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Building to Suit

Sophisticated boutiques can best handle complex litigation.

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BY STEVEN F. MOLO

'ANY CUSTOMER CAN HAVE a car painted any color he wants, so long as it is black," Henry Ford famously said. That attitude, of this is how we do it, regardless of the needs and wants of those for whom we are doing it, can fairly describe the approach taken by many large law firms to complex litigation today.

Regardless of the nature and demands of the case, the large firm has the same recipe for handling it. Start with a senior partner who may not have much, if any, experience taking complex cases to trial. Add in a junior partner or two and some senior associates who may be earnest, bright and hard working, but also lacking any trial experience or strategic insight into the case. Sprinkle in some junior associates whose prime motivation is overcoming crushing law school debt, along with a team of paralegals looking to take on crushing law school debt and become junior associates.

Oh, and bill the client by the hour as the case is processed towards settlement, under an agreement, whether or not the hourly rates are discounted, which has the firm's and the client's economic interests directly at odds.

Well, actually that assessment is a bit harsh. In fact, there are large law firms with great litigation departments led by some of the country's premier advocates. But for many of them, the success they enjoy, for now, is occurring despite their business model, not because of it.

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The far better way to handle today's complex litigation, from both the perspective of the client and the law firm, is through the sophisticated boutique.

The Flawed Assumption

Many mega-firms today cling to what they perceive as the "Cravath System," which, as they execute it, translates to: hire lots of associates fresh out of school; have them work on whatever they are assigned to do without much regard for true career development; after eight or nine years, the lucky winners are made equity partners, while the others, either directly or indirectly, are forced out of the firm; and the cycle repeats itself. The more associates, the better, because leverage is king.

What's lost on those who use this business model to perpetuate the leverage-driven mega-firm today, is that Paul Cravath's "System" was based on hiring a handful of the "best and brightest," of which there are a limited number: sadly, our profession is not some Lake Wobegon where all children are above average.

The System also was based on truly training, in fact, nurturing, them as lawyers, and helping those who failed to grasp the brass ring of partnership find a respected and remunerative place in the profession. And the billing was generally for "services rendered," rather than "time spent."

The quality resulting from the Cravath System cannot be sustained in a mega firm, which is not to say there may not be pockets of that quality in those firms. The sheer number of associates coming though the firm, the pressure to keep all of them occupied on billable work, which may or may not involve real lawyering, and the increasing complexity of the business and scientific issues that are the subject of today's complex litigation prevent the current system from really addressing the client's needs.

But, like Henry Ford's black model T, the leverage-driven service model continues to be imposed on the market.

It's a 'Lose-Lose' Proposition

If you were designing a system to deliver complex litigation services to business, or individuals for that matter, it would not look the way the big firm system looks today. Neither the client nor the law firm does as well as it should if it were driven by economic realities.

The deficiencies for the client include:

- excessive bills based on high billing rates for inexperienced lawyers who spend too much time following process rather than finding solutions;
- case staffing that often lacks team members with appropriate experience and skills suited to their specific roles;
- a lack of innovative solutions to resolve litigation issues quickly, based, significantly, on the first two points above;
- a lack of predictability in the costs and a need to spend substantial time and resources in reviewing bills and "managing" outside counsel.

The deficiencies for the law firm include:

- a failure to receive compensation based on the true value of services and a need to regularly increase rates to increase profits;
- a failure to effectively use and be paid for expertise and knowledge acquired over time;

• delays in payment based on clients' perceived need to scrutinize bills, which imposes an unproductive dynamic on the relationship;

• an inability to develop talent for specialized roles because lock-step associate compensation and the "up or out" system value individual lawyers based upon limited criteria that ignore true client needs and crowd out opportunity for experimentation and talent development.

The likelihood of the business direction of large firms changing meaningfully in the near future is remote. They tend to be run with short-term horizons to maximize near-term profits. They are flat, often far-flung, organizations with complicated political cultures and, therefore, are difficult to direct.

And somewhat surprisingly, little meaningful change is being driven by clients. The use of "strategic sourcing" and enforcement of one-size-fits-all "guidelines" are consultant-promoted approaches focused on controlling conduct and "cost" without regard to results and value. That's not to say that such measures do not have a place in managing the legal affairs of a large enterprise. But blind devotion to them, without regard to the nature of the work being done or the firm's approach to doing it, is the client flip-side of the highly-leveraged service model of the mega-firm.

Models Outside the Profession

Since at least the early 1980s, lawyers, particularly those in large firms, have been telling one another that "this is a business." That phrase has been used by many a managing partner to address the problem of "deadwood," as well as by many an under-appreciated, or perhaps petulant, partner to demand more compensation.

Happily, we remain a profession with responsibilities to our clients, the public and one another that surpass the pursuit of financial reward. Yet, the "this is a business" mantra merits some consideration when taking into account the stakes for the client and for the firm in complex litigation. So why not look to other businesses to see if there are models to address the deficiencies of a system that no longer reflects or serves the economic realities of its participants? Two come to mind immediately: financial services and advertising.

Notwithstanding the current economic downturn and the legislative changes being imposed on financial institutions today, the past 15 years have see tremendous change in the way capital is deployed and businesses are run. Private equity firms and hedge funds now occupy a prominent place in a space that had been the exclusive province of commercial and investment banks.

