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I Don't Have Time to Be Ethical: Addressing the Effects of Billable Hour Pressure

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I DON'T HAVE TIME TO BE ETHICAL: ADDRESSING THE EFFECTS OF BILLABLE HOUR PRESSURE

SUSAN SAAB FORTNEY*

TABLE OF CONTENTS

I. REVIEW OF STUDY FINDINGS.....	308
II. REVIEW OF ABA COMMISSION REPORT.....	311
III. MATTERS THAT AD HOC COMMITTEE SHOULD ADDRESS	314
IV. CONCLUSION-CHALLENGE FOR THE FUTURE	318

In a minute there is time . . .
For decisions and revisions which a minute will reverse
For I have known them all:
Have known the evenings, mornings, afternoons,
I have measured my life in coffee spoons . . .

The Love Song of J. Alfred Prufrock by T.S. Eliot

These poetic words of T.S. Eliot could describe the grind of attorneys who measure their lives in billable hours. Attorneys who use hourly basis can easily slip into a mentality of thinking of their days in terms of tenth or quarter of an hour increments. For example, when I was in private practice, I remember being incensed over how much billable time I was wasting in line at the cleaners. Such a reaction is common for attorneys on the billable hour treadmill who find themselves worrying, even obsessing, about "billables."

Over the last four years the likelihood of associates worrying about billable hour production has increased as billable hour expectations and associates salaries have increased. The latest round of salary hikes began in December 1999 when the Silicon Valley firm of Gunderson, Dettmer, Strough, Villeneuve, Frankline & Hachigian announced that first-year associates would be paid \$125,000 with a

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guaranteed bonus of \$20,000.¹ This created the "Gunderson Effect" when other firms responded by raising their associate salaries.²

The funding of the associate salary increases could come from different sources including higher hourly rates, lower partner compensation, or increased billable hour requirements.³ With the economic downturn, clients resist higher hourly rates and partners resist lowering their own compensation. As a result, the funding of the salary increases largely came from increased billable hour expectations for associates.⁴ One analysis of the impact of the increased salaries on billable hour requirements concluded that in some cases, associates would be toiling an extra 300 hours a year to fund the salary increases.⁵ This estimate is particularly disturbing considering that the billable hour requirements in many large firms had already reached 2000 hours per year.⁶

Practitioners and academics alike have expressed concern over the consequences of increasing billable hour requirements, speculating on the consequences of the billable hours derby. To gauge the actual effects, I conducted an empirical study in 1999-2000, focusing on the effects of billable hours expectations and firm culture.⁷ My study findings revealed that billable hour pressure is transforming law firm

1. Yvonne Krywyj, *The Gunderson Effect and Billable Mania. Trends in Over-billing and the Effect of New Wages*, 14 GEO. J. LEGAL ETHICS 1001, 1012 (2001) (explaining that the firm increased salaries attempting to prevent the exodus of associates to prosperous dot-com companies).

2. NAT'L ASS'N FOR LAW PLACEMENT, *Epilogue: The Salary Wars and Their Aftermath*, at <http://www.nalp.org/refdesk/salwars.htm> (last visited Feb. 18, 2003) (noting that evidence indicates that even the smallest firms around the country succumbed to the pressure of the latest round of salary hikes).

3. Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207, 207-08 (2000) (discussing the professional responsibility concerns related to the increased pressure on associates to bill hours).

4. Vicki M. Huebner, *Increased Starting Salaries: What Have We Wrought on the Profession?*, 42 ORANGE COUNTY LAW 32 (Oct. 2000).

5. NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 2 (citing a LEGAL TIMES analysis).

6. Rex S. Heinke, *Putting Associate Salaries Into Perspective*, 23 L.A. LAW 12 (July-Aug. 2000).

7. For a lengthy article on the study's findings and recommendations, see Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239 (2000) [hereinafter *Soul for Sale*]. For a shorter discussion, see Susan Saab Fortney, *An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements* (pt. 1), 64 TEX. B.J. 1060, 1060 (2001), and Susan Saab Fortney, *An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements* (pt. 2), 65 TEX. B.J. 74, 74 (2002), available at www.texasbar.com/globals/tbj/dec01/fortney.asp and www.texasbar.com/globals/tbj/jan02/fortney.asp (last visited Feb. 10, 2003).

culture and economics, impacting individual attorneys and their firms, as well as the legal profession and consumers. To combat this trend, I urged firm and bar managers to explore changes within firms and within the regulatory and competitive environments in which firms operate.⁸

