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EXECUTIVE SUMMARY AND RECOMMENDATIONS

In June, upon appointment as President of the New York State Bar Association, Stephen Younger announced the formation of a task force to examine issues concerning the future of the profession, as highlighted by the recent economic downturn. Among these issues, private practice, one of the key engines of the profession, is under increasing pressure to value-engineer its services. New lawyers face mounting debt burdens and bleaker job prospects, which inhibits their development. And clients resist “on-the-job training” of new lawyers, which is necessitated by the dominant model in legal education.

In response, lawyers have undertaken a better-faster-cheaper ethic, necessary both to differentiate themselves from their competitors and to satisfy clients. This leads to burn-out and the loss of human capital and expertise, placing additional economic burden on firms and taking its toll on individuals. Finally, technology drives many of these changes, affecting the traditional tasks associated with lawyering and how lawyers interact with their clients.

In sum, the profession has changed in its demands of lawyers and how they provide their services. And it will continue to change, as adaptation feeds back against economic and social shifts already taking place. One of the core challenges for the New York State Bar Association is to engage these issues and contribute its accumulated wisdom to effect desirable and sustainable change in shaping the future of the profession.

In particular, the Task Force was asked to focus on the following four areas: (1) the evolving structure of private practice, including alternative billing practices; (2) the education, training and development of new lawyers; (3) work-life balance and integration; and (4) harnessing technology to support practice. Each of these topics became the focus of intense study by a subcommittee of the Task Force.

Task Force presents in this Report its observations and recommendations, informed by months of research and solicitation of input from private practitioners, in-house counsel, legal academics, and professional consultants. The Task Force believes that adopting these recommendations will help shape the future of the profession in a more just, efficient, and satisfying manner for lawyers and clients alike, and keep these important issues before the Bar as important areas for growth and development.

The following summarized recommendations are more fully set forth in their respective sections of the Report:

I. LAW FIRM STRUCTURE AND BILLING

1. Lawyers should maintain their focus to provide quality legal services for purposes that serve client needs. Pressure to adapt should not result in compromise of our professional imperatives.
2. Changing models of law firm structure and compensation may raise novel ethical issues. NYSBA should designate an appropriate entity for the review of innovative practices and related ethical rules.
3. The Task Force observes that lawyers are taking on new roles, dictated by the changing manner of providing legal services and client demands for increased efficiency and integration with business processes. Attorneys seeking alternatives to traditional practice should consider opportunities for more specialized and non-traditional legal roles, and NYSBA should form a committee to address unique issues in non-traditional legal practices.
4. The Task Force recommends that small firms or solo practitioners with specialized skills consider the development of business models to leverage their work product with others and take advantage of lower overhead and price advantage.
5. The wide availability of information, including legal manuals and related material, have encouraged many to engage in legal self-help. The Law Practice Management Committee and the Solo and Small Firm Coordinating Council should study issues presented by the role of attorneys in relationship to clients engaged in self-help, and develop materials or programs to educate lawyers accordingly.

6. The Task Force recommends that the Bar Association support additional research and the development of a best practices manual concerning the economics of alternative fee arrangements and value billing.

II. TRAINING NEW LAWYERS

1. Engage with educators and employers to conduct research and curriculum reform geared towards identifying and inculcating core competencies (knowledge, skills, values, habits and traits) that make for successful lawyers, as contrasted to solely doctrine-based learning.
2. Support the development of new assessment tools for law students and new lawyers, including the use of outcome-based analysis for new lawyers and alternatives to traditional essay-writing in law schools.
3. Experiment with the bar exam to de-emphasize strict memorization of diverse legal rules and principles, emphasizing the core legal rules necessary to begin practice and the assessment of problem solving capabilities. Support research into the disparate impact of credentialing practices upon minority applicants to the Bar, to determine whether the credentialing process accurately predicts success or arbitrarily inhibits diversity.
4. Reduce credit restrictions on the extent to which clinical or “outside the classroom” experiential coursework can count towards admission to the New York State Bar. New York State is the most restrictive state in accepting clinical and practical education.
5. Formally study and consider whether to adopt a mandatory mentorship program for new lawyers or to integrate continuing legal education requirements with mentoring.
6. Monitor the cost of legal education and support critical evaluation and transparency of hiring criteria and salary expectations. The NYSBA should support efforts to minimize the impact of student debt on the future members of the profession and encourage prospective students to make informed decisions about the cost of legal training, based on accurate information.

III. THE WORK LIFE BALANCE

1. The Task Force finds that Work Life Balance is an issue of equal importance to both genders, and recommends that it be treated as a gender-neutral issue.
2. Firms should assess the value proposition of encouraging a healthy balance of professional and personal lives for their attorneys, including better relationships with clients, the costs associated with turnover and training, and maintaining a reputation that will attract additional talent.

3. NYSBA should create model policies from which employers can formulate flexible work arrangement programs.
4. Lawyers should strive to preserve vacation time by defining expectations within firms and with clients. Larger firms may consider adopting a practice of awarding sabbaticals to productive attorneys.
5. NYSBA should support continued research on impairment (i.e., mental and physical illness caused by conditions in the practice), with an eye towards evaluating the effectiveness of Work Life Balance consideration. Research in this area has not been advanced significantly in many years.

LAW FIRM STRUCTURE AND BILLING

Introduction

The practice of law is changing in response to changes in client needs and attitudes, in technology applications that affect the way legal services are delivered, and the value proposition upon which the relationship between lawyers and clients is based. Some commentators have suggested that these changes represent a sea change for the legal profession.¹ An even more critical question for lawyers in 2011 is how these changes will affect the organization and structure of the firms where they work.

Recent economic conditions have reduced and shifted the demand for many forms of legal services, forcing many corporate clients to explore cost reductions in a variety of areas, including services for outside legal counsel. Law firms have, accordingly, reacted with downsizing, restructuring, and the development of new practices. Commentators and consultants have asked whether these changes represent a temporary situation driven by the economic downturn, or whether they signify longer-term shifts in private legal practice.² In our view, the recession has simply accelerated and highlighted changes in the market for legal services and the means of their delivery. We expect these trends to continue, with increased experimentation in alternative fee arrangements and efforts by law firms to compete more effectively in an evolving marketplace.³

¹ See Gary A. Munneke, *Seize the Future: Forecasting and Influencing the Future of the Legal Profession*, American Bar Association (2000).

² See Gary A. Munneke, "Is It Back to Business as Usual...Or Not?" *New York State Bar Journal*, September 2010.

³ See generally Deborah Epstein Henry, *Law and Re-Order: Legal Industry Solutions for Work-Life Balance, Retention, Promotion and Restructure*, American Bar Association (2010).

This section of the Report addresses the fundamental tension between private law firms and their clients regarding the delivery of legal services in a way that both demonstrates value to clients, but also provides adequate compensation for lawyers. We have considered issues relating to the structure of the law firm, i.e., changes in the economic model of private practice; billing and fee arrangements; and the relationships between and amongst attorneys and clients, which relationships drive the legal process and the delivery of legal services. In reaching our conclusions and recommendations, we have surveyed the state of the market and considered innovative practices.

We have paid particular attention to how criticism of the hourly billing model for charging legal fees has led to experimentation with alternative fee arrangements. Despite these developments, the hourly billing system has proven resilient, with both clients and firms clinging to established norms for compensation. Nonetheless, we expect that billing models will continue to evolve through continued innovation and experimentation, and that alternative fee arrangements will become prevalent in many segments of the legal marketplace. As these models evolve, we expect law firms will experience greater pressures to deliver services more efficiently, assess and communicate the value of those services more clearly to their clients, and leverage their intellectual work product in ways that will alter the manner in which generations of lawyers have provided services. This will entail a concomitant evolution of the organizational models of firm structure, service delivery, and client relationships.

An Era of Change

It has been said that the abiding constant in the twentieth century was change—for example, in technology, the economy, social institutions, and the availability of knowledge. The effects of these changes are felt in the legal profession no less than in other sectors of the

economy, although lawyers have been slower to respond to change than some other sectors of the economy. As lawyers, our challenge is to evaluate how the profession has been affected, what risks and opportunities are presented, and seek a course that comports both with our professional responsibilities to our clients and to the law, and to our personal well-being.⁴

I. SOCIAL CHANGES IMPACTING THE LEGAL PROFESSION

A number of widely noted social changes directly implicate changes to the legal profession in a various ways. Of these changes, shifts in demographics, client attitudes, talent management, technology, and globalization bear particular note and should be considered in reassessing our legal practices.

American society has become more demographically diverse. And so has the legal profession. From an almost entirely white, male profession, women now make up nearly 50% of all law graduates and 27% of the profession as a whole.⁵ Racial and ethnically diverse lawyers increased from 7.4% of all lawyers in 1990 to 11.2% in 2000, although data for lawyers of color and other diverse backgrounds do not reflect the same growth that has occurred for women.⁶ However, the number of women and minority lawyers who have become law firm

⁴ The Section of this Report on Work Life Balance addresses the issues related to this question in greater depth, but quality of life is an important component of professional growth and the delivery of quality legal services.

⁵ Barbara Curran Clara Carson, *The Lawyer Statistical Report*, American Bar Foundation (2004).

⁶ *Id.* These represent the most recent American Bar Foundation data, but the percentage of both women and diverse lawyers continue to rise as the percentage of law school graduates continues to remain higher than the percentages in the profession; *see* <http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf>.

equity partners has not been as great and some evidence suggests that in the case of women greater numbers are leaving the practice of law to pursue other fields of endeavor.⁷

As information has become increasingly accessible, reflecting the leveling of what economists call “information asymmetry,” consumers have become more suspicious of institutions, including professional service providers like lawyers. Clients are less willing to take what their lawyer says at face value, more willing to seek a second opinion or do it themselves, and more willing to leave or sue if they are not happy with the services. This attitude, often described as autonomy, may undercut the traditional role of many lawyers as a trusted and unquestioned advisor.

Technological tools serve to advance the process of delivering legal services, render established methods as obsolete, and raise the bar for competent practice. Technology has dramatically changed many aspects of law practice including client expectations, time demands, work/life management, quality control, stress, and access to information. In particular, electronic communication has fueled a culture in which clients want more legal information, answers on-the-spot, and lawyers who can interpret, rather than simply provide, information. At least one consequence of this shift is the trend toward greater specialization among legal practitioners, in order to deliver higher quality services at a lower cost on a compressed time schedule.⁸

Each of these social changes interacts with the others and has direct implication for our changing legal profession: Demographic diversification of lawyers interacts with a

⁷ See Deborah Epstein Henry, *Law and Reorder: Legal Industry Solutions for Work-Life Balance, Retention, Promotion and Restructure*, American Bar Association (2010) at 105-13 (discussing opportunities for attorneys of color and women attorneys and citing several studies).

⁸ See generally Richard Susskind, *The End of Lawyers: Rethinking the Nature of Legal Services*, Oxford University Press (2008).

globalized legal market. Technological shifts impact our relationships with our clients and the nature of the work we are performing. Globalized services may be provided more effectively with a diverse workforce. We must seek to understand these changes and leverage them against each other.

II. ECONOMIC CHANGES IMPACTING PRIVATE PRACTICE

The evolving economic model for law firms is not simply a product of the recent recession. The economic downturn brought to light problems inherent in the existing law firm economic structures and exacerbated the stresses on many weakened organizations. The current economic model, which developed over the course of the twentieth century, was built upon a foundation of senior lawyers acting through partnership, with the support of employed junior lawyers and non-legal support staff, to deliver legal services to clients. By leveraging the work of their employees, partners could increase their profits beyond what they stood to earn as individuals.

The development of larger, more complex firms paralleled the growth of organizational clients, as small local companies grew to become state, regional, national and eventually multi-national institutions. As companies grew in size and complexity, so did the size and complexity of the legal problems they encountered, and larger law firms capable of delivering more efficient and valuable resources to assist these organizations experienced an economic advantage in the legal marketplace.

As the twentieth century ended, large law firms operated in a globalized economy, serving clients with interests throughout the world. Aware of it or not, virtually every lawyer now operates in a globalized environment with increased competition. A solo practitioner in Elizabethtown, New York can have a client with a legal problem involving a supplier in China.

A law firm in Manhattan can send legal work to Bangalore as easily as it can to an associate on its 32nd Floor. A solicitor from Toronto can represent a client with legal interests in Buffalo, just a few miles (kilometers) down the road.⁹

Accordingly, lawyers in the United States face competition not only from other law firms, but from non-legal service providers within this country and from law firms and other providers from outside the United States. An increasingly deregulated, and perhaps unregulatable, market for professional services places significant pressure on all legal service providers to deliver quality services efficiently and at a competitive price.

Traditionally, employed associate lawyers have learned their craft by assisting partners with increasingly complex tasks over a period of years. During this time newer lawyers learned the skills of lawyering through supervised experience, billed to and paid for by clients. Although the costs associated with recruiting and hiring new lawyers might be covered in just a few years, these employees were not considered for partnership for several more years, during which time they generated profits for the partners.

At the end of this period of development, associates were either invited to become partners, or were told that they should look for other employment. In theory, the most able attorneys were invited to join the partnership. But in fact, partnership decisions were much more complex, and took into account other criteria, such as the number of hours billed to client matters or the ability to generate business. Many talented attorneys were “aged out” of the process as a result of the economic model. This “up or out” approach does not so much profit the firm

⁹ Thomas Friedman, *The World Is Flat: A Brief History of the Twenty-first Century*, Farrar, Straus and Giroux (2007).

economically as it serves the firm's need to find the few "successful" partners necessary to carry on the work and survival of the firm.

In this system, associates passed over for partnership often went to work in-house for clients represented by the law firm, joined other law firms or started their own practices. The inefficiency of employing and training lawyers long enough to create capable attorneys and potential competitors, and then letting them go, escaped many if not all law firms. Yet the system persisted for most of the twentieth century. More recently, many companies have either recruited top law school graduates directly or hired away associates who were on track for partnership.

Lawyers who were fortunate enough to become partners were expected to continue to produce revenue and to oversee the development of new crops of novitiate attorneys. It was not uncommon for lawyers to spend their entire careers at one firm, except for a sabbatical in public service or a stint on the bench. Relationships with clients were also stable, and many financial institutions, industrial organizations and insurance companies used one or a small number of firms to handle their legal work.

This economic model supported the expansion of the legal industry, as the demand for legal services experienced expansive growth for several decades. There were marked increases in virtually all metrics evaluating the robustness of law firm profitability, including the number of law firms; average size of law firms; number of associates; lateral hires; billing rates; law firm expenses (i.e. staff, occupancy, insurance); starting and average attorney salaries; hours worked per year; and profits per partner.

Since 2009, however, based on economic conditions and increasing client demands for value-oriented delivery of legal services, the demand for legal services has

contracted. Demand for legal services has been stagnant or has decreased.¹⁰ Many law firms have laid off attorneys, with headcount decreasing for a second straight quarter in early 2010.¹¹ Average associate class sizes have also decreased, and fewer associates are being promoted to the status of equity partner. In general, the economic outlook for law firms has deteriorated, though with the reduction in head count, firm productivity and profits per partner have remained stable, although many firms report slight declines in per partner revenue since 2007; even at firms where revenues have increased, these increases have generally been small. Many law firms, however, still remain optimistic in their ability to increase rates.

Although data are lacking, there is anecdotal evidence that smaller firms have been less severely impacted than their larger peers, both by the economic expansion and recession and the general trends in the legal industry, positive and retractionary.¹² Perhaps as a result, as lawyers in larger firms have recognized more stable opportunities presented by practicing in smaller organizations, many boutique firms have been created by groups of attorneys “spun-off” from parent firms, bringing the quality and depth of knowledge and experience associated with practice in a larger firm to practice with greater flexibility in fee arrangements. Still, overall economic trends in the industry have tended to affect both large and small firms, whether in a dense urban area, or serving a rural population.

¹⁰ See Hildebrandt/ Citigroup 2010 Client Advisory report, Chart 1.

¹¹ See Hildebrandt Peer Monitor Economic Index report 1Q-10.

¹² This raises an interesting question as to what is small and what is larger. Outside New York City, the largest law firms are often “mid-sized” by City standards, and in rural counties, a large firm might have ten or fifteen lawyers. For purposes of this discussion, we will borrow from *The Lawyer Statistical Report* by the American Bar Foundation (2004), which uses the following groups: solo, 2-5, 6-10, 11-20, 21-50, 51-100 and 101+. For purposes of this Report, large firms include those with more than 100 lawyers, and small firms include solos, 2-5 and 6-10 lawyers, leaving mid-sized firms as those from 11-100. The 250th firm in the NLJ 250 had 165 lawyers in 2010. See

A. Pressures on the Billable Hour

For years, the average number of billable hours worked by individual attorneys increased, with median billing rates reaching \$284 in 2010.¹³ In 2008, however, the average number of billable hours dropped by more than 12% to 1,784, and attorneys reported increased pressure to reduce their fees.¹⁴ This trend took place all across the market – in big firms and small firms, amongst partners and associates.¹⁵

One might expect that with shocks to approved hours and hourly rates brought about by the economic downturn, attorneys would increasingly experiment with alternative fee arrangements. Indeed, during the trench of the recent economic downturn, reports of the death of the billable hour and calls for new economic models were commonplace.¹⁶ However, it appears that overall, law firms have clung to the hourly fee model, with an expectation that economic recovery will resuscitate the billable hour and even increases in rates,¹⁷ even though (as discussed below), clients are persisting with demands for alternative fee arrangements.

Large law firm lawyers, in particular, have expressed an unwillingness to cede the “value proposition” to small law firms or alternative fee arrangements. And notwithstanding the

¹³ See <http://research.lawyers.com/How-and-How-Much-Do-Lawyers-Charge.html>. The average rate for law firms of 150 lawyers or more is \$333. *Id.* Billing rates for some firms and top practitioners may be considerably higher than the norms.

¹⁴ See April 2010 NALP Bulletin

¹⁵ See Altman and Weil Survey of Law Firm Economics 2007.

¹⁶ See *e.g.*, ABA Commission on the Billable Hour Report, 2001-2002, American Bar Association (2002).

¹⁷ See 2010 Flash Survey by Altman Weil on billing rates found that US law firms projected an average overall increase in rates of 3.2% for 2010. Large firms (1,000+ lawyers) reported a projected increase of 4.0%, while small firms with 50-99 lawyers projected a rate increase of 3.0%. Firms that planned an across-the-board increase projected a rate change of 4.1%.

criticisms of hourly billing (ironically, many of which are also lodged against alternative fee arrangements), e.g., that hourly billing leads to abuse by law firms, gross inefficiencies, inferior lawyering, diminished collaboration between clients and outside counsel, and numerous other negative outcomes,¹⁸ most clients continue to seek and support hourly fees.

Successful law firms are already aware of the need to provide the best possible service and highest possible quality for the least possible cost (especially those interested in fostering long-term relationships with clients), and in matters billed by the hour, collaborate exceedingly closely with clients on issues ranging from strategy to staffing to budgeting, routinely writing off excess or unnecessary hourly bills, which clients often, in any event, resist paying. Furthermore, proponents of hourly billing expressed the view that leveraging associates on an hourly basis increases profitability, which benefits the firm. Although leverage may not work for many firms, it is a viable organizational model for others, and many of the most profitable law firms still use hourly billing as the primary method of charging clients for legal work. Proponents of hourly billing would argue that the issue is not billing by the hour per se, but too many hours, too high rates, and using on-track associates when cheaper resources – tech-based or human – would be more efficient. In any event both proponents and opponents of hourly billing feel strongly about their respective positions.

