



Major Practice Areas Analyzed

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The Landscape of Litigation

Litigation is as American as apple pie. In our litigious society, it is never likely to fall out of fashion.

Many attorneys decided to enter the law as young people because they were entranced by the glamorous trial lawyers they saw on film and television. While the real world is of course very different from the Hollywood version, there is no doubt that the kind of high-stakes, win-lose competitiveness intrinsic to litigation work exerts a powerful pull for many attorneys. Litigation is a game of chess that requires endless diligence, inspired creativity, brilliant arguments, and excellent negotiating skills.

The reality is that the vast majority of cases never go to trial, and that most are won or lost during the months or years of plodding preparation. This means that litigation associates spend most of their time assisting their superiors with the vast quantity of work that goes into the discovery process. This includes reviewing volumes of correspondence, drafting motions, taking depositions, and filing interrogatories.

Litigation is another relatively recession-proof practice area, because when individuals and companies are losing money, they are more likely to seek redress through the courts. The demand for litigators is thus countercyclical, and healthy in the current climate.

In addition to general commercial litigation, there are a number of different sub-practice areas, including contract disputes, employment, IP, securities, and toxic torts, to name a few. Some attorneys spend all or most of their time in one area or another, while others are generalists.

Litigators work at firms of all sizes, from major American general practice firms to small boutiques. The cultures at these firms are as heterogeneous as the firms themselves, but litigators are generally known for their competitiveness and smartness.

What Do Recruiters Want?

From a recruiting standpoint, there are several things for litigators and aspiring litigators to bear in mind. While the market for litigators is strong and healthy, the number of litigators available to make a lateral move at any one time is also relatively high. This means that competition can be fierce for individual positions.

Some of the things that can set you apart from the pack include top-notch academic qualifications, Law Review, and participation in Moot Court. A federal clerkship is an outstanding asset, not only for



the knowledge and contacts it can yield, but also for the distinction it confers. Successful litigators are smart, aggressive, and work very hard to win, and they expect that these same qualities will manifest themselves on an attorney's resume.

If you have good experience in a relatively unusual area at a solid law firm, this can overcome other weaknesses in your credentials. Examples include toxic torts, employment, intellectual property, and others. IP and securities litigators are also in high demand, and these practice areas require special skills and experience. Research and writing skills are critical in a litigator.

Intellectual Property

If "plastics" was the one-word career advice given to Dustin Hoffman in *The Graduate* over three decades ago, "intellectual property law" would have been a likely 90's legal version of the same. While the "dot gone" companies have vanished — taking along with them many of the attorneys (including IP) who provided them with legal services — there is no doubt that IP law is here to stay for the long haul.

As the United States and other industrialized economies have migrated from industrial production through a service economy to what has been termed "intellectual capitalism," IP law has increased dramatically in importance. The engine of the US economy has become ideas, and "knowledge workers" have been their driving force. In short, ideas are king. And attorneys who help inventors, entrepreneurs, and artists to protect intellectual property play a vital role in their capitalization.

IP law can be divided, like Gaul, into three parts: patent prosecution, litigation, and "soft" IP (trademarks and copyright). The technology recession and collapse of the "new economy" have affected each of these areas of law quite differently. The softness in the economy has prompted a softness in the job market for soft IP attorneys.

Law firms have responded to the contraction in business by engaging in a 'flight to quality.' Whereas previously patent prosecutors did not necessarily require an advanced degree in a technical field, that requirement is now frequently the norm. The reason for this is quite simple: understanding the technology behind patents is as vital as understanding patent law in getting patents issued. Nothing is more exasperating to a client than having an attorney who is unable to understand their invention.

That said, patent law is one of the few practice areas in which it is possible to work at a prestigious firm without having attended a stellar law school, or made law review. Even so, opportunities for patent prosecutors are thin on the ground and very competitive.

Bankruptcy

While debtor's prisons (such as the one that held Charles Dicken's father) were abolished long ago in North America, the inability to fulfill financial obligations continues to send record numbers of companies and individuals into insolvency. Bankruptcies are at an all-time high.



