It’s no secret that real estate law practitioners were among the hardest hit by the Great Recession. The wheeling and dealing of property, often recklessly, came to a screeching halt when the economy imploded. And that meant bankruptcy lawyers were flush with work and real estate lawyers were left twiddling their thumbs, with many leaving their practice groups and scrambling to learn new areas of law.

*Continued on page 2*
But when the economy picks up, the demand for real estate law expertise does as well. The reasons for increased activity these days vary, depending on where in the nation property buyers and sellers operate and where lawyers practice.

In New York City and its suburbs, both a recent spike in prices and renewed availability of capital has property owners listing and selling more. In Dallas, certain robust industries, particularly the health care sector, drive real estate deals, while hospitality interests boost real estate transactions in the tourist destinations of New Orleans and Phoenix.

“We had a pretty diverse and active real estate practice [in 2014],” says Leo Leyva, co-chair of the 25-plus-attorney real estate department at New Jersey-based Cole, Schotz, Meisel, Forman & Leonard. “We’re fortunate that we represent a number of developers, hedge funds, and private equity groups as well as bridge lenders and financiers. We have a tremendous amount of sale work, representing sellers, as some of our fund entities are now cashing in on the upswing in the pricing that we’re seeing, especially in the New York metropolitan area.”

While Leyva and his team have closed many transactions recently, they also have been helping clients track major property deals and make offers only to see property bidding wars force them to pull out. “We chase a large number of deals,” he says. “Unfortunately, we lose more deals now than we actually land only because there’s a lot of what I call crazy money out there. Things are getting bid up. So, many of our clients say, ‘Thanks but no thanks. We’ll bail on this one.’ They get outbid and that happens often. Still, we’ve closed a lot of deals.”

At Dallas-based Strasburger & Price, the 15-attorney real estate group saw a hike in activity in 2012 and 2013, a welcome change from the stagnation in the depths of the recession. “The years from 2009 through 2011 were pretty rough with the market fairly slow,” says Diana Bearden, a partner who practices commercial real estate and commercial finance law. “Real estate is so reflective of the economy. When the economy goes sluggish, people stay where they are. They’re not buying; they’re not selling. Things finally started picking up again in 2012 and 2013.”

Last year, Bearden says, was strong at times, but real estate development was up and down. Of course, some industries were better than others. “Health care is really growing.
New Book Is a Blueprint for Change; And, Good-bye to a Friend

As a professor at a college in Portland, Oregon, I teach nonfiction writing and, like most writing instructors, I recommend to my students The Writer’s Bible. That is, of course, the one and only, classic and timeless, *The Elements of Style* by William Strunk Jr. and E.B. White. I tell the student-writers to buy Strunk & White (as it is often referred to), read it, reread it, and even sleep with it under their pillows.

Quick, what’s the difference between “disinterested” and “uninterested”? Don’t know or forgot? Consult Strunk & White. Are you guilty of using “awkward adverbs” or simply too many adverbs? Strunk & White will show you the light. And remember: Use the active voice as it’s usually “more direct and vigorous than the passive.”

Well, when I received a recently published book in the mail and felt it in its envelope, I immediately thought of Strunk & White because of its similar size and shape (at least the advanced readers’ paperback copy I received feels the same). When I read this new book, I saw other comparisons to *The Elements of Style*. In fact, it’s not too far of a stretch to say that *Finding Bliss: Innovative Legal Models for Happy Clients and Happy Lawyers* is the Strunk & White for the legal profession.

*Finding Bliss* serves as a reference guide to operating a successful law firm, a template for communicating well with clients, and, importantly, a blueprint for change.

Although the writing in *Finding Bliss* is not nearly as concise and expertly crafted as The Writer’s Bible (but then, what is?), it does sum up in simple, clear, well-written prose many of the critical changes that have taken hold of the profession in the last decade. The authors are the three co-founders of Bliss Lawyers, an innovative, transformative secondment firm, Deborah Epstein Henry, Suzie Scanlon Rabinowitz, and Garry A. Berger. They lay out and examine seven important themes, in seven chapters, to enhance the practice of law for lawyers and the delivery of service to clients: innovation, value, predictability and trust, flexibility, talent development, diversity and inclusion, and relationship-building.

On that last theme, the authors provide readers with a powerful anecdote from Robin Smith, the general counsel of the toymaker LEGO Systems. Smith told the story as a panelist at a conference, and the writers of *Finding Bliss* were smart to include it. The GC recalled how he recoiled when a visiting lawyer couldn’t “comprehend the office culture that encourages the LEGO professionals to ride down hallways on toys and test and experience the various LEGO products.” Smith knew right then that the attorney could never represent LEGO. The lesson: Lawyers need not only to understand the clients’ businesses, obvious advice that’s been repeated often, but the “spirit of the companies” as well. That’s a fresh recommendation, and the anecdote hammers it home.
Contributions from the C-Suites

In fact, one of the book’s strength is its many contributions by corporate counsel that preface the beginning of each chapter. For example, Thomas Sager, the legendary senior VP and GC (now retired) of Dupont, wrote these words in his brief lead-in to Chapter Six, Diversity and Inclusion. “To survive and thrive, companies and firms must continue to embrace and advance a culture that values diversity and inclusion.” He also asserted that leaders must “use our platform to set the right tone.”

What’s more, Finding Bliss doesn’t sugarcoat its messages or gently massage lawyers’ sensibilities. Consider this assertion in the chapter on predictability and trust on the issue of alternative billing: “Many perceive the increasing distrust [between law firms and clients] as coming solely from the client. This is shortsighted. In most cases, it is mutual, and what underlies much of the mistrust is fear. Law firms fear they will miscalculate … and lose out on well-deserved fees. Clients fear law firms will overestimate an alternative fee to cover themselves ….” That’s telling it like it is. The authors go on to offer viable solutions to this disconnect, the key of which is the willingness, by both parties, to make adjustments over the course of the engagement.

Epstein Henry, Scanlon Rabinowitz, and Berger all borrow from their extensive experience in the profession and around lawyers and clients, sharing what they’ve learned with honest and spirited writing. Scanlon Rabinowitz, for example, tells about how she left the profession for five years to raise her kids before eventually hooking up with Berger and his virtual law firm—all of which underscores the importance of law firms to consider the idea of flexibility in work schedules and innovative operational models.

Clearly, the three writers collaborate well (at least in writing and presumably in running their secondment firm) as this Strunk & White guide for the legal profession flows smoothly, summing up and offering advice on the transformations in the practice of law while calling for creative solutions to both traditional and new problems. Reading it and applying their recommendations will go a long way in helping any lawyer attain that state of mind we all crave: Bliss.

