
Article

Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession

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INTRODUCTION

More than two decades ago, Chief Justice Rehnquist lamented:

It seems to me that a law firm that requires an associate to bill in excess of two thousand hours per year . . . is substantially more concerned with profit-maximization than were firms when I practiced. Indeed, one might argue that such a firm is treating the associate very much as a manufacturer would treat a purchaser of one hundred tons of scrap metal: if you use anything less than the one hundred tons that you paid for, you simply are not running an efficient business.¹

Little has changed since; if anything, practicing law as a business is now the prevailing norm.² Work in a firm, particularly “big law,” is often grueling, hierarchical, mind-numbing, and, at times, downright dehumanizing.³ In this environment,

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1. Chief Justice William H. Rehnquist, Dedicatory Address: The Legal Profession Today, Address Before Indiana University School of Law (Sept. 12, 1986), in 62 IND. L.J. 151, 153 (1987).

2. Today, law firms are profit-driven businesses, ranked by profits per partner. See, e.g., Rosemarie Clancy & Russell Miskiewicz, *Profits Show a Healthy Increase*, AM. LAW., May 2011, at 139, 139–40. Rankings according to gross revenue and revenue per lawyer are also available. Rosemarie Clancy & Russell Miskiewicz, *Seventeen Firms Gross More Than \$1 Billion*, AM. LAW., May 2011, at 121, 121–29; Rosemarie Clancy & Russell Miskiewicz, *The Harbinger of a Recovery?*, AM. LAW., May 2011, at 131, 131–37.

3. One law firm partner argued that the current billable hour system renders associates “as interchangeable as widgets.” Niki Kuckes, *The Hours: The Short, Unhappy History of How Lawyers Bill Their Clients*, LEGAL AFF. Sept.–Oct. 2002, at 40, 40, available at <http://www.legalaffairs.org/issues/>

attorneys are often overtired,⁴ under informed about their cases, and afraid of appearing weak or incapable to superiors.⁵ Understandably, these attorneys are frequently unable to perform to the best of their abilities or to exercise good independent judgment.⁶ The scope of the problem takes on larger and darker dimensions when unhappy or stressed lawyers become ethical liabilities.⁷ In adopting an increasingly profit-driven business model that mirrors that of their clients,⁸ lawyers have adopted a model that is fundamentally at odds with their professional obligations.⁹ Although the legal profession attempts to compensate for these tensions through increasingly detailed ethical rules, the fact remains that workplace mistreatment of lawyers creates a system that marginalizes professional responsibility.

This Article argues that labor issues and ethical issues in the legal profession are inherently intertwined. Despite the widespread acknowledgment of tensions between how private

September-October-2002/review_kuckes_sepoct2002.msp; see also Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2283 (2010) (arguing that the emphasis on “around-the-clock commitment to the firm” exacerbates already prevalent stereotypes regarding the female lawyer’s inherent under-commitment to the firm).

4. See Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 182 (2005) (reporting that 3% of surveyed attorneys sleep less than five hours per night and 35.7% sleep five to six hours per night).

5. 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, 743 (1998) (arguing that young attorneys do not receive the opportunity to “slowly learn their craft” and instead are pressured to “hit the ground running”).

6. See Fortney, *supra* note 4 (concluding that overtired attorneys may not be operating at “peak performance”).

7. Claude Solnik, *Stressed-out, Overworked Lawyers Lead to Disciplinary Actions by State Bar*, ALLBUSINESS (Aug. 19, 2005), <http://www.allbusiness.com/north-america/united-states-new-york/1083441-1.html> (reporting on the correlation between stress and overwork on the ethical practice of lawyering in terms of client availability, substantive work product, judgment, and financial integrity).

8. See David B. Wilkins, *Partner Shmartner! EEOC v. Sidley Austin Brown and Wood*, 120 HARV. L. REV. 1264, 1273 (2007) (noting that “[t]he prevailing wisdom is that only ‘business-like’ firms that successfully organize themselves in ways that parallel their business clients will survive in today’s competitive marketplace”).