In 2001, I was thrilled to learn that American Bar Association (ABA) President Robert E. Hirshon tackled problems created by the increasing billable hour requirements. In his first news briefing in 2001, President Hirshon announced the formation of the ABA Commission on Billable Hours ("the Commission") to consider "the tyranny of the billable hour system" and alternatives to it.⁹ The Commission investigated and reported on the effect of the billable hours system on the legal profession.¹⁰

Within a year, the Commission issued its final report. This report and the work of the Commission deserves both attention and recognition.¹¹ Concerned attorneys should not merely read the report and place it on the bookshelf. Rather we should carefully study the Commission Report and make recommendations for the work of the Ad Hoc Committee on Billable Hours, the ABA group charged with continuing the work of the Commission.¹²

In that spirit, I write this essay to discuss the unintended consequences of the billable hour derby and changes to address the deleterious effects of increasing billable hour requirements. Part I generally reviews the findings from my study. Part II discusses the work and report of the ABA Commission, identifying those issues and approaches that the ABA and firm managers should explore. Because it is doubtful that hourly billing can be completely eliminated, the conclusion calls on bar and firm leaders to reexamine compensation and

8. For a discussion of steps that firm managers, bar leaders and regulators should take to address the deleterious effects of billable hour pressure, see Fortney, *Soul for Sale*, *supra* note 7, at 292-99.

9. Martha Neil, *Off to a Running Start: Hirshon Announces Initiatives on Billable Hours and Student Loans*, 87 A.B.A. J. 82, 82 (2001).

10. ABA NETWORK, *Background on the Ad Hoc Committee on Billable Hours*, available at <http://www.abanet.org/careercounsel/billable/toolkit/bkrnd.html> (last visited Jan. 29, 2003). See M. Allyn Dingel, Jr., *The ABA at the Cradle of Democracy*, 45 IDAHO ST. B. ADVOC., 26, 26 (June 2002) (reporting on the Commission's gains in studying the consequences of the "tyranny of billable hours" on family and pro bono service, as well as the relationships between firms and their clients).

11. ABA NETWORK, *ABA Commission on Billable Hours Report*, available at <http://www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf> (last visited Jan. 29, 2003).

12. Following the release of the Commission report, the Commission was renamed the Ad Hoc Committee on Billable Hours under the ABA Section of Business Law. ABA NETWORK, *Ad Hoc Committee on Billable Hours, Model Talking Points*, available at <http://www.abanet.org/careercounsel/billable/toolkit/talk.html> (last visited Jan. 29, 2003).

partnership models that result in attorneys sacrificing their personal lives in order to achieve professional success.

I. REVIEW OF STUDY FINDINGS

In the last five years, the frustration over hourly billing has mushroomed to the point where attorney and client complaints have reached a fevered pitch. Rather than speculating on the problems, I decided to obtain actual data on the effects of billable hour requirements and possible solutions to the problems created when firms emphasize billable hour production over quality work and other contributions to firms.

To obtain data, I used a mail survey sent to 1000 associates in Texas firms with ten or more attorneys.¹³ Respondents worked in firms of varying sizes. Half of the respondents worked in firms with more than 100 attorneys ("Large Firms"), 27% worked in firms with 25-100 attorneys ("Medium Firms") and 21% worked in firms with 11-24 attorneys ("Small Firms").

On an individual level, the most obvious consequence of the hour derby is a time famine for attorneys who do not have enough time for themselves and their families. While the general work force struggles to balance work and personal life, the intense time pressure inherent in law practice exacerbates the problem for attorneys. In my study, 66% of the respondents reported that billable hour pressure had taken a toll on their personal life.¹⁴

Close to three-quarters of respondents agreed with the statement that "I must sacrifice fulfillment outside of work in order to attain partnership status."¹⁵ Respondents appeared to recognize that once they make partner, they will probably be required to devote more time than less. As described by a participant in another study, "It's like a pie-eating contest where the first prize is all the pie you can

13. While the study was limited to one state, I believe that the study's results reflect experiences nationwide. Texas is a diverse state with more than 67,000 attorneys practicing in large metroplexes as well as smaller cities and towns. Tony Alvarado, *Surveys Galore*, 64 TEX. B.J. 887, 887 (2001). A statistical profile on the State Bar of Texas is available on the state bar website, www.texasbar.com, under the link called "About the State Bar."

14. Predictably, the number of persons reporting that billable hour pressure had taken a toll increased as the number of hours worked increased. The percentage also increased with firm size with 74% of respondents in large firms reporting that billable hour pressure had taken a personal toll. Fortney, *Soul for Sale*, *supra* note 7, at 265.

