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Inside Outsourcing™



Inside with: Paul Mickey

Partner, Steptoe & Johnson, LLP

Larry Janis'
interview with:

Paul Mickey

Steptoe & Johnson,
LLP

With more than 400 attorneys, Steptoe & Johnson LLP provides counsel and representation in a wide range of legal fields. In more than 60 years of practice, the firm has gained a national and international reputation for vigorous representation of clients before governmental agencies, successful advocacy in litigation and arbitration, and creative and practical advice in guiding business transactions. The firm has offices in Washington, New York, Phoenix, Los Angeles, Century City, London, and Brussels.

LJ: Your practice focuses on matters of unjust dismissal, discrimination, and other workplace issues, what has your experience been in Outsourcing?

PM: Employment lawyers tend to get involved whenever a sourcing transaction affects a workforce--clearly a common result. Transitions of workers from one organization to another raise a host of employment issues. Displacements and the criteria by which selections are made are very sensitive, of course. And pension and benefits issues invariably arise. And then there's an HR component as well. I'm a former CEO as well as an employment lawyer, and much of my work involves counseling senior executives on how to implement decisions affecting their workers in ways that will maximize motivation as well as avoid liability. It's as much art as science.

My work on Outsourcing projects has consistently reinforced two precepts. First, it's hard to overestimate the importance of timely and candid communication. (Many HR executives will say their first rule is 'no surprises,' and it's equally important to employment lawyers.) The transactions that produce the fewest legal headaches are those in which the pressing questions of affected workers are anticipated and senior management strives to answer as many of them as it reasonably can as soon as it is able.

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From the Editor.

Welcome to our current issue!

Inside Outsourcing's goal is to provide you with articles of interest and with a forum for the exchange of information in this rapidly evolving industry.



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LJ: *Which sectors of outsourcing have you been involved with? (ITO, BPO or others)*

PM: I've worked on ITO's, BPO's, facilities management arrangements, pretty much the full spectrum.

LJ: *Are you typically involved on the buy or sell side?*

PM: I have typically been asked to handle HR issues in Outsourcings by other lawyers who are handling the corporate and technology issues in those transactions, and they are generally on the side of the customer. Most of the legal work done for vendors is handled by their in-house lawyers.

I have a lot of respect for the ones I've encountered—on the other hand, working for the customer produces a variety of fresh challenges that keeps the job interesting.

LJ: *What is your opinion of the various types of non-compete contracts that some outsourcing providers are asking their employees to sign?*



PM: It's common and fair for an employer to ask an employee to sign a non-compete when the employee will be entrusted with sensitive information that shouldn't be shared with competitors. Problems arise when the restriction is thrust on an employee in midstream, rather than as part of a clearly understood bargain--those restraints are often hard to enforce. And problems arise when the restriction is commercially unreasonable--either it doesn't serve a legitimate business interest of the employer (because the information is highly perishable, for example), or the geographical reach, duration, and functional scope of the restriction are excessive. Limiting an executive from working for a direct competitor in a similar capacity for a year may well be deemed reasonable; on the other hand, limiting him/her from working for any business in the same field, or for a period of many years, or in any capacity, may well be found unenforceable.

Courts in a few jurisdictions strictly limit the enforcement of noncompetes or reject them altogether. Remember that the consequence of making a non-compete overbroad may be that it is found invalid and yields no protection whatsoever.

LJ: *Has outsourcing caused any changes in negotiating and resolving controversies under executive employment agreements?*

PM: I see at least two impacts. First, it has long been common for executives to have change-of-control protections in their contracts. The prevalence of Outsourcing has caused executives and employers alike to focus more attention on those provisions, so as to clarify the consequences if an executive is asked to do the same job but under new supervision. A second impact involves arbitration.

