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Ethics Counsel's Role in Combating the "Ostrich" Tendency

Susan Saab Fortney¹

In college I served as a resident assistant in a dormitory. My way of dealing with marijuana use on my dormitory floor was to conveniently say, "If I don't see it—it's not there." Some firm managers effectively use a similar strategy in handling internal ethics issues such as questionable billing practices. Other firm principals, including proactive ethics counsel, feel compelled to confront, and even discover, conduct that falls below firm and professional standards. Rather than waiting for firm members to present ethics issues, proactive ethics attorneys conscientiously participate in risk avoidance and the formulation of firm policies and procedures.

To illustrate the importance of ethics advisors playing an active role in building a law firm's ethical infrastructure, this article focuses on ethics problems related to hourly billing. Ethics experts who have studied hourly billing recognize attorneys' reluctance to report billing misconduct. In the book, *THE HONEST HOUR*, Professor William G. Ross refers to the inclination of attorneys to close their eyes when they suspect billing irregularities.² Professor Lisa G. Lerman made a similar observation in noting that firm attorneys who share income may "turn a blind eye to misconduct" by another firm attorney.³ Both

1. Professor, Texas Tech University School of Law. Portions of the article, 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), ©UMKC LAW REVIEW are abridged in this piece. Reprinted with permission. I thank Dr. Cynthia Spanhel, director of the Department of Research and Analysis, and the Don Jones, division of the State Bar of Texas for supporting the empirical study on which this article is based. I also thank Professor Lisa Lerman for her valuable feedback on the survey instrument used in the study.

2. WILLIAM G. ROSS, *THE HONEST HOUR, THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* 199 (1996) (noting that the "reluctance of attorneys to report billing irregularities is partly the result of a natural fear of making false accusations about suspected misconduct that is not easily verified and about which *ethical norms are often unclear*") (emphasis added).

3. Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEORGETOWN JOURNAL OF LEGAL ETHICS 205, 226-227 (1999) (referring to Professor Deborah Rhode's suggestion that attorneys, judges and disciplinary officials may suffer from "cognitive conservatism" in which "they are more likely to register and retain information that is compatible with established beliefs or earlier decisions," as well as "cognitive dissonance" in which individuals who make decisions tend to suppress or reconstrue information that casts doubts on that decision). See Deborah L. Rhode, *Institutionalizing Ethics* 44 CASE W. L. REV. 665, 685-686 (1994).

Professors Lerman and Ross recommend that firms establish ethics counsel or ethics committees to provide a channel for reporting billing misconduct and to address other problems associated with hourly billing.⁴ Specifically, Professor Lerman has identified three initiatives for in house ethics advisors and ethics committees: (1) establishing written policies on billing practices and reimbursement for expenses, (2) training all firm attorneys and support staff on billing practices and other ethics issues, and (3) encouraging all firm employees to report possible misconduct to the ethics committee, and ensuring that those who report are protected from retaliation for raising questions.⁵

In discussing the need for and efficacy of initiatives by ethics counsel, this article draws on findings from an empirical study of law firm culture and the effects of billable hour requirements on associates.⁶ This study was based on a mail survey of 1000 randomly selected associates in Texas firms who (1) had been licensed for ten or fewer years as of June 1999, and (2) worked in private law firms with more than ten attorneys (the Associate Survey).⁷

The survey form included a number of questions related to firm policies, controls, and associate attitudes.⁸ The following discussion focuses on the study results that pertain to the work of ethics attorneys in improving institutional controls and shaping firm culture. As explained below, the first step in addressing improper billing practices is for ethics attorneys to appreciate the need for written policies on billing practices.

THE NEED FOR GUIDANCE ON BILLING

Neophyte attorneys forge into private practice with little or no experience in billing their time. Often associates start work with a "lecture" from a senior

4. Lerman, *supra* note 3, at 298 and ROSS, *supra* note 2, at 206 (suggesting that ethics committees encourage the reporting of billing irregularities by permitting the "disposition of complaints in a manner that might be far more discreet, nonpunitive, and constructive than a report to bar of law enforcement officials").

5. Lerman, *supra* note 3, at 298. Professor Lerman's recommendations for eliminating billing and expense fraud follow an in-depth discussion of sixteen cases involving billing and expense fraud by prominent lawyers.

6. For a lengthy article on the study 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) ©UMKC LAW REVIEW. Portions of that article are abridged in this piece.

7. Restricting the sample to attorneys licensed for 10 or fewer years helped filter out attorneys who were "permanent associates" and attorneys who had equity status. Limiting the sample to persons in firms with more than 10 attorneys eliminated solo practitioners and many small firm attorney who do not use hourly billing as the principal method for billing clients. The letter transmitting the questionnaire also asked the recipients not to complete the survey if they were not associates currently using hourly billing. Three mailings were sent beginning in 1999 and continuing into 2000.

8. Dr. Cynthia Spanhel, director of the State Bar of Texas Department of Research and Analysis assisted in preparing the survey instrument, in conducting the survey, and in analyzing the results.

attorney who advises associates to "[b]ill every minute . . . we'll adjust the bill on the back end."⁹ This approach to billing does not recognize the traps involved in billing another attorney's time. First, it assumes that the supervisor possesses enough information on the client's legal matter in order to evaluate intelligently the amount of time expended. Second, the approach assumes that the supervisor can ably sift through associate time sheets that may be a "propaganda piece."¹⁰ Finally, if the firm compensates a billing partner for the amount collected from billed clients, the billing partner may be reluctant to write off associate time.¹¹

Some senior attorneys may provide additional guidance on billing in instructing associates to "write down their time on the same day, be honest, use good judgment, and don't double bill."¹² This general advice gives associates unfettered discretion because the rules on billing practices remain unclear. Even when firm managers implement general billing guidelines, attorneys still have a great deal of latitude in the way that they apply the guidelines. This was illustrated by a management consultant who found a great deal of disparity in what firm partners would bill for travel, even though the firm implemented a policy to bill for travel time.¹³ Rather than leaving attorneys in a quandary on billing practices,¹⁴ firm managers can clarify how and what attorneys should bill. This guidance can include written guidelines, training programs, and formalized channels within the firm for open communication.

