

PRACTICING LAW AFTER SEPT. 11th: NEW RULES FOR LAWYERS AND CLIENTS

by

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It is striking how differently lawyers and legal profession observers react when asked to assess the effects of September 11, 2001. This LEGAL BACKGROUNDER offers a review of some of the more salient points being made, including the effects on client services, litigation practices, and law firm economics.

Place at the Table. No fact of life, post-September 11, speaks more directly to how the professional services must now be communicating with their clients than the certainty of immediate change. It affects both the content of client communications and the very tone of those communications. It requires a heightened proactive consciousness. It requires counselors to talk to clients about the whole integrity of their business in the months ahead. Any law firm that positions itself as a full-service operation must “partner” with clients as never before.

One salutary example is the Counter-Terrorism, Public and Corporate Law Security Group, a practice team formed after September 11 by Bracewell & Patterson. The group was put together with remarkable alacrity soon after the attack, with the idea of providing counseling and lobbying to clients in any areas where they’ll continue to be affected by the events of September 11.

As Bracewell partner and former Arkansas Congressman Ed Bethune lists them, the main issues now — maybe America’s only issues — are personal safety, protecting the nation’s infrastructure, and the economy. Clearly, the laws affecting all three are in flux. Clearly, there will be discussions on Capitol Hill as new statutes get written. For Bracewell’s clients, the burning question is, “Will *they* be a part of those discussions?”

Large hotel chains, for instance, will almost certainly be facing new security compliance requirements, such as having to complete mandatory security standard reports not unlike what the Environmental Protection Agency demands from businesses that have an impact on the environment. Will the hospitality industry passively take whatever the government offers, or will it *help draft* the new requirements, with input on what is and what is not practicable, on what is and what is not economically onerous, on what does and what does not actually contribute to the personal safety of a hotel’s guests and staff? With former Montana governor Marc Racicot also part of Bracewell’s practice team, the implicit promise is that you, the client, will have a voice in determining your own future.

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But the practice group is more than just a team of politically charged lobbyists. The group includes specialists handling contracts and commercial, environmental, financial services, privacy and security, government contracts and claims regarding government actions, and labor and employment. Bethune and his colleagues held a series of well-attended seminars in Texas, and found a clientele deeply interested in what they were offering. "I run a whole company," one CEO fretted to Bethune. "Where do I begin?" Bethune advised him to inventory his staff. Do you have the communications people in place? Do you have the HR people? Do you have the lobbyists? Are they up to the job? Once these proverbial ducks are in a row, then client and counsel devise multi-dimensional strategies to provide informed and detailed input that will significantly affect what the government finally does.

Bracewell's fast response to the September 11 crisis may have been unusually prescient and, with a politically connected former FBI agent in the vanguard, the firm may have also been uniquely positioned to launch this practice. But the initiative underscores a possibly beneficial effect of September 11 on the entire legal and business communities. If there is a permanent residual effect, *the September 11 disaster will have reinforced the crucial trend toward partnering, and the closer participation of law firms in the essential business of their clients.*

In the Trenches. Legal practice may have been decisively affected by September 11 on other levels as well. Indeed, new factors affect how lawyers do their jobs on a day-to-day basis. One especially dramatic example: Should a trial lawyer approach the courtroom experience differently in the aftermath of September 11? For example, Dr. John Gilleland, a psychologist and Director of Research for DecisionQuest, a leading trial consultant firm, has focused on *voir dire*. Should lawyers query the impact of September 11 on jurors' lives? If so, how? Which jurors will be favorable to defendants in the current malaise? Which will be favorable to plaintiffs?

Gilleland cites ego trauma, the devastation of one's sense of self that occurs after an event like September 11, as a determinative factor. It is a psychological phenomenon that lawyers have long pondered in their assessment of courtroom participants. Today, with continuous public commentary on how Americans will "never feel safe again," ego trauma may well have become a lasting fixture in litigation practice. "Only by asking jurors what they feel and how they are coping will the court system have *any* hope of ferreting out those who should not be asked to serve as jurors at this point in their lives," writes Gilleland in a recent article.

At the very least, the possibility of ego trauma introduces unpredictability into the process. Popular wisdom tends to see the advantage shifting to defendants since September 11, at least when we're dealing with less than extraordinary injuries. *See, e.g.* Maura Dolan, *Terrorism May Shift Jurors' Attitudes*, L.A. TIMES, Oct. 19, 2001. On the other hand, Dr. Mark S. Sobus, a DecisionQuest Vice President, has conducted research that indicates no effect favoring defendants or disfavoring plaintiffs. Instead he cites multi-million dollar verdicts since September 11 that certainly do not indicate any more conservatism among juries whatsoever.

The views of Gilleland and Sobus are not so much contradictory as they are complimentary. It adds up to this: For trial lawyers, September 11 is a possible factor affecting jury impartiality, but it can cut either way, pro-defendant or pro-plaintiff. *It will certainly not have the pro-defendant effect that the conventional wisdom has predicted.*

Short-Term Effects, Long-Term Implications. Another broad area of commentary since the attack has included likely changes in the actual configuration of professional services organizations like law firms, and the new demands that will now be placed on them in terms of management, marketing, and strategic planning. Tim Cullen, a partner in the Washington, D.C. office of Jones, Day, Reavis & Pogue, sees additional changes "at the edges," including short-term inconveniences, fewer airplane trips by lawyers, etc. For the time being, we may, in fact, be looking at the death of the day trip. If there's any doubt about the necessity to go from Point A to Point B, the greater tendency will be to just sit still.