B. Alternative Fee Arrangements

Whether or not one generally supports hourly billing, it is clear that client demand for non-hourly billing has increased dramatically. A recent survey by the Association of Corporate Counsel showed that 77% of its members – the largest financial consumer of legal

¹⁸ See <http://acc.com/valuechallenge/>; ABA Commission on the Billable Hour, 2001-2002, American Bar Association (2002).

services – would like to consider alternative fee arrangements in work handled by outside counsel. General counsel cite a desire for more predictability, efficiency and value in the delivery of legal services.¹⁹

In addition to the traditional alternative model of contingency fees, newer alternative fee arrangements generally include arrangements such as caps and collars other limitations, premium fees based on results, stock or investment arrangements or other incentives, fixed or flat fees for types of or single or grouped matters, task based pricing, increased and creative usage of retainers and contingent fees, and other pricing models. Many of these arrangements have been recognized for decades, and in some cases used by law firms and clients, but the difference today is that the use of these alternative models is becoming more mainstream, as law firms and clients experiment with innovative ways to apply alternative billing in mainstream practice areas traditionally dominated by hourly billing.

The demand for alternative fee arrangements is driven by market forces. For example, the increased availability of market information about rates and costs has led to greater competition for work and client ability to determine prices for services. As there is a growing sense that “clients hire lawyers, not law firms,” attorneys who bill at higher rates are, in fact, presumed to be in greater demand, or clients would not pay for their services. The combination of factors translates into greater partner mobility and an ability to work the market for higher compensation, with the implicit inconsistency that these higher-priced lawyers must devise a method to generate the revenue that supports and justifies their compensation. Clients paying high hourly rates for those leveraged hours, however, may not immediately apprehend the

¹⁹ *Id.*

connection between paying substantial hourly fees for junior attorneys and their desire to obtain the services of more senior attorneys. They may prefer an alternative means of arriving at fair compensation. Some large clients have employed convergence initiatives to reduce the number of firms they use, eliminating firms that do not provide value for the fees charged.

In some practice areas traditionally dominated by small firm practitioners have established norms of working from flat fees (e.g., residential real estate, low level criminal work such as DUI, or simple wills), and contingent fees (plaintiff's personal injury, worker compensation). In addition, some smaller firms have successfully moved away from hourly billing, though they may still manage matters internally by the amount of time spent per attorney, and now use fee arrangements for all matters. With regard to larger firms, however, while there may be similar arrangements in certain departments for more commoditized work or for particular clients. For most firms, the end billing product usually amounts to a discounted hourly billed fee; in this sense, hourly billing is a mix of discounted rates and judgments about how much of the recorded time should be billed based on value of work done.

While the trend towards alternative fee arrangements is growing, and in demand even by larger corporate clients, alternative fee arrangements remain a relatively small portion of legal services agreements. Of surveyed general counsel, 82.6% of them reported that less than 10% of their outside legal fees constitute alternative fee arrangements. Though relatively small as a percentage of engagements, the value of alternative fee arrangements is growing; one source predicted an increase of more than 50% in corporate spending on alternative fee arrangements based on a 2009 total amount \$13.1 billion vs. \$8.6 billion in 2008.²⁰ Those arrangements are

²⁰ See e.g., 2009 BTI Premium Practices Forecast.

delivering value to clients; corporate legal departments who have utilized alternative fee arrangements have created cost savings for their companies of 15%.²¹

C. Metrics of Performance

Many law firms are accustomed to being measured and ranked on parameters such as profits and revenue per partner or matter, and utilization and realization per attorney. At least one industry expert, Hildebrandt Baker Robbins in conjunction with Citigroup Private Bank,²² has argued for adoption of a more granular range of performance metrics. These metrics, like profit per employee or profit per partner's managed share of practice group, would provide greater and more detailed information on a firm's health, and force the operations of legal practice towards a more beneficial and sustainable structure. This approach is focused on financial performance, but not necessarily on client-focused metrics related to efficiency. Some firms, like Orrick Henderson, have gained recognition for re-structuring these metrics, but many other firms continue to rely on profitability as the driving measure for practice and practice group success.

III. CHANGES TO LAW FIRM ORGANIZATION AND STRUCTURE

The way attorneys practice law has changed dramatically in the last half-century, as reflective of the social and economic changes described above. Similarly, the organizational structure and norms of law firms have evolved, or not, in response to the changing demands of legal practice. Today, the traditional norms and practices of law firms are under increasing pressure to change, and these shifts have taken on greater significance for both new and

²¹ *Id.*

²² *See* Hildebrandt/Citigroup 2010 Client Advisory Report Chart 11.

established attorneys, because their success or failure depends at least in part on the choices they make about their place in the emerging legal marketplace.

A. The Emergence of Large Firms

One primary reason for the emergence of large law firms was an increase in bigger and more complex legal transactions and disputes and regulatory issues between corporate clients operating in a global marketplace. Opportunities to handle sophisticated legal work, coupled with the fact that starting salaries at these firms are generally the highest paid to newly licensed lawyers, drove intense competition for positions at these law firms and their growth dramatic.²³ As these same firms cut back on hiring beginning in 2008, however, not only did the number of positions for law graduates decline but fewer new lawyers were earning top salaries. During the period of economic growth, demand was, in fact, outstripping supply, which produced rising prices. At the same time, in-house departments were growing dramatically, further suggesting a demand-driven scenario. In addition, in-house lawyers were generally managing outside lawyers, and both shared the same traditions of how work was done, how lawyers were used, and the leveraged partner model. As cost pressures increased, however, and even before the recession as alternatives emerged, many clients woke up to the fact that the old model was not as efficient as it might be; that there were some perverse temptations or incentives in the leverage/ billable hour model that not all lawyers were able to resist. When the economic downturn occurred, and the actual demand for legal services declined, many clients were already disposed to re-think legal fees.

²³ See National Association for Law Placement Employment Report, 1974-2010 demonstrates that the percentage of law graduates entering the growing number of large law firms has increased consistently since the mid-1970s.

The unanswered question is this: why are associate salaries at the top starting to move up again, and why are top lawyers paid so much? The answer must be that truly top talent is still in high demand and quality legal services are valued. Why are highly-leveraged top-tier firms still more highly leveraged than mid-tier firms, and yet still in demand? The answer must be that the model works for some clients for some matters.

B. Non-Equity Partners and Permanent Staff Lawyers

Some firms have begun to question the “up-or-out” approach to legal employment, particularly as their ability to elect new partners has been impacted by the slowing growth of firm profitability. These firms have begun to create a variety of temporary and permanent positions for non-partner lawyers, called various names such as non-equity partners, permanent associates, staff attorneys, contract lawyers, and of counsel. These lawyers are generally salaried employees who do not own an equity interest in the firm and have been told by their firms that future advancement is unlikely.

The emergence of a permanent class of employed firm lawyers, along with declining opportunities to become partner has prompted some lawyers to pursue opportunities outside of law firms, where a decline in the amount of work that traditionally was used to train junior lawyers in law firms, has almost certainly had an adverse effect on the employment opportunities of new lawyers. On the other hand, law firms that are able to develop and retain attorneys whose skills and abilities would be lost through attrition may provide firms with a more stable population of skilled attorneys, reducing the pressure for firms to ask clients to pay for the training of inexperienced associates.

C. Merger, Dissolution, and Reorganization

Simultaneous with changes in the way associates are hired, assimilated and promoted, partnership ranks have been de-stabilized as well. With greater competition for legal work among legal competitors, combined with rising operational costs, law firms are increasingly challenged to deliver profits that satisfy some of their partners. In former times, it was sometimes said that there were three kinds of lawyers: finders, minders and grinders. The finders went out and brought in business, which was overseen by the minders, who managed and served existing client relationships, and associates to grind out the work. In many firms, however, finders (or rainmakers), had the power to “vote with their feet,” and to leave a firm where they did not feel adequately compensated or appreciated.

It has become common for individual lawyers, lawyers with supporting associates, and even entire practice groups to leave one firm for another. The departure of clients can have the effect of accelerating reductions in profitability for the remaining partners, and in some cases can trigger an implosion of the old firm. These remnants might then be picked up by still other firms or left to reorganize as smaller boutique firms.

Some firms, in order to avert collapse have sought to merge with other firms, and concomitantly, some acquisitive firms have gone looking for takeover targets. The result has been the development of a practice environment in flux, with firms and their constituents changing regularly. This ongoing reconstitution of firms and relationships has also contributed to the emergence of a number of multi-office, multi-state, multi-national law firms, whose numbers of attorneys are not in the hundreds, but the thousands.

D. Disaggregation, Offshoring, and Outsourcing

An increasing number of law firms and clients are successfully disaggregating legal work and establishing contract relationships with lower cost providers, particularly for commoditized work such as repeat corporate transactions or litigation project management and discovery. These vendors may be overseas or in lower cost legal communities in the United States. Forrester Research estimated that by 2010 the United States would lose 35,000 legal jobs to offshore outsourcing; this number is expected to increase to 79,000 by 2015.²⁴ As clients push for more efficiency in legal services, and become savvy about how and where certain portions of their legal matters can be handled, it is expected that the use of outsourcing will increase.

Firm use of contract and staff attorneys represents another trend in the legal industry to reduce the cost of legal services. In an environment where the volume of legal work varies not only from month to month, but from day to day, one way that many firms reduced costs was through reductions in force. During the economic downturn, layoffs of lawyers and support staff alike were not uncommon. Some firms re-classified certain full-time jobs to part-time jobs, not only to reduce the total salary paid, but also to reduce the obligation to pay certain benefits. Some firms went so far as to not employ staff, but rather to purchase services on the open market as needed, giving rise to contract lawyering and support, and outsourcing functions to companies established to provide legal support for the functions outsourced.

In boom years, large firms would traditionally take the more mundane or less intellectually demanding aspects of large litigation or corporate cases (like due diligence and

²⁴ See <http://forrester.com>

discovery) and outsource them to staffing agencies and teams of contract or staff attorneys who would work only on those matters. As the economy has retracted and the size and number of mega-deals have shrunk, many law firms are keeping even that rote legal work in-house in order to keep their own attorneys sufficiently busy to bill out at their arranged hourly fee. The pressure from clients, however, coupled with some of the structural changes in law firm practice (discussed in other sections of this Report) will cause law firms to reassess the ways in which they might more efficiently outsource aspects of legal practice again to staff or non-partner track attorneys.

E. Lawyer Mobility

Before 1960, it was not uncommon for a lawyer to accept a job at a law firm, and remain with that firm throughout his professional life. Since then, lawyers have become increasingly mobile, and a typical law school graduate in 2010 can expect to have 5-8 jobs over the course of her career.²⁵ The 2010 graduate is more likely than not to be in a relationship with a spouse or partner whose career may take the couple in different directions. Even when a lawyer desires to stay at one firm, the career of the lawyer's significant other may lead in a different direction, impacting the employment of both.

F. Professional Management

Many firms have increasingly assigned management responsibilities to administrators who are trained and experienced in management. Traditionally, law partners designated a management committee, or even a single managing partner, to run the firm. As firms grew in size, management became more complex. Some lawyers prove to be effective

²⁵ See Gary A. Munneke and Ellen Wayne, The Legal Career Guide: From Law Student to Lawyer, American Bar Association (2008), at 23.

managers, but others are not suited or inclined to the growing demands of organizational management. Accordingly, administrative tasks are often delegated to professional staff; whereas a hiring partner may have handled hiring, now larger firms have directors of human resources, who oversee recruiting.

Lawyer leadership in many firms now functions more like a board of directors in a corporation than an active management group. This delegation has not been easy in many cases, as lawyers often resist letting go of decision making, even to those who are skilled managers. On at least some level, many lawyers fear that non-lawyer administrators may focus too much on the business side of practice – the bottom line – than on issues of professionalism. Nonetheless, the shift from lawyer management to professional management has proceeded unabated, at all levels, including executive leadership (e.g., COOs, CFOs, CIOs, CMOs), senior administrators, mid-level managers, and paraprofessional support.

G. Legal Information Management

Law firms, even fairly small law firms, have traditionally had libraries, where they kept the books used in delivering legal services. These resources needed to be updated on an ongoing basis, and in larger firms, the library was directed by a professional librarian. Law firms also possessed systems that governed how the firm handled legal matters, and individual lawyers possessed legal knowledge gained from years of practice. Past case files served as knowledge base capable of being leveraged for use in newer cases.

The onset of computers and networked computing has accelerated a number of changes that are contributing to increased efficiency today. The most important one is probably the demise of the law library as an integral institution in most firms. The Internet provides not only online access to resources formerly available in print, but also to databases not otherwise

easily accessible to lawyers. Technology also permits law firms to integrate their internal knowledge base with external resources in ways not possible with manual systems. Today, automated legal research is almost universal in legal practice.²⁶

H. Law Firm Capitalization

Although investment by non-lawyers in law firms is prohibited in all American jurisdictions,²⁷ some foreign jurisdictions, such as the United Kingdom and Australia permit public funding of law firms. This allows law firms to raise the capital needed to grow a global practice and invest in tools to deliver legal services more efficiently. U.S. law firms must fund growth through the re-investment of profit or borrowing; the former strategy competes with partner compensation, and the latter by the costs associated with lending practices. These limitations may make it difficult for domestic law firms to compete effectively in the international market for legal services

I. Solo and Small Firm Practice

Solo and small firm practitioners face some unique challenges. Solo and small firm work may encompass a variety of substantive areas of law. Although the bulk of services provided by many solo and small firm lawyers may be characterized as consumer services, and may be less complicated than complex work encountered in a corporate transactional or trial practice, small firms and solos boutiques also serve small to very large business clients and individuals with complex claims. The competition is fierce for consumer services, because many lawyers are competent to handle the work. In addition, there may be increased pressures on

²⁶ The impact of technology on the information or knowledge management of law firms is discussed in a separate section of this report, but it is mentioned here as one of the driving forces of change in law firm structure.

²⁷ See New York Rules of Professional Conduct, Rule 5.4 (2010).

smaller practices from the increased availability of information and the disaggregation of services, including on-line lawyers and legal service providers (many of whom are not lawyers). Self-help books and services encourage consumers to handle legal problems themselves without the assistance of a lawyer. And in many jurisdictions, the number of individuals representing themselves pro se in legal proceedings has increased dramatically. In a variety of settings, from financial planning to real estate transactions, non-legal service providers have encroached on work traditionally handled by lawyers. In most states unauthorized practice laws go unenforced, leaving small firm practices to compete directly with non-legal service providers.

For the small firm provider of consumer services, there is thus considerable pressure to maintain a client base. Like their larger counterparts, the cost of doing business has risen, and the challenge of staying ahead of competitors is constant. Looking forward, continued layoffs and re-structuring amongst larger law firms may result in greater numbers of dislocated lawyers competing in this sector. Solo and small firm lawyers may be more nimble than large organizations, but they all share the threat of an uncertain future if they do not prepare for it.

Adaptations in a Changing Profession and Marketplace

Against this backdrop, the Task Force surveyed innovations and current practices with respect to billing and law firm organization, with the objective of forecasting the direction of the profession and making recommendations to the Bar.²⁸

²⁸ See generally Deborah Epstein Henry, Law and Re-Order: Legal Industry Solutions for Work/Life Balance, Retention, Promotion and Restructure, American Bar Association (2010). Henry explores the trends that contribute to changes taking place in law firm organization and structure, and she discusses these changes in the lives of individual lawyers.

I. CLIENTS DEFINE AND DEMAND VALUE

The fundamental change that has already occurred in the attorney-client relationship is that the market for legal services has become a buyers' market. Until the recent recession, legal services in virtually every sector of practice were priced by the sellers of those services. Even though, necessarily, there were negotiations between clients and attorneys, and price-point choices that consumers of legal services could make, service providers essentially set their terms. In that market, hourly billing prevailed, and client success in restraining the costs of legal services were limited. In our view, this shift in the market for legal services – at least for the foreseeable future – will be a durable one, because the trends that have produced these changes are not likely to abate in the short term.

The new reality, that clients have greater power to define and demand “value,” is reflected in the title and substance of the Association of Corporate Counsel (“ACC”) ‘s recently published “Value Challenge”²⁹ Lawyers and law firms should receive fees based on the value of the services provided.³⁰ In particular, the providers of legal services (lawyers) and consumers (clients) may define value in accordance with several factors, including outcomes delivered, the cost of comparable services, or the cost of production, including a reasonable profit. Alternate fee arrangements may take the form of a fixed fee per deliverable or matter, a capped fee, a flat fee per time period, or a portfolio fixed fee. And they may encompass incentive/performance-based payments, success fees, contingency fees, and hybrid arrangements of alternate fees with traditional hourly fees.

²⁹ See <http://acc.com/valuechallenge/>

³⁰ *Id.*

The adoption by clients of a value-oriented approach to selecting and paying the providers of legal services has substantial implications on who will deliver those services, and how they will go about doing so. For example, value-based billing encourages increased collaboration and cooperation between lawyers (and law firms) and clients. This plays out in several ways.

First, clients who embark on this approach tend to significantly reduce the number of outside firms that they use. One general counsel for a large corporation noted that when her company began adopting alternate fee arrangements, it quickly reduced the number of outside firms from the sixty to which that it had traditionally sent work down to five. There is a significant increase in the use of secondments from outside firms to work inside client businesses – precisely to foster the increased depth of knowledge of the client’s needs and operational structures, and to improve communication.

Second, the selection criteria by which outside firms will be given business is focused on the selected firms’ demonstrated efficiency. As a result, many law firms that were profitable in the past may be at a disadvantage in the new era, at least for some kinds of work. Small, boutique firms with high expertise, relatively low overhead, limited leverage needs, and the proven ability to provide services with maximum efficiency may well win out in the competition for business.

Third, the internal model of firms is likely to change. While clients generally understand that experienced lawyers do not simply appear the minute they graduate from law school, they do not want to bear the direct cost of training. This explains the increasing resistance of clients, who may still be paying hourly fees, to pay for first (or even, anecdotally, second or third) year associates to work on their matters. As a result, firms may find it more

effective to hire fewer associates, to treat their training as an investment cost, and to make it more attractive for those attorneys they do hire and train to remain at the firm. On the other hand, projects requiring larger groups of supporting lawyers are increasingly likely to be staffed with contract lawyers, or even for the work to be contracted to entities that handle legal process outsourcing (LPO).

Fourth, and conversely, if all risk is on law firms, clients can be incented to behave irresponsibly as well. For example, a firm might press a low value case, at no cost to them in spite of reasonable settlement offers, or act unreasonably about trivial deal elements, because the redo, delay, or other effort by the law firm produces no cost to the client

Solo and small firm practitioners are not immune from these changes. Long in the forefront of fixed-fee arrangements in many spheres (e.g., immigration; criminal law; trusts and estates), these practitioners may often be in a position to meet the value-based needs of individual and smaller entity clients. Technology is a great leveler, in particular with the contract-based services that have become available to complement a small firm's work, and may provide small firm practitioners the structure that will enable them to compete effectively for business in a value driven world that would have been entirely out of reach under the prior legal service delivery model.

