

Ep #23: Roots of the Lawyer Shortage



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John E. Grant

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So, there's a topic that's been on my mind a lot lately, and it's something that I think a lot of us in the legal world are feeling the effects of, even if we can't quite put our finger on exactly what's happening. I'm talking about the growing shortage of lawyers, certainly here in the US, but I think this is an issue in other countries as well. It's a complex issue with a lot of different factors at play. But the impacts are popping up all over from the public defender crisis to the civil access to justice gap to the fierce competition for hiring and retaining mid-career associates.

Today I want to take a step back and dig into the roots of this lawyer shortage because it might feel like a sudden crunch. But the reality is that this is the result of some long term shifts in the demographics of the profession, the economics of law practice and legal education, the regulation of the legal profession, and even the way that legal work itself is changing. So, let's peel back the layers and try to get a clearer picture of what's going on and what it means for all of us working in the legal services industry today.

Welcome to *The Agile Attorney* podcast powered by Agile Attorney Consulting. I'm John Grant and I've spent the last decade helping lawyers and legal teams harness the tools of modern entrepreneurship to build practices that are profitable, scalable, and sustainable for themselves and their communities. Each episode I offer principles, practices, and other ideas to help legal professionals of all kinds be more agile in your legal practice.

Welcome back. So today I want to talk about a topic that has been on my mind a lot for a lot of different reasons. And that is this idea that we have in the United States specifically, although I think this is true in a lot of other countries as well, a shortage of lawyers. And this is something, like I said, it's bubbling up in a lot of different ways across the industry. And it manifests itself certainly in the work I do with the Commons Law Center, where we're very focused on the access to justice gap.

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But a lot of my private clients as well, where they're trying to hire people to come in and help them meet the demand for their legal services and they're having a really hard time. The job market for hiring, especially sort of moderate, experienced lawyers, people between that three and ten year or three to twelve year experience mark is really challenging right now. And I'm not sure everyone fully understands why.

So first off, I actually want to just sort of establish that we do in fact have a lawyer shortage because sometimes people will question me on that contention. And here in my home state of Oregon, it manifests itself really clearly in what we're calling our public defender crisis.

And the situation here is so dire. We have such an under supply of public defenders that a federal judge recently stepped in and has ordered the release of criminal defendants after a week if they haven't been able to get legal representation. And in the opinion, the judge called it a sixth amendment nightmare and it's kind of hard to argue with that. And that's a decision that was recently just upheld on appeal in the ninth circuit. So, this is very real and it's manifesting itself clearly here in Oregon and again, I think in other states as well.

But what I've been saying to anyone who will listen here in Oregon, is that the public defender crisis really is just the most visible manifestation of this overall lawyer shortage. And it's really well documented over the years. The most recent Legal Services Corporation, equal justice report or justice gap report, found that low income Americans received inadequate legal support for 92% of their civil legal problems. And that's a number that keeps getting worse.

When I first was doing the futures task force here in Oregon and starting to pay a lot of attention to this issue, the number was 84%, 86% and now that number is up to 92%. So, this access to justice gap keeps growing despite some really concerted efforts by the LSC and obviously a lot of legal aid organizations and other state organizations to close the gap. It just keeps

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getting worse. And that to me is evidence that we don't have enough providers that are providing legal services to low income people.

And while the LSC is looking at people that are legal aid qualified, which is folks that are 125% or below of the federal poverty level. I don't think it's much of a stretch to say that the actual justice gap and the civil legal needs gap, so the public defender crisis is obviously focused on criminal needs. But the civil legal needs of everyday Americans, the ability to find and hire a lawyer for most of the everyday things that people run into in legal issues that would pop up in the course of a sort of normal life. It's harder and harder to find help.

And that's borne out in some of the studies around state courts and other things feel right here. Again, in Oregon the numbers I'm most familiar with that's something like 82 to 84% of all family law issues involve at least one side who was unrepresented by counsel. And that doesn't even count people that default, which default rates for people that receive divorce papers is actually surprisingly high here in Oregon and elsewhere.

So, there's a lot of evidence that the need for lawyers is far outstripping the availability of lawyers. And it's actually one of the things I hear all the time from my lawyer clients is, "God forbid I have to hire a lawyer because it would be a huge financial strain for me to be able to hire one, to find one, and I know what I'm doing." So, for everyday people, it's really, really hard.

And then like I mentioned before, the other manifestation is this difficulty in hiring, law firms are often struggling to find talent. And it was really bad for a couple of years out of the pandemic. It seems to be easing ever so slightly right now, but still, there's very much, I think, a seller's market in terms of people with law degrees and a little bit of experience. They're typically not having much trouble finding jobs.

