SFS LAW GROUP OCCASIONAL PAPERS

WHEN IT'S NOT BUSINESS AS USUAL

SMALL FIRM, BIG IMPACT

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THE SMALL FIRM

How does a solo practitioner, small firm, or group of lawyers who want to increase business and add capabilities without incurring the costs and liability risks that follow the creation or expansion of a law firm accomplish their goals? What options are there for lawyers who want to pursue engagements that require resources and personnel they do not have in their own practices? How can the small firm[1] compete with larger firms for the work that it cannot pursue on its own?

Alliances, Arrangements and Cooperation among Lawyers to Serve their Clients:

How to create non-firm firms, non-partner partners, split fees and compete in the market place.
Can it really be done?

What models are available to small firms to adopt and follow without having to become larger enterprises?

A. Historical and Current Models

Many lawyers practice in groups of varying sizes in the United States. The trade press is enamored of large law firms and devotes substantial attention to the lawyers whose firms serve large multi-national companies and dominate the commercial litigation, mass tort and other engagements that required large numbers of lawyers to serve their clients.

Many more lawyers, however, practice in small groups or individual practices. It is taken as a fundamental aspect of small firm practice that there are inherent limitations in the scope of their practices, complexity of the available engagements, and the size of the clients they can pursue.

[1] The term "small firm" in this Occasional Paper includes solo practitioners.

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For many small firms, access to the clients, legal engagements, and highly profitable legal work that require resources in addition to their own staff is also limited by existing ethical rules, lack of market recognition, and assumptions on the part of clients and their advisors that only large firms of lawyers can do the work.[2]

Lawyers have dealt with these problems in a number of different ways:

1. Refer the Case to Others

If a client needs a broader range of expertise and more staff than a small firm has available, the firm often finds others who have the resources and refers the client to those firms.

The practice of collecting "referral fees" from the law firm getting the referral is a longstanding practice but often problematic in compliance with ethical rules. There is a requirement that the referring lawyer actually do something on the case to justify the fee. How much work is required is undefined. Clients must be told about the arrangement and agree to it. There is also the risk that taking a referral fee will open the referring lawyer to potential malpractice liability since she cannot claim that she had no role in the case and comply with the ethics rules in receiving a referral fee. The referral fee is usually quite small in relation to the engagement and is more of a brokerage arrangement. Having said that, in the personal injury area and other engagements with potentially large recoveries, referring lawyers may seek a material portion of the eventual recovery.

In the class action, mass tort, personal injury practice, and similar cases that may generate substantial profits for the lawyers who handle them, local counsel often provide the clients to firms or lawyers specializing in the field in exchange for a portion of the eventual recovery. The cost of advancing expenses for experts, studies, and pretrial discovery makes it prohibitive for firms or lawyers who do not have the capital to invest in such cases to prosecute them on their own.

The capital demands and, multi-jurisdictional aspects of those engagements create special circumstances in which the options for small firms are limited. In practice though, having a class member or injured client does enable small firms to broker the client to the lead firms and participate in the case.

No matter how the relationship is structured, referring the engagement or client to another firm reduces the value of the engagement and some lawyers may prefer to find an alternative to passing the engagement on to others.

2. Take the engagement and add staff.

Changing the overhead and operating expenses of a practice to accommodate a specific engagement creates substantial risk and is a major

[2] Small firms like small businesses come in all shapes and sizes. The smallest American firm on the NLJ 350 has over 175 lawyers. This paper considers a firm of a dozen or fewer lawyers to be a small firm.

issue for a small firm. The expenses arise immediately, but the revenue stream arrives much later.

Even in a standard monthly billing engagement, it is often as much as ninety days before an hour worked on a case becomes cash in the hands of the firm or the level of economic risk in the case becomes evident if the client does not meet the payment expectations. While the small firm may have a clear agreement among the participating lawyers on how the benefits of a large, expensive engagement will be shared, the risk factors and costs are rarely allocated in advance. If substantial increases in operating expenses, debt, and employment are not adequately funded by the engagement requiring the investment, the result can be catastrophic for a small firm and lead to a break up and dispute over the allocation of clients and revenue.