II. MANAGING THE PROCESS OF DELIVERING LEGAL SERVICES

A. Assessing Risk, Measuring the Value

Client empowerment to define and demand value imposes upon attorneys the practical obligation to devise systems that optimize the processes by which they deliver their services, and to communicate that value to the client. In this environment, pitching a client requires more than establishing a relationship of professional trust; attorneys may be required to

demonstrate their ability to assess and manage business risk associated with legal problems, strategically streamline their services based upon those assessments,³¹ and measure their results. Comfort with these types of assessments, more traditionally associated with in-house counsel and business personnel, becomes more critical for private practice attorneys as they share in the process of devising value-oriented compensation schemes. Alternative fee arrangements transfer some of the risk of the engagement onto the retained attorney. In some firms, these project management and value-assessment functions are being handled by non-lawyer professionals rather than lawyers, while in others considerable effort and resources are being invested in training lawyers to become effective project managers. The Task Force believes that even in situations where non-lawyer professionals participate in risk management decisions, lawyers should oversee the decision-making process and retain professional responsibility for such decisions.

B. Applying Business Management Principles Law Firms

The bookstores are littered with volumes on innovative business management principles and “systems,” but these approaches to improving efficiency and the delivery of services have gone largely ignored by the legal industry, at least insofar as measuring and optimizing the value of their services goes, for their clients and customers. As firms are forced to assess their own services and the value they deliver to their customers, however, widely

³¹ There is a key professional liability issue imbedded in this text: who makes the risk assessment and decision? Certainly outside lawyers should have the skill to advise on questions implicating professional liability, although business risk traditionally has been the province of an informed client or in house counsel. This Report does not suggest that client-driven services will or should relieve lawyers of the responsibility to make reasonably prudent legal decisions. *See generally*, Anthony E. Davis, Risk Management for Law Firms, American Bar Association.

adopted methods of business management may become a kind of lingua franca for negotiating alternative fee arrangements.

An emerging interest by clients in legal project management and more limited efforts to apply “quality management” or “Lean Six Sigma”-style methods may be affecting how some businesses meet their legal needs.³² The key inquiry is often “How can processes be simplified to eliminate steps, unnecessary work, and unnecessary costs while reducing the likelihood of errors or the need to rework some aspect of a project?” As applied in the business world, the Six Sigma approach will often look at the supplier’s processes, the customer end of the supply chain, and at the interface between the two. The underlying principle is that the most cost savings and outcome improvements can be realized by taking work out of the project at any and all points along the way. Six Sigma has been applied in some in-house legal departments, particularly those in companies that have embraced the discipline across their organization, and to a much more limited extent in law firms. The Task Force believes that one of the new frontiers in building and sustaining a successful firm is to redefine the interaction between how clients’ in- house counsel and outside law firms work together, to find efficiencies in the supply chain for legal services.

C. Attorney Collaboration

In the traditional model, a single lawyer or firm took on discrete matters and projects for clients, and performed all of the necessary tasks to complete that matter. Clients and lawyers, however, have begun to customize project teams from diverse sources, including contract attorneys, vendors, and even teams of attorneys from competing full-service firms.

³² See Geoff Tennant, *Six Sigma: SPC*, Gower Publishing, Ltd. (2001). The concept was originally developed by Motorola in 1986, as an outgrowth of the total quality management movement.

Virtual firms have been created to connect lawyers with projects on an as-needed basis, but which have no permanent staff and very limited permanent facilities. Commercial services provide contract lawyers for a variety of needs from document review to research to drafting to higher level expertise. Business clients and firms create integrated teams of inside and outside resources to do their work. Much of this collaboration can and is done remotely. These changes affect both large and small firm practices and even solo practices. And in many instances, innovative use of technology has enabled the formation of these decentralized teams.

D. The Creation of New Products and Legal Services

The wide-availability of information, and particularly the development of network-based technologies, has given birth to a new sector of legal products and services developed by both law firms and clients. These include process-driven systems, extranets, and intelligent document assembly.³³ Many law firms have invested increasing resources in delivery systems. Corporate clients have also utilized technology to help them manage outside counsel. For example, the du Pont Company uses an extranet to allow law firms employed by the company to access data and information related to the matters they are handling.

On the consumer side, web-based knowledge sources, document generation systems, and “paralegal” supported services purport to allow consumers a significant degree of self help in drafting wills, preparing consensual divorce documents, sales transactions, employment agreements, and a wide variety of small business services. Non-lawyer served resources for debt settlement, tax dispute advice and resolution, and other services are more widely accessible due to the Internet, creative providers, and lax enforcement. Some of these

³³ These developments are covered in greater detail in the section of this Report on technology, but they are mentioned here, because of their profound effect on legal process management.

have proven to be of dubious quality, unethical, or even illegal, but that is not true of all of them. In many states, the existence of title insurance and settlement companies has taken lawyers nearly entirely out of the residential real estate practice. Similarly, community-based dispute resolution services and some web-based dispute resolution services are providing new options for individuals and small business entities seeking alternatives to traditional litigation.

Larger and more sophisticated business clients also have a range of alternatives or complements to traditional law firm services. As previously noted, these range from litigation support services, to contract resources services, to contract lawyer services, to foreign outsourcing services, to document generating and advising systems. In some instances, law firms have developed these products and offered them alongside of, or integrated with, traditional legal services. Some firms employ teams of staff attorneys to conduct routine document review, or non-lawyer staff to provide supporting analysis in complex business matters. Because the employees do not expect to be compensated as associate attorneys, those firms can offer value on those services to their clients. Two other frequently cited examples are the online term sheet generator made available by a leading Silicon Valley firm and the agreement drafting service for financing documents sold on a subscription basis by a leading London firm. Competitors of these firms had been charging for these services and perhaps by the hour.

In this vein, to address some of the inefficiencies of large firm practice, there may be a push towards the “industrialization” of legal services, a concept that is anathema to many legal professionals and which, to some extent, the law itself resists. This is not to endorse ethically problematic legal practices, such as the mass production and execution of affidavits. But for some types of services, the Task Force believes the law can learn from other business

organizations and from other professions that have faced similar challenges from the market place.

“Mass customization,” for example – broadly defined as the use of flexible computer-aided systems to produce custom output – can serve the objective of combining the low unit costs of mass production processes with the flexibility of individual customization to produce an increase in variety and customization without a corresponding increase in costs. While the technology for creating such applications – such as form agreements for repetitive transactions, or “macros” that assist in the development of first forms – has existed for some time, changing dynamics in lawyer/client relationships may make the investment in developing and maintaining such proprietary applications more attractive. Another example of the opportunity for this kind of investment in automation is the development of integrated systems for specialty and multi-jurisdictional legal projects.

Recommendations

First, the Task Force recommends that though the profession may be under economic and social pressure to adapt, the primary consideration for lawyers should be to provide competent services and to maintain high quality in its skilled expertise, including legal analysis, case and statute interpretation, general drafting, general informal advocacy and negotiation, as well as the interpersonal skills that allow them to effectively counsel and work with clients. Any changes to the structure of practice must not compromise on our core values or the purpose of our profession.

Consonantly, the Task Force recommends against adaptation or change simply for the sake of making change. At the very highest level of risk, reward, and sophistication, where individual expertise, judgment, and raw legal talent is required, some of the traditional ways of

doing work and delivering service may not change as much as they will elsewhere in the profession. These needs can be as varied as a sophisticated tax or regulatory issue to an individual criminal trial.

Notwithstanding those cautionary points, the Task Force encourages lawyers to embrace the challenge of measuring and optimizing the manner in which they provide services, so as to communicate to clients the value of high quality, professional services. There is much room for experimentation and evolution in the vast area of day-to-day legal needs, some very sophisticated, very large, and very resource intensive, and others very routine, which we believe will, inevitably, be impacted by process changes.

The Task Force notes that a number of serious and challenging ethical issues may be raised by some of the process changes and experimentation with new business models in the profession. A discussion of the extent to which ethical rules will impact the process of change to meet market needs should be undertaken by the New York State Bar Association in the immediate future, and the Task Force recommends the designation of an appropriate entity within the Association to undertake this effort.

At the root of this experimentation is the need, for both large and small firms, to assess the services they provide, define the value proposition that they offer their clients, and communicate both of these to prospective and existing clients. If it ever did, legal competence alone – even legal excellence – no longer guarantees commercial success.

More specifically, in recognition that the greater availability of information may lead to “self-help” efforts by individuals and small businesses, solo practitioners and small firms may wish to communicate a willingness to review and advise on the client’s work. A will client may come with a financial plan or draft will already prepared courtesy of an Internet Web site,

seeking the last bit of lawyer expertise and advice. Parties to a divorce may come with a draft separation agreement. Those Internet-drafted documents may have been created through a sophisticated set of software, much like tax returns are now prepared, and an attorney may only be necessary to review the final product and determine it has been completed appropriately. The Task Force recommends that the Law Practice Management Committee and the Solo and Small Firm Coordinating Council study how these changes will impact solo and small firm practitioners and the issues presented by advising clients on self-help, as well as develop programs or materials to educate lawyers about this emerging role.

The Task Force recommends that small firms or solo practitioners with specialized skills consider the development of business models to leverage against the work product of others and provide specialty services to a wide variety of businesses around the country or around the world, utilizing their expertise and taking advantage of their low overhead price advantage. These attorneys may have no office outside the home, little infrastructure investment, and communicate with clients only at a distance. There are already specialty immigration attorneys operating across the U.S. by internet with a large contingent of paralegals, serving a high volume of immigration clients, either directly or as the “back office” for other lawyers. When they need expertise or help, they may contract with a research agency, possibly offshore, or buy drafting services from another online lawyer. Similar approaches will likely be applied in other specialties. Alternatively, small firms and solo practitioners may affiliate to create relatively permanent virtual teams. They may, as is done now in plaintiffs’ personal injury work of some kinds, act largely as the retail, intake end of a service process, while the bulk of the substantive client work is done by a firm specializing in claims regarding a particular product or in class actions.

The role of a lawyer will likely broaden from what it is today into other areas of responsibility, opening up career opportunities for lawyers with expertise in new processes and suggesting both a broader scope of services, and narrower specialization. The Task Force recommends that lawyers looking for alternatives to traditional practice in a firm consider the delivery of specialty services. For example, there may be opportunities:

- To assist in systematizing legal processes, working on their own or with software developers to create more automated legal solutions.
- To create project plans, manage, or train lawyers to handle massive legal projects requiring hundreds of staff, myriad simultaneous activities, and entailing large costs
- To specialize in finding, managing, and applying information or work product culled from the internet or from law firm knowledge bases
- To structure virtual teams of firms that provide highly competitive services or who can create viable offshore substantive service providers.
- There will continue to be opportunities for lawyers working for legal publishers or other types of substantive service companies to create packaged research, forms, and other solutions to be used by other lawyers. And there will be more opportunities for lawyers who want the flexibility of contract or freelance work, and pro bono opportunities to create processes and systems to serve a larger base of clients than can be served, one at a time, in the traditional manner.

The Task Force recommends that the Bar Association identify businesses and best practices for lawyers advancing the concepts above, and that the Law Practice Management Committee consider whether a new committee or additional resources should be established for the purpose of addressing emerging issues in non-traditional legal practice.

Larger, full-service firms are under the greatest fee pressure from business clients, and are entering newer territory for them as alternative fee arrangements spread to more types of work. Alternative fee arrangements require different and more intensive management in order to deliver value and maintain profitability of services. However, because of the scale of their

services and resources, larger firms also stand to benefit more, on a relative basis, from implementing optimized management strategies, including technological and systems solutions along with the investment in staff to implement them. The message to large law firms from a segment of their client base (especially those represented by the supporters of the ACC Value Challenge) is that large law firms have not yet turned all of the potential presented by their substantial resources into the value that their clients are seeking. The New York State Bar Association, through its Law Practice Management Committee, should work with the Association of Corporate Counsel, professional consultants, and corporate clients to support research into the economics of alternative fee arrangements and value billing, develop standards for assessing value in legal services, and educate law firms on the advantages and disadvantages of different models.

The profession may benefit from the implementation, with larger clients, of a partial outsourcing model, in which an outside company (the law firm) provides services to the client that are integrated with the clients' operations in the sense that all of the provided outsourced functions fit together seamlessly and dovetail with the client's other business functions. To deliver such larger scale services to large business clients, firms may need to:

- Dedicate professional work-flow management to the process of delivering legal services. Three examples make the point. Business managers for lines of practice, which are now appearing in large law firms, may be more widespread and influential and may likely have more staff support. Lawyers with superior skills in managing legal projects and relationships may be developed and rewarded and be key members of legal teams. Similar skills may become more important for in-house counsel to have.
- Project management may be more commonly and explicitly applied, with careful budgeting. Budget compliance may become even more widespread. Financial discipline within firms, used increasingly at the "production" level may become more common and more effective.

- Resolve conflicting demands in law firms for efficiency and profitability may be resolved in favor of efficiency. Firms may respond by changing how they do their work, with a new mix of resources, both human and otherwise.
- Implement Lean Six Sigma and related processes to improve efficiency and quality. Systems and standardization of processes and content may become more important as tools to create efficiencies.
- Develop new patterns of staffing may become more common with non-lawyers playing increasing roles and fewer “on-track” associates (those rising toward partner). Lawyers may leverage technology more as a substitute for labor, and focus.
- Focus on effective information and knowledge access and management to improve efficiency and reduce cost. Firms may focus on what solutions can be bought from publishers and other third-party providers or can be found “on the web”—a short hand for the vast of array of free or inexpensive knowledge that is increasingly available.

The extent to which the changes outlined above do in fact occur will also depend on client behaviors. In the case of large clients and large firms, the frequent mantra that “I hire lawyers, not law firms” is a message that cuts several ways. It undoubtedly reflects the fact that within a firm, lawyers do not deliver a homogeneous level of service. It also probably reflects the bundle of intangible factors that make a lawyer/client relationship successful, including personal chemistry, working style compatibility, and the fact that the very particular needs of a client in terms of experience will not always be present in equal degrees in firms.

The result of this approach if it were truly widely applied is that firms may not have the incentive to invest in narrow or transient relationships in ways that will bring about the most process improvement. To the extent that client purchasing trends to the transactional, the client also has limited incentive to invest in process improvements. On the other hand, if purchasing strategies focus on broader, deeper, and longer term relationships, as for example is the case when corporations set up major outsourcing arrangements or strategic supply chains, the

incentive to improve processes and efficiency, including at the interface between the client and the law firm is greater.

The Task Force believes that both approaches will continue into the future but that if firms make progress on providing uniformly high quality and efficient service, the trend to deeper and longer relationships will accelerate. The Task Force recommends that the New York State Bar Association urge all entities in the Association, and its members generally, to examine these trends in light of their particular practice areas. To this end, the Task Force recommends that the New York State Bar Association disseminate this report to all members.

The Task Force also urges the Law Practice Management Committee and other entities charged with improving the practice of law to continue to study and report on the matters embraced in this Report, and offer to ongoing educational programs to assist lawyers and law firms to proactively manage the process of change. To this end, the State Bar should invest in demographic and economic studies of law practice in New York that will permit lawyers and their clients to make informed decisions about practice delivery and billing options.

As the marketplace for legal services evolves, lawyers and law firms need to develop new models of providing legal services, which will look and feel different from the practices of the recent past. The largest firms will grow even larger than they are today, reflecting a decades-long trend and continued trend towards consolidation. Clients will expect and demand changes in the way that legal services are delivered to them and the way they pay for services.

A new value proposition based on performance objectives rather than on time will emerge to govern the delivery of legal services. Over time, the value of legal work will be measured by the outcome obtained by the lawyer as perceived by the client, compared to the

prior value proposition based upon the cost of time to the lawyer. Law firms will re-engineer the delivery of legal services in a variety of ways, leading to new methods of charging for services and billing. Hourly billing will not disappear, but it will be utilized in fewer situations.

The role of lawyers and law firms will continue to change, particularly as the delivery of legal information becomes increasingly available to lay people through the Internet, including both legal and nonlegal Web sites. Practice systems will deliver routine legal services, supported by lawyers and staff who perform repetitive tasks, and with the aid of electronic delivery systems. General practitioners, as popularly conceived, will increasingly be replaced by specialized lawyers who serve narrow practice areas.

There will be winners and losers in this evolving marketplace as free market forces will cause less-efficient law practices to dissolve and more efficient law practices to thrive. Lawyers and law firms will have to be proactive, insightful, and aggressive in charting a course in these unknown waters. Those who wait for change and hope to react will not be able to navigate a sustainable course in the future. This Report represents a starting point for New York lawyers as they venture forth.

EDUCATING AND TRAINING NEW LAWYERS

Introduction

The current educational and structural model for preparing law students and forming new legal professionals is under fire on many fronts. Educational experts criticize law school teaching for its reliance on passive learning in the classroom, focus on appellate cases and failure to prepare students for the real life experience of representing clients and practicing law. Critics also point to the failure to focus on learning outcomes and lawyer competencies as well as the absence of appropriate assessment and evaluative measures of competency. In addition to pedagogical critiques, consumer advocates complain that entering law students do not have a realistic understanding of what a career in the law truly entails including a realistic perspective on work/life demands and the financial burdens and benefits.

Meanwhile, structural critics of law schools forecast the end of the current business model of law schools.³⁴ That forecast is based on a combination of economic factors including the pervasiveness of US News and World Report rankings and the need to create scholarly output valued there, the tension between directing curriculum at state bar licensing requirements and fully preparing students to represent real clients, and the inconsistency between legal employer hiring criteria and the demand for “practice-ready” lawyers.

Post-law school professional development is also often deficient. Employer-created training programs remain rare and extremely costly, while state CLE transitional

³⁴ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 129 (2007). Rachel J. Littman, *Training Lawyers for the Real World: Part 1*, 82 N.Y. ST. B. ASS’N J. 7, 20–24 (Sept. 2010); Richard A. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (Or Anyone Else)?*, 82 N.Y. ST. B. ASS’N J. 9, 20–26 (Nov. 2010), available at http://www.nysba.org/AM/Template.cfm?Section=Bar_i_Journal_i_&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43636.

programs are often inadequate to bridge the gap between law school and practice. Although mentorship is often cited as a mechanism for providing corrective formation, modeling and support, the work/life imbalance of most new lawyers provides little incentive or opportunity to seek out additional hours of formation.

There is no simple solution to these complex and interwoven issues. However, the Task Force has identified eight areas where NYSBA can help shape and improve the professional formation of young lawyers. Instead of the clichéd approach of fingerpointing between and among law schools, employers and the bar, our committee endorses an approach in which the various sectors work together to undertake the professional formation of young lawyers.

Innovations in Training and Development

I. IDENTIFYING, ASSESSING AND SHAPING GOOD PROFESSIONAL DEVELOPMENT: MAKING BETTER LAWYERS FASTER

We used to think that being a good lawyer meant knowing the law. Today we are more likely to think that good lawyers know how to do useful things with the law. Society has shifted from a static understanding of professional competence as memorized knowledge to a dynamic conception of lawyers adding value through judgment and their ability to manage and solve complex problems. This dynamic conception of lawyering is both promising and demanding. More is expected of lawyers today and these heightened expectations are particularly stressful for young lawyers. Too many law students and recent graduates are not as well prepared for the profession as they might be. Law schools, bar examiners, the judiciary and the bar owe more to our young colleagues in these difficult times.

