Trial Lawyers Care:
The legal community responds to aftermath of Sept. 11

By David S. Casey Jr.

It is hard to grasp that we are nearing the 10th anniversary of Sept. 11. Images of that horrible day, when thousands of innocent victims died in the first foreign attacks on U.S. foreign soil since World War II, remain fresh and indelible in our minds.

While the death and destruction it caused are incomprehensible, what many don't realize is that this horrific disaster paved the way for the most important — and largest — pro bono effort in the history of American jurisprudence: Trial Lawyers Care, a program developed by The Association of Trial Lawyers of America (ATLA — now known as the American Association for Justice).

The program, in which hundreds of attorneys from almost every state in the country — as well as Canada, England, Mexico and Australia — joined forces to provide pro bono services to families of the victims offers a shining example of how the legal profession can work together and make a positive difference.

In fact, the program exceeded everyone's wildest expectations — in terms of participation, results and efficiency — and when all was said and done, 1,745 claimants were represented free of charge. More than 1,100 attorneys participated, including 40 from California, succeeding in securing awards of more than $2.2 billion. The average death award was more than $2 million, the average injury award was nearly $50,000, the value of the pro bono legal services provided exceeded $300 million dollars, and the hours donated by attorneys totaled more than 100 years. Nearly 100 percent of the victims' families participated. Within two and a half years all cases were closed, and the families fully paid.

The genesis of Trial Lawyers Care was driven by a tragedy of unprecedented proportions. In a report by ATLA to Congress, entitled *"Thousands of Heroes: The Rest of Us Could Only Help,"* the events of Sept. 11 was not a mass tort — a negligent infliction of harm — but premeditated mass murder. Whether negligence might be attributed to the airlines or other parties paled in comparison to the terrorists' cold-blooded criminal acts, the report stated.

Moreover the civil justice process was hindered by inadequate insurance. Since total liability insurance on all possible defendants was significantly less than the likely losses, it was believed that a plaintiff with the best day in court would win only a few cents on the dollar — after many years of litigation. This outcome would not be just, as most family's required immediate financial assistance.

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Associated Press

Kathy Maycen reaches to touch the name of her daughter, Lindsay Stapleton Morehouse, who was killed on Sept. 11, 2001, at a memorial in Palm Beach Gardens, Fla.

When it became clear that Congress would bail out the airlines, ATLA's position clearly emerged. "If you are going to bail out the airlines, you have got to save the families," said Leo Boyle, who was president of ATLA at the time, and played a key role in the formation of the program. So ATLA encouraged the immediate enactment of the Sept. 11 Victim's Compensation Fund, which was conceptualized, written and enacted into law within seven days.

Trial Lawyers Care set up shop in a state office building in lower Manhattan several months later. Participants had to have been licensed to practice for at least five years and have tried or settled at least 15 personal injury, death or other related cases — if not, they were supervised by an attorney with the necessary expertise. Attorneys from out of town had to be able to travel long distances to meet clients, and clients could request a new attorney at any time. And at no point could they benefit financially.

For a myriad of reasons, representing clients before the Victim Compensation Fund was a completely unique experience in the professional life of most of the participating attorneys. There were no legal precedents to consult and when lawyers entered the hearing room, there was no adversary arguing the other side of the case.

Not surprisingly, it was by no means a simple process. Since there was no legal precedent to turn to, lawyers faced many challenges in calculating awards and counseling clients. Participating attorneys would also eventually have to learn the substantive law in 11 countries and 35 states, as each country and state has different laws as to who constitutes an heir.

Yet despite its complexity, for most attorneys, participating in the program was infinitely rewarding and marked the pinnacle of their careers. "This experience has been one of the most significant accomplishments in my legal career," said Benjamin Bunn, the former president of the Consumer Attorneys of San Diego. "Virtually every lawyer I know who has participated agrees with me that this has been the most rewarding thing they've ever done."

Kenneth Feinberg, who was appointed by the U.S. attorney general to be the special master of the Victims Compensation Fund, oversaw the fund without compensation for two and a half years, and called its contributions an "incredible public service."

According to Connecticut attorney Richard Beider, who was president of Trial Lawyers Care, the program — which officially closed in June of 2004 — enabled hundreds upon hundreds of families to better cope with the aftermath of Sept. 11.

"The assistance provided by these attorneys and others to victims has been unprecedented in American history," said Bieder. "It is gratifying to realize the extent to which Trial Lawyers Care lawyers — and other volunteers — mobilized to help these families persevere."

Representing the victims of the Sept. 11 terrorist attacks was a massive and incredibly worthwhile undertaking, involving the time, talents and expertise of thousands. It was the legal profession's way of contributing and giving back to our society at a time of desperate need, and ultimately helped speed the healing process for these grieving families.

Indeed, speaking at the annual ATLA Convention in 2004, Justice Stephen G. Breyer said Trial Lawyers Care is "about what's best in our profession. It is a profession with a spirit of public service. It is a profession that tries to help; it is a professional that responds when asked to help."

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Transparency in law firms: I'll show you mine, if you show me yours

By Edwin B. Reeser

A line of cases in California, beginning with *Jewel v. Boxer* (1984) 156 Cal.App.3d 171, requires that attorney fees received on cases in progress ("unfinished business") by withdrawn partners from a defunct law partnership are to be shared with the former partners according to their right to fees, regardless of which partner provides legal services in the case. The fact that the client substitutes a former partner as attorney of record in place of the former partnership does not affect this result. The ongoing matters of a firm are its assets. So partners who take them elsewhere, and the firms that take them on, are accountable for disgorging to the failed firm the fees less costs incurred to earn them.

