

NEW YORK STATE BAR ASSOCIATION



NYSBA

Report of the Task Force on the Future of the Legal Profession

April 2, 2011



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**REPORT OF THE TASK FORCE ON
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April 2, 2011**

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The rapid pace of change in the legal profession, accelerated in part by the recent national economic downturn, prompted New York State Bar Association President Stephen Younger to form a task force to examine issues concerning the future of the profession. Under the leadership of Co-Chairs Linda L. Addison and T. Andrew Brown, the Task Force on the Future of the Legal Profession (“Task Force”) was asked to address the following:

(1) developments in the economics, structure, and billing practices of private law firms; (2) changes in the model for educating and training new lawyers; (3) the pressures on lawyers seeking to find balance between their professional and personal lives; and (4) the implications of technology on the practice of law.

Given the inherent difficulty in predicting the future with certainty, the Task Force studied current trends that are driving change. Understanding these trends provides insights into the probable future in various areas of the legal profession and enables lawyers to manage change as it unfolds.

There is strong evidence that unprecedented changes in practice are producing a restructuring in the way legal services are delivered. These changes include widespread access to legal information, the routinization of many legal tasks, demands by clients for more control of legal service delivery, and the emergence of an increasingly competitive marketplace. This restructuring in the way legal services are delivered affects all law firms—regardless of size, geographic location, and substantive practice area—although it may impact different firms in different ways. Clients are seeking more efficient services, predictable fees, and increased

responsiveness to their needs, and they are willing to replace their lawyers if they are not satisfied with the services they receive.

In the area of billing for legal services, the hourly billing model has been strongly criticized by clients and commentators, leading to a shift away from hourly billing to alternative fee arrangements (“AFAs”). There are differing opinions among members of the Task Force as to how fundamental and pervasive this shift in billing practices will be. The Task Force believes, however, that AFAs will continue to expand over the course of the next decade, as a model for compensating lawyers and providing value to clients. The Task Force also believes that hourly billing will not disappear as a fee model in some practice areas.

The economic downturn of 2008–09 produced considerable economic fallout for law firms, including lower earnings, reduced hiring, more downsizing, and greater internal reorganization. As the economy recovers, it is apparent to many observers that the legal profession will not return to business as usual, and that to be successful in the post-recession era, law firms will need to engage in long-term restructuring to maintain sustainability and grow organically. Lawyers also will need to rethink the model and methodology of educating and training lawyers to deliver services and serve clients in the evolving law practice environment.

Competition for legal work will be intense, not only within the legal profession, but also among law firms and nonlegal service providers, foreign law firms, *pro se* litigators and self-help providers, as well as companies that use innovative delivery systems. Law firms that do not understand and address these changes will have difficulty competing in the emerging marketplace. Law firms will need to think more strategically, manage more effectively, and strive to be more client-centered than they have been in the past.

Technology is a driving force for many of these changes. Technology is a double-edged sword that helps lawyers to work faster and more efficiently, yet enables them to work constantly. It permits them to find better solutions to legal problems, yet increases the expectations of clients; assists them to compete more effectively in the marketplace, but opens the door to more competition. Technology has revolutionized the practice of law over the past quarter century. All signs indicate that technology will continue to impact the way lawyers are educated and practice, and will impact the traditional skills associated with lawyering and how lawyers interact with their clients.

It is in this context that the Task Force undertook its charge. Task Force Co-Chairs Linda L. Addison and T. Andrew Brown created four subcommittees: (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. Members of the Task Force were selected for their expertise regarding the mission of the Task Force. The Task Force's subcommittees collected information on their respective subject areas, met to discuss the issues raised by this research, and then formulated a coherent report on their findings. Thereafter, the Task Force integrated the four subcommittee reports into a cohesive whole.

This Task Force Report ("Report") reflects a conceptual order. The first section discusses fundamental issues involving critical changes in the practice of law. The second section addresses the extent to which these changes will require new approaches to education and training of lawyers. The third section recognizes that these changes are not just economic and that individual lawyers attach great significance to finding balance in their personal and

professional lives. The fourth section examines technology because it is a common thread throughout the other sections of the Report.

The Task Force presents this Report and its recommendations, informed by months of research and solicitation of input from private practitioners, in-house counsel, legal academics, and professional consultants. The Task Force urges the House of Delegates of the New York State Bar Association to adopt these recommendations to help shape the future of the profession. The Task Force also urges all members of the legal profession, from individual lawyers to lawyers practicing in law firms and other organizations, to examine this Report and its recommendations with an eye toward enhancing the quality of the future of their own legal practices and enhancing their ability to meet the needs and expectations of their clients.

The complete recommendations of the Task Force and the bases for those recommendations are more fully set forth below. Certain key recommendations of the Task Force are summarized here.

LAW FIRM STRUCTURE AND BILLING

1. The Task Force recommends that the New York State Bar Association (“NYSBA”) offer continuing legal education (“CLE”), print and electronic publications, and Web-based services to teach members how to achieve the objectives of providing quality legal services in ways that maximize value to the consumers of legal services. The Task Force observes that responding to clients’ needs may require new and different ways to deliver services.

2. The Task Force recommends that NYSBA’s Committee on Standards of Attorney Conduct explore changing models of law firm structure and compensation, make recommendations to the House of Delegates as needed to address professional responsibility

issues that may emerge, and propose appropriate amendments, if needed, to the New York Rules of Professional Conduct and other regulatory standards.

3. The Task Force recommends creating a best practices manual and related CLE seminars concerning the economics of alternative fee arrangements and value billing to assist NYSBA members.

4. The Task Force recommends that NYSBA's Unauthorized Practice of Law Committee and its Law Practice Management Committee reaffirm the 2009 Report of the Special Committee on Solo and Small Firm Practice, particularly as it supports the allocation of greater resources to assist small firms and solo practitioners who need to take advantage of low overhead and adaptability to leverage their skills for effective competition in the legal markets they serve.

5. The Task Force recommends that NYSBA investigate issues presented by the increased availability of print and online legal information to nonlawyers, and assist lawyers to make a strong business case for the continuing need to retain lawyers to solve legal problems.

6. The Task Force recommends that NYSBA conduct economic and other research to continue to keep lawyers informed about the ongoing changes identified by the Task Force and the changing landscape of the legal profession.

EDUCATING AND TRAINING NEW LAWYERS

I. Participate in the National Development of Model Competencies for Lawyers

1. The Task Force recommends that NYSBA endorse the ALI-ABA Summit Recommendations pertaining to the development of model competencies that are needed to practice law effectively and provide active support for that project, including active engagement by NYSBA in a national model competencies project.

2. The Task Force recommends that NYSBA should request New York State law schools to report to NYSBA's Standing Committee on Legal Education and Admissions to the Bar on whatever current steps they are taking to develop learning competency-based models at their schools, and that NYSBA 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.

II. Monitor Proposed Revisions to Accreditation and Admissions Standards

3. The Task Force recommends that 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.

4. The Task Force recommends that NYSBA should recommend that the New York Court of Appeals reevaluate its rules for the admission of attorneys and counselors of law to (1) emphasize how to apply theory and doctrine to actual practice and (2) encourage the process of acquiring and applying professional judgment through simulated and clinical activities under appropriate faculty supervision.

5. The Task Force recommends that NYSBA should recommend that the New York Court of Appeals eliminate the hourly restriction governing hours spent by law students "outside the classroom," which may in certain circumstances discourage students from taking critical clinical experiences and which forces law schools to separate clinical credits from the rest of the academic program.

III. Propose Assessment of New Skills-Based Practice-Based Licensure Requirements

6. The Task Force recommends that NYSBA should recommend that the New York State Board of Bar Examiners begin assessing professional skills. The Task Force notes that law schools have already done much of the groundwork for developing this assessment tool, and a useful evaluative and developmental project could begin within eighteen months.

7. The Task Force recommends that through the Standing Committee on Legal Education and Admission to the Bar, NYSBA should participate in serious study of important potential licensing reforms including:

- adoption of 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.

8. The Task Force recommends both continued commitment to the central values of diversity¹ and inclusion for our profession, as well as serious attention to how licensing shapes diversity of the legal profession.

IV. Study and Integrate Mentorship, CLE, and New Lawyer Training Programs

9. The Task Force recommends that NYSBA’s Law Practice Management Committee and NYSBA’s Young Lawyers Section study and make recommendations regarding

¹ The Task Force did not consider *de novo* a diversity policy for the legal profession, which was beyond the scope of the Task Force’s assignment. The Task Force refers readers to NYSBA’s diversity policy. See NYSBA Employee Handbook 6-1 (Mar. 2009).

how to assist new lawyers' transition to practice from law school through use of mentorship programs, CLE, and model training programs for new lawyers.

V. Support Appropriate and Realistic Entry Into the Profession

10. The Task Force recommends that NYSBA closely monitor the issue of law student debt and play an active role in all aspects of the national debate regarding law school debt and full disclosure of tuition costs and job prospects, including working cooperatively with other entities to develop ways to reduce the impact of student debt on the future of the legal profession and to promote greater transparency regarding the cost of legal education and prospects of employment.

11. 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.

VI. Integrate Assessment of Legal Education and Professional Development with Model Competencies

12. The Task Force recommends 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, and explore structures for facilitating the development of useful, valid assessment tools for CLE providers and others who focus on professional development of lawyers in private practice.

VII. Work With U.S. News & World Report

13. The Task Force recommends that NYSBA should meet with representatives of *U.S. News & World Report* to discuss current methodologies and to propose changes that are aligned with improvement to the profession outlined in this Report.

WORK-LIFE INTEGRATION AND THE PRACTICE OF LAW

1. The Task Force recommends that NYSBA and the legal profession recognize work-life balance as an issue that impacts both men and women, and treat the issue in a gender-neutral way.

2. The Task Force recommends that NYSBA adopt a policy encouraging law firms to commit to the value of encouraging a healthier work-life balance for their lawyers. The business case for such efforts includes (1) better relationships with clients; (2) reducing the cost associated with turnover and training; and (3) maintaining a reputation that will attract additional talent.

3. The Task Force recommends that NYSBA through the Law Practice Management Committee should offer support to legal employers striving to implement nonstigmatized/gender-neutral work-life policies and practices, including (1) creating and adopting model policies through the Law Practice Management Committee from which employers can formulate flexible work arrangement programs and quality-of-life initiatives; (2) using technology to facilitate flexible work arrangements; and (3) encouraging greater transparency from law firms about partnership, flexible work arrangements, and quality-of-life initiatives.

TECHNOLOGY AND THE PRACTICE OF LAW

1. The Task Force recommends that law schools and firms increase educational and training opportunities for lawyers regarding practical ways to use technology to enhance their practices, to understand and use technology more effectively, and to develop practice management and project management skills.

2. The Task Force recommends that firms consider the adoption of system-based approaches, beginning with an assessment of the functions the firm performs and the

related flow of information and work among its personnel, to determine which tools are most useful and effective to meet their needs. The Task Force observes that firms that design sound practices and implement technology that makes sense in the context of their practices are more likely to benefit from and be satisfied with their investments.

3. The Task Force recommends that NYSBA's Committee on Standards of Attorney Conduct should study and make recommendations concerning the ethical and risk management considerations associated with new technologies such as social networking, third-party hosted solutions, and virtual law firms.

4. The Task Force recommends that NYSBA's Law Practice Management Committee create model policies concerning the use of mobile technology, including the establishment of guidelines for security issues associated with mobile technology, and clear communications to attorneys as to when they are, and are not, responsible for maintaining a connection with the workplace. The Task Force also recommends that NYSBA's Law Practice Management Committee assist firms in increasing their attorneys' productivity through the development of efficient tools and best practices for the efficient handling of the ever-increasing e-mail traffic they receive.

5. The Task Force recommends that NYSBA encourage legal employers to use technology to support a healthier work-life balance by facilitating flexible work arrangements.

6. The Task Force recommends that NYSBA consider whether and how NYSBA can leverage its resources to assist smaller firms with technology-related issues.

LAW FIRM STRUCTURE AND BILLING

INTRODUCTION

The practice of law is changing. Client needs and attitudes, the process of delivering legal services, law firm economics and technology applications all contribute to an evolving practice environment. This metamorphosis not only has affected the way services are delivered, it also has affected the underlying value proposition upon which the lawyer-client relationship is based. These changes represent a sea change for the legal profession,² which will affect the organization and structure of the firms where lawyers 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 responded by downsizing and restructuring their operations. Whether these changes represent a temporary response to the economic downturn, or whether they signify longer-term shifts in private legal practice remains to be seen.³ The Task Force believes that the recession has accelerated and accentuated changes in the market for legal services and the means of service delivery. These trends will produce increased experimentation in alternative fee arrangements and efforts by law firms to compete more effectively in an evolving marketplace.⁴

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 maximizes value to clients while providing adequate compensation for lawyers. The Task Force considered issues

² See Gary A. Munneke, *Seize the Future: Forecasting and Influencing the Future of the Legal Profession* (American Bar Ass'n 2000).

