



THE PHILADELPHIA BUSINESS LAW INSIDER

Volume I Issue III—September 2011

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Renee F. Bergmann, Esq.
Editor

From the Editor:

As summer has come to an end and we have spent our last days on the beach, at the lake or simply enjoying a relatively empty city, our children are off to kindergarten, college and everything in-between, it is the perfect time to evaluate your practice. What more could you be doing, and where are you wasting time? How has your practice changed in the last 12 months? The “I’ll do it when summer is over” excuse has expired, and fall is a great time to get started on any one of those projects simmering on the back burner since last spring.

In this issue, we bring you another wide variety of topics. Employment taxes, an update on the Commerce Court Opinion Project, an introduction to the ACE Program, and something we can all use – specific advice on evaluating your own practice. As always, we hope there is something in this issue for everyone, and if you are looking for a new fall project, consider those mentioned here or set the simple goal of submitting an article to us for the next issue. Now is a great time to get started, no matter which project you choose - before we enter the busy fall season and are able to comfortably say “I’ll do it after the Holidays.”



DISCLAIMER

The articles and reports contained in The Insider reflect the views of the writer and do not necessarily represent the position of the Business Law Section or The Philadelphia Bar Association or the editors.

CAREER PATHS FOR LAWYERS—WHAT MIGHT THE FUTURE HOLD

By Janice Giannini



Janice Giannini

Recent economic shifts have caused many industries to re-evaluate their business operations, focusing on how they do what they do, who does it, and expectations of team members, owners, and shareholders. We see this phenomenon across many industry verticals, particularly with professional services.

This article discusses the landscape for lawyers and what we are calling the career path for the modern lawyer. In all fairness, some of what you read has been going on in pockets for a while now. As the economy continues to shift, the burning question is how this will continue to cascade into the legal community. In addition, what might be some of the challenges and corresponding actions to address these challenges?

In the legal industry, there have always been opportunities in traditional law firms, corporate and government law practices, and private practice, as well as independent contract status. The path a particular lawyer selected was a function of interest and ability, motivation be it business or social consciousness, and supply and demand in their market space.

The overall size of the legal services industry in conjunction with the global economy and supply and demand are morphing the legal landscape in many directions as we speak.

If we focus just on the state of the economy and how it has initiated or accelerated changes in law practices, it begs the question: where do we go from here, and how does one, as a practicing attorney, best position oneself to achieve their ultimate goals in the face of uncertain global economic impacts.

There has been talk for a while now that law firms need to run more “like a business” than the traditional law firms of past years. If we consider this scenario to be the wave of the future, what does this really mean? What qualities / characteristics would the successful attorney need to possess and cultivate in order to flourish in this environment as it escalates and drives the industry?

We describe here several of the most salient characteristics of delivering legal services in the future:

- **Untethered from a traditional office**
- **Be able to work when and where the client needs you.** Continued downward pressure on rates that clients are willing to pay. While there will always be a niche for the \$1000/ hour attorneys, the strategic percentage of law firms focused on this high end will be more carefully considered.
- **Has a specialist mentality and an electronic Rolodex of experts for on-demand team assembly.**

Continued...

CAREER PATHS FOR LAWYERS—WHAT MIGHT THE FUTURE HOLD *continued*

While some law firms may grow in size and capability with more offices throughout the country and globally, with a desire to offer capabilities of the large diverse firm, but act locally, expect more partnerships and alliances with small to mid-size firms in order to offer diverse capabilities in a streamlined manner for the clients.

- **Knows what these terms mean and how to use them in their practice:** Lean, Six Sigma, and business process improvement. Already there are law firms using a version of this to streamline their internal operations in order to control costs and run more efficiently. Look for continued distinction between the core capability that needs to remain in-house and work that can be automated and outsourced as a commodity.
- **Can price the way the client wants to buy: by the hour, by the project, by the page - fixed and mixed rate.** There is already an expressed unwillingness to pay traditional high legal fees. Given the size of the legal services industry, expect the consumer to be smarter and more demanding. As a result, flexibility is key. Look to technology and standardization of content as much as possible to enable fixed price to become profitable. Also recognize that supply and demand economics, both globally as well as nationally, will cause the fluctuations in the pricing strategies over time.
- **Knows the types of work clients should and should not off-shore and why.** In some cases becoming more of a business partner bringing the global perspective to the table.
- **Left the old-school value of partner status behind years ago.** Look for diverse models for creating and running traditional law firms. The very nature of what a law firm is and what types of companies offer legal services is being re-defined.
- **Believes the Legal Services Act is a "when" question versus an "if" question.** The Legal Services Act, surfacing in other countries as we speak, allows for non-attorney ownership and external governance of legal professional services. As US companies expand their reach globally, look for pressure regarding this to accelerate. What implications does this have for who can offer and deliver legal services? What is the impact on running your entity if you only offer legal services versus a consulting company that offers legal services as a division of a much more comprehensive offering?
- **Has figured out that success is about the client and not about the lawyer.** As in any business, it's a balance between your ethical obligation and the clients' needs. As fixed price becomes the norm in some cases, this may surface additional challenges.
- **Is a great practicing business person and business development person.** In the past, there was not as much emphasis on developing the individuals to become better at the business side of the equation. The future demands that we prepare attorneys at all levels to be well-rounded business people in order to remain competitive, leverage assets, and control fixed cost. This is consistent with other professional services