We have not, of course, ignored these problems. Legal education and post-graduate training have changed significantly in the past thirty years. Most law school faculty

now include significant numbers of clinical teachers and faculty who combine law degrees with other academic credentials. Mandatory CLE is now common, many large firms and institutional practice settings have devoted significant resources to training and management of human capital. Courses in transactional law, mediation, and arbitration are now mainstays of the law school curriculum. We have become much more intentional and strategic in our efforts to prepare lawyers for practice and to help them continue to develop throughout their careers.

And there is much more we can do. Recently, interesting and useful suggestions have been made in the related areas of understanding, assessing and certifying lawyers' readiness to meet the demands of contemporary practice. The basic impulse is that if we can sharpen our understanding of our goals – usefully understand the competencies, skills, knowledge, practices and values of a good lawyer and; if we can sharpen our ability to measure progress toward those goals and; if we can align systemic incentives that flow from the bar exam with the practices best aimed at achieving our goals, then we will improve our system for forming young lawyers. Recently, several different organizations have begun or proposed significant initiatives in each of these areas and we urge NYSBA to engage with these projects.

II. UNDERSTANDING THE SKILLS AND VALUES OF A LAWYER: THE MODEL COMPETENCIES PROJECT

We urge NYSBA to participate in the Model Competencies Project recommended by the recent ALI-ABA ACLEA Critical Issues Summit.³⁵ This project is an opportunity to continue important work pioneered by the MacCrate Commission and which continues today.

As contemporary practice grows more complex and demanding, law schools, law firms, law

³⁵ ALI-ABA, *Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21st Century—Final Report* (Charles C. Bingaman, ed. 2009), available at <http://www.nobc.org/uploadedFiles/Announcements/ALIABA%20Final%20Report.pdf> [hereinafter *ALI-ABA Final Report*].

examiners, CLE providers and others concerned with the continued professional development of lawyers have ever greater needs for a deeper and more useful understanding of the knowledge, skills, values, habits and traits that make up the successful modern lawyer. It is not enough to say a lawyer must know the law. It is not even enough to say a lawyer must know the law and seek justice. Those who are in the business of developing professionals need more precise assessment tools that reflect our best current understanding to assess and guide our efforts that reflect our best current understanding of what skills, aptitudes, values and habits a contemporary lawyer should optimally possess.

The model of the lawyer as an expert problem solver began to emerge in the legal academic literature in the 1980s.³⁶ Academics and others began to conceptualize professional formation as a complex process involving an ongoing cycle of abstract learning and engagement with professional practice. That cycle permits each professional to develop individualized cognitive structures which enable the rapid problem solving that characterizes expertise. Experts don't just know more than novices, they are able to do more with the knowledge they possess.³⁷

As this conceptual framework began to emerge, lawyers both in and outside of the academy began to ask about the particular nature of lawyers' expertise. While it has long been clear that the lawyers most members of the profession admire knew something much more than

³⁶ See DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991) (noting that lawyers solve clients' problems in the world using the law); Anthony G. Amsterdam, *Clinical Legal Education: A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984) (invoking the language and models of Newell & Simon).

³⁷ One of the best and earliest applications of the general model to lawyering is Gary Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 318 (1995). For a more theoretical application, see Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 VT. L. REV. 1 (1998). For other work on lawyering as judgment, see Alex Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161 (2002).

just the law as a body of doctrine,³⁸ the emergence of the professional expertise model, along with the profession's renewed commitment to ethics in the aftermath of the Watergate scandal, fueled the drive to better understand what it is that lawyers know and the distinctive things they can or should be able to do with that knowledge.

Developing useful assessment tools in connection with this new paradigm is a similarly complex matter. Understanding the process of developing and exercising judgment has challenged thinkers since Aristotle.³⁹ We have learned that aspiring lawyers develop expert judgment by acquiring knowledge and skills as they join a community of practice distinguished by its shared commitments to a set of values, traditions and practices. Those shared commitments are often contested at the margins and may sometimes be quite diffuse but have a well recognized core. While learning the law, or some areas of the law, is indispensable to those who wish to enter the legal profession, the process of becoming an American lawyer requires something more complex than learning to recite rules. The process of developing judgment is individualized, difficult and time consuming. Contemporary research suggests that while the development of expertise has a steep initial learning curve, lawyers and other professionals continue to develop as experts for as many as ten years.⁴⁰

³⁸ A number of works can be understood as efforts to capture how lawyers add value and solve problems by doing something more than just applying legal doctrine and resolving legal disputes. *See, e.g.*, L. BRANDEIS, *Business—A Profession*, in *BUSINESS—A PROFESSION* (1914); L. BRANDEIS, *The Opportunity in the Law*, in *BUSINESS—A PROFESSION* (1914); KARL LLEWELYN, *THE BRAMBLE BUSH: ON LAW AND ITS STUDY* (1960); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

³⁹ Mark Neal Aaronson, *We Ask You to Consider: Learning about Practical Judgment in Lawyering*, 4 *CLINICAL L. REV.* 247, 258–61 (1998).

⁴⁰ The modern conception of the professional as expert grows from the groundbreaking work of Allen Newell and Nobel Prize-winning economist Herbert A. Simon. ALLEN NEWELL & HERBERT A. SIMON, *HUMAN PROBLEM SOLVING* (1972). Another important voice is DONALD A. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983). For work in the process and length of

The key contemporary effort to describe what a lawyer should know and be able to do was the ABA's groundbreaking Statement of Skills and Values by the MacCrate Commission.⁴¹ The MacCrate Report was important in many ways and focused all of us - the profession, the academy, the bench and all lawyers - on the ways lawyering requires the integration of multiple dimensions of knowledge and skills, a process that begins in law school and continues throughout one's professional life. Lawyers need substantive knowledge, they must be able to use that substantive knowledge, they must be able to communicate, persuade, advise, draft and collaborate, all the while keeping track of their ethical obligations to clients, others and society.⁴² It is a complex process. But it is one that American lawyers have accomplished, with more or less success, since they laid the foundations for our extraordinary nation.

The MacCrate Report's Statement of Skills and Values had real and important impact on law schools, lawyers and our understanding of the process of professional development. While many other currents and thinkers played a role, it is safe to say that MacCrate played a key role in moving law schools⁴³ to act upon the new conception of what lawyers need to know, which took us from a more static view of lawyers as repositories of legal knowledge to a contemporary dynamic view of lawyers as skillful agents who exercise judgment

time, see THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE (K. Anders Ericsson et al., eds., 2006). Perhaps the best-known contemporary popular treatment of these issues is MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2007).

⁴¹ ABA SEC. LEGAL EDUC. & ADMISSIONS B., LEGAL EDUC. & PROF. DEV.: AN EDUC. CONTINUUM (1992) [hereinafter MACCRATE REPORT].

⁴² For an intriguing recent discussion of the range of lawyering competencies, see Shultz & Zadek.

⁴³ The MacCrate Report contemplates a continuum of life-long learning and urged continued focus on professional growth through enhanced CLE and other measures. The Report seems to have had more impact among law schools than among others involved in professional development.

in several related realms to get things done. Indeed, in contemporary society, many have easy access to information that used to be expensive and often almost impossible to gain if one was not a professional. So lawyers must do something more than say what the law is if they are to add value for clients and society.

The effort to understand what lawyers should know and be able to do did not stop with the MacCrate Report. Within the academy, others continued to refine the picture.⁴⁴ Many law firms have developed their own inventories of competencies, seeking to better understand how they can maximize value for clients and best develop their human capital.⁴⁵ Some of the most significant current efforts to refine our understanding of what lawyers know and do are occurring as part of the ongoing review of the ABA Accreditation Standards for Law Schools.⁴⁶

But as important as each of these ongoing efforts is, each part of the larger system remains isolated. Law schools use one set of words, the ABA pursues a related but distinct agenda for defining lawyerly competencies, law firms are pursuing their proprietary visions and

⁴⁴ See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 176–78 (2007). To combat these critiques, some law schools have redesigned their curricula. Justin Myers, *Golden Gate University's New 1L Curriculum*, BEST PRACTICES FOR LEGAL EDUC. L. BLOG (Dec. 18, 2009), <http://bestpracticeslegaled.albanylawblogs.org/2009/12/18/golden-gate-universitys-new-1l-curriculum/>; Justin Myers, *Washington & Lee's New 3rd Year Curriculum*, BEST PRACTICES FOR LEGAL EDUC. L. BLOG (Dec. 21, 2009), <http://bestpracticeslegaled.albanylawblogs.org/2009/12/21/washington-lees-new-3rd-year-curriculum/>; Scherr, *supra* note 16; Aaronson, *supra* note 13.

⁴⁵ HEATHER BOCK & ROBERT RUYACK, CONSTRUCTING CORE COMPETENCIES: USING COMPETENCY MODELS TO MANAGE FIRM TALENT (ABA-CLE Career Resource Center 2007).

⁴⁶ The Special Report on Outcome Measures and the ongoing work of the Outcome Measures Subcommittee of the Standards Review Committee of the ABA Section on Legal Education are two important efforts in this area. Catherine L. Carpenter et al., *Report of the Outcome Measures Committee*, ABA SEC. LEGAL EDUC. & ADMISSIONS B. (2008), available at <http://www.abanet.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf>; ABA, *Standards Review Committee*, <http://www.abanet.org/legaled/committees/comstandards.html> (last visited Nov. 17, 2010).

many others responsible for lawyer training and development remain outside these valuable but entirely discrete projects.

The recent ALI-ABA Critical Issues Summit issued a call for a collaborative effort among representatives from law schools, the practicing bar, legal employers, bar associations, bar admissions, MCLE regulators, CLE providers and in-house professional development to design a model approach to lawyer competencies. This important initiative would, in many ways, continue the important work of the MacCrate Commission, building upon that foundation to further refine our understanding of what lawyers need to know and be able to do. Developing a more broadly shared understanding of competencies would be a key step toward strengthening the continuum of legal education and professional development. That stronger system, in turn, would better help law students and lawyers meet the evolving challenges of our profession and our society.

We recognize that many challenges must be met to make the model competencies effort useful. How we understand the relationships among different realms is a complex question. Are skills and values separate or must skills always be understood within the context of values? Are the affective and social components of lawyering to be treated independently or as subparts of skills such as communication and collaboration? Is abstract knowledge privileged or just another of many co-equal ingredients? Level of specificity, organization and what to leave out are always hard questions in a project like this. But it is clear to us that prior efforts to answer these questions have yielded real and important gains for law schools, law firms and others concerned with professional development. If we don't know what we are trying to accomplish, we cannot plan intelligently. Nor can we measure our successes and failures.

These complex questions also pose more practical questions about both the approach and the process of moving forward. What is “practice-ready” in a profession where there is a myriad of practice types in the law firm setting and an apparent preference in the legal marketplace for specialist practitioners? What will be needed to bring together academicians and the practitioners who are in the business of teaching, training and employing lawyers and encourage agreement on what values, skills and knowledge make a lawyer “practice-ready”? What is the role of law schools, employers, and CLE providers in preparing attorneys for practice in the era of change described in the preceding section – including by providing exposure to project management skills; training in information access, management, and processing using the new technology discussed in this Report; and training in efficient work process – all areas of significant importance in the changing legal landscape. What will be needed to develop a unified integrated plan for the education, training and development of lawyers who can practice effectively and with a measurable standard of excellence that is based on a model competencies approach? What will be needed to reach agreement on how the education and training responsibilities should be allocated among the schools, firms, bar associations?

III. MEASURING PROGRESS: THE PROBLEM OF ASSESSING PROFESSIONAL DEVELOPMENT

NYSBA should also foster development of useful and valid assessment tools for lawyers and law students. Assessment, when well done, is a very powerful teaching and learning tool. For some years, medicine and social work have pioneered the idea of data driven practice.⁴⁷ In more recent years, the related idea of outcome assessment has become so

⁴⁷ Hertz Cmmttee Report.

important in American education. From primary through secondary schools and into the University, regulators are asking for evidence that students are meeting the goals we have set for them.⁴⁸

Relative to other professions, the law has a relatively weak tradition of assessment.⁴⁹ Our law schools rely heavily upon final exams and outside of clinical courses do not tend to offer timely feedback from quizzes, tests, papers or other tools while the course is ongoing and there is still time to adjust one's approach.⁵⁰ Particularly in the first year, our schools remains dominated by a single form of summative or grading assessment, the canonical three essay exam, perhaps leavened with some multiple choice or short answer questions.

Once students graduate from law school, the picture does not improve. The bar exam does not claim to assess readiness for practice and CLE providers are quite ill positioned to provide meaningful, useful feedback. There is much that should be done to improve assessment and use it to help law students and young lawyers better prepare themselves to be lifelong learners and ever improving professionals.

Of course assessment, even when well done, cannot address all the challenges of professional development. And we must be careful to find efficient, valid modes of assessment. Not everything that is important can be measured, and not everything that can be measured is important. But law schools, bar examiners, CLE providers and others concerned with

⁴⁸ [Assessment Handbook?](#)

⁴⁹ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter THE CARNEGIE REPORT].

⁵⁰ Educational theorists distinguish between formative assessment, which occurs during learning and is designed to help students improve their performance, and summative assessment, which occurs at the end of a course and measures how much the student has learned. STUCKEY ET AL., *supra* note 21, at 191.

professional development have already begun to experiment with new modes of assessment.⁵¹ NYSBA should encourage these efforts and help our profession develop a stronger culture of assessment and critical reflection, a direction also urged by the ALI-ABA Critical Issues Summit.⁵²

Accordingly, we recommend that NYSBA study the issue and consider commenting in the ABA process and working with CLE providers or others to develop and share assessment ideas.

Influencing Preparation for Practice

I. STRENGTHENING COURT OF APPEALS RULES GOVERNING CLINICAL AND PRACTICAL COURSEWORK AND ENCOURAGING CAPSTONE CURRICULA.

At a time when the bench and bar are continually decrying the lack of training and preparedness of law graduates for the competent and ethical practice of law, it is surprising that the state with the largest bar in the country still imposes significant express restrictions on clinical and practical skills training for law graduates seeking admission to its bar. New York Bar Rule (N.Y. Ct. App.) 520.3(c)(1)(i) limits to 20 credit hours the number of credits in “courses related to legal training or clinical courses” that can be counted toward the 80 minimum credit hours required for admission to the New York State Bar. We are not aware of any other state bar that so drastically limits admission to its bar to students that it deems to have received too much clinical or practical skills training in the required hours of study.

⁵¹ See, e.g., Clark D. Cunningham, *Legal Education After Law School: Lessons from Scotland and England*, 33 *FORDHAM URB. L.J.* 193, 196–99 (describing Scottish advances in assessing readiness for practice).

⁵² *ALI-ABA Final Report*, *supra* note 12, at recommendations 1–2.

Contrast the NY Court of Appeals Rules with the American Bar Association Accreditation Standard 304 that requires at least 45,000 minutes of instruction in “regularly scheduled class sessions.” Interpretation 304-3 states that this includes minutes “in a law school clinical course . . . so long as (i) the clinical course includes a classroom instructional component, (ii) the clinical work is done under the direct supervision of a member of the law school faculty or instructional staff whose primary professional employment is with the law school, and (iii) the time and effort required and anticipated educational benefit are commensurate with the credit awarded.”

Unlike the Court of Appeals’ “classroom” approach, the ABA has recognized the value of law school work that does not necessarily occur in an actual classroom. Under the ABA rules, the “classroom” includes places where students are directly or indirectly supervised on lawyering activities, such as meeting with clients in and outside of the clinic, meeting with clients in court, and interacting with clients in settings outside of the law school. The interpretation that these minutes count as “regularly scheduled class sessions” so long as the students’ clinical work is under the direct supervision of law school faculty or instructional staff whose full-time employment is with the law school is consistent with the value of clinical legal education as recognized by the Carnegie Report and Best Practices. It is time for New York State to recognize the value of clinical hours and to change its approach.

The Court of Appeals should amend its accreditation rules to emphasize how to apply theory and doctrine to actual practice, as well as encourage the process of developing professional judgment. These are critical skills that all newly admitted lawyers should have as they embark on their legal careers. The first step in accomplishing this would be to amend Rule 520.3(c)(1)(i) to eliminate the 20 hour maximum limit. As the rule stands, students are

discouraged from taking clinical courses and law schools are forced to separate clinical courses from the rest of the law school curriculum.

We do not suggest to create a situation in which law students abandon the traditional classroom or return to the apprenticeship model. For example, as a matter of policy, law schools should avoid providing academic credit to students used as unpaid labor by for-profit entities which offer no serious feedback, assessment and/or training on lawyering skills. The amended rule should be carefully crafted to provide for expanded clinical programs and rigorous certification processes for supervisors in clinic or field-placement programs, analogous to what is done in social work programs. The overreaching goal is to encourage students to participate in the clinical and other courses that will provide them with the necessary skills to apply their knowledge in practical settings.

In addition to clinical experiences, capstone courses should be encouraged. Capstone courses are designed to reflect real world scenarios that integrate doctrine, skills, and theory into legal education. They “build on previous learning, require students to be responsible for their learning, and encourage reflection on legal ethics, professionalism, and what they learned.”⁵³ Capstone curricula “require students to produce manifestations of their learning, including written briefs, contracts, papers, or a videotaped trial or negotiation”⁵⁴ and allows for many opportunities for students to receive individual assessment and feedback. It also requires students to manage more complex tasks than those presented in the classroom.

⁵³ John O. Sonsteng, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WILLIAM MITCHELL L. REV. 1, 104 (2007).

⁵⁴ *Id.*

In capstone classes, “[s]tudents will develop an expertise as a result of a systematic and progressively sophisticated study of a discrete area of practice Substance and method can be taught and learned in a thoroughly harmonious and complimentary fashion. Capstone courses with significant writing, clinics and other practical exercise will ease the student’s transition to practice.”⁵⁵ These courses are used in the third year of law school as a culmination of legal education and to provide a new attorney the skills to “self-direct” his or her learning in the future.⁵⁶

II. STRENGTHENING THE NEW YORK STATE BAR EXAM’S ASSESSMENT AND LICENSING REQUIREMENTS

The New York State Bar Exam (“Bar Exam”) is our primary assessment and credentialing tool. It is a good test of substantive knowledge, abstract analysis and exam writing skills. These are not inconsiderable aspects of competent lawyering. But many urge that the test could be more efficient in those areas and expand its scope to a range of other skills lawyers need. The Bar Exam also has an important role in diversifying our profession and significant attention must be paid to those concerns. And, of course, the Bar Exam has a powerful effect on law school curriculum, teaching methods and student selection at many law schools. For these and other reasons, many look to improving the Bar Exam as a key step in meeting the challenges faced by our profession. Strong as it is, the Bar Exam could better align with the best current thinking on measuring and incentivizing best practices in legal education.

A very useful and thoughtful discussion of these issues is the very recent report of the NYSBA Special Committee to Study the Bar Examination and Other Means of Measuring

⁵⁵ Jeffrey E. Lewis, “Advanced” *Legal Education in the Twenty-First Century, A Prediction of Change*, 31 U. TOL. L. REV. 655, 658–59 (2000).

⁵⁶ Sonteng, *supra* n. 48, at pg. 103.