Hiring contract lawyers, administrative staff, and paralegals directly or through legal staffing firms is often used to deal with large discovery or information collection projects that will require extra resources for a limited time. The advantage is that the direct cost is limited to the hourly fees for the lawyer or paralegal charged by the agency. The firm it can end those expenses on short notice.

Even with the contract lawyer or contract paralegal approach, the cash disbursements will be made months before the revenues will be received for their work. Contract lawyers also require close management and supervision.

Billing clients for the work of contract professionals at a rate that exceeds the payments made by the firm for their services has become a widespread practice, but may also be viewed as misleading under the ethical rules. The costs of contract lawyers and paralegals may be viewed as expense items that should be reimbursed at their cost rather than marked up to generate a profit to the firm. While such billing issues can be worked out in advance with clients to secure their approval of the billing terms, clients will be aware of the profit margin sought in the arrangement if it is properly disclosed and may balk at the prospect of paying a legal fee that is marked up over the actual fee for the contract lawyer or paralegal. Rather than covering the small firm's overhead expenses, clients may simply look for a larger firm that already has the resources available.

The use of part-time or short term employees to provide legal services billed under the firm's general hourly rate practices is appropriate and consistent with general practices, but the difference between charges for employees and charges for lawyers employed by a contracting agency is material and could be viewed as inappropriate.

3. De Facto Law Firms

For many years, the plaintiffs' securities bar developed an identifiable practice in the pursuit of litigation that they often referred to as creation of "de facto" law firms. Usually, multiple law firms in several jurisdictions file lawsuits on behalf of clients who are

willing to serve as class plaintiffs. The initial filings may produce scores of lawsuits that are either concentrated in a single court that oversees the cases and enters orders designating steering committees and lead counsel or they are managed under a voluntary joint counsel arrangement with similar structure. The terms of such arrangements are also quite varied.

In securities litigation, in particular, the courts have developed "lodestar" compensation formulas under which legal fees are calculated by multiplying the standard hourly rate to produce fees that may be three or four or more times the usual billing rates. The lawyers who participate in those cases often have a sense of how the time will be allocated among them and negotiate shares in the fee awards. The arrangements occasionally give rise to disputes and litigation over the allocations, however.

Historically, the firms in the plaintiffs' securities litigation business have been much smaller than their adversaries who are usually large multi-jurisdictional firms. The small size reflected the contingent nature of the litigation and the need to maintain close control over the costs of the litigation since recoveries and payment could take several years with substantial out of pocket investment in the litigation.

In the course of these large cases, there may be dozens or scores of lawyers working under the direction of a committee and lead counsel who often negotiate the split on the proceeds when the group is formed. Though the plaintiffs' bar in these cases may work together frequently in the same cases and adopt procedures and practices in the management and prosecution of the cases that reflect a continuing and longstanding agreement among them, they do not consider themselves to be partners or join venturers. They function more as a club with a loosely identified membership

Recent changes in the law over selection of lead plaintiffs has changed the dynamics in the competition for lead counsel and steering committee roles, but many of the firms who have practiced in the area for decades remain leaders in the practice with a few new entrants.

The "de facto" law firm concept has great risk if it is applied in other legal engagements or adopted as a continuing relationship. If lawyers identify themselves with a common name, address, shared staff and expenses, they may find themselves treated as a single enterprise and face both malpractice and contractual liability for the acts of other attorneys in the group. They may also encounter unexpected conflicts challenges and conflict with their insurers if claims are made against the group for the actions of individual members. It is also very difficult to establish internal operating agreements among lawyers who do not want to be viewed as "partners" or joint venturers.

It is common for groups of lawyers to operate without written agreements when they are sharing work

on an engagement. The result is that disputes over costs and revenues are resolved on an *ad hoc* basis. On the other hand, agreements that go beyond the allocation of some shared overhead costs such as rent, equipment usage, maintenance, and other expenses that are not tied to specific clients and joint legal engagements could result in the lawyers being treated as a joint venture or partners in disputes with clients and others.

