

November 29, 2016

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

This is our 28th annual report on what's going on in the legal profession. As in all previous reports, it is based on information my colleagues and I continually gather throughout the year from many sources – law firms, other providers of legal services, legal departments, surveys and the legal and general press.

It is also the seventh report published shortly after a Presidential election and the fourth in which the election resulted in a change of party and, therefore, a change of administration. These changes always have some impact on the legal profession, mainly in practice areas, but we expect the Trump administration will have a greater impact on the profession than any of the last three changes of administration.

PRACTICE AREAS

Note: There can be differences in some geographic areas.

Red Hot

- **Cybersecurity** continues to be the number one issue for in-house counsel and is becoming so for consumers. Also see “Other Trends & Issues”.
- **Health Care** and almost every practice area involved. Of course the Affordable Care Act (ACA) will have substantial changes or could even be repealed.

Hot

- **Intellectual Property**, particularly patent prosecution and trademark litigation.
- **Immigration**. Obviously. And it will get Red Hot.
- **Elder Law**. Not just due to the ageing population but also due to increased emphasis on health directives.
- **Regulatory**. While there will probably be fewer new regulations or even cancellation of some existing ones, prosecution under corporate integrity agreements (CIAs) will continue and also under other compliance issues. The Davis-Bacon Act will at least be modified if not repealed.
- **Energy**. Oil, gas and electrical. Coal may warm up but alternative energy will cool down. Also see Environmental below.
- **Technology**. Of course
- **Environmental**. The Trump Administration is expected to pull back a number of the “Midnight Rules” the Obama Administration will promulgate before inauguration. In addition there may be far more friendly policies regarding the exploration and production of both coal and natural gas.
- **Infrastructure**. One of the reasons will be greater support for public-private partnerships.
- **Financial Services** although IPOs have been cool but they may get hot next year.
- **Real Estate & Construction**. Commercial. Residential now heating up.

Warm

- **Labor & Employment**. Was Hot earlier this year and will heat up again regarding wage-and-hour issues and also if more states pass Right to Work laws.

Mixed Reading

- **Commercial Litigation.** Pretty Hot in MidLaw firms but still Cool in most BigLaw firms. Many clients don't want to pursue the types of litigation they used to. Also companies are having their legal departments handle more and more cases.
- **Corporate.** As we reported in our Midyear Update, depending on a firm's client mix and also industry practice groups.

Cold

- **Bankruptcy.** Will remain so unless the economy stumbles.

INDUSTRY GROUPS

Note: As with practice areas, there can be differences in some geographic areas.

Hot

- **Manufacturing & Distribution.** 3D Printing continues to grow.
- **Food, Beverage & Agriculture.** Have been Hot (and we missed listing them previously).
- **Cannabis.** There is significant product liability risk to both manufacturers and sellers as marijuana is infused into edible products.

Cool

- **Renewable Energy Storage.** It is still in the early stages but the Department of Energy is currently funding the development of different approaches. This may get Hot.

HOTTEST GEOGRAPHIC MARKETS

- **New York.** Firms which had previously branched into other markets are now opening offices in Manhattan for a variety of reasons: It has become a high-tech center; their clients are doing business in the city and "It looks good to be in New York."
- **Pittsburgh.** As described by Steve Taylor in the *Of Counsel* 700 Annual Survey, "its economy is fueled by banking, health care, technology and education." Not only are the two long-dominant firms growing but also other mid-sized firms. Recently firms from other parts of the country have opened offices there.

MARKETING & BUSINESS DEVELOPMENT

- **Gamification** is being employed by a growing number of firms to motivate lawyers to become better rainmakers.
- **Predictive Analysis**, which has been used for years to determine what a jury will decide, is now being used by some firms to identify client and industry needs.
- **"Hunting in packs"**, the term now being used to get lawyers in different practices and geographic areas to work together to obtain new clients.
- **Client Feedback** is much talked about but in many firms is still honored more in the breach than in the observance.
- **Professional Business Developers, i.e. "sales executives"**. They have been a staple in accounting firms for many years. Now some law firms are employing them and believe they are, or will be, productive.
- **"Evergreen Content"**. This is material which has no time limit and, therefore, can be used currently or retained for later on. Susan Kostal encourages developing it for all forms of writing and social media. Makes sense.
- **Social Media.** Continues to be far more effective for building individual lawyer reputations than for firms.
- **ROI** is becoming even more important for measuring the results of marketing & BD activities. The challenge is what criteria to use.
- **Marketing/Business Development consultants.** There are more than ever!

OTHER TRENDS & ISSUES

- **Increase in number of lawyers.** The *Of Counsel* 700 Survey reports a 3.7% increase this year. In view of the over-capacity that has been growing in the profession the past few years and the decreasing number of law school graduates being hired, this is a huge surprise and,

at first glance, doesn't make sense. However, *Of Counsel* went on to say this blip is due to timing and that the overall trend continues to be downward.

- **Lateral hiring** continues to be hot. While there are other reasons, the principal one is to increase revenues and, hopefully, profits. However, some statistics indicate that only about half of the lateral partner hirings achieve these objectives. One of the reasons is that . . .
- **Lateral integration** all too often it is not adequately implemented. Some firms such as Benesch are using client teams and cross-office meetings to improve and accelerate integration into the firm.
- **Project Management.** Firms are continuing to invest in this to meet client demands.
- **Artificial Intelligence.** Just being explored by a few firms. Will be the focus of next year's College of Law Practice Management Futures Conference.
- **Competition.** It's no longer just from other law firms. It's now coming from two other directions: Non-legal business entities like LegalZoom and, for large firms, more and more from the clients themselves who are using their legal departments as well as alternate service providers.
- **Blockchain.** The technology behind bitcoin. It is a shared digital ledger in which items or transaction are added at the end of the chain and encryption ensures that it remains unbroken, tamper-proof and error-free. Currently being adopted by banks. Advocates say it has the potential to "change the world" as the internet has done.

