OF COUNSEL
The Legal Practice and Management Report

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Practice Area Snapshot …

Convergence of COVID Fallout and Other Factors Fuel L&E Law

Legal profession players and observers alike fully understand that certain practice areas serve as reflections of developments and trends in the national landscape at large. Perhaps no other field of law acts as a mirror of changes in the United States as much as labor and employment law. Economic cycles, shifting political winds, gender and cultural changes, and cataclysmic events like pandemics all affect the workplace, which in turn carry ramifications for L&E law and its practitioners.

For example when the #MeToo movement took hold for several years halfway through the last decade, women across the country spoke out about sexual harassment—and worse—in all sectors of society, particularly in the workplace. This brought far-reaching repercussions that were compelling employers to keep their attorneys on speed dial.

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While the height of the movement has shrunk somewhat, harassment, gender discrimination, and related claims are still keeping labor and employment lawyers busy. Several have reported that nearly every day they get contacted by a client regarding such claims or questions about their preventive policies and procedures.

Many law firms have earned a reputation for handling these claims. "We are particularly sought-after to represent clients in disputes involving sexual, gender-based, and other alleged discrimination and harassment, and we also conduct workplace investigations involving highly sensitive matters," says Kerry Garvis Wright, partner and chair of the employment group at Los Angeles-based Glaser Weil, who adds that the firm handles many other L&E matters.

Garvis Wright and her team also provide preventative counseling in this area. "The advice and counsel portion of our practice," she adds, "draws upon our litigation experience and focuses on helping clients navigate potential employment challenges and pitfalls to avoid litigation and assisting in creating and implementing robust employment practices."

At Atlanta-based Constangy, Brooks, Smith & Prophete, the firm's labor and employment attorneys also say they tackle a lot of gender-based claims, among others. "Our lawyers," says Maureen Knight, who handles many L&E matters and chairs the firm's class/collective actions department, "are kept busy assisting clients with compliance issues such as wage and hour laws and changing employment regulations, as well as handling complex litigation matters related to discrimination, harassment, and retaliation claims."

Pandemic Transformations

Of course, as widely reported, conditions within the work environment took many twists and turns when the pandemic hit, changing on-the-job operations for employers and employees and the relationships between them. As Garvis Wright puts it: "The pandemic undeniably shifted certain workplace dynamics and, in many ways, altered how employers and employees interact."

Much like MeToo, COVID transformed labor and employment law, requiring

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Taylor's Perspective …

View Your Website with a Critical Eye: If It Bores You, It Surely Disappoints Your Visitors—Part One

These days, law firms increasingly place a greater focus on their websites than they did even a few years ago, with many regularly updating or completely overhauling them. Fortunately, more and more partnerships have learned that their online presence can truly impress visitors—and entice prospective clients—if their websites market their firms' services with dazzling designs and spirited prose. I've talked to many lawyers at several firms who "get it." That is, they've shunned the staid style and content of, well, the old days. Thankfully.

Deborah McMurray and Keith Wewe, leaders of the Dallas-based, national, marketing strategy and technology company Content Pilot, help law firms get the most out of their sites with fresh designs and compelling writing. (For more about them, see the end of this article.) I've turned my column over to these two highly regarded experts this month and next for a two-installment article. Here's Part One:

Designing a new website can be such a time-consuming, painstaking, expensive task that, when it's finally launched, it's no wonder lawyers have lost interest in it. They quickly move on to other pressing projects that feel more important—and frankly, more fun.

Return on this investment—the sought-after ROI—happens over time with continuity, consistency, and commitment. Post-launch, when certain exasperated lawyers ask, "Why did we spend all this money?!" an acceptable answer for any leader in your firm to give is, "What have you done to invest in it? Have you kept your bio current? Have you provided experience details to the marketing team so they can update the website, pitch, and proposal materials?"

Of course, they haven't. Hold all your lawyers accountable for getting the ROI you deserve. If you believe it *should* be everyone's job to keep it fresh and growing, read on.

What do lawyers care about? Their bios. Once they realize that the majority of your website visitors are viewing lawyer profiles, they quickly get very self-focused. How does *my* bio look and how does it read? If lawyers are confident in the quality of their personal pages—the photos, and the currency and relevance of their experience lists—they seldom give the other 5,000 or more pages of your website much thought. That page count isn't an exaggeration; AmLaw 200 firms have at least that and the largest firms have multiples of that.

But what about the quality of your colleagues' bios? Fine if your bio represents you well, but what about your partners' bios? Do the bios of the partners you bring in on client matters who are critical to the success of a deal or the outcome of a trial represent *you—and them*—well? After all, the reason you should care is that you're asking clients to *trust* these colleagues. You're transferring the trust they have in you to these other lawyers.

This is a critical hand-off that happens every day but it often doesn't go very smoothly.

As unrealistic as what follows sounds, you should care about every bio on your law firm website as though it were your own. You might boast, "My clients hire *me*, not the law firm." But unless you are a solo practitioner and you work entirely alone matter after matter, this is not entirely true. The law-firm collective is significant in generating the most desirable results for your clients, even if you're the lead when it comes to driving the relationship.

If you doubt that, consider the lateral partners who have left your firm to go to another firm and the ones who have joined your partnership from a competitor. Both of those lawyer groups promised that "their" clients would follow them. How did that turn out? Statistically and anecdotally, the number of clients who work with several partners in a firm who then follow a departing partner is considerably smaller than what was promised in the sales pitch to that partner's new firm.

The First Three of Ten Practical Tips for Your Website Content (the Rest to Come in Part Two):

But First, Change your Attitude. If you're thrilled to be a part of the community that your law firm offers, then care about everything in the firm that represents it. There are few tools available that can encompass most of the strengths of your firm, tell your differentiating story, highlight your culture and values, have the flexibility to be updated within seconds, and have the power to reach clients and prospects in every corner of the world that matters to you. But your website is, uniquely, one of these tools. So, stop thinking that your firm's website is someone else's job. It should be everyone's job to care for and feed it.

1. **Your marketing and business development team desperately needs updated experience details from you. Don't make them beg.** Buyers of legal services want to know three things: What have you done? For whom have you done it? How did you do it? The answers to these questions won't necessarily get you hired, but they will guarantee that you'll be on coveted shortlists. And, if you don't provide them, you have little chance of getting hired, because your competitors are providing these details. Once on the shortlist, then it's up to you to persuade the buyers why you/your team are the very best choice.

