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Business of Law

By Frank Michael D'Amore¹

Prospects for Law Firms and More....

I have received quite a few questions during the past year. There are three that have been asked more often than any other; they are addressed below.

Q. Do you believe that things are looking better for law firms? Is the worst of the recession, at least as it relates to law firms, behind us?

A. With the important caveat that neither Chairman Bernanke nor other market cognoscenti look to legal recruiting and consulting work as indicators as to where the economy is going, my short answer is “yes.” Although managing partners and other law firm leaders are careful with public pronouncements, the feedback we have received is that there is cautious optimism that the next 18 months should show an uptick, even if it may be modest, in top line revenue. No one has forecast a rise of the sort that we saw in the halcyon days of the mid to late ‘90s, but discussions with clients and their resultant conduct have fueled that confidence. The pattern of quickly settling litigation matters is slowly edging back to the pre-recession norm of more protracted battles, while projects that have been on hold are now at least being discussed again.

We have seen similar trends in the recruiting of partners/groups and in the law firm M&A sector. While some firms capitalized on the recession to become much more aggressive in lateral partner recruiting, many stood on the sidelines (unless a candidate fell into their proverbial laps), as the latter were more focused on controlling costs and maintaining revenue. Some of these firms are now girding for reentry into the partner recruiting arena, as they are starting to feel just a bit better about their standing. Similarly, many candidates who were reluctant to move during the recession are rethinking that stance, as they are feeling more bullish about the economy, in general, and more

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secure that clients and work will follow.

Q. My niece is entering law school in the fall. If you were to look into your crystal ball, what practice areas do you think are likely to grow, and be the most secure, during the next 10-20 years and thus may be the best for her to consider?

A. Preliminarily, I have to preface my forecast with a comment that should be obvious to everyone: you cannot simply pick a practice area in the abstract. There needs to be a good match between the practice area and the type of lawyer who not only tends to flourish in it, but actually enjoys it. For example, someone who shies away from conflict and is not comfortable with public speaking, would be wise to eschew a career in litigation. Similarly, a lawyer who is more extemporaneous, and not detail oriented, is unlikely to enjoy a career in tax or a similar technically oriented practice. With that key requirement in place, I offer two suggestions, both of which are broad enough to accommodate a range of personality types.

A bellwether for this economy, and one which is only likely to become more important as time passes, is intellectual property ("IP"). Companies are more ardently protecting their IP and relying more heavily on it with respect to driving revenues; it thus should be a practice that should remain quite strong. An important caveat, though, is that your niece's prospects in the IP field would be significantly enhanced if she has a scientific degree. If she does not, and believes that IP is where she wants to be, she would be well served to step back and get that degree before she becomes a lawyer.

Some may disagree with that advice, as there are quite a few IP litigators who do not have any scientific training, but have carved out highly successful careers. However, in a perfect world, and if your niece wanted to have multiple options in front of her, the scientific degree will be her ticket. This will enable her to become a member of the USPTO and will be a predicate for doing prosecution work. Even if your niece is more geared toward being an IP litigator, she will be better prepared for that career, and will have an edge on competitors, if she has that scientific background and also has spent some time prosecuting patents and doing opinion work. She may ultimately decide that the prosecution side is more consonant with her personality and interests and, without that degree, it is an area that she would have been foreclosed from pursuing.

The second practice area for consideration is energy. Unless there is some type of divine intervention or technological breakthrough that is beyond our ken, it is apparent that energy is

going to be an ever increasing area of emphasis and concern. As readers know, “energy” is a term, especially from a practice standpoint, that is somewhat malleable (as it can embrace traditional forms of energy, alternative sources, utilities, and even environmental). No matter how it is defined, it is the practice area that many firms are targeting, as are their clients.

An interesting aspect of energy is that it is broad enough to accommodate quite a few sub-areas that are suitable for different types of lawyers. For those who like litigation, there are quite a few opportunities, whether it is agency work or more traditional cases that are filed in federal and state courts. Similarly, for those who like transactional and deal work, the field is broad enough to allow someone to build a career doing just that type of work. Additionally, for those who like a more regulatory type of practice, there may be no better field, as there also are countless areas in the field that support such a practice.

Q. Alternative fee arrangements, the decline of hourly billing, and rates are seemingly being written about every day. Is a lot of this more hype than substance and how do you think things may shake out when the market stabilizes?

A. As these changes, for the most part, are being driven by corporations and their in house lawyers, they have to be taken seriously, as clients are the ones who provide the work and pay the bills.

As to alternative fee arrangements (“AFAs”), these are not new, as they have been discussed and used, at least in part, for decades. In fact, as law firms have submitted countless AFAs during the last 30+ years, the reluctance of in house counsel, prior to this recession, to adopt AFAs is the reason why had not taken hold. When decision time arose, it was in house counsel who blinked and decided to forego using AFAs on a broader scale, as they countered by asking for (and most often receiving) a discounted rate.

Reports suggest that use of AFAs has, in fact, risen significantly. This makes eminent sense, as they are an important means for clients to have more certainty with respect to legal expenditures. As such, I do not anticipate that there will be a retreat away from AFAs when the economy truly bounces back. Nevertheless, I also do not believe that this signals the impending death of hourly billing. There is risk associated with AFAs and some clients would prefer not being exposed to that. Additionally, there are matters that are just too important or otherwise defy being easily

wedged into an AFA. I thus think that hourly billing is here to stay, even if its use declines somewhat over time.

Your reference to rates is more interesting than you may have imagined, as, in my opinion, there is a sea change underway that is cresting and is now coming into greater focus. The more recognizable development during the recession was that it became much harder for law firms to push through the type of rate increases that they had in prior years; in fact, many held the line, especially in more rate sensitive practice areas. As the balance of power swung to in house counsel, they have been able to drive harder bargains on non-AFA work. A bit of an underreported story is that some of the largest firms in the country, that historically would have walked away from work that required them to cut rates, did offer discounts, as the pressure to maintain top line revenue was quite intense.

Getting those discounts from large firms may prove to be a watershed development, as it underscored that a new world order may be unfolding that will reward firms that have business models that support greater pricing elasticity. These firms may be better positioned to get a broader range of work because they will be more suitable partners for their clients; their challenge will be to maintain a cost structure that keeps this lower end work within profit parameters. Firms that are inflexible, or are too hyper focused on rates, may get hurt as a result.

Reports concerning an upcoming comprehensive study on rates have intimated that data will show that there is much more elasticity in a partner's rates, even for the same type of work. It thus should follow, a fortiori, that pricing elasticity will also be important, if not more important, for different types of work. If that holds true, and I believe it should, doesn't it thus make sense that firms that are set up to support pricing elasticity may be the long term winners?

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