9. See Rehnquist, *supra* note 1, at 154 (“[E]thical considerations . . . are factors which counsel against maximization of income in the best Adam Smith tradition . . .”).

practice is conducted and the values lawyers hold,¹⁰ the issue of how to remedy legal ethics is misunderstood and often analyzed on a rule-by-rule basis. This approach avoids the core of the problem, which is systemic and, thus, requires a systemic solution.

The first innovation of this Article is to import and apply new institutionalism,¹¹ a theory widely used in economics and political science, to legal practice. Applying this theory to law reveals that the ethical crisis at the heart of the current private practice system is an institutional and systemic flaw. The inevitable tension between the conscious acts (or inaction) of individual lawyers and the institutional norms of private practice that facilitate unethical behavior has led to an ethical crisis. By approaching these circumstances from a new institutionalist perspective, one can begin to craft meaningful and workable solutions to restore professionalism, agency, and integrity to the legal workplace. The question changes from, “how can individual lawyers act ethically?” to “how do lawyers change firms as institutions to support or compel ethical behavior?”

This Article further argues that only a structural change in firm institutions—a seismic shift—can reorder the legal workplace into one conducive to professionally responsible practice. Past solutions—such as piecemeal amendments to the American Bar Association Model Rules of Professional Conduct (Model Rules),¹² or relying on firms and individuals to self-police—are ineffective. Similarly, banishing the billable hour is neither pragmatic nor likely. Agreements between lawyers regarding

10. See generally Fortney, *supra* note 4, at 178 (discussing how high billable hour requirements may incentivize inefficiency and dishonest time records); Robert E. Hirshon, *Law and the Billable Hour: A Standard Developed in the 1960s May Be Damaging Our Profession*, 88 A.B.A. J. 10, 10 (2002) (“Mentoring, life-balance, workplace stimulation and innovation are affected when the timesheet reigns.”).

11. See generally Thomas A. Koelble, *The New Institutionalism in Political Science and Sociology*, 27 COMP. POL. 231, 232 (1995) (describing various forms of new institutionalism, but acknowledging that they all “share a concern for the role of institutions in social science”).

12. See generally MODEL RULES OF PROF’L CONDUCT (2010). The Model Rules devote an entire section to decoding the basic principles of professional responsibility in the context of a law firm. See *id.* R. 5.1–5.8. This alone recognizes the innate difficulty and quagmire of ethical contortions that the bar must go through in order to facilitate law practiced in firms. But the fact is, improved working conditions for the attorneys practicing at law firms would do more to ameliorate ethical issues than creating complex rules. Improved working conditions would attack the root of the problem and the structure of legal work at firms.

pay are antitrust violations.¹³ Labor discussions between individual lawyers and their firms reveal extreme leverage inequalities, lack enforceability, and are subject to client and economic pressures to be competitive with other firms. As such, this Article proposes the most effective remaining alternative: private-sector attorneys must unionize, not only to change their own lives and working conditions, but to uphold their ethical obligations as lawyers.

Unionization is the only option that will allow private-sector attorneys the ability to transcend the institutional norms of firms and neutralize some of the market forces at play in the current system. Any change to firm labor practices needs to be relatively uniform across firms because: (1) clients may shop around for firms that are more willing to exploit labor or that are nonparticipants in informal labor agreements; (2) even were this not the case, the threat of losing clients will prevent partners from supporting labor changes unless competitors are bound to the same terms; and (3) if all attorneys in the sector are bound by the same general terms of employment then how law is practiced will change—partners will have leverage to “push back” on clients, the government, and potential adversaries for things like reasonable work deadlines. Unionization legally allows attorneys across firms to make the demands necessary to reform the profession and empowers associates, staff attorneys and partners to fundamentally change how private law is practiced. Time management, good decision making and prioritization, and quality over quantity become the central focuses of effective practice.