The spate of pending lawsuits and multi-million dollar settlements that arise in these situations highlights the problem of inadequate due diligence by law firms, as well as disclosure of information to the firms that extend an offer to a lateral partner candidate. The hiring firms risk potentially millions of dollars of disgorgement payments to the estate of the failed firm previously home to these lateral entry partners. There will likely be an increased scrutiny of lateral partner candidates seeking to relocate from failed (and even "struggling") law firms by prospective new law firms.

Law firm managements appear to have been slow to appreciate this risk, as the proliferation of claims and large settlements makes abundantly clear. A key question evolving for both the hiring firm and the relocating partner becomes how much of a "reach back" before the law firm failure is the new hiring law firm exposed to? Will it be for partners that leave within two years of the firm's demise per the basic fraudulent transfer rule under federal law? Or could it be as much as four years (perhaps even seven years) pursuant to state law regarding fraudulent transfers? What is it worth to a law firm when a partner with millions of dollars of business annually causes the firm to disgorge the fees for active matters transferred? Should it affect the compensation paid to that partner?

A real conundrum is that much meaningful information essential for a new candidate to make an informed decision on whether to join a firm is not shared with existing partners these days.

Relocating lateral partners need to be more careful in evaluating their new firms as well. The level of information generally available to lateral partner candidates from law firms is usually not sufficient for a relocating partner to make an informed business decision with respect to "investing" their business book and hundreds of thousands of dollars of capital in their new firm. Indeed, the level of meaningful financial disclosure is typically not even adequate for partners promoted up from the ranks within a law firm to make that decision. At some point, a recently admitted partner to a law firm that fails shortly after his or her start of employment will raise issues about the firm's material misrepresentations or omissions to disclose key information, particularly where there may be a determination that the firm was functionally insolvent at a date that preceded the admission of the partner to the firm. Depending on the facts of the case, that date of insolvency could be as much as a year or more before the actual vote to dissolve by the partners, or the involuntary/voluntary bankruptcy was filed.

The new law firm's decision-making process regarding whether to extend an offer of partnership to a lateral candidate is critically important. Typically required is a detailed disclosure by the candidate of clients, originations, pending matters, hourly rates, compensation, and much more. This information is scrutinized carefully, conflicts searches are run, and subsequent communications about the information shared. Ideally, the new firm should also have information concerning the financial strength of the lateral candidate's present law firm. However, even in the rare circumstances where a candidate would have such information, there are legal, contractual and ethical constraints that could limit or preclude sharing such information.

Alas, both law firms and relocating partners have severe challenges with the ability to provide "real" numbers. The partner who comes from a top 200 ranked law firm almost certainly has a confidentiality provision in their current law firm partnership agreement prohibiting disclosure of information about the firm, client names, and both law firm and client financials. There are also ethical disclosure constraints for all lawyers under the applicable Rules of Professional Conduct. Contact with clients about relocating to a new firm prior to giving formal notice to the current firm could be violation of a partner's fiduciary duty to their current firm, which makes it difficult to get approval to share the client information with a prospective new law firm. (Indeed the prospective new law firm must be concerned about receiving any of this information as well.) While there may be ethical obligations to disclose to the client the pendency of the move in order to protect the client, this is a very difficult arena to move safely about. Only the most general bits of information may be clearly permissible to disclose.

None of this is new, so why is it somehow of increased importance now? Because in most circumstances not involving a law firm failure, it doesn't make economic sense for either party to dispute it. If a partner relocates, their prior firm is not in much of a position to stop him or her due to their inability to restrict the relocating partner's practice of law. Firms are often anxious to hurry the withdrawing partner out the door, waive the restriction, and continue business quietly.

Clients choose lawyers, not firms, to represent their interests. The interest of the old firm and the departing lawyer is to manage a smooth transition, jointly looking after the best interest of the client as their shared priority. The departing partner wants her capital returned, and the old firm wants their receivables collected fully and promptly from the clients that leave. The transferability of partners with business that firms profit by, and suffer from, has become part of the game. Breaches in the spirit, and sometimes in the letter of the applicable rules, statutes and contracts go without formal legal actions most of the time.

But when a law firm fails, new parties with an economic interest emerge and many new issues can become critical. What if the departure of one partner led directly to the demise of the firm? What if the departure by itself was not sufficient to cause the firm's demise, but it led to a series of departures, and that collectively caused the demise, and it was predictable? Could there be a liability beyond that associated with "unfinished business" profits? Perhaps the partners in the old firm don't care because they are all in the same boat of liability together, but maybe the unpaid creditors for millions of dollars do care. Or perhaps enough remaining partners feel betrayed by the circumstances of the departure that they care to press the issue of breach of fiduciary duty after the collapse. Maybe the young lawyer who takes a second mortgage on his house to make the capital contribution and becomes a partner on Jan. 1, only to see the firm vote to dissolve six months later, thinks the managing partner should have said: "You know, you might not want to do this because I think there is a good chance we won't make it."

On the other side of the table, the prospective law firm has to be cautious about how much material information is disclosed to a lateral partner candidate, even when shared under protection of a confidentiality agreement — lest the information appear in the social media. A real conundrum is that much meaningful information essential for a new candidate to make an informed decision on whether to join a firm is not shared with existing partners these days. Management cannot be confident that an existing partner will not release sensitive information to the public for any number of personal motivations. Nor can management be assured that when armed with such information, existing partners wouldn't make an informed decision to leave the firm rather than stay! Confidentiality commitments in agreements notwithstanding, the traceability of a "leak" can be close to nil.

Thus the characterization of "transparency" in law firm communications from management to partners nowadays is more a reference to an absence of content, than to full disclosure of material information. It is a difference that matters on many levels, with a growing possibility of individual accountability on the horizon.

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