On Another Note: Thank You and Good Bye, Long-Time Friend

Law partnerships and other professional service firms lost a good friend, marketing wizard, successful and prolific author, and true gentleman when Bruce Marcus died on December 1, 2014, in New Haven, CT. He was 89.

While it’s standard to refer to someone by their last name, even in obituaries, it doesn’t feel right in the case of Bruce. He meant a lot to those of us at Of Counsel, both as an occasional contributor and a valued source. Although Bruce was often the “smartest guy in the room,” he always conducted himself humbly and always showed respect for the intellect of other people. And, he was as kind as he was intelligent.

Bruce left an indelible footprint on the legal profession as he was instrumental, through his passionate but calm lobbying efforts and his clear persuasive writing, in getting the profession to loosen its outdated and restrictive policies about how lawyers solicit clients. He’s the author of 16 books, and his excellent The Complete Guide to Marketing Professional Services is considered one of, if not the best book of its kind. It’s hard to imagine the emergence and evolution of law firm marketing without Bruce.

It’s harder still to see the world without him.

—Steven T. Taylor
Online Merchants Beware:  

The New FTC Rule on Internet, Mail, and Telephone Order Purchases

The Federal Trade Commission (FTC) released a new version of the Mail or Telephone Order Merchandise Rule, 16 C.F.R. § 435, that directly impacts consumer purchases made via Internet, mail, telephone, or fax. The rule went into effect on December 8, 2014, just in time for holiday shopping, and expanded the FTC’s previously issued rule to include all Internet orders, even those made through a mobile device (or through mobile apps).

In particular, the new rule “prohibits sellers from soliciting mail, Internet, or telephone order sales unless they have a reasonable basis to expect that they can ship the ordered merchandise within the time stated on the solicitation or, if no time is stated, within 30 days.”

Importantly, this 30-day clock begins to run when the seller receives a properly completed order, not when payment clears. A “properly completed order” means that the consumer tendered or authorized full or partial payment in the proper amount and provided an order containing all the information needed by the seller to process and ship the order.

However, purchases in which a consumer is applying to the seller for in-house credit to pay for the merchandise in whole or in part gives the seller 50 days to ship an order, so as to allow extra time to process the credit application. As with purchases shipped under the 30-day rule, representations regarding shipment time for purchases financed in this manner must have a “reasonable basis” as well.

A “reasonable basis” means that the seller has information that, at the time of the communication regarding the shipping date, would satisfy a reasonable and prudent businessperson under the circumstances, acting in good faith, that the representation is actually true. In practical terms, this information and evidence will vary with the circumstances, but sellers should take into account anticipated demand, supply, the capacity of any fulfillment system, and recordkeeping for each individual transaction.

Multiple Provisions

The new rule provides that, in the event of any delays in shipment, the consumer must be given sufficient advance notice of the delay (ordinarily, as soon as the seller has notice of any delay in shipment), but no later than the date of the originally promised shipment. If no shipment time was promised, the consumer should be given notice of any delay within 30 days.

Sufficient advanced notice of any shipment delay is required so as to give consumers time to make a meaningful decision on whether to consent to the delay or request a refund. Of course, where a delay in shipment is expected, sellers always have the option of simply cancelling an order and sending a refund in lieu of seeking consumer consent to a delay. Sellers must have a “reasonable basis” for any new shipment date or any representation that the shipment date is unknown.

If the seller is unable to fulfill an order by the date promised, the new rule provides specific guidelines for notifying the consumer. Indeed, the first delay option notice to the consumer notice must include (1) a definite revised shipment date (or, if the revised shipment date is unknown, a statement to that effect); (2) being able to cancel the order and obtain a full and prompt refund; and (3) a way for the consumer to cancel the order at
If the revised shipping date is unknown, the new rule states that the notice must include (1) the reason for the delay and in the event the consumer agrees to the indefinite delay; and (2) the option of cancelling the order any time before merchandise ships.

The new rule also requires buyer consent for delayed shipments. If the delayed shipment is 30 days or less after the original promised shipment date, the consumer’s non-response to a first delay option notice may be treated as consent to the delay.

The best practice would be to make this inference clear in the delay option notice (e.g., “If we do not hear from you before shipment, we will assume you agree to this delay.”). Delays of longer than 30 days require an automatic cancellation where the consumer does not respond to the notice. Sellers must issue a refund promptly for all money paid by the consumer for the unshipped merchandise.

If a seller is unable to ship a product by the revised shipping date, the seller must obtain explicit customer consent for any further delay in shipment, and the seller should issue a second delay option notice. The second delay notice should contain substantially similar information. Moreover, unlike a first delay option notice, consumer silence in response to a second delay notice cannot be inferred as consent to delay.

Under the new rule, sellers now have seven working days (as opposed to one billing cycle under the previous rule), after a buyer’s right to a refund vests, to process refunds for payments made through third-party credit cards (e.g., Visa or MasterCard) as well as payments made by cash, check, or money order. The period for refunding purchases made by first-party cards (e.g., where a seller itself issues the credit card) remains one billing cycle.

Refunds should be in the same method of payment as was tendered by the consumer, although, where a seller cannot issue a refund in the same method that payment was received, the refund may be made by cash, check, money order, or any means that is at least as fast and reliable as first class mail. This change will provide sellers with more flexibility in choosing cheaper and more convenient methods of delivering quicker refunds to consumers.

The new rule continues to be inapplicable to (1) subscriptions ordered for serial delivery (such as for magazines), though the initial shipment must be in compliance with this rule; (2) orders of seeds and growing plants; (3) orders made on a collect-on-delivery (COD) basis; and (4) transactions governed by the FTC’s Negative Option Rule (such as book and music clubs). Further, the rule does not cover services.

**Penalty Phase**

The new rule also comes along with severe penalties for noncompliance. For example, the FTC has the power to sue a seller for injunctive relief and civil penalties of up to $16,000 per violation of the rule. Additionally, the seller may be required to redress consumers. State law enforcement agencies also may take action for violations of state consumer protection laws, where applicable.

Although sellers are not required under the new rule to keep records, the rule does place the burden of proving compliance on sellers. Failure to provide the FTC with records or documentary proof establishing the use of procedures assuring shipment of merchandise within the applicable time creates a rebuttable presumption that the seller lacked a reasonable basis for expecting it would be able to timely ship orders.

Thus, sellers should make advertised shipping representations clear and unambiguous. They also should verify that they are retaining documentary proof of the procedures used to assure that merchandise was shipped within the timeframe the rule requires in...
order to help refute any claim of noncompliance by the FTC or buyers.