And actually, again one of the things I see anecdotally with my clients is that there's a fair amount of job hopping going on. And sometimes that's to

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try to make more money, oftentimes, it's just to find a better cultural fit or a better work life balance. So, there's a lot of different components to that.

So, what's behind the drop in the availability of lawyers? There are really a couple of big demographic shifts that are happening simultaneously right now. And the first is that there has been a really sharp drop off in law school admissions and law school class sizes that happened a few years after the great recession. So back in 2010, the first year enrollment of law students, 1Ls peaked at a little over 52,000 students. But just four years later in 2014, the number of new 1Ls at American law schools was down to 38,000, and it's stayed pretty much flat ever since.

So, for the past 10 plus years, we've been creating 14,000 fewer law students every year. And obviously not all of them are graduating and going into the profession, but that's a pretty significant drop off in the availability of people entering the lawyer pipeline. Which means that if you're looking for somebody that has, again, that three to ten year experience, which seems to be the sweet spot for a lot of job postings, a lot of hiring desires. There just aren't as many of them anymore. They're really hard to come by.

At the same time, we're on the front end of this gray wave of baby boomer generation lawyers hitting retirement age, sort of in mass. And that cohort makes up a pretty significant chunk of the practicing bar and it obviously is a lot of people in leadership positions, in solid financial positions in order to sort of invest in practices and things like that. And replacing them is getting difficult because there just aren't enough new lawyers coming in on the supply side to match the number of exits that are beginning to ramp up in terms of retirements.

Another thing that's going on right now in terms of the demand side is that the law itself and sort of what it takes to operate within the bounds of laws and rules and regulations, especially in the business world is getting more and more complex.

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There's a study and it's a few years old now, but Professor Daniel Katz and I'm forgetting his co-author. But they ran a study on the complexification of federal law over the last 50 years and they're finding, they did the statistical analysis that the sheer number of pages in the federal register and in the US code has gotten significantly longer but it's more than just that. It's all of these cross references and interconnections between all of these different laws and rules that is creating complexity that is harder and harder to navigate for businesses and regulated industries, things like that.

And so, they are relying more and more on lawyers to help them with things like privacy and fintech and security and all these other things that businesses need to keep up with in order to continue as a going concern. And so, one of the things that the data bears out is that business law, corporate law needs are using more and more of the available supply of legal services providers, of lawyers, than ever before. And that's a trend that seems to be accelerating too.

And I'll point you to the excellent work by Professor Bill Henderson at Indiana Law School on his blog *Legal Evolution*. I'll put some links to some specific posts of his in the show notes. But he's got this series of posts that he's done over the years on what he calls the decline of the people law sector. And there's no clear definition of what's people law, but it's those everyday practices that affect regular folks, stuff like family law, criminal defense, estate planning, debt defense, personal injury, immigration, things like that.

And the thing that Professor Henderson has shown through his research is that back in the early 70s at 1972, the revenue from people law work made up over half of the total revenue of the legal industry. It was something like 52 to 54%. But after 1972, we've been on this really sort of consistent decline. And so, by 2007 the revenue share of the people law sector was down to 29% of the total legal services market in the US. By 2017 it was down to 25% of the total legal services market.

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And his most recent numbers which are from 2021, that's holding steady. It's actually back up very slightly to 26% of the legal services market. But the overall market is growing and the people law sector is basically stagnant. Which when you look at population growth over that time period, it kind of makes no sense at all. The number of people in the country who would be consumers of people law has grown significantly since the 1970s.

So, it's pretty clear that the business law sector, the corporate law sector is cannibalizing the people law sector in order to meet the demand, which is totally understandable, for this increased complexity of the law, these increased needs around regulatory compliance. And then all the other business litigation and contracts and things that obviously is the lifeblood of making businesses go.

And of course, for anyone with a law degree, if you're being sort of the rational economic actor, then you're going to go to where the demand is. You're going to go to the jobs where you can get the best return on your investment for having put in obviously the money, but also the time and effort and everything else to get the ability to practice law in this regulated industry. And obviously there are things that people value beyond just money.

And there are certainly always going to be some subsection of new lawyers or people, even experienced lawyers that are moving towards the people law sector. But the data pretty clearly shows that relative to the business law sector, that's shrinking. The other thing that happens is inside of the people law sector, there of course is an incentive in there to take your practice upmarket.

So, if you're a family practitioner doing divorces and you've got a little bit of experience, the rational thing to do is take yourself into divorces for high net worth clients. Because they're going to be able to pay your fees better, pay higher rates and maybe have less sensitivity to the overall amount of time and money it takes to handle a legal matter.