9. Compare Joseph Calve, *A Lawyer's Worth*, TEX. LAW., March 23, 1998, at 3 (referring to the "stock lecture" that a senior litigation partner gave when the author started working as an associate at a Wall Street firm) with Lisa G. Lerman, *Lying to Clients*, 139 U. PA. L. REV. 659, 716 (1990) (describing the experience of a billing paralegal who reported that "partners told new lawyers and paralegals to keep complete records of their hours and assured them that if, in reviewing the bills, the partners thought the time was excessive they would cut the bill." With the exception of one partner who carefully checked each of the bill, the paralegal stated that partners "never cut time . . . [U]sually they didn't even look at the daily time sheet, but just made sure that the narrative was correct.") *Id.*

10. Sara J. Berman-Barrett, *Integrating Beginning Lawyers into the Business of the Law*, 19 NO. LAW PRAC. MGMT. 22, 26 (1993) (explaining that "the associate's time sheet is likely the major (and sometime the only) tool a partner-the associate's boss - will ultimately use to evaluate, promote and give raises or bonuses to the associate").

11. A billing partner would prefer not to write down time if the collections from the section or from certain clients directly affects the partner's own compensation. On a firm-wide basis a partner's participation of firm profits creates an incentive to inflate or pad hours. Douglas R. Richmond, *Professional Responsibility and the Bottom Line: The Ethics of Billing*, 20 S. ILL. U. L.J. 261, 262 (1996). Presumably, partners' desire to serve and satisfy clients will cause partners to scrutinize all time included in final client bills.

12. John W. Morris, *Writing Their Own Rules*, AM. LAW., June 1995, at 5 (reporting that a quiz of 29 associates from 22 large firms in nine cities revealed that firms have "few hard and fast rules" for billing).

13. *Id.* When a consultant put a complex but realistic billing hypothetical to partners at one firm, the charges for one day's activity ranged from 1.5 to 7.8 hours. *Id.*

14. "If partners in the firm are divided on [a double billing travel] issue, associates are placed in a quandary. As employees, which boss should they follow? As professionals, what do they feel is right. And it they do not double bill, how will they compete with other associates who do?" Berman-Barrett, *supra* note 10, at 27.

STUDY RESULTS RELATING TO BILLING GUIDANCE AND ETHICS SYSTEMS

In the Associate Survey only 40% of the respondents indicated that their firms had written billing guidelines other than those imposed by clients. Thirty-six percent of the respondents reported that their firms had no such guidelines. This 36% can be coupled with the 25% who checked "I don't know." Associates who don't know about guidelines or systems essentially operate in a firm in which guidelines or systems provide no assistance. The fact that one quarter of the respondents do not know about guidelines suggests a lack of communication within firms, a problem identified in other studies.¹⁵ AMERICAN BAR ASSOCIATION, THE REPORT OF AT THE BREAKING POINT, A NATIONAL CONFERENCE ON THE EMERGING CRISIS IN THE QUALITY OF LAWYERS' HEALTH AND LIVES—ITS IMPACT ON LAW FIRMS AND CLIENT SERVICES, Apr. 5-6, 1991, at 4.

The survey results do show a relationship between firm size and written guidelines. The percentage of firms with written guidelines increases with firm size.¹⁶ On the other hand, the percentage of firms using written billing guidelines decreased as the billing expectation increased. Among those firms with a minimum billing expectation of 2400 hours a year only 8% used written guidelines.¹⁷ Undeniably, associates in those firms face a great deal of pressure to bill without the benefit of written guidance on billing.¹⁸ Such an environment can lead to questionable billing practices by some associates, putting more "conservative" associates at a competitive disadvantage in billing.

The majority of the respondents (56%) agreed that clear billing guidelines would help eliminate questionable billing practices.¹⁹ An even larger percent-

15. E.g. NALP FOUNDATION FOR RESEARCH AND EDUCATION: KEEPING THE KEEPERS: STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION 106 (Jan. 1998) [hereinafter *Keeping the Keepers Report*] (noting the majority of the associates in a focus group "feel communications from firm management or supervising partners could be improved"). As stated in the Report of the National Conference on The Emerging Crisis in the Quality of Lawyers' Health and Lives—Its Impact on Law Firms and Client Services:

One of the most common problems cited by participants from all but the smallest firms was the breakdown of communication within the office. This was true in several critical areas: Associates have little information about what is happening in the firm. Despite the fact that they sacrifice their lives for the chance of financial and professional security with the firm, they are kept in the dark regarding important administrative matters and their input is not sought."

16. Forty-nine percent of the Large Firms used written guidelines, compared to 39% for Medium Firms and 26% for Small Firms represented by the respondents.

17. At the other end of the scale, 67% of the respondents with a billing expectation of below 1800 hours work in firms with written guidelines. The percentage of firms with written guidelines ranged from 37% to 43% for firms with annual billing expectations in categories from 1800 to 2399 hours.

18. Conceivably, written guidelines may hamper an associate's ability to meet high billable hour requirements.

19. This 56% breaks down to 18% who "strongly agree" and 38% who "somewhat agree."

age (71%) agreed with the following statement: "Clear billing guidelines would help attorneys who want to practice ethically."²⁰

Training on billing can also help attorneys who want to practice ethically. The survey results revealed that only a small percentage of respondents received more than two hours of law school or firm training on billing.²¹ Surprisingly, 35% indicated that the firm provided less than one hour of training or instruction on billing and 26% of the respondents noted that the firm provided no training or instruction on billing.²²

Firm managers who do not provide training or written guidelines to associates may not affirmatively communicate firm norms to new associates, leaving them to learn institutional norms by observing the behavior of others.²³ As suggested by Professor Lerman, "many associates anxious to assimilate themselves into an institution and to be successful within it, will watch the more experienced lawyers to see what the real standards of conduct are."²⁴ "If the senior lawyers are not precise in their billing practices, the junior lawyers will not be."²⁵ Rather than leaving associates to discern standards and acceptable conduct, firms should implement guidelines and training programs to encourage ethical behavior and discourage abuses.²⁶ These measures serve as part of the firm's ethical infrastructure.²⁷

Another important aspect of the firm's ethical infrastructure is a system or policy for dealing with ethical concerns of attorneys.²⁸ While a majority of respondents (54%) indicated that their firms had such a system or policy, 22% said that the firm had no such system or policy and 24% checked the "I don't know" box.²⁹ Again, the number of associates who did not have knowledge of a

20. This 71% reflects 30% who "strongly agree" and 41% who "somewhat agree."

21. Fourteen percent of the respondents noted that the firm provided more than two hours of training on billing and 16% indicated that more than two hours of law school class time was devoted to discussing the ethics of hourly billing.