This Article proceeds in four Parts. Part I applies the theory of new institutionalism to law firms and reframes longstanding and emerging ethical and labor issues embedded in firms’ current work structures. Part II outlines in greater detail the specific ethical rules undermined by current firm practices. Part III discusses other possible solutions to the ethical issues presented and concludes that non-unionization options are illegal, limited, or ineffective. Lastly, Part IV outlines the legality and ethics of unionization for attorneys and concludes that unionization is the best way to address the ethical and labor issues pertaining to private-sector lawyers.

13. See *infra* Part III.E (discussing Fed. Trade Comm’n v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411 (1990)).

I. NEW INSTITUTIONALISM AND THE STRUCTURE OF
THE MODERN LAW FIRM

A. THE THEORY: NEW INSTITUTIONALISM

“In the majority of situations, rules and procedures (that is, institutions) are clearly established, and individuals follow routines. They follow well-worn paths and do what they think is expected of them.”¹⁴

The theory of “new institutionalism,” frequently applied in modern economics, political science, and sociology, provides an important framework for understanding why lawyers at law firms do not, and will not, change their working conditions as individuals despite the obvious negative ethical implications of their work structure.¹⁵ Broadly speaking, new institutionalism conceptualizes institutions not as specific groups of people or physical places, but as dynamic sets of formal and informal rules.¹⁶ These rules may take the form of behaviors, customs, symbols, patterns of thought, or conventional wisdom.¹⁷ New institutionalism posits that, whatever form they take, these rules frame—or supersede—conscious decision making and structure human interactions.¹⁸ Under this theory, institutions

14. Koelble, *supra* note 11, at 233.

15. There are three branches of new institutionalism: rational choice, historical, and sociological. This Article will focus on the sociological branch of new institutionalism. For discussion of the distinctions, see generally Peter A. Hall & Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936, 950–55 (1996) (discussing strengths and weaknesses of the three types of new institutionalism); Koelble, *supra* note 11 (identifying major differences between rational choice, historical, and sociological new institutionalism).

16. See B. GUY PETERS, INSTITUTIONAL THEORY IN POLITICAL SCIENCE: THE “NEW INSTITUTIONALISM” 28–29 (1999); Paul J. DiMaggio & Walter W. Powell, *Introduction* to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 1–3 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

17. See JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 22 (1989) (“By ‘rules’ we mean the routines, procedures, conventions, roles, strategies, organizational forms, and technologies around which political activity is constructed.”).

18. See WENDELL GORDON, INSTITUTIONAL ECONOMICS: THE CHANGING SYSTEM 16 (1980) (“[A]n institution is a grouping of people with some common behavior patterns, its members having an awareness of the grouping. But in this definition the emphasis is on the institutional behavior pattern. It is not especially helpful to reify institutions in the sense of thinking of them as buildings or groups of people. . . . So, the essence of the institutions is the commonly held behavior pattern.”); Þráinn Eggertsson, *A Note on the Economics of Institutions*, in EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE 6, 6–7 (Lee J. Alston et al. eds., 1996) (asserting that institutional rules “shape

matter because “they shape, even determine, human behavior. Institutions come about to give legitimacy to rules of conduct and behavior which concern power relations and the establishment of social and cultural norms”¹⁹ Institutions keep individual actors behaving a certain way through various mechanisms of control: hierarchies, sanctions, rewards, rules, and procedures.²⁰ A law firm is an institution, replete with its own set of norms, beliefs, and practices that are self-reinforcing and are not imposed or enforced by any one individual.²¹

The institution of the modern law firm did not develop in a vacuum. Rather, it was “created or adopted in a world already replete with institutions.”²² Because “developing new institutions ‘borrow’ from the existing world of institutional templates,”²³ law firms internalized the business models of their successful clients, and adopted a sort of Wall Street ethos.²⁴ For lawyers this is a problematic development, since the institutional structure of Wall Street cannot safeguard the duties as lawyers. Unlike their Wall Street clients, lawyers are bound by demanding and highly codified rules of professional responsibility and ethics that are incompatible with unmitigated profit

human interaction”); James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 736 (1984).