4. The Law Firm Alliance Model

Many law firms join alliance organizations such as Lex Mundi (Womble Carlyle). The Law Firm Alliance (Brooks Pierce) and the US Law Firm Group (McGuire Woods). There are many, many such alliances. In Charlotte, several other firms belong to alliance groups. Horak Tally belongs to Primerus. Smith Moore belongs to MSI Global Alliance. Many other lawyers subscribe to law lists and other marketing organizations. These organizations all have fee structures which may make them expensive for small firms. They are generally established to provide referral sources to their members.

In the alliances that focus on the development of extended relationships among members, membership is usually limited so that there are specific territories allocated to individual members. Referrals are not required or mandated by the organizations, but the goal of the groups is to allow members to capture business of any size and geographic scope and compete with larger multi-jurisdictional firms. There is also an effort to create an organization in which the members are not likely to be in direct geographic competition for the same clients.

For some of the groups, the multi-jurisdictional expansion of firms has created internal concerns since multi-jurisdictional firms may be in direct geographic competition with other members. Firms that are acceptable members may become unacceptable members when they are absorbed by larger firms.

The additional benefit of joining such organizations is that they behave like trade associations with educational programs, meetings, marketing discussions, and other group activities that create a group identity that may look like a large multi-jurisdictional law firm. The alliances, however, are not law firms. They do not offer legal services themselves and specifically disclaim that they are legal service organizations. Clients do not engage the alliances.

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(b) Alliances for Small Firms and Individual Practitioners

It would be difficult for a small firm to secure a territory in an Alliance that is more than a simple law list arrangement since the other constituent firms prefer to have members with sufficient size to provide services to their clients. The alliance groups do not want to function as law lists or legal directories. Their business plan is to have an identifiable group of law firms who will share work and generate engagements for each other.

The ideal member is a firm with sufficient size and presence to be a leading firm in the allocated geographic area with clients who may need counsel in other locations with sufficient resources to accept large engagements. Firms of thirty lawyers or less are not likely to find such alliances interested in them.

Whether such alliances do generate substantial legal work is difficult to determine. As a marketing and competitive tool, however, membership in a multi-jurisdictional alliance projects depth in numbers and breadth in expertise as well as joint marketing opportunities.

A common model offered to small firms is the creation of special value by becoming "boutiques". In that way a small firm can identify some key expertise and seek clients with specific needs. A "boutique" firm may be attractive to larger firms who need specific expertise and prefer not to refer clients to departments of competing law firms.

A "boutique" firm of litigators, however, may also feel that need to service clients with other needs and to offer other services to maintain a necessary level of business. Solo practitioners are even more likely to offer a general practice to attract sufficient business volume despite a preference and expertise that focuses on a more narrow range of services.

Since many small firms rely on referrals from lawyers in their community, being associated with an identifiable group of attorneys could have a negative impact on their current sources of business if they develop a new business structure that puts them in competition with their referral sources.

(c) The Law Firm Managed Alliance

There has been some development of alliance structures by individual law firms and offered to clients as additional resources available through the firm.

These law firm managed alliances differ from the "independent" alliance groups which disclaim any role in practicing law or overseeing the practice of any constituent law firm. The law firm managed alliance is clearly an organization offering legal services under the control of an identifiable law firm.

If the sponsoring law firm creates a business name for its alliance group and offers the services of alliance lawyers as service to its own clients, the firm is likely to encounter liability claims for the contracts and torts of the sponsored alliance. Though the firm may disclaim any responsibility for the work of the alliance members, the fact that it is a law firm sponsoring the group makes a disclaimer that it is offering legal services ineffective. The use of a trade name for the group or a service mark creates additional likely joint venture obligations and liabilities.