In a land of failing and failed businesses, the bankruptcy attorney is king. In this sense, bankruptcy law is not only recession proof, but also strongly countercyclical. Demand for bankruptcy associates and partners are naturally also at an all-time high. Bankruptcy law comes from the US Bankruptcy Code, which itself stemmed from a provision in the US Constitution.

What Do Recruiters Want?

Given the strong demand for bankruptcy associates at present, candidates with somewhat average credentials are currently able to land solid jobs. The top firms still require top law schools and good grades. But additional assets include a spell as an extern or clerk in a bankruptcy court, and working for a well-known bankruptcy practice, regardless of size.

Corporate

Overview

Since the charter of the Jamestown Company was first drawn up in 1607, attorneys have been responsible for helping, advising, and representing the companies that have played a significant role in shaping and maintaining the wealth and prosperity of the modern world. While many early "joint stock" companies merely required the imprimatur of a king or queen to authorize the scope of their operations, the vastly more complex regulatory, legislative, and legal requirements of the present day mean that virtually every commercial enterprise from the largest multinational to the humblest start-up needs a competent attorney to help them navigate the minefield of owning and/or operating a business.

Corporate attorneys are the trusted advisors who assist them in almost every sphere of their commercial activity, and in every stage of their life cycle. This entails addressing both tactical and strategic issues, from company formation to corporate governance, from start-up and ongoing finance to possible liquidation or change in control (including private equity, M&A, and initial and subsequent public offerings), from employment agreements and "non-competes" to regulatory and tax compliance, among others.

The work of a corporate attorney is often more varied than in other areas of the law, and this can mean it is more interesting and rewarding. Furthermore, whether you are working at a law firm or at an in-house position, you are constantly interacting with other lawyers (both within other practice areas of your firm and opposing counsel), as well as non-lawyers at the companies you counsel. The best corporate attorneys have excellent communication skills, and are able to understand and anticipate client needs by wearing a business hat as well as a legal hat. Corporate attorneys help companies solve problems, from day-to-day issues to life-or-death transactions, and this can be as challenging as it is rewarding.

The Crisis in Corporate Practices

The current predicament of many corporate attorneys with dwindling billables, or worse, present or threatened unemployment, mirrors the macroeconomic trends of the last two years. While a "rising



tide lifted all boats," boosting associate and partner compensation to the stratosphere at many firms, the crash of the New Economy has brought pain and retrenchment with the massive falloff in business, like a neap tide suctioning jobs and money back from whence they came. Once eminent firms have shuttered, layoffs are legion and virtually no corporate practice has been unscathed by the fallout. What's more, a classic supply and demand problem has made the market for corporate associates without portables a challenging one indeed: there are simply more corporate attorneys than there is demand for them. The law firm economics that once made hiring corporate associates so attractive — and profitable — before the crash in the summer of 2000, has reversed with the decline in billable hours. Once high-performing assets, recently minted corporate associates are now in many cases liabilities at firms that are struggling to break even, or better, turn a profit. The inflationary price wars that caused salaries to skyrocket have collapsed into stagnation and, in many cases, deflation.

From a recruiting standpoint, the situation is even direr for the corporate attorneys who chose to go "in-house" at the companies they were advising, and who are now seeking to rejoin law firms. Many of the companies they joined have either gone under or are going nowhere, and the options they were granted that once promised quick riches have transformed, Cinderella-like, back into worthless scraps of paper (and even worse, in many cases, tax liabilities where no monetary gain was ever realized). Rightly or wrongly, law firms take a dim view of this migration to in-house positions or solo practice, in part because they see it as a negative predictor of future "stickability."

The same slogan "differentiate or die" that applies to businesses can also apply to corporate associates in a down economy. Without a unique or compelling competitive advantage, in the form of knowledge, skills, impeccable credentials or portable business, corporate associates are left to the vagaries of the job market. Being "jack of all trades" is not an attractive proposition when trade itself is down and you are competing with others with very specialized skill sets. There are, of course, many niches in which a corporate attorney can specialize, from securities and M&A to contracts to employment and litigation management.