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There's also a component that is a regulatory economic burden, all the things that we have to do as lawyers around the rules for how we engage clients and how we do conflict checks. And how we manage client funds and IOLTA accounts and all the various standards that are part of the RPCs or other rules and regulations governing lawyers. They're not free and it's not billable work.

So doing work and opening matters for lower price point work has a worse return on investment because you still have to invest in all of these regulatory requirements. You still have to do the administrative work, but if there's less money in the overall fee and it doesn't matter if you're billing hourly or a flat fee or whatever. The ROI for the matters that you're handling gets lower and lower if the total fee of the matter is lower. Which again, incentivizes lawyers to sort of move their practices upmarket, it makes rational economic sense.

So, what does this mean? What are the takeaways for people that are out there trying to do this work in the legal system today? Obviously there's no silver bullet solution. Fixing the lawyer shortage is going to require tackling a lot of thorny, systemic issues. There's the cost of legal education, which, let's face it, there's no incentive to drive that down. So, I don't expect to see any progress on that front. Maybe we'll see law schools start to admit a few more students, but there's a whole complexity to the economics of that so I'm not going to hold my breath.

The thing I'm a little more optimistic about is regulatory reform. I've been part of some successful efforts to change the rules around legal practice here in Oregon, a handful of unsuccessful efforts too but improvement isn't linear. But we've done some things to lower barriers to entry for people that are law school graduates, it makes it easier to join the profession in Oregon.

We in Oregon have licensed paraprofessionals in a couple of areas of law now. And we're hoping that that helps create a little bit more supply of legal

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services providers to help folks that maybe are at the lower end and just need little bits of legal help on not terribly complex matters. I know there's a lot of mixed opinions about that. But from an access to justice standpoint, I think the evidence is pretty clear that we need more legal services providers and law schools aren't producing them. So, we need to turn to other places to see what we can do.

I'm also cautiously optimistic about using technology to help empower legal services and help them scale a little bit. I'll give you some great examples that we're doing at the Commons. We run an eviction defense clinic inside of the Multnomah County Courthouse here in Oregon. And we've got some very efficient ways of when people first come in and decide to use the help of the clinic. They scan a QR code on a laminated card that takes them to an intake form and they can fill out the form on their phones.

And then we are using document automation and other things from that intake form that we've got a very efficient way of doing the conflict check of drafting the engagement letter, of drafting the fee waiver notice that's required in court for most of these people. And drafting the limited scope notice that we also have to file with the court. And again, we do that very efficiently because we're able to use document automation connected to pushing some of the data input onto the client in order to make that very efficient.

So, technology can be great. That said, I also think that there's a lot of discussion around things like AI as an access to justice tool that aren't really grounded in the reality, number one, of what people need when we're talking about access to justice. And one of the things again, that we've learned at the Commons, and I talked about it in an earlier episode, is that people don't just want documents. People don't just want the technical legal things taken care of. They actually need to have some human interaction.

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And I don't think that AI, even though they can chat and they can do all these things. I'm not sure that AI is going to be a trusted or even a trustworthy way of delivering that sort of social, emotional need around getting legal help anytime soon. But who knows, maybe something will prove me wrong.

The other thing I worry about is that access to technology tools in general and AI specifically, it's not free. And so, I worry that there will be something of an arms race where people that are able to afford to invest in these technology tools and automations are actually going to get even further ahead of the everyday needs of people and make access to justice a little bit harder. Because they're doing things so efficiently and they can sort of keep their own costs down in ways that make it difficult for everyday people to keep up with enforcing their legal rights.

Outside of the access to justice context, I think there are some things that people who are running law firms or managing legal teams need to keep in mind. And one of them is that putting your hopes in the idea that you're going to add staff, add another attorney, get someone with experience, it's really hard to do right now, a lot of you know that first hand. If you haven't tried to hire someone lately, I can tell you it is really, really challenging.

And so, there's a couple of takeaways from that. Number one, other firms are probably trying to hire your people. And so, if you're not focused on the culture and the engagement of the people in your firm, then that's a very real risk. Because there is going to be some other firm out there that wants to create a better culture or more engagement, or maybe just dangle a bigger paycheck, but they're trying to steal your folks. The headhunters are out there, they get paid when they poach people. And so, the marketplace for poaching lawyers is really strong right now.

Another thing to keep in mind is that you're going to feel more and more demand to take on more work simply because there's more work out there. There are people really struggling to find legal help, and so it's natural. I

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think a lot of us have a service mindset and I applaud that but it makes it easy to take on work that gets you beyond the volume of work that you can sustainably handle.

You feel that pressure to ramp up simply because the demand is there. And as I talked about a couple of weeks ago, that can be really dangerous because if you scale in a way that's not sustainable, then burning yourself and your team out is the almost inevitable example.

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