Lawyer Competency⁵⁷ (the “Kenney Report”). This carefully documented report examined a number of studies, including, among others, the MacCrate Report,⁵⁸ the Davis Committee Report,⁵⁹ the Millman Report⁶⁰ and the Klein study.⁶¹

Based on those reports and its own careful analysis, the Kenney Report notes that the current exam “remains much too heavily focused on test takers’ ability to memorize an enormous volume of legal rules and principles rather than to deploy other important skills,”⁶² and made these recommendations: (1) streamline the current bar exam to more efficiently test for the core of legal rules lawyers need to have at their command when beginning practice; and (2) experiment with assessing some of the range of skills not currently addressed.⁶³ With regard to the second prong, the Kenney Report urged aiming at (i) identifying and admitting those students who will be competent lawyers but are unable to pass the Bar Exam without great difficulty under the existing regime; (ii) identifying additional requirements that can be tested using time

⁵⁷ New York State Bar Association, *Report of the Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competency* (2010) (forthcoming 2011) [hereinafter Kenney Report].

⁵⁸ MACCRATE REPORT, *supra* note 18.

⁵⁹ Committee on Legal Education and Admission to the Bar, *Report on Admission to the Bar in New York in the Twenty- First Century — A Blueprint for Reform*, 47 RECORD ASS’N B. CITY N.Y. 464 (1992) [hereinafter Davis Committee Report].

⁶⁰ Jason Millman et al., *An Evaluation of the New York State Bar Examination* (1993) [hereinafter Millman Report].

⁶¹ Stephen P. Klein, *Reader and Panelist Judgments Regarding the Passing Score on the New York Bar Exam* (1992), available at <http://www.nysba.org/> (click on Sections/Committees in left column; click “view committees;” scroll down and select “Special Committee to Study the Bar,” click “Klein Report Feb 2002.”).

⁶² Kenney Report, *supra* note 30, pg. 4.

⁶³ *Id.*

and effort saved by modifying the existing exam; and (iii) identifying requirements that law schools can satisfy.⁶⁴

In addition to these recommendations, the Kenney Report addressed a range of other important issues. We note the crucial issue of diversity.⁶⁵ Our profession must continue its commitments to openness, pluralism and diversity. Many other voices have expressed concern about the significantly lower first time pass rate for test takers of color. Useful discussion of these issues is found in both the Davis Committee Report and the Millman Report.⁶⁶ Since the Millman Report, the passing score on the Bar Exam has been raised and there are renewed concerns about diversity.⁶⁷

Accordingly, we recommend that NYSBA give very serious consideration to the analysis and recommendations of the Kenney Report. In particular, we urge attention to the very difficult issue of disparate results for test takers of color and note recent work suggesting that purely situational factors may play a larger role than previously thought in the underperformance of certain groups.⁶⁸ We also urge experimentation to begin to build capacity to expand the scope

⁶⁴ *Id.*

⁶⁵ See *id.* at 4-5.

⁶⁶ *Id.* at 16-20.

⁶⁷ The Kenney Report presented updated statistics, as cited in other studies conducted since the increase of passing score, that demonstrated that in July 2005 the five-point increase in the passing score did indeed result in a 3.9% decline in pass rates for Black candidates. Kenney Report, *supra* note 30, at 28 (quoting Letter from Mark H. Alcott, President of the New York State Bar Association, to Honorable Judith S. Kaye (Nov. 29, 2006)). However, the Kenney Report also noted that this impact of the increase in the pass score diminished over time, with the passage rate of Blacks who initially failed the bar exam increasing to 72.3% in February 2006 and 75.1% in July 2006. *Id.* at 28–29. Nonetheless, it was clear that although the pass rate of Blacks and other ethnic minorities increased over time, the pass rate of Blacks was still much lower than that of Caucasian/Whites “(72.3% vs. 92.1% in February 2006).” *Id.* at 29.

⁶⁸ See generally, Rachel Godsil, *Stereotype Threat and the LSAT: Understanding and Overcoming Social Psychological Barriers to Successful Law School Performance by African American Students* (Sept. 23, 2010) (work in progress on file and cited with permission of author) (arguing that stereotype threat and

of competencies assessed. Valid testing is complex and demanding. The urge to leave well enough alone in so technical an area is strong and rapid change is probably unwise. But we must seriously examine our assumptions about the Bar Exam if we are to make progress in meeting the challenges we face.

As in the other two areas, the challenge is to build upon the strength of the Bar Exam to address concerns about whether all bar passers are ready for the responsibilities of a law license. The Bar Exam is not responsible for the shortcomings in our system of professional formation, but it could be a powerful tool for addressing them.

Helping New Lawyers Form a Professional Identity

The training and development of a new lawyer should reflect both an understanding of the professional skills and attributes necessary to be an effective lawyer and a commitment by the entire legal community to support that training and development. Some elements of the framework for educating a new lawyer are well-recognized. Law schools have traditionally emphasized legal analysis in which a student learns general principles and doctrines that are applied to infinitely variable fact patterns. More recently, legal education has embraced a second element — an introduction to the practical skills that enable a lawyer to work with, and on behalf of, clients in addressing legal problems. The third element of the framework is professional identity, which encompasses ethics, or professional responsibility, and broader issues of morality and character.

Against these elements of educating new lawyers is the question of who bears responsibility for creating the learning opportunities necessary for attainment of the professional

other barriers cause significant under-prediction of the likelihood of successful law practice by African Americans and describing ongoing research at Ohio State University to measure and counter the effect).

skills and attributes of an effective lawyer. Today we are confronted with increasingly complex laws and regulations and intense economic pressures ranging from disproportionately high student debt loads to client demands for quality legal services at substantially reduced cost. Further, society's standards of conduct for discourse and interaction among diverse groups of people are continually evolving and a person's conduct is often subject to almost immediate scrutiny, whether in the mass media or through more personal, albeit often anonymous, forms of communication, such as chat rooms, hot lines, Facebook and Twitter. A central figure in this environment, whether as a source of mediating influence, a source of aggressive legal positioning, or the subject of scrutiny, is the lawyer. Society benefits greatly if a lawyer exhibits a high degree of professionalism in a variety of roles. This professionalism should be developed over a continuum with shared responsibility among law schools, starting with the admissions process and continuing through graduation; law school accreditation organizations influencing the scope of law school pedagogy; bar examiners as gatekeepers to the license necessary to practice; and the practicing legal profession itself. All must respond to the need for effective training and development of new lawyers.

This section of the Report elaborates on what is perhaps the least developed element of effective legal education — professional identity. It also explores mandatory mentoring as an approach to training which reflects the practicing bars' shared responsibility for the quality of new lawyers' work product.

Professional identity embodies two interrelated spheres of lawyer conduct. One is professional ethics, or rules of conduct for lawyers, embodied in a code of professional responsibility. It is a course of study mandated by the American Bar Association and a substantive field tested on bar exams. Rules for ethical conduct typically focus on a lawyer's

relations with clients, opposing counsel, and the courts. Examples include conflicts of interest, confidentiality of client communications, and avoiding even the appearance of professional impropriety.

A second, broader element of professional identity involves issues of morality and public responsibility. Defining morality, of course, is a subject that quickly leads to complex philosophical debate, but that does not mean the development of a new lawyer should not include consideration of the subject. As the Carnegie Report⁶⁹ makes clear, professional identity includes both character and the rules of conduct and broad matters of responsibility for clients. It includes basic honesty and trustworthiness, accurate representation of expertise, integrity, professional civility, respect for clients, compassion, commitment, working collaboratively, listening carefully, and other human qualities. Professional identity reflects a sense of responsibility toward the profession, an appreciation for the personal meaning of the practice of law, an understanding of the complexities of lawyers' roles, a context for the meaning of legal work, and an ability to demonstrate the social capacities lawyers need to work effectively. Professional identity is not confined to rules of conduct, but rather it embraces both ethics and individual and social justice. While these are values not easily taught and not typically tested on bar exams, this fact does not diminish their importance to the profession.

The Carnegie Report also considers whether lawyers have a responsibility to pursue substantive justice in individual cases and to consider the broader impact of their actions as legal advisors conflict with their responsibility to advocate on behalf of their clients. Further, it raises the complicated relationship between advocacy and a lawyer's role as counselor and the

⁶⁹ THE CARNEGIE REPORT at 129.

obligation to not just explain what is within the law, but to advise the client of the ramifications and implications of particular courses of legal action.⁷⁰ As most lawyers well understand, development of professional identity and an ability to resolve complex tensions like those mentioned above are not easily attained. On the other hand, it seems clear that all new lawyers must have exposure to the issues and be afforded experiential opportunities to learn how to evaluate and balance competing interests and, further, to assess how the role of the lawyer may affect that balance in different situations. There can be, for example, real differences between the role of a lawyer representing a criminal defendant and a lawyer advising a corporation in contract negotiations. But the judgment to discern an appropriate approach to each such issue only develops from experience.

Another objection to infusing new lawyers with a full sense of professional identity is often expressed by the faculty of many law schools. The Carnegie Report summarizes this hurdle as a view that ethical and social values are subjective and may directly conflict with the academic rigor of a law school education. Conversely, the Carnegie Report states that when faculty discuss ethical-social issues in courses and clinics, they create a student awareness of examples of approaches to the issues and allow students to reflect on their own emerging professional identity. Ultimately, the authors conclude that:

For better or worse, the law school years constitute a powerful moral apprenticeship, whether or not this is intentional. Law schools play an important role in shaping their students' values, habits of mind, perceptions, and interpretations of the legal world, as well as their understanding of their roles and responsibilities as lawyers and the criteria by which they define and evaluate professional success Even though the three years of law school represent a relatively brief period in the lifelong

⁷⁰ *Id.* at 131–32.

development of a lawyer, the law school experience, especially in its early phases, is pivotal for professional development.⁷¹

Law schools, then, can and should enhance development of professional identity over a continuum of learning opportunities, including curriculum, legal clinics, extra-curricular activities, summer jobs, and internships.

Learning opportunities, however, should not be limited to the three years of law school. Roy Stuckey in his book, *Best Practices for Legal Education*, states unequivocally that “[m]ost law graduates are not sufficiently competent to provide legal services to clients or even to perform the work expected of them in large firms.”⁷² Lawyers, of course, should be learning throughout their careers from experience, collaboration, self-study, reflection, and continuing legal education. The linkage of continued development for all new lawyers with continued learning through experiential opportunities after admission to the bar should be axiomatic for experienced members of today’s legal community. Learning beyond law school and the bar admission process involves enhanced analytical and practical skills but, importantly, also emphasizes cultivation of a level of judgment to effectively address the issues surrounding professional identity. The practice of law is highly competitive, whether viewed from the perspective of fee generation or the obligation to advocate aggressively on behalf of a client. Against these pressures are other forces, such as ethics rules, issues of social justice, and a lawyer’s own beliefs and values. Experience in forming judgments to balance these interests is a complex and challenging process even after many years of lawyering, much less in the first few years of practice.

⁷¹ *Id.* at 139.

⁷² STUCKEY ET AL., *supra* note 21.

State bar licensing authorities and bar associations give varying degrees of recognition to the need for continued training and development of new lawyers after initial admission to the bar. Examples include additional mandatory CLE in the first year(s) of practice, voluntary mentoring, bridge the gap programs and mandatory mentoring. Mentoring that is required seems to be the most comprehensive and effective way to enable a new lawyer to gain proficiency in practical skills and, particularly, to further develop a well grounded sense of professional identity.

I. MANDATORY MENTORING

A. Three approaches: Georgia, Utah, and South Carolina

Several states have implemented mandatory mentoring programs for newly admitted lawyers in their first year of practice. Georgia was the first state to enact such a program. The impetus for lawyer mentoring began in 1996, when Georgia's State Bar created the Standards of the Profession Committee and tasked it with investigating whether the Bar should require new lawyers to complete internships or other such supervised work before being admitted.⁷³ The Bar realized that law schools could not prepare new lawyers for practice without assistance, and that the Bar and its members had "a professional obligation to assist beginning lawyers in acquiring the practical skills, seasoned judgment, and sensitivity to ethical and professional values necessary to practice law in a highly competent manner."⁷⁴ In 1997, the Committee recommended to the Board of Governors of the State Bar of Georgia that a Pilot Project review whether a mentoring and a continuing legal education component could be

⁷³ *Transition Into Law Practice Program Timeline*, <http://gabar.org/public/pdf/tilpp/7-B.pdf> (last visited Oct. 22, 2010).

⁷⁴ Sally Evans Winkler et al., *Learning To Be a Lawyer: Transition Into Practice Pilot Project*, POPULAR MEDIA Paper 78, at 10 (2001), http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1079&context=fac_pm.

combined to form a “transition into practice program.”⁷⁵ The Board passed a unanimous resolution authorizing the Project, and the “Executive Council of the State Bar’s Young Lawyers Division also voted unanimously to approve the report.”⁷⁶ From there, the Pilot Project was developed and funding was obtained, and the Pilot Project was implemented in 2000 with 100 mentors and 100 new lawyers.⁷⁷ After a successful program evaluation in 2002, the Committee formally recommended that the Transition Into Practice Program be mandatory. The Board of Governors approved this recommendation and authorized the Committee to develop an implementation plan.⁷⁸ The Supreme Court of Georgia also approved the concept of the Program in 2004. The Committee developed an implementation plan, which the Board of Governors approved in 2004 and the Supreme Court approved in 2005. The mandatory Transition Into Law Practice Program took effect on January 1, 2006.⁷⁹

The Transition Into Law Practice Program combines a mentoring and a CLE component.⁸⁰ While most new lawyers are required to participate in a yearlong mentoring relationship, complete an enhanced bridge-the-gap program, and complete continuing legal education credits, this requirement is waived for certain groups, such as inactive members and attorneys practicing in other jurisdictions but admitted on motion without taking the Georgia bar exam. While judicial clerks need not comply with the Program during the course of their

⁷⁵ *Transition Into Law Practice Program Timeline*, *supra* note 56.

⁷⁶ Winkler, *supra* note 57.

⁷⁷ *Transition Into Law Practice Program Timeline*, *supra* note 56.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ State Bar of Georgia, *Transition Into Law Practice Program*, http://www.gabar.org/programs/transition_into_law_practice_program/ (last visited Oct. 30, 2010).

clerkship, they must still enroll in it.⁸¹ The CLE component “lays the groundwork for and supports the mentoring component Most beginning lawyers will attend an Enhanced Bridge-the-Gap Program that combines a day of introduction to law practice with a second day of instruction.”⁸² The second day session “focuses on the roles of attorneys in working with and counseling clients, dealing with others as representatives of clients, and negotiating for clients.”⁸³ The purpose of the mentoring component of the Program is to give new lawyers “meaningful access to an experienced lawyer equipped to teach the practical skills, seasoned judgment, and sensitivity to ethical and professionalism values necessary to practice law in a highly competent manner.”⁸⁴ The mentoring program is of no additional cost to new lawyers; the State bar funds it. New lawyers simply pay for the “regular CLE fee for the twelve-hour CLE component” for the entire program.⁸⁵

Three types of mentoring are available. If the new lawyer practices in a firm or organizational setting, he or she will have an “inside mentor” from that practice. If the new lawyer does not practice with other lawyers (for instance, is a sole practitioner), he or she will

⁸¹ State Bar of Georgia, *Mentoring*, http://www.gabar.org/related_organizations/chief_justices_commission_on_professionalism/mentoring/ (last visited Oct. 23, 2010); State Bar of Georgia, *Information for Beginning Lawyers*, http://www.gabar.org/programs/transition_into_law_practice_program/beginning_lawyers/ (last visited Oct. 30, 2010).

⁸² STATE BAR OF GEORGIA, TRANSITION INTO LAW PRACTICE PROGRAM: EXECUTIVE SUMMARY 2 [hereinafter EXECUTIVE SUMMARY] (July 21, 2005), available at <http://gabar.org/public/pdf/tilpp/7-G.pdf>.

⁸³ *Id.* Regulation (1)(C)(i) to State Bar Rule 8-104(B) requires new attorneys to attend mandatory CLE events, while Regulation (1)(C)(ii) to State Bar Rule 8-104(B) requires that new attorneys have a mentor for one year and complete a “Mentoring Plan of Activities and Experiences.” State Bar of Georgia Commission on Continuing Lawyer Competency, *Inside Mentoring Manual* [hereinafter *Inside Mentoring*] 6 (2009), available at http://gabar.org/public/pdf/tilpp/IM_Manual.pdf.

⁸⁴ *Inside Mentoring*, *supra* note 66, at 20.

⁸⁵ EXECUTIVE SUMMARY, *supra* note 65, at 10.

have an “outside mentor” — someone who works outside of the new lawyer’s office.⁸⁶ Group mentoring is available when the new lawyer is unemployed or does not work in a legal setting. Some firms, government agencies, and other organizations have developed their own “Master Mentoring Plans” that they use for all newly admitted attorneys subject to the Transition Into Law Practice Program. If an employer has such a plan, then the mentor and mentee need not create and submit a written mentoring plan.⁸⁷ Some differences exist between inside and outside mentoring. For instance, in inside mentoring, the new lawyer’s employer designates an inside mentor volunteer,⁸⁸ whereas in outside mentoring, the new lawyer nominates his or her mentor or notifies the program director that a mentor is needed.⁸⁹ To qualify as a mentor, an individual must be an active member of the Georgia bar; have been admitted to practice law for at least five years; maintain a professional reputation; have not been disbarred, suspended, or otherwise sanctioned during the ten years before serving as a mentor; and have professional liability insurance with “minimum limits of \$250,000.00/\$500,000.00, or, if applicable, the equivalent to such coverage through the legal status of his or her employer.”⁹⁰ Georgia’s Supreme Court has

⁸⁶ See *Information for Beginning Lawyers*, *supra* note 64.

⁸⁷ INSIDE MENTORING, *supra* note 66, at 9.

⁸⁸ *Id.* at 11.

⁸⁹ State Bar of Georgia Commission on Continuing Lawyer Competency, *Outside Mentoring Manual* [hereinafter *Outside Mentoring*] 11 (2009), available at http://gabar.org/public/pdf/tlpp/OM_Manual.pdf. Additionally, communications between an inside mentor and a mentee may be confidential depending on the firm’s or office’s policies. In contrast, communications between the outside mentor and the mentee are not confidential. Beginning lawyers may not ask outside mentors case-specific questions or give the mentor names of clients, and must deal with problems in a hypothetical manner. *Id.* Furthermore, outside mentors do not supervise the new lawyer’s practice of law, whereas inside mentors may supervise the new lawyer’s work depending on the firm’s or office’s policy. *Id.*

⁹⁰ GA ST. B. RULE 8-104(B), Reg. 6, available at http://gabar.org/handbook/part_viii_continuing_lawyer_competency/rule_8-104_education_requirements_and_exemptions/.

the sole authority to appoint mentors, though the Standards of the Profession Committee may nominate qualified individuals.⁹¹

The only activity that mentees must complete (in the mentoring context) is the Advocacy Experience, and only if they appear as sole or lead counsel in Georgia's Superior or State Courts in a contested civil case or a criminal trial.⁹² In that case, mentors and beginning lawyers must develop mandatory advocacy experiences, such as an actual or simulated witness deposition or an actual or webcast appellate argument in the Supreme Court.⁹³ Three of the five credits required may be obtained prior to admission, after the new lawyer's completion of sixty percent of the credit hours needed for graduation from law school.⁹⁴ In addition to the advocacy experience, mentoring activities and experiences may be created to best suit the needs and circumstances of the mentor and mentee. However, the plan must include:

- Regular contact and meetings between the mentor and beginning lawyer;
- Continuing discussions between the mentor and beginning lawyer on at least the following topics: (i) Ethics and professionalism; (ii) Relationships with clients, other lawyers (both in and outside the firm), the judiciary and the public, including unrepresented parties; (iii) Professional work habits, organizational skills and practice management; (iv) Economics of practicing law in the relevant practice setting; (v) Responsibility and opportunities for pro bono work, bar activities, and community service;
- Introduction to the local legal community;

⁹¹ *Id.*

⁹² EXECUTIVE SUMMARY, *supra* note 65, at 10.