19. Koelble, *supra* note 11 (describing the work of MARCH & OLSEN, *supra* note 17, at 23–24).

20. See Ellen M. Immergut, *The Theoretical Core of the New Institutionalism*, 26 POL. & SOC’Y 5, 5, 16 (1998), available at <http://pas.sagepub.com/content/26/1/5.full.pdf+html> (arguing that “decisions cannot be understood as macro-aggregations of individual preferences but instead result from cognitive and organizational procedures that produce decisions despite uncertainty”); Koelble, *supra* note 11, at 233 (describing the way that individual actors are “kept in line”).

21. For example, some typical norms in the law firm are: to place firm work above all other obligations, not to refuse additional work, not to report poor judgment or behavior on the part of anyone in the firm to a superior or parties outside the firm, to seek to maximize billable hours, to file every possible motion, to conduct extensive document review immediately—before being able to target key issues—and expect immediate around-the-clock responses using mobile devices. See *infra* Part I.B.1–3.

22. Hall & Taylor, *supra* note 15, at 953.

23. *Id.*

24. Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 381 (2001) (discussing a shift from conceptualizing being a lawyer as being a “guardian of the law” to a “hired gun”).

maximization.²⁵ Beyond formal rules of ethics, lawyers also play a broader role in safeguarding the rule of law.²⁶ These distinctions are part of what makes lawyers critical actors in civil society.²⁷ By continuously asking attorneys to work under sub-par conditions where they lack agency or are treated without respect, the institution of the firm fundamentally undermines the ability of a lawyer to be a lawyer, a professional, and, ultimately, a responsible advocate.

So how does one change an institution with deeply ingrained norms, where individual actors are structurally constrained? “Organizations are characterized by their use of job specification and division of labor;” as such, the structure of labor is pivotal in maintaining an institution’s hold over individual actors.²⁸ Thus, a labor reform results in institutional reform by providing new opportunities for individual action.²⁹

B. THE INSTITUTIONAL STRUCTURE OF THE MODERN LAW FIRM

1. The Players

The basic structure of the attorney workforce at a law firm is a simple hierarchy: at the top are partners, who have equity; then associates, who potentially could join the partnership ranks;³⁰ then staff attorneys, who do rote, repetitive work that associates dislike,³¹ and for which clients hate to pay top dol-

25. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231–33 (1995) (concluding a middle-ground approach that would continue bar admission while permitting nonlawyers to practice law and substituting market and government regulation for self-regulation of legal ethics is a viable alternative to standing models of practice). Even legal scholars arguing in favor of a “business paradigm” of practice do not advocate for a simple market based system. *Id.*

26. See MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 6 (2010) (“[A] lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”).

27. See *Professionalism Symposium*, 52 S.C. L. REV. 443, 490 (2001).

28. Koelble, *supra* note 11, at 233.

29. The very act of unionization breaks with current (unspoken) norms. Despite the fact that attorneys play a vital role in the private sector, there has not been serious consideration to date on unionization of the attorney workforce.

30. See generally MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 2–3 (1991) (listing the dichotomy between partners and associates as one of the distinctive features of the big law firm).

31. See Peter D. Sherer & Kyungmook Lee, *Institutional Change in Large Law Firms: A Resource Dependency and Institutional Perspective*, 45 ACAD.

lar;³² and, at the bottom, contract attorneys, who are temporarily employed by firms on an ad hoc basis depending on a given matter.³³ Generally speaking, partners are completely at the disposal of clients and provide round-the-clock responsiveness, regardless of whether they are on vacation, or even giving birth.³⁴ Associates face other labor issues, like physically grueling travel, excessive and irregular hours, routine sleep deprivation, unclear advancement policies, and no formal layoff or job severance policy.³⁵

Staff and contract attorneys have even less leverage and, by no coincidence, have the longest list of workplace grievances. In addition to the issues plaguing associates, staff and contract attorneys face compensation issues, lack of paid leave,³⁶ poor or

MGMT. J. 102, 107 (2002) (describing staff attorneys as non-partnership track attorneys hired to perform “routine price sensitive work”).