Supporting documentation should provide substantiation for shipment representations, details on the seller’s fulfillment system, and proof of adequate recordkeeping. The length of time for which sellers should keep these relevant documents varies, but best practices would dictate a minimum of five years because the statute of limitations on actions for civil penalties under this new rule is five years.

Finally, as a protective measure, sellers should check the statutes of limitations on any applicable state consumer protection laws where sellers plan on doing business, as such statutes may lengthen the period of time for which sellers should maintain supporting documentation.

—Gail Podolsky and Kate Celender

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Integrating Laterals:

Best Practices for Managing Major Investments

This article is based on excerpts from comments made during a Webcast on March 12, 2014, entitled “Successful Lateral Hiring,” hosted by the LA Daily Journal and featuring Professor Bill Henderson (Indiana University Maurer School of Law); Michael Roster (former managing partner of Morrison & Foerster’s Los Angeles office); and Edwin Reeser (served on the executive committees and as an office managing partner of firms ranging from 25 to over 800 lawyers in size).

As I often see at firms that engage in strategic planning, there is a huge time investment in having very senior partners working on the plan with the result that, when the plan is completed, everyone wants to get back to their client work, leaving the execution of the plan to happen by divine intervention.

So too it seems with lateral recruitment. After a long process of identification, search, courtship, vetting, due diligence, interviews, and so forth, we inevitably revert to our long-revered tradition in the profession of “hiring bright, autonomous, self-starting” individuals and then just turning them loose, maybe to reach in at the end of the year to see what the results were.

That approach is just not working.

There are two important issues involved with integrating a new lateral addition that require the attention of firm leadership: time and management.

Time to Execute

I believe the key to retaining laterals lies in investing time to treat these individuals as true partners and to help them feel connected. In that spirit, let me offer some prescriptive suggestions of what I’ve seen firms doing that does work. Some firms do a good job of integration, while others almost seem to ignore this task. I’m going to divide this discussion into two buckets of suggested action steps: first around the pre-integration phase, before the lateral joins our firm, and then during the actual integration period.

Pre-Integration

Here are the essential to-dos:

1. Clearly define and communicate to your existing partners the strategic benefit of adding this particular candidate to your firm, whether it’s based on his or her particular specialty and experience or because this lawyer is bringing clients that need the expertise of others in your firm. The reason why this is such an important first step is because your existing partners are likely feeling threatened: some because this lateral is a new source of competition for what they do, some because there is the potential for conflicts, and some because it may dilute their power in the firm.

Meanwhile, you have senior associates who are seeing this lateral as a barrier to their elevation to partnership. As all of this is going on, there is a strong possibility that everyone is experiencing lateral fatigue given that the statistics tell us that, in 2012 for example, firms added an average of 10.3 laterals.

2. In concert with your lateral, before they join your firm, work to draft a written plan that clearly sets out the precise expectations of both sides. Your plan should be agreed upon by both your firm and the lateral, identifying timelines, responsibilities, and milestones, with a precise schedule for continual feedback and assessment over the coming two years, which is, I believe, an accepted time frame required for full integration.
You then should take that written plan and provide your lateral with a detailed examination of the firm’s (or practice group’s) business plan along with an analysis of how his or her individual plan complements, supports, and fits within the firm’s plans.

3. A step some firms completely overlook is to give the lateral a budget, both for expenses and for nonbillable time (which should be treated like billable time for the first six months). The expense portion is to accommodate internal lunches, travel to other offices, attendance at relevant events, perhaps an industry gathering, and so forth. The nonbillable time budget (or, as one firm prefers to call it, the “investment time budget”) should be provided concurrent to having the laterals identify specific value-added services that they are willing to offer in order to give their fellow partners a justifiable reason for making a client introduction.

These value-added services might encompass offering a complimentary in-house client presentation or CLE event, discussing a novel approach the lateral has used in helping other clients, or perhaps even providing introductions to high-value contacts and people whom the lateral knows and that certain clients may want to meet. Of course, you want to track the budget and corresponding activity.

4. Before the lateral comes onboard, you will want to introduce the candidate to key partners in the firm with whom he or she may be working. That process obviously should include those within the firm who perceive benefit from the lateral’s arrival.

Some firms have invested the effort, before the lateral’s start date, to create a list of partners who will commit to introducing the lateral to specific clients and then are asked to check their calendars for the first 30–60 days after the lateral starts for suitable occasions to bring along the new lateral to meet their client. Of course, if that lateral has some value-added service to offer, it makes the entire process that much easier.

5. Help your lateral craft a compelling story for clients on why they joined your firm, why this new firm is different and a better platform for serving the client’s interests. In other words, have the lateral complete this sentence: “I made this move to benefit you, the client, by…”

6. Every firm has a different billing process, conflict procedure, knowledge management system, and so forth, and any newcomer can be inundated with an intensive orientation that often serves only to overwhelm. You need to confer with each lateral to determine and prioritize in advance the specific administrative and orientation issues that need to be covered and when, so as to provide that lateral with the necessary information and support on an as-needed basis.

7. We should keep in mind that one of the primary concerns of any lateral is to get up and running as smoothly and quickly as possible. If your lateral is not bringing a former EA along, you should possibly think about assigning a seasoned, organized, and respected assistant.

Integration

Let me turn now to a few suggestions with respect to integration, when the lateral actually arrives at your firm. (Some of these also could fit arguably into my pre-integration bucket.) We should not lose sight of this process as a two-way street in that the lateral also has an obligation to become fully integrated. So, with many of these suggested actions, a good lateral candidate should be proactive in moving the ball forward.

What I have seen work most effectively is the appointment of one individual in charge of the orientation and integration process, rather than relying on some committee. You need to select someone internally who then “owns” the responsibility, tracks progress on mutual promises made in the integration plans, and reports back to firm leadership.

At some firms, this person is called the Director of Orientation or the Director of
Lateral Integration. In any event, the very best candidate is usually another lawyer with deep institutional knowledge. One firm I’m familiar with selected their former managing partner, who is now referred to as the “Lateral Czar.” At another firm, this role is designated as the “Cultural Attaché.”

That individual then selects a second partner as “Peer Advisor.” Notice the term “peer.” If I’m really a valued addition to your firm, I deserve the attention of another partner, not some administrative assistant with good intentions. The firm therefore should select a partner who has a vested interest in this lateral’s success, someone who sponsored their coming to the firm, or at least some partner who knows and has an existing relationship with the lateral.

This peer usually is given extra compensation, in some form, for the time invested in providing hands-on coaching, serving as a sounding board, and interpreting firm nuances. Most importantly, this peer should spend time “selling” the lateral to other partners in the firm.

Notice that this whole effort is undertaken as a way to send a clear message that integration is important and needs to be sustained. The Executive Committee therefore should be asking for a monthly progress report for the first six months and a quarterly report for the next six quarters.