³ See Gary A. Munneke, *Is It Back to Business as Usual . . . Or Not?* N.Y. ST. B.J. Sept. 2010.

⁴ See generally Deborah Epstein Henry, *Law and Re-Order: Legal Industry Solutions for Work-Life Balance, Retention, Promotion and Restructure* (American Bar Ass'n 2010).

relating to the economic model of private practice; the structure of law firm billing and fee arrangements; and the legal service delivery of legal services.

The Task Force paid particular attention to criticism of the hourly billing model for charging legal fees, which has led to experimentation with alternative fee arrangements (AFA). These AFAs have become increasingly prevalent and will eventually become predominant in many practice areas, although hourly billing will not completely disappear. As the use of AFAs increases, 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

I. Social Changes Impacting the Legal Profession

Change—for example, in technology, the economy, social institutions, and the availability of knowledge—affects the legal profession as it does other sectors of society, although lawyers have often been slow to respond to change. The challenge for lawyers is to evaluate how the profession has been affected, to identify the risks and opportunities presented, and to seek a course that comports with our responsibilities to our clients, to the justice system, and to our personal well-being.⁵ A number of social changes directly implicate the legal profession in various ways. These include shifts in demographics, client attitudes, talent management, technology, and economic globalization.

⁵ The section of this Report on Work-Life Balance addresses the issues related to this question in greater depth. Quality of life is an important component of professional growth and the delivery of quality legal services.

American society has become more demographically diverse.⁶ Yet, the number of women and minority lawyers who have become law firm equity partners has not increased by same percentage, 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, 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.⁸ Technology has dramatically changed many aspects of law practice including client expectations, time demands, stress, work/life management, quality control, 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

⁶ Barbara Curran Clara Carson, *The Lawyer Statistical Report* (American Bar Found.) (2004). The percentage of both women and diverse lawyers continues to rise, albeit slowly, as the percentage of law school graduates continues to remain higher than the percentages of women and minorities in the profession; *see* <http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf>.

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

⁸ The Technology section of this Report covers these issues in greater detail.

practitioners, in order to deliver higher quality services at a lower cost on a compressed time schedule.⁹

Each of these social changes interacts with the others and has direct implication for the legal profession: Demographic diversification of lawyers interacts with a 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 current economic model for law firms evolved over the course of the twentieth century. This model was built upon a foundation of senior lawyers practicing alone or in partnership with the support of employed junior lawyers and nonlegal 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.

A major trend in the legal profession over the past two decades is the emergence of large law firms, and not surprisingly employment with these firms is highly competitive.¹⁰ 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.

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 multinational 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

⁹ See generally Richard Susskind, *THE END OF LAWYERS: RETHINKING THE NATURE OF LEGAL SERVICES*, Oxford Univ. Press (2008).

¹⁰ 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.

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 this globalized environment with increased competition.¹¹ Accordingly, lawyers in the United States face competition not only from other law firms, but from nonlegal service providers within this country and from law firms and other providers from outside the United States. An increasingly deregulated 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 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. 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. This “up or out” approach does not so much profit the firm 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. Lawyers who became partners were expected to continue to produce revenue and to oversee the development of new crops of novitiate attorneys.

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,

¹¹ THOMAS FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY*, Farrar, Straus & Giroux (2007).

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, the demand for legal services has been stagnant or has decreased.¹² Many large law firms laid off attorneys,¹³ the average size of associate classes has decreased, and fewer associates have been promoted to the status of equity partner. During this period, many firms reported declines in per partner revenue since 2007, although some firms continued to grow.

Despite the fact that data are lacking, anecdotal evidence suggests that smaller firms were less severely impacted during the economic downturn than their larger peers.¹⁴ Perhaps as a result, 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 a rural population.

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 2010.¹⁵ In 2008, however, the average

¹² See Hildebrandt/Baker Robbins Citigroup Private Bank 2010 Client Advisory Mar. 3, 30120, Chart 1.

¹³ See Hildebrandt/Baker Robbins Peer Monitor Index for 1Q May 5, 2010.

¹⁴ 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.

¹⁵ 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.

number of billable hours dropped by more than 12% to 1,784, and attorneys reported increased pressure to reduce their fees.¹⁶ This trend took place all across the market—in big firms and small firms, among partners and associates.¹⁷

During the recent economic downturn, some law firms experimented with alternative fee arrangements. Although critics called for elimination of hourly billing,¹⁸ many law firms have clung to the hourly fee model, with an expectation that economic recovery will resuscitate the billable hour and even support increased rates,¹⁹ even though (as discussed below) clients continue to demand alternative fee arrangements.

Critics of hourly billing suggest that the model promotes inefficiency, places an emphasis on time as a measure of value rather than outcome or client satisfaction, encourages inferior lawyering and abusive billing practices, and incents unhealthy work values for timekeepers.²⁰ Critics point out that experimentation with AFAs has increased in recent years in a variety of practice areas, and they predict that these practices will continue to supplant hourly billing in the years ahead.

Conversely, proponents of hourly billing, particularly larger law firms, appear unwilling to cede the value proposition to small law firms or AFAs. Proponents expressed the view that leveraging associates on an hourly basis increases profitability, which benefits the firm. Although leverage may not work for some firms, it is a viable organizational model for others,

¹⁶ See NALP Bulletin April 2010.

¹⁷ See 2007 Survey of Law Firm Economics, Altman Weil, Inc.

¹⁸ See, e.g., ABA Comm'n on the Billable Hour Report, 2001-2002 (American Bar Ass'n 2002).

¹⁹ See Altman Weil Flash Survey on 2010 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%.

²⁰ See ABA Comm'n on the Billable Hour, 2001-2002 (American Bar Ass'n 2002) available at <http://acc.com/valuechallenge/>.

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 argue that the issue is not billing by the hour per se, but too many hours, too high rates, and using high-priced associates when cheaper resources—tech-based or human—would be more efficient. In any event, the Task Force included both proponents and opponents of hourly billing, and both groups felt strongly about their respective positions.

B. Alternative Fee Arrangements

Client demand for nonhourly billing has increased dramatically. A recent survey by the Association of Corporate Counsel showed that 77% of its members—the largest financial consumers of legal 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.²¹

AFA's include both fixed fees and contingent fees. In addition, such arrangements as caps and collars, premium fees based on results, stock or investment arrangements, performance incentives, task-based pricing, increased and creative usage of retainers and contingent fees, and other creative pricing models may be considered AFA's. Flat and contingent fees have been recognized for decades, but the difference today is that the emergence of more complex hybrid alternative variations.

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 influence pricing. To the extent that “clients hire lawyers, not law firms,” attorneys in greater demand can bill at higher rates. Demand also

²¹ *Id.*

translates into greater lateral mobility, with the implicit inconsistency that higher-priced lawyers must devise a method to generate the revenue that supports and justifies their compensation.

Clients paying high hourly rates may prefer an alternative means of arriving at a fair value of the legal services performed, although “fair” in the eyes of clients may be different from “fair” in the eyes of their lawyers. 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, lawyers 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 (*e.g.*, plaintiff’s personal injury, worker compensation). Even larger firms may choose to charge nonhourly fees for more commoditized work or for particular clients

Although the trend toward alternative fee arrangements is growing, AFAs 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 versus \$8.6 billion in 2008.²² Those arrangements are delivering value to clients; corporate legal departments that have utilized alternative fee arrangements have created cost savings for their companies of 15%.²³

²² *See, e.g.*, BTI Premium Practices Forecast 2009, BTI Consulting Group.

²³ *Id.*

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,²⁴ has argued for adoption of a more granular range of performance metrics. These metrics, such as 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.

III. Changes to Law Firm Organization and Structure

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 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 clients could not easily restrain the costs of legal services. It is the view of the Task Force that 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.²⁵

²⁴ See Hildebrandt/Citigroup 2010 Client Advisory Report, Chart 11.

²⁵ See generally Henry, *supra* note 3. Henry explores the trends that contribute to changes taking place in law firm organization and structure, and their effect on the lives of individual lawyers.

Today, clients have greater power to define and demand “value,” as reflected in the title and substance of the Association of Corporate Counsel (ACC) “Value Challenge.”²⁶ Lawyers and law firms should receive fees based on the value of the services provided.²⁷ In particular, the providers of legal services (lawyers) and consumers of such services (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.

The adoption by clients of a value-oriented approach to selecting and paying the legal services providers 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 reduce significantly 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.

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.

²⁶ See <http://acc.com/valuechallenge/index.cfm>.

²⁷ *Id.*

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 longer at the firm.²⁸ 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).

These developments can be expected to influence the organization and business model of many law firms. The Task Force believes that fewer firms will look like the pyramidal structure of past decades, as they adopt some of the following attributes.

A. Nonequity Partners and Permanent Staff Lawyers

Some firms have begun to question the “up-or-out” approach to legal employment, particularly as their ability to admit 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 nonpartner lawyers, called various names such as nonequity 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

²⁸ The subject of lawyer training is addressed in another section of this report, but it is worth noting that the needs and expectations of both lawyers and clients are relevant to questions about how, where and when new lawyers are trained. Law schools, legal employers and clients cannot simply pass off training to other groups, because they do not want to invest in the training process.

employed lawyers, along with declining opportunities to become partner, has prompted some lawyers to pursue opportunities outside of law firms. 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.

B. Merger, Dissolution, and Reorganization

Simultaneous with changes in the way associates are hired, assimilated and promoted, many firms have sought to merge with other firms or practice groups to create more competitive organizations. In some cases, the departure of key partners or practice groups has led to the dissolution or reorganization of the remnants of the old firm. 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 also has contributed to the emergence of a number of multioffice, multistate, multinational law firms, whose numbers of attorneys are not in the hundreds, but the thousands.

C. 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 2015.²⁹ As clients push for more efficiency in legal services, and become savvy about how and where certain

²⁹ See <http://forrester.com>.

portions of their legal matters can be handled, the use of outsourcing will increase. The use of contract and staff attorneys represents another trend in the legal industry to reduce the cost of legal services. Some firms prefer 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.

D. 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 five to eight jobs over the course of her career.³⁰ The 2011 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.

E. Professional Management

Many firms delegate 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. Although some lawyers prove to be effective managers, others are not suited or inclined to the growing demands of organizational management. Accordingly, administrative tasks are often delegated to professional staff. 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.

³⁰ See Gary A. Munneke & Ellen Wayne, *The Legal Career Guide: From Law Student to Lawyer* (American Bar Ass'n 2008), at 23.

F. Legal Information Management

The onset of computers and networked computing has accelerated a number of changes that are contributing to increased efficiency today. An important change in this area is 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.³¹

G. Law Firm Capitalization

Although investment by nonlawyers in law firms is prohibited in all American jurisdictions,³² some jurisdictions outside the United States, 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 reinvestment of profit or borrowing. It remains to be seen whether these limitations on American firms will make it difficult for domestic law firms to compete effectively in the international market for legal services.

H. Solo and Small Firm Practice

Solo and small firm practitioners are not immune from these changes. Historically in the forefront of fixed-fee arrangements in many practice areas (*e.g.*, immigration; criminal law; real estate; trusts and estates), these practitioners often may be in a position to meet the value-based needs of individual and smaller entity clients. Technology is a great leveler, in

³¹ 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.

³² See New York Rules of Professional Conduct, Rule 5.4 (2010).

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.

Solo and small firm practitioners face some unique challenges. The bulk of their services may be characterized as consumer services, and may be less complicated than work encountered in a corporate transactional or trial practice. Yet small firms and solo boutiques also serve small to very large business clients and individuals with complex claims. Meanwhile, the competition for consumer services is fierce because many lawyers are competent to handle the work. In addition, smaller practices face increased pressures from the increased availability of information and the disaggregation of services, including online 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, nonlegal 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 nonlegal 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 restructuring 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.

IV. Managing the Work of Delivering Legal Services

A. Assessing Risk While Measuring Value

Client empowerment to define and demand increased 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,³³ 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 nonlawyer professionals rather than lawyers, while others involve the investment of considerable effort and resources in training lawyers to become effective project managers. The Task Force believes that even in situations where nonlawyer professionals participate in risk management decisions, lawyers should oversee the decision-making process and retain professional responsibility for such decisions.