   Be the "experience advocate" in your firm—walk the halls (virtual or in-person) and cajole your colleagues into regularly updating their bios and service/industry pages, too. Your valuable experience is where the future money lives in your firm.
2. **Be concise. Website visitors scan, they don't read.** Craft action-oriented, compelling content throughout the site that clearly communicates all your talents (not just the nuts and bolts of what you do). You're writing a story—explore ways to capture their attention by showcasing relationship skills, responsiveness, inventive thinking, and the time you pulled a rabbit out of a hat at the eleventh hour. Use relevant quotes, callouts, and highlights in colorful containers or boxes to catch their eyes. Use short, crisp, conversational, and informal phrases and sentences.
3. **Prove you're a trusted authority, but never make any claims you can't prove.** Thought leadership and industry insights can be wildly effective IF they tell interesting stories that are relevant to what's going on in the world. High-quality articles, white papers, case studies, and webinars can generally be improved by humanizing the details. Take a hard look at what you and your team are producing—what story are they telling and what does the quality of this content say about you? [*See* the August issue for tips four through ten.] ■

—Deborah McMurray, CEO and strategy architect, Content Pilot LLC deborah.mcmurray@contentpilot.com and Keith N. Wewe, vice president, strategy and solutions, Content Pilot LLC keith.wewe@contentpilot.com

Use Your Peacetime Wisely:

Fourth in a Series on Reputation Management and Risk Communications

"You must learn from the mistakes of others. You can't possibly live long enough to make all of them yourself."

—Sam Levenson

At 7:02 am on December 7th, 1941, Privates Joseph Lockard and George Elliott, using a new technology known as radar, saw what looked like a formation of 180 Japanese aircraft 132 miles outside of Hawaii. Unable to reach their immediate supervisors, Private Elliot contacted the Intercept Center on the island but received no direction, though the Center did inform Army Air Corp First Lieutenant Kermit Tyler. Inexperienced in the Intercept Center's operations, having received virtually no training and on his second day on the job, Lieutenant Tyler downplayed the report, thinking it was likely a formation of B-17 aircraft coming from the continental United States. Twice he told a protesting Private Lockard, "Don't worry about it."

53 minutes later, "a day that will live in infamy" began.

There are three things in life we are most afraid of—death, change, and public speaking, though not necessarily in that order. Having to digest new information that suggests a paradigm shift, especially one that requires an imminent quantum leap, is onerous for humans.

In the world of crisis prevention and communications, we are often asked to read the tea leaves—the 180 dots on a radar screen—and

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advise what is likely to happen next. It's arduous because you often have to ignore popular opinion and seek out a single data point amongst hundreds or thousands and understand why this time is different. Added to the difficulty in predicting the future is the mockery from peers for seeing things differently.

Unlike meteorologists, political and sports prognosticators, the expectation is that in crisis communications you will always be right or suffer the slings and arrows of being called "Chicken Little."

"Don't Worry About It."

Which brings us to Southwest Airlines, the 15,000 flights they canceled and the approximately one million passengers they stranded and inconvenienced over the 2022 holiday travel period. Why, angry customers and the market asked, were approximately 90% of Southwest flights canceled when only about 2% of all other domestic airline flights were suffering the same plight?

There are a number of reasons for this, originating, of course, by a once-in-a-half-century arctic blast. The thing about unusual events is that, though rare, they still happen.

Although I only occasionally fly Southwest, I have been a fan for more than a quarter century, going all the way back to reading the book Nuts! Southwest Airlines' Crazy Recipe for Business and Personal Success. Just as then, the rules Southwest learned to build an airline that has been profitable for nearly four decades and the ones they learned during the arctic blast apply now, when their fortunes are moving in the opposite direction.

There are a number of reasons cited for Southwest's colossal failure. They fly "point-to-point" with planes flying destination to destination rather than "hub and spoke" that most major American airlines fly. Point-to-point is more efficient and profitable most of the time, but during unusual weather events such as the arctic blast, what starts as a few delays cascades quickly into the maelstrom we have just witnessed—or personally experienced.

There is, also, Southwest's policy of not exchanging tickets with other airlines (though other airlines started to pitch in over the holidays, regardless). This prevented Southwest from exchanging tickets for passengers with other airlines. Thousand of passengers stood in line for hours only to learn what they already knew—"You're stuck."

But most critically, there is an antiquated computer system as the root cause which, other than important but ultimately small fixes (e.g., improved reservations system, maintenance records, and baggage handling), has not been overhauled in many years. Warned by unions, flight attendants, and internal memos that the system could not handle the modern load, the airline chose to ignore the warnings and luxuriate in their profits—nearly $6 billion in the fiscal year 2022—pay dividends and use their $7 billion pandemic bailout funds for other purposes.

The system is so antiquated, pilots and flight attendants are forced to call in when they arrive at their destinations (rather than use an app), calls that can last for hours and are counted by the Federal Aviation Administration as part of crews' work-hour limits. Stay on hold long enough and Southwest loses valuable crew members… during the best of times. The hold times over the holidays were glacial.

Passengers trying to rebook flights found the website, airport kiosks, and overwhelmed airport desk agents unable to help them. When delayed passengers called the airline they too were often put on hold for hours.

As Zeynep Tufekci, a professor at Columbia University and guest columnist for the *New York Times* wrote,

"It's been an open secret within Southwest for some time, and a shameful one, that the

company desperately needed to modernize its scheduling systems. Software shortcomings had contributed to previous, smaller-scale meltdowns, and Southwest unions had repeatedly warned about it. Without more government regulation and oversight, and greater accountability, we may see more fiascos like this one, which most likely stranded hundreds of thousands of Southwest passengers — perhaps more than a million — over Christmas week. And not just for a single company, as the problem is widespread across many industries."

Lessons from the Arctic Blast

Southwest will ultimately recover from this brand-damaging moment, but not without a heavy cost far in excess of doing the right thing with their computer system when the need became obvious. For companies still in the "before" moment rather than Southwest's "after" debacle, here are a few helpful lessons:

Denial

In October of 2021, after another computer glitch caused some delays, then-Southwest CEO, Gary Kelly, after admitting to some challenges, said Southwest had "wonderful technology." Denial may work for a while but reality will return with a wicked bite. In most companies, one of the hardest things for employees to do is tell the truth to power. Welcome constructive criticism, not with a one-time pronouncement but with an open-door policy which is cultural in nature. Many ideas will not be helpful, but the ones that wisely point out significant future problems need to be embraced, not denied or punted down the road.

Your Trust Bank Account Is Never Big Enough for the Worst Moments

Southwest deservedly has a great brand, is known for its customer loyalty and, despite some periodic challenges, has strong employee relationships. If the pain they are going through now—negatively impacting all three—can happen at Southwest, it can happen anywhere. You can never build strong enough bonds or an impervious enough brand, so keep building your trust bank. The stronger these relationships are, the faster your company will recover and the sooner the event will fade into memory. Like exercise, this is a daily habit.