⁹³ State Bar of Georgia, *Rule 8-104: Education Requirements and Exemptions*, http://gabar.org/handbook/part_viii_continuing_lawyer_competency/rule_8-104_education_requirements_and_exemptions/ (last visited Oct. 30, 2010).

⁹⁴ *Id.*

- Specific planning for professional development and continuing legal education within and outside the firm; and
- Periodic evaluation of the mentor-beginning lawyer relationship.⁹⁵

If the lawyer fails to complete the mentoring program within one year, he or she must complete an approved Rehabilitation Plan or attend a session of the State Bar's Ethics School.⁹⁶

Utah's mentoring program, known as the New Lawyer Training Program (NLTP), is designed to match new lawyers with more experienced lawyers for training during their first year of practice in professionalism, ethics, and civility; to assist new lawyers in acquiring the practical skills and judgment necessary to practice in a highly competent manner; and to provide a means for all Utah attorneys to learn the importance of organizational mentoring, including the building of developmental networks and long-term, multiple mentoring relationships.⁹⁷

NLTP completion is required of all newly admitted lawyers with an active license, except those completing judicial clerkships, who may defer the program until after the completion of the clerkship.⁹⁸ NLTP is a yearlong program and replaces the first year of Utah's New Lawyer Continuing Legal Education program (NLCLE).⁹⁹ After the lawyer completes the NLTP, he or she will receive 12 hours of NLCLE credit.¹⁰⁰ The cost of the entire NLCLE

⁹⁵ EXECUTIVE SUMMARY, *supra* note 65, at 11. For a sample Mentoring Plan, see *id.* at 20–27.

⁹⁶ *Id.* at 12.

⁹⁷ Utah State Bar, *New Mandatory Mentoring Program*, <http://www.utahbar.org/nltp/> (last visited Oct. 30, 2010).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

program, including the mentoring component, is \$300. Half is paid upon enrollment and the other half is paid upon completion.¹⁰¹

The NLTP involves three types of mentoring: inside mentoring, where the new attorney's mentor is located within the new attorney's workplace; outside mentoring, where a mentor is appointed from outside of the new attorney's workplace; and circle mentoring, which "involves group discussions among new lawyers and mentors when deemed advisable or necessary by the NLTP administrator."¹⁰² Utah's Supreme Court appoints qualified mentors and places them on a list. The new lawyer, the new lawyer's workplace, or both, will choose a mentor from the list. New lawyers will be assigned an inside mentor whenever possible.¹⁰³ While new lawyers may request a mentor who is not on the list, he or she will have to submit an application for approval by the Utah Supreme Court.¹⁰⁴ In order to be a mentor, the individual must meet a number of criteria, including "[having] seven years of practice; no past or pending formal discipline proceeding of any type or nature; malpractice insurance in an amount of at least \$100,000/\$300,000, if in private practice; and approval by the Supreme Court's Advisory Committee on Professionalism."¹⁰⁵ Mentors receive 12 CLE credits for participating in the NLTP.¹⁰⁶

¹⁰¹ Utah State Bar, *New Lawyer Training Program Manual* 15 (2008), available at <http://www.utahstatebar.org/nltp/assets/manual.pdf>.

¹⁰² *New Mandatory Mentoring Program*, *supra* note 80.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

The mentor and the new lawyer will work together to develop a mentoring plan. Certain subjects are mandatory, such as working with clients, while others are elective, such as negotiation.¹⁰⁷ For both mandatory and elective subjects, new lawyers have a variety of activities that they either must or may complete.¹⁰⁸ For instance, the Model Plan states that in the required ‘working with clients’ section, the mentor must “[t]rain, through discussion and client interaction, how to screen for, recognize, and avoid conflicts of interest,” and may “[t]rain on how to decide whether to accept a proffered representation.”¹⁰⁹ After the mentor and new lawyer develop a particularized mentoring plan, they must submit it for approval by the NLTP program administrator and the New Lawyer Training Committee.¹¹⁰ Once the plan is approved, the new lawyer has twelve months to complete the NLTP.

After the new lawyer has participated in the NLTP for one year and has completed all of the mentoring plan’s requirements, the mentor will certify to the Bar and the Utah Supreme Court, in writing, that the new attorney has completed the program.¹¹¹ If the mentor does not so certify, the new lawyer must contact the NLTP administrator to develop a plan to complete the NLTP and to ascertain whether his or her license renewal is jeopardized.¹¹²

¹⁰⁷ See generally Utah State Bar, *Model Mentoring Plan*, available at http://www.utahbar.org/nltp/assets/Model_Mentoring_Plan_2010.pdf.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 10.

¹¹⁰ *New Mandatory Mentoring Program*, *supra* note 80.

¹¹¹ *Id.*

¹¹² *Id.*

Finally, in 2008, the South Carolina Supreme Court created the Lawyer Mentoring Second Pilot Program.¹¹³ Pursuant to the Supreme Court's order, all lawyers admitted to the South Carolina bar between "March 1, 2009 and January 1, 2011 are required to participate in the mentoring program during their first year of practice."¹¹⁴ All new lawyers, even those who are currently unemployed, must register for the Program. Exceptions to participating in the Program include if the new attorney is not a resident of South Carolina or does not practice in the state.¹¹⁵ New lawyers participating in full-time, non-permanent judicial clerkships may apply for a deferment.

New lawyers are free to choose their mentors from within their firm or agency, or they may choose outside counsel. Mentors must:

- be active members of the South Carolina Bar or inactive/retired members who have taken that status within the preceding two (2) years;
- have five (5) years of practice experience (litigation experience is not required);
- have a good reputation for professional behavior; and
- must not have been publicly reprimanded in any jurisdiction within the past ten years or suspended or disbarred from the practice of law at any time.¹¹⁶
- Unlike in Utah and Georgia, mentors are not required to carry malpractice insurance. Mentors must apply and be approved by the Commission on Continuing Legal Education and Specialization, and once approved may serve as mentors for up to five years.¹¹⁷ The mentoring program is one year long and upon completion, the new lawyer must file a certificate of completion,

¹¹³ Supreme Court of South Carolina: Chief Justice's Commission on the Profession, *Lawyer Mentoring Second Pilot Program*, <http://www.commcle.org/MentoringProgram.html> (last visited Oct. 30, 2010).

¹¹⁴ Supreme Court of South Carolina: Chief Justice's Commission on the Profession, *Frequently Asked Questions*, <http://www.commcle.org/MentorPDF/MentoringFAQs2.html> (last visited Oct. 30, 2010).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

signed by the mentor, with the Commission. If the program is not completed within the allotted time frame, the new lawyer must tell the Commission why he or she failed to complete it and ask for an extension.¹¹⁸

South Carolina's program is designed differently than Utah's and Georgia's.

Rather than mandatory and elective subjects or tasks, South Carolina has nine objectives that the new lawyer must meet, including "establish[ing] a clear understanding as to the expectations of both the mentor and the new lawyer."¹¹⁹ The Uniform Mentoring Plan lists suggested means for achieving these objectives and acts as a guide for mentors and mentees to structure individual mentoring programs.¹²⁰

B. Effectiveness of mandatory mentoring

While few studies have been conducted in states with mandatory mentoring programs to measure their effectiveness, the Shapiro Research Group conducted a telephone survey at one-year intervals during Georgia's two-year Pilot Project. The survey revealed that about "approximately 85% of both the mentors and beginning lawyers rated the Pilot Project as satisfactory in varying degrees."¹²¹ The Committee on the Standards of the Profession noted that on professionalism measures, such as dealing with clients, the new lawyer's self-perceptions of their skills matched the perceptions of their mentors. Additionally, "the beginning lawyers' rating of their ability to handle the ethical aspects of law practice increased consistently from the

¹¹⁸ *Id.*

¹¹⁹ Supreme Court of South Carolina: Chief Justice's Commission on the Profession, *Uniform Mentoring Plan 2*, available at <http://www.commcle.org/MentorPDF/UniformMentoringPlan.pdf>.

¹²⁰ *See generally id.*

¹²¹ Committee on the Standards of the Profession, *Transition Into Law Practice Program Pilot Project*, Jan. 1, 2000–Dec. 31, 2001 (15), available at <http://gabar.org/public/pdf/tilpp/7-C.pdf>.

baseline over the course of the Pilot Project. This was also true for dealing with other lawyers, judges and court personnel.”¹²²

The Shapiro Survey also revealed that new lawyers’ self-perceptions were positive, and career satisfaction increased over the course of the Pilot Project. At the end of the second year, “60% of the group rated themselves ‘very satisfied’ with their legal careers.”¹²³

The Committee’s report argued that having a mentor “can be an important factor in raising this level of satisfaction” and may have a positive impact on a new lawyer’s professional life.¹²⁴

While the Survey did not measure how lawyers participating in the Pilot Project compared to non-participating lawyers in their “competence, career, satisfaction, and sensitivity to professional and ethical norms . . . the results [did] show convincingly that on the areas targeted for emphasis, the beginning lawyers and the mentors reported steady improvement.”¹²⁵

C. Mandatory mentoring and New York

The Task Force believes that mandatory mentoring has the potential to be the most effective system to assist newly admitted lawyers in their development of professional skills and professional identity. Given the importance of appropriate training and development of all newly admitted lawyers, we recommend that NYSBA commit to a thorough study of mandatory mentoring. This study should include consideration of the following questions:

- When would new lawyers be required to register for the program, and for how long? Would participation be mandatory for both employed and unemployed lawyers? Would there be exemptions from the program?

¹²² *Id.* at 15–16.

¹²³ *Id.* at 16.

¹²⁴ *Id.*

¹²⁵ *Id.*

- What are possible incentives for practicing attorneys to engage in mentoring? How would mentors be selected? Would mentoring dilute other volunteer activities of attorneys (VLSP, bar association community projects)?
- What types of mentoring would be available to new lawyers, and for how much time? Would there be a specific curriculum or specific goals for mentors and mentees? Would any objective or activity be required? Would there be a sample mentoring plan? What would that sample plan include? What would the consequences of non-completion or untimely completion be?
- What outcomes would the program expect to achieve and how will these be measured? Would mentees have to complete objectives to finish the program? How will the program be evaluated to determine if it is achieving its intended outcomes?
- Who would oversee the mentoring program or enforce the program's requirements? How would the program be funded? Would mentees have to pay for it?
- What is the students' voice on mentoring? Namely, how could such a program be shaped to address student concerns?

II. CONTINUING LEGAL EDUCATION

New York's mandatory continuing legal education program ("CLE") is governed by 22 NYCRR 1500 and regulated by the CLE Board's Regulations and Guidelines (the "Guidelines"). CLE courses or programs must be provided by either an Accredited Provider, a person or entity whose entire CLE program has been certified by the CLE Board, or each CLE course or program that is not offered by an Accredited Provider must meet the accreditation process and be approved by the CLE Board 60 days prior to the occurrence of the course or program. Attorneys must obtain CLE credits in the following areas: (i) Ethics and Professionalism; (ii) Skills; (iii) Law Practice Management; and (iv) Areas of Professional Practice. 22 NYCRR 1500.2 and 1500.4.

Newly admitted attorneys are required to take accredited transitional CLE courses or programs presented in traditional live classroom settings or through attendance at fully

interactive videoconferences with CLE Board approved videoconference technology. Each newly admitted attorney must complete a minimum of 32 credit hours of accredited transitional education within the first two years of the date of admission to the Bar. Sixteen accredited hours must be completed in each of the first two years of admission to the Bar, broken down as follows: (i) Three hours of ethics and professionalism; (ii) Six hours of skills; and (iii) Seven hours of law practice management and areas of professional practice.

Currently, a number of Accredited Providers offer two-day “bridge-the-gap” programs aimed at providing newly admitted attorneys with “transitional” skills between law school and “real world” practice of law. The two-day program fully satisfies the newly admitted attorneys’ mandatory CLE requirement of 32 credits with 16 credits derived each day. The bridge-the-gap programs cover topics in various areas of law, including practical skills such as legal writing and civil procedure, as well as ethics and professionalism. Many large firms offer in-house programs that qualify for transitional credit and thereby avoid the need to send people to the bridge-the-gap programs offered by CLE providers.

One of the major concerns regarding CLE programs or courses, including the bridge-the-gap program, is that there is no mechanism in place to assess whether the programs and courses are effective. Because “bridge-the-gap” programs are offered by CLE providers, there is no regulation or oversight to ensure consistent content and quality of instruction. CLE credit is given simply based on the attorneys’ attendance at the program. Because there are many ways to meet the transitional credit requirement for new lawyers, it can be difficult to measure outcomes. Also, there is no consistency in the substantive content as the focus is on meeting the credits versus the substance to meet the credits. If the goal is to have a program of learning to help new lawyers transition to practice, then this approach falls short.

There is also no accountability in assessing whether attorneys are actually participating or actively engaged in learning the materials presented. In addition, with regard to the bridge-the-gap programs, some of the topics covered may not necessarily relate to the attorney's area of practice or interest. Moreover, programs that focus on skills, such as business development and networking which many seasoned attorneys consider invaluable to the development of a newly admitted attorney are currently not eligible for CLE credit. In addition, programs related to job search, resume building, and interviewing are also not eligible for CLE credit.

Finally, the costs of CLE programs and courses must be reduced. Many programs and courses cost hundreds of dollars just for few hours of CLE credit. Although most large firms cover these fees for their attorneys, many young attorneys who are working in government or small law firms must pay for the courses themselves.

In order for newly admitted attorneys to gain the most out of the CLE programs and their time and money spent in attending these mandatory programs, both the CLE requirements and accreditation of these programs must be reviewed and modified. Further consideration and study is merited on the following topics:

- Integrating a mentorship program with CLE transitional requirements. For example, one might consider reducing the 32 credit requirement to 24 and pairing it with one year of mandatory mentoring;
- Expanding CLE program content to include career navigation issues such as business development, job search, interviewing, and networking;
- Reducing the cost of CLE programs and the ability to offer more free CLE courses; and
- Assessing newly admitted attorneys learning after attendance at each transitional attorney CLE.

III. NEW LAWYER TRAINING PROGRAMS

The issue of training by larger firms raises a number of questions that warrant close analysis by NYSBA.

Many law firms are moving forward in the creation of competency models that are serving as a basis for moving from lock-step compensation formulas. But as individual firms move to create these competency models, there are likely to be significant impacts on law schools. For example, what does it mean if, arguably, each firm in the AmLaw 200/NLJ 250 develops its own competency model that is used to decide if a lawyer in a particular firm is a “competent” 3rd, 4th, or 5th year associate? What impact does this have on law schools, CLE providers, or even on ALI-ABA’s effort to develop national model competencies? Law firms are likely to be moving faster in developing these competency models, where the Summit recommendation will unfold over a longer period of time. We encourage greater collaboration between academia and practitioners in identifying and thinking through the implications of competency models.

Will law firms share these competency and training models or will they consider them protected property? How can we create collaboration so that all lawyers in the profession become more competent, so that “all boats rise” on the same tide?

IV. PARTICIPATE IN THE NATIONAL DEBATE REGARDING LAW SCHOOL DEBT

Recent commentators within and from outside legal education argue that the current structural and business model of law schools is no longer sustainable.¹²⁶ These commentators call attention to the burden our current economic model places on unsuspecting

¹²⁶ See, e.g., Segal, David, “Is Law School a Losing Game,” NYTIMES, Jan. 8, 2011.

law students while law school administrators point out the stranglehold U.S. News & World Report's criteria and rankings have on law school finances. Escalating law school tuition, drastically increased student debt, and the high probability that most debt-burdened law graduates will not quickly obtain high paying employment has not only created an *economic* nightmare but a real *moral* and ethical challenge for law schools and the profession. Steps need to be taken to create more realistic financial expectations for those entering law school. Law schools need to provide more transparency in employment data and examine the real cost in human terms that flows from new graduates carrying such large debt loads. At the same time, law firms that decry the lack of practice-ready law graduates need to examine whether their own hiring criteria is based on elitism or fundamental lawyering ability and skills. Law firms also need to be more transparent about what they truly offer new lawyers in terms of training and feedback.

Recommendations

I. PARTICIPATE IN THE NATIONAL DEVELOPMENT OF MODEL COMPETENCIES FOR LAWYERS

NYSBA should endorse the ALI-ABA Summit Recommendations pertaining to the development of model competencies and provide active support for that project, including active engagement by NYSBA in a national model competencies project. NYSBA should offer assistance to this project, including coordinating broad participation from law schools, the practicing bar, legal employers, bar associations, Bar examiners, MCLE regulators, CLE providers and in-house professional development staff.

The NYSBA should request New York State law schools to report to the Standing Committee on Legal Education and Admissions to the Bar whatever current steps they are taking to develop learning competency based models at their schools.

While acknowledging the freedom of legal educators to develop appropriate curriculum for their own institutions, NYSBA should work with law schools to support the development of curricular initiatives that integrate the knowledge, skills and values specified in the model competencies as well as those designed to encourage the development of practice-ready graduates. As model competencies are adopted at the national level or within New York State, NYSBA should convene a meeting that includes New York State law school deans to review model competencies and evaluate curriculum improvements.

NYSBA should identify law firms that are developing or have developed competency frameworks in NEW YORK STATE and encourage these firms to participate in the ALI-ABA project to develop national model competencies. This will ensure that the competencies deemed most relevant to a vibrant profession in NY will be brought forward to the national project.

II. MONITOR PROPOSED REVISIONS TO ACCREDITATION AND ADMISSIONS STANDARDS

NYSBA should closely monitor the currently proposed changes to ABA accreditation standards in light of the need of clients and consumers of legal services to have law graduates ready to begin the competent and ethical practice of law.

NYSBA should recommend/request that the New York State Court of Appeals re-evaluate its rules for the admission of attorneys and counselors of law to: (i) emphasize how to

apply theory and doctrine to actual practice; and (ii) encourage the process of developing professional judgment in action under appropriate faculty supervision.

In particular, NYSBA should recommend/request that the Court eliminate the hourly restriction governing hours “outside the classroom” which may in certain circumstances discourage students from taking critical clinical experiences and which force law schools to separate clinical credits from the rest of the academic program.

III. CONSIDER REQUIRING NEW SKILLS-BASED PRACTICE-BASED LICENSURE REQUIREMENTS

NYSBA should recommend that the New York State Board of Bar Examiners begin to experiment with assessing professional skills. While there are several promising alternatives, we urge development of in-role exercises that could be efficiently recorded and evaluated by multiple graders. Law schools have already done much of the groundwork for developing this assessment tool. A useful evaluative and developmental project could begin within eighteen months.

NYSBA should participate in serious study of important potential reforms, including:

- The Uniform Bar Exam – a format that would promote efficiency and reciprocity;
- Sequential licensing, which would permit limited practice for new professionals pending further training and examination;
- Adjusting an applicant’s score on the bar exam to reflect the successful completion of skills courses; and
- Permitting licensure after a period of closely supervised public service work.