The direct sponsorship and control of the administration of an

alliance by a law firm is the creation of a de facto law firm and fraught with risk if the sponsoring firm does not have control over the constituent firms or lawyers. The more familiar course in alliance structures is the creation of an entity that will insulate the firm from unplanned liability risks since it will not itself purport to be a law firm

Nevertheless, with the appropriate understanding of the insurance needs of a sponsored alliance and the need to control the contract, employment law, and tort risk, a managing firm could find the economic benefit of managing the alliance to be justified. Such an arrangement is as close as firms have come at this point to creating limited duration joint ventures operating under an identifiable trade name.

(c) Is An "Of Counsel" Arrangement A Low Cost Solution For Small Firms?

It is quite common for individual practitioners to form "of counsel" relationships with law firms to identify themselves as part of a larger organization. The "of counsel" relationship allows lawyers to show a connection with a law firm but remain largely independent. For the larger firm, an "of counsel" lawyer may add the indicia of certain expertise or simply another name on its letterhead to add to their numbers.

For insurers, despite the wide range of relationships covered under the "of counsel" umbrella, "of counsel" lawyers and law firms are included in the malpractice risk and will add to the insurance costs of a firm. In some cases, an individual lawyer joining a firm as an "of counsel" lawyer will have a higher cost of malpractice insurance which may arise from the firm's history and its areas of practice. The cost may be borne by the firm or charged against the "of counsel" lawyer. The availability of staff support, equipment and other resources also creates costs to the "of counsel" lawyer in negotiating the economic terms of the relationship.

The ability of an "of counsel" attorney to conduct a separate practice that would not be conducted through the firm could also create conflict. Law firms usually require the individual "of counsel" lawyer to engage clients on behalf of the law firm and bill them as law firm clients. Both the "of counsel" lawyer and the law firm must run their conflicts checks against each other's clients. For the individual lawyer, new and unexpected conflicts issues could appear in future engagements. Law firms must also screen the "of counsel" lawyer from any existing representation that would create a conflict if she were a member of the firm.

Law firms also engage other law firms under "of counsel" arrangements. The most common is the establishment of an "of counsel" arrangement between firms in different jurisdictions. Since the characteristics of the "of counsel" relationship are generally undefined beyond the requirement that there be some sort of continuous relationship between the of counsel firms, the internal agreement should be set forth in a comprehensive document so that the

firms, at least, understand the arrangement. The "of counsel" rubric is so unstructured that a lawyer may be "of counsel" to more than one firm.

Law firms identifying themselves as being in an "of counsel" relationship usually practice independently from each other and enter into engagements in their own names with their clients. Nevertheless, a joint engagement by firms that identify themselves as "of counsel" creates material risk of contractual, professional and tort liability.

Internal agreements among the "of counsel" firms and clear disclosure in engagement letters with clients should provide some degree of confidence in how the arrangement will be treated by the parties and a court when a conflict arises. Since clients and other non-parties to the "of counsel" agreement may see things differently, the risk of unforeseen liability is material in such arrangements.

While a firm will face liability for the acts of "of counsel" lawyers when they are acting as attorneys with or agents of the firm, the goal of the individual lawyer or "of counsel" law firm is to be free of malpractice liability risk for the acts of the firm and other attorneys and to avoid other contract or tort liabilities arising from the activities of the firm in which they are not engaged. That is difficult to accomplish. Ideally, the "of counsel" lawyer will be treated as an employee or independent contractor and avoid contract and non-professional tort liability. She will remain liable for her own malpractice and the malpractice of lawyers she supervises.

The compensation arrangements are quite varied and can resemble commission or business brokerage relationships or more of an employment relationship in which "of counsel" status is used to identify a contract lawyer or salaried attorney. In any case, a commitment to the firm is expected in such arrangements.

B. What's New, If Anything?

It is fair to argue that any arrangement among licensed attorneys to expand their practice, increase profitability, and pursue business opportunities that could be contemplated has already been thought of and tried by someone. Sometimes the ideas that seem propitious end up as abject failures. Dreier, LLP was organized in New York by Marc Dreier under the concept that he would be the only equity owner of the firm with all other lawyers practicing as employees. Lawyers and law firms became part of the Dreier firm and added their practices to the firm. It was a new model under which talented lawyers could practice law, reap large incomes, and leave the management to Mr. Dreier.

