence should come at the end of the paragraph. The thesis sentence should conclude what the topic sentence introduced. The thesis sentence answers the topic sentence. If the topic sentence and thesis sentence were the only parts of the paragraph — with the middle cut out — the reader should still understand the writer's point. The thesis sentence should also lead the reader into the next paragraph.

To connect sentences within a paragraph, writers should underline the first few words of every sentence and clause in every paragraph. The underlined words should be consistent with each other. Writers should put themselves in the reader's shoes to make the sentences cohesive. Readers should be able to move easily from one sentence to the next with the sense that each sentence is unified within the paragraph's larger structure. Every sentence must relate to the sentences that precede and follow them. Every sentence must also relate to the topic and thesis sentences.

A common legal-writing paragraph pattern is V-shaped. A V-shaped paragraph begins with a general discussion of the topic and then narrows to the specific support. This paragraph doesn't return to a general statement at the end.[22]

Organize Material for the Audience

Audience-oriented editing guides readers with headings, roadmaps, and charts. In checking a document's organization from the reader's point of view, writers must look for overall effectiveness. To make organization effective, writers can outline the headings and subheadings from the finished draft. Doing that will make the topics flow in an orderly way and arrive at a clear conclusion.

Four components create an outline apparent to readers: parallelism, coordination, subordination, and division.[23] Maintaining parallel structure between headings and subheadings means that if the first heading is stated as a verb, the second should also be in verb form:

Continued on Page 52

Heading 1: Choosing a business entity for your new company

Heading 2: Forming a corporate structure

To coordinate properly, information in one heading should be as significant as information in the other headings. Similarly, information in one subheading should be as significant as information in the other subheadings:

> Heading 1: Choosing a business entity for your new company
> Subheading A: General partnership
> Subheading B: Limited liability company
> Subheading C: Corporation
> Heading 2: Forming a corporate structure
> Subheading A: Distribution of corporate power
> Subheading B: Action by directors
> Subheading C: Action by shareholders

In the example above, Headings 1 and 2 describe broad, weighty topics. The subheadings carry particularized information. The subheadings under Heading 1 have the same significance: They look at different kinds of business-entity possibilities for a new company. The subheadings are also equal in Heading 2. They consider the factors in forming a corporate structure, one of the chosen entities under Heading 1.

To subordinate, and thereby distinguish between headings and subheadings, the information in the headings should be more general than the information in the subheadings. In the above example, each of the six subheadings deals with specific aspects under the generalized heading's umbrella.

Each heading should be divided into two or more parts. In the above example, Heading 1 is divided into three subheadings, each for a different business entity. As an audience-oriented organization strategy, dividing headings allows writers to break down larger topics into smaller pieces to allow the reader to absorb information.

Headings should describe information and suggest content.[24] Generic headings like "Facts," "Law," and "Conclusion" aren't helpful.

Audience-Oriented Changes

These changes look to clarity, style, and tone. When editing for the audience — the reader — writers should undergo an out-of-body experience. By placing themselves into the reader's position, writers are able to see their documents from a new perspective: Would someone approaching the document for the first time understand what the writer wants to convey?

The message should be clear from the start, maintain clarity throughout, and arrive at a logical conclusion. Editing for clarity is hard. Clarity for writers comes at the end of the writing process, once they've hashed out their thoughts. Clarity for readers must come from the outset. To write clearly, writers should start with the essentials. They should give the rules before the exceptions. They should state general propositions before specific ones. They should introduce concepts before they discuss them. They should assume that readers know nothing about the case.

Here are five ways to edit out unclarity:

- Negatives. Write in the positive. Negatives hinder comprehension. Negatives require readers to invert their logic to determine what something isn't.[25] "No" and "not" turn positives into negatives. Prefixes like "non-" and "un-" also derail clarity. Writers should watch out for words that operate negatively, including "except," "however," and "unless."
- Nominalizations. Nominalizations are verbs turned into nouns. *Incorrect:* "The court made a decision." *Becomes:* "The court decided." Nominalizations make documents confusing, long, and stuffy, not concise and crisp.
- Passives. In passive-voice sentences, the subject isn't doing the action but rather is being acted upon. The passive voice uses the verb "be" with a past participle. Single passives defy readers' expectations. Readers expect to see subject, verb, object, in that order. Double passives obscure the actor. Readers expect to know who's doing what to whom. To correct improper passives, look for the subject of the sentence. Ask "whether the subject performed the action described by the verb."[26] If the answer is yes, the writer has used the active voice.
- Metadiscourse. State your point without the wasted "run-up," or throat-clearing openings. Cut to the chase. Examples include airy statements like "We believe that . . . ." or "Needless to say, ..." Throat-clearers are helpful when writing a draft. They keep up momentum. While editing, writers should eliminate these unnecessary expressions.[27]
- Modifiers. Words or phrases that modify some other word or phrase in a sentence should be firmly joined. *Incorrect dangling modifier:* "Having arrived late to the meeting, a formal apology was necessary." This sentence means that the formal apology arrived late. *Correct:* "Having arrived late to the meeting, the lawyer needed to give a formal apology." *Incorrect misplaced modifier:* "The Defendant was sentenced to jail for assault in court." This sentence suggests that the assault was committed in court. *Correct:* "The court sentenced the Defendant to jail for assault."