You need to issue an internal “Welcoming Announcement.” This sounds trivial but the goal here should be to get each new lateral noticed and remembered, and to show a personal touch in so doing. We should never have our people learning about some new lateral through the legal press.

One firm I know takes a rather novel approach in that it has all new professionals articulate, in their own words, an answer to two questions. First, “tell us about your most gratifying personal achievement, something that you have accomplished that most people don’t know about you.” Second, “tell us about your most important professional accomplishment, something that you are proud of that many of your former partners did not know.”

I know of yet another firm that produces a video of each new lateral in an interview format that is then posted to the firm’s intranet.

Convene a special meeting, on the first day of the lateral’s arrival, to have the entire practice group consult with the newcomer about which existing client matters this newcomer could best enhance. Notice that any discussion about cross-selling a lateral’s clients is deferred until the newcomer develops some sense of trust and is integrated into the work of existing clients.

During the lateral’s first three months, the emphasis should be on building professional relationships. So …

- Have each practice leader invite the lateral to a practice group meeting. One firm encourages their laterals to attend all practice group meetings (outside of his/hers) for the first few months;
- Encourage the new lateral to travel to the other offices of the firm within the first month to meet, get to know, and develop collaborative face-to-face exchanges with their fellow practice group members and other partners; and
- Get the lateral engaged in working on some internal firm committee or project assignment that matches this lateral’s interests and brings them together with partners of similar interests, even as it cuts across clients and practice areas.

Request and require all laterals, within their first six months at your firm, to deliver a substantive internal training effort or presentation, that is, something from their different client experiences that others in the firm can benefit from.

Don’t forget the lateral’s spouse. One firm has a special event to welcome spouses. The event is intended to help promote the spouses’ business or career interests or get
them involved in the firm’s or office’s charitable or community activities. Remember, if my spouse loves you, I will love you. And if they don’t, it makes it that much harder to be investing those long hours away from home. What have you done to make my significant other feel they’re part of the family?

The firm leader should conduct a two-hour interview with all new laterals on their first month’s anniversary with your firm in order to get their detailed observations on what they’ve seen that works and what could be improved. This opportunity to interview someone new to your firm, while first impressions are still fresh, presents a prime opportunity to pick up best practices from their experiences at other firms.

The firm leader also should conduct a second two-hour interview with every new lateral on their three-month anniversary with the firm. This interview is intended to solicit feedback on the lateral’s view of the integration efforts to date, get the lateral’s candid assessment of whether their expectations are being met, and begin to make any course corrections if they are needed.

Providing the time and attention of the firm leader to this meeting reinforces the value of having this lateral in your firm, while it also allows you to explore ways to further demonstrate to the newcomer how the firm’s strengths can contribute to creating the opportunities that motivated his or her move to your firm in the first place.

Someone once said, “The measure of a successful integration is that other partners can’t recall when the lateral was not part of the firm.”

**Time to Manage**

As noted, there are two major issues involved with integrating laterals, so let me touch on the second.

I recently noticed an article penned by Michael Allen of Lateral Link in *Above the Law* in which he made two interesting observations. First, Michael tells us that the average tenure of a Big Law partner is a mere 5.2 years. More importantly, Michael identified, from his extensive experience in recruiting laterals, the “Top 5 Reasons Why Attorneys Move.” The number one reason starts with an “M.” Most of you will think I’m referring to money, but the number one reason why attorneys move is actually management!

Upon reading the article, I remembered a discussion I had some years back with an office managing partner in Los Angeles. She bemoaned how upsetting it was for the firm to be losing good talent that it really didn’t want to see go. During our discussion, and I don’t know where the inspiration came from, I asked her, “Tell me please, are you losing these good lawyers from your high-performing, best organized practice groups or from your dysfunctional groups?” She paused for a moment, looked at me, and said, “McKenna, I think you are on to something.”

Since that time, I have posed exactly the same question to no less than a dozen firm leaders, only to extract precisely the same response. Now I bring up this issue because the standard advice on lateral integration often will suggest making sure that practice group leaders are at the forefront of your integration efforts. In fact, at some firms, the practice group leaders are charged mistakenly with overseeing integration. Why do I say mistakenly?

As some readers may know, twice a year I do an intense, interactive workshop on behalf of Ark Conferences that addresses practice group leadership. In these workshops, we will normally get 20 to 30 participants, all from firms of at least 100 attorneys in size. I’ve been doing these sessions for about the past six years, but more recently I’ve been asking participants a few “diagnostic” questions before we get into the substantive content.

Question number one: “Show of hands, please! How many of you have a formal,
written job description?” Out of 30 participants, about three hands go up.

Question number two. “Show of hands, please! How many of you have a very clear understanding from firm leadership as to precisely how many nonbillable hours you are expected to spend managing your group?” Out of 30 participants, no hands.

I sometimes ask individual practice leaders, “How often does your practice group meet?” and get responses like “Occasionally,” which is code for … “Never.”

I could go on ad nauseam, but the message should be clear. You can’t drop a valued lateral partner into a practice group that never meets or, when it does meet, it’s only an excuse to eat lunch. You can’t drop a valued lateral partner into a practice group that really isn’t doing anything to make an impact on their marketplace and then expect that lateral to hang around.

If you’re spending $600,000 per lateral, and that’s the latest per capita estimate of combined direct and indirect expenses, you cannot afford to be parachuting these laterals into dysfunctional groups.

It’s costing you big time! You need to get to work on fixing your practice group structure.

—Patrick J. McKenna

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Getting in Front of the Curve:
The First Mover Advantage

Just about every law firm would like to be seen as a trend setter. But few firms are willing to invest the capital and take the risks involved in being a first mover. Fortunately, that doesn’t necessarily mean a firm must be behind the curve.

A lot is written about the first-mover advantage that firms derive when they identify trends early and pursue them ahead of their competitors. It’s a great concept and makes for some great consultant and academic articles. (I know, I’ve written some of them). Yet saying it is one thing, doing it is another.

To be successful in getting ahead of the curve requires that law firms do two things successfully.

The Bona Fide Trend

The first is that they must identify correctly occurrences that will turn out to be trends. It doesn’t seem like such prognostication should be all that difficult. I hear law firm leaders talk about “no brainers,” while most firms have “would have, could have, should have” stories about opportunities that they foresaw but did not take advantage of.

Often the early identification of a trend is confirmed by the actions of other large law firms, which serves to further stimulate the perceived urgency of taking such action yourself.