15. *Id.* In noting how billable hours pressure had taken a toll, 95% of the respondents checked the box that stated: "I have less time for my friends and family" and 25% checked the box that stated: "I have more trouble sustaining an intimate relationship than I used to." *Id.* at 265-66.

eat."¹⁶ Many associates now do not even aspire to climb the ladder to partnership. In the study only 8% identified full partner participation as the professional goal they were most interested in attaining.¹⁷

Disenchantment with the partnership track and general dissatisfaction with law practice is linked to increases in the number of hours worked by attorneys in private practice. An ABA Young Lawyers Division study identified increased work pressure as the major cause for attorney dissatisfaction.¹⁸ The extent of attorney dissatisfaction is suggested by the percentage of associates interested in changing jobs. In my study 39% of respondents indicated that they are interested in changing jobs during the next two years.¹⁹ Results from other studies reveal similar or even higher percentages of respondents who report that they are likely to change jobs.²⁰

Of those respondents in my survey who indicated that they wanted to change jobs in the next two years, 37% preferred a corporate counsel position and 22% preferred a nonlegal job.²¹ Together these percentages indicate that a majority of respondents who desire a change want to leave private practice.²²

Not surprisingly, in my study billable hour pressure was identified as the factor most influential in causing respondents to change jobs.²³ In particular, ethical associates may feel as if billable hour

16. *Id.* at 266. See also NAT'L ASS'N FOR LAW PLACEMENT, *Keeping the Keepers: Strategies for Associate Retention in Times of Attrition* 106 (1998), available at <http://www.nalp.org/fndres/kpintro.htm> (last visited Jan. 10, 2003).

17. Fortney, *Soul for Sale*, *supra* note 7, at 266.

18. Comparing results from a 1984 YLD study to the results from a 1990 YLD survey, the number of respondents who indicated that they were satisfied with their jobs decreased. See ABA YOUNG LAWYERS DIV., *The State of the Legal Profession* 52 (1990) (reporting a 20% reduction in the number of lawyers indicating that they were very satisfied with their jobs).

19. Fortney, *Soul for Sale*, *supra* note 7, at 285. Based on income, the group of respondents who were most interested in changing jobs were associates whose income was less than \$50,000, the majority (54%) of whom indicated that they were interested in changing jobs. By comparison, only 25% of the respondents whose income was between \$125,000 to \$159,999 a year indicated an interest in changing jobs in the next two years. *Id.*

20. In a Spherion Corporation and Harris Interactive Inc. study, 56% of the respondents reported that they were likely to change jobs within the next two years and more than a third reported that they would do so within the next twelve months. Gregory J. Mazares, *Associate Retention for Law Firms: What are Your Lawyers Saying About You?*, 29 CAP. U. L. REV. 903 (2001).

21. Fortney, *Soul for Sale*, *supra* note 7, at 287.

22. Other studies also reveal that attrition cannot be won with dollars. See, e.g., Kathleen J. Wu, *Money Makes the World Go Round, but it Doesn't Make it Stable*, 16 TEX. LAW. 55 (OCT. 30, 2000) (reporting on an American Lawyer survey that revealed that interesting work and prestige, more than cash, would influence associate attrition).

23. The largest percentage of respondents (28%) indicated that a "reduction of work hours" was the factor that would be most influential in causing the respondent to

pressure is effectively pushing them out the door. The survey results reveal that approximately half of the respondents (46%) agreed with the following statement: "Billing pressure causes ethical and competent attorneys to leave private law practice."²⁴ Only half that number disagreed with the statement. Rather than attempting to compete with "heavy-handed" billers who engage in questionable billing practices, ethical associates may voluntarily leave practice or be penalized when firm management makes compensation and retention decisions on the basis of billable hours.

If attorneys do not leave private practice another deleterious effect of billing pressure is the degradation of ethical standards and rationalization of improper billing practices.²⁵ Sixty-four percent of respondents agreed that attorneys tend to rationalize and justify questionable billing practices. Only 10% disagreed with the proposition that attorneys rationalize and justify questionable practices such as over billing.

The risk of over-billing is particularly acute when billing practices are not monitored because partners face their own pressure to bill and generate business. In the survey, 43% of the respondents agreed with the statement that "[b]ecause of the pressure on partners to bill and generate business, partners in my firm do not provide the monitoring and training that I need and want."²⁶ Clearly, the decline in mentoring and supervision is another unintended consequence of compensation systems that emphasize production and generation. Such a decline in supervision adversely affects the quality of legal services.²⁷

The quality of legal service also suffers when pressure and stress lowers the level of performance.²⁸ Attorneys who handle liability and

change jobs. For a table setting forth other factors identified by respondents, see Fortney, *Soul for Sale*, *supra* note 7, at 285.