22. This compares to 42% of the respondents who noted that no amount of law school class time was devoted to discussing the ethics of hourly billing.

23. Lerman, *supra* note 9, at 681.

24. *Id.*

25. *Id.*

26. Austin Sarat, *Enhancements of Professionalism: A Study of Judges' and Lawyers' Account of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 824 (1998) (noting that attorneys' views on whether firms have such distinctive cultures varies depending on the positions of attorneys within firms).

27. See Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991) (using the term "ethical infrastructure" to refer to firm policies, procedures, and systems that control attorney conduct).

28. Eighty-three percent of the firms that use written guidelines (83%) also have an ethics system or policy for dealing with the ethical concerns of attorneys. This might suggest that firms that are conscientious about billing matters also appreciate the importance of a general system or policy regarding ethics.

29. A 1995 survey of all managing partners of all Texas firms with 10 or more attorneys revealed that 73% of the respondents indicated that their firms had an appointed principal or committee to handle ethics or malpractice problems. Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves?*

firm system suggests a lack of communication within firms.³⁰ Given the "natural reluctance of attorneys to report misconduct by their peers," firm managers should both adopt some type of internal reporting policy or system and communicate to associates the importance of reporting concerns.³¹ By doing so, firm leadership signals a commitment to ethical practice.³²

With the exception of in-firm meetings, which are commonly conducted in smaller firms, these percentages show a relationship between firm size and implementation of formal ethics systems or policies. Larger percentages of respondents from Small and Medium Firms (35% and 24% respectively) checked "other" possibly reflecting the tendency of smaller firms to rely on informal monitoring.³³

Table 1 shows the types of ethics policies or systems that the respondents' firms have implemented.

TABLE 1
FIRM SIZE AND ETHICS MEASURES OR SYSTEMS³⁴

	Small Firms 11-24 attorneys	Medium Firms 25-100 attorneys	Large Firms over 100 attorneys
Designated ethics counsel	15%	35%	56%
Ethics committee	8%	24%	63%
Written policy encouraging the reporting of misconduct	12%	24%	33%
Scheduled in-firm meetings	42%	16%	18%
Scheduled ethics training	31%	42%	51%
Other means/measures	35%	24%	9%

An Empirical Study of Law Firm Peer Review and Culture, 10 GEO. J. LEGAL ETHICS 271, 289 (1996). The difference between this 73% of firm managers responding to the 1995 survey and the 54% of associates responding to the Associate Survey may relate to a number of factors including the lapse in time, the lack of communication with associates in firms, and the possibility that some firm managers "overstated" the existence of a system. Compare Stephen R. Volk et al., *Law Firm Policies and Procedures in An Era of Increasing Responsibilities: Analysis of a Survey of Law Firms*, 48 BUS. LAW. 1567, 1578 (1993) (reporting on a 1992 study of fifty law firms nationwide which found that 25% of the respondents had a policy and system for dealing with ethical concerns of lawyers).

30. See *supra* note 15 and accompanying text.

31. ROSS, *supra* note 2, at 206-16 (discussing the value of internal reporting mechanisms in helping overcome attorney reluctance to report others' misconduct). In particular, junior attorneys who fear retaliation appear to be particularly reluctant to report violations. *Id.* at 209.

32. Legal experts recognize the role of firm managers in cultivating a moral climate within a firm. As stated by Professor Lerman, "standards of ethical conduct can be raised successfully only by the leadership of the firm because higher ethical standards may reduce profits, and junior lawyers are under intense pressure to contribute to the firm's profit margin. Lerman, *supra* note 9, at 681.

33. See John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multi state Offices; Firm as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 976-78 (1995) (describing the differences between monitoring mechanisms in large and small firms).

34. Respondents checked all measures and systems used by their firms.

Associates may consult the firm's ethics system or policy when they encounter questionable billing practices by other firm attorneys. The majority of the respondents (52%) noted that they have had concerns about the billing practices of other firm attorneys.³⁵ When asked about how they handled the concerns, the largest percentage (61%) noted that they "discussed the matter with another associate" while only 24% indicated that they "discussed the matter with a supervisor or managing attorney." The associates' peers, unlike the associates' superiors, probably possess limited experience and power to address the perceived problem. Under these circumstances, consultation with other associates appears to be more cathartic than corrective.³⁶ Given the apparent reluctance of many associates to consult their superiors and the large number of associates (27%) who "did nothing" when they had concerns about the billing practices of others, firm managers should not rely solely on associate feedback. Rather, supervising and billing attorneys should diligently monitor billing practices and records.

Survey results suggest that many supervising attorneys may not be questioning billing entries. Sixty-seven percent of the respondents on the partnership track indicated that during the last year their supervising attorneys never "questioned" the associates' billing entries.³⁷ Among Large Firm associates, the percentage reporting that their billings had not been questioned goes up to 71%.³⁸ Especially in firms where associates face a great deal of pressure to bill, this lack of scrutiny may allow billing abuses and questionable billing practices to go undetected.

BILLING PRACTICES ADDRESSED IN ABA ETHICS OPINION 93-379

ABA Formal Ethics Opinion 93-379 tackled a number of questionable

35. In his 1991 and 1994-95 surveys Professor Ross found "distressing indications" of the extent to which attorneys perceive that other attorneys abuse hourly billing. ROSS, *supra* note 2, at 29. His 1994-95 study revealed that approximately "one sixth of both the inside and outside counsel said that they believe that more than a quarter of all billable time is padded." *Id.*

36. In private practice as an associate and partner, I observed the associate subculture.

37. One respondent commented that the term "questioned" was ambiguous. This term was used to encompass all possible scrutiny from an outright challenge of an billing entry to a simple inquiry.

38. Another 31% of the respondents on the partnership track noted that their supervising attorneys had "occasionally" questioned their billing entries during the last year. Only 2% of the respondents indicated that their supervising attorneys had "frequently" questioned their billing entries.

