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COMMENTARY

New Age Practice Associate Ranks Are No Longer Divided Into Washouts and Stars

By Bruce MacEwen
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I have posited before that the traditional one-size-fits-all associate-to-partner model is coming under increasing stress.

Evidently, Allen & Overy agrees.

After suffering 25 percent attrition in its associate ranks last year, the London-based, multinational firm announced after a lengthy study that it will be introducing two formal new career tracks for associates: "managing associate" and "of counsel."

The second first: "Of counsel," as has sometimes been the case here, will be for people who are expected to make a serious ongoing business contribution but who, for reasons of temperament or talent, don't quite make the equity partner cut.

A&O managing partner David Morley commented pointedly: "It's not a reward for long service. It's not an elephants' graveyard." Yes, quite. (Subtext: They are not damaged goods; as a client I can rest assured that I'm still in good hands at A&O when an "of counsel" is on my matter.) Point taken.

However, this raises the metaphysical question of what distinguishes an of-counsel from a nonequity partner. Even A&O admits the possibility, however remote, that an "OC" could become an "EP," which is likewise true of U.S.-style "NEPs," at least according to the party line.

My take on the distinction? On the surface, not much; the proof will be in the execution over time. Indeed, the most salient point as of now is purely and primarily one of terminology: The OC's business card and letterhead will say OC, while the NEP's card and letterhead say to the world, "partner." To the outside world, partner is partner is partner, and the equity/nonequity distinction is (intentionally?) suppressed.

So what? Actually, it matters: If I were in a bakeoff for general counsel of a Fortune 500 company, I'd far prefer my title be a (nonequity) "partner" at a name-brand U.S. firm than "OC" at Allen & Overy, even if there is no functional distinction: There is a chasm of semantic distinction. So give A&O credit for candor.

What, then, of "managing associates"?

"Managing associates will have increased responsibilities and some access to partnership information and will be viewed as likely partnership material," says A&O.

In other words, these are the contenders.

Again, great credit is due A&O for being among the first to recognize - and act on (always the tricky part) - the fact that the world of associates is not divided in Manichean fashion into washouts and stars. While it's a fact of life in any hierarchical organization that not all can ascend to the top, it has long struck me as the

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height of irrationality to proceed from that truism to the conclusion that those who will not ascend to the top should be discarded after about a decade, just as they are hitting their career stride.

What to do with these "of counsels"? Actually, I have two economically driven suggestions:

In today's global (or large-national) firms, while it's indisputably the case that places like New York, London, and Hong Kong generate a disproportionate share of business, we've known at least since we first heard of Bangalore that there's zero reason all the work has to be performed in those global high-rent districts. Logically, some nontrivial percentage of the OCs (or NEPs, as I consider them functionally interchangeable within the firm) will be located in places like St. Louis, Atlanta, or Dallas, with a lower cost-of-living and lower commercial overhead. And they are, by hypothesis, thoroughly trained and inarguably competent: Why couldn't more "originating" partners staff their matters in the field rather than in midtown Manhattan? The firm could then offer either lower rates (enter acerbic comment here) or enjoy higher margins.

My second suggestion looks at the situation from the OC's perspective (and I duly credit the prefers-to-remain-anonymous reader who contributed to my thinking on this; you know who you are). As matters stand, an associate earns perhaps 30 percent of the amount he/she bills up to, say, 2,000 hours a year. No one would claim this is a remotely inadequate return to the associate. On the other hand, once the billable hours cruise above 2,000 or so, what is the associate's "return" on those extra hours? 5 percent? 10 percent? Certainly nothing like 30 percent; almost the entire value is captured by the firm. (I'm assuming that at 2,000 hours, the associate is "paid for," in the sense that benefits, rent, overhead, and a reasonable profit have all been covered by the firm from the associate's revenue, so the associate's marginal cost to the firm takes a dive.)

But isn't this illogical? Don't we have our incentives misaligned? After all, it's the hours — 2,000 — that are the really hard ones, the ones put in on nights and weekends, the ones that are carved out of "personal" time, the ones, in other words, where a little incentive would do nicely, thank you very much. Assume a firm chose to share the same 30 percent or so of revenue with an associate (or an OC) smoothly right on up the curve? I predict some nontrivial proportion of OCs would take the firm up on the offer, as it were, to the enrichment of all.

The basic point dramatized by A&O's move remains the key: Whatever we as a profession decide to "do" with OCs and NEPs, there are surely smarter, more economically and emotionally productive alternatives, than continuing our devil's bargain with up-or-out.

MacEwen, a New York lawyer, is creator and host of the Web log "Adam Smith, Esq.," www.bmacewen.com/blog, from which this article is reprinted with permission.