As a rule of thumb, however, when someone labels an idea as a “no brainer,” it is usually a signal to stop and think about it. Even the most knowledgeable prognosticators only get it right about half of the time. For example, Bill Gates in his 1995 book The Road Ahead, labeled the Internet as a minor “stepping stone to the real information superhighway.” To be sure, the really big insiders frequently get the really big obvious stuff wrong.

For law firms, examples of trends that made complete sense but never really came to fruition are everywhere: firms that raced to Florida to build probate practices, product liability firms that geared up for a flood of food additive toxic tort cases, firms that opened offices in South Dakota to represent creditors in usury matters or in North Dakota to benefit from fracking. And who can forget the investment that many firms made in 1999 to create Y2K practices?

Acting On It

Even firms that correctly identify an issue may not be able to benefit from their insight. As such, the second thing law firms must have to “get ahead of the curve” is the capability of taking action on a trend.

Trends often take years to develop and frequently require significant capital investment that may not be recouped quickly. Make no mistake about it, there are significant advantages to being the first mover on a successful trend. But the adage is still true: You can always tell the pioneers, because they’re the ones with the arrows in their backs.

So how does a firm identify realistic opportunities and take advantage of them without putting large amounts of capital at risk? Here are some thoughts:

1. Look for opportunities that provide for horizontal or vertical integration. If the proposed action works off of or supports a firm’s existing practices, offices, or
structure, there is a much higher chance of success.

2. Don’t be too much of a first mover. Many trends take years to mature to a level where there is a return on investment. A lot of red ink over a multiyear period may be a wise investment, but it is likely to be a political disaster in many partnerships. It is often better to watch some other pioneer catch the arrows and then step in once a real market has developed.

3. Don’t worry about what peer firms are doing. Law firms can be like lemmings, following other firms off some very dangerous cliffs. While there is palpable value in acting with the majority, it pretty well kills the first-mover advantage. Unless it is necessary for a defensive position, there is not a lot of advantage to being a “last mover.”

4. Assess how bad the worst case scenario is. Even if the idea fails to turn profitable in a couple of years, there is often a possibility of some recovery of the investment. There is a big difference between putting the opportunity for potential profits at risk and losing the entire investment. Avoid swinging for the fences when a double is available. (Readers from outside the United States can drop me a note and I’ll explain the metaphor.)

5. Whenever possible, bench-test ideas. Look for inexpensive, low-risk, low-commitment ways to prove a concept. Thinking of cold-opening an office in Timbuktu? First put a lawyer in a hotel room or office suite for three months to better test that market.

Gaining a first-mover advantage is a bit like winning a lottery. The more tickets you buy, the better your chances. It is common sense to take small risk positions carefully on a number of opportunities that most likely will yield a better collective result than going all in on a single trend.

—Ed Wesemann

Ed Wesemann is a member of the consulting firm of Edge International. He is also a co-owner of Legal Resource Group, a recruiting firm specializing in senior administrative staff members, and has written four books on legal management issues. For further information visit the Legal Resource Group Web site at www.LRGLLC.com or at the Edge International Web site at www.Edge-International.com. He maintains a blog site at www.edwesemann.com and can be reached at 1-912-598-2040 or by email at ed@edwesemann.com.
**New Year’s Resolution:**

Increase Law Firm Revenue and Profit in 2015

The highest strategic priorities in 2015 and beyond for most law firms are to get new business and to increase profitability. In today’s extremely competitive market for outside legal services, attaining these objectives requires adopting and implementing proven strategies in addition to, and in conjunction with, the most commonly used growth strategies based on new lateral hires and acquisitions.

Here are several proven tactics to achieve these priorities of increasing revenues and profits—and in a measurable manner:

*Formalize and Upgrade Collections Year-Round*—To avoid large, old, and noncollectable aged receivables, collecting should not be a primarily year-end effort. The proven tips in a free, highly-rated, 30-minute Webinar on “How to Turn Collections Season Into a New Business Development Opportunity” may help. You can find it on YouTube.

*Assess and Invest in Attorneys’ Business/Client Development Potential and Interest*—Ask which lawyers at your firm (be they partners or associates) have demonstrated some capabilities when it comes to developing business and also have, or want to have, the desire to put in the work to become better rainmakers. Consider sending a query. Tally and then provide proven programs, tools, and resources to help them get there. Consider supplementing internal business/client development support with proven outside programs and services guaranteed to return a measurable return on investment and report measurable results.

*Avoid Expenses Associated with Reinventing the Wheel*—Considerable attorney and support staff time and cost savings can be achieved by identifying existing proven programs and resources, thereby avoiding the time and the investment to recreate them. On-demand Webinars addressing topics such as “Getting the Most Out of LinkedIn for Lawyers©,” “Key ‘Sales’ Tools for Lawyers©,” “Innovative Client Service©,” and “Mastering the RFP Process™” are available on the Internet.

*Intensify the Focus on What Works to Develop Business*—The vast majority of lawyers’ business and client development efforts are nonbillable, so optimizing lawyers’ preparation and results from all nonbillable efforts is key to increasing revenue and profitability.

Over the last 25 years, we have compiled a massive volume of available and relevant information and research that proves what works best to develop new business and clients for lawyers and law firms, beyond having the right relationships. This body of research consists of decades of study, surveys, and data analysis, including intake and client surveys, material from hundreds of books, reviews of financial and statistical data, and analysis of other survey results from hundreds of firms.

Yet most law firms are not aware of this “proven science of business/client development” nor do they educate all their lawyers about it or capitalize on it. If you would like more information on the science of business and client development for lawyers and law firms, you can send me an email at julie@busdevinc.com.

Another option is to consider formally assessing and identifying the strategies, tools, and tactics in your firm that generate the most revenue the fastest. Then benchmark, compare, and consider upgrades/changes that can yield even better results from them and educate internally. For example, most firms have Key Client Teams, yet not all function
optimally. Also, some law firms have created Client/Referral Source Advisory Boards, but few use them as productively as possible. Indeed, most lawyers are pitching new business and responding to RFPs now more than ever, yet not winning as much new business as they would like.

Consider commissioning a customized “Perfect Your Pitch” program for lucrative and interested practice groups, such as “Perfect Your Data Security & Privacy Pitch,” “Perfect Your National Coordinating Counsel Pitch,” “Perfect Your Water Rights Pitch,” “Perfect Your Wage and Hour Pitch,” and “Perfect Your Patent Litigation Pitch.” All are searchable online.

Objectively Assess and Upgrade Your Firm’s Business and Client Development Processes—Just like the practice of law, business and client development is a process, each stage of which consists of many subprocesses. To remain competitive, regular upgrades and innovations to these processes are critical.