Fix It Before the Federal Government Steps In

If you needed an incentive to fix a likely future problem, remember that when a crisis is big enough and public enough the federal government will step in and control the narrative. Before the inquiries and investigations begin—in this case, the Department of Transportation and the Senate Commerce Committee for starters—President Biden made it clear who was responsible, just as President Obama did with the BP Gulf Deepwater Horizon spill in 2010 and the United States Senate did with Wells Fargo over the years-long credit card scam in 2016.

This means three more likely extended negative news cycles—the White House, regulatory agencies, and Congress, each of which can last days or weeks. There is an old saying in Washington—"Never kick a man while he is up. It's too much work." You don't want to put your company in a position to be subject to Washington's favorite sport, "the pile-on."

If You Break It, You Own It

It is not just courts of law that look at companies and ask not only what they knew but what they "should have known." The public follows this rule as well. "We didn't know" is an unimpressive defense and only emphasizes incompetence, not innocence. Colin Powell and Richard Armitage used to call this the Pottery Barn rule. "If you break it, you own it."

You Can't Talk Your Way Out of Something You Acted Your Way Into

"What is the worst that can happen?" While the short-term costs to fix a significant problem almost always look higher than the long-term ones, that math is seldom accurate. A stock price drop, regulatory fines, class action lawsuits and, most expensively, a significant decline in brand loyalty often take significant time to overcome. Like a losing baseball team, it's always easier to fire the manager than the team. When foreseeable things go badly, you won't be able to talk your way out of it.

People Do What They Are Rewarded For

Companies—like Southwest—that tie their corporate executives' compensation to stock prices and quarterly earnings provide a strong incentive for current executives to kick problems down the road, rather than make an investment that negatively impacts short-term profits. It is obvious why this is an attractive form of incentive, but it comes with a potential unfortunate downside. If your company uses this approach, it may be time for a review before the next CEO is hired.

Two more things to add to your mantra: It can happen here and brand loyalty is earned daily. Not believing in the first is the triumph of hope over experience and forgetting the second is negligence. After all, as the inexperienced Lieutenant Tyler said over 80 years ago, "Don't worry about it." There is always someone else willing to take your customer.

As Harvey Mackay has put it, "Time is free, but it's priceless. You can't own it, but you can use it. You can't keep it, but you can spend it. Once you've lost it you can never get it back."

The Art of Not Listening

These are the times that try men's souls; the summer soldier and the sunshine patriot will, in this crisis, shrink from the service of his country; but he that stands it now, deserves the love and thanks of man and woman."—Thomas Paine, December 19, 1776.

According to Sir Thomas Malory's masterful work, *Le Morte d'Arthur*—the mainspring tales of the legendary Camelot and the Knights of the Round Table—a young King Arthur romanticized Merlin's soothsaying abilities. Since the mighty magician lived backward—his past was our future—he was wise and always accurate in his predictions (at least until Mark Twain's 1889 novel, A Connecticut Yankee in King Arthur's Court, turned Merlin into a jealous and small-minded competitor to protagonist Hank Morgan). As Merlin instructed the boy king, 'It is a curse to know the future.'

It is indeed no blessing to know the future, but it is a gift, particularly in times of crisis, to have a pretty good idea of what is coming next.

A little more than a year after 9/11, when Americans were understandably incensed and inconsolable by the horrific tragedies on American soil, many Arabs in the Gulf region were caught in a dragnet and taken to Guantanamo Bay, Cuba, a U.S. prison not fully subject to Constitutional protections. While hundreds of detainees would be found guilty, hundreds more languished in the prison for years without charges or trial. In a post-9/11 America, heartbreak, fear, and anger meant there was little interest in separating the guilty from the innocent. Even the George W. Bush administration, fully sensitive to the politics of the moment, was unmoved by three U.S. Supreme Court rulings which required due process.

Leaders in Kuwait—one of America's closest allies in the region—invited us to meet with them to develop a communications approach to support their legal strategy and ensure due process for their sons, brothers, and fathers. All but one would turn out to be innocent, but they were also politically convenient collateral damage.

On departure from Washington, D.C., we had been told by our perspective client that we should rest upon arrival and then meet with them the following morning. And rest we did until moments after closing our eyes the hotel room phone rang and we were invited to a diwan—a large meeting room in a private home.

As is custom, it was two dozen Arab men in thawbs and kaffiyeh, only two of whom spoke English fluently, all sitting on couches in a large rectangle, with us in the middle. How, they asked, were we going to proceed to ensure justice?

It must have gone well enough, for the next day we were invited to a private home and granted entrance before the man of the house—a retired Kuwaiti military officer—returned. We were invited in by his wife and daughter who had made tea and cakes for our wait. While this may seem an old custom to many Americans, it is highly unusual in the Arab culture for unknown men to be alone with the women of the house. Being welcomed into a home under such circumstances indicated a high degree of trust. We knew at that moment we had won the business.

Over the coming years, we would work closely with these families and, in concert with legal counsel, succeed in release, trial, and rendition for all but one of the detainees. Due process and justice prevailed even at a time of the highest tensions.

What always impressed me was despite the cultural differences, legal challenges, and issues of life and liberty that were at stake, the clients listened to us every step of the way, from a protest march at Old Bailey in London to media interviews and editorial meetings. It was a long process and terrifically unpopular in the United States at the time, but due process and justice prevailed.

What Do I Do When The Cameras Are on Me?

"All the world's a stage and most of us are desperately unrehearsed." —Sean O'Casey

Speaking with journalists, shareholders, customers, and stakeholders is easy when the going is good. As the old saying goes, "We are all capitalists on the way up but socialists on the way down." But when things turn bad? Communications suddenly becomes much more challenging. As another old saying goes, "The gods of crisis demand a sacrifice."

I'm no Merlin but years of experience in the trenches of the most challenging matters globally provide the experienced crisis communications professional a sixth sense about what's next. Here's a cheat sheet for CEOs and other decision-makers responding publicly when things are moving in the wrong direction:

Who is driving the bus? Legal counsel in a crisis is essential and needs to be on the bus, but unless legal exposure is the single greatest market cost, it shouldn't be driving the bus. First, determine the greatest exposure and the likely sacrifice and then let that department or counsel drive the decision making.

What are the interests of the people giving you information? As a leader in a crisis, you need information quickly and accurately, but it is often the thing in the shortest supply.

In a crisis, everyone should bleed the company colors. Unfortunately, personal interests often get in the way. Frequently, direct reports

provide select information to avoid highlighting any of their potential culpability. It is always easier to point fingers after something has gone wrong, so this instinct is understandable. Consume as much information as you can but be sure to question the personal interest of the messenger.