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CAREER PATHS FOR LAWYERS—WHAT MIGHT THE FUTURE HOLD continued

industries.

- **Is a great practicing lawyer.** It is fundamental. First you need to be good at your craft. It is no longer enough and hasn't been for quite some time now. Look for this trend to escalate.
- **Realizes the impact of globalization - specifically “what is the impact to the legal profession and career paths for lawyers as the world get smaller?”** How do you address different practices across sovereign boundaries and what does that imply for the skill set for attorneys of the future?

So, what does this mean for the attorney specifically:

- Regardless of the type of law you practice and the business model within which you choose to operate, clearly the successful attorney of the future will be competing in a transformed space much the same as other professional services industries are today.
- To be successful in the future requires:
 - Well-rounded global business acumen
 - Problem solving abilities
 - Accountability and personal leadership
 - Business development capabilities
 - Ability to work globally
 - Excellent communication skills, both written and verbal
- As in any industry, professionals need to consider what their goals are and what investment in their future is required to achieve those goals. As the Legal Service Industry starts to behave as any industry in a saturated market space looking for growth- what are the implications for you?

Janice Giannini is an executive partner and regional director of Paradigm Associates, LLC, based in Cranford, NJ. This national firm specializes in bringing strategic planning and sustainable performance improvement for executive leaders who are in complex businesses and have a burning desire to achieve their stretch goals as they are defining a new normal. Visit www.ParadigmAssociates.US or call 1-877-640-2404, for more information.

IF YOU HAVE A COUPLE OF HOURS A MONTH, YOU TOO CAN BE AN ACE

By **Reneé F. Bergmann, Esquire**

I admit it, I'm a serial volunteer. The problem with being a serial volunteer is that you often give much more than you receive, leaving you with less energy for the next volunteer opportunity. However, every once in awhile the payback is ten-fold and the time you have committed to a project leaves you energized. Being a volunteer in the ACE (Advancing Civics Education) program provides just that type of payback.

Continued...

IF YOU HAVE A COUPLE OF HOURS A MONTH, YOU TOO CAN BE AN ACE continued

I've been an ACE volunteer for the last three years and am eagerly looking forward to the 2011-2012 school year. ACE is the brainchild of former Philadelphia Bar Association Chancellor A. Michael Pratt, who sought to bring role models and basic tenets of Constitutional government into urban high schools, while at the same time educating lawyers and judges in Philadelphia about the challenges faced by the school district. In my experience this goal has been met. I had no teaching experience prior to signing on as an ACE volunteer, but believe I have finally found a transferable skill for lawyers. It is also an inspiration to work with the teachers and fellow volunteers, weaving together a curriculum appropriate for the ACE program goals, yet something that works for your individual class.

It is particularly satisfying when you spot that "diamond in the rough" in your classroom. The student who is eager to participate, listens carefully to your every word and is always ready for the next lesson. Last year, I had the unique opportunity to teach both my ACE class and a high-performing suburban high school in the very same week. The difference was astounding. Teaching in suburbia was similar to teaching an undergraduate class; in contrast, the students in my ACE class struggled to read handouts aloud. This experience makes me particularly passionate about public education and the desperate need for equality in this system.

To date, over 150 volunteer attorneys and judges have participated in the ACE program, with more than 20 high schools all over Philadelphia being touched by the program. Ninth graders have participated in lessons ranging from model jury exercises to the very emotional and difficult topics of slavery and suffrage through a Constitutional lens. Some of these lessons provide the volunteers with the opportunity to learn more from the students than you may be teaching them that particular day.

The program has been so successful that this year ACE is launching a new initiative to expand into elementary schools, starting with fifth graders in South Philadelphia. This program is being run as a partnership between the Philadelphia Bar Association and the National Constitution Center.