NYSBA should encourage and participate in further study of how licensure shapes diversity. We note that this is a very complex and important problem which has been

resistant to change. We urge both continued commitment to the central value of diversity and inclusion for our profession and serious attention to promising new ideas including:

- Psychometric research to improve our ability to identify promising candidates who are currently under-predicted because of the imprecision of our current instruments; and
- Research assessing the impact of stereotype threat and other remediable situational factors that may cause systemic under-prediction of the potential of some people of color to succeed as lawyers.

IV. STUDY AND INTEGRATE MENTORSHIP, CLE AND NEW LAWYER TRAINING PROGRAMS

NYSBA should further study how new lawyers transition to practice from law school. This study could take the form of a special task force or a referral to a Standing Committee and should include an exploration of each of the following three programs as well as how all three should be integrated to fully support a new lawyer's transition to practice:

A. Mentorship programs

NYSBA should further study mandatory mentorship programs designed to help lawyers transition from law school to practice. In considering whether to recommend a mandatory mentoring program in the future, NYSBA would review other states' experiences with mandatory mentoring programs and analyze issues specific to NYSBA that could impact the success of such a program in New York.

B. Continuing Legal Education

NYSBA should further study the current CLE regulations regarding transitional credit and bridge-the-gap programming aimed at helping new lawyers transition from law school to practice, including a consideration of creating a combined mentoring and CLE requirement. Our Committee has been able to identify several gaps, inconsistencies and concerns with the current program.

C. Model new lawyer training programs

NYSBA should request that law firms, law schools, CLE regulators and CLE providers work collaboratively to develop model new lawyer training programs and to aid new lawyers in transitioning to practice from law school. New lawyer training should utilize model competencies (see recommendation #1) to determine program substance and ensure that new lawyers have the knowledge and skills to be effective professionals as well as comply with standards for effective teaching of knowledge and skills and the application of adult learning theory and practice.

V. SUPPORT APPROPRIATE AND REALISTIC ENTRY INTO THE PROFESSION

The Task Force recommends that NYSBA closely monitor the issue of law student debt and the role of the federal government as its only creditor. The issue of debt combined with the decreased hiring due to the economic downturn has a tremendous impact on the future of the legal profession. NYSBA should play an active role in all aspects of the national debate regarding law school debt, including working cooperatively with other entities to develop ways to reduce the impact of student debt on the future of this profession.

The Task Force recommends that law firms consider using hiring criteria that more accurately reflect their needs for practice-ready lawyers in addition to the criteria historically used by private practice law firms.

The Task Force recommends that NYSBA should be actively engaged with the ABA in its consideration of requiring standardized reporting of placement data from law schools. NYSBA recommends that in considering standardized reporting the ABA analyze the statistical accuracy and soundness of placement data already reported to NALP, the length of time it takes most law graduates to secure a permanent, full-time legal job (up to a year-and-a-half in the

current economy), the uniqueness of each law school, the pools from which they draw their students and, most importantly, the communities into which they place their graduates. NYSBA also recommends that if the ABA decides to require reporting of such placement data in a new standardized format, the ABA also release a statement that prospective law students should consider this information to be but a few of the many factors to consider in choosing whether and where to go to law school.

All law schools should provide accurate and meaningful information to entering and current students regarding the job market, career options, and their placement of recent graduates both at the J.D. and at the LL.M. level. Self-reported information should be audited and include data concerning recent graduates hired by private sector employers, including size of firm, starting salary, type of position (e.g., partnership track, staff attorney, temporary, other), geographic location of employer, substantive area(s) of practice, and diversity, particularly at the leadership and equity partner levels.

VI. INTEGRATE ASSESSMENT OF LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT WITH MODEL COMPETENCIES

NYSBA should recommend that law schools, bar examiners, CLE providers and others concerned with professional development build capacity to perform useful, valid assessments of the range of lawyer competencies.

NYSBA should explore structures for facilitating the development of useful, valid assessment tools for CLE providers and others who focus on professional development for lawyers in private practice. NYSBA is particularly well positioned to offer support in this area to an important group that tends to enjoy less institutional support than others involved in legal education and lawyer credentialing.

NYSBA should recommend that legal employers and CLE providers continue to improve the effectiveness of their training programs by: (i) using input from clients to identify important practice skills that will help lawyers serve their clients more effectively; (ii) applying adult learning theory and approach when designing programs; and (iii) partnering with law schools to share resources and to identify and apply the best content and teaching approaches.

VII. INFLUENCE U.S. NEWS & WORLD REPORT

NYSBA should meet with representatives of US News & World Report to discuss their current methodologies and to develop changes aligned with improvement to the profession outlined in this Report.

THE WORK LIFE BALANCE

Introduction

Over the past decade, numerous studies and research have concluded that organizations which implement policies and programs to support integrating an employee's professional and personal life – for purposes of this Report, we use work-life integration and work-life balance interchangeably -- have directly improved the organizations' profitability. There should no longer be a serious debate that a focus on and commitment to work/life integration is the right thing to do and makes economic sense.

In recent years, the number of lawyers seeking a better integration of their work and personal lives has increased. This is due, in part, to the “sandwich generation” phenomenon -- as people live longer, many Generation X (those born between 1965-1976) and Baby Boomer lawyers (those born between 1944 and 1964) have responsibility of caring for aging parents as well as their own children.¹²⁷ Moreover, while work-life balance began as a women's issue, with an increasing number of dual-earner families, it is now an issue that impacts both men and women alike. Men are increasingly taking responsibility for the care of their children and elderly parents as well as for other family related tasks and, in so doing, report dramatically increased work/life conflict.¹²⁸

While reading this report – and whenever discussing work-life integration/balance – it is important to understand that attorneys are not less committed to the practice of law or their

¹²⁷ More than 25% of American families are involved in some way with elder/parent care. Carol Abaya (quote taken from Wikipedia citing this woman's website – **NEED CITE**)

¹²⁸ Joan Williams, *Reshaping the Work-Family Debate: Why Men and Class Matter*. Harvard University Press (October 1, 2010), see also Galinsky et al., [Times Are Changing: Gender and Generation at Work and at Home](#), 2008 National Study of the Changing Workforce, Family and Work Institute, 2009.

clients. Although some attorneys do want to work fewer hours, many attorneys seeking work-life balance are often simply trying to attain more flexibility or predictability in their work responsibilities.

In this Section of the report, we provide the rationale for focusing on improved work/life integration. We begin with the benefits that inure from three perspectives: expense reduction, revenue enhancement and risk minimization. Then we discuss the negative impact of ignoring the problem, citing empirical studies that describe the impact on health and wellness, initiatives that have been designed in response, as well as areas of interest requiring further research. Finally, we offer a robust inventory of “best practices” and recommendations for employers, including the development of flexible work policies, using technology to support work/life integration, guidelines for preserving vacation time, sabbaticals and other innovative “quality of life” programs that merit consideration.

The Business Case for Work Life Balance/Integration: Good for Lawyers, Good For The Bottom Line

I. BENEFITS TO EMPLOYERS

A. Expense reduction

Clients are demanding more transparency and accountability with regard to the cost of legal services. One report put it plainly, “Clients will be increasingly focused on considerations of efficiency and cost effectiveness in the delivery of legal services.”¹²⁹

Associate attrition, some of which is related to the challenge of work/life balance and integration,¹³⁰ undermines the clients’ interest in controlling costs while maintaining the quality

¹²⁹ [The 2010 Client Advisory Presented by Hildebrandt Baker Robbins and Citi Private Bank](#)

¹³⁰ [Stark, Kristin, and Prescott, Blane, “Why Associates Leave: A Special Report”, May 7, 2007, Hildebrandt International.](#)

of legal services. As one Assistant General Counsel told the task force, “Often when we purchase professional services in other contexts we use a turnover metric which impacts the fees paid for services. Stability in the staffing of certain matters is important enough that we should consider making it part of the agreements we negotiate for legal services.”

Retention has been of considerably less concern in recent years as lawyers’ professional mobility was reduced by dismal economic conditions and the industry saw deferred start dates for incoming lawyers, forced reductions of associates, and de-equitization of partners. However, as we come out of the downturn, retention will once again become an issue for firms to address, perhaps with even more vigor than before the economic crisis for two reasons: First, clients are increasingly sensitive to paying for the learning curve of new attorneys assigned to work on their matters. If clients resist paying for newly assigned lawyers to get up to speed, realization rates¹³¹ will decrease, negatively impacting profitability. And second, attorney turnover is expensive.¹³² One analysis concludes that firms do not recoup the initial investment they make in an associate until close to three years from the date of hire.¹³³ Another estimates that the costs to identify, recruit, pay, and support an associate for the first three years ranges from \$500,000 to \$700,000.¹³⁴ Firms that manage to control attorney attrition will be in the best position to maintain or even increase profit margins as conditions improve.

¹³¹ Billing Realization is the percentage of billable hours that are actually billed to the client. The Lawyer’s Guide To Governing Your Firm, Arthur G. Greene, American Bar Association. Section of Law Practice Management

¹³² In 2006, 78% of new associates leave their firms by the end of their 5th year (up from 60% in 2000). 2006 NALP Foundation study

¹³³ Peter Giuliani, “Parting May Be Sweet Sorrow, But It’s Getting More Expensive”, Law Practice Management: May 2006, p. 32

¹³⁴ “Best Practices for the Hiring, Training, Retention and Advancement of Women Attorneys”, Committee on Women in the Profession, New York City Bar, February, 2006. See also [Changing](#)

B. Revenue enhancement

Not only does the failure to address work-life integration affect the expense side of the ledger, there is an opportunity cost on the revenue side as well.

Better work life integration impacts job satisfaction,¹³⁵ and increased satisfaction leads to stronger performance and decreased attrition. Associate attrition frustrates clients. For example, Linda Madrid, former general counsel at CarrAmerica, considers the quality of life at a firm as a consideration before she engages a firm:

It is frustrating when outside counsel don't provide consistent lawyers...[N]othing [is] worse than investing in and relying on someone, and then having that person pulled out. Or, even worse, the firm isn't treating them well enough to keep them. We have tried to look at how our outside counsel treat their young lawyers... including demands in terms of billing. These are all issues that we think ultimately have an impact on the services we receive.¹³⁶

The same report also highlighted the resentment clients feel when they are forced to expend additional time to educate newly assigned lawyers to replace those who have left the firm. John J. Flood, then Vice President and Associate General Counsel, NASD, stated, "Some firms try to hide attrition. In one case, the chief partner, a trial lawyer, and two associates disappeared in an 18-month period and we were only told about one. I won't use that firm again.

[Approaches to Lawyer Training: The Latest Battleground in the Growing War for Talent, James W. Jones, Hildebrandt Institute.](#), March 2006.

¹³⁵ Galinsky et al., [Over Work in America: When the Way We Work Becomes too Much](#), Family and Work Institute, 2005.

¹³⁶ [Better On Balance? The Corporate Counsel Work|Life Report, The Project For Attorney Retention Corporate Counsel Project Final Report, December 2003](#)

It's wasting my time to have to re-tell the story, what my corporation is about, what our history is.”¹³⁷

Firms that are able to offer consistency with regard to legal talent will be able to differentiate themselves from those who can't — and very well may benefit from increased revenue as a result.

Savvy business organizations are recognizing the upside potential in the possibility of parlaying innovative solutions to the work life integration conundrum into a corporate capability. Mike Cook, the CEO of Deloitte LLP recognized in 1992 that the demographics of its future talent pool warranted an aggressive response to the recruitment, retention and advancement of women.¹³⁸ One of the findings was that work life integration was important not only to women but to men too.¹³⁹ Cook assembled a Task Force and implemented a strong program that continues to this day. Deloitte created a whole new model¹⁴⁰ (known as Mass Career Customization™) which provides alternative ways for all employees to manage their careers.¹⁴¹

C. Risk Minimization

Successful law firms recognize that “brand management” strategy is important to long term profitability. One important element of brand management for professional services

¹³⁷ [Better On Balance? The Corporate Counsel WorkLife Report, The Project For Attorney Retention Corporate Counsel Project Final Report, December 2003](#)

¹³⁸ Douglas M. McCracken, “Winning the Talent War for Women: Sometimes It Takes a Revolution”, Harvard Business Review, Nov.-Dec.2000, 78(6), 159-165

¹³⁹ This is still the case. See Galinsky et al., [Times Are Changing: Gender and Generation at Work and at Home](#), Family and Work Institute, 2008

¹⁴⁰ <http://www.masscareercustomization.com/>

¹⁴¹ Cathy Benko and Anne C. Weisberg, Mass Career Customization: Aligning the Workplace with Today's Nontraditional Workforce, Harvard Business Press, 2007

firms is the ability to recruit top talent and, increasingly, work life integration is a barometer that matters to law students as they decide where they want to work. For example, in 2006 students at Stanford Law School created Building A Better Legal Profession,¹⁴² a grassroots organization that ranks law firms according both to their minimum associate billable hour expectations and other characteristics. By 2008, BBLP had chapters at the top twenty law schools.¹⁴³ Firms risk damaging their ability to attract the best and the brightest if they ignore the issue of work life integration.

Not only does attention to work life balance/integration enhance a firm's profile and reduce attrition, a recent study showed requiring "predictable" (scheduled) time off actually increased communication among a team of professionals. The result of this collaboration was new processes that enhanced efficiency and effectiveness with no negative impact on client service standards.¹⁴⁴ This example demonstrates that law firms too can approach work life balance/integration from a risk management perspective.

II. THE NEGATIVE IMPACT OF NOT ADDRESSING WORK/LIFE ISSUES

In addition to having a positive effect on the bottom line, not having sustainable work life balance has a negative impact on the attorneys themselves. In recent decades, a plethora of literature has emerged, documenting the emotional toll visited upon significant numbers of practitioners as a result of the current training methods and the present culture of

¹⁴² <http://www.betterlegalprofession.org/index.php>

¹⁴³ Nina Schuyler, "Building A Better Legal Profession", San Francisco Attorney, a publication of The Bar Association Of San Francisco, Winter 2008

¹⁴⁴ Leslie A Perlow and Jessica L. Porter. "Making Time Off Predictable—and Required." Harvard Business Review, Oct. 2009.

legal work environments. Organizations and employers who fail to adopt and adapt policies to ameliorate these effects (or who do not have written policies in place to deal with these matters) may bear the consequences of individuals' declining work product and potential health problems as well as the associated business costs of attrition. At least thirty years ago, anecdotal evidence began to appear in scholarly articles and bar journals describing the toxic effects of the present method of educating young lawyers and its carryover into the practice of law.

III. EMPIRICAL STUDIES

There are two seminal studies addressing this issue. The first, conducted in 1986, tracked University of Arizona Law School students in the first two years of legal practice.¹⁴⁵ That study was replicated and expanded among Washington lawyers in 1990. Interestingly, there was a high correlation between the Arizona study and the Washington study. Both studies' findings were disturbing.

The 1986 study found:

As the results indicate, before law school, subjects develop symptom responses similar to the normal population. This comparison suggests that prospective law students have not acquired unique or excessive symptoms that set them apart from people in general. During law school, however, symptom levels are elevated significantly when compared with the normal population. These symptoms include obsessive-compulsive behavior, interpersonal sensitivity, depression, anxiety, hostility, phobic anxiety, paranoid ideation, and psychoticism (social alienation and isolation). Elevations of symptom levels significantly increase for law students during the first to third years of law school. Depending on the symptom, 20 – 40% of any given class reports significant symptom elevations. Finally, further longitudinal analysis showed that symptom elevations do not

¹⁴⁵ American Bar Foundation Research Journal, 1986: 225; G. Andrew Benjamin, Alfred Kaszniak, Bruce Sales, Stephen B. Shanfield. **ARTICLE ENTITLED** *The Role of Legal Education in Producing Psychological Distress Amongst Law Students and Lawyers*

significantly decrease between the spring of the third year and the next two years of law practice as alumni. . . . Specifically, on the basis of epidemiological data, only 3 – 9% of individuals in industrial nations suffer from depression; pre-law subject group means did not differ from normative expectations. Yet, 17 – 40% of law students and alumni in our studies suffered from depression, while 20 – 40% of the same subjects suffered from other elevated symptoms.¹⁴⁶

These findings were repeated in the Washington study:

Compared with the 3 – 9% of individuals in westernized, industrialized countries who suffer from depression, 19% of Washington lawyers suffered from statistically significant elevated levels of depression. Of these individuals, most were experiencing suicidal ideation...

Eighteen percent of the lawyers were problem drinkers. This percentage is almost twice the approximately 10% alcohol abuse and/or dependency prevalence rates estimated for adults in the United States...

While approximately 18% of the lawyers who practiced 2 to 20 years had developed problem drinking, 25% of those lawyers who practiced 20 years or more were problem drinkers...Alcohol abuse and dependency is a chronic and progressive disease.¹⁴⁷

Finally, the authors noted that, “it appears from comparing the new Arizona alumni with the similar group of Washington lawyers that the presence of depression, problem drinking, and cocaine abuse is likely to affect lawyers at similar rates, regardless of jurisdiction within the United States.”¹⁴⁸

¹⁴⁶ *Id.*, 246-247

¹⁴⁷ “*The Prevalence of Depression, Alcohol Abuse and Cocaine Abuse Among United States Lawyers*”, G. Andrew Benjamin, Elaine J. Darling, Bruce Sales, *International Journal of Law and Psychiatry*, Vol. 13, 233, 240-241(1990)

¹⁴⁸ *Id.* at 242

IV. RESPONSES TO THE EMPIRICAL EVIDENCE

During the last 30 years, programs to ameliorate depression and alcohol and drug abuse within the legal profession have increased exponentially. Virtually every state in the nation maintains a Lawyer Assistance Program with different organizational structures and levels of support. The New York State Bar Association initiated the State's first professionally-staffed Lawyer Assistance Program, and the Lawyer Assistance Committee provides guidance for the Program; other local bar associations have followed suite.

However, while significant progress has been made in the numbers of attorneys who have benefited from these educational programs and the provision of services through the Lawyer Assistance Program, legal employers have done little to educate attorneys and staff within their organizations as to the prevalence of these diseases, nor have they structured work environments in such a way as to foster early recognition and treatment of these diseases.

A 2009 New York State Bar Association survey discovered that 80% of the responding law firms had no specific written policies concerning impairment due to depression or alcohol and drug addiction and 20% of the law firms surveyed would not allow leave time for treatment of these diseases. As a result of this survey, the Lawyer Assistance Committee drafted a Model Policy on Impairment intended to be adapted and adopted by law firms or other legal employers.

What do these studies mean for the future of the legal profession? Work settings which do not address stressors of the modern practice of law will continue to produce a significant number of lawyers who are depressed, dissatisfied with the quality of their lives, spend too little time with their families and communities, continue to be isolated and show increased levels of depression and addictive behaviors.

Best Practices for Law Firms and Some Things to Consider

As discussed above, sophisticated organizations understand that in order to attract and retain the best and the brightest, they must offer flexibility in their work environment. Increasing numbers of practitioners are struggling to maintain the delicate balance between their personal and professional lives. We will now address (1) how organizations can create and implement Flexible Work Arrangements that meet both the organization and the employees' needs; (2) vacation policies and practices; (3) sabbaticals; and (4) other quality of life initiatives.