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Employers realize that the advantages of arbitrating employment disputes are sometimes overstated (it isn't necessarily quicker or cheaper), but when large numbers of workers are affected there are advantages (particularly lessening the risk of a runaway fact finder) that make it seem clearly advantageous to install an arbitration scheme. Those schemes can't be devised and implemented overnight, schemes can't be devised and implemented overnight, so smart employers are working today to minimize tomorrow's risk.

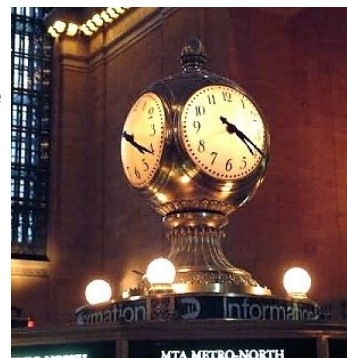
LJ: *As we continue to move to a global economy, are there any trends in employment law that you see evolving?*

PM: Sure. Substantive and procedural norms that exist under one nation's regime over time are adopted as the norm for transactions (such as Outsourcings) that have multinational effects. Take the example of Sarbanes-Oxley, the statute enacted by the US Congress in 2002 to promote good-corporate governance in the wake of the collapse of Enron and other corporate scandals. Sarbanes-Oxley provides extensive protection for corporate whistleblowers (through both civil and criminal sanctions) and requires companies to create effective channels for employees to voice concerns

about unlawful activities. Most of Sarbanes-Oxley's provisions apply to US public companies; however many companies that are not subject to the full range of the law's provisions (because they are private US companies or are based elsewhere) will opt to build those more elaborate whistleblower protections into their policies, to provide uniformity across national boundaries and to anticipate and diminish the impediments to mergers and acquisitions

LJ: *You spent eight years as Managing Partner of another large Washington law firm. Why did you change firms?*

PM: The firm I had led opted to merge with another large national firm and one of the consequences of that merger was the creation of conflicts of interest where my firm and its merger partner were on opposite sides of a client representation. The General Counsel of my oldest client called me, expressed concern that one of my new partners was in fact suing her in a hotly contested matter, and said that I'd need to be elsewhere if I hoped to continue representing her company. Fortunately, at just that time I got a call from the Managing Partner of Steptoe & Johnson. I had known Steptoe well for decades (it was the firm



I turned to for employment law assistance when, in my earlier role as General Counsel of a large company, I needed help on a complex EEO class action), and I was delighted to learn that Steptoe was looking to enhance its already considerable practice in employment law. The fit couldn't be better. One of the great jobs of leading Shaw Pittman, I should add, was helping to cultivate its extraordinary practice in outsourcing. The capability to handle enormously complex transactions that Bob Zahler and others created was most impressive, and was a major contributor to the success of the institution.

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Integrated Search Solutions Group



We are a fourteen-year-old retainer based executive search firm that has successfully attracted top talent in the areas of Outsourcing (IT, BPO and BPM), Consulting (Strategy & Technology) and traditional IT functions (CIO, CTO, etc). We have worked effectively with major corporations as well as effectively with venture capitalized start-ups. Executive recruiters typically pride themselves in their ability to recruit top executives, irrespective of the industry. Leaders in outsourcing tell us a different story; outsourcers value what we do because we understand their business.

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LJ: *Are there any specific attributes that have helped to make you successful?*

PM: I truly enjoy working collaborating with other people to solve complex problems. And the people part is particularly interesting to me--that's why I chose to focus on employment law. When you chair a large partnership, such as a law firm or an accounting firm, your ability to ordain a particular course of action may be quite limited--the challenge is to fashion a plan of action that will propel the organization forward and will enjoy general (but not universal) support, and then to build momentum for the plan, by your enthusiasm and your advocacy (and sometimes plain stubbornness). The skills that make a Managing Partner successful are the same ones called into play when a client needs to be persuaded at the last minute to alter its thinking on a key HR issue so as to minimize its legal risk.



“ When someone asks you, A penny for your thoughts, and you put your two cents in, what happens to the other penny?”

George Carlin