39. In all categories the results reveal a relationship between firm size and supervisors questioning billing with more scrutiny occurring in the smaller firms. For example, 56% of the Small Firm respondents and 65% of the Medium Firm respondents reported that their supervisor had "never" questioned their billings during the last year. The percentage of respondents who noted that their supervisors had "frequently" questioned their billings was 6% in the Small Firms, 2% in the Medium Firms and less than 1% in the Large Firms. Supervisors in smaller firms who work closely with their associates may be better positioned to evaluate and question billing entries.

practices⁴⁰ related to the ethics of hourly billing.⁴¹ After explaining that an attorney "who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she actually spends on the client's behalf," the opinion condemns particular billing practices including "double-billing" and "recycling" work.⁴² In this context, Professor Ross defines "double-billing" as billing two clients for work performed at the same time.⁴³ "Re-cycled work" refers to billing "clients by the hour for work that was created at another time for another client."⁴⁴ In his 1991 and 1994-95 surveys Professor Ross asked inside and outside counsel about both double billing and billing for recycled work.

In comparing the results on the 1994-95 survey to the 1991 survey, Professor Ross noted that attitudes of outside counsel "changed markedly during recent years."⁴⁵ He found that the number of respondents who said that they had never engaged in double billing increased from one half in 1991 to three

40. ABA Standing Comm. on Ethics and Prof. Responsibility Formal Op. 93-379 (1993) (referring to "problematic billing practices" that are "the subject of frequent inquiry, with the goal of helping the profession adhere to its ethical obligations to its clients despite economic pressures.") [hereinafter *ABA Opinion 93-379*]. Some commentators characterize certain practices in the ABA Opinion as "questionable" because of the differences of opinion on the ethics of the practices. E.g. Adam C. Altman, *To Bill, or Not to Bill?: Lawyers Who Wear Watches Almost Always Do, Although Ethical Lawyers Actually Think About It First*, 11 GEO. J. LEGAL ETHICS 204, 214 n.81, at 214 (1998) (referring to those who view double billing as "questionable" unlike "outright fraud" which is clearly unethical). For arguments justifying double-billing under certain circumstances, see ROSS, *supra* note 2, at 80-83 (introducing the discussion by noting that the ethics of double-billing "are more complex than the ABA's opinion suggests."). Compare Roy Simon 22 HOFSTRA L. REV. 625, *Gross Profits? An Introduction to a Program on Legal Fees*, 22 HOFSTRA L. REV. 625 633 (1994) (referring to a "fairly sarcastic op-ed column from sociologist Amitai Etzioni asking why lawyers needed to be told these things at all.")

41. The opinion divides the practices into two sets. The first set involves 'billing more than one client for the same hours spent' and the second relates to billing for expenses and disbursements. *ABA Opinion 93-379, supra* note 40.

42. According to the opinion a lawyer "who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of (the) economies on to the client." *Id.* Therefore, an attorney who "flies for six hours for one client, while working for five hours on behalf of another, has not earned eleven billable hours." *Id.* "A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated. "In short, the lawyer who is billing by the hour is never permitted "to charge the client for more hours than were actually expended on the client matter." *Id.*

43. ROSS, *supra* note 2, at 79. For a discussion of the ethical problems with double billing, see Sonia S. Chan, Note, *ABA Formal Opinion 93-379: Double Billing, Padding and Other Forms of Overbilling*, 9 GEO. J. LEGAL ETHICS 611, 617-25 (1996).

44. *Id.* While Professor Ross offers justifications for double-billing, he emphatically states that hourly billing for recycled work is "clearly unethical." *Id.* at 82, 83. Cf. Kevin Hopkins, *Law Firms, Technology, and the Double Billing Dilemma*, 12 GEO. J. LEGAL ETHICS 95, 99 (1998) (stating that the ethics rules do not provide guidance for determining an appropriate fee when a lawyer uses recycled work).

45. *Id.* at 83

quarters in 1994-95.⁴⁶ Professor Ross found a similar pattern in the responses to the questions related to the ethics of billing for recycled work. On the 1991 survey 12% of respondents believed that it was never "ethical for an attorney to bill a client for work (e.g. research or drafting) that originally was undertaken for another client and has been 're-cycled' for a second client."⁴⁷ In the 1994-95 study that percentage increased to 65%.⁴⁸ Professor Ross suggests that the changes in attitudes reflect a "growing awareness of the ethical impropriety of billing for re-cycled work." This trend continues as indicated by the survey results discussed in the next section.

SURVEY RESULTS RELATED TO DOUBLE BILLING & RECYCLED WORK

The questionnaire used in the Associate Survey included some questions similar to those used in the Ross surveys. The double billing question asked, "During the last year, have you ever billed two clients for work performed at the same time (e.g. billing one client for reviewing a deposition while billing another client for travel time?) In response to this question, 86% of the respondents answered "no." On the recycled work question, 83% of the respondents noted that they do not bill more than the revision time when revising and recycling a document originally prepared for another client.

Interestingly, the percentage of the respondents who engage in the double billing and recycled work practices goes down as firm size increases.⁴⁹ While only 10% of the respondents in Large Firms admitted double billing, 14% in Medium Firms and 24% in Small Firms admitted double billing during the last year.⁵⁰ A similar pattern occurred on the responses to the recycled work question. A shocking 30% of the associates in Small Firms indicated that during the last year they recycled work and charged the hourly client more than the revision time. In Medium Firms and Large Firms the percentage goes down to

46. *Id.* The comparison also reveals that the number of respondents who believed that double billing is never ethical increased from one-fifth in 1991 to two-thirds in 1994-95. *Id.* Professor Ross attributes the change to "the widespread discussion of ethics of double billing, which produced a consensus that (the practice) is unethical." *Id.*

47. William G. Ross, *The Ethics of Hourly Billing by Attorney*, 44 RUTGERS L. REV. 1, 93 app. A. Another twenty percent of the respondents believed that the practice was ethical "even if the second client is billed on the basis of time and is not informed that the work was re-cycled." *Id.* Professor Ross described this result as perhaps "the most shocking revelation of my 1991 survey." *Id.*

48. ROSS, *supra* note 2, at 267.

49. These results appear to refute the perception that the pressure on big firm attorneys to bill leads to questionable billing practices. See ABA *Opinion* 93-379, *supra* note 40 (referring to the "common perception that pressure on lawyers to bill a minimum number of hours and on law firms to maintain or improve profits may have led lawyers to engage in problematic billing practices").