³³ 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 & Peter R. Jervis, *Risk Management: Survival Tools for Law Firms* (American Bar Ass'n, Sept. 2007).

B. Applying Business Management Principles to Law Firms

As firms are forced to assess their own services and the value they deliver to their customers, widely 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”³⁴-style methods may be affecting how some businesses meet their legal needs. 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

³⁴ See GEOFF TENNANT, SIX SIGMA: SPC AND TQM IN MANUFACTURING AND SERVICES (Gower Publishing, Ltd. 2001). The concept was originally developed by Motorola in 1986 as an outgrowth of the total quality management movement.

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. Virtual firms have been created to connect lawyers from different firms with projects on an as-needed basis. 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 be 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.³⁵ Many law firms have invested increasing resources in delivery systems. Corporate clients also have utilized technology to help them manage outside counsel.

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. Nonlawyer 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 of unauthorized practice rules. Some of these services have proven to be of dubious quality, but that is not true

³⁵ These developments are covered in greater detail in the section of this Report on technology and are mentioned here because of their profound effect on legal process management.

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 to traditional law firm services, from litigation support 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 nonlawyer staff to provide supporting analysis in complex business matters. Because these employees do not expect to be compensated as associate attorneys, firms utilizing such services can offer value on those services to their clients.

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 legal profession itself resists. But for some types of services, the Task Force believes the legal profession 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 individually tailored services to increase 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 multijurisdictional legal projects.

CONCLUSIONS

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 those high quality, efficient, professional services. The Task Force notes that a number of challenging ethical issues may be raised by some of the process changes and experimentation with new business models in the profession. An analysis of the extent to which ethical rules will impact the process of change to meet market needs should be undertaken by NYSBA’s Committee on Standards of Attorney Conduct.

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. Legal competence alone—even legal excellence—no longer guarantees professional or economic success.

Given that 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 Trusts and Estates client may come with a financial plan or draft will already prepared courtesy of an Internet Web site, seeking simply the last bit of lawyer expertise and advice. Parties to a divorce may come with a draft separation agreement. These Internet-drafted documents may have been created with

sophisticated software, much like tax returns can be prepared now, and an attorney may be necessary only to review the final product and determine it has been completed appropriately.

The Task Force believes that small firms or solo practitioners with specialized skills should consider the development of business models to leverage on 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, may have little infrastructure investment, and may communicate with clients only at a distance. There are already specialty immigration attorneys operating electronically across the U.S., 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 likely will be applied in other specialized fields. Alternatively, small firms and solo practitioners may affiliate to create relatively permanent virtual teams. As is done now in some plaintiffs’ personal injury practices, they may act largely as the intake end of a service process, while the bulk of the substantive client work is done, for example, by a firm specializing in claims regarding a particular product or in class actions.

The role of lawyers likely will 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 urges lawyers looking for alternatives to traditional practice in law firms to consider alternative careers, including:

- assist in systematizing legal processes, working on their own or with software developers to create more automated legal solutions;

- create project plans, manage, or train lawyers to handle massive legal projects requiring hundreds of staff, myriad simultaneous activities, and entailing large costs;
- specialize in finding, managing, and applying information or work product culled from the Internet or from law firm knowledge bases;
- structure virtual teams of firms that provide highly competitive services or who can create viable offshore substantive service providers;
- explore opportunities 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
- consider contract or freelance work.

Larger, full-service firms are probably under the greatest fee pressure from business clients, and are entering newer territory as alternative fee arrangements spread to more types of work. Alternative fee arrangements require different and more intensive management to deliver value and maintain profitability of services. The message to large law firms is that many have yet to maximize the potential of their substantial resources into the value that their clients are seeking. In some cases, the solution for larger clients may be a partial outsourcing model in which the law firm provides services to clients that are integrated with client operations to 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 illustrate this point. Business managers for lines of practice, which are now appearing in large law firms, may be more widespread and influential. Lawyers with superior skills in managing legal projects and relationships may be developed and rewarded.
- Apply project management skills with careful budgeting. Budget compliance will become even more widespread as clients demand it.
- Resolve conflicting demands for efficiency and profitability. Such demands may be resolved in favor of efficiency. Firms may respond by

changing how they do their work and utilize 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.
- Develop new patterns of staffing, including nonlawyers for certain paralegal functions and fewer partnership-track associates. Lawyers may leverage technology more as a substitute for labor.
- Focus on effective information and knowledge access and management to improve efficiency and reduce cost. Firms should focus on what solutions can be bought from publishers and other third-party providers or can be found “on the Web.”

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

The Task Force believes that if firms make progress on providing uniformly high quality and efficient service, deeper and longer client relationships will result. The Task Force urges NYSBA, and its members generally, to examine these trends in light of their particular practice areas. To this end, the Task Force recommends that NYSBA make this Report available to all members on the NYSBA Web site and by an e-mail 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 ongoing educational programs to assist lawyers and law firms to proactively manage the process of change in the profession. To this end, NYSBA should

commission 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 which continues the move toward 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 by which clients pay for legal services based on performance objectives rather than billed time will continue to emerge to govern the delivery of legal services. Over time, the value of legal work will be measured increasingly by the value as perceived by the client. Law firms will reengineer 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 become increasingly marginalized as a standard billing model.

RECOMMENDATIONS

1. The Task Force recommends that NYSBA offer CLE, print and electronic publications, and Web-based services to teach members how to achieve the objectives of providing quality legal services in ways that maximize value to the consumers of legal services. The Task Force observes that responding to clients' needs may require new and different ways to deliver services.

2. The Task Force recommends that NYSBA's Committee on Standards of Attorney Conduct explore changing models of law firm structure and compensation, make recommendations to the House of Delegates as needed to address professional responsibility

issues that may emerge, and propose appropriate amendments, if needed, to the New York Rules of Professional Conduct and other regulatory standards.

3. The Task Force recommends creating a best practices manual and related CLE seminars concerning the economics of alternative fee arrangements and value billing to assist NYSBA members.

4. The Task Force recommends that NYSBA's Unauthorized Practice of Law Committee and its Law Practice Management Committee reaffirm the 2009 Report of the Special Committee on Solo and Small Firm Practice, particularly as it supports the allocation of greater resources to assist small firms and solo practitioners, who need to take advantage of low overhead and adaptability to leverage their skills for effective competition in the legal markets they serve.

5. The Task Force recommends that NYSBA investigate issues presented by the increased availability of print and online legal information to nonlawyers, and assist lawyers to make a strong business case for the continuing need to retain lawyers to solve legal problems.

6. The Task Force recommends that NYSBA conduct economic and other research to continue to keep lawyers informed about the ongoing changes identified by the Task Force and the changing landscape of the legal profession.

EDUCATING AND TRAINING NEW LAWYERS

INTRODUCTION

Just as the practice of law is undergoing a “sea change” created by the confluence of factors such as client needs and attitudes, the technological transformation of daily life, the increasing globalization of what used to be national, regional or local concerns, and recent challenging economic conditions, so too has the business of educating and forming new lawyers.

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, its focus on appellate cases and its failure to prepare law students for the real-life experience of representing clients and practicing law. Critics also point to legal education’s failure to focus on “learning outcomes” (evaluating what students can *do* as a result of instruction) and “lawyer competencies” (knowledge, skills, values, habits and traits that make for successful lawyers), as well as the absence of appropriate assessment and evaluative tools to measure such outcomes and competencies. 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 which come with a legal education and career.

Meanwhile, structural critics of law schools forecast the end of the current business model of law schools.³⁶ That forecast is based on a combination of economic factors that include the pervasiveness of *U.S. News & World Report* rankings and the need to create scholarly output valued by *U.S. News* reviewers, 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.

³⁶ 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.

Post-law school professional development also is often deficient. Employer-created training programs remain rare and extremely costly, while state CLE transitional 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, it remains unclear whether voluntary or mandatory programs are more effective, how to certify such programs, and how to integrate them with previously existing CLE requirements.

Although there is no simple solution to these complex and interwoven issues, 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 finger-pointing between and among law schools, employers and the bar, the Task Force recommends an approach in which the various sectors and stakeholders 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 simply meant knowing the law.

Today, we are more likely to think that good lawyers know how to *do* useful things with the law to help solve client problems. 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, and many large firms and institutional practice settings have devoted significant resources to training and management of their lawyers' 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.

Yet there is much more we can do. Interesting and useful suggestions have been made recently in the related areas of understanding, assessing and certifying lawyers' readiness to meet the demands of contemporary practice. The basic impulse is two-fold: to sharpen both our understanding of the competencies, skills, knowledge, practices and values of a good lawyer and our ability to measure progress toward those goals. If we can align systemic incentives of the bar exam with the practices best aimed at achieving our goals, then we will improve our system for launching the careers of young lawyers. Several different organizations recently have begun or proposed significant initiatives in each of these areas. The Task Force encourages NYSBA to participate in and dialogue with these projects.

II. Understanding the Robust Knowledge, Skillful Expertise and Fundamental Values of a Lawyer: The Model Competencies Project

The Task Force recommends that NYSBA participate in the Model Competencies Project recommended by the recent ALI-ABA ACLEA Critical Issues Summit.³⁷ This project is an opportunity to continue important work which was pioneered by the MacCrate Commission and which continues today. As contemporary practice grows more complex and demanding, law schools, law firms, law 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 and seek justice. Those in the business of developing professionals need more precise assessment tools that reflect our best current understanding of the 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.³⁸ Academics and others began to conceptualize professional development 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

³⁷ 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), http://www.equippingourlawyers.org/documents/final_report.pdf.

³⁸ 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).

expertise. Experts do not just know more than novices—they are able to *do more* with the knowledge they possess.³⁹

As this conceptual framework began to emerge, lawyers both inside and outside the academy began to ask about the particular nature of lawyers' expertise. Although it has long been clear that the lawyers who are admired by most members of the profession know something much more than just the law as a body of doctrine,⁴⁰ 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 understand better 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.⁴¹ We have learned that aspiring lawyers develop expert judgment by acquiring knowledge and skills as they join a community of practice that is 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 they have a well recognized core. While learning the law is indispensable, the process of becoming an American lawyer requires something more complex than just learning to recite

³⁹ 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).

⁴⁰ 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).

⁴¹ Mark Neal Aaronson, *We Ask You to Consider: Learning about Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 258–61 (1998).

rules. The process of developing judgment is individualized, difficult and time consuming. Contemporary research suggests that, although 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.⁴²

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 in 1992.⁴³ 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, and 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.⁴⁴ 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

⁴² 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 time to develop expertise, 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).

⁴³ ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *Legal Educ. and Profession Dev.—An Educational Continuum Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Jul. 1992) [hereinafter "MacCrate Report"].

⁴⁴ For an intriguing recent discussion of the range of lawyering competencies, see Marjorie M. Shultz and Sheldon Zedeck, *Final Report—Identification, Development and Validation of Predictors for Successful Lawyering*, Shultz & Zedeck, September 2008, available at <http://ssrn.com/abstract=1353554> (last visited Feb. 11, 2011).

development. While many other thinkers contributed, it is safe to say that the MacCrate Report played a key role in moving law schools⁴⁵ to act on the new conception of what lawyers need to know, taking 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 in several related realms to get things done. Indeed, in contemporary society, many have easy access to information that used to be expensive and almost impossible to gain by nonprofessionals. So lawyers must do something more than state 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 end with the MacCrate Report. Within the academy, others continued to refine the picture.⁴⁶ Two recent documents—the “Carnegie Report” and “Best Practices”—have transformed the current conversation within law schools. Meanwhile, many law firms have developed their own inventories of competencies, seeking to understand better how they can maximize value for clients and best develop their human capital.⁴⁷ Some of the most significant current efforts to

⁴⁵ 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.

⁴⁶ 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. Posting of Justin Myers, *Golden Gate University’s New 1L Curriculum* to BEST PRACTICES FOR LEGAL EDUC. L. BLOG (Dec. 18, 2009), <http://bestpracticeslegaled.albanylawblogs.org/2009/12/18/golden-gate-universitys-new-1l-curriculum/>; posting of 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.

⁴⁷ ROY STUCKEY, ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 176–78 (2007); WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter THE CARNEGIE REPORT].

⁴⁷ HEATHER BOCK & ROBERT RUYACK, CONSTRUCTING CORE COMPETENCIES: USING COMPETENCY MODELS TO MANAGE FIRM TALENT (ABA-CLE Career Resource Center 2007).