So, whether you are a serial volunteer like me, or if this is the first time you have considered donating some time, this is a project worth considering. The volunteer contact for ACE is Beth Specker, Director of Civic Education at the National Constitution Center, bspecker@constitutioncenter.org.

There goes the school bell; I hope to see you in the classroom soon.

Reneé Bergmann is Counsel at Becker Meisel, practicing commercial litigation in Pennsylvania, New Jersey, and New York.



EMPLOYMENT TAX

By Phyllis Horn Epstein, Esquire

Personal liability for corporate employment taxes may come as a surprise to corporate employees, directors, and owners who expect to be insulated from corporate debts and misdeeds. It is critical that individuals who serve the corporation in these various capacities become aware of the potential for personal financial responsibility for these taxes leading to aggressive collection activity and liens on personal assets by the IRS. The obligation to pay has no statute of limitations and cannot be extinguished in bankruptcy.



By Phyllis Horn Epstein, Esq.

Employment taxes are imposed on employee compensation which includes both wages and most benefits. These taxes are withheld from an employee's paycheck by their employer. Because the withheld taxes belong to the government and must be paid over, they are held in trust by the employer and are known as "trust fund" taxes.

Employment taxes include withheld income tax, social security, and medicare taxes. Employers and employees each contribute toward social security and medicare taxes, identified as FICA on the employee's form W-2. The employer contribution for social security is at the tax rate of 6.2% (unchanged from 2010). The rate of withholding for social security tax from an employee is reduced from 6.2% to 4.2% effective January 31, 2011. The Medicare tax rate is 1.45% for each of the employer and employee (unchanged from 2010), a total tax of 2.9%. The employee's 1.45% medicare withholding and 4.2% social security withholding are trust fund taxes. As of Jan. 1, 2011, employers must deposit employment taxes electronically using the Federal Tax Payment System (EFTPS) and report withheld taxes on Form 941. Payments and returns are due quarterly with an exception for those who have an employment tax liability of \$1,000 or less. Deposits include withheld income tax, withheld and employer social security tax, and withheld and employer medicare tax.

An employer is responsible for withholding, depositing and reporting employment taxes, and is liable for the correct amount of tax even if the employer fails to correctly withhold. By way of example, by misclassifying an employee as an independent contractor, an employer may fail to adequately withhold. A delegation of responsibility to an employee or third-party to withhold and pay over trust fund taxes will not relieve an employer of ultimate responsibility for the tax, even if caused by a miscalculation, omission or misappropriation of trust funds. In litigation with the IRS, the burden of proof is on the employer to prove payment.

The trust fund recovery penalty equals the full amount of unpaid trust fund taxes comprised of withheld income taxes and the employee's portion of social security and medicare taxes. Failure to file and failure to pay penalties may be imposed (although the failure to file penalty is reduced by the amount of the failure to pay penalty if they overlap). Interest accrues on unpaid taxes.

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EMPLOYMENT TAX continued

A responsible person is someone who has significant control over the financial affairs of a business, even if another has the ultimate authority over corporate funds. The definition of “significant control” was more fully elaborated by the Seventh Circuit Court which set out a seven factor guideline. The seven factor guideline provides that the person with significant control may be someone who:

1. is an officer or member of the board of directors
2. owns shares, or possesses an entrepreneurial stake in the company
3. is active in the management of day-to-day affairs of the company
4. has the ability to hire and fire employees
5. makes decisions regarding which, when and in what order outstanding debts or taxes will be paid
6. exercises control over daily bank accounts and disbursement records and
7. has check-signing authority.

This seven factor test has been applied by other Courts. At least one court has held that Factor 5 is the most significant: Who decides whether or not to pay taxes. The individual with check writing authority, who decides whether taxes get paid before other creditors is a responsible person. However, financial control is distinguished from check writing duties that are merely ministerial. An individual who merely pays the bills under another’s direction is not a responsible party. Overall, the individual with significant, and not necessarily exclusive, control over financial affairs may be the responsible party for the payment of employment taxes. If more than one person is responsible, each is fully responsible for the tax.

Additional factors found by other Courts to have some bearing and weight as to whether someone is a responsible person include:

- the scope of ultimate authority or oversight in financial matters regardless of who has the “final word”;
- the level of involvement in the business, even if some duties were delegated;
- the access to corporate books;
- the authority to negotiate with IRS or sign quarterly tax returns (Form 941);
- one’s official title (i.e. Treasurer) may not be controlling without significant control over finances;
- retention of significant control by a shareholder or director;

A third-party, such as a payroll service provider or employee leasing company, having significant control over the payment of employment taxes may also be a responsible party. Persons acting under power of attorney or as a stand-in, i.e. where a wife covers the family business during her husband’s illness and a personal representative of an estate who temporarily runs a business after the death of a decedent, may be responsible persons as well.