- **Fewer equity partners.** In October *The Wall Street Journal* reported that the average number of equity partner billable hours in AmLaw 200 firms had dropped to 1,589. The resulting impact on profits is the principal reason most of these firms are planning to reduce the number of equity partners next year, either by de-equitizing them or asking them to leave.
- **Higher partner contributions.** Due to slow growth and declining productivity, some firms are requiring more contribution from their partners for operating capital rather than attempting to increase their bank loans.

- **Alternate Fee Arrangements.** While they may account for more than half of the total legal spend, this is due mainly to large firms with clients that have a high amount of litigation and want to drive down the fees. Many clients want billing options but most firms still cling to the billable hour structure. Therefore, despite continued predictions . . .
- **The Billable Hour is not dead** – and won't be.
- **Cybersecurity.** While many firms have developed plans for reacting to a cyberattack, many more have still not developed or implemented cybersecurity plans to prevent such attacks. One overlooked factor is what actually constitutes a "breach". Some firms regard any unsanctioned access of a firm system as a breach while others do not regard it as a breach until something – data, files or money – has been taken.
- **Law firms for churches.** In September, Nelson Madden & Black claimed they are the first private law firm in New York City to cater to religious institutions. But they're not the only such firm in the U.S. The office of Raymond Dague in Syracuse does and, in Grapevine, Texas. The Church Law Group, a practice area of Anthony & Middlebrook, has built a substantial practice.

- **Publicly traded law firms.** Slater & Gordon in Australia, the first such firm in the world, is facing a securities class action suit. This leads back to the issue of . . .
- **Alternate Business Structures (ABSs).** This is the current term for non-lawyer ownership or investment in law firms. Still prohibited in the U.S. except in a limited form in Washington D.C., they have been "legal" for 15 years in Australia and for nine years in the U.K. We first discussed this issue in an article I wrote in 2012 and then in our January 2013 *Legal Communique*. Opposition continues to be strong although the number of non-lawyer entities continues to increase and is providing more and more services.
- **Employee Class Actions.** Dormant and almost extinct in recent years, they appear to be making a comeback since the death of Justice Scalia.

- **Mergers.** Soared to a record high in 2015 and may surpass that number this year. For the acquiring firm, the objective is usually to increase revenues and, hopefully, profits. For the acquired firm, it's usually to survive – in some form.
- **Leadership.** While effective Management is needed in all firms regardless of size, this is not enough. To survive, firms also need Leadership to execute the vision, strategy and culture established by the leader. This subject is superbly discussed by Susan Duncan of RainMakingOasis in the blog headlined “Do Your Firm Leaders Lead or Manage?” posted recently on INFOCUS.
- **Fewer private practice jobs for law school graduates.** According to the National Association of Law Placement’s 2015 survey, although the number of jobs in large firms increased, the overall employment total was the lowest since 1996. While the percentage of graduates who obtained jobs has increased slightly, this was the result of the steep drop in overall law school enrollment which continues. Not a good picture for the future. But what can be done to improve it?
- **Scamblogging.** A category of online writing by debt-burdened law school graduates who are convinced their law schools misled them about their opportunities for employment.
- **Changing lawyer structure.** Because many firms of all sizes are being faced with overcapacity, there will be fewer equity partners, more non-equity partners and “permanent” associates as well as greater use of contract lawyers.
- **Changing management structure.** Some mid-size as well as large firms are recognizing the need for more non-lawyer managers, not only in the technology and marketing areas but also as project management directors and chief operating officers. The term “legal engineers” is being used more widely to describe these positions.
- **Student debt.** A few firms such as Orrick, Herrington & Sutcliffe, are beginning to offer new associates cash to help them pay their student loans until they qualify to receive a bonus.
- **Litigation Funding,** which has been little noticed until recently, is increasing as start-ups like LexShares and Trial Funder attract investors with promises of double-digit returns.
- **Women being elected partner.** There are mixed reports on whether the number is increasing or not.
- **Bar passage requirements.** After being threatened by the Department of Education with having its accreditation powers removed, the ABA has started the process to tighten up the bar passage requirements for accredited schools. One part of the proposed rule would mandate that at least 75% of a law school’s alumni pass the bar exam within two years of graduation. Currently the requirement is five years. There are several other factors involved which may or may not make this change effective. The House of Delegates must approve the measure and the earliest they can do that is in February at the Midyear Meeting. If approved, it could go into effect for 2017 graduates who sit for the July bar exam.
- **First Trans-Atlantic alliance.** While many U.S. firms have forged alliances with firms in Asia, Womble Carle has become the first to forge an alliance “across the pond”, in this case with U.K. firm Bond Dickinson. Will there be more?

This report could not have been developed without the participation of my colleagues whose comments, by agreement, are not attributed to them. I am most appreciative for their input. Each of us maintains our commitment to the legal profession but with concern on whether or not it will continue to adapt to change as it has always done in the past, albeit often slowly.

Bob Denney