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.⁴⁸

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 lawyer competencies. Law firms pursue their proprietary visions, and many others responsible for lawyer training and development remain outside these 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 boards, MCLE regulators, CLE providers and in-house professional development specialists to design a model approach to lawyer competencies. This important initiative, in many ways, continues the valuable work of the MacCrate Commission, building upon that foundation to refine further 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 help law students and lawyers better meet the evolving challenges of our profession and our society.

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

⁴⁸ 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. OF LEGAL EDUC. & ADMISSIONS TO THE BAR (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).

as subparts of skills such as communication and collaboration? Is abstract knowledge more important or just another of many co-equal ingredients? Level of specificity, organization and what to leave out are always difficult questions in a mission like this. Yet it is clear that prior efforts to answer these questions have yielded real and important gains. If we do not 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 ones 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 the values, skills and knowledge that 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? What are the sources that will provide exposure to project management skills; training in evolving information technologies discussed in the Technology section of this Report; and training in efficient work processes? What will be needed to develop an integrated plan to educate, train and develop 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, CLE providers, and 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 done well, is a very powerful teaching and learning tool. For some years, medicine and social work have pioneered the idea of data driven practice.⁴⁹ In more recent years, the related idea of outcome assessment has become very important in American education. From primary through secondary schools and the universities, regulators are asking for evidence that students are meeting the goals we have set for them.

Compared with other professions, the law has a relatively weak tradition of assessment. Our law schools rely heavily upon final exams. Outside of clinical courses, they tend not 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 remain 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 so that law students and young lawyers better prepare themselves to be lifelong learners and ever improving professionals.

⁴⁹ ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR REPORT OF THE OUTCOME MEASURES COMMITTEE, July 2008, *available at* <http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf> (last visited Feb. 11, 2011).

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.

Of course assessment, even when done well cannot address all the challenges of professional development.⁵¹ 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 professional development have already begun to experiment with new modes of assessment.⁵² 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.⁵³

Accordingly, we recommend that NYSBA study the issue and consider commenting in the ABA process and working with CLE providers and 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 have been 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 legal 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

⁵¹ For a spirited discussion of the national debate on the role of assessment in education see, DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* (2010).

⁵² 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).

⁵³ *ALI-ABA Final Report*, *supra* note 36, at recommendations 1–2.

required for admission to the New York State Bar. We are not aware of any other state bar that so drastically limits the number of students deemed to have received too much clinical or practical skills training in the required hours of study to sit for the bar.

In contrast, the American Bar Association Accreditation Standard 304 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 ABA rules, the “classroom” includes places where students are directly or indirectly supervised on lawyering activities, such as meeting with clients inside and outside 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*.⁵⁴ 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

⁵⁴ The Carnegie Report, *supra* n. 46; Stuckey, *supra* n. 45.

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 abandonment of the traditional classroom or a return to the apprenticeship model but rather a more sophisticated 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 with 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 over-arching goal is to encourage students to participate in 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.”⁵⁵ Capstone curricula “require students to produce manifestations of their learning, including written briefs, contracts, papers, or a videotaped trial or negotiation”⁵⁶ and allow

⁵⁵ John O. Sonsteng, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WILLIAM MITCHELL L. REV. 1, 104 (2007).

⁵⁶ *Id.*

students many opportunities to receive individual assessment and feedback. They also require students to manage more complex tasks than those presented in the classroom.

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.”⁵⁷ These courses are used in the third year of law school as a culmination of legal education and to provide a new attorney with the skills to “self-direct” his or her learning in the future.⁵⁸ Required capstones in the third year will ensure maximization of learning as law students transition into novice professionals.

II. Strengthening the New York State Bar Exam’s Assessment and Licensing Requirements

The New York State Bar Exam (“Bar Exam”) is our State’s primary assessment and credentialing tool for new lawyers. 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 could expand its scope to include other skills that lawyers need. The Bar Exam also plays 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

⁵⁷ Jeffrey E. Lewis, “Advanced” *Legal Education in the Twenty-First Century, A Prediction of Change*, 31 U. TOL. L. REV. 655, 658–59 (2000).

⁵⁸ Sonsteng, *supra* n. 55 at pg. 103.

align with the best current thinking on measuring and incentivizing best practices in legal education.

A useful and thoughtful discussion of these issues is in the recent report of the NYSBA Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competency⁵⁹ (the “Kenney Report”). This carefully documented report examined a number of studies in this area, including among others the MacCrate Report,⁶⁰ the Davis Committee Report,⁶¹ the Millman Report⁶² and the Klein study.⁶³

Based on this prior work and its own 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.”⁶⁴ The Kenney Report made the following 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.⁶⁵ With regard to the second prong, the Kenney Report urged focusing on (1) 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; (2) identifying additional requirements that

⁵⁹ 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].

⁶⁰ MACCRATE REPORT, *supra* note 42.

⁶¹ 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].

⁶² Jason Millman, et al., *An Evaluation of the New York State Bar Examination* (1993) [hereinafter Millman Report].

⁶³ 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.”).

⁶⁴ Kenney Report, *supra* note 57, pg. 4.

⁶⁵ *Id.*

can be tested using time and effort saved by modifying the existing exam; and (3) identifying requirements that law schools can satisfy.⁶⁶

In addition to these recommendations, the Kenney Report addressed a range of other important issues. We note the crucial issue of diversity.⁶⁷ 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 Report and the Millman Report.⁶⁸ Since the Millman Report, the passing score on the Bar Exam has been raised and there are renewed concerns about diversity.⁶⁹

Accordingly, we recommend that the Legal Election and Admission to the Bar Committee of 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.⁷⁰ We also urge experimentation to build capacity to expand the scope of competencies assessed. Valid testing is

⁶⁶ *Id.*

⁶⁷ *See id.* at 4-5.

⁶⁸ *Id.* at 16-20.

⁶⁹ 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 African-American candidates. Kenney Report, *supra* note 57 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 African-Americans 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 African-Americans and other ethnic minorities increased over time, the pass rate of African-Americans was still much lower than that of Caucasian/Whites “(72.3% vs. 92.1% in February 2006).” *Id.* at 29.

⁷⁰ *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 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).

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 on 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 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 to acquire the professional 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 predictable and substantially reduced costs. 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, hotlines, Facebook and Twitter. A central figure in this environment—whether as a 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 professionalism⁷¹ in a variety of roles. This professionalism should be developed over a continuum with shared responsibility among law schools; their accreditation organizations; and bar examiners, the 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 the avoidance of even the appearance of professional impropriety.

⁷¹ The Task Force did not consider *de novo* the definition of “professionalism,” which was beyond the scope of the Task Force’s assignment. The Task Force refers readers to a definition of “attorney professionalism” that is provided by NYSBA’s Committee on Attorney Professionalism. See NYSBA Committee on Attorney Professionalism, *Attorney Professionalism*, available at <http://www.nysba.org/AttorneyProfessionalism> (last visited Mar. 24, 2011).

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 Report⁷² 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 in collaboration, 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 whether 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 obligation not just to explain what is within the law, but to advise the client of the ramifications and implications of particular courses of legal action.⁷³ 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

⁷² THE CARNEGIE REPORT *supra* note 46, at 129.

⁷³ *Id.* at 131–32.

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 for each such situation develops only 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 development of a lawyer, the law school experience, especially in its early phases, is pivotal for professional development.⁷⁴

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

⁷⁴ *Id.* at 139.

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.”⁷⁵ 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 enhances 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.

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. Required mentoring seems to be the most comprehensive and effective way to enable a new lawyer to gain

⁷⁵ STUCKEY, ET AL., *supra* note 45.

proficiency in practical skills and, particularly, to further develop a well grounded sense of professional identity.

I. Exploring 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. Its mandatory Transition Into Law Practice Program took effect on January 1, 2006⁷⁶ and combines a mentoring and a CLE component.⁷⁷ 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.” 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.” 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.” The mentoring program involves no additional cost to new lawyers; the Georgia bar funds it. New lawyers simply pay the “regular CLE fee for the 12-hour CLE component” for the entire program.

Utah’s mentoring program, known as the New Lawyer Training Program (“NLTP”), is designed with the following goals in mind: (1) to match new lawyers with more experienced lawyers for training in professionalism, ethics, and civility during their first year of practice; (2) to assist new lawyers in acquiring the practical skills and judgment necessary to

⁷⁶ *Id.*

⁷⁷ State Bar of Georgia, *Transition Into Law Practice Program*, available at http://www.gabar.org/programs/transition_into_law_practice_program/ (last visited Oct. 30, 2010).

practice in a highly competent manner; and (3) 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.⁷⁸

NLTP is a year-long program and replaces the first year of Utah's New Lawyer Continuing Legal Education program ("NLCLE").⁷⁹ After the lawyer completes the NLTP, he or she receives twelve hours of NLCLE credit.⁸⁰ The cost of the entire NLCLE program, including the mentoring component, is \$300. Half is paid upon enrollment and the other half is paid upon completion.⁸¹

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.⁸² 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 in jeopardy.⁸³

Finally, in 2008 the South Carolina Supreme Court created the Lawyer Mentoring Second Pilot Program.⁸⁴ 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.

⁷⁸ Utah State Bar, *New Mandatory Mentoring Program*, available at <http://www.utahbar.org/nltp/> (last visited Oct. 30, 2010).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Utah State Bar, *New Lawyer Training Program Manual 15* (2008), available at <http://www.utahstatebar.org/nltp/assets/manual.pdf>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Supreme Court of South Carolina: Chief Justice's Commission on the Profession, *Lawyer Mentoring Second Pilot Program*, available at <http://www.commcle.org/MentoringProgram.html> (last visited Oct. 30, 2010).

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

- Be active members of the South Carolina Bar or inactive/retired members who have taken that status within the preceding two years.
- Have five years of practice experience (litigation experience is not required).
- Have a good reputation for professional behavior.
- 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.

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 may serve as mentors for up to five years.⁸⁵ The mentoring program is one year long and upon completion, the new lawyer must file a certificate of completion, 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.⁸⁶

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."⁸⁷ The Uniform Mentoring Plan lists suggested means for

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 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>.

achieving these objectives and acts as a guide for mentors and mentees to structure individual mentoring programs.⁸⁸

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 “approximately 85% of both the mentors and beginning lawyers rated the Pilot Project as satisfactory in varying degrees.”⁸⁹ The Committee on the Standards of the Profession noted that on professionalism measures, such as dealing with clients, new lawyers’ 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 baseline over the course of the Pilot Project. This was also true for dealing with other lawyers, judges and court personnel.”⁹⁰

The Shapiro Survey also revealed that new lawyers’ self-perceptions were positive and that 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.”⁹¹ 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.⁹² While the survey did not measure how lawyers participating in the Pilot Project compared to

⁸⁸ See generally *id.*

⁸⁹ State Bar of Georgia 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>.

⁹⁰ *Id.* at 15–16.

⁹¹ *Id.* at 16.

⁹² *Id.*

nonparticipating 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.”⁹³

C. Mandatory Mentoring in 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 conduct 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?
- 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 and 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 be the consequences of noncompletion or untimely completion?
- 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 would 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?

⁹³ *Id.*

II. Assessing Continuing Legal Education Requirements

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 an "Accredited Provider," a person or entity whose entire CLE program has been certified by the CLE Board. Alternatively, 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: (1) Ethics and Professionalism; (2) Skills; (3) Law Practice Management; and (4) 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. Alternatively, they can attend fully interactive videoconferences with CLE Board-approved videoconference technology. Each newly admitted attorney must complete a minimum of thirty-two credit hours of accredited transitional education within the first two years 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: (1) three hours of ethics and professionalism; (2) six hours of skills; and (3) 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 thirty-two credits with sixteen 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 new lawyers 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 because the focus is on obtaining the credits versus the substance needed 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. With regard to the bridge-the-gap programs, some of the topics covered may not relate necessarily 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 not eligible for CLE credit.

Finally, the costs of CLE programs and courses must be reduced. Many programs and courses cost hundreds of dollars for just a 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 from the CLE programs and their time and money spent, both the CLE requirements and accreditation of these programs must be reviewed and modified. Further consideration and study by NYSBA's CLE Committee 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.
- Assessing newly admitted attorneys learning after attendance at each transitional attorney's CLE.

III. Learning From Law Firm 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 serve as a basis for moving away 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" third-, fourth-, or fifth-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 recommendations 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 and “all boats rise” on the same tide?