24. *Id.* at 279.

25. Based on results from two billing studies, Professor William G. Ross suggests that most over-billing is the result of self-deception rather than conscious fraud. WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF THE TIME-BASED BILLING BY ATTORNEYS* 63 (1996).

26. A comparable percentage (42%) disagreed with the statement. For a discussion of the connection between the decline in mentoring and associate attrition, see Fortney, *Soul for Sale*, *supra* note 7, at 283-86.

27. For insights related to the importance of mentoring and supervising, see Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998).

28. Isaiah Zimmerman, a Washington D.C. psychologist who specializes in counseling lawyers and judges, explains that the causal link between high levels of stress and lowered performance is well documented. Christopher T. Borgeson & Elizabeth M. Link, *Stress Management: Minimizing the Risk of Malpractice-Is Stress Affecting Your Competency?*, 2 No. 3 LEGAL MALPRACTICE REP. 11, 12 (1991).

disciplinary matters know that stress increases the likelihood of professional malpractice and disciplinary violations, especially when junior attorneys are not properly supervised. In my study, the majority of respondents (64%) agreed with the following statement: "Working long hours adversely affects my ability to think critically and creatively."²⁹ Referring to this effect of working long hours, Professor Geoffrey C. Hazard cautions that fatigue impairs one's capacity to make fully reasoned and sound professional judgments.³⁰

Those associates who pride themselves in doing quality work express frustration with another consequence of billable hour pressure—what I call the "quantification" of law practice that occurs when firms emphasize the quantity of hours billed over the quality of work performed. Other commentators, including Dean Anthony Kronman, have bemoaned the increased emphasis on billable hours as the basis for evaluating and compensating associates.³¹ My study revealed that many firms do compensate associates largely on hours billed and collected. Over three-quarters of respondents (76%) agreed with the statement: "My income and advancement within the firm are principally based on the number of hours that I bill and collect."³² Since my study, the trend to base income on billable hour production has continued, with many firms basing bonuses on reaching specific billing benchmarks.³³ As discussed below, the ABA Commission Report reflected a concern over compensation systems that base bonuses to the number of hours clocked.

II. REVIEW OF ABA COMMISSION REPORT

ABA President Robert Hirshon appointed distinguished attorneys to serve on the Commission, under the leadership of Co-Chairs

29. See Fortney, *Soul for Sale*, *supra* note 7, at 274.

30. Geoffrey C. Hazard, *Ethics*, 14 NAT'L L. J. NO. 24, 19, 19-20 (1992) (questioning the ability of attorneys to perform "serious mental work" when billing more than 2000 per year).

31. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 302 (1993) (noting the firm manager reliance on quantitative standards for evaluating associates has contributed to associates competing on that basis and equating firm success with hours billed).

32. Comments also revealed that firms are increasingly emphasizing billable hour production in determining associate compensation. See Fortney, *Soul for Sale*, *supra* note 7, at 277.

33. With the economic downturn, "it is becoming more common to find bonuses paid only to associates making significant contributions to the firm as measured by chargeable hours that exceed 2,000 per year." COMP. & BENEFITS FOR LAW OFFICES, *Are New Associate Bonus Plans Counterproductive?*, available at www.ioma.com/products/prod%5Fdetail.php?prodid=25 (quoting the executive director of the National Association of Law Placement).

Jeffrey F. Liss, Chief Operating Officer of Piper Rudnick, LLP and Ananstasi D. Kelly, Senior Vice President and General Counsel of Sears, Roebuck and Co.³⁴ In an effort to obtain feedback from attorneys and law students, the Commission created a web board, enabling persons to complete questionnaires and to provide narrative comments and concerns.³⁵ The Commission reports that 570 firm attorneys completed questionnaires and 126 in-house attorneys completed a separate questionnaire.³⁶ The Commission obtained nineteen responses to a separate questionnaire mailed to the 100 largest law firms in the country.³⁷ Drawing on information gathered from these sources, the Commission issued its final report at the ABA annual meeting in August 2002.³⁸

The ABA Commission on Billable Hours Report ("Commission Report") begins with a Forward by the Honorable Stephen G. Breyer, Associate Justice of the U.S. Supreme Court.³⁹ This forward underscores how billable hour pressure adversely affects lawyers' time devoted to their public service duties. To combat the problem, Justice Breyer explains that the Commission's task was to examine a number of issues, including whether billable hours pressure undermines a practitioner's ultimate goal of providing clients with the best legal services possible.⁴⁰