The firm employed 250 lawyers in December 2008 when it was discovered that Mr. Dreier had engaged in massive fraud. The firm ended up in bankruptcy and Mr. Dreier will remain in prison until 2026. The solo practitioner blog *MyShingle.com* opined on December 14, 2008 that the arrangement looked too good to be true:

> I'm not sure why this proposed arrangement didn't set off any alarm bells among firm partners. Surely they must have realized that as partners in a firm, they could face malpractice liability for their partners' mistakes. But instead of thinking rationally, these lawyers buried their concerns, allowing themselves to buy into the illusion that one can simply practice law without any regard to the messy business of running a firm.
> In starting a practice, many new solos may find themselves faced with all kinds of too good to be true propositions from unscrupulous lawyers. Some may offer to provide office space in exchange for a few hours of work a week, then turn around and expect you to work 25 hours a week to meet your rental obligation. Or a lawyer might invite you to rent space in his suite saying, "Oh, we could use a family lawyer here for referrals," and then six months later, when your business picks up, the lawyer may open his own family law practice and compete for your clients. In another situation, a lawyer rented space to an acquaintance of mine, and started asking him to sign the pleadings. Turned out the lawyer had been suspended from practice, and was using the acquaintance as a temporary front to allow him to continue to practice.
> Bottom line: analyze every proposal that you receive with the same due diligence that you'd extend to a client. Get references on the lawyers involved and ask for an unbiased opinion from the bar's law practice management advisor, a trusted colleague or even your spouse or a friend. As the Dreier situation shows, too good to be true can quickly morph into worse than you ever imagined.

The folk lore of the profession contains many other stories of incoherent and disastrous law firm structures. The rise of the limited liability company has created new unforeseen problems when lawyers rely on handshakes rather than operating agreements and end up in extended litigation over assets.

Any effort to develop a business relationship among lawyers should be based upon sound business and legal planning. Many solo practitioners share space with others without a space sharing agreement to deal with the special needs lawyers have to preserve confidentiality, avoid conflicts, and clearly identify themselves as independent practitioners.

The dramatic growth in the American legal profession beginning in the mid twentieth century, the ancillary business of law firm consulting, the burgeoning law practice management industry, and extensive trade media have produced an extensive and often incoherent literature about lawyers and how they make money.

The major impact media and the law practice management industry have focused on the expansion of law firms over that period with a particular interest in growth, mergers, international expansion, multi-jurisdictional practices, multi-disciplinary practices, non-lawyer ownership and other management issues for larger enterprises.

The literature on large multi-jurisdictional firms, whose revenues are often in the hundreds of millions of dollars and more, does provide useful information for small

firms. The pursuit of new engagements by large firms produced significant changes in ethical rules that have benefitted small firms.

The narrowing of the reach of conflict of interest limitations on large firm practice has led to the development of screening practices, enforceable ethical waivers, non-refundable fees, and statutory changes in some long standing rules. Bankruptcy practice, in particular, has benefited from the changes in law adopted to allow large firms to overcome seemingly self-evident conflicts of interest. The Bankruptcy rules, however, have not caught up to the use of alliances and other "de facto" law firm structures and retain the more traditional ban on "fee-splitting" among lawyers.

In what may be another application of the law of unintended consequences, the anti-competitive bias of the professional conduct rules has been diluted through the accommodations made to support the geographical and physical growth of the largest law firms. Small firms and individual practitioners are the lawyers whose ability to compete in the legal market place has been the most constrained by the anti-competitive history of the ethical rules.

1. Some Thoughts on New Models for Small Firms

Those firms who find themselves passing on opportunities or losing opportunities due to the limitations inherent in their size and geographic reach may seek a way to capture or preserve that business.

Law firm marketing remains subject to the in person non-solicitation rules that bar direct marketing by lawyers to prospective clients unless there are existing relationships that the ethics rules recognize as justification for in person approaches. However, it has become quite common for law firms to schedule appointments with in house counsel to pitch their practices to business organizations.