Good editing recognizes that readers are busy professionals.

The problem with editing for style is that style is subjective. Writers reading their own work might believe that

their point is conveyed clearly. This is where having an editor will help. Editing for style means checking for wordiness. Sentences should be clear and strong. Beyond clarity and coherence, good writing style embraces eloquence. Eloquent writing features antithesis, parallelism, metaphors, and similes.[28]

Tone is important, too. Legal writers must maintain a professional tone and respect for the reader and avoid humor, sarcasm, and rhetorical questions.[29] Formal documents shouldn't omit articles like "a," "an," and "the" or use contractions, slash (virgule) constructions ("and/or," "he/she"), abbreviations, or undefined acronyms. Good editing recognizes that readers are busy professionals.

This column will continue in the October 2009 *Journal* with macro-revisions, proofreading, and proofreader marks. ■

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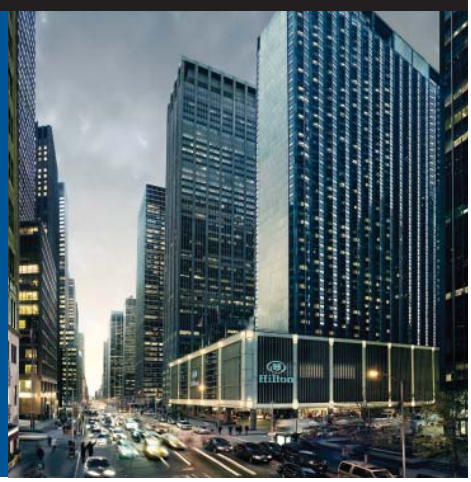

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BY GERALD LEBOVITS

~~Prove~~ Proof It With ~~Revision~~ Re-vision — Part I

Lawyers can be many things: advocates, counselors, negotiators. Regardless which roles they find themselves in, lawyers will inevitably edit and proofread their own work and the work of others. This two-part column offers revision tips for legal writers.

Some use "editing" and "proofreading" interchangeably. But the terms describe different stages of revision.[1] Editing occurs throughout the writing process, especially between drafts. Editing produces changes that affect overall meaning and presentation. Editing focuses on content and organization. The goal in editing is to clarify, condense, and strengthen communication.[2] Proofreading takes place later in the writing process. Proofreading is about correcting mechanical errors like spelling, typographical mistakes, and omitted words. Proofreading is a methodical effort to spot errors.[3]

Editing and proofreading are not the final steps of an almost-finished product. They're an integral part of the writing process.

Different models describe revision. The stage-process model assumes that writing is linear, that writing is divided into stages.[4] Inexperienced writers write linearly. They divide projects into prewriting, writing, revising, and polishing. They make surface changes and fix obvious errors but keep substance.[5] Inexperienced writers' most frequent edit is a meaning-preserving substitution of words they originally chose. Inexperienced writers place "symbolic importance on their selection and rejection of words as the determiners of success or failure of their compositions."[6] Inexperienced writers miss organization and analysis problems.[7]

Experienced writers find the stage-process model flawed. Writing isn't linear. Experienced writers progress cyclically. They go back and forth from start to finish.[8] This is the recursive model, in which writers continuously revisit and improve their writing by switching roles and becoming readers. The recursive process allows writers to "re-see" their writing from the reader's perspective.[9] Re-seeing requires a change in attitude. With that change, writers will uncover better solutions. If the route to good writing is rewriting, the route to good rewriting is re-seeing.[10]

> If the route to good writing is rewriting, the route to good rewriting is re-seeing.

Legal writers should use three re-seeing habits. First, they should resolve dissonance, the disharmony between what authors write and what they want to write.[11] Dissonance is resolved by brainstorming with mind-maps, prewriting materials, and outlines. Mind-maps are diagrams that represent words and ideas around a central idea. Prewriting materials help writers organize their thoughts before they write. Outlines help writers put those thoughts into headings and subheadings to structure the text.

Second, they should revise to explore new ideas and generate new writing. One way to explore new ideas is through zero-drafting. Zero-drafting involves generating ideas in a stream-of-consciousness mode.[12]

Third, they should revisit all their decisions. This includes attending to audience and purpose.[13] Re-seeing deemphasizes meaning-preserving changes and stresses overall goals.[14]

The key to re-seeing is to divide editing and proofreading into macro-level revisions and micro-level revisions. Macro-revisions improve organization and substance.[15] Micro-revisions fix surface errors.[16]

Macro Revisions

Macro revisions look at the big picture: coherence, meaning, and order.[17] Writers should start macro-revising by analyzing their document's large-scale organization to ensure that information flows logically from beginning to end. Next, writers should look at small-scale organization — the organization within a paragraph. Writers should check their document to ensure that the material is organized for the audience. This means writing clearly and giving readers effective roadmaps, headings, and subheadings.

Large-Scale Organization

Overall organization includes the order of paragraphs and sections. Organization relates to structure. When editing for organization, writers should read their entire document once

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