Encourage robust debate amongst different experts: You cannot get to the best decision without a healthy debate amongst disciplines. Have legal, IR, brand, C-Suite, HR, crisis communications, and others calmly debate it and determine what the risks and benefits of each path are. The goal isn't perfection but the lowest market cost.

Embrace sacrifice: A true crisis is defined by the fact that there is no perfect path. There will be a price to pay no matter which road you choose. Identify the least costly and simultaneously most beneficial sacrifice and make it early. Pulling a product, firing a team, selling a brand, making an apology, or whatever the situation demands can be the most effective tool for deflating a calamity. You cannot make that determination without having the trusted counsel mentioned above do the math and determine the sacrifice.

Never lead with the Ego: Too often, when a crisis involves a CEO, founder, or other high-profile executives, we hear concerns about their "reputation." Reputation management is, of course, critical, but the business issues come first. In time—and less time with effective communications efforts—bad news on the internet can be replaced by good news in a post-crisis environment. As we say, 'If you want to keep a secret, put it on the second page of Google.'

We often see executives worried about their reputation and desire to set the record straight. This can be an important strategy for the right moment, but if the narrative is already written, it is often wise to keep your head down and set the record straight later, when you control the communications, not the critics.

In a crisis, everything is upside down: All the rules that got you here won't necessarily get you out of the crisis. Start with a tabula rasa and reconsider all of your options. Don't pay the bonuses. Consider a deal with the prosecutors. Recall the product voluntarily. Keep quiet or run to the light, depending on what will make the story go away. Rather than look backward at what you have always done, understand that in a crisis, all the rules have changed. You cannot get to rebuilding reputations and brands if you have not gone through the crisis first.

What will your adversaries do next? Many business crises have adversaries—regulators, the plaintiffs' bar, politicians, activist shareholders, unions, NGOs, and others. What are their interests and what will they do next? How will they zig if we zag? Never make decisions in a vacuum. Instead, ask, "If I were counseling them, what would I do next?" Then, plan accordingly.

Silence can be golden: Fighting back is a natural instinct and, under the right circumstances and timing, is precisely the right strategy. 1988 presidential candidate Michael Dukakis famously learned the cost of not fighting back against the Vice President and presidential candidate George H.W. Bush, watching his double-digit lead disappear before it occurred to him to throw a punch. But sometimes silence is golden. Before you raise your head above the parapet, balance the costs between fighting back and remaining silent. In today's exceptionally fast-moving news cycles, some crises will either be over in a day or two or be elongated if you fight back. Make sure you make the proper determination, lest you break into jail. ■

—Richard S. Levick

Richard Levick, who passed away in April, was chairman and CEO of LEVICK, a global advisory firm providing a full range of strategic communications consulting services to companies and nations involved in critical high-stakes issues. He was an unexampled pioneer.

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Law Firm Leadership Reflections (Part 1):

Practical Advice For Those Who Have The Responsibility

• There is No Antidote for a Lack of Leadership

There are very few people out there with bad intentions, but there are firm leaders with bad habits. Last week I spent an hour on a call with the Managing Partner from a 200+ lawyer firm who was seeking my advice on succession planning and specifically with their practice and industry group leaders, many of whom were very senior and had been in the role for well over a decade. I began our discussion by asking five very basic questions:

First; do these group leaders have a formal, written job description? Answer: "No."

Second; do these leaders have a clear understanding of precisely how many non-billable hours they are expected to spend leading and managing the people on their teams? Answer: "No."

Third; have you provided these team leaders with any organized leadership training within the past three years, to help them enhance their individual performance? Answer: "No."

Fourth question; have these leaders be given any written expectations, (such as you must, as a group, meet at least once per month) of what your firm's leadership is expecting them to do with their teams? Answer: "No."

Fifth question; do you, as the firm leader, meet with all of your team leaders to have them share and discuss their particular problems and successes with each other, at least once quarterly? Answer: "No."

Final and very serious question, why are you bothering to even have practice or industry teams? Are these simply TINOs (teams in name only)?

Now, let me not leave anyone with the impression that this was, in any way, an isolated incident, or that the answers that I most often elicit from firm leaders, to these five questions, is wildly different in most other discussions that I've had.

It is still the case in too many law firms that we form these teams and then we say to the team leader, we want you to manage this group, but by the way, you will still be assessed largely by your personal numbers. This is completely nonsensical. It is guaranteed to have no leadership or management in the system. Another way of looking at this is to conclude that law firms are very good at demanding that their people succeed but are pathetically useless in helping their people succeed. This is not a system designed to obtain maximum performance.

So I guess the GOOD NEWS for those of you reading this is that your firm may continue to succeed in spite of itself, as most of your competitors perform just as pathetically. Or as my good friend, David Maister used to say, "the savings grace for the typical law firm is that they only have to compete against . . . other law firms." But sadly, that is rapidly changing!

• Why Did Lawyers Ever Adopt the "Transactional" Label?

I'd heard this a number of times over the years from clients but was struck by an article authored by the editor of strategy+ business (PwC) wherein he states that "*Transactional* has become something of a **dirty word in the business world**. It suggests a short-term,

one-off mindset and a commoditized approach to value. Nobody wants transactional relationships."

Meanwhile, if we search "transactional lawyer" we get over 200,000 Google results and are informed that "A transactional lawyer is also known as a business lawyer, and transactional lawyers counsel individuals and organizations on the legal issues generated by their business dealings." We are even informed that as a young lawyer "if you are not sure you want the life or work style of a litigator, then maybe you should consider the practice area of transitional law." So I guess it is a **practice area**, the one that in the old days, used to be called Corporate or Business.

What Does the Word "Transactional" Really Mean?

A true transactional undertaking is built upon an expectation for reciprocation—and by its definition, it suggests strongly that there is absolutely NO interest in building a relationship or seeking to collaborate on any long-term basis. Both individuals are concerned only with how they will each benefit. Individuals are self-serving, such that the lawyer wants to ensure that they can get as much money as possible for a set amount of work in return. Within any transactional undertaking, bonds are broken the moment one party does not hold up their end. Therefore, these undertakings tend to be highly fragile.

Now is that really the impression your firm wants to project? And how do you label yourselves Transactional Attorneys while also claiming to be obsessed with delivering value and client service which tends to be relationship driven.

A true collaborative relationship is meant to be long term where both parties are willing to make sacrifices for the sake of their bond. They are both concerned with the perspective, interests, and needs of the other party and have a commitment to each other's success. To a certain extent, individuals are willing to give without expecting anything in return. This helps to build a strong longer-lasting attachment that is difficult to break.

If we really care what clients think, and accept that the term "transactional" may be undignified, maybe we need to **expunge** this term from our collective vocabulary!

• Leadership Horse Races Rarely End Well!