Yet, as Cullen points out, these short-term effects have long-term implications. With more lawyers staying in their offices, there will be greater reliance on sophisticated communications systems, including

video-conferencing as well as e-mail and telecommunications. In turn, such increased reliance offers an additional competitive advantage to the larger, capital-intensive firms that can continuously refurbish their technological infrastructures.

Likewise, firms that are already global, and can already provide multi-office and multi-jurisdictional services, are ahead of the game, since they won't need to worry as much if world events impede human mobility from place to place. The large firms are bureaucratic but they are also multifaceted. September 11 has thus raised the ante for the behemoths, where, as Cullen puts it, "inertia is typically at war with adaptability."

Such adaptability will also make itself felt at firms that can re-deploy lawyers from practice area to practice area as the trauma to the world's financial markets requires shifts in workloads. Contracts are being rewritten or challenged. New energy sources are being sought "anywhere that isn't sandy," as Cullen puts it. Today's Geneva-based deal set up to move oil out of the Emirates is suddenly retargeted for China.

Corporate practice is grinding to a halt in some areas, and litigation is being seen as the vanguard of growth in the year ahead, especially as business partners renege on contracts in order to pursue more favorable business strategies post-September 11. The energy, transportation, and insurance industries are all question marks, according to Cullen, as corporations "re-jigger their relationships." Cullen, himself a litigator, likewise foresees a stellar increase in the volume of arbitrations that global law firms must now be prepared to handle.

As has been widely noted, September 11 is producing a surge in government contracts work. But it is not merely an uptick in work volume for a particular practice area. It is a whole new post-September 11 mind set in which the government itself is now instinctually perceived as an "industry." An erosion is fast taking place, an erosion of the laissez faire mentality that predictably dominated how businesses, and the professional services that cater to them, had typically perceived the world for decades.

Globalization itself will be fine-tuned. For years, large law firms have been moving toward a global practice model where locally-based practitioners practice local law. September 11 accelerates that trend; in fact, it may have finalized it. If global transportation is at all impeded on a semi-permanent basis, having a lawyer licensed to practice indigenous law is no longer a choice, but an absolute necessity. Big-firm veterans like Cullen are also cautiously agreeing that the emphasis on signature practice areas, on carving out very specific industry, must be qualified somewhat in the post-September 11 environment. "I push lawyers to have a major *and* a minor," says Cullen.

A Prognosis for Law Firms. A post-September 11 phenomenon as simple as a reluctance among professionals to fly across the Atlantic thus foreshadows macrocosmic changes in which ever broader global strategies will emerge. Given a downturn directly ahead, however, what should law firms do in the current milieu to survive the challenging days in store, and how, as business entities, will they be affected by inexorable changes?

According to consultant Carl Peters, president of LAWMANAGE, September 11 will force the smarter firms to more aggressively adopt certain recessionary management measures, but without eviscerating themselves to a point where they will not be positioned to exploit the inevitable recovery. Expect the smarter firms to:

1. Conduct more strategic audits of client legal needs as a way to demonstrate value;
2. Anticipate in-house staff reductions (already underway, according to Peters) as a way to spot gaps in legal service and fill them from the outside; and
3. Maintain current marketing budgets, while slashing profligate allocations for travel and entertainment.

Peters also sees an opportunity for small and mid-sized firms with lower rates to lure clients away from the larger firms. His prediction qualifies the competitive advantages presumably enjoyed by megafirms like Jones, Day in a post-September 11 world. In certain local markets, top-rate lawyers from the larger firms will be viewed as excessive. Expect the larger firms to redouble their marketing in response, to counteract that perception.

There seems to be some fairly broad consensus on the likely “what’s hot/what’s not” practice areas in the post-September 11 marketplace. Peters’ list is fairly representative:

1. As discussed above, law practices related to deal-flow will suffer ongoing decline until later in 2002. There will be a shift toward workouts and restructuring.
2. Real estate throughout the country will enjoy a flurry of flight-to-quality transactions but then taper off through most of 2002.
3. As government contracts heat up, most other regulatory work, including antitrust, will decline.
4. There will be increased competition for government-financed work, which will grow at a steady pace. Public-private co-ventures will be a mainstay for many firms.
5. Insurance clients will provide a steady flow of work, but they’ll put a lot of pressure on rates.
6. IP law will stay strong as clients protect existing technology and introduce new systems (including security-related systems in the aftermath of September 11).
7. Labor practices will stay strong as the recession reconfigures workforces.
8. Employee benefits practices will enjoy stellar growth as clients look to cut costs on retirement and health care.
9. The only brake on litigation will be an increased tendency to settle as a way to save on legal fees.

No management decisions in the post-September 11 market will have greater impact than choice of technology. Expect to see new systems fall by the wayside. At the same time, systems that proved themselves before the attacks will now attract an avid customer base. A case in point is the electronic data recovery systems such as the one marketed by Ontrack Data International – DataTrail Group.

The relevance of these systems, designed for comprehensive recovery of online evidence during discovery, has only been elevated by the terrorist attacks. “The perpetrators proved their knowledge of information technology and digital communications by communicating discreetly behind the veil of seemingly innocuous chat groups and web sites in order to pass messages between different branches of their organization,” comments Ontrack’s Daniel L. Pelc, associate legal counsel of the Eden Prairie, Minnesota-based e-recovery pioneer.

The attractiveness of e-mail to terrorists should create a dramatic new focus on systems like Ontrack’s to recover such traffic, which in turn will be a marketing boon for these vendors as law firms, and businesses in general, become more aware of such systems’ applicability to their own caseloads. Before September 11, law firms were just nibbling at such “right” technology. Now, they will need to gobble it up.