The Preface to the Commission Report, written by ABA President Robert E. Hirshon expresses similar sentiments on how billable hour pressure has taken a toll on pro bono work and attorneys' willingness to devote time to community service. The first sentence of the

34. Following his appointment, Mr. Liss recognized the widespread interest in the work of the Commission in stating, "[t]he predominance of the billable hour system in the delivery of legal services remains a source of tremendous frustration for lawyers and clients alike. . . . Everyone would rather be off the clock, but there is confusion and trepidation about how to do it." Wendell Lagrand, *Beat the Clock*, 1 A.B.A. J. E-REPORT No. 6, 14, 14 (Feb. 2002).

35. The Commission encouraged interested persons to complete an electronic questionnaire, available at www.abanet.org/careercounsel/billable.html. Edward Poll, *Put in Your Two Cents*, L. PRAC. MGMT., Apr. 2002, at 41. The website included separate questionnaires for in-house and firm attorneys.

36. The A.B.A. COMMISSION ON BILLABLE HOURS REPORT 2001-2002 [hereinafter COMMISSION REPORT], available at <http://www.abanet.org/careercounsel/billable.htm> (describing the information gathering methodology and response rates). The COMMISSION REPORT can also be accessed from a link on the ABA homepage.

37. See *id.* at xi.

38. For information on the Commission's membership, work and report, see <http://www.abanet.org/careercounsel/billable/toolkit/bkrnd.html>.

39. COMMISSION REPORT, *supra* note 36, at vii.

40. *Id.*

Preface sets the tone for the entire report in noting that "many of the professional's contemporary woes intersect at the billable hour."⁴¹

The body of the report consists of three parts. Part One generally describes the "corrosive impact of emphasis on billable hours," outlining problems associated with hourly billing.⁴² The chapter also succinctly discusses why billable hour practice predominates despite the problems and negative consequences of the billable hour model.⁴³

Part Two of the Commission Report makes an immediate leap to exploring various alternative billing arrangements, devoting the majority of the report to discussing various fee methods, models, and case studies. This coverage coupled with other work of the Commission clearly indicates that the Commission focused its attention on alternative billing methods.⁴⁴

Part Three considers steps that can be taken to make the billable environment more tolerable. The introduction to Part Three identifies concerns related to hourly billing including the problems associated with setting and increasing billable hour requirements, the need for more training on proper billing practices, and the effects of basing bonuses on the number of hours logged.⁴⁵ Following this introduction, Part Three includes a thoughtful list of "best practices" for avoiding some of the most damaging aspects of billable hour requirements, a Model Firm Policy Regarding Billable Hours, and a description of one firm's experience working within the billable hour system. The last page of Part Three sets forth the following recommendations for firms trying to improve their environment without abandoning the billable hour: (1) stop raising starting salaries, (2) evaluate attorneys on the quality of their work, and (3) eliminate minimum billing requirements.⁴⁶

41. *Id.* at ix (noting further that unintended consequences of the billable hours model have permeated the profession).

42. *Id.* at 5.

43. Explanations offered for the popularity of hourly billing include the simplicity, profitability, and predictability of the model. *Id.* at 7-11.

44. Jenny B. Davis, *Quality-of-Life Issues: Hirshon Cites Progress on Presidential Goals*, 88 A.B.A. J. 65, 65 (Oct. 2002). According to the Model Talking Points on the ABA website, "[t]he Commission focused on recommending innovations in hourly billing systems that reflect value to the client, and enhance the professional development and satisfaction of lawyers." Ad Hoc Committee on Billable Hours, Model Talking Points, available at <http://www.abanet.org/careercounsel/billable/toolkit/talk.html>. This emphasis was also reflected in the program that the Commission sponsored at the 2002 ABA annual meeting. The session called "A Candid Dialogue About the Unintended Consequences of the Billable Hour and Its Impact on the Profession" focused on alternative billing methods with limited discussion on the effects of the billable hour system.

45. COMMISSION REPORT, *supra* note 36, at 43-45.

46. *Id.* at 55.

Finally, the report's conclusion provides a "view toward the future," noting that we "owe it to ourselves and the lawyers of the future to continue the Commission's valuable work in seeking to design successful alternatives to the hourly billing arrangement so that lawyers can realize the richness of their profession."⁴⁷ The comments in the conclusion, coupled with the body of the Commission Report, clearly reveal that the Commission treated alternative billing methods as the best way to address the problems associated with billable hour practice.