IV. Attending to the National Debate Regarding Law School Debt

Recent commentators within and outside legal education argue that the current structural and business model of law schools is no longer sustainable.⁹⁴ These commentators call attention to the burden our current economic model places on unsuspecting law students while law school administrators point out the stranglehold that *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. Law schools must continue to examine the real cost in human terms that flows from new graduates carrying such large debt loads and ensure more realistic financial expectations for those entering law school by providing more transparency in employment data. However, a balance needs to be struck. Law schools cannot afford to be saddled with additional, costly regulatory requirements, nor should applicants from disadvantaged economic or diverse social backgrounds be discouraged from entering the profession in the attempt to create “realistic expectations.” At the same time, law firms that decry the lack of practice-ready law graduates need to examine whether their own hiring criteria are based on elitism or fundamental lawyering ability and skills. For example, do large-firm

⁹⁴ See, e.g., Segal, David, “Is Law School a Losing Game,” N.Y. TIMES, Jan. 8, 2011, at BU1.

employers request interviews with those law students who have excelled in clinical experiences, or do they simply emphasize more heavily those who have the best GPAs from the most prestigious institutions or who have law review credentials?

RECOMMENDATIONS

I. Participate in the National Development of Model Competencies for Lawyers

1. NYSBA should endorse the ALI-ABA Summit Recommendations pertaining to the development of model competencies that are needed to practice law effectively 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 helping to encourage 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.

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

3. 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.

4. 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 New York will be brought forward to the national project.

II. Monitor Proposed Revisions to Accreditation and Admissions Standards

5. 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 who are to begin the competent and ethical practice of law.

6. NYSBA should recommend that the New York Court of Appeals reevaluate its rules for the admission of attorneys and counselors of law to (1) emphasize how to apply theory and doctrine to actual practice; and (2) encourage the process of acquiring and applying professional judgment through simulated and clinical activity under appropriate faculty supervision.

7. NYSBA should recommend that the New York Court of Appeals eliminate the hourly restriction governing hours spent by law students “outside the classroom,” which may in certain circumstances discourage students from taking critical clinical experiences and which forces law schools to separate clinical credits from the rest of the academic program.

III. Propose Assessment of New Skills-Based, Practice-Based Licensure Requirements

8. NYSBA should recommend that the New York State Board of Bar Examiners begin assessing professional skills. The Task Force notes that law schools have already done much of the groundwork for developing this assessment tool, and a useful evaluative and developmental project could begin within eighteen months.

9. Through the Standing Committee on Legal Education and Admission to the Bar, NYSBA should participate in serious study of important potential licensing reforms, including:

- adoption of 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.

10. NYSBA should encourage and participate through its Committee on Legal Education and Admission to the Bar in further study of how licensure shapes diversity. The Task Force notes that diversity is a complex and important problem that has been resistant to change. The Task Force recommends both continued commitment to the central values for our profession of diversity and inclusion, as well as 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 testing 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

11. NYSBA’s Law Practice Management Committee and the Young Lawyers Section should further study and make recommendations regarding how new lawyers transition to practice from law school. An existing NYSBA committee or section should explore 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

12. 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 should 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

13. 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 consideration of a combined mentoring and CLE requirement. The Task Force has been able to identify several gaps, inconsistencies, and concerns with the current program.

C. Develop Model New-Lawyer Training Programs

14. NYSBA should request that law firms, law schools, CLE regulators, and CLE providers work in collaboration 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 I above) to determine program substance and ensure that new lawyers have the knowledge and skills to be effective professionals. It should also 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

15. The Task Force recommends that NYSBA closely monitor the issue of law student debt. 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 and full disclosure of tuition costs and job prospects, including working cooperatively with other entities to develop ways to reduce the impact of student debt on the future of the legal profession and to promote greater transparency regarding the cost of legal education and prospects of employment.

16. 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.

17. The Task Force recommends that NYSBA be actively engaged with the ABA in its consideration of requiring standardized reporting of placement data from law schools. The Task Force recommends that, in considering standardized reporting, the ABA should (1) analyze the statistical accuracy and soundness of placement data currently reported to NALP, (2) 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), (3) the uniqueness of each law school, (4) the pools from which they draw their students, and (5) most importantly, the communities into which they place their graduates. The Task Force also recommends that if the ABA decides to require reporting of such placement data in a new standardized format, the ABA should 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.

18. 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

18. 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.

19. 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.

20. NYSBA should recommend that legal employers and CLE providers continue to improve the effectiveness of their training programs by (1) using input from clients to identify important practice skills that will help lawyers serve their clients more effectively; (2) applying adult learning theory and approach when designing programs; and (3) partnering with law schools to share resources and to identify and apply the best content and teaching approaches.

VII. Work With U.S. News & World Report

21. The Task Force recommends that NYSBA meet with representatives of *U.S. News & World Report* to discuss current methodologies and to propose changes to the U.S. News methodology that are aligned with improvement to the profession outlined in this Report.

WORK-LIFE INTEGRATION AND THE PRACTICE OF LAW

INTRODUCTION

Over the past decade, numerous studies have concluded that organizations that implement policies and programs to support integrating an employee's professional and personal life have directly improved their profitability. There should no longer be a question that a commitment to work-life integration, or work-life balance (which terms are used interchangeably in this Report), is the right thing to do and one that makes economic sense.

The number of lawyers seeking better integration of their work and personal lives has increased in recent years. This is due, in part, to the "sandwich generation" phenomenon—as people live longer, many Generation X (those born between 1965 and 1976) and Baby Boomer lawyers (those born between 1944 and 1964) have responsibility to care for aging parents as well as for their own children.⁹⁵ Moreover, although work-life balance began as a women's issue, the increasing number of dual-earner families has made it 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.⁹⁶ In addition, technology is giving clients and other

⁹⁵ More than 25% of American families are involved in some way with elder/parent care. Carol Abaya, *The Sandwich Generation*, <http://www.thesandwichgeneration.com> (last accessed February 14, 2011).

⁹⁶ Joan Williams, *Reshaping the Work-Family Debate: Why Men and Class Matter*. (Harvard University Press Oct. 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.

lawyers increasing access to attorneys during offhours decreasing truly personal time and making it more difficult to leave the office behind.

It is important to understand that attorneys who seek work-life balance are not necessarily less committed to the practice of law or their clients. Although some attorneys do want to work fewer hours, many are often simply trying to attain more flexibility or predictability in their work responsibilities.

This section of the Report provides the rationale for focusing on improved work-life balance. We begin with the benefits from three perspectives: expense reduction, revenue enhancement, and risk minimization. We then 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 list 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: 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, “[c]lients will be increasingly focused on considerations of efficiency and cost effectiveness in the delivery of legal services.”⁹⁷ Associate

⁹⁷ 2010 Client Advisory, *supra* note 11.

attrition, some of which is related to the challenge of work/life balance,⁹⁸ undermines the clients' interest in controlling costs while maintaining the quality of legal services. As one Assistant General Counsel told the Task Force, "[o]ften 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 of lawyers has been of less concern in recent years because lawyers' professional mobility was reduced by poor economic conditions. However, as the legal profession emerges from the economic downturn, retention will once again take prominence as a key issue that law firms must address. 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 rates⁹⁹ will decrease, negatively impacting a firm's profitability. In addition, attorney turnover is expensive.¹⁰⁰ One analysis concludes that firms do not recoup their initial investment in an associate until close to three years from the date of hire.¹⁰¹ Another estimates that the costs to identify, recruit, pay, and support an associate for the first three years ranges from \$500,000 to \$700,000.¹⁰² Firms that

⁹⁸ Stark, Kristin, and Prescott, Blane, "Why Associates Leave: A Special Report," LEGAL TIMES, May 7, 2007.

⁹⁹ Billing Realization is the percentage of billable hours logged that are actually billed to the client. THE LAWYER'S GUIDE TO GOVERNING YOUR FIRM (American Bar Association Section of Law Practice Management 2009).

¹⁰⁰ In 2006, 78% of new associates leave their firms by the end of their fifth year (up from 60% in 2000). 2006 NALP Foundation study.

¹⁰¹ Peter Giuliani, "Parting May Be Sweet Sorrow, But It's Getting More Expensive," N.Y. ST. B.A.J. May 2006, p. 32.

¹⁰² 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 Approaches to Lawyer Training: The Latest Battleground in the Growing War for Talent*, James W. Jones, Hildebrandt Institute, March 2006.

manage to reduce attorney attrition will be in the best position to maintain or even increase profit margins as conditions improve.

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,¹⁰³ 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.¹⁰⁴

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, “[s]ome 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. It's wasting my time to have to retell the story, what my corporation is about, what our history is.”¹⁰⁵

¹⁰³ Galinsky, et al., *Overwork in America: When the Way We Work Becomes Too Much* (Family and Work Institute 2005).

¹⁰⁴ *Better On Balance? The Corporate Counsel Work/Life Report*, The Project For Attorney Retention Corporate Counsel Project Final Report, Dec. 2003.

¹⁰⁵ *Id.*

Firms that offer consistency with regard to legal talent will be able to differentiate themselves from those that do not, and well may benefit from increased revenue and profitability as a result. And, they may be able to encourage clients to assign additional work to associates with whom they develop longer term relationships.

Savvy business organizations are recognizing the upside potential 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.¹⁰⁶ One of the findings was that work-life integration was important not only to women but to men, too.¹⁰⁷ Cook assembled a task force and implemented a strong program that continues to this day. Deloitte created an entirely new model¹⁰⁸ known as Mass Career CustomizationTM that provides alternative ways for all employees to manage their careers.¹⁰⁹ Law firms are well advised to consider similar initiatives.

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 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

¹⁰⁶ Douglas M. McCracken, *Winning the Talent War for Women: Sometimes It Takes a Revolution*, HARVARD BUSI. REV., Nov.-Dec.2000, 78(6), 159-165.

¹⁰⁷ 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).

¹⁰⁸ See <http://www.masscareercustomization.com/>.

¹⁰⁹ Cathy Benko & Anne C. Weisberg, *Mass Career Customization: Aligning the Workplace with Today's Nontraditional Workforce*, HARVARD BUSI. PRESS, 2007.

at Stanford Law School created Building A Better Legal Profession,¹¹⁰ a grassroots organization that ranks law firms according to their minimum associate billable-hour expectations and other characteristics. By 2008, BBLP had chapters at the top twenty law schools.¹¹¹ 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 that 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.¹¹² This example demonstrates that law firms too can approach work-life balance issues from a risk management perspective.

II. The Negative Impact of Not Addressing Work-Life Issues

The lack of a 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 legal work environments. Organizations and employers that fail to adopt and adapt policies to ameliorate these effects, or that do not have written policies in place to do so, 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

¹¹⁰ See <http://www.betterlegalprofession.org/index.php>.

¹¹¹ Nina Schuyler, *Building A Better Legal Profession*, SAN FRANCISCO ATTORNEY, The Bar Ass’n of San Francisco, Winter 2008.

¹¹² Leslie A Perlow & Jessica L. Porter, *Making Time Off Predictable—and Required*. HARVARD BUSI. REV., Oct. 2009.

present physically and emotionally demanding method of educating young lawyers and its carryover into the practice of law.

III. Empirical Studies

Two seminal studies address this issue. The first, conducted in 1986, tracked University of Arizona Law School students in the first two years of legal practice.¹¹³ 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 Arizona 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 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.¹¹⁴

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

¹¹³ G. Andrew Benjamin, Alfred Kaszniak, Bruce Sales, & Andrew H. Benjamin, et al. *The Role of Legal Education in Producing Psychological Distress Amongst Law Students and Lawyers*. AM. B. FOUND. RES. J. 1986.

¹¹⁴ *Id.*, 246-247

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.¹¹⁵

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.”¹¹⁶

IV. Responses to the Empirical Evidence

During the last thirty 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. NYSBA 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 suit.

Although 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.

¹¹⁵ G. Andrew H. Benjamin, et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT’L J.L. & PSYCHIATRY 233, 240-241 (1990).

¹¹⁶ *Id.* at 242

A 2009 NYSBA 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.¹¹⁷ 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 employers¹¹⁸, which was approved by NYSBA's House of Delegates.¹¹⁹

What do these studies mean for the future of the legal profession? Work settings that 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, attracting and retaining the best and the brightest will require a flexible work environment, as more practitioners are to maintain the delicate balance between their personal and professional lives. We address below (1) how organizations can create and implement Flexible Work Arrangements that meet both the organizations' 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 that are mutually beneficial to the law firm and to the attorney. For purpose of this Report, "flex-time"

¹¹⁷ See "Survey Results & Analysis for 2009 HOD Lawyer Assistance Program Law Firm Policy Survey," New York State Bar Association, at 2, 3, Oct. 14, 2009.