We've all been reading about talent wars, unprecedented levels of turnover, and how various firms have reacted. Meanwhile, I'm intrigued to read in this week's legal media that a particular law firm's "*Managing Partner RACE is Down to Three*."

From having worked with numerous large firms on their leadership succession issues, I know first-hand that having a contested election isn't necessarily a negative, it only becomes highly problematic when it becomes public and political. In this case, partners are set to go head-to-head to succeed the firm's current firm leader. The media are loving it and this is when it all begins to go off the rails!

First, it can become quite distracting to everyone in the firm as it is politicized through continuous speculative discussions amongst partners. This is when things begin to heat up as our various candidates move from subtle campaigning to having their friends become more overt in canvassing for their support. Factions develop, emotional discord creeps in and rivalries become intense. It is not uncommon for partners to take sides for or against particular candidates which can result in overt behavior that deters teamwork and knowledge sharing.

And what do the clients think . . . or does anybody care?

In one instance because I was involved in overseeing the process, I had all of the candidates quietly confer with their largest clients. One partner upon asking his important GC client "What would you think if I were to let my name stand as a candidate to become the firm's next Chair?" came back to the nominating committee to report that his client's response was "Think again!" This GC was

making it very clear that if this partner were to proceed, the legal work would be moving to some other firm.

Finally, in looking at who might best assume the leadership mantle, firms will tend to gravitate to those who are legally talented and gifted rainmakers. In these kinds of contested situations, a highly valued partner who loses may ultimately take it very personally (who likes to be publicly humiliated?) and decide to leave your firm. It should be no secret that headhunters usually swarm whenever firms go through highly contested elections because they know that there will inevitably be fallout.

So, any publicly contested horse race may just serve to paint a bulls-eye on some of its Star Partners!

• Would You Rather Be A Leader or Manager?

In a recent discussion I had with the management group within a particular law firm, I began to say, "as group managers . . ." when I was interrupted mid-sentence and told that the proper title was "group *leader*." I've noticed this same behavior on a number of occasions as if to suggest that there is some contempt attached to the word "management" and a sense of esteem attached to the term "leadership."

I was ruminating about this issue when I came across commentary offered by Jim Collins, best-selling author of *Built to Last*, *Good to Great,* and *Great by Choice*. Jim was commenting on the contributions of Peter Drucker, the late father of modern management . . . *As Peter Drucker shows, the very* ***best leaders are first and foremost effective managers****. Those who seek to lead but fail to manage will become either irrelevant or dangerous, not only to their organizations, but to society.*

Drucker belonged to the church of results. Instead of starting with an almost religious belief in a particular category of answers—Drucker began first with the question "what accounts for superior results?" and then derived answers. He started with outputs—the definitions and markers of success—and worked to discover the inputs, not the other way around. The more noble your mission, the more he demanded: what will define superior performance? "Good intentions," he would seemingly yell without ever raising his voice, "are no excuse for incompetence."

For my part, I really don't care which label we use as long as the lawyer given the title is prepared to do the job that goes along with the title. Perhaps we should have more firms adopting the title of group *coordinator* or *group coach*. I've said to many firm leaders, I think we made a huge mistake in calling our people practice or industry group 'leaders." For one thing, everyone wants to be known as a leader, but too few of them want to really work at doing the job required.

And all too often the concept of leadership is taken to mean being a "role model." Or put slightly differently, "I was clearly promoted to this role of leadership because I am such as successful practitioner. So, just do what it is you see me do and you too will be successful."

Don't we all wish it was only that easy? ■

—Patrick J. McKenna

Patrick J. McKenna is an internationally recognized author, lecturer, strategist, and seasoned advisor to the leaders of premier law firms; having had the honor of working with at least one of the largest firms in over a dozen different countries. He is the author/ co-author of twelve books most notably his international business best seller, First Among Equals, currently in its seventh printing and translated into nine languages. His most recent work, Industry Specialization: Making Competitors Irrelevant (Legal Business World Publishing, 2022) provides in-depth guidance on organizing your firm with an industry focus. Patrick is the recipient of an "Honorary Fellowship" from Leaders Excellence of Harvard Square. Reach him at: patrick@patrickmckenna.com

Responding to Growth Pressures:

Best Practices for Evaluating Merger

Law firms are facing intensifying growth pressure. Competitive and client forces have pushed law firms to not only focus on increasing revenue and profitability, but perhaps more importantly, to add practice depth, practice breadth, overall scale, and geographic reach. Significant investments in lateral hiring and law firm combinations have changed the competitive landscape by forming new, dominant firms in particular practice areas, industries, and geographic regions. This has reshaped the AmLaw 200, with an increasing number of firms now offering considerable scale and reach compared to existing competitors, regionally, nationally, and internationally. This evolution has created new choices for clients seeking advisors who can provide services across multiple jurisdictions or offer superior depth in particular practices and industries, further fueling the race for market share and the pressure on law firms to grow.

In light of these growth pressures, an increasing number of law firms recognize that achieving their strategic goals and remaining competitive will require greater scale and reach than they can realistically build organically. Unfortunately, too many firms invest substantial time and resources pursuing merger opportunities which never come to fruition. A material number of potentially strategic mergers are not completed due to inadequate management of the merger process—failing to sufficiently test key aspects of strategic, financial, and cultural fit early on in the process or failing to bring their partners along in the process. Taking the right actions early on can help firms avoid over-investing in merger opportunities that cannot or should not materialize, and to focus on those opportunities that offer the greatest benefit to their clients and their people.

So, what are the most critical areas firms should focus on in managing the merger process? And what is the general staging for addressing each of these elements of the process?

- ***Define the Business Case:*** First and foremost, firms must invest in defining and articulating the strategic rationale for a combination early in the process. The most successful merger processes typically involve leadership discussion of the business case at the initial meetings, and then continuing to cultivate business case discussions throughout the remainder of the merger process. The business case must be explored and documented, starting at a 30,000-foot level and then progressing to a greater and greater level of practice, industry team, client, and operational level of granularity as the merger discussions advance over time. Too often, firms fail to adequately articulate the strategic rationale for the merger. In these cases, merger discussions are much more likely to break down when difficult issues arise. Without a strong business case, firms and their partners tend to lose sight of the upside of the combination. And without a well-defined and communicated business case, firms lack the ability to defend the merger against the inevitable opposition from skeptical partners.
- ***Plan the Process:*** Once the two firms have developed initial thoughts on the business case, a key next step is to agree upon a process and general timetable for future discussions. Merger processes often consume an inordinate amount of resources—from conflict checking, to due diligence, to defining the business case, to exploring deal terms, and so on. The goal of process planning is to ensure that both firms understand and are committed

to the magnitude of time and resources needed to explore the opportunity and are realistic about their ability to move the opportunity forward within their respective partnerships. While merger discussions rarely proceed according to plan, seeking to align on a process and timeframe enables firms to test their merger partner's appetite and ability to pursue the merger in a serious and focused way. And of course, a general timetable and plan results in a better-managed process and helps avoid situations where one firm is operating with a far greater sense of urgency, while the other is working at a much more gradual pace.