The Commission's emphasis on alternative billing arrangements appears to ignore the fact that for many consumers such alternatives may not be feasible or understandable. Many alternative fee arrangements that may be suitable for large firms dealing with sophisticated in-house counsel and client representatives will not work for other attorneys who deal with less sophisticated consumers of legal services. For example, in a contested divorce the client or the attorney will probably prefer billing on an hourly basis. As acknowledged by Commission Co-Chair Jeffrey F. Liss, there is "no silver bullet that will allow every firm to scrap hourly billing."⁴⁸ While alternative billing may free some firms from dependence on hourly billing a significant number of attorneys will continue to bill by the hour.

Recognizing this, in continuing the work of the Commission, the Ad Hoc Committee on Billable Hours should address various problems and solutions not discussed in the Commission Report. The following section briefly discusses the matters that deserve more attention in future work of the Ad Hoc Committee on Billable Hours.

III. MATTERS THAT AD HOC COMMITTEE SHOULD ADDRESS

In discussing the corrosive effects of emphasizing billable hours, the Commission Report mentions various negative effects including the decline in collegiality in firms, associate attrition, and the perverse incentives that can result in over-billing and inefficiency.⁴⁹ Unfortunately, the Commission Report does not discuss some of the most serious effects of billable hour pressure. For example, there is no specific discussion of the impact of stress on the mental and physical well-being of attorneys and the quality of work they perform.⁵⁰ Simply

47. *Id.* at 59.

48. Davis, *supra* note 44, at 65 (referring to comments made at the Commission sponsored program conducted at the 2002 ABA annual meeting).

49. COMMISSION REPORT, *supra* note 36, at 5-7.

50. The Commission Report does generally refer to attorney burnout and dissatisfaction. See, e.g., *id.* at 43 (noting that rising billable hour requirements only serve to increase the growing number of complaints about burnout and dissatisfaction with the practice of law).

said, overworked attorneys suffer distress and fatigue, negatively affecting both the quality of work for clients and the quality of life for attorneys. In its continuing examination of billable hour practices and pressure, the Ad Hoc Committee should specifically address these problems, as well as the ways in which quantifying law practice hurts the quality of legal services and undermines associates' aspirations to attain partnership status.

From the standpoint of the legal profession and consumers, the exodus of ethical associates is the most deleterious effect of increasing billable hour requirements. While the Commission Report does generally refer to the ethical dimensions of associates competing in a billable hour race,⁵¹ the report does not actually discuss how billable hour pressure puts an ethical associate at a disadvantage when competing with heavy-handed billers. Those associates who refuse to engage in unethical billing practices such as double-billing must work harder and longer than those associates who cut corners. One respondent in my study captured the dilemma of ethical associates in stating, "I can't compete with estimator, but I'm not willing to compromise my strict billing practice either." In commenting on how the billable hour system "encourages lying," another respondent in my study noted, "[i]f you don't lie, you are perceived to be a slacker, even though, in reality you may work far more than others."⁵²

Over the years, various former students of mine have shared similar concerns. When they are hustling to meet billing expectations they report that being ethical operates as a handicap in the billable hour race. In the long-term, those ethical associates may either succumb to billing pressure and change their practices or find other employment that does not punish ethical practitioners. As noted above, the largest percentage of respondents in my study (46%) agreed with the following statement: "Billing pressure causes ethical and competent attorneys to leave private law practice."⁵³ These results should capture the attention of firm and bar leaders who recognize the consequences of firms losing ethical associates and future partners dedicated to maintaining ethical standards. Without these ethical attorneys, firms may be financially solvent, but ethically bankrupt.

The Ad Hoc Committee should specifically address the billing pressure and the exodus of ethical attorneys, identifying steps that

51. The introduction to the Commission Report explains that many associates must do what is necessary to satisfy hourly requirements. *Id.* at 43. In discussing how hourly billing puts client interests in conflict with lawyer interests, the Commission Report also notes that "the efficient and quick lawyer will earn a lower fee than an inefficient and slow lawyer." *Id.* at 7.

52. Fortney, *Soul for Sale*, *supra* note 7, at 279.

53. *Id.* Only half that percentage (13%) disagreed with the statement.

firms should take to support ethical associates who are placed at a competitive disadvantage when firms emphasize billable hour production. By specifically considering how billing practices hurt ethical associates, the Ad Hoc Committee educates firm managers by underscoring the risk of firms losing ethical attorneys.