The keys to the success of any process are the people who do the work and create efficiencies within the process. Gone are the days of “we have always done it like this.” The days of having only one or a few marketing directors/staff members who “do all our marketing/business development” are likewise waning. Assistance is available for the numerous firms that have needed to conduct a thorough assessment. Help is also available to support the implementation of upgraded strategic investments in order to improve their measurable results.

One of the biggest trends in the past few years is law firms’ increased hiring of specialists within the business and client development function, such as pricing specialists, client development “sales” specialists, strategy and innovation specialists, internal “sales” coaches, and so forth.

—Julie Savarino

Julie Savarino, Managing Director, Business Development Inc., is an attorney and an internationally renowned, award-winning veteran expert in client and business development for lawyers, law firms, and other professional services entities. Reach her at julie@busdevinc.com.
and so that’s an industry that’s keeping real estate lawyers busy in Dallas,” Bearden says.

And even with the heightened activity of the last few years, the recession clearly transformed the business of buying and selling property. “It’s harder to get financing,” Bearden says. “Lenders are scrutinizing things a lot more. There are a lot of financial covenants that are very stringent. You see lenders looking more critically on financing, so that has had an impact on whether some industries can build new facilities.”

**The Big Easy’s Back**

It’s hard to believe that this August marks the 10-year anniversary of Hurricane Katrina, but of course for many in New Orleans and the Gulf Coast it’s been a long 10 years of recovery and rebuilding. Now, though, it seems the region is back on its feet. “New Orleans has regained its stature after the storm as a great place for conventions and tourists, and it’s attracting a lot of people,” says Rudy Aguilar, managing partner of New Orleans-based McGlinchey Stafford. “The city’s also become a magnet for young professionals and entrepreneurs.”

Consequently, the hospitality industry is alive, well, and growing, with development and redevelopment fueling the regional economy and, by extension, boosting demand for real estate attorneys. “There are buildings being converted to hotels, new hotels out of the ground, restaurants and entertainment venues,” Aguilar says from his Baton Rouge office. “So projects surrounding hospitality are keeping our real estate team busy with work related to new construction, acquisitions, renovations, leasing, and tax credits.”

Construction in the area isn’t the only thing that’s up. The lawyer count has grown at several New Orleans law firms, including McGlinchey Stafford, which saw an increase of nearly 30 attorneys from 2013 to 2014 and now has around 180, according to the 2014–2015 edition of the Of Counsel 700 Annual Survey of the Nation’s Largest Law Firms; the partnership’s real estate group has 14 lawyers.

The hospitality industry in another tourist destination, Phoenix, also has real estate lawyers working long hours. “Our real estate practice group has been very busy over the last couple of years,” says Joyce Wright, the practice group leader of the 69-attorney real estate group at Phoenix’s Snell & Wilmer. “We represent a lot of REITs [Real Estate Investment Trusts, which are companies that own or finance income-producing real estate]. I represent a hotel REIT, [with Canadian ties], which has been very active in the United States acquiring hotels since it was formed a couple of years ago. We also advise a number of other REITs that invest in other hospitality properties as well as in office and retail properties and multifamily residences.”

Recently, Snell & Wilmer also has guided many clients through the legal maze that usually comes with mergers and acquisitions, often calling on real estate attorneys for help. “We’ve done a lot of M&A transactions, and whenever there’s one of those there will often be significant real estate diligence associated with the deal,” Wright says, adding that her team also does a significant amount of work in the education arena, from charter schools to universities.

**Considering Concerns**

Now all of this activity doesn’t mean real estate lawyers don’t face challenges. They do, especially since their practice is so dependent on a smooth-running economy. “Many of us are concerned that this ‘bubble,’ this spike in prices, which I think is fairly limited to the
New York metropolitan area and, to some extent, gateway cities, won’t continue,” Leyva says. “We ask ourselves ‘How long is this going to last? Are we going to find ourselves in another down market?’”

After all, cheap money in the financing markets is driving the current bump in real estate deals, and international investors are getting into the action in cities across the United States. But recent history tells us economic trends can change quickly. “We saw how fast things came to a grinding halt in 2008 and 2009,” Leyva says.

McGlinchey’s Aguilar says that much of the funding for development in New Orleans, and elsewhere, flows from a range of outlets, and real estate attorneys are cautiously optimistic that the various financial pipelines will remain open. “A lot of our transactions now are not fronted by traditional bank loans,” he says. “Money is coming from a lot of different sources, such as hedge funds and private equity [groups]. So real estate lawyers lie awake at night concerned that the source of funding for all of these real estate projects keeps changing, and we want it to keep coming.”

Competition also poses threats to real estate practice groups, something that’s especially true in the fiercely competitive Dallas-Fort Worth area. “In Dallas County, there’s such a glut of lawyers and in particular a huge glut of real estate lawyers,” Bearden says. “So there are a lot of people vying for the same work. And there are rate wars going on. Several lawyers came out of big firms to start or join smaller firms, and the rates are lower there.”

Competition has grown stiffer in New York’s real estate legal market as well. That affects midsize firms like Cole Schotz, which had been benefitting from its leaner operations and ability to offer lower rates—that is, until the magafirms finally caught on. “Many of the larger firms have come to understand that it’s not an open checkbook anymore, so there’s actually more competition,” Leyva says. “The big law firms are realizing that they may need to be more competitive, which is a shot at us because years ago [few of the large firms were] looking at that.”

**Recruiting Challenges**

During the recession, many law firms made headlines with their massive layoffs, sometimes dumping or severely trimming entire groups. As development waned and property transactions fell off, a significant number of real estate lawyers became expendable, especially junior associates. “Young people who were in the real estate field had to scramble,” Aguilar says. “After all, large law firms laid off entire divisions, entire teams. Those people had to go find other things to do. And they did. Now, they’re not transitioning back.”

That phenomenon, combined with a trend in which older attorneys decided the recession was a good time to retire, resulted in a shortage of experienced real estate lawyers. “The profession lost a lot of real estate lawyers to retirement,” Aguilar says. “In my view, real estate tumbled back in 2007 and is only now beginning to blossom again. So that’s been a good seven-plus-year run of it limping along. In that time span, some people said, ‘I’ve reached the stage of my life where I can just retire.’ I think that’s what happened to some real estate lawyers.”

Consequently, while Aguilar and his partners can find plenty of first-year associates to train in real estate law, hiring experienced attorneys in the area is another story. “We’re not finding many laterals we can bring into our system who have the right training, experience level, or business background,” he says.