50. A cross tabulation between the responses to the double-billing question and the billable hours requirements revealed no significant relationship. Similarly, the results indicated no significant relationship between the responses on number of hours billed and the double billing questions.

19% and 9%, respectively. These differences in percentages may relate to the possibility that some associates in Small and Medium Firms may not have enough work to fulfill their annual billable requirements.⁵¹

Contrary to what might be expected, the results revealed that a larger percentage of associates in the lower income categories double bill compared to associates in the higher income categories. While 20% of those associates who make \$50,000 to \$84,999 indicated that they double billed within the last year, only 9% of the associates who make over \$125,000 admitted doing so.⁵² Similarly, the largest percentage of associates who charged for more than revision time occurred in the income category of between \$50,000 and \$84,999.⁵³ These associates in the lower income category may feel more pressure to produce than those whose income is higher. More attention to the ethics of double billing and billing for recycled work might reduce the number of attorneys who engage in those practices. Fifty-seven percent of the respondents indicated that their supervising attorneys and firms had not provided any guidance on the two practices. Slightly over half of the respondents (51%) noted that they had not even heard of ABA Opinion 93-379.⁵⁴ Of those who had read or heard about the opinion, a smaller percentage of them engaged in double billing, as compared to those respondents who had not heard of the opinion.⁵⁵

Finally, the responses related to double billing and recycled work may be the ones in the questionnaire that are the most susceptible to self-reporting errors and impression management.⁵⁶ Respondents who deny questionable practices may be engaged in "enhancement (the claiming of positive attributes),

51. The responses revealed no significant relationship between the responses to the question on recycled work and the number of billable hours required.

52. Ten percent of the associates whose income is between \$85,000 and \$124,999 admitted that they double billed during the last year.

53. Among those associates whose income was \$50,000 to \$84,999, 22% reported that they billed for more than revision time, while 14% of those who make between \$125,000 and \$159,999 did so.

54. When Professor Ross asked the same question in 1994-95, 57% of the respondents indicated that they had not heard about the year old ABA Opinion 93-379. ROSS, *supra* note 2, at 267. In the Associate Survey the number of associates who at least had heard about the opinion should have been greater if more law school professional responsibility classes and continuing legal education programs included discussion on the ethics of hourly billing.

55. Among the respondents who admitted double billing, 7% had read ABA Opinion 93-379. The percentage goes up to 28% for those who had heard about the opinion, but not read it. The largest percentage of those who double billed were those who had not even heard of the opinion. This suggests that reading and knowledge of ABA Opinion 93-379 influenced a number of respondents. On the other hand, a cross tabulation of the respondents who had read the ABA opinion and those who billed for recycled work revealed no significant relationship.

56. The term "impression management" describes "the behavior of attempting to manipulate others' impressions through 'the selective exposure of some information (it may be false information) . . . coupled with suppression of [other] information.'" RONALD JAY COHEN & MARK E. SWERKLIK, *PSYCHOLOGICAL TESTING AND ASSESSMENT: AN INTRODUCTION TO TESTS AND MEASUREMENT* 389 (4th ed. 1999).

denial (the repudiation of negative attributes), or self-deception (the tendency to give favorably biased but honestly held self-descriptions).⁵⁷ The anonymous nature of the answers helps counter the desire of some respondents to provide socially acceptable answers that may not be truthful.⁵⁸

THE QUANTIFICATION OF PRIVATE LAW PRACTICE

Commentators and attorneys alike have bemoaned the trend in firms that emphasizes the quantity of billable hours over the quality of work performed.⁵⁹ Walt Bachman in a chapter called, "The Almighty Billable Hour," captured the "ascendant importance of billable hours" by describing billable hours as "the litmus test of the worth and financial success of a lawyer or law firm."⁶⁰ In *The Rodent*, an underground newsletter for associates, one anonymous writer explained how his firm used billable hour production as a measuring stick for success. Reportedly, firm partners chided the associate for not billing enough hours, but praised the associate one-month when he racked up a large number of hours.⁶¹ In those firms that emphasize quantity of hours over quality, associates largely compete by racking up hours.⁶² As described by Dean Anthony T. Kronman:

The increased emphasis on hours billed as a criterion for measuring associate performance—which reflects in part the cultural devaluation of other attributes less directly connected to the external good of moneymaking and in part the administrative need for a uniform quantitative standard of evaluation in firms who size makes more-qualitative criteria unworkable—has in turn propelled competition of associates more and more in this direction. Increasingly, associates at large firms themselves equate success—promotion and prestige—with hours billed.⁶³

57. *Id.*

58. See Connie J. A. Beck, *Lawyer Distress: Alcohol-related Problems and other Psychological Concerns Among A Sample of Practicing Lawyers*, 10 J. L. & HEALTH 1, 12-13 (1995-96) (comparing the relative advantages and disadvantages of self-reporting questionnaires).

59. Professor Carrie Menkel-Meadow asserts that using billable hours to make more quantitative than qualitative decisions creates instability in firms by reducing "bonding between senior attorneys and associates and by creating a 'time famine.'" Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE. W. RES. L. REV. 621, 632, (1994).

60. WALT BACHMAN, *LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION* 102 (1995). "A lawyer who allows his or her annual billable hours to slip too low . . . risks more than a decrease in income. Survival, of the lawyer within the firm . . . is at stake." *Id.*

61. Paul Reidinger, *Confessions of the Rodent*, A.B.A. J., Aug. 1995, at 82, 83.

62. Compare Michael Sean Quinn, *Attorneys' Fees and Lawyers' Billings: A Tale of Emperors' Old Clothes*, ENVTL. CLAIMS J., Autumn 1997, at 131, 133 (referring to the "time card mentality") with Cornelia Wallis, *The Honest Hour: The Ethics of Time Based Billings by Attorneys*, PROF. LAW., Aug. 1996, at 14 (stating that a "lawyer's worth, his or her value to a law firm, is measured today by the numbers of hours billed").

63. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 302 (1993).