Associates who want to practice ethically would benefit from adopting the Commission Report recommendation that firms evaluate attorneys on the quality of their work and eliminate minimum billing requirements. The "best practices" recommendations included in the Commission Report provide valuable guidance for firm managers who want to address damaging aspects of billable hour requirements.⁵⁴

In addition to such initiatives, firms can take other steps to retain associates who want to practice ethically. Specifically, firms should adopt clear billing guidelines rather than taking an "ostrich" approach to over-billing and other questionable practices.⁵⁵ Such guidelines would protect and empower ethical associates.⁵⁶ In my study, 71% of the respondents agreed that clear billing guidelines would help attorneys who want to practice ethically.⁵⁷

Once firms adopt guidelines, firm managers should provide training on the guidelines and devote resources to monitoring the guidelines. Monitoring should include close scrutiny by billing attorneys and periodic random audits of bills.⁵⁸ This reinforces ethical conduct by sending a clear message that firm management takes such guidelines seriously.

54. The "best practices" include giving credit so that pro bono hours count toward billable hour requirements and salary determinations and imposing a ceiling on the number of hours over which no additional compensation will be paid. COMMISSION REPORT, *supra* note 36, at 46-47. In addition to identifying a number of best practices, the report notes that a "worst practice" is rigidly basing compensation on billable hours. *Id.* at 46.

55. For a discussion of the reasons why firms might take an "ostrich" approach, see Susan Saab Fortney, *Ethics Counsel's Role in Combating the "Ostrich" Tendency*, PROF. LAW (forthcoming 2003) (on file with the *Idaho Law Review*).

56. In discussing whether formal training on billing would eliminate questionable billing practices, the Commission Report noted that formal training, even in large firms, was limited. In interviewing twenty-five new associates in large New York law firms, one Commission member learned that only three or four received any formal training at all. COMMISSION REPORT, *supra* note 36, at 44 n.3.

57. Fifty-six percent of the study respondents agreed that "clear billing guidelines would help eliminate questionable billing practices." Fortney, *Soul for Sale*, *supra* note 7, at 253-55 (urging the use of guidelines).

58. For a discussion of one firm's experience with random audits, see Edward A. Adams, *Could A Managing Partner Steal Firm Funds Here?*, 211 N.Y. L.J. NO. 97, 1 (May 20, 1994).

Appointment of an in-house ethics advisor or committee also provides additional guidance on billing and ethics questions.⁵⁹ The Commission Report failed to mention the important role that ethics counsel serves in avoiding and addressing problems related to billable hour practice. This omission suggests that the Commission failed to critically examine certain internal firm systems, preferring instead to focus on alternatives to hourly billing.

Similarly, the Commission Report does not consider changes to firm employment and partnership systems that require associates to sacrifice their personal lives in order to attain partnership status. My study findings mirror results from other surveys revealing that a significant number of associates are interested in work alternatives, such as reduced-hour arrangements.⁶⁰ In the vast majority of firms, those associates who are interested in reduced-hour arrangements are forced into a position of permanent associate or staff attorney.

Many of the associates who are interested in reduced-hour arrangements are concerned that such a choice will affect their treatment and advancement within firms. Responses to my study question on respondents' willingness to make less to work less reflected this concern. Forty-three percent of the respondents indicated that they would be willing to make less to work less provided that the reduction did not affect their advancement and/or treatment at the firm.⁶¹ These associates may shun reduced-hour arrangements, fearing that they will be perceived as second-class attorneys.

Given that many of these associates want to eventually earn a partnership interest, firm leaders should fashion alternative partnership tracks to allow associates to reduce hours while progressing on some form of partnership track.⁶² Some firms have already taken steps to create alternate tracks for associates to climb the partnership ladder. The Washington D.C. firm of Dickstein, Shapiro, Moring and Oshinsky has an alternate track that permits a proportional percent-

59. See Fortney, *Soul for Sale*, *supra* note 7, at 75 (discussing steps that in-house counsel can take in helping firms address the negative effects of hourly billing).

60. See, e.g., Mazares, *supra* note 20, at 6 (reporting on results from a Harris Interactive/Spherion Corporation study that revealed that lawyers are more likely than the general workforce to prefer a reduction in work hours or a more flexible work schedule to an increased salary).

61. Seven percent of respondents indicated that they were willing to make less to work less, regardless of its impact on their treatment or advancement at the firm. For a chart summarizing the study findings on respondents' willingness to make less to work less, see Fortney, *Soul for Sale*, *supra* note 7, at 261. Cf. Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 FORDHAM L. REV. 2207, 2212 (2002) (reporting on recent surveys that reveal that most men as well as women indicate a willingness to take lower salaries in exchange for more time with their families).