- ***Identify Deal Breakers:*** Successfully moving a law firm merger forward requires tackling a short list of critical, 'deal breaker' topics. These topics include firm governance, partner compensation, partnership structure, capital, voting rights, and firm name. Too often, firms dance around these topics for many months of merger discussions—describing their current processes to one another and avoiding hard conversations about how the combined firm would handle each issue. In some cases, firms even believe that their discussions are resulting in alignment on these topics, but in fact, they are not really on the same page. While merger processes that drill down too quickly on too many of these critical deal breakers at once can alienate participants, merger discussions that avoid tackling these topics result in failed combinations. Firms must seek to strike the right balance of a methodical and staged process to address each firm's respective deal breakers early on in discussions, while concurrently exploring the business case to ensure that both sides remain motivated to work through the hard conversations. The stronger the business case, the more likely it is that solutions to deal breakers will be found. That said, even a stellar business case simply cannot overcome true misalignment and disagreement on critical deal-breaker topics.
- ***Conduct Due Diligence:*** Law firms are often keen to kick the tires of their prospective merger partner—sometimes to a point where the firm becomes so overly focused on finding the skeletons in the other firm's closet that they lose sight of the strategic advantages of the combination. However, we also observe merger discussions where firms fail to identify financial fit problems or material conflicts early in the process. Or in other cases, firms identify the potential issues, but do not dedicate sufficient time to understanding and testing the severity of the challenge early enough in the process. Naturally, discovering a 'skeleton' late in the process is never a good thing, so the need for careful due diligence and conflicts review simply cannot be underestimated.
- ***Cultivate Partnership Support:*** Perhaps one of the greatest challenges in the merger process is bringing the partnership along in merger discussions and evaluation of an opportunity at the right time and in the right way. The larger the combination, the more challenging broader partnership communications about a merger become due to confidentiality concerns, risk of premature media coverage, and the likelihood that a portion of the partnership will begin to mount a resistance campaign. Our experience indicates that in most circumstances it is more effective to keep a partnership informed of progress as discussions proceed and seek partners' input, endorsements, and commitment on a step-by-step basis rather than attempting to 'sell' what may be regarded by partners as a done deal. Keeping partners informed involves more than simply communicating status updates and sharing information, but also requires that firm leaders truly engage their partners in exploring the merger opportunity in order to garner their support and buy-in. Cultivating partnership support for a merger requires time and energy from a broad group of leaders, but it results in the case for merger being tested throughout the process, allows leadership to maintain a close sense of the mood of

the partnership and, most significantly, builds commitment and reduces the risk of failure at the final stage.

In our experience, successful merger processes approach these five critical aspects of merger as concurrent work streams, by simultaneously exploring the business case, tackling deal-breaker topics, conducting due diligence, reviewing conflicts, and gradually involving an expanding group of partners in the consideration process.

A poorly managed merger process carries a high opportunity cost—it risks failing to execute on a strategic opportunity, wastes valuable leadership time, hinders the firm's ability to pursue other firm strategic priorities, frustrates partners (and even risks partner losses), compromises the chances of a future merger, and is a dangerous distraction from serving clients. Effectively planning and managing merger discussions is a tremendous lift of management time, resources, and energy, but it is a necessary investment. A well-executed merger process enables firms to focus on opportunities that will contribute to successfully advancing the firm's growth strategy and provide the greatest benefit to the firm's clients and people. ■

—Lisa Smith and Kristin Stark

This Insight was written by Lisa Smith and Kristin Stark, Principals at Fairfax Associates. Fairfax is a specialist firm of highly experienced consultants focused on serving law firms. Our focus is built on a deep understanding of the strategy, organization, and motivation of professionals. Fairfax assists law firms in defining and executing strategy, pursuing strategic growth and merger, and addressing partnership issues including partner compensation, governance, and firm performance. The Insights series draws upon our collective consulting experience to address topics that we consider of current interest to the senior leaders of law firms.

L&E Update

Continued from page 2

L&E attorneys to work long hours to meet client demands. They still get clients reaching out constantly for legal guidance on a range of pandemic-triggered issues, which include remote work, leave accommodations, workplace safety, among others.

"These concerns have forced our clients to navigate a rapidly evolving legal landscape, and to also focus on the smaller pieces, such as employee health screenings and PPE requirements, as these have now become the focus of potential legal liability," Knight says. "Our role is to help our clients stay on top of these changes and ensure they are fully compliant with all legal requirements."

Many employers across the economic spectrum seem to have learned a lot from the changes COVID forced on them and are taking precautions and planning for other major disruptions that may strike by preemptively talking with their attorneys.

"While industries have weathered COVID's most severe impact due to shutdowns, employers are recognizing the need to maintain safety in the workplace, and ensure they are prepared for the future," says Daniel Aquino co-chair of the employment and labor law practice at Nevada's McDonald Carano. "Employers are still requesting our assistance to look forward by helping them review and revise a comprehensive suite of human resources policies and procedures that need to be tailored to address what could be considered 'lessons learned' from the special considerations of the COVID pandemic."

Aquino says these requests for help encompass many workplace concerns. They include counsel on ADA reasonable accommodation analysis, employee privacy, HIPAA compliance, on-site employee health and safety issues, hybrid work arrangements, and crisis communications.

Nevada's been experiencing significant growth in recent years and, as *Of Counsel* as reported, McDonald Carano seems to be right in the thick of it, which is fueling activity in this area. "[The state's] economy is growing, and businesses are expanding throughout Nevada," Aquino says when asked what's driving the firm's L&E practice. "There's a significant number of businesses relocating corporate headquarters to Nevada from other states, or otherwise expanding their regional operations … into Nevada. Our practice is busy serving the employment and labor law needs of these businesses."

Tough to Find Talent

Like in most busy legal practice areas, the L&E field still finds itself in a heated contest to attract talented attorneys. It's simply not easy to hire good lawyers to meet the increased demand created by the many drivers of workplace-related law.

While hiring partners look for candidates with many skills, one trait stands out among their multi-faceted criteria, particularly when it comes to handling disputes. They believe that L&E litigation is frequently caused by business decisions. Consequently, they look for lawyers who can fully recognize clients' business needs and the ways in which the litigation or strategy crafted and implemented in a case helps them attain their goals.