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EMPLOYMENT TAX continued

The element of willful behavior is only a small hurdle. Acts of willfulness may include the failure to take remedial action to pay taxes, or more commonly, the payment of other creditors knowing that taxes have not been paid. Willfulness does not imply or require an evil motive; a simple indifference to the requirements of the law and the non-payment of taxes is sufficient. For example, an individual who pays the bill for office supplies while knowing that taxes haven't been paid has behaved willfully in the nonpayment of employment taxes.



Trust fund responsibility begins at the time of withholding regardless of whether that person is employed at the time quarterly taxes are to be paid. It is therefore critical for a responsible person to insure against personal liability after leaving a company in the event the company later fails to pay over the taxes that were withheld during their tenure. A letter or agreement of resignation should address this issue. If resigning from a parent company, the resignation letter should address trust fund taxes of the subsidiaries as well.

When more than one person may be a responsible party, the IRS may seek full reimbursement and judgment against any and all responsible parties. Each party is responsible for the full tax regardless of the extent of their participation. The IRS may then abate the total liability by amounts paid by each responsible party AFTER expiration of the statutory period for filing a refund suit or adjudication of a refund suit.

Individuals must therefore be acutely aware of the potential for personal liability for trust fund taxes based upon the level of their awareness of corporate finances, the authority they have to sign or approve checks and direct payments, and even the view in hindsight that the non-payment of taxes was an event they should have known of and failed to correct.

If a claim of individual responsibility is made, there is a procedure to present a defense both with Internal Revenue and with the Courts. The worst thing to do is nothing and assume the problem will go away by itself.

Phyllis Horn Epstein, Esquire is an owner in the law firm of Epstein, Shapiro & Epstein, PC (Phyllis@esclaw.com) specializing in tax litigation and planning. She is a former co-chair of the PBA Commission on Women in the Profession.

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Code 7501(a)

Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010

Code sec 3403

See also Reg 31.3403-1

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COMMERCE COURT OPINION PROJECT'S FIFTH YEAR

By Lee Applebaum



Lee Applebaum

Five years ago, I began the Commerce Court Opinion project, under the auspices of the Business Litigation Committee of which I was then chair. The premise was to match up local area law school student authors with Philadelphia lawyer editors to summarize Commerce Court opinions by distinct subject matter. Each lawyer-student team would produce a “chapter” summarizing all cases on a specific subject.

After some winnowing, our goal would be to cover approximately 40 different subject areas addressed in the Commerce Court’s publicly issued opinions - a number now in excess of 900. These chapters would be posted on the Committee’s website, the Commerce Court’s website, and would be included in PBI publications used in connection with Commerce Court CLEs.

In July of this year, the tenth chapter, on Settlement and Releases, was completed. It has been posted on the websites with the other completed chapters, and will likely find a home in a future PBI publication. It joins our prior chapters on arbitration, restrictive covenants and non-competes, gist of the action, breach of fiduciary duty, piercing the corporate veil, trade secrets, injunctions, civil conspiracy and negotiable instruments and the UCC. You can see these chapters on the Committee website, <http://www.philadelphiabar.org/page/BLSLitigation?appNum=1>, many of which have been published by PBI.

For those of us who have edited and mentored the students, it has been a fulfilling experience. It has allowed us to play some role in bringing our students along in their careers, while also providing a service to the litigation community. It has been an invaluable experience for the students who were able to transform an academic exercise into something with practical effects, while working with and learning from practicing commercial litigators.

The Philadelphia legal community includes the area’s law schools, and whatever we can do to bring law students into a practical relationship to that community is a boon to all of us. This is especially true in these times that are extremely difficult for law students. If you are interested in being a project coordinator, and willing to commit to that role – which requires considerable patience and diligence, but offers great rewards when the goal is achieved -- please feel free to contact me at (215) 893-8702 or lapplebaum@finemanlawfirm.com.

Lee Applebaum, a litigation partner at Fineman, Krekstein & Harris, authored the chapter “The Steady Growth of Business Courts,” in the National Center for State Court’s publication *Future Trends in State Courts 2011*, and the law review article “Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases,” in the *Pepperdine Dispute Resolution Journal*. He also has been appointed Liaison from the American Bar Association’s Business and Corporate Litigation Committee to the Ad Hoc Committee on Judges Initiative. Applebaum is a former chair of the Business Law Section, the ABA’s Subcommittee on Business Courts and is an Honorary Charter Member of the American College of Business Court Judges.