62. See generally Fortney, *Soul for Sale*, *supra* note 7, at 294-95 (emphasizing the importance of providing alternative partnership tracks and other work options).

age work schedule that leads to a proportional percentage partnership participation.⁶³ With such a proportional track, an associate who works a quarter less than other associates can proceed on a partnership track that takes one quarter longer than other associates.⁶⁴ At a minimum, firms should make an explicit firm policy on advancement for attorneys working reduced-hour schedules.⁶⁵ Firm managers, with the guidance provided by the Ad Hoc Committee, should explore similar initiatives in rethinking the "all or nothing" model of promotion to partnership.⁶⁶ The Ad Hoc Committee can provide leadership in helping firms explore alternative partnership tracks and other work options.

IV. CONCLUSION—CHALLENGE FOR THE FUTURE

The Commission Report started the process of fashioning new approaches to address problems created by hourly billing. In continuing the study of the effects of billable hour practices, the Ad Hoc Committee should examine alternative work models to give attorneys options and retain ethical attorneys who currently feel pushed out of private law practice. As succinctly stated by Associate Justice Stephen G. Breyer, the task is creating "a life within the firm that permits lawyers, particularly younger lawyers, to lead lives in which there is time for family, for career, and for the community."⁶⁷

To create environments in which attorneys can thrive, firm leaders must address firm cultural expectations and systems that require attorneys to sacrifice their personal lives to win the partnership trophy. The ABA Ad Hoc Committee should assist firms in this process

63. Terry Carter, *Your Time or Your Money*, 87 A.B.A. J. 26, 27 (Feb. 2001) (noting that the firm has developed the "infrastructure" such as firm advisers to help ensure that the proportional percentage system works).

64. Management experts recognize that proportional partnership arrangements make good business sense because they improve the retention of professionals. Starting in the 1990s Deloitte & Touche changed its culture to allow alternative work schedules. Now the firm has hundreds of partners on such schedules. *Id.* at 27.

65. Twenty-one of the twenty-five largest law firms in Massachusetts are working with bar leaders on implementing suggestions in the Boston Bar Association Report called *Facing the Grail: Confronting the Cost of Work-Family Imbalance*, available at <http://www.bostonbar.org/workfamilychallenges.htm> (last visited Jan. 9, 2003). Managing partners with each of the twenty-one firms have agreed to implement at least one measure suggested in the report, such as making explicit the firm's policy on promotion and advancement for attorneys working reduced schedules. *Id.*

66. Otherwise, ethical associates who want to reduce hours in exchange for less compensation may feel as if they are committing professional suicide in a dead-end mommy track. Rhode, *supra* note 61, at 2213 (referring to survey results that revealed that three-quarters of surveyed attorneys believed that taking an alternative schedule would jeopardize prospects for partnership).

67. COMMISSION REPORT, *supra* note 36, at vii.

by providing information on alternative compensation systems and partnership modes.

In exploring alternative partnership tracks and work options, the Ad Hoc Committee should consult law practice and human resource management experts who work with the ABA Career Resource Center and the ABA Law Practice Management section. At the same time, ethics experts such as members of the National Association of Professional Responsibility Attorneys and the ABA Center for Professional Responsibility can provide valuable insights on how billable hour pressure hurts clients as well as ethical attorneys. Ethics professionals can provide guidance on how firms can fortify their ethical infrastructure and how regulators can address abuses and problems related to hourly billing practices.

Finally, the Ad Hoc Committee should acknowledge that approaches that may be feasible in large firms may not work for smaller firms. Recognizing this, the Ad Hoc Committee should consult with leaders in small firms, as well as large firms. To include more voices and constituencies, the Committee should use a mail survey that goes beyond the 100 largest law firms in America.⁶⁸ As I learned in my study of the effects of billable hour pressure and firm culture, attorneys in firms of all sizes deal with problems created by billable hour pressure.

Above all, the Ad Hoc Committee should recognize that such alternative billing methods are not a panacea. Rather, the Committee should devote time and resources to exploring alternative partnership and work models as well as policies and procedures to encourage ethical practice within firms of all sizes. If the Committee fails to do so, it will earn the criticism that it dwelled on the easy fix of alternative billing rather than tackling the hard questions related to billing pressure, firm culture, and partnership structures. As stated in the final pages of the Commission Report, "regaining quality of life in the practice of the law requires that we provide lawyers with the resources to balance the competing demands of the profession and the flexibility to reach that balance."⁶⁹

68. Beyond sending a mail survey to the 100 largest firms in America, the Commission largely relied on volunteers completing an electronic questionnaire available on the Commission's website.

69. COMMISSION REPORT, *supra* note 36, at 59.