"The hiring landscape for talented labor and employment attorneys is highly competitive," Knight says, adding that she and her team look for certain attributes in the candidates they interview, "We believe that the most successful attorneys in this area are those who possess strong communication skills, unparalleled attention to detail, and a deep understanding of the ever-changing legal [environment]. Additionally, it's important

for lawyers to [provide] practical and strategic guidance that helps them achieve their business objectives."

Legal recruiters say the need for both young and lateral attorneys in this field may have hit its peak a year or two ago but that the competition remains fierce. "At our agency, we've talked to many labor and employment practice group leaders who are just plain desperate to fill their ranks," says one partner at a major national recruitment firm who asked for anonymity. "And we've seen evidence that law firms of all sizes are pulling out all the hiring stops in what seems like all-out warfare to beat their competitors on the hiring battleground."

This source also says some firms have lowered their hiring standards: "I've talked to more than a few law firm hiring partners who essentially tell me, 'At this point, we just need warm bodies who've passed the bar to handle our lower-level work.'"

The Shape of Things to Come

So what does the future look like for labor and employment law? The three lawyers interviewed for this article look out toward the horizon and offer these assessments—in their own words.

From Glazer Weil attorney Garvis Wright:

"The employment law landscape in California is always evolving and often is on the leading edge of labor and employment law. For example, California recently updated its pay equity law as it relates to pay transparency. This amendment undoubtedly will significantly impact the power balance between employers and employees in terms of recruitment and hiring.

In the near term, we can expect more decisions surrounding confidentiality and non-disparagement provisions in settlement agreements and non-compete provisions…. In the long term, we will continue to see impacts of the pandemic on the dispersion of the American workforce, which is creating ripple effects throughout the economy. Employment law is often used as a tool to address cultural shifts, so this trend is something to watch."

From Constangy's Knight:

"The future of labor and employment law will undoubtedly be shaped by continued advancements in technology, new legislation, and a complex global economy. As a result, it will be important for firms to adapt and evolve their practice areas to keep up with these changing dynamics. We believe that the demand for knowledgeable employment lawyers will only increase, as companies continue to grapple with challenges such as compliance, workplace harassment, and employee retention."

From McDonald Carano's Aquino:

"The future of employment and labor law will continue to be driven by an ever-changing patchwork of laws and regulations on the local, state, and federal levels. These laws are particularly susceptible to administration changes transforming policy, which filter down to federal and local agencies enforcing employment and labor laws. (One example is the NLRB's recent sharp disapproval of non-compete agreements.) Further, as history confirms, new employment laws and labor regulations are often driven by the interrelated social, cultural, and political changes and movements that make their way into the workplace." ■

—Steven T. Taylor

Of Counsel Interview

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An Agent for Change

Of Counsel: Why did you decide to become a lawyer?

Dana Walsh Sivak: Since I was younger my whole thought about my future was that I would help people. I didn't really know what that was going to look like and a lot of people told me that I have a natural ability to argue. [*laughs*] People love to hear that, that you're a good arguer. I considered careers in occupations like social work and psychology—but I really liked the idea of being part of a system that was going to maybe effect positive change on the world and that I would be able to stick up for people and defend people and advocate for people who aren't able to do that for themselves. That was why I ultimately decided to become a lawyer.

OC: Where did you go once you graduated and passed the bar? And then why did you go into elder law?

DWS: The answer to your second question is: Elder law found me. I didn't think I was going to be working in this area. I thought I'd be working in public interest law. I went back and forth with the type of work I wanted to do when I graduated. In my last semester in law school, I participated in the Child Advocacy Clinic. I was able to go into court and represent children in foster care. I thought that was what I was going to do for my career, and then due to the economy being what it was, there were hiring freezes and limits. It was very difficult to get a job in those types of government agencies or public interest organizations.

So I took whatever jobs were available. I got a temp position at a healthcare organization called Catholic Health, and I used that to learn about healthcare law—I didn't even take a class in that in law school—but I did find it interesting. And then I came upon a job vacancy and it just seemed like the kind of place where I would be able to learn in a supportive environment. I wanted to take a chance on something and keep an open mind. And that's how I found my first position in elder law, Cona Elder Law, which was then called Genser Cona Elder Law. And, I stayed there for about 10 years.

Protecting Those in Need

OC: While you perform a range of elder law services, what work is the most compelling or rewarding for you?

DWS: Guardianship work is really where my heart is the most. The thing that really keeps me going in law is the passion, and because every single case I get is different. Guardianship in its truest form exists to allow the court to step in and help protect the person who will suffer harm if [the judges and other decision makers] don't appoint a guardian for them. It then requires other people to step up and take on that responsibility, whether it's an agency or whether it's a person. Somebody has to make sure that that person is safe.

And it's very emotional and there are very high stakes. If I think back on my career and the kinds of cases that kept me up at night, it is those kinds of cases, where I'm really worrying about what happens during a person's day-to-day life. I worry about doing something wrong or not fighting as hard as I could have. I worry that something bad could happen. My heart goes out to the clients that I have, especially when I have to give them a bit of a reality check and explain that maybe, even though we have a strong case, the odds are stacked against them. And, they may decide that fighting isn't the best way. I'm a big advocate of trying to resolve things collaboratively, and if

there is ever a way to do that I try to support my clients in going there, but it doesn't always work.

It's unfortunate that sometimes you're dealing with families in crisis, and it can be hard even for the practitioner to know if we're on the right side or not. I've had cases where I go with guns blazing into a court appearance and I find out halfway through that I'm not representing the person who necessarily has the elderly person's best interests at heart. Or I learn it's more complicated and there are numerous people who care and have the person's best interests at heart. There might have been pain in that family, abuse, a history that I know nothing about that really clouds the subject matter and makes it difficult to see what the appropriate outcome would be.

I've seen a lot of situations where the power dynamic in the family shifts when the patriarch or matriarch passes away, and now you have children trying to position for the control that that person had in the family. It often leads to a lot of hurt feelings and it's very hard for an attorney to come in years down the line and try to navigate that and perhaps help them see what complicating factors exist from their existing family trauma.

I almost try to practice "trauma-informed" lawyering. I hear that a lot in the nursing home industry when I go to these conferences about nursing. When we're talking to our clients in a situation like guardianship, they're coming from a place of such hurt. It can be hard for them to see through all of that to be objective and to hear what I'm trying to counsel them through.

Going the Extra Mile

OC: I'm sure this work keeps you going, and as you say, keeps you up at night. Is there a case that stands out as particularly complex but, in the end, gave you a sense of satisfaction?

DWS: Yes, in one case the issue was that we were told that the person didn't have a documented immigration status and he needed it to get Medicaid, and he potentially wasn't eligible for benefits. The nursing home was aware that there was one person who was a former case manager for this person who, by the way, was developmentally disabled and now was an adult in a nursing home. The case manager was listed as his power of attorney.