In Phoenix, Wright concurs that finding experienced talent poses a problem but with enough time and effort Snell & Wilmer usually can fill its real estate practice group’s needs. “I would agree that it’s easier to hire [attorneys right out of law school],” she says. “If we’re looking for someone in the three-to
Wrights adds that as the hiring market has gotten more fluid (as opposed to during the darkest days of the recession when no one wanted to move; many attorneys were just happy they had jobs), the firm is finding that some lawyers from other markets are happy to relocate to the sunnier climates of Phoenix, Los Angeles, and Orange County, where the firm has offices. “So when we’re seeking lateral candidates we get interest from people in the Midwest and from the East Coast,” she says. “We’ve been able to recruit the people we need, although it might take some time to find the right fit.”

Firms like Cole Schotz sometimes face serious recruiting competition from big firms with deep pockets but are generally successful in hiring enough good talent, according to Leyva. “It’s a busy market so that means there’s much more of a demand for good real estate associates,” he says. “We’ve chased several people and we landed many of them. We lost a couple just because the big New York law firms paid them a stupid amount of money. But again, we’ve been fortunate with hiring because, for one reason, we’re a little more entrepreneurial. We like to incentivize our people, and we’re all about team and team effort.”

—Steven T. Taylor
cases, the challenge of helping navigate a new partnership, and other topics. The following is that excerpted interview.

**Of Counsel:** Noah, what attracted you to the legal profession?

**Noah Hagey:** I’m one of many attorneys who probably knew very early on, or at least had a good idea, that the practice of law was appealing. When I was probably six or seven I had this idea of what it was to be a courtroom attorney: the mythical attorney who stands up in court, the Perry Mason type, who makes arguments for justice. That sort of intellectual competition and the long history of social justice that goes into the profession were intuitively very exciting to me.

I found a career that engaged this inherent competitiveness I have; I grew up playing team sports and played two varsity sports in college. And, being a litigator, particularly in complex commercial litigation, it carries forward a lot of those elements: working within a group to win, understanding your opponent, playing against your opponent’s weaknesses, learning the rules and applying them to your advantage. For me, there’s a combination of the sheer intellectual enjoyment of the battle combined with the fundamental idea that you’re in this position of protecting folks. To sum it up, all this makes it very fun but also very rewarding.

**OC:** What did you do after you graduated from law school at the University of Texas in 2001?

**NH:** I knew that I wanted to be a commercial litigator. I also knew that the best place to build the skills and practice at the highest level was in New York. I started with the firm that is now called Dentons. The firm that I joined was a litigation trial boutique, which ended up merging with a firm called Salans. I did a summer associate program at Milbank [Tweed, Hadley & McCloy] in New York as well as Salans and chose Salans because of the deep bench of trial attorneys that they had.

I was there for four and a half years, and then I moved laterally to the New York office of Quinn Emanuel [Urquhart & Sullivan based in Los Angeles]. There, I found a really natural fit for what I was mentioning before: the competitiveness and inherent aggression but also the interest in the intellectual issues involved in complex litigation. I learned a lot from some great mentors there.

**Client Helps Drive Founding of Boutique**

**OC:** It says in your bio that you served as general counsel to some companies. When did you do that?

**NH:** After I’d moved to Quinn Emmanuelle’s San Francisco office, I was working on a couple of cases for a private equity firm based out here [in San Francisco]. They were growing and a number of their portfolio companies were involved in various stages of litigation. And they made a proposal that I start my own firm and begin handling that portfolio of company litigation, so sometimes I would be the outside litigation counsel and sometimes I would serve in more of a general counsel role.

**OC:** So you were at a prestigious firm that has been on the rise for many years now, Quinn Emanuel, and yet you left to start your own firm. What was it that really made you want to strike out on your own with just a few partners?

**NH:** It was one of those opportunities that doesn’t come around very often. I had the idea of wanting to be more in control of my practice. Even as a junior associate, I had very strong ideas about how cases should be
run and how they should be argued. I wanted to be the lead trial attorney who would be up speaking to the court and presenting the facts and making the legal arguments. And by 2009 Quinn had already become a firm where that kind of experience was increasingly very difficult to get. So my desire to have more control in addition to the lucrative opportunity to serve a well-established client made it a very safe bet.

**OC:** You and your partners formed your firm in March 2009 as the recession was really taking hold of the economy.

**NH:** Yes, we did. But for us it was a very exciting time. We had a couple of really important, complex cases to litigate right away, and we did a great job. We had 12 or 13 class actions filed around the country against [Pirate Brands, the maker of the snack food] Pirate’s Booty, one of our clients at the time. These cases were getting very dangerous. Some of them were approaching trial date; some of them were approaching class certification. There had been no coordinated defense of them yet. A number of firms had come and gone. So we came in and used some very creative procedural maneuvers to emphasize our argument that the plaintiff’s counsel were engaged in, we thought, bad-faith litigation conduct, filing all these duplicative cases around the country.

About a month and a half later, literally every single case got dismissed without payment of any money by our client.

**OC:** That’s a great way to launch a partnership.

**NH:** It certainly helped pave the way for what we’ve built now.

**OC:** Can you talk a little bit more about your representation of Pirate Brands?

**NH:** So this class action lawsuit, and this is back in 2000, 2001, was alleging that the calories that were advertised on the packaging of the product were wrong. So the class was seeking from $50 million to $200 million in damages, and the class represented everybody who purchased the product nationwide for six years. So there were millions of people in that class.

The Satisfaction of Achieving Relief

**OC:** Noah, what was most rewarding for you in getting the dismissals for your client?

**NH:** The best part about any victory is having the sense that you achieved relief for your client. One of the nice things about not being in a multilayered, big, institutional law firm is that you end up having very personal relationships, even with our larger corporate clients, with the executives and general counsel. The result that we got for Pirate Booty had an immediate impact on the management team as well as the shareholders. They didn’t have to face discovery and adverse publicity, and they could get back to doing what they were doing, which obviously was selling products and running a company.

**OC:** For a company like Pirate Brands that was probably a make-it-or-break-it case.

**NH:** If they had lost that suit, it would have severely taken down the brand. I’m not sure they would have survived.

**OC:** What big name law firms have you run up against, and what kind of challenges do you face when you go against a firm with deep pockets?

**NH:** We love litigating against big firms, and those big shops that we have litigated against come to recognize very quickly that we move fast, our briefing is excellent and that, for all intents and purposes, they may as well be litigating against another deep-bench law firm. We had a bet-the-company, complex, financial fraud and hedge fund litigation that ran for several years where [Oakland’s] Boies, Schiller & Flexner was first brought in as counsel and we won a number of motions. And then they
were replaced by a trial litigation specialist and then he was replaced, after we won several motions, by my old firm, Quinn Emanuel, so then we got to litigate against my friends at Quinn Emanuel. The result of the case was a confidential settlement but, suffice it to say, we enjoyed that litigation. We’ve also gone up against [New York’s] Holland & Knight and [San Francisco’s] Keker & Van Nest.