The Road Ahead

The "supply overhang" that is responsible for so much suffering and economic loss is likely to persist beyond 2003 and well into 2004. While it does, the opportunities for lateral moves are few and far between. Firms are now able to "cherry pick" young associates with outstanding credentials they once would have had no hope of courting. Even many capable young attorneys with stellar credentials are finding it difficult to get new jobs. Some, sadly, are abandoning the practice of law altogether, out of frustration or financial necessity.

But the prognosis is not dire over the medium to long term. While corporate associates are hostage to the same business cycle as the firms they advise, their fortunes will improve with economic expansion and the inevitable recovery that has followed every recession in American history. The day will not be long coming when the same cycle repeats itself, and many eager law school students are drawn by opportunity and financial gain into corporate practices across the land. Come hell or high water, corporate practices will continue to be the core revenue-driver at major American law firms.



As long as private enterprise continues to drive economic growth around the world, corporate attorneys will be 5 needed to help them.

Early Years

Corporate associates cut their teeth drafting, revising, and in some cases negotiating boilerplate agreements. In addition to the tedium of practicing "form law," and the bad habits this can encourage, the nature of this work means that writing, reading and revising stacks of generic documents are the initiation rites that young corporate associates must endure. To many, this work is neither intellectually arresting, nor particularly fulfilling, but the pleasure of working closely with clients makes it well worth the effort. The prospect of deal making later on, the job mobility in a good economy, and the financial rewards of working for a thriving practice are additional incentive to practice corporate law.

A Typical Day

Corporate attorneys spend most of their day on the telephone advising clients. Unlike litigators, who are shaped by the win-lose, binary nature of trials and settlements, successful corporate attorneys are masters of compromise and problem avoidance. Because large amounts of their business hours are spent on the phone, it is not unusual for corporate attorneys to work late hours, and pull all-nighters if crunch time has arrived in the form of a pending deal. With the recent decline in business, however, the more frequent reality today is of a collapse in billable hours. We have seen associates who billed in excess of 2300 hours at the height of the boom see their workloads fall to 1500 hours and under. This is a lose-lose, for the associate and their firm.

Flavors of Corporate Law

Corporate practice is not a monolith; there are, in fact, numerous niches within corporate practice that require different skills, backgrounds, and credentials. Likewise, these sub-practice areas are more or less attractive to law firms depending on the state of the economy and on the needs of their clients at any point in time. While defining these areas in great detail goes beyond the scope of this article, it is worth briefly mentioning a few: M&A, securities, and project finance.

Mergers and acquisitions are what happen when one company acquires, or is merged with, another. Because of the onerous reporting requirements and the many pitfalls that characterize such deals (including the potential of bankrupting the acquiring company in a bet-the-farm transaction), M&A activities require the assistance of M&A attorneys, as well as the investment bankers and executives on both sides of a deal. The devil is in the details, and the time to discover it is during due diligence. Due diligence is a laborious process that usually requires many weeks or months of frantic auditing activity, in which every single legal agreement and liability of the company being acquired must be gone over with a fine-toothed comb (often in conference rooms, and frequently late at night, the closer it gets to the deal date.) Since finance is the lifeblood of these deals, and in fact the key to a profitable return on both sides, an understanding of finance and accounting is the sine qua non of an M&A attorney. Many young M&A attorneys will have finance and accounting degrees, or even MBA's. At the more senior levels, negotiating skills take over as a core skill.



The current state of the economy has caused some corporate associates with M&A backgrounds to increase their billable hours because of the number of failing businesses that must be sold, or that don't have a realistic prospect of raising capital in the public markets in the near term. In these cases, corporate associates are engaged in extended negotiation and due diligence sessions that can still come to naught after months of work. Nevertheless, M&A is one area of specialization that is relatively desirable because it requires a special skill, and has favorable economics. As in other areas of the law, it helps to be mentored by a rainmaking partner – in this case, to teach the vital negotiation skills and black magic required to shepherd a desirable deal to fruition.

Corporate attorneys with a strong background in securities law are also in a more defensible position than those of the "garden variety." These attorneys are expert at securities law, including the disclosure requirements of the 1934 Securities Act.