Direct marketing to individuals and business organizations is essential to expanding a legal practice. In house counsel has been the most common line of access. On occasion, organizations have invited bids or proposals. Any business model that opens the way for direct marketing to prospective clients is worth pursuing. Alliances, of course, expand the universe of prior relationships, existing clients, and opportunities to meet with prospective clients in ways that should avoid solicitation challenges.

For specific transactions or events that come to the attention of a small law firm, it is more difficult for the firm to get before a client and present its qualifications and proposals in a timely manner in compliance with the current solicitation rules. The discussion of new models must assume that marketing must follow the ethical standards currently in effect.

(a) A Ready Response Team

Every firm should and often does have relationships with lawyers who

practice in different areas. Even small firms that project a general practice may need special tax, bankruptcy, criminal, patent, trademark, immigration, and other expertise that is not part of their general practice. Usually, the relationships are personal among individual lawyers.

A starting point for creating alliance relationships is to identify the areas where outside assistance has been required in the past or may be anticipated in the future and identify the lawyers and firms who have worked with the firm on other occasions. From that group, the firm should prepare a list of lawyers or firms and their expertise and consider establishing a more structured referral and cooperative relationship. For firms that already practice in identifiable specialties such as criminal law, tax, bankruptcy, and domestic relations, the complexity of their practices now requires skills in many other areas. Criminal lawyers must deal with civil forfeiture actions, more complex business crimes, the rise of "white collar" departments in large law firms, and the many business-based fraud prosecutions.

Domestic relations practice has always required tax expertise, but bankruptcy expertise and financial valuation issues now require skills that are difficult to develop without the assistance of lawyers with those skills.

An initial effort to develop candidates for a dedicated group of lawyers may prove difficult to structure without a specific engagement to define the required skill set. A small firm can identify paradigm engagements that are likely to require assistance and engage in some advance planning that would benefit the participants.

For business lawyers, the availability of insolvency and bankruptcy lawyers who become part of the restructuring and insolvency planning process may keep the work with the firm and even avoid formal proceedings. Experienced insolvency counsel can also serve as advisors to the firm itself to ensure that it will not face preference or other liability issues in the event of a bankruptcy filing.

The team should also include non-lawyer professionals. Whether tax issues require lawyers or other financial professionals is often unclear. Several firms in Charlotte have subsidiaries of non-lawyer professionals who enable them to preserve current engagements and clients and to secure new business. McGuire Woods owns a government relations practice. Culp Elliott has CEC Advisors which appears to be a business consulting and tax business. Other firms have invested in investment banking and financial advisory subsidiaries to provide non-legal services.

The sharing of clients between accounting firms and law firms is a mainstay to many firms. Estate planners often have referral relationships with insurance companies and financial advisors. The ethical restrictions on lawyers may limit the degree of integration of those businesses in offering services, but alliance structures may provide the vehicle for small professional groups to offer the services

through joint marketing and advertising arrangements that do not conflict with the personal solicitation rules governing lawyers.

Though legal practices in other countries has not been a main focus of bar regulators in the United States, the competitive advantage of British firms of solicitors and Accounting firms in cross-border practice will continue to generate interest in allowing law firms to add non-legal resources and services to their offerings.

The current uncertainty over the marketing of non-legal or hybrid services by a law firm has produced joint marketing efforts and cooperation between financial advisors, accountants and lawyers which retains the indicia of independence and legal separation. Accounting firms and business consultants actively market to small businesses with little anti-competitive restraint. Lawyers may be required to market to other lawyers and professionals to avoid the direct personal solicitation rules and to conduct joint marketing with other professionals with care to adhere to the ethical limitations on solicitation of clients. The treatment of non-legal service subsidiaries is still evolving.

A first step in creating a vehicle to protect existing relationships and pursue new work and new clients is to identify both the individuals and firms that will be part of the alliance and the services that the alliance will identify.

(b) Target Practices

The following are the more obvious targets:

Succession Planning

For clients operating family businesses, the corporate, estate planning, tax planning and litigation issues require a team approach. Small businesses often generate control litigation and disputes over management and compensation. Many LLC's have no operating agreements or agreements that created litigable issues. Sale of a business or passage of the business to family members also creates tax and other issues that require multiple disciplines.