¹¹⁸ See "New York State Bar Association Lawyer Assistance Committee Model Policy," New York State Bar Association, Apr. 9, 2010.

¹¹⁹ See "New York State Bar Association Resolution Adopted by House of Delegates," New York State Bar Association, Apr. 10, 2010.

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 used to refer to attorneys who work fewer hours than traditional full-time attorneys. The Task Force notes that the term “part-time” is a misnomer for such arrangements because most attorneys, even those on reduced hour schedules, work more than traditional part-time employees. The term “flexible work policies” is used to encompass both “flex-time” and “reduced hours.” This subsection of the Report addresses assisting 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 work less than full time,¹²⁰ an individual attorney of either gender may desire flex-time or reduced hours for a variety of reasons, including, but not limited to, parenting. For instance, an attorney may have other interests he or she wishes to pursue such as writing, teaching, or volunteering. An attorney may be struggling with a personal illness or injury, or that of family members. An attorney may desire flex-time or reduced hours to transition into retirement.

An attorney also may find he or she is consistently working at a reduced pace, and a 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 why 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. The Task Force recognizes that this is a challenge, which we address in the remainder of this section of the Report with some practical tips.

¹²⁰ See <http://www.catalyst.org/publication/246/women-in-the-law-in-the-us>.

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.¹²¹ To date, the legal marketplace has two established practices to structure these policies: uniform reduced hours policies and “custom” arrangements for individual attorneys. For 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. The Task Force notes that no alternative work schedule 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 the same opportunities as their standard-schedule colleagues with respect to quality of work, 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 that address eligibility, scheduling and approval. 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 client needs and emergencies, etc.

¹²¹ 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*, *supra* note 3.

- 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

At some firms, eligibility to work a flexible work schedule depends on the attorney's employment at the firm for a period of time; others require no "tenure" period. Those with a "tenure" period also require the attorney to have been through at least one review cycle and be deemed in good standing.

D. Manage the Process

Most firms recommend appointing a partner or manager to oversee all flexible work arrangements. This is the person to whom requests for flexible work arrangements are submitted, and the person who makes recommendations regarding approval or modification of flex-time or reduced hour proposals. She/he is the go-to person for issues that arise for the flexible work arrangement lawyer, and is sometimes the person monitoring usage/hours and possibly work assignments and professional development opportunities. She/he may also be the person who ensures that honest conversations occur regarding the success or lack thereof of any given flexible work arrangements for the lawyer and for the firm. Firms should understand the impact of flexible work arrangements on career progression, compensation and professional development, and should discuss this impact with lawyers who seek such arrangements.

E. Encourage Usage of Flexible Work Policies

Many organizations that have well-written and well-intentioned flexible work policies experience poor utilization of their policies. The Task Force observes that a common obstacle to utilization of flexible work arrangements is stigma. The Task Force further observes that firms may reduce stigma associated with flexible work arrangements by encouraging greater transparency among users, so that flexible work arrangements become an accepted practice.

Partners and other leaders in the firm who openly support or even use these policies can make a significant difference in minimizing any stigma associated with flexible work arrangements.

Consider, for example, the effect on a team of a partner who will let team members know that he or she will arrive at 11 o'clock on Thursday mornings to take his or her 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. Similar to the reduced hours schedules, the Task Force observes that it is a best practice for a partner to oversee such arrangements and that the lawyer seeking the arrangement have a good track record at the firm. It is important that such arrangements be open to all attorneys so as to meet the needs of their personal and professional circumstances.

G. Technology as a Resource

To make it easier for participants to work from home, some firms provide the necessary technology to make the participants' home office as functional as their law firm office. Many attorneys provide this for themselves. Desktop computers, laptops, high speed Internet connection, printers/scanners and fax machines are examples of what technology is required for attorneys who work remotely.

Additionally, technological advances (addressed in the Technology section of the Report) such as "smartphones" 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 require it. The result is to deprive lawyers of uninterrupted personal time. These advances have also raised the expectations of clients, who anticipate speedy responses even at off hours. As is

discussed in the Technology section of this Report, the Task Force recommends that firms should support their attorneys' use of these devices to maximize responsiveness, while setting clear guidelines and expectations regarding response time, respect for personal 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 (*e.g.*, cellular phone, remote access and Blackberry/"smartphones"). Further, such accessibility is often expected by firms and clients. Additionally, small firms and solo practitioners often feel compelled to be equally responsive so as not to risk jeopardizing their client base.

As noted above, research has recognized that the failure to detach from office demands can lead to stress-related medical issues, burn-out and decreased productivity. Therefore, attorneys must 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 should institute a written policy recognizing the importance of vacations and make other attorneys within the firm available to handle client matters while an attorney is on vacation.

Small or solo firms should set vacation time well in advance, providing clients the vacation schedule in advance, and most importantly, have a plan for who will handle issues during that time. If expectations are defined early, there is less likelihood of unmet expectations. The retainer agreement or engagement letter also should provide clients with information about the plan to have another attorney assist, in the event of an emergency.¹²²

¹²² See Blackford, Sheila, *How to Take a Vacation From Your Law Practice*, LAW PRACTICE MANAGEMENT TODAY. Law Practice Mgmt. Section (A.B.A. Aug. 2009).

III. Sabbaticals

A somewhat more dramatic approach toward ensuring work-life balance for lawyers is the time-honored academic tradition of a sabbatical; *i.e.*, an extended break from professional practice for professional and/or personal development, reflection and rest. Although less common than other leaves for family or personal reasons, sabbatical policies are in place in an increasing number of law firms. Generally, they allow lawyers, typically partners, with a substantial investment of time and effort in the firm to leave for a specified duration, with full, partial or no pay, and with very little restriction on their sabbatical activity.

A. The Reasons for Sabbaticals

What is the rationale? Letting income-generating lawyers 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 is quite another. It may seem unrealistic or irrational.

Firms with sabbatical policies take a long-term view of their investment in their partners, allowing productive lawyers to refresh and reenergize so that they continue to perform at the highest levels of effectiveness and efficiency. As the standard model for law firm practice evolves, the sabbatical may become an important tool to recruit and retain the best professional talent. Similarly, sabbaticals can help lure a highly sought-after lateral.

There is a balancing factor to the justifiable worry about clients' reactions to a key attorney's sabbatical; it may force a level of collaboration and teamwork that significantly benefits the client, overcoming many attorneys' reluctance to share responsibility.

For smaller firms, accommodating a sabbatical may be more problematic. Yet, the fact remains 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. Some

form of “succession planning” is necessary, irrespective of whether a sabbatical program is in place.

B. Key Elements of Sabbatical Policies

Issues to be addressed in a sabbatical policy include the following:

1. ***Duration.*** Attorney sabbaticals commonly extend only three to six months or even shorter in some cases so as not to permanently disrupt client relationships and the business objectives of the firm.

2. ***Eligibility.*** Most firms limit sabbaticals to partners who have been in the partnership ranks for some period of time, ranging from as little as two to as many as ten years. For most firms, it is a one-time experience.

3. ***Notice, preparation, and approval.*** A substantial amount of notice is typically required, and attorneys are required to take whatever steps are necessary to prepare and effectively “hand-off” responsibility for their matters.

4. ***Compensation.*** Policies run the gamut, from full-pay to partial-pay to no-pay. A reduced pay approach may be the ideal way to protect the firm’s economic interests without entirely discouraging lawyers from taking the sabbatical. At a minimum, firms should maintain key employee benefits in place during the sabbatical.

5. ***Sabbatical activity.*** The sabbatical activity is normally not circumscribed by the firm, with one exception: lawyers are typically precluded from practicing law during the sabbatical, for both liability and competitive reasons.

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

Law firms can employ many programs other than flexible work arrangements and sabbaticals to have a positive impact on the quality of life of their 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. In general, the initiatives can be broken down into four sub-categories: (1) assistance with day-to-day personal matters that affect many or all lawyers in the firm; (2) social morale-building initiatives; (3) professional development and morale-boosting initiatives; and (4) programs and policies (other than alternative work schedules) designed to assist subgroups of lawyers in work-life integration in order to achieve professional success.

Examples used by firms are:

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 p.m. each evening for those lawyers who have to work late
- private banking
- personal computers for home use
- laundry and/or dry cleaning services
- carry-over vacation policies for associates whose workloads 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
- 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 as 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 New York 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 nonpartners who originate business—while this is more common at small firms, a growing number of larger New York 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 Subgroups of Lawyers With Work-Life Integration to Achieve Professional Success

- reentry coaching—providing services of an outside professional coach to assist attorneys returning from family leave or disability-related absence from the firm in reintegrating 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 subgroups, 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 subgroup 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

1. The Task Force recommends that NYSBA and the legal profession recognize work-life balance as an issue that impacts both men and women, and treat the issue in a gender-neutral way.

2. The Task Force recommends that NYSBA adopt a policy encouraging law firms to commit to the value of encouraging a healthier work-life balance for their lawyers. The business case for such efforts includes (1) better relationships with clients; (2) reducing the cost associated with turnover and training; and (3) maintaining a reputation that will attract additional talent.

I. Flexible Work Policies

3. Law firms should implement flexible work arrangements and policies. To do so, law firms should (1) establish guidelines and formalize a program; (2) define reduced hours; (3) establish eligibility criteria; (4) appoint a partner or manager to manage the process; (5) encourage usage of flexible work policies; (6) allow for customized arrangements; and (7) provide technology/support/advice as a resource for participants.

II. Quality of Life Initiatives

4. Law firms should consider adopting quality of life initiatives (itemized in detail in subsection IV above) in the following areas: (1) assistance with day-to-day personal matters that affect many or all lawyers in the firm; (2) social morale-building initiatives; (3) professional development and morale-boosting initiatives; (4) programs and policies designed to assist subgroups of lawyers in work-life integration to achieve professional success; and (5) policies designed to allow attorneys to leave the office behind them while on personal time.

III. Addressing Expectations

5. NYSBA should encourage law firms to provide accurate disclosure regarding expectations of hours worked and work environment when recruiting associates.

IV. Support for Work-Life Policy Implementation

6. NYSBA through the Law Practice Management Committee should encourage and offer support to legal employers striving to implement nonstigmatized/ gender-neutral work-life policies and practices, including the following: (1) creating and adopting model policies through the Law Practice Management Committee from which employers can formulate flexible work arrangement programs and quality-of-life initiatives; and (2) encouraging greater transparency from law firms about partnership, flexible work arrangements, and quality-of-life initiatives.

7. 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.

V. Vacations/Sabbaticals

8. 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. Law firms should have written policies for vacations and, if offered, sabbaticals.

9. 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.

VI. Research into Stress-Related Health Issues

10. 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 NYSBA-suggested Model Policy on Impairment in an effort to educate the profession about these issues.

TECHNOLOGY AND THE PRACTICE OF LAW

INTRODUCTION

The practice of law has been through a period of rapid technological innovation during the last twenty-five years. Although the basic nature of legal services generally remains the same, the way we practice has changed dramatically. One of the clearest examples of this change is in the realm of technology and knowledge management. Lawyers practicing twenty-five years ago worked largely without personal computing resources: no desktop computer, e-mail, Internet, online research resources, or mobile computing. While some may look back to

those days with nostalgia, most lawyers today would be unable to function without a computer or a mobile phone.

Given the many, varied, and increasing technological changes in recent years, it is difficult to predict what will come in the next three to five years. Bill Gates famously observed that “we always overestimate the change that will occur in the next two years and underestimate the change that will occur in the next ten.” This section of the Report will offer guidance to lawyers regarding the best ways to handle the technological changes that are coming to or that are already occurring in their practices, while recognizing that most lawyers have a “herd” mentality when it comes to such technology—they neither want to lead nor be left behind.

We take this approach in light of what we see as the failure of many law firms to evaluate periodically and redesign their work flow to assure that their entire system operates efficiently and effectively. Instead, many firms focus only on portions of the system, adopting particular technologies to address specific problems, thereby potentially winning incremental improvements in one area while complicating other areas and burdening the overall system. What begins with good intentions often results in diminished efficiency. The Task Force believes the primary challenge of technology in the coming years is to redesign the way we work so that technology is fully integrated into our work flow in an efficient and effective manner.

