

Something's in the Air...

By [Joseph B. Altonji](#) on February 2, 2016

The creative and entrepreneurial juices in the legal industry are boiling in the early days of 2016, particularly in the litigation space. One month into the New Year, there have been at least four high-profile boutique startups launched from AmLaw firms focused on litigation and trials. Meanwhile, ALM Legal Intelligence reports that, not only was 2015 a record or near record year for lateral partner moves, but that the largest single share of those moves involved litigation partners. Merger and acquisition activity in the industry is also at a high point, and while not all focused on litigation, the interest in absorbing litigation boutiques seems reasonably high, while some older litigation boutiques, facing succession issues as their founding partners approach retirement, seem more open than ever to the idea.

Something is clearly in the air. This activity comes during a time when corporate litigation has been under pressure for several years. For almost all companies, litigation is an overhead cost, not a business strategy, and the desire to avoid, or minimize its cost will continue unabated. For law firms, it's almost as if there is an unspoken agreement that the litigation game is shifting, and something needs to happen to reposition the industry to better serve client needs. Technological innovation is accelerating in the litigation space (leading to more effective and efficient service delivery) and larger corporate clients are increasingly handling routine litigation in-house. Meanwhile, in larger firms, some litigation departments are thriving, while others struggle to keep people busy at acceptable levels. The winners and losers proposition continues.

"Litigation" is clearly under pressure across the board, but not all litigators or litigation teams are so affected. Some are thriving. But all have concerns about the future, and the startups and changes seem, in many cases, to be platform responses to competitive pressures felt in the practice. Some of these include:

- **Changing the Value Proposition.** Not exactly a new story, but the industry is evolving past the early stages of discounting its way to client acceptability to actually considering true alternative fee structures and client value. Commercial contingencies, fixed fees, discounts with success kickers, and other true alternatives to pure hourly billing are increasingly being proposed, accepted, and tried. Some firms, though, seem paralyzed when considering alternative approaches and remain resistant and highly inflexible when partners propose them. The ability to try new things, take cases their prior firms won't take, and operate with greater flexibility (and much lower cost) appears to be a major driver of boutique formation, and as a result, we would expect boutique launches to continue.
- **Cost Structure.** Related to the above, pressures on rates and moves toward alternative fees place cost management at a premium. Yes, for true "bet the company" litigation clients may not care what is being charged, but the amount of actual "bet the company" litigation is quite limited. A \$100 million commercial dispute is not "bet the company" if lodged against Apple or Exxon, for example. So even (or maybe especially?) when paying by the hour, clients are particularly sensitive to costs, and some firms clearly cost more than others – always reflected in rates. Would it be a surprise in interviewing lateral litigation partners if many or most of them were seeking firms where their cost to their client would be lower? Firms that have focused on delivering cost effective routine commercial litigation services have been growing in this space, while others have suffered.
- **Conflicts.** While also not a new story, as firms get larger and larger, managing conflicts continues to challenge firms, even while partners grow increasingly frustrated by their inability to bring in matters they are interested in.

Moving to smaller firms is an obvious way to alleviate, if not eliminate, this pressure.

- **Trial Skills.** One of the biggest worries we see among commercial litigation teams is the ability to replace the declining number of people who can truly claim to be “trial lawyers.” There simply aren’t enough trials in the commercial space (or realistically, even in the entire civil arena) to develop enough trial lawyers to replace those approaching retirement. Trial lawyers regularly point out that most litigators have little actual trial experience – and they are right. It is normal for lawyers to make partner in litigation without ever having first chaired a commercial trial. Maybe, if they are lucky, they did a pro bono matter, but they usually haven’t tried a case for the firm’s clients. Nor do those clients want young lawyers trying their cases. It should not come as a surprise that at least startups want to focus on building the next generation of trial lawyers. If you succeed, this will likely provide a long-term competitive advantage, but to do so will likely require taking matters most large firms simply cannot take.
- **Technology.** Technological progress in litigation practice seems to be accelerating, with noticeable effects on efficiency, but technology isn’t cheap, and not all firms have made the investment commitment needed to stay on the leading edge. Over time, we anticipate that firms willing (and able) to invest in critical technologies will see their position enhanced, while those less willing to do so will decline. Those willing to invest will attract the best lawyers.

We’ve been talking about a decline in litigation activity now for several years, and it appears that the market response to this decline may have kicked into high gear. Whether repositioning by making a lateral move to a firm with a more effective litigation platform, or starting or joining a boutique, many are seeking a different way to serve their clients at a time when the clients are consistently demanding change. In the end, this will be healthy for the industry and the clients, though some firms losing highly productive and profitable groups may be less inclined to agree. We suspect this trend is in its early stages, so stay tuned as more firms open and others combine, all seeking improved platform positions. We encourage leaders of firms with valuable litigation practices to focus on how to keep those groups thriving and cutting edge, at a time when market pressures are high.