ANNOUNCEMENTS...

PHILADELPHIA BAR ASS'N BUSINESS LAW SECTION IS LINKED IN...JOIN US!



The Philadelphia Bar Association's Business Law Section has created a LinkedIn group now accessible online through the Section's webpage at <http://www.philadelphiabar.org>. LinkedIn is a new and easy way for members of the Section to stay in touch, keep posted on new developments and expand business networks. If you haven't yet joined, consider becoming part of an expanding group of Philadelphia business lawyers who are already on LinkedIn.

RENEE BERGMANN JOINS BECKER MEISEL

The Philadelphia Law Insider's editor, Reneé F. Bergmann, has joined Becker Meisel Attorneys at Law as Counsel, practicing in the firm's Cherry Hill office. Ms. Bergmann will continue to focus her practice on business litigation, including mediation and arbitration in Pennsylvania, New Jersey and New York. Previously, Ms. Bergmann was a member of Thorp Reed & Armstrong, LLP's Commercial and Corporate Litigation Group, as well as a member of the nationally ranked franchise team with the global firm Nixon Peabody LLP.

CLE LUNCHEON—GETTING MORE: HOW TO NEGOTIATE FOR GREATER SUCCESS IN WORK AND LIFE

The Business Law Section, in Conjunction with the State Civil Litigation Section and Federal Courts Committee, invites you to a one hour CLE luncheon on Monday October 24, 2011 at the Pennsylvania Bar Institute located in the Wanamaker Building in Philadelphia featuring Professor Stuart Diamond, author of *Getting More: How To Negotiate To Achieve Your Goals In The Real World*. Professor Stuart Diamond has taught and advised on negotiation to corporate and government leaders in over 45 countries. He has an MBA with distinction from Wharton, a law degree from Harvard, and a BA from Rutgers. He has consulted extensively for the United Nations, and has taught professionals from more than 200 of the Fortune 500 companies. In a previous career, he was a journalist for the New York Times, where he won the Pulitzer Prize as a part of the team investigating the crash of the space shuttle Challenger in 1986.

Want to get more out of any negotiation? Professor Diamond is here to teach you the 12 counterintuitive strategies that will help you achieve your goals in the real world. His course teaches new, innovative and immediately useful competitive negotiation strategies, replacing conventional wisdom. Since negotiations is the basic process of business and legal practice, affecting every interaction, better methods are central to increasing competitiveness.

Professor Diamond has developed a new model: its central theme is that finding the pictures in the head of the other party are much more important than the collection of power, leverage and rationality based tactics widely used today. Counterintuitive to its core, the revolutionary strategies articulated in his *New York Times* bestselling book, *Getting More*, Diamond shows how straying from a combative model provides a massive advantage.

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The program has been approved for 1.0 Substantive CLE credit. Participants wishing to receive the CLE credit will be required to pay a fee of \$33.50 for members of the Philadelphia Bar Association admitted for more than five years and \$28.50 for members of the Philadelphia Bar Association admitted for less than five years. CLE Tuition prices include lunch.

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BUSINESS LAW SECTION: WHO ARE WE?

As the largest substantive law section in the Philadelphia Bar Association, the Business Law Section, through its many committees, promotes the objectives of the Association and the interests of business law practitioners in the fields of corporate, banking, securities, intellectual property, municipal finance, and related areas of the law.

The Section, made up of in-house, government and private practice business lawyers, sponsors numerous committees which provide important networking and continuing legal education opportunities for Section members. The Business Law Section advocates legislative changes in Harrisburg under the umbrella of the Association.

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MISSION STATEMENT

It is the mission of the Communications Committee of the Business Law Section of the Philadelphia Bar Association to foster improved communication among its members in the furtherance of the goals of the Section. To this end, *The Insider* provides a forum for professional and open exchange among the Section membership on all issues related to its members.



EDITORIAL POLICY

The Business Insider is a publication of the Business Law Section of the Philadelphia Bar Association. The purpose of the publication is to facilitate communication among the membership of the Section on topics and events of general interest to business law practitioners. The editors of *The Insider* reserve the right to accept or reject any submission and to edit any submission to ensure its suitability for publication, its adherence to the Mission Statement of the Communications Committee, and its furtherance of the objection of the Business Law Section.

Applause, Applause... The help and creative initiative of Becker Meisel's Marketing Associate, Stephanie Michael, has made this edition possible. Our deepest gratitude.

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