Immediately when you see something like that you start to question, why does this caregiver all of a sudden gain control of all of this person's money? Are they doing that in a predatory way? And that's often the court's knee-jerk reaction. So I got involved and I tried to investigate the person's background. And it turned out that I uncovered this whole history that this person had gone through. I connected with a think tank in New York City because I couldn't otherwise find out what had happened.

They were able to go back through the immigration records and find that this man, when he was a child, was brought over here from Germany as an orphan at around the time that the Nazis were defeated. There were all of these children in need of homes. He was biracial, and they felt that maybe he would have a better chance of getting a home if he were brought to the United States.

OC: And you were able to piece together his life story?

DWS: Yes, we literally found the manifest of the airplane, because we had to go back and show the county where he had lived, for Medicaid, what happened, when did he come here, is the government aware of his presence and are they allowing him to be here because that would qualify him for benefits. I was able to get so much information. Catholic Charities had taken him on as a child, and I saw notes about his development and stories about him hugging the nuns and not developing well because he didn't get along with the other children. I could kind of read between

the lines, but at some point they labeled him as having a mental disability, but for all we know he also had a hearing impairment. Maybe he couldn't understand them or he couldn't speak the language.

Over time I just sat there and pored over these records and saw this man's case unfolding, of this child who never really had a chance and ultimately never was adopted. But he did in fact connect with this case manager, who became basically his only friend in the world for much of his life. She loved him, and he didn't have a family. He didn't have anyone else, so it was the case manager who I had formed all these negative thoughts about from the outset, and she really did take care of him. The facility was at fault for not really communicating with her about her efforts. So I was able to work with her.

In getting to know her I learned even more about him, and it did turn out that he had had a beautiful life as best he could. He had a job. And when he went to the nursing home, friends [he made at his former workplace] came to see him and threw him a birthday party. So he did have people who cared for him and that was nice to see. But the case really took a big emotional toll on me. When we're dealing with people who are elderly and we're going through their lives, we learn so many things about them. Often we discover that, although they are now living in a nursing home, they had this rich life before that.

OC: I can understand why you chose that story. You did all that research. It proves what all that digging and reading and poring over and thinking about can do. And, it really changed the whole dynamics when you found out there was goodness in this guardian's heart.

DWS: Yes, and thankfully once we resolved things with her and got him the clarification of his status by submitting all of those records that we obtained from the think tank, they were able to approve his Medicaid.

The Elderly and Marijuana

OC: Let's shift gears, would you summarize the importance of cannabis in what you do? You've done a lot of writing and speaking about this and you really have been one of the pioneers in the legal profession in combining cannabis and the benefits it can have on seniors.

DWS: Several years ago, I was tasked with researching this area and seeing if it fit into elder law. In looking into it I started to hear these anecdotal stories about the positive impact medical cannabis was having on the elderly. It wasn't something that was studied very much in the United States because cannabis is federally illegal. But in other countries, such as Israel, they were having these amazing results in studies they were doing. Cannabis treatment was having such a positive effect on the conditions that the elderly suffer from. And I started to see over the past few years, as more facilities and more doctors are becoming supportive of cannabis and allowing people to use it, how helpful it is to elderly people in particular.

As people age their bodies can't tolerate certain medications, or things become toxic to their bodies that wouldn't have been when they were younger. And, if you could substitute medical cannabis for something like a harsh opioid on a 90-year-old person's body, why would we not want to do that?

I started to think about why we don't do that, and it's really societal bias and stigma. It's people deciding what they think, rather than what might be best and what people should be able to explore as an option. I'm not looking to force anybody to use cannabis, but what I want is for every senior citizen, regardless of their socioeconomic status, to have the opportunity to try it if it could help them.

The problem with it, particularly in New York, is that it's available, but because it's

federally illegal, it's a Schedule One [drug]. I have had doctors who treat the elderly tell me that they have patients who could benefit from cannabis and are forced instead to take opioids because they don't have $200 a month in their income available to pay for their cannabis treatment. Someone on Medicaid is only allowed to have $50 a month for their own use. So that is a real barrier here. This is truly a case where poor people cannot use medical cannabis and are forced to use narcotics, but people who are wealthy have all of these different options that are not available to others.

So as a societal issue, this is something I think we should be focusing more on. There are lots of studies out there that support cannabis as a treatment that helps with Alzheimer's and dementia, cancer, increasing someone's appetite, people suffering from seizures, and other conditions that are seen in healthcare facilities. So you have people in nursing homes who are suffering from the very conditions that science is telling us cannabis can treat, but we're not talking enough about allowing them to actually use it.

The scientific basis for this Schedule One designation for cannabis is indisputably based on outdated science. Every state has data to support that it's a safe medication to take under a doctor's care and that it has a medical benefit. So, the [Schedule one] classification is just completely inappropriate. The president has said that in so many words, but they are slow to actually effectuate the change. And that's what is needed.

I'm on this crusade to help people in positions of power, and not just in political power, but the people who run nursing homes, the people who are executive directors of assisted living facilities. These are the people who have the power to say, "This is something that we want to offer to our residents." I'm meeting with the staff of assisted living facilities, for instance, to talk about how we can safely and legally create a program for their residents to support their medical cannabis use in a way that everybody—the facility, the residents, and their families are all comfortable with. We're making progress but there's more work to do. ■

—Steven T. Taylor

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Of Counsel *Interview . . .*

Pioneering Elder Law Attorney Draws on Legal Skills, Passion, and Compassion

When some attorneys talk about their practice, the listener comes away from the conversation thinking, "She's only in it for the money." Or maybe, "He really needs to change his job; he's dead-tired of being an attorney—and he's only 40." But other lawyers exude enthusiasm—genuine enthusiasm and even passion—for their practice, their clients, their partners, and the legal system at large.

Dana Walsh Sivak falls into the latter category. An elder law attorney at Falcon Rappaport & Berkman, based in Rockville Centre, NY, Walsh Sivak has gained a stellar reputation for her top-notch client service, legal acumen, creative thinking, writing and speaking skills, and yes, her passion for what she does. Importantly, her clients know she cares about them.

The recipient of numerous honors, Walsh Sivak co-chairs the firm's elder law group and recently was elevated to partner. While she counsels and represents clients on an array of issues in this hot and growing hotter practice area, she's carved out a name for herself in handling guardianship cases and as a pioneer in working to expand access to medical cannabis to seniors, particularly those living in nursing homes and assisted living facilities. She's also a prolific author and public speaker about this important and innovative development.

Recently *Of Counsel* talked with Walsh Sivak about what motivated her to pursue a legal career, her path into elder law, her work in guardianship, a case that meant a lot to her, medical cannabis, and other topics. What follows is the edited interview.

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