32. Jonathan D. Glater, *Billable Hours Giving Ground at Law Firms*, N.Y. TIMES, Jan. 30, 2009, at A1.

33. “Contract attorneys” are essentially freelance attorneys who come in on an ad hoc, case-by-case basis, often to engage in document review. They may work completely on their own. Alternatively, in the context of big cities, it is more likely that they come from large agencies. For example, Black Letter Discovery provides staff for document review, review facilities, management, and onshore review in eight U.S. cities. *Discovery Services*, BLACK LETTER DISCOVERY, http://www.blackletterdiscovery.com/services/discovery_services.php (last visited Apr. 16, 2012); *Locations*, BLACK LETTER DISCOVERY, http://www.blackletterdiscovery.com/about/bld_locations.php (last visited Apr. 16, 2012).

34. Some law firm partners respond via blackberry even during labor. See Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 FORDHAM L. REV. 111, 121 (1988).

35. See *infra* Part I.C.

36. Select agencies do provide benefits to workers. *Benefits*, COUNS. ON CALL, <http://www.counseloncall.com/Page/Benefits> (last visited Apr. 16, 2012) (providing health benefits, holiday pay, 401(k) plans, and workers compensation insurance); *Frequently Asked Questions/Attorneys*, AXIOM LAW, <http://www.axiomlaw.com/index.php/whoware/faq> (last visited Apr. 16, 2012) (providing “health, vision, dental and malpractice insurance,” among other benefits). However, these agencies do not view themselves as “staffing companies” providing contract attorneys, but rather, as boutique flexible firms offering the services of a variety of elite practitioners. See, e.g., *Counsel on Call*, COUNS. ON CALL, http://www.counseloncall.com/images/upload/File/counsel-on-call-fact-sheet_09.2011.pdf (last visited Apr. 16, 2012); *Frequently Asked Questions/Attorneys*, *supra*. Note that both Counsel on Call and Axiom Law are highly selective companies which pride themselves on providing “experts” in the field that they are called on. This is not an option for inexperienced attorneys. See *Frequently Asked Questions/Attorneys*, *supra*. (“Nearly 75% [of Axiom attorneys] come from a top 25 school, most have worked at an AmLaw 50 or Magic Circle firm and about two-thirds have spent several years in-house before joining the firm.”).

unsafe working conditions, and even less job security.³⁷ For experienced attorneys with highly sought after skill sets, being a contract attorney once appeared to be a way to more favorably manage work-life balance during boom times.³⁸ However, for many recent law graduates, who have no work experience, contract work through an agency is viewed as a necessary evil to get experience and build a network.³⁹

2. Basis of Employment: Contracts

In terms of binding obligations, law firms generally do not require or allow associates to sign employment contracts with the firm. Thus, the terms of employment are fluid, with few written rules or policies regarding job security. Lawyers at firms, like most employees, work at will. This means that they can be fired with or without cause and without any notice, provided their termination is not otherwise unlawful.⁴⁰ One of the few exceptions to this rule is that an employer may not terminate an attorney's employment for insisting that the firm fulfill its obligation to report another attorney's misconduct.⁴¹

3. How Work Is Accomplished: Billing Structures

At the core of the labor structure of the modern law firm is the billable hour. Put simply, lawyers bill clients by how much time they spend on a matter, rather than billing clients a set

37. Julie Kay, *Contract Lawyers: Cheaper by the Hour*, NAT'L L.J. (Jan. 12, 2009), <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202427395994> (reporting on the constricting job market, poor working conditions, and pressure to decrease wages).