I. FLEXIBLE WORK ARRANGEMENTS

Law firms should implement flexible work arrangements and policies, which are mutually beneficial to the law firm and to the attorney. For purpose of this Report, “flex-time” refers to attorneys working full-time hours with regular flexibility built into their schedule, e.g., regularly working one day a week from home. “Reduced hours” is being used to refer to attorneys who work fewer hours than traditional full-time attorney. This term is being used rather than “part-time” which is a misnomer because most attorneys, even those on reduced hour schedules, work more than traditional part-time employees. “Flexible work policies” is being used to encompass both “flex-time” and “reduced hours.” The purpose of this subsection of the Report is to assist law firms in crafting flexible work policies.

For years, flexible work policies have been identified with attorney/mothers who wanted to have reduced or flex-time hours. Although more women than men do work less than full time¹⁴⁹, as discussed earlier, an individual attorney of either gender may desire flex-time or reduced hours for a variety of reasons, not just parenting issues. For instance, the attorney may

¹⁴⁹ <http://www.catalyst.org/publication/246/women-in-the-law-in-the-us>

have other interests he or she wishes to pursue such as writing, teaching, or volunteering. An individual may be struggling with a personal illness or injury, or that of family members. An attorney may desire flex-time or reduced hours to segue into retirement.

An attorney may also find he or she is consistently working at a reduced pace and the firm may wish to offer reduced hours to match the reality of the attorney's work. Law firms need to recognize that although an attorney may be strongly committed to the profession, there are many valid reasons he or she may seek a more flexible or reduced work schedule. The law firm should strive to be creative and responsive to attorneys' needs while ensuring the firm's business needs are being met. That is the real challenge, addressed in the remainder of this section of the Report with some practical tips.

A. Establish guidelines and formalize a program

Firms that have succeeded in offering alternative work schedules have adopted written policies to provide guidance to their attorneys about their expectations of hours and schedules.¹⁵⁰ To date, in the marketplace there are two established practices to structure these policies: uniform reduced hours or creating "custom" arrangements for attorneys. With either of these options, flexibility on the part of the lawyer and the firm as well as technology-resources are key to making alternative work schedules successful. And, no policy will be effective without buy-in from firm management.

Of critical importance overall is the commitment to proportionality – the recognition that those working reduced-hours or other flexible arrangements should be provided

¹⁵⁰ In her book *Law & Reorder*, Deborah Epstein Henry highlights what she refers to as the "Ten Principles for Successful Flexible And Reduced Hour Policies." It is important for the profession to recognize that work-life balance is no longer simply an option. *See* *Law and Reorder* at 158.

the same opportunities as their standard schedule colleagues with respect to advancement, benefits, training, business development opportunities, etc. The following are some additional factors to be considered in establishing a program for flexible hours.

B. Define reduced hours

Most firms that offer attorneys an option of working a reduced work week, have established guidelines in place. These guidelines address eligibility, scheduling and approval. Well-defined guidelines, consistently and evenly applied, may help ensure that the firm will continue to meet its business objectives while meeting the needs of its lawyers. Of the firms we contacted, most require:

- a target range of billable hours of at least 65% of that of attorneys on traditional schedules.
- an agreement from the attorney that he/she remains flexible as needed to accommodate emergencies, etc.
- approval from the practice group leader who will consider both the needs of the lawyer making the request and the overall needs of the firm and its clients.

C. Establish eligibility criteria

With regard to eligibility to work a flexible work schedule, some firms require that the attorney have been employed at the firm for a period of time; others require no waiting period. Those firms which require a waiting period also require that the attorney have been through at least one review cycle and be deemed in good standing.

D. Manage the process

Also recommended by most firms is the appointment of a partner or manager to oversee all flexible work arrangements. This partner or manager is the person to contact for requests and makes recommendations regarding approval or modification of flex-time or reduced hour proposals. S/he is the go to person for issues that arise for the flexible work arrangement

lawyer as well as the person monitoring usage/hours and possibly work assignments and professional development opportunities. This may also be the person who ensures that honest conversations regarding trade-offs are held with those on flexible work arrangements. The firm should have a sense of the impact of flexible working on career progression, compensation and professional development and include that in discussions with lawyers.

E. Encourage usage

Many organizations have well-written and well-intentioned policies but poor utilization. A common obstacle to utilization is stigma. Firms may reduce stigma by encouraging greater transparency among users, so that it becomes an accepted practice. Partners and other leaders in the firm who openly support or even use these policies can go a long way in minimizing any stigma associated with flexible working (e.g., a partner will let team members know that he will arrive at 11:00 on Thursday mornings in order to take his child to physical therapy).

F. Customized Arrangements

Flexible work arrangements should offer the opportunity for attorneys to make individualized arrangements. These arrangements generally involve lowering base salary in exchange for limiting hours or days of work as well as limiting expectations on the type of work this attorney performs. Similar to the reduced hours schedules, it is recommended that a partner oversee these arrangements and that the lawyer have a good track record at the firm. It is important that such arrangements be open to all attorneys to meet the needs of their personal and professional circumstances, and not simply one-off arrangements.

G. Technology As A Resource

In order to make it easier for participants to work from home, many firms provide participants with the necessary technology to ensure that their home office is as functional as their law firm office. Desktop computers, laptops, high speed Internet connection, printers/scanners and fax machines are examples of what firms offer to provide attorneys when they begin working a reduced hours or customized schedule.

Additionally, technological advances such as smart phones and Blackberrys, have made it easier for attorneys to work from almost anywhere. Of course, the ability to work anywhere, anytime also creates the challenge of increased expectations that lawyers will give immediate attention even to matters that do not need it. The result is to deprive lawyers of uninterrupted personal time. These advances have also raised the expectations of clients, who anticipate speedy responses. Firms should support their attorneys' use of these devices to maximize responsiveness, while setting clear guidelines and expectations regarding response time, privacy concerns, acceptable uses of the technology, effective billing practices, and client confidentiality.

II. PRESERVING ATTORNEY VACATION TIME

It is common for attorneys to feel the need to be accessible on vacation via electronic means – cellular phone, remote access and Blackberry/smart phones. Further, it can often be expected from firms and clients. Additionally, small firm and solo practitioners often feel compelled to be responsive on vacation or jeopardize their client base.

As addressed above in Section Two (Negative Impact Of Not Having Balance), research has recognized that failure to detach from office demands can lead to stress-related medical issues, burn-out and decreased productivity. Therefore, it is necessary for attorneys to

prepare for and preserve their time away from the office. The benefits are likely to include enhanced performance and a more satisfying personal life.

Law firms can institute a written policy recognizing the importance of vacations and have other attorneys within the firm on call to handle client maintenance and emergencies.

For solos or small firms, set vacation time well in advance. For example, let clients know in advance for your vacation schedule and have a plan for who to handle issues while away. If expectations are defined early, there is less likelihood of unmet expectations. Your retainer agreement or engagement letter should provide your clients with information about your plan to have another attorney assist you in the event of an emergency.¹⁵¹

All firms and attorneys will benefit from the following best practices:

- Make a Work in Progress list with deadlines and contact information;
- Locate a colleague (internal or external) that clients can contact, with appropriate authorizations from clients if external. This may require different attorneys depending upon the area of law for a particular file;
- Advise your current clients as to when you will be on vacation;
- Prepare an automatic email message to notify everyone that you are out and will contact them upon your return and provide emergency contact information;
- Prepare a 3 month docket list of court appearances, deadlines and follow-up dates so if an emergency occurs someone stepping in can manage the files appropriately;
- Advise opposing counsel and courts of your vacation;
- Make sure time and billing records are up-to-date;
- Prepare list of where open and closed files are kept;

¹⁵¹ See Blackford, Sheila. Law Practice Management Today. ABA Law Practice Management Section. Aug 2009.

- List all necessary passwords and logins, including voicemail, computer log-in, email access and names of programs used;
- Prepare an important list of firm contacts, such as current employees along with their contact and emergency information. Also include your property manager or landlord and firm's service providers – especially information for any outside IT providers;¹⁵² and
- Solo firms should arrange for an emergency signer for the Trust Account if client funds are on deposit.

III. SABBATICALS

A somewhat more dramatic approach toward ensuring work/life balance for lawyers is the time-honored academic tradition of a sabbatical—an extended break from professional practice for professional and/or personal development, reflection and rest. While less common than other leaves for family or personal reasons, an increasing number of law firms have instituted firm policies that allow lawyers with a substantial investment of time and effort in the firm to take a sabbatical leave for a specified duration, either with full, partial or no pay, and generally with very little restriction on their sabbatical activity.

Sabbaticals offer a significant and innovative approach to assuring lawyers can integrate their professional and personal lives and to allowing mid-career professionals a potentially restorative and rejuvenating break in their otherwise intense career.¹⁵³

A. The reasons for sabbaticals

Before turning to the details of some of these policies, what is the rationale? Why would a law firm or other employer of lawyers authorize its productive asset—the billing professional—to become intentionally unproductive for some period of time? Letting lawyers

¹⁵²Id.

¹⁵³ Much of the discussion of this concept is drawn from a comprehensive review of sabbaticals in the law firm concept, *Rest Assured: The Sabbatical Solution for Lawyers*, by Lori Simon Gordon, published by the American Bar Association.

address significant personal or family obligations is one thing; allowing them to step out of productive practice for a period of time for no reason other than their need to refresh or recharge themselves seems quite another. The prospect of allowing income-generating lawyers to become unproductive for any substantial period of time may seem unrealistic or irrational.

Firms with sabbatical policies take a long-term view of their investment in their professional staff and view the sabbatical both as a means to inspire and re-energize key personnel who will remain committed, enthusiastic and productive members of the enterprise. As outlined above, lawyer burnout, fatigue and even depression are not uncommon: having the opportunity to look forward to and then benefit from a refreshing and re-energizing experience may, in the long run, ensure that its lawyers continue to perform at the highest levels of effectiveness and efficiency.

As the standard model for law firm practice and growth evolves, firms may come to view the sabbatical as an important tool to retain and recruit the best professional talent. Moreover, to a generation of lawyers who may place a higher priority on the work/life balance, the existence of a sabbatical policy may enhance the firm's ability to compete for the best and the brightest. The promise of a break from the often highly-pressured and intense work environment of the modern law office may keep those talented lawyers from departing. Similarly, in a world in which lateral partner movement has become much more commonplace, sabbaticals can provide a sufficient incentive to deter a highly profitable partner from grasping at a slightly better offer presented by a rival firm: an opportunity to avail him- or herself of a promised sabbatical may be enough to keep the partner from defecting.

Law firms justifiably worry about the reaction of clients to the news that a valued attorney will not be available for some period of time. Even the strongest advocates for

sabbaticals acknowledge that attending to the client relationships is a key priority in a profession in which personal relationships between clients and attorneys play such an important role. On the other hand, a sabbatical policy may actually force a level of collaboration and teamwork that significantly benefits the client and that might not otherwise occur. Attorneys are sometimes reluctant to share responsibility for a client, either out of a commendable desire to ensure the quality and effectiveness of the client’s representation or out of fear that their significant responsibility for the client—and recognition for the fees generated by the representation—may be lost to a colleague.

Particularly for a smaller firm, the loss of a uniquely talented attorney, who may practice in a field that does not warrant having more than one expert within the firm, could be devastating, both to existing client business and the ability to attract new clients. It may be extremely difficult to allow the sole ERISA or tax expert in a small firm with a practice that requires that expertise—but doesn’t require an excess of it—to voluntarily excuse himself from the practice of law. The fact remains, however, that any number of life’s uncertainties could befall that key player—an accident, a health care crisis, a family emergency or an irresistible offer from a competing law firm—that would leave the firm without his or her expertise, either on a temporary or permanent basis. Some form of “succession planning” is necessary, whether or not a sabbatical program is in place.

B. Key elements of sabbatical policies

If a firm chooses to establish a sabbatical policy, a number of issues need to be addressed, including the following:

Duration. Unlike their academic colleagues, who typically enjoy a sabbatical year, attorney sabbaticals more commonly extend only three to six months or even shorter in

some cases. A three month hiatus from practice has been viewed by many firms as long enough to recharge the batteries but not so long as to permanently disrupt client relationships and the business objectives of the firm.

Eligibility. Most firms limit sabbaticals to partners who have already been in the partnership ranks for some period of time, ranging from as little as two to as many as ten years; a few larger firms allow longer-tenured associates (five or more years) the opportunity to take a brief sabbatical even before being admitted into the partnership. For most firms, it's a one-time experience that cannot be enjoyed a second time.

Notice, preparation and approval. The policies typically require a substantial amount of notice to allow the firm and the attorney to prepare adequately for the departure. Attorneys will always be required to take whatever steps are necessary to prepare for the sabbatical and effectively "hand-off" responsibility for matters for which they are responsible. Some firms justifiably may require attorneys to schedule sabbaticals in a manner that does not deplete the firm's professional resources at the same time and may require attorneys to stagger their sabbatical schedules to avoid undue disruption. From a human resources and legal perspective, it may be important to characterize the policy a privilege, not a right, that will preserve some discretion in the firm in the scheduling and the approval of the sabbatical leave.

Compensation. Policies run the gamut, from full-pay to partial-pay to no-pay. The absence of any compensation would, obviously, significantly limit the opportunity for most lawyers to avail themselves of the experience and a reduced pay approach may be the ideal way to protect the firm's short term economic interests without entirely discouraging lawyers from taking the sabbatical. At a minimum, firms should maintain key employee benefits in place during the sabbatical.

Sabbatical activity. In keeping with the concept, what someone does during the sabbatical is not typically circumscribed by the firm, with one exception: lawyers are typically precluded from practicing law during the sabbatical, for both liability and competitive reasons. It is not generally required that the sabbatical be viewed as particularly productive or relevant to the professional development of the attorney—although embarking on some arguably useful educational or experiential activity would presumably not be discouraged, either.

While these policies may be most likely established by larger law firms, smaller firms have established sabbatical policies—admittedly with greater restrictions on timing and duration—as have corporate law office settings.

In general, lawyers are not likely to avail themselves of a sabbatical if it is viewed by the firm's power structure as evidence of a less than full commitment to the firm. The key to the policies' success, like most law firm initiatives, is the level of acceptance and support at the firm's highest levels, including its utilization by the key members of the firm's hierarchy.

IV. QUALITY OF LIFE INITIATIVES

There are also many programs law firms can employ that fall short of flexible work arrangements and sabbaticals but nonetheless have a positive impact on the quality of life of attorneys. The Task Force conducted a survey of twenty-five law firms of varying sizes in New York State regarding their quality of life initiatives. Some examples of "best practices" are listed below. In general, the initiatives can be broken down into four sub-categories: (i) Assistance with day-to-day personal matters that affect many or all lawyers in the firm; (ii) Social morale-building initiatives; (iii) Professional development and morale-boosting initiatives; and (iv) Programs and policies (other than alternative work schedules) designed to assist sub-

groups of lawyers in integrating work and family responsibilities in order to achieve professional success. The initiatives are summarized below:

A. Assistance with Day to Day Personal Matters

- Health club memberships/discounts/on-site gyms
- High-quality coffee, fresh fruit, and healthy snacks provided free of charge in break rooms
- Dinner served in conference room at 8 PM each evening for those lawyers who have to work late
- Private banking
- Personal computers for home use
- Laundry and/or dry cleaning services
- On- site hair care/manicures/shoe shine
- Dog walking services
- Carry-over vacation policies for associates whose work loads do not permit them to take all of their vacation in a given year

B. Social initiatives

- Business casual dress codes
- On-site yoga classes
- Foreign language classes
- Movie nights at Bryant Park
- Trivia nights at a local bar
- Weight Watchers on-site meetings
- March Madness/World Cup parties in a conference room
- Wii tournaments
- Ping pong/Bowling tournaments
- Sports Teams

- Karaoke nights at local bars
- Gift certificates for dinner/movie as a reward for excessive hours worked
- Themed lunches or cocktail parties

C. Professional initiatives

- Career counselor – either on staff at the firm like some firms already have or a local for-hire professional career counselor to assist associates with career-related issues
- Professional outplacement assistance—most large (e.g., NALP) firms provide some professional outplacement assistance to lawyers who are leaving their firms involuntarily
- Career Counseling Program—a growing number of NY firms have arrangements with outside career consultants to provide career coaching
- Client Development Budgets—available to all lawyers at a specified degree of seniority (often beginning at about the third year) to spend on meals and/or sporting or other social events to strengthen client relationships
- Percentage of fees paid to non-partners who originate business—while this is more common at small firms, a growing number of larger NY firms are adopting this as well
- “Secondment programs” to strengthen relationships between associates and clients, and to facilitate the eventual transition of attorneys to in-house positions
- “Side Bar” or other public interest/public sector externship programs in lieu of economic-based layoffs
- Annual teaching award—given by the associates to one partner in each practice group for his or her outstanding mentoring/teaching
- Upward performance reviews—a growing number of firms solicit performance evaluations of partners, counsel and more senior associates by associates, as well as of associates by more senior lawyers

D. Assisting sub-groups of lawyers with work/family integration to achieve professional success.

- Re-entry coaching—providing services of an outside professional coach to assist attorneys returning from family leave or disability-related absence from the firm in re-integrating with the firm and practice group

- Associates Committee—with elected members to voice associate concerns regarding quality of life and professional development initiatives
- Other affinity group initiatives—providing opportunities for sub-groups, such as ethnic minorities, LGBT attorneys, parents, and attorneys with disabilities to hear strategies for success from more senior lawyers, and to discuss their own concerns in a safe environment
- Mentoring across sub-group lines: providing opportunities for a minority group associate to receive one on one coaching from a majority group partner. Often combined with professional “shadowing” programs

Recommendations

Against this backdrop, Law firms should assess or reassess the value proposition of encouraging a healthy balance of professional and personal lives for their attorneys. The case for encouraging a healthier work-life balance, includes better relationships with clients, the cost associated with turnover and training, and maintaining a reputation that will attract additional talent. The NYSBA should encourage law firms to provide “truth in advertising” when recruiting associates – in particular employers should be honest about the hours expectations and work environment.

The Task Force recommends that the NYSBA offer support to legal employers striving to implement work life policies and practices. This support should include, among other things, (a) creating and adopting model policies from which employers can formulate flexible work arrangement programs; and (b) encouraging greater transparency from law firms about partnership and flexible work arrangements. For example, are partners – both equity and non-equity if a two-track firm – permitted to work flexible work schedules? Can someone be promoted to part-time partner from a reduced hour schedule? It is important that any model policy clearly states the principle of proportionality, which allows users of these policies access to all other opportunities available to their standard hours colleagues.

Moreover, in an effort to encourage utilization, educate firms on what other firms are doing and decrease the stigma associated with flexible work arrangements, the NYSBA should publicize success stories of law firms/legal employers who have successfully implemented policies/practices supporting work life balance, and encourage mentoring by attorneys who are successfully working a flexible schedule. It is important for senior management of law firms to show their commitment to creating a culture that promotes workplace flexibility and that helps lawyers address their work and family responsibilities. Policies and practices on paper are not meaningful without support from above.

Lawyers and law firms should strive to preserve vacation time by defining expectations within firms and with clients. Larger firms may consider adopting a practice of awarding sabbaticals to productive attorneys. The NYSBA should facilitate and encourage collaboration between clients and law firms to implement such arrangements, in part by offering or highlighting CLE programs that train lawyers on how to negotiate issues related to successful work life integration

Finally, NYSBA should support continued research on attorney impairment (i.e., mental and physical illness, as well as alcoholism and drug addiction) and continue to encourage firms to adopt the NYSBA suggested Model Policy on Impairment in an effort to educate the profession about these issues.