Finally, this section of the Report is addressed to lawyers rather than technology specialists because it is important that lawyers be involved in the selection and implementation of the technology and knowledge management methodologies used in their practice. Practicing lawyers need a basic understanding of these tools and methodologies so that they can guide their technology advisers to select tools that support, rather than distort, their practice.

PRACTICAL APPROACHES TO THE ADOPTION OF TECHNOLOGICAL SOLUTIONS

There is an instinctive tendency to be enthralled by the latest technological tool, whether it is a web-platform that promises more efficient project-based communication with colleagues, or a new piece of hardware that promises to automate functions previously performed by hand, or a new “app” that brings a wealth of information to a hand-held device. Software and gadgets, however, should never be adopted unless they make sense within the larger context of how a firm operates and should rarely be the starting point for an evaluation of how to harness technology. This subsection of the Report provides practical guidance to firms that wish to evaluate their use of technology and consider strategic investments in it.

I. Employ a Systems-Based Approach

A systems-based approach to the use of technology begins with an assessment of the functions the firm performs and the related flow of information and work amongst its personnel. This process often reveals duplicated efforts and a need to streamline access to information.

As a first example of an area that can benefit from a systems-based approach, consider the new matter intake process. In the natural rush to begin work on a new client engagement, a lawyer checks for conflicts and then opens a new matter in the time and billing system as quickly as possible, often with little thought to providing a comprehensive description of the matter or categorizing the engagement by matter type, industry, or the lawyers involved. As the matter progresses, the client’s goals may change, but they are not likely to be reflected in the firm’s recorded matter information.

After the matter closes, there is no system in place to assist the lawyer or others when seeking new business or building a team with relevant experience. There is no way to look for internal precedents from similar matters and no way to analyze the firm’s business to better

understand the types of matters it tends to take and its record with respect to those matters. In each case, an initial matter description that is accurate and thorough, and systemically updated, could be very helpful. It would eliminate the need to query multiple systems or to track down information from the lawyers involved in the matter when seeking relevant experience for other matters or when preparing marketing materials.

In a truly systematic approach to the new business process, the lawyer opening the matter provides a basic description, including the matter type and client industry. This information, along with information relating to the lawyers involved, is then periodically updated either automatically or through updates from the lawyers on the client team. The updated information is then shared automatically across all relevant systems (time and billing, conflicts, document management, expertise location, staffing database, and marketing database). Now, when the business need arises, the firm has current matter information readily available.

In the systems-based scenario, (1) each piece of information has a single home and a custodian charged with its upkeep; (2) information is entered once in the host system and provided to other systems as necessary to avoid the double entry of that information; (3) information is kept in a particular silo (*e.g.*, the database supporting a time and billing system or a document management system) that is easily accessible for use across silos; and (4) the streamlined information search does not interrupt the billable work of the firm.

Electronic billing is a second example of an area that can benefit from a systems-based approach. The legal profession has come a long way from submitting legal bills that simply stated, "For Services Rendered." Today, most hourly billing requirements involve Uniform Task Based Billing Codes in increments with explanations broken down by ten or

fifteen minutes. With this granularity, however, come bills that can be hundreds of pages long and difficult to understand.

As electronic billing, or e-billing, has become more sophisticated, it has allowed the bill reviewer to understand the level of work and hourly charges over time, and it has made the task of reviewing large bills much simpler. Today, e-billing allows clients and insurance companies to aggregate bills, organize charges by type of work performed, and customize the process to “flag” or highlight certain types of billing errors or concerns. Thus, the client can take a monthly bill and understand it in relationship to the total costs, compare the charges to the budget, and pinpoint any questionable charges.

Because e-billing affords a greater understanding of the time and cost involved, the conversations can focus more readily on the “value” of the work performed. In litigation, for example, the number of hours spent on a typical motion to dismiss can be determined, compared across like cases, and more accurately budgeted up front. Thus, instead of a discussion after the work has been performed, the client and lawyer can discuss together the cost/benefit of work before agreeing to a particular course of action. Mutual dialogue about risk versus cost, based on real data from past cases, has the potential to change the way law is practiced and improve the lawyer/client dynamic.

Although e-billing has been driven mostly by large clients wanting more consistent and detailed information about work done on their behalf, law firms, too, can employ e-billing internally for more efficient case management. A firm can develop the data necessary to see how efficient it is, or is not, at doing certain kinds of work. Over time, the firm can use this data to analyze how well it handles various tasks and to budget legal expenses for the client.

II. Define the Goals for Applying Technology to a Legal Practice

Adopting technological solutions without considering the goals to be achieved by that technology has led many firms down the path of spending large sums of money to acquire computer hardware and software that are underutilized, or worse, that result in increased frustration and reduced productivity. Typically, the most important goals to consider when adopting new technologies are: (1) improving work product quality while reducing costs; (2) increasing the satisfaction of the firm's clients and lawyers; (3) enhancing efficiency, (4) minimizing risk exposure; (5) maintaining confidentiality and security; (6) supporting mobile and flexible work arrangements; and (7) achieving high levels of knowledge capture and sharing. Unless investment in technology addresses these factors in a comprehensive manner, that technology is unlikely to be durable.

Although substantial investments in technology may not be possible or appropriate for everyone, and particularly not for smaller firms, a law firm that takes a minimalist approach to technology and these goals may find itself at a disadvantage with respect to clients. Clients are often ahead of their lawyers when it comes to technology. They often expect their lawyers to have access to the same technologies they use and become frustrated when their lawyers lag behind. Having common platforms allows firms to strengthen their relationships with their clients while better managing costs. For example, some clients have moved law firms toward common platforms for e-billing. Law firms should look for other common platforms that they can leverage to enhance client relationships.

III. Understand and Embrace the Concept of “Knowledge Management”

Lawyers have always understood the value of the information and experience gleaned from client engagements, *i.e.*, “knowledge management.” The goal of knowledge

management is to ensure that the right information is in the right hands at the right time, leading to better decisions about legal strategy and the business direction of the firm.

As a practical matter, knowledge management within a firm may involve systematic efforts to capture work product and learning as well as methods to retrieve and share that knowledge. Knowledge management principles can also be used to streamline support functions and enhance information sharing across administrative departments, reducing wasted time spent in fruitless searching or duplication of effort. Finally, as one commentator¹²³ has suggested, too many lawyers are torn between not wanting to be early adopters and dreading being left behind. The result is that some lawyers fail to optimize the tools they have, let alone take advantage of the most appropriate tools available.

IV. Educate and Train Lawyers to Understand and Use Technology More Effectively

Given the importance of technology to the practice of law, the legal profession shares the burden of finding a way to help lawyers understand and use technology more effectively. The Task Force recommends that law schools and firms increase (or begin) the education and training of lawyers about practical ways to use technology in their practices.

Law schools throughout the state should place greater emphasis on practical courses in various aspects of legal technology such as eDiscovery, document management technology, advanced online legal research, legal technology in the courtroom, and project management. Although many schools currently offer elective courses in some of these areas, or invite vendors on campus to provide training, law schools can better serve their students and the profession by offering instruction in a broader range of technological subjects and integrating such classes into the requirements for graduation.

¹²³ See Richard Susskind, note 8 *supra*.

Similarly, law firms should invest in, and require, the training of both new and established lawyers to understand and adopt the efficiencies that technology can provide. If senior attorneys do not take a lead role in implementing a firm's strategic investments in technology, the firm is unlikely to develop a culture that will allow technological innovation to succeed.

CURRENT TRENDS AND TOOLS

Although the Task Force cautions against a "tools-first" approach, a survey of some applications and technologies that are finding their way into law firm practice provides some insights into how firms are using new technology. This section considers some of the technological solutions with which lawyers are experimenting and some of the issues related to their adoption. Some of these solutions (such as Web sites and e-filing) are already widely used, while others (such as cloud computing, iPads, and social networking) are just beginning to venture into the legal landscape.

I. Cloud Computing

In many areas of commerce, "cloud computing"—loosely defined as the use of Internet-based shared servers or applications hosted by third parties—promises to be a major technological step forward in collaboration, mobility, and infrastructure. For more than two decades, internal law firm technology infrastructure has been centered around data storage, servers, and telecommunication. Flexible cloud platforms, however, have the ability to assume this responsibility externally, allowing many users to access the information in a fully mobile manner. Cloud computing has the potential to connect lawyers and clients seamlessly to the same data and software, even when working remotely.

For small firms, cloud computing may inexpensively serve all of their computer software needs by allowing them to outsource their IT infrastructure, maintenance, and support.

A single service provider may, for one price, provide online all of the tools a lawyer needs to practice law and manage his or her practice, including case management, billing, calendaring, creating documents, storing and organizing those documents, and providing the tools to search and retrieve them, along with fully mobile communications functionality (e-mail, phone, and videoconferencing). Users no longer need to worry about hardware for storage and back-up, licensing software upgrades, or virus protection. Although many of these services are available to some extent today, users may need different devices for each operation and may pay separately for access to each service. As the market consolidates, cloud computing will provide all of this in one bundle.

Larger firms may be less trusting of third-party hosts. They may be more inclined to invest in private cloud computing where applications and data are hosted by a central, secure source, and made accessible to other attorneys, clients, and vendors. Although potentially more costly, the establishment of private clouds offers some presumptive advantages in terms of security and customizability, which may be necessary given the proprietary and confidential nature of much of the material handled by lawyers. However, confidential data are not necessarily inherently safer, merely because they are hosted locally. Any data storage device can be compromised, including data stored on a “local” law firm network, particularly a network that is insufficiently staffed with professionals untrained in threat detection and into which many people have password-based access. Sophisticated third-party cloud platforms—both public and private—use secure locations for their servers with trained staff on-site to deal with threats.

As cloud computing becomes more prevalent, the Task Force recommends that NYSBA’s Committee on Standards of Attorney Conduct consider the ethical issues surrounding the hosting and security of client data in cloud resources. Other state bar associations are already

taking up this issue. For example, the Nevada, Arizona, and Alabama State Bar Associations have recently addressed cloud computing in the context of attorneys' retention obligations,¹²⁴ applying a "reasonable care" standard and noting that a lawyer may choose to store or back up client files via a third-party provider or Internet-based server, provided that the lawyer exercises reasonable care in doing so. These third-party or Internet-based servers may include cloud computing. And, the ABA's Ethics 20/20 Project is addressing ethical issues presented by cloud computing. The Task Force recommends that NYSBA recognize that, using reasonable care, the potential benefits to the practice—in terms of lawyer mobility, access to client data, and communication—may outweigh the risks associated with security and that in some situations those risks may even be lessened. The identification and publication of data security standards by NYSBA would assist attorneys in adopting cloud computing into their practices.

II. Mobile Computing

With mobile computing, a waiting lawyer can be a working lawyer. Mobile devices allow for uninterrupted Internet connectivity and access to electronic files and other resources available at the office. This level of information access allows attorneys to adapt to situations as they unfold, gather last-minute research that could prove decisive, and quickly address a client's concerns from anywhere in the world.

A new generation of tablet computers has entered and may soon take over the marketplace. The iPad and its competitors can be switched on almost instantaneously, have large touchscreens with solid functionality, Web access, cameras, room for software applications that perform a myriad of duties, and an on-screen keyboard. Tablets can give lawyers access to large amounts of information—such as briefs, cases, and Web sites. Tablets certainly have the

¹²⁴ See Alabama State Bar Ethics Opinion 2010-02, "Retention, Storage, Ownership, Production and Destruction of Client Files" (undated). See also State Bar of Nevada Formal Opinion No. 33 (Feb. 9, 2006) and Arizona State Bar Opinion 09-04 (12/2009).

potential, at least in the near term, to become the primary mobile work machine for many and to become a “game changer” in the world of legal technology.

Law firms must recognize that mobile computing also has disadvantages and that, in some situations, it can make practice more, rather than less, burdensome. Professional demands tether attorneys to the array of devices so they maintain an unbroken connection with work long after the office is locked. Many lawyers find themselves unable to disconnect from their clients’ needs.¹²⁵ Law firms should establish guidelines that address this issue, identifying conditions under which attorneys are, and are not, responsible for maintaining a connection with the workplace, and recognizing that for the sake of the profession, it may not always be necessary or wise to have an instant response to every issue. NYSBA’s Law Practice Management Committee should promulgate model policies in this area.

Finally, firms must recognize that perhaps no technology has transformed the daily practice of law more than e-mail, particularly now that it has become an ever-present feature of a myriad of mobile devices. Communications that were once accomplished by traditional letters or telephone now occur in seconds, with neither the time provided by letters nor the personal interaction provided by a telephone call. Clients often expect instant responses and instant analyses. Further, many lawyers find that, despite their best efforts to the contrary, their days are largely driven by what has been called the tyranny of e-mail. Firms should work to develop tools that will assist their attorneys in prioritizing and organizing the ever-increasing flood of e-mails.

