

Not so secret agents: firms eye patent drafting efficiencies

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With associates commanding more money, law firms have increasingly hired patent agents for drafting – and some say that gives them better results

Law firm partners say cheaper salaries and the ability to get higher-quality work have increasingly led them to prefer patent agents over associates for drafting.

Patent agents can't work on all the same tasks that lawyers can, but are allowed to draft and prosecute patent applications.

Lawyers can draft and prosecute applications, but can also provide additional legal advice, such as evaluating freedom to operate.

Ahsan Shaikh, head of the patent prosecution practice group at McDermott Will & Emery in California, says his firm employs a higher percentage of agents than a lot of its competitors.

“That’s because the market compensation for patent agents is typically less than associates at firms that follow the Cravath scale,” he says.

The Cravath scale is a compensation system commonly used in so-called ‘Biglaw’ that pays associates based on the number of years since they left law school.

“Having no published market scale for patent agents means we have more flexibility on compensation and the type of benefits we can give,” Shaikh notes.

Mean machine

Shaikh adds that over the past few years, his firm has moved towards a “lean, mean patent prosecution machine model”.

The firm has fewer partners than it used to, but they are handling more issued patents for clients than ever before.

Since he took over the patent prosecution practice in 2020 the firm has implemented guaranteed salaries and bonuses for patent agents which help the firm attract and retain the right talent to prosecute patents more efficiently.

“This push for hiring more patent agents as opposed to patent associates is because client budgets haven’t changed for decades. Firms feel that pressure and need to ensure they are hiring the best talent at the best price to our clients,” says Shaikh.

Others agree that budget pressures make patent agents more attractive.

James Love, co-head of Oblon's electrical and mechanical patent prosecution practice group in Virginia, says his firm often uses patent agents for drafting.

“Often the budgets on drafting require that you hire someone with a lower billing rate. Associates are just going to have a higher billing rate,” he says.

He adds that firms aren’t charging much more for patent prosecution than they did around 15 years ago, even though associate salaries have risen significantly.

“Because of that, you’re seeing a lot more patent agents than you did in the past.”

Cheaper and better

Some counsel have found that they often get better work out of agents, even though they are paid less.

David Easwaran, partner at K&L Gates in Charlotte, says there’s a larger pool of people who have technical credentials but haven’t gone to law school than there is of those who went to law school and have the necessary technical background.

A lot of lawyers go to law school to get away from their technical training, which can mean they may be weaker on the technical side, he argues.

“I’ve come to the conclusion that I’m going to get a better candidate for patent preparation by trying to find non-attorneys,” he says.

“My first choice, not even taking cost or economics into account, is to hire someone who’s not a lawyer.”

Easwaran notes that he would have to teach the associate legal skills anyway.

“Patent agents are cheaper but they’re also actually better if you hire the right people.”

He adds that part of the reason he joined K&L Gates in July of this year was because he knew there was an interest in switching to a patent agent model.

Some of the benefits of hiring patent agents can come down to experience, however.

Shaikh notes that a starting base salary for a first-year associate, as per the Cravath scale, is around \$215,000.

“That’s a higher-end salary for a patent agent, and likely one that would be competitive for an agent with 10 or more years of law firm drafting experience in an important technical area,” he says.

Shaikh adds that his firm tries to offer “very attractive” compensation for patent agents.

“We find that veteran patent agents typically have more legal experience than first-year patent associates, more technical experience, and tend to stay longer at firms like ours,” he says.

“The quality of their work is incredibly high for our clients, and our clients really appreciate that.”

Others say, however, that the question of whether associates or patent agents are better candidates depends a lot on the individual employee and the technology.

Carla Ji-Eun Kim, chair of the patent prosecution practice at Sterne Kessler in Washington DC, notes that if a technology is complicated, a patent agent with an advanced technical degree may understand it better than an associate with a bachelor's degree in a technical subject.

She adds that it’s become harder to find associates with advanced technical degrees.

“But if the technology is rather simple, associates can be a really good resource if they understand the law,” she says.

She adds that associates may be better suited to tasks if the patent prosecution requires a lot of legal expertise.

Ad hoc hires

However, not all firms are set on either agents or associates.

Kim says Sterne Kessler is open to bringing on anyone who's smart and talented, without focusing on their title.

The firm does, however, encourage patent agents to go to law school.

"The end goal is that we want everyone to be patent attorneys so that they can practise every aspect of patent law," she says.

She adds that the firm is also open to people remaining as patent agents if that's what they want.

Heather Flanagan, principal at Fish & Richardson in Austin, says her firm hires according to individual teams' requirements.

"We really think of it on an individual hiring basis. We hire as needed for specific technical needs," she says.

Those firms that do hire fewer associates, however, must ensure that they still have enough lawyers to maintain a sufficient number of partners further down the line.

Fortunately, firms have a good handle on this situation.

Love at Oblon notes that his firm encourages its patent agents to go to law school.

Shaikh at McDermott Will & Emery says his firm has very few associates but invests a significant amount of money to send associates and non-equity partners to leadership programmes or bring those programmes in-house.

"It's a cost to us but we see a lot of benefit to the attorney, as well as to the firm," he says.

He notes that many firms hire a lot of associates but only expect a small percentage to become partners.

“We want everyone we hire as an associate in the patent group to become a McDermott partner. We’re not trying to whittle out people but make sure every hire is a leader at our firm.”

Easwaran agrees that this could be a good strategy to get enough partners.

“Perhaps on the patent side, you get the opportunity to be much more selective with your associates and expect a higher percentage to stick. The associates you hire really need to be people you want to keep,” he says.

Firms may need to limit the number of associates they hire, especially if client budgets continue to be tight.

However, those that do make the cut will at least have some assurances that their employers consider them to be a long-term investment.