In a work culture with minimum hour expectations, associates quickly learn that falling below the minimum risk job loss and exceeding the minimum is generously awarded through bonuses,⁶⁴ promotion to partner and an increased profit share percentage.⁶⁵ One legal auditor asserts that this type of "incentive compensation" system is "virtually identical to the system condemned by consumer protection enforcement officials in the auto repair industry."⁶⁶ Query whether associates who are promoted and compensated largely on the basis of hours billed and collected are much different than automobile service personnel who are compensated for repair sales generated.⁶⁷

One byproduct of quantifying law practice may be an increase in personnel claims brought by disgruntled associates.⁶⁸ Some claims may be based on the firms' refusal to invite an associate into partner ranks. With quantitative evaluations of productivity and value, associates who have "numbers" comparable to promoted associates may allege discrimination. For example, a female associate in the Dallas-based firm of Hughes & Luce filed a discrimination complaint with the Texas Commission on Human Rights after the firm did not promote her to partner.⁶⁹

The associate claims that she met the firm's objective criteria for partner-

64. Following the recent wave of salary increases some firms acknowledged that they based bonuses on hours billed. See, e.g. *Salary Watch*, TEX. LAW., Mar. 20, 2000, at 3 (showing how one Texas firm's bonuses were based on the number of hours billed). The wave of associate salary increases started in 1999 resulted in most firms tying raises (and increased bonuses) to higher hourly billing requirements. Andre Gharakhanian & Yvonne Krywyj, *The Gunderson Effect and Billable Mania: Trends in Overbilling and the Effect of New Waves*, 14 GEO. J. LEGAL ETHICS 1001, 1013 (2000-2001).

65. Elena S. Boisvert, *Is the Legal Profession Violating State and Federal Consumer Protection Laws?*, PROF. LAW., Nov. 1997, at 1, 4.

66. *Id.* at 4 (explaining that regulators concluded that the "incentive compensation" system of rewarding sales personnel for the number of repairs sold, "created an atmosphere that encouraged the sale of unnecessary repairs").

67. See *id.* at 4 (insisting that law firm compensation systems based on hourly billings are no better than the "incentive compensation" system attacked by the automobile repair regulators because law firms "first impose what may be excessive hourly requirements" and then seek to reward those who can actually exceed the minimum). *Id.*

68. Associates who feel used or even abused may be more inclined to sue their employers. See Andrea M. Alonso & Kevin G. Faley, *The Law Firm Culture of Abuse*, A.B.A. J., Nov. 1998, at 116 (describing verbal abuse and intimidation of associates). Firms that formally seek associate feedback can deal with abuse and possibly improve associate morale. For example, the Denver based firm of Holland & Hart asks associates if they would want to work for particular partners again. Jonathan Foreman, *Poor People Skills Can Collapse Firms*, NAT'L L. J., Jan. 29, 1996, at A1. The information obtained impacts partner compensation. *Id.* For a discussion of the mechanics of associate review of partners, see Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329, 367 (1995).

69. Angela Ward, *A Court-Ordered Partner? Hughes & Luce Associate Seeks Unusual Ruling*, TEX. LAW., Aug. 2, 1999, at 1 (noting that the associate is awaiting a Texas Commission on Human Rights decision before she files a discrimination suit in state court).

ship—the clients, the hours and the years.⁷⁰ By emphasizing and rewarding objective accomplishments such as hour production, firms make themselves vulnerable to such complaints.

The results from the Associate Survey revealed that many firms do reward hours production, employing an incentive compensation system focusing associate evaluations on hours billed and collected. Thirty-two percent of the respondents noted that they strongly agreed with the statement, "My income and advancement within the firm are principally based on the number of hours that I bill and collect." Another 44% indicated that they "somewhat agree" with the statement. Comments also reflected the emphasis placed on hours billed. When asked about their firms' annual billing requirement, four respondents volunteered that their firms' based bonuses on billable hours recorded or collected. In the general comment section one respondent flatly stated, "[t]he firm has one goal—maximize billing at any cost." One respondent referred to the "disturbing trend" of firms to "reduce annual income in favor of a bonus system that is almost exclusively tied to billable hours." As stated, "Given that the more lucrative bonuses kick in at 2300+, it is easy to see the allure of 'padding' the time sheet." Another respondent noted that "basing bonuses 100% on billable hours . . . encourages people to 'pad' their time."

Interestingly, Professors David B. Wilkins and G. Mitu Gulati described this exact consequence in discussing the partners' ability to monitor shirking by associates. They suggest that using hours to measure associates' work creates an incentive for associates to inflate their hours, "to the extent that associates believe that partners view hours as a surrogate for quality."⁷¹ Moreover, "partners will generally find it difficult to detect" when associates pad their hours because of the difficulty in correlating the quality and quantity of work produced.⁷² Francis H. Musselman, *Abandon the Billable Hour!* N.Y. ST. B.J., July/Aug. 1995, at 28, 28-29.

Padding may occur when attorneys overstate the amount of work actually performed, overwork files, or fail to complete work in the most efficient man-

70. *Id.* at 16.

71. David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1594 (1998).

72. *Id.* at 1595-96 (illustrating the "limited usefulness of using hours as a measure of associate effort"). The following illustrates how billable hours do not reflect quality or output:

The number of billable hours worked by Lawyer A in any particular time period measures the amount of time required to do the work he or she did during that period. The number of billable hours tells us nothing about the quality of, or the quantity of, Lawyer A's work product. Lawyer B might have accomplished as much in half the time . . . Lawyer B who takes half the time might be said to be twice as productive as Lawyer A . . . If one only considers the raw number of hours each worked, B would be the least productive. . . .

ner.⁷³ In all these situations, inefficiency and even billing fraud may be rewarded when attorneys' worth is based on billables.⁷⁴ Simply stated, hourly billing creates an incentive to overwork files and misrepresent time because the more hours worked, the more fees are generated.⁷⁵ As observed by one survey respondent, "the biggest problem I saw (at two medium sized firms) was attorneys who billed for time they didn't work."⁷⁶

Attorneys may be tempted to overwork files and to bill for work they didn't actually do when they do not have enough work to meet the firm's billing requirements. Professor Lerman explains that associates who do not have enough work to legitimately bill the required number of hours, must choose: "(1) to do unnecessary work; (2) to lie about the number of hours worked; or (3) to fail to meet the firm minimum and reduce her chances of become a partner"⁷⁷ or even keeping her job. On the other hand, associates who have enough work to fulfill the billing requirements⁷⁸ and associates who have client contact may be less inclined to overwork files and to engage in other questionable billing practices.

