The Faustian Deal and Why We Litigators Must Change the Way We Practice

I am, of course, speaking in generalities, but these observations are nevertheless generally true. The legal profession and, in particular, the large to mid-size firms, are doing an abysmal job in training their litigation associates to become trial lawyers.

Firms are now completely driven by the bottom line. It controls all that is done. Lure top associates with ever-increasing starting salaries in order to lay claim that "our firm attracts the best talent." Work those associates to death on make-work tasks to pay for those salaries and to produce the profits necessary to keep up with the Joneses to maintain or raise "profits per partner" in order to keep and lure supposed rainmakers.

The result: few, if any, private sector associates are gaining any concept of the big picture in the cases they work on. They are given mounds of projects to work on as part of a larger group of pyramided lawyers in various matters. But how many are actually an integral part of any case's litigation team?

It is the rare (very rare) exception where a firm staffs its cases with small teams, where the associates work closely with a senior partner on all aspects of the case. As those who have read my posts or other articles know (go to my website for the articles), even the largest cases are more effectively run with small litigation teams. It is the best way to win, and it costs less for the client. It is also the best way for young lawyers to develop the skills they will need to be case leaders.

Top law graduates — intelligent as they are — accept the current Faustian deal only because the money seems to be too good to pass up. But as everyone knows, most associates will be gone within five years, and most of these young litigators leave with few, if any, marketable skills. Few have even taken a deposition, let alone participated in any meaningful way in a trial or some other form of contested hearing. Those who stay have limited skills for their years, and this experience lag continues — with some "litigation" partners at large firms never having tried a case either as a first or second chair!

How could so many smart people act so stupidly for a few extra short-term dollars?

There is only one end point for this trend: eventually the only people capable of trying cases in large firms are going to be former USDA or state's attorneys. But there are not enough USDA and state's attorney jobs available to provide the training for the private sector's needs.

Moreover, let me tell you a little-known secret: there is actually an art — unfortunately a dying one — to handling large complex civil litigation matters that one only learns from doing them in the private sector. So even government-trained attorneys, while having a leg up on their private sector counterparts in terms of courtroom experience, are at a disadvantage when they come up against seasoned private sector civil litigators who know what they are doing. For example, it is one thing when you have the FBI gathering your evidence for you and another when you have to do it yourself.

Those firms currently drunk on the short-term revenues from this inefficient pyramid are going to be in for a rude awakening based upon simple economics of supply and demand.

On the supply side, law school graduates aspiring to be litigators are going to get smart and realize that they are better off tightening their belts in their early years and gaining in-the-trenches trial experience at a smaller firm (say a litigation boutique) where, to borrow a phrase, rather than giving them a fish, the firm teaches them how to fish. There are already supply-side organizations cropping up, such as Law Students Building a Better Legal Profession (click here), that are starting to confront the issue of the quality of associate life and training.

Yet it still amazes me how the herd mentality takes over for most of the top law school grads. How else can one explain seemingly intelligent people who, for a few extra short-term dollars, knowingly squander all that they have worked for to be worked to death for four to five years and walk away with few meaningful marketable skills? It is a losing proposition. If it were a case, it would be dismissed out of court.

There is absolute rule number one for soon-to-be law school grads who aspire to be litigators: if you want to have personal autonomy (e.g., control your career arc), make sure that wherever you land, you are going to be given the opportunity to (1) take and defend depositions and argue before courts within your first two
or three years and (2) try cases as second and first chair within the first five years of your practice. Ask the associates who interview you how many depositions they have taken and defended. Ask them how many trials they have worked on and what they did.

They may not like these questions, but if you intend to make a career out of asking the right questions, it makes sense to do so when you are making an important career choice. You are entitled to know these things. If someone is going to hold it against you for asking these questions, then you should think twice about why you want to work at such a place.

For those litigation associates who now realize that their high-paying jobs are on a track to nowhere in terms of skill development, get out. Get over the prestige issue and get over the money thing. Nine years out, no one will care where you spent your first years of practice if you don’t have needed skills, and whatever money you made up front in your early years will be quickly lost in diminished earning capacity later on.

On the demand side, as large and mid-size general practice firms’ development of litigation talent continues on its diminished trend, more and more top-flight litigation boutiques are going to become the norm — not only because smart law school grads who want to become real trial lawyers are going to flock to them but also because clients big and small are going to prefer to hire these firms.

In short, unless this trend reverses and large firms pay attention to something other than short-term profitability, the marketplace will dictate a division where the best/most talented litigation firms and departments will be litigation-only firms.

The trend has already begun, pioneered by firms like Susman Godfrey and followed by firms like Bartlit Beck. Yes, these firms are uber-versions of litigation-only firms that currently have the luxury of selecting only the cream-of-the-crop law school grads. But one should not write them off as one-hit wonders — firms that only arose because of the unique abilities of their founders.

There is a valid business model behind these firms, why they are so successful, and, most important, why they are more sought after than large firm litigation departments time and again. The model is quite simple: they get the talent, they develop the talent, and, as a result, they provide a better product.

The model is being successfully followed. Numerous complex litigation boutiques are sprouting up in every major metropolitan area.

Will the litigation boutique overtake large firm litigation departments in my lifetime? Probably not. But having litigated my fair share of antitrust matters, I am a firm believer in the marketplace. You don't have to be a Nobel laureate economist to understand that both the supply side and demand side may very well seek an alternative when the large firms fail to provide what both sides want.

About the Author

Until recently Stewart Weltman was a partner with the nationally known plaintiff's complex litigation firm Cohen, Milstein, Hausfeld & Toll, PLLC. In January 2007 Weltman formed the Weltman Law Firm.

Over the last 28 years, Weltman has been a lead and trial counsel in numerous complex litigation matters for both plaintiffs and defendants, ranging from antitrust, accounting malpractice, legal malpractice, and securities fraud to patent issues, contract actions, and consumer fraud. While much of his practice has centered on pursuing claims on behalf of individuals and classes who have been injured as the result of fraud or antitrust violations, Weltman has also successfully defended complex matters.

In addition to his antitrust experience, Weltman has acted as lead attorney or lead counsel in several securities fraud matters. He has argued before the Illinois Appellate Court and the Fifth and Federal Circuit Courts of Appeals. He has appeared before the United States Supreme Court as both counsel of record and amicus counsel.

Weltman has been an adjunct instructor at the John Marshall Law School and has served as a lecturer and panel member for numerous FDIC and RTC investigator training seminars and AICPA Litigation Support Section seminars. He has also been a lecturer for the Illinois Institute for Continuing Legal Education, and he coauthored an article for the American Bar Association's Antitrust magazine, analyzing the Chicago School's influence on the Seventh Circuit's antitrust jurisprudence as of 1989. He authored an article entitled "Contingency Litigation 101 — for Big Firms" that was published in the September 2007 ABA Litigation Section magazine.
Weltman graduated from Roosevelt University with a BA in English Literature in 1975 and from the John Marshall Law School, where he was a member of the law review, with a JD in 1978. He is admitted to practice in Illinois; the District of Columbia; the Third, Fifth, Seventh, and Federal Circuit Courts of Appeals; and the United States Supreme Court.

Please see this article to find out if litigation is right for you: *Why Most Attorneys Have No Business Being Litigators: Fifteen Reasons Why You Should Not Be a Litigator*