Due primarily to technology and a reset in thinking, Wall Street, as we knew it, has been transformed. Billions of dollars in assets are controlled by small teams of smart people taking calculated risks. And some of the iconic names in corporate America, many of which had long been public companies, are owned by elite firms—sometimes on their own, or sometimes banded together with other elite firms—willing to bet that approach can create more value than their previous ownership.

Similarly, the advertising industry has seen an aggregation and disaggregation resulting in tumultuous change, again fairly attributable to technology and a reset in thinking. The partners of Sterling Cooper Draper Pryce, whose offices, I believe, were just above Lord Day & Lord and just below Donovan, Leisure, Newton & Irvine, would not recognize the profession they once so boldly led, cocktails in hand, from behind their Eero Saarinen desks.

The New York Times reported recently that the two co-presidents of industry giant JWT (once known as J. Walter Thompson, a name as towering as that of any of the Am Law 100) left to form a firm called Co:. They refer to their new venture as a "brand studio" that will serve client needs by forming teams from among a current list of 40 independently owned firms providing various advertising services. Notwithstanding somewhat improbable names such as Big Spaceship, Campfire, Propellerfish and Victor & Spoils, the anticipated collaborators are among the industry elite. According to Co:, when the client needs are satisfied, the teams are dispersed.

A Lesson for Lawyers

The alternative business models that continue to emerge in other industries, with small, elite teams competing at the highest levels by leveraging technology, using scalable staffing, and focusing on results, provide some interesting lessons for the legal profession.

Just like there probably will always continue to be a need for the large financial institution and large advertising agency, there will likely always be a need for the mega-firm. Large transactions regularly calling for a particular range of expertise, certain high-volume litigation, and cross-border matters are some examples of where the mega-firm can add value. In fact, it could be argued that some of these firms are actually too small given what they might be offering clients in their areas of strength.

But when addressing a complex litigation problem, the boutique offers the sophisticated client many advantages.

A team approach. The boutique's size fosters greater communication and efficiency. Practiced at its highest level, complex civil or criminal litigation is an exercise in collaboration. It is hard to achieve meaningful collaboration when the cast of players (read: junior partners and associates) may be a rotating lot because of commitments across a large firm or the usual attrition among their ranks. Moreover, if the boutique incentivizes its lawyers properly, everyone can benefit financially from a great result. And there is little that motivates shared effort better than shared reward.

Financial alignment. The billable hour system, as well as the variations of it offered as "alternative fee arrangements," always places the fundamental economic interests of the law firm and the client at odds. A boutique willing to share a client's risk in exchange for some reward for performance aligns its financial interest with the client's.

Most large firms are unwilling to do this in a meaningful way for two reasons. First, the litigators who might propose such an agreement have to answer to their non-litigation partners who rarely are willing to sign on for the risk involved, particularly when, despite what they may say, they truly lack an understanding of the nuances of the bet they are placing, just as the litigators might not understand the nuances of a complex M&A transaction as it is put together. It is easiest to default to the billable hour.

Second, the traditional big firm approach to litigation, leaving no stone unturned regardless where it might be and what might be under it, does not work when the premium is on focus and efficiency.

Scalability. A boutique can put a superior team on the field because it is not confined to the players in the clubhouse. Based on the particular demands of the case, it can bring in the best lawyers, not just those affiliated with the firm, to provide the greatest chance of success.

This could mean working with a partner in a large firm with subject matter expertise in an area like tax or structured products. Or it might mean hiring a lawyer with substantial complex litigation experience to play the role of managing discovery in a single case, but with no expectation of becoming a permanent full-time employee of the firm.

That lawyer, who may not have made partner at a large firm, likely brings far more value to the task than were it performed by a fourth or fifth year associate with one foot out the door. Or it might mean affiliating with another boutique to provide more senior level coverage of particular issues in a case, for example taking the lead in working with a particular group of experts.

Better overall talent. Notwithstanding how great an individual lawyer or group of individual lawyers may be at a mega-firm, there tends to be an unevenness in talent not found in a boutique that hires only experienced lawyers. A mega-firm that, perhaps until recently, may have hired 50 or 150 new associates each year to sustain its leverage model, cannot maintain the level of quality as a boutique with lawyers who "self-select" to practice in this setting and with a structure that does not rely on leverage for profits.

A boutique's structure and collaborative style also provide junior lawyers with better mentoring and more responsibility sooner, making the whole firm stronger. While a boutique may not be able to offer internal formal training programs like those of large firms, there are plenty of opportunities for formal training through outside organizations like NITA, the National Institute for Trial Advocacy, and the interests of senior lawyers are served in a boutique by having their juniors take advantage of them. And most juniors want to take advantage of that training because that tends to be part of the culture.

A Fundamental Change?

Notwithstanding the advantages of working with a boutique, many clients will still take comfort in the notion of "bigger is better." Over the past 25 years there have been outstanding elite boutiques achieving tremendous professional and financial success and that did not prevent the big firms from morphing into mega-firms.

But, as technology advances, top talent increasingly sees the boutique as the more professionally satisfying and possibly more lucrative environment, and the mega-firm model remains unresponsive to the true demands of complex litigation, look for more clients to conclude "less is more."

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