Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Recovering Lawyers' Lost Position Of Independence

By **Samuel Samaro** (May 14, 2018, 2:02 PM EDT)

Samuel Samaro

That we live in divisive times, particularly on political questions, is not subject to serious dispute. Whatever the cause, we find ourselves inhabiting ever smaller communities of like-minded people — "silos," as they have come to be known — where opinions are reinforced in feedback loops and assumptions are protected from contrary evidence.

The question that many ask is whether our institutions and traditions can help us return to a greater consensus — whether the historically steadying influences of our democracy will ensure that, in the words of the poet, the "center holds." In days long past, the legal profession could have been counted on to serve just such a function. It no longer can, at least not to the degree it once could.

The problem is that the moment requires leadership from groups and individuals with broad credibility across the ideological spectrum. Lawyers, who were once viewed as unaligned advocates for all interests, are now just as polarized as everyone else.

We do not take all comers, as used to be the case. Instead, we tend to pick a side in some age-old social or economic conflict, and then devote our professional lives to that side's cause. The result is that the lawyer, having abandoned the traditional role of advocate, is no longer much of a force in society for moderation and agreement, and thus not much help at this perilous juncture.

Interestingly, we do not often think about it as picking a side, because it seldom seems intentional. You get a job out of law school for a firm with insurance carrier clients and you become a defense lawyer. You do not take plaintiff cases after that because it may anger insurers, lead to conflicts, dilute your "brand." It strikes you as a purely fortuitous personal choice and not a decision to represent financial interests against individuals. But that is what it is, and it has consequences.

Writing 30 years ago, Prof. Robert W. Gordon, in an article entitled "The Independence of Lawyers," described some of them:

> Believers in the ideal of lawyers as engaged in a public profession ... stress that lawyers should remain independent of all the particular factional interests of civil society, including those of their clients.

> If lawyers become overidentified with one set of client interests, they won't be credible advocates for the opposing position in the next case. If lawyers generally get identified with client causes, moreover, they won't be able to take on the disgusting or unpopular one.

Lawyers from an earlier period would not recognize the current practice (or business) of law. Prior to the late 19th century, even the most prominent lawyers worked in very small groups, often alone, and took what came their way. No doubt ability to pay mattered, but what did not seem to matter much was the client's social standing, political orientation or business interests.

Lawyers were advocates, the public viewed them as advocates, and there was no sense that in representing a particular client today, the lawyer risked losing the opportunity to represent some other client tomorrow. Famous examples are legion.

In 1770, John Adams, already a prominent critic of Britain's policies toward the colonies and soon to be a revolutionary, defended six British soldiers accused of murder after the Boston Massacre. Abraham Lincoln, as a country lawyer in Illinois, represented railroad interests as they spread westward toward the Pacific. At the same time, he sued railroad companies on behalf of ordinary citizens who claimed that they were physically harmed or cheated by railroad company excesses.

Today, analogous things would not happen. A lawyer representing railroads would never represent an injured railroad worker, and a lawyer identified with a particular cause would never represent the sworn enemy of that cause.

What changed, of course, was the advent of class (and later cultural) warfare. The growth of large industrial corporations in the second half of the 19th century spurred the development of larger, more sophisticated law firms that could handle complex financial transactions and high-stakes commercial disputes. Those firms found even more work to do on behalf of corporations in the early 20th century, when health and safety and antitrust regulations first appeared.

By the 1930s and the New Deal, private enterprise viewed itself to be under siege by forces it deemed socialistic and un-American, and responded by hiring armies of lawyers that could fight those forces in the halls of Congress, in the courts and in the court of public opinion. Suffice to say, a corporate lawyer in that era would be viewed as treasonous, and soon without clients, for representing anyone or anything viewed as hostile to unfettered capitalism.

Not surprisingly, groups favoring the regulation of business responded by hiring their own lawyers, and the "us versus them" dichotomy familiar to us today was born. This separation was greatly exacerbated by the post-war explosion in tort cases and the legislative achievements of the civil rights movement, most notably, affirmative action requirements and statutory prohibitions against discrimination in education, housing, employment and public accommodations.

Perhaps the most extreme example of an "us versus them" practice area is employment law. It is a fairly recent legal specialty as such things go, only becoming significant after the passage of the Civil Rights Act of 1964. Before that time, there were no real employment lawyers, only "labor lawyers" who represented companies or employees in the contentious battles surrounding unionization and the enforcement of collective bargaining rights.

As the economy changed and the union movement began its long period of decline after the 1950s,

individual (not collective) rights became more significant and many labor lawyers became employment lawyers. But allegiances did not change much. If you represented nothing but unions in 1960, you were probably representing quite a few employees in wrongful discharge, employment contract and discrimination cases in 1985. You did not start representing employers.

Which is the way it still is. If you get a job practicing employment law today, you are very likely to be on one side or the other. A growing number of mostly smaller firms are representing both employees and employers in employment law cases. But they are the exception.

Most of the larger and more established firms in the field would never dream of crossing the aisle, and it is frankly getting silly. More than that, it perpetuates class conflict at a time when we badly need to move on from what that legacy has wrought.

In the summer of 2017 a big firm lawyer by the name of Eric Dreiband was nominated by President Donald Trump to head the U.S. Department of Justice's civil rights division. Almost immediately, civil rights groups voiced their opposition to the pick, largely on the stated ground that he had spent much of his career defending large corporations in employment discrimination cases.

Is it fair to draw assumptions about how Dreiband would approach his job based on the type of work he handled as a private attorney? Maybe, because his career choice identifies him as an activist. But if in addition to representing defendants he also represented groups of employees in lucrative collective action litigation, he would make a lot of money and the objection to his nomination would evaporate.

In "The Independence of Lawyers," Professor Gordon quotes Louis Brandeis for the republican ideal of the lawyer's role: "a position of independence, between the wealthy and the people, prepared to curb the excesses of either." In Gordon's interpretation, lawyers in the preindustrial era formed "a separate estate in society, committed by professional instincts and habits to functioning as a balance wheel in political life."

No one would argue that all aspects of the practice of law circa 1850 should or could be replicated now. But given the hyperpartisan miasma that has enveloped us, reemphasizing an earlier conception of independence, functioning once again as a "balance wheel in political life," would greatly increase our usefulness in these troubled times.

Samuel J. Samaro is a member of Pashman Stein Walder Hayden PC.