73. A report of the ABA Law Practice Management Section noted that lawyers "are being pushed to the edge by myriad pressures" including "incentives that fail to reward efficiency and effectiveness," and "increasing temptations to keep hours or income up by overworking files, taking shortcuts, and performing lower level routine work." BEYOND THE BREAKING POINT TASK FORCE, ABA LAW PRACTICE MANAGEMENT SECTION, BEYOND THE BREAKING POINT: A REPORT AND PLAN FOR ACTION 2 (Dec. 28, 1992). One author theorizes that attorneys who increase the number of hours spent on matters "tend, on average, to overstate legal risks" in an effort to justify time spent on a matter." Donald C. Langevoort & Robert K. Rasmussen, *Skewing The Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L. J. 375, 391 (1997).

74. Ironically, hourly billing which was originally "hailed for its objectivity and efficiency . . . increasingly has been assailed for encouraging inefficiency, excessive litigation, and fraud." Ross, *supra* note 47, at 2. Because of the incentives created, one commentator characterized hourly billing as a "devilish creature that rewards inefficiency and penalizes productivity." Elizabeth A. Kovachevich & Geri L. Waksler, *The Legal Profession: Edging Closer to Death With Each Passing Hour*, 20 STETSON L. REV. 419, 426 (citing a NATIONAL LAW JOURNAL commentator). Compare David J. Waxse, *Ethical Implications of Hourly Billing*, J. KAN. B.A., Dec., 1998, at 2 (noting that hourly billing "creates disincentives for competent and prompt resolution in representations [because] the lawyer is paid for time, not value. . .").

75. Stephen W. Jones & Melissa Brenda Glover, *The Attack on Traditional Billing Practices*, 20 ARK. LITTLE ROCK L.J. 293, 295 (1998).

76. The respondent stated that the "other big problem is attorneys that do not create timely time sheets. Attorneys that try to recreate a months worth of billing at the end of the month always end up billing more time than they actually worked."

77. Lerman, *supra* note 9, at 674. One associate quoted by Professor Lerman described the "no win" situation as follows, "The problem is that they want these many hours, and you're looking for work to do, and there is not work to do. You have to fudge." *Id.* at 714.

78. One respondent recognized that questionable billing practices may be less likely to occur when attorneys have an adequate amount of work to handle. As stated, "Billable hours have never been an issue as there is more legitimate work than we can handle. If we can keep our clients happy-billable hours take care of themselves. I have only seen one or two instances of 'questionable' billing practices."

BILLING PRESSURE AND THE EXODUS OF ETHICAL ASSOCIATES

Another unintended consequence of quantifying law practice is that ethical attorneys who do not pad or work long hours may be placed at competitive disadvantage come evaluation time. A couple of respondents referred to this problem. One respondent who described his/her diligence in using an electronic timer program to bill by the minute, expressed frustration over colleagues who estimate their time. The respondent stated, "I can't compete with estimators, but I'm not willing to compromise my strict billing practice either." In noting that the billable hours system "encourages lying" another respondent explained, "If you don't lie, you are perceived to be a slacker, even though, in reality, you may work far more than others." "Slacker" associates may feel pressure to change their practices or find other employment. Ethical associates who refuse to compromise their standards may become increasingly disillusioned in having to compete with other associates who use questionable billing practices to record hours. These ethical associates may voluntarily leave private practice.

Results from the Associate Survey reveal that a large number of respondents see the connection between pressure and ethical attorneys abandoning private law practice. The questionnaire asked the respondents to indicate their agreement or disagreement with the following statement, "Billing pressure causes ethical and competent attorneys to leave private law practice." The largest percentage of the respondents (31%) neither agreed nor disagreed with the statement. Forty-six percent noted some level of agreement with the statement.⁷⁹ Personally, I believe that this is the most disturbing survey result because it suggests that billing pressure may be causing firms to lose ethical associates and future leaders who uphold high ethical standards.

ETHICS COUNSEL'S ROLE IN ADDRESSING THE BILLING ABUSES AND THE DELETERIOUS EFFECTS OF INCREASED BILLABLE HOUR PRESSURE

While the position of ethics advisor varies from firm to firm, firm managers and ethics advisors should agree on the approach used. At one end of the continuum are "reactive" ethics advisors who deal with specific problems presented to them. For example, the title "conflicts resolution counsel" used by an ethics advisor implies that the advisor's role is largely limited to determining if and how a firm can handle prospective representation. At the other end of the continuum are proactive ethics advisors whose work goes beyond dealing with individual problems. Rather, proactive ethics advisors strive to improve firm policies, procedures and systems relating to ethical practice. The proactive

79. Sixteen percent noted that they strongly agreed with the statement and 30% indicated that they somewhat agree with the statement that billing pressure causes ethical and competent attorneys to leave private law practice. Thirteen percent checked that they "somewhat disagree" with the statement and another 10% noted that they "strongly disagree."

approach is particularly valuable in addressing firm-wide issues such as billing practices and the effects of billable hour pressure.

As a starting point, ethics advisors should study their firms' existing billing procedures, practices and policies. In this process, the advisor can obtain assistance of the firm's malpractice insurer or use self-audit questionnaires developed by risk management experts. For example, Anthony Davis has developed a Billing Systems and Control Questionnaire that includes 36 questions and commentary for analyzing the answers.⁸⁰ Some of the questions involve straight auditing functions such as confirming that the billing rate charged is the same as the rate set forth in the engagement letter.⁸¹ Other questions require a more qualitative evaluation to determine if clients are improperly being charged for a "learning curve" or unnecessary overstaffing.⁸² The answers to the questions will provide firm management with an assessment of the firm's current time-charge and billing processes, revealing what gaps or issues need to be addressed.⁸³

In the process of evaluating billing policies and procedures, billing guidelines should be carefully evaluated. If the firm does not have written billing guidance, an ethics advisor should spearhead the adoption of clear billing guidelines. By encouraging firm managers and section leaders to adopt and enforce billing guidelines, ethics advisers counter the ostrich approach taken by firm managers who require attorneys bill a high number of hours without giving attorneys meaningful guidance on how to bill ethically. While firm partners may financially benefit from questionable billing practices by taking the position that "if I don't see it, it's not happening," results from the Associate Survey suggest that the failure to implement and enforce clear billing guidelines hurts ethical associates who refuse to engage in questionable practices. Close to three quarters of the survey respondents indicated that they agreed or somewhat agreed with the statement, "Clear billing guidelines would help attorneys who want to practice ethically." Ethics advisors can assist section leaders in articulating guidelines suitable for particular practice areas. Such guidelines should be coupled with training of attorneys and support staff.