Access to the capital markets is the lifeblood of continued operations and shareholder value for all publicly held companies, as well as many privately held ones that hope — at some stage — to have an initial public offering. Many corporate associates who specialize in securities law will spend valuable time at the Securities and Exchange Commission. Unfortunately, the collapse in IPO activity in the last twenty-four months has caused a number of promising young securities attorneys to lose their jobs. Over the long term, this trend is likely to reverse. With high-profile scandals like Enron and Worldcom, and the new legislation that has been pushed through Congress, the onerous disclosure requirements companies whose sell securities face are sure to wax rather than wane, and so, therefore, will the workload of their corporate counsel.

Project finance associates are corporate attorneys who help facilitate major infrastructure deals, often in the international arena. Corporate attorneys who wish to work abroad at some stage of their career often seek opportunities in project finance, because many of these projects occur in Asia, and in developing countries, which are chronically short of infrastructure. Roads, bridges, dams, and power-generation plants are some of the types of projects that require project finance expertise. Because of the sheer scale of these multi-year projects, and the political uncertainties that sometimes accompany them, the risk and cost are spread among a number of financial institutions and investors. This means that project finance associates must be fluent in both finance and, in many cases, the local laws and regulations that constrain the methods by which such projects are effected.

In sum, while corporate attorneys can be generally characterized as attorneys who help companies to survive and thrive despite the many legal, regulatory, and business strategy challenges that they face – and many are, in fact, generalists firmly connected to their clients' needs – there is in fact a wide variety of sub-practice areas, of specialties, that corporate attorneys can pursue.

Intellectual Property

According to Peter Drucker, businesses (and for that matter, individuals who are engaged in commerce of some kind) are primarily concerned with marketing and innovation. IP attorneys help build, maintain and sustain a competitive advantage in the area of innovation, without which



sustained economic development would be impossible. The reason that companies invest billions of dollars in research and development (R&D) each year is that they hope to capitalize on those inventions, be they in the area of biotechnology or pharmaceuticals, electrical engineering, or mechanical engineering. Without IP law, this would be impossible: inventions would simply be stolen in a free-for-all that would rapidly lessen the returns, and therefore the incentive, to innovate. The productivity gains that society relies on to become richer and more efficient with each passing year would likewise, in time, vanish. Before IP law, the world had a relatively stagnant economy for millennia. Then along came the US Constitution.

The three kinds of IP attorney are patent prosecutors, IP litigators, and trademark and copyrights attorneys. The areas of IP law include patents, copyrights, trademarks, unfair competition, and trade secrets.

Patents grant 20-year exclusive licenses (from the date of the patent application) to make, use, sell or license an innovation. In order to obtain a patent, the US Patent and Trademark Office needs to be convinced that the invention is new, useful, and not obvious in light of "prior art." In one recent controversial case, this included the granting of a patent to Amazon for its "1-click" shopping (as a business process). A rash of recent litigation in this arena continues to prove the limits of patent law.

Patent prosecutors research, prepare, and apply for patents on behalf of their clients. In most cases, because of the technical nature of the work, it is necessary for the patent prosecutor to have one or more undergraduate or advanced degrees in engineering. Given the esoteric and often abstruse subject matter, patent prosecutors must be able to keep up with their clients, and stay one step ahead of the USPTO. Surprisingly, a strong technical degree will be a compensating factor in the job market for those who did not attend Top Twenty law schools. A strong scientific background opens doors at top firms that would otherwise be closed. The job market for patent prosecutors is currently fairly soft, although there is always room for the best. One of the additional requirements besides having an engineering degree is to have one or more patents issued, a process which usually takes several years.

Patent litigators help companies enforce, and thus secure the profitability of, their patents. As the number of patents increases tremendously by the year, the amount of litigation naturally rises as well. Some individual multinational companies will apply for many thousands of patents in a single year.

"Soft IP" lawyers are currently facing a recession. This phenomenon, like the glacial slowdown in general corporate work, will likely last throughout the present recession. The skills needed to be a soft IP lawyer are less rigorous. In effect, there are lower barriers to entry and many more young attorneys joined the party while the drinks were flowing. Now the hangover has set in.

Not all of the controversies regarding protecting intellectual property are as recent as they may appear; Hollywood itself was allegedly founded by men who crossed the country to avoid paying Thomas Edison the royalties due him for his invention, the movie projector.