**OC:** What was the biggest challenge that you and your partners encountered as you were trying to get your footing and establish your firm within the market?

**NH:** Figuring out the internal firm dynamics was the biggest challenge. It’s the hiring, the things that go on in running a successful business, learning how to find the right pieces that are going to complement your style and echo your goals and serve in the trenches with you. It’s not like we’re a transactional shop. We don’t work fewer hours or have less intensity or have a boutique lifestyle. We feel like we’re constructing something that can stand up to any litigation challenge, anywhere in the country or anywhere in the world.

So finding the right puzzle pieces to fit into that has been hard. Figuring out the right compensation structure, the personality structure, finding people with the right pedigree and the right experience, and then, for junior folks, training them—all of that was new to us. You learn a whole lot as you go. Sometimes you make mistakes and sometimes you get lucky and find really good people.

**OC:** Noah, what’s another case or two that comes to mind as being important or particularly rewarding to work on?

**NH:** We have a lot of success in class action defense for food product companies. That’s always been at or a little bit more than 50 percent of our practice. We had a series of cases that we litigated on behalf of a small, really great ice cream company that’s based in San Diego called Arctic Zero. They have one of the only truly super low-calorie ice creams that exist in the market. There was a series of lawsuits filed by attorneys all over the country claiming that Arctic Zero was misleading consumers as to the amount of calories in the product. It was just not true. Their lab testing was faulty. Nonetheless, there were six class actions pending against a relatively new company. If these suits continued and there was a class certified, you’re probably looking at a company that has to go into bankruptcy.

We took the case on. We litigated it very aggressively. We discovered that the plaintiff’s counsel had done some very sloppy, potentially dishonest things. We brought it to the court’s attention. We had some very serious motions pending to disqualify opposing counsel. In the midst of all that, we used some creative tactics to strongly suggest that the plaintiff should walk away from the case, which in federal court are called Rule 68 offers that shifts costs to the other side if an offer is not accepted. They were seeking over $20 million against our client. But ultimately, those cases all went away for $1,000 an apiece.

**Battling “Abusive” Litigation**

**OC:** Does that get to the heart of what we started our conversation with today, that sense of social justice that initially attracted you to law? After all, you were, in this series of cases, going to bat for the little guy.

**NH:** It does. There’s a lot of abusive litigation filed against brands all over the country. We think it’s abusive and a lot of judges think it’s abusive. But the system is designed in such a way that there’s a lot of leverage and power placed in the plaintiff’s class action bar and their ability to extract really exorbitant settlements just because the cost of defense and the risk to your brand is so great. Dozens of companies have paid seven or eight figures to settle such matters.

And, we’ve taken a slightly different tact than a lot of our larger firm brethren. We’ve
basically turned the tables and put the focus on the abusive litigation tactics, the collaborative filing of multiple, almost identical, cookie-cutter, cut-and-paste complaints around the country in order to generate pressure on a defendant. We think it’s totally improper to file cases where there’s really no injury and really no misrepresentation. We’ve had a lot of success with those.

There’s another case that has been important to the firm in a different way—and this goes to the social justice part. One of the nice things about being a boutique is that we get to take on pro bono matters that carry significant social justice impact. Several years ago, my partner and I were approached by an organization called California Advocates for Nursing Home Reform about this massive system of drug abuse, or forced drugging of patients in assisted-living facilities around the state. Folks go in to be treated for six months and end up staying for a much longer period of time. Instead of being in care and being rehabilitated, they are warehoused [and prescribed] a bunch of psychotropic drugs, which the assisted-living facilities make money on.

We have a client who was brought to us and subject to this abuse. The facility that she was staying at had tried to change itself to be her Social Security beneficiary so they’d be getting money. We engaged in a very long drawn-out battle with one of the largest groups in the state around that issue, and ultimately prevailed. We now have an injunction that’s in the final stages of being approved by the court that’s going to end that practice.

So it’s not just corporate defense work that we do. We love taking on big battles of all stripes. Guys like [names a prominent attorney at a large firm] are unable to get involved in those kinds of cases. I think a well-rounded career in this profession sees us taking on challenges of a similar nature that are only going to get bigger as the firm grows.

**OC:** Thank you. To shift gears a little, why has there been such an upsurge in food litigation cases?

**NH:** There are many reasons. One, the securities litigation bar—and this might be the most cynical answer I can give you—has been decimated by the [Private Securities Litigation Reform Act]. It made it very difficult to certify those classes and pay recoveries in those classes. So a certain portion of that bar has been focusing on food as a way to make money. The same sort of trends going on with tobacco lawyers and, they make no bones about it. They think food litigation is the next tobacco. So there’s an industry dynamic where lawyers who made a lot of money in one particular segment of the legal market, the asbestos or tobacco or securities areas, see another area in the market that’s ripe for litigation. I think that’s the main reason for the surge in these cases.

**OC:** Finally, Noah, do you do much advertising or other marketing, or do you rely mostly on referrals?

**NH:** We get most of our work through referrals. We get involved in these supersized battles involving complex litigation with much larger firms in New York and elsewhere, and no amount of advertising can get you into those cases. There needs to be a real handoff from someone you’ve done great work for who says, “These guys can do it.”

—Steven T. Taylor
Of Counsel Interview…

Boutique Co-Founder and His Partners Battle Big-Name Firms… and Win

Matt Borden remembers a trial when his partner, Noah Hagey, sliced and diced a well-respected accountant, who was serving as an expert witness, during a tense cross-examination and, in so doing, helped secure an important victory for their client.

“The key issue in the case was whether this particular company was insolvent or not,” says Borden, a co-founder of the San Francisco-based, seven-lawyer litigation boutique BraunHagey & Borden. “This accountant was saying it was insolvent and our accountant was saying it wasn’t. Noah really pulverized the guy and reduced him to a quivering mass of jelly on the witness stand.”

Borden, who has known and worked with Hagey for years, says that Hagey’s excellent trial performance that day is typical of his courtroom success. “Noah’s a great thinker on his feet, which of course is part of what it takes to be a good lawyer,” Borden says. “But he’s also super-prepared. And, I’ve seen him do some devastating cross-examinations. If I ever needed a lawyer, he’d be the guy I’d go to.”

Hagey, Borden, and the firm’s other attorneys have battled and defeated some of the largest and most prestigious deep-pocketed law firms in the nation. The five-year-old partnership has defeated dozens of alleged class cases brought against companies in several states. And, not one of its clients has had a class certified against it. In the past three years alone, Hagey has served as lead trial counsel to defeat more than $300 million in claims.

Recently, Of Counsel talked to Hagey about his career, his firm, a couple of his prominent

Continued on page 20