Periodically, an ethics advisor can assist the firm in monitoring compliance with the guidelines. Some firms have started auditing attorneys' billing and expense records. For example, Proskauer Rose Goetz & Mendelsohn in New York created the position of an internal auditor, an accountant who "makes sure the rules of the game are being observed by everyone."⁸⁴ The firm's chief operating officer reports that having an auditor "provides an extra incentive for

80. ANTHONY E. DAVIS, RISK MANAGEMENT SURVIVAL TOOLS FOR LAW FIRMS 107-110 (1995)

81. *Id.* at 108, question 23(a).

82. *Id.* at 107, questions 23 (e) and (f).

83. *See id.* at 167 (describing the function of the self audit).

84. Edward A. Adams, *Could Managing Partner Steal Firm Funds Here?* N.Y.L.J., May 20, 1994, at 1 (citing Robert Kafin, the firm's chief operating partner).

people to be careful" as well as the "opportunity to find mispostings or errors."⁸⁵ Periodic random checks by ethics advisors promise to have the same prophylactic effect. Another approach would be for ethics advisors to initiate audits of billing records of attorneys who bill over a certain level such as 2200 hours a year.⁸⁶

For routine auditing of bills, a firm might purchase software marketed by legal bill auditors. Some companies, including PeerPoint Technologies, sell software designed for law firms, allowing firms to pre-clear bills before sending them to clients.⁸⁷

In an effort to learn what is happening in the billing trenches, firm managers and supervisors should encourage all firm attorneys and other personnel to contact the firm's ethics counsel with questions and concerns related to ethics and billing. If ethics advisors are visible, associates and support staff members will be more inclined to consult the advisor rather than doing nothing or merely discussing the matter with peers. Firm attorneys and staff members will also be less reluctant to report billing problems if the ethics counsel or committee ensures that employees who report misconduct are protected from retaliation.⁸⁸

On a more institutional level, ethics counsel should assist firm managers in reexamining structures in firms that have contributed, if not caused, various problems related to emphasizing billable hours and business generation. Acting with some objective distance, the ethics counsel can instigate consideration of the firm's compensation system for associates, as well as partners. The review of a compensation system should focus on identifying the conduct that the system rewards.⁸⁹ Specifically, the firm's compensation system should encourage ethical practice and motivate associates and partners alike to behave in ways that are beneficial to the firm and its clients.

Ethics advisors can urge firm managers to rethink the advisability of high billable hour requirements and a compensation system that awards bonuses based on numerical billing benchmarks.⁹⁰ In lieu of rewarding "heavy handed" billers, firm managers and ethics advisors should scrutinize the work of attorneys who regularly bill an extraordinary number of hours. When possible firms

85. Erin White, *THE WALL STREET JOURNAL*, July 14, 1998, at B8.

86. Professor Lisa G. Lerman recommends systematic audits of billing practices of attorneys who bill over 2,000 hours per year or more. Lerman, *supra* note 3, at 298.

87. Wayne J. Lovett, *Services and Software Help Manage Legal Billings: An Entire Industry is Devoted to Making Sense of Mind-numbing Bills and Spouting Irregularities*, NAT'L L. J., Dec. 14, 1998, at B8 (reviewing the strengths and weaknesses of various software products).

88. Lerman, *supra* note 3, at 298.

89. *The Keeping the Keepers Report*, *supra* note 15, at 47.

90. Firm managers should ask whether the billable hour requirement for associates is a fair one to them and to firm clients. (emphasis added) James S. Bolan, *Ethics, Risk and Malpractice Avoidance*, MASS. CONTINUING LEGAL EDUCATION 2000, ETHLII MA-CLE 23-i.

should recognize and reward ethical conduct. Firms could expressly include ethical conduct as a criterion in evaluating and compensating attorneys.⁹¹ Such moves would send a message to firm attorneys and clients that the firm values quality over quantity.⁹²

Ethics advisors should also attempt to evaluate how compensation systems are undermining attorneys' willingness to devote time to mentoring, supervision and training. Partner compensation systems that do not reward supervision time on an equal basis with other time punish supervisors in different ways. First, supervisory attorneys do not receive the short-term monetary rewards from billing and generating business. Second, supervision time may actually hurt supervisors' mobility if time devoted to supervision competes with the time that supervisors spend building their own portable client base.⁹³ A compensation system should not punish supervisors and mentors, but should adequately compensate them for their contributions to their firms.⁹⁴

By taking steps recommended above, proactive ethics advisors can prevent some problems and discover other problems, enabling firm managers to address improprieties before a subpoena server arrives. Long term, such efforts reap benefits in attracting and retaining ethical attorneys, as well as clients impressed by law firm accountability and professionalism.

91. See Sarat, *supra* note 26, at 827 (quoting an associate who said that partners treat ethics "as a matter of sanctioning people for bad behavior rather than rewarding good behavior").

92. For recommendations on how firms can emphasize quality, over quantity, see Ronald M. Martin, *The Empowered Law Firm—Driving Empowerment: Reengineering our Context*, 20 No. 7 LAW PRAC. MGMT. 34 (1994).

93. "Top lawyers may also be unwilling to devote considerable time to management, recognizing that they stand to benefit more from portable assets like client relationships and substantive legal skills than from firm-based assets like efficient management structures and sound financial practices." Deborah K. Holmes, *Learning from Corporate America: Addressing Dysfunction in the Large Law Firm*, 31 GONZ. L. REV. 373, at 404 (1995-96).

94. If firm partners are concerned that partners might fudge on supervision time recorded, the firm could set annual maximums for supervision time that will be calculated into the objective portion of the compensation system. The annual maximum could vary depending on the position that the supervisor holds. For example, a member of a firm's ethics committee may have a higher annual maximum than a member of the firm's recruitment committee. Another way of monitoring supervision time is to implement some form of peer review in which information is sought from associates and partners. For a review of the models of peer review, see Fortney, *supra* note 68, at 363-70.