¹²⁵ Two NYSBA surveys of law firm managing partners revealed that the typical managing partner believes that lawyers should answer non-emergency e-mails on weekends. See “State Bar Straw Poll of Law Firm Managing Partners Shows Guarded Optimism About the Future: 90% Expect the Demand for Legal Services to Remain the Same or Increase in 2011,” New York State Bar Association, Sept. 23, 2010; “Straw Poll of Law Firm Leaders from Western and Central New York Shows Optimism About the Future,” New York State Bar Association, Dec. 16, 2010.

III. Virtual Law Firms

Developments in technology have created the opportunity to form new kinds of law firms and legal enterprises. Brick-and-mortar law offices are competing with—and in some cases being joined by—overhead-saving small firms that exist “virtually,” meaning they exist and work almost exclusively online. Using the latest technology, virtual law firms can gather and share information online through secure sites or platforms that reside on the Internet. Improved encryption systems, pervasive web usage, and the ease of digital document and information transmissions have allowed the “virtual law firm” to become a viable option.

In some of these arrangements, communications are transmitted online through a portal, perhaps with enhanced voice or videoconferencing capabilities. Clients and potential clients may register with a law firm site, log in, fill out questionnaires, check work, and make payments. Firm Web sites may have third-party servers located in a secure facility, regimented and redundant back-up systems, and file encryption. If work is primarily transactional in nature, clients may receive a finished document, reviewed by an attorney at a price point that meets their budget requirements—and provided only upon final payment. Clients that require litigation or other services that are difficult to handle remotely may be referred to an appropriate legal practitioner.

Marketing a virtual legal practice requires a level of professionalism and web marketing expertise that can be daunting to new attorneys or attorneys contemplating such a transition. Without a branded, traditional brick-and-mortar practice from which to network, a virtual legal practice may use search engine optimization tools and professional marketing services, as well as alternative marketing approaches such as social networking.

Virtual law firms are representing clients across a broad range of practice areas, including transactional services, intellectual property, tax, commercial law, energy, and

employment. Multijurisdictional virtual law firms with multiple attorneys are currently in operation, and compliance with different states' laws will be an important issue for these entities, as it is for multijurisdictional brick-and-mortar firms.

IV. Online Advertising and Social Media

A law firm Web site is a window into the firm and may be the first impression a prospective client has of the firm. A firm's Web site often highlights news about recent victories and awards received, describes its practice areas, provides biographies of attorneys and staff, and showcases the firm's strengths. Often the site contains alert memos on current legal issues, as well as downloadable intake forms. Increasingly, clients are coming to expect "push-out" alerts from firms about cutting edge legal developments.

Law firms that wish to use their Web sites to develop business should carefully select keywords that reflect the terms for which potential clients would be expected to search and that match both the law firm's practice areas and geographic location. By understanding the intricacies of Web site keyword optimization, a firm can increase its visibility in search engine results.

Lawyers must always be mindful of permissible advertising when creating and maintaining a Web site.¹²⁶ The same caution applies to other Internet postings on services such as Facebook, Twitter, and LinkedIn that may also be subject to rules of professional responsibility for advertising.

Social networking is another area in which lawyers communicate and advertise. The 2010 ABA Legal Technology Survey reports that 56% of its respondents maintain a presence in an online social network such as Facebook or LinkedIn. Among large firm

¹²⁶ New York Rules of Professional Conduct Rule 7.1, effective Apr. 1, 2009, as amended May 4, 2010; see "Report and Recommendations of Task Force on Lawyer Advertising," New York State Bar Association, at 48-55 Oct. 21, 2005.

respondents, 63% maintain a presence in an online social network. The following reasons were given for participating in social networking: professional networking (76%); socializing (62%); client development (42%); career development (17%); and case investigation (6%).

Social networking allows a lawyer to create and maintain relationships with current and potential clients and to share his or her expertise on the subjects discussed in public forums. It also provides the opportunity for search engines to index the material so that the search engine can return the postings in its search results. Confidentiality and ethical cautions apply to social networking as they do to other forms of communication, but perhaps more so with “social” communications that some may forget are permanently and publicly recorded.

Lawyers using social networking sites should become knowledgeable about the potential implications of such use. Given that these tools are still sufficiently new that their impact is not yet fully understood, and the rules governing how lawyers should use them are still not settled, lawyers should be cautious about their use. Confidentiality of lawyer-client communications easily could be breached when posting inquiries or comments online. A public list of an attorney’s contacts or “friends” on a site or a link to a Web site belonging to a client may cause a breach of a confidential relationship. Also, providing “casual advice” online may lead to a claim that an attorney-client relationship has developed, which could lead to the lawyer’s being disqualified from representing a client adverse to the person to whom he or she provided the advice—or potentially worse, a breached duty to a present or former client not to act in a manner adverse to the client’s interests. It is important that lawyers know how to limit access to information they provide on such sites.

Web sites, blogging, and social networking do not respect state boundaries, potentially leading to issues relating to the unauthorized practice of law in jurisdictions outside

of the states where the lawyer is licensed to practice. At a minimum, when using any of these tools, lawyers should use disclaimers to indicate clearly the state in which the attorney is licensed. Moreover, social networking media could be construed as advertising, and, depending on the communication, could be considered a solicitation.

Within the past few months, NYSBA and the New York City Bar Association have issued guidelines on when it is appropriate for a lawyer to gather information about an opposing party on Facebook. The guidelines address when it may be inappropriate to contact an opposing party or witness to view private profiles. The Task Force recommends that NYSBA's Committee on Standards of Attorney Conduct pay continued attention to ethical issues created by the use of new media in practice.

V. Extranets

An extranet allows a firm to provide electronic documents, billing information, and interactive forums with clients or other parties outside of the firm. Extranets generally control who has access to documents and information on an individual basis. For example, the general counsel of a client and his or her key staff might be given access to legal documents that others at the client might not have permission to see or an extranet may provide a means for co-counsel to share information.

One promising area for extranets is the client library. A client library is an extranet into which a firm can post work that was done on behalf of the client, including historic documents, closing sets, real time or past billing information, client alerts drafted by the firm that relate specifically to work that is being done for the client, and other material that might be of interest to that client. A library can also contain model documents, access to automated forms, and expertise systems to provide advice to a client without the client having to speak directly with a lawyer.

Some large corporations have started to mandate that their outside counsel use a common system for housing and sharing their work product, not only with the client, but with the client's other outside counsel. Client control over the library allows the client to maintain and neatly organize the work product from various sources. Such control means that a client can easily facilitate cooperation among its outside counsel and no longer needs to search multiple sites to locate its work product.

VI. Enterprise Search

Most of the useful information in a law office is no longer stored in tabbed paper folders located in file cabinets, but is instead stored on hard drives and file servers. Finding such files at a later date can be time consuming, if not impossible, if the files are poorly organized. With ever growing pools of digital information, it is critical that lawyers have the tools necessary to find documents and other relevant information they need quickly and efficiently. Enterprise search provides the ability to search for and locate documents across all of the firm's systems, including document management systems, e-mail systems, and financial systems.

As these sources of knowledge grow and spread out across different systems, it is essential that the search results be both comprehensive and relevant. Traditional keyword searches, while helpful, tend to be either underinclusive or overinclusive. Recently, there have been improvements in search technology in the area of concept searching. Concept searching uses mathematical and statistical models to find related concepts, as opposed to merely finding matching words, and it can often provide more relevant and comprehensive results than traditional methods.

Large firms and corporate counsel have the means to purchase search tools and document management systems that include concept searching tools, but small firms without the financial or technical resources may forgo the expense of such tools, possibly putting them at a

competitive and technological disadvantage. To help make these tools available to small firms, NYSBA should consider working with its new concept search engine provider to have the vendor develop a service for the benefit of its membership.

VII. E-Filing

Electronic filing (or e-filing), already mandatory in federal courts, is rapidly becoming a required filing standard throughout New York State courts. Given that almost every legal document is created on a computer, and that most attorneys and parties are using electronic mail to communicate, integrating these methods into the court system has improved efficiency by removing the need to print and store paper versions of the documents or to visit courthouses to retrieve them. Depending on the e-filing method, the filed documents may be searched and indexed in a database for ease of access, retrieval, and review. E-filing significantly reduces the amount of space needed by courts and attorneys for storage of filings, and the use of off-site backups can protect against loss of files due to natural or man-made disasters. For attorneys and litigants, e-filing reduces production and transmission costs for papers and related documents, and it lowers travel and service costs for attorneys located far from the courthouse or from their adversaries.

The New York Unified Court System has established the “New York State Courts E-filing” system, or NYSCEF, over the past decade, based on recommendations made by NYSBA’s Task Force on the e-filing of Court Documents and by New York State courts and attorneys. NYSCEF allows for the filing of electronic legal documents with county clerks and with courts in certain types of cases and in certain venues. NYSCEF may be used to initiate a case, and cases that were originally filed in hard-copy paper format can be converted to electronic format through NYSCEF.

Through NYSCEF, access to all e-filed documents, regardless of the security designation by the filer, is permitted at the courthouse, unless the document or file is sealed pursuant to statute or court order. Currently, the system allows the public to search for cases, claims, and documents, and it offers a subscription service called CaseTrac that allows the subscriber to track cases and be notified by e-mail when any changes have occurred with the case. Since the implementation of the NYSCEF system, e-filing has become more pervasive throughout the New York State court system, being adopted by more counties' Supreme Courts, Surrogate's Courts, and Courts of Claims. NYSBA's E-Filing Task Force originally envisioned that e-filing would eventually become available in all courts throughout the state. While this will become the reality over time, implementation is necessarily completed in small stages, owing to the costs of introducing the system into a new region, training court employees and county clerks to use the system, and so on. Currently, e-filing is available, but not mandatory, in most courts. Although it may eventually become mandatory, it will not eliminate paper filing altogether, as *pro se* parties will not be mandated to use e-filing, and may not even be permitted to use the e-filing system. As more courts adopt the NYSCEF system and allow e-filing or mandate its use, more New York attorneys will need to learn to use the system. The NYSCEF Web site¹²⁷ contains several user guides to assist attorneys with the system and also contains links to the relevant sections of New York rules and legislation that cover e-filing. The New York County Supreme Court also provides attorneys a free two-hour e-filing training session worth two CLE credits. In addition, the NYSCEF site contains both a live system and a practice system on which attorneys can practice using and filing forms. At the federal level, e-filing is handled

¹²⁷ See <https://iapps.courts.state.ny.us/fbem/mainframe.html>.

through the PACER system. E-filing in federal courts is mandatory nationwide, and all attorneys in the state who practice in federal courts should be trained on the federal e-filing system.

RECOMMENDATIONS

1. The Task Force recommends that law schools and firms increase educational and training opportunities for lawyers regarding practical ways to use technology to enhance their practices, to understand and use technology more effectively, and to develop practice management and project management skills.

2. The Task Force recommends that firms consider the adoption of system-based approaches, beginning with an assessment of the functions the firm performs and the related flow of information and work among its personnel, to determine which tools are most useful and effective to meet their needs. The Task Force observes that firms that design sound practices, and implement technology that makes sense in the context of their practices are more likely to benefit from and be satisfied with their investments.

3. The Task Force recommends that NYSBA's Committee on Standards of Attorney Conduct should study and make recommendations concerning the ethical and risk management considerations associated with new technologies such as social networking, third-party hosted solutions, and virtual law firms.

4. The Task Force recommends that NYSBA's Law Practice Management Committee create model policies concerning the use of mobile technology, including the establishment of guidelines for security issues associated with mobile technology, and clear communications to attorneys as to when they are, and are not, responsible for maintaining a connection with the workplace. The Task Force also recommends that NYSBA's Law Practice Management Committee develop model suggestions to assist firms in increasing their attorneys'

productivity through the development of efficient tools and best practices for the efficient handling of the ever-increasing e-mail traffic they receive.

5. The Task Force recommends that NYSBA encourage legal employers to use technology to support a healthier work-life balance by facilitating flexible work arrangements.

6. The Task Force recommends that NYSBA consider whether and how NYSBA can leverage its resources to assist smaller firms with technology-related issues. For example, NYSBA may wish to consider whether it can work with its technology vendors to develop services that benefit members and practitioners for whom individual investment in technological solutions is not economically feasible.



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