The intersection of corporate legal advice and estate planning advice has become quite significant. Many "asset protection" practices are cloaked as "estate planning" practices.

Asset protection and estate planning have become part of the business planning process for many closely held and family-owned businesses. Succession of control over family enterprises has generated significant litigation. An interdisciplinary team approach is essential when dealing with family enterprises.

Domestic Relations

Divorce and domestic relations practice requires financial, tax and litigation skills. Most domestic relations lawyers are competent litigators in dealing with key divorce and custody issues. They may not have the financial

litigation skills that are required in dealing with more complex business relationships.

Tax considerations are common and many divorce lawyers are familiar with the issues, but usually engage accountants to deal with financial and tax issues. The impact of Bankruptcy law has become more significant due to the impact of a Bankruptcy cases on assets, shared liabilities, property ownership, and the treatment of support and maintenance obligations. In large divorce matters, insolvency counsel should be consulted as frequently as tax and financial consultants.

Business and Transactional Practice

Business lawyers have always dealt with many areas of the law in advising their clients. . The securities issues involved in raising small amounts of capital under the special provisions of the federal and state securities laws are familiar to most business lawyers. Executive compensation tax reporting tied to executive compensation is also familiar to most business practitioners.

Opportunities for expanded practice and more complex engagements often arise when a small company seeks investment from a hedge fund, equity fund or venture fund. When a client is caught up in the "first round" investment negotiations, the complexity of dilution provisions, series A preferred stock or LLC interest units may require some additional experience. Representing entrepreneurs and closely held companies in negotiations with investors is a complex business.

Small firms should evaluate their resources and consider how they would deal with a significant transaction and whether they should have a plan to keep the business by identifying the expertise they need and the alliance that will be required to represent the client.,

It is not common for business lawyers to bring in litigation advisors when they are negotiating a friendly transaction. So many transactions generate residual conflict that litigation counsel should certainly be consulted to discuss the risks that the inevitable non-deal deal terms and ambiguities create for the parties.

Litigation

While the most obvious alliance need of litigators is the need for personnel and advisors to deal with complex or otherwise intense litigation, there are some specialists who should be on deck for any litigation firm.

Electronic discovery and other major discovery needs require outside professional services. Few small firms have the infrastructure and resources to deal with a major electronic discovery problem. They should establish some relationships now. Of course the use of financial advisors and experts to conduct analyses and give opinions is standard fare for commercial litigation. Medical and scientific experts are standard fare for medical malpractice and personal injury litigations.

Litigators, however, assume they can get specialists to deal with the technical issues and are comfortable with a team of experts to support their prosecution or defense of litigation. They are also familiar with the staffing needs of larger cases. The usual response to a case that exceeds resources is to bring in another firm as co-counsel and work out the allocation of responsibility. The use of an alliance structure to identify firms that could complement a small firm's skills and staffing may be an advantage in getting the work done and in keeping the work as well. Whether litigators can structure the relationship with other attorneys in a way that allows them profit from the work of other lawyers will depend on the way the engagement is disclosed and approved by clients and compliance with the ethical rules.

(b) Structure

Since many law firms do not have clear agreements among themselves, the development of a coherent operating and compensation arrangement is a major problem for alliance relationships.

Sharing clients usually involves separate billing and service agreements with loose coordination. An alliance arrangement could provide for fee-sharing and allocation of profits among lawyers for specific limited engagements.

The development of model agreements would provide small firms with guidance and proposed structures. A proposed uniform alliance agreement that incorporates the different types of arrangements such as joint counsel, lead counsel, and joint venture and compensation structures would provide a general framework and starting point for the lawyers and firms developing alliance structures.

Small law firms can use alliance structures to allocate fees and profits with other lawyers, pursue large engagements, and compete with larger organizations, but the need to structure the relationships so that they comply with ethical requirements and appear attractive to clients and other lawyers.