38. Hannah Hayes, *Lawyer for Hire: Freelance Contractors Change the Marketplace*, 17 PERSP. 12, 12 (2009), available at http://www.americanbar.org/content/dam/aba/publishing/perspectives_magazine/women_perspectives_Winter09_Freelance_Contractors.authcheckdam.pdf.

39. *Id.* at 13 ("In tough economic times, many law students sign up with agencies to gain experience and network.").

40. *Lefcourt v. Legal Aid Soc'y*, 312 F. Supp. 1105, 1105-07 (S.D.N.Y. 1970) (ruling that, absent a state action or membership in a union, the Legal Aid Society could fire lawyers employed at will in response to speech); *Horn v. N.Y. Times*, 790 N.E.2d 753, 755, 759 (N.Y. 2003) (explaining that an employer may discharge an employee "without cause or notice" so long as it does not violate some statutory right or contract).

41. *Wieder v. Skala*, 80 N.Y.2d 628, 638-39 (N.Y. 1992); see also *Connolly v. Napoli, Kaiser & Bern L.L.P.*, 817 N.Y.S.2d 872, 877-78 (Sup. Ct. 2006) (holding that an associate fired for refusing to violate DR 1-102, which imposes an obligation on attorneys not to engage in dishonesty, fraud, deceit or misrepresentation, stated a cause of action for breach of implied contract).

fee per matter or by outcome.⁴² Billable hours include only minutes billed directly to clients and not time spent on education programs, bar work, general firm activities, or simple daily acts like lunch.⁴³ Time in the private sector is usually measured and billed in six minute intervals, most commonly by using electronic trackers on computers.⁴⁴ Making money under this model is simple—more hours worked means more money earned by the firm.

Much scholarly and professional debate has centered on the ethics of the billable hour, and whether the billable hour is a per se ethics violation remains an open debate.⁴⁵ Regardless, the implementation of the billable hour has, in practice, become a facilitator for unethical behavior.⁴⁶ Particularly when employee leverage is low and hour maximization is sought without factors that limit how and when those hours are attained, the ethical practice of law is jeopardized.⁴⁷ This is because without increased leverage, lawyers who are fearful of losing their livelihood simply do not pull the institutional weight to counter the systemic billing and client pressures. Ultimately, as long as there is no penalty, and only benefit, to taking more time to do a task, attorneys will abuse the billable hour system. As such, the billable hour needs strict restrictions in order to avoid its misuse.

42. A.B.A. COMM'N ON BILLABLE HOURS, ABA COMMISSION ON BILLABLE HOURS REPORT 2001–2002 at 45 (2002), available at <http://www.judicialaccountability.org/articles/ABABillableHours2002.pdf>.

43. Pro bono work is a gray area where firms differ in their approaches. For the years of 2009 and 2010, eighty percent of firms reported counting some pro bono work towards billable hour requirements. *A Look at Associate Hours and at Law Firm Pro Bono Programs: NALP Bulletin*, NAT'L ASS'N FOR L. PLACEMENT, tbl.4 (Apr. 2010), <http://www.nalp.org/july2009hoursandprobono>. At over forty percent of firms, there is a maximum number of “billable” hours an associate may earn towards their quota from pro bono work. *Id.* tbl.5. The average number of pro bono hours credited in these years was just over seventy-two. *Id.* tbl.6. Under this model, law firms disregard any additional pro bono hours over the maximum number for the purposes of billable hours. *Id.*

44. Maxwell S. Kennerly, *Sound and Fury over Flat Fees, Signifying Nothing*, LITIG. & TRIAL (Jan. 18, 2011), <http://www.litigationandtrial.com/2011/01/articles/the-business-of-law/the-long-view/sound-and-fury-over-flat-fees-signifying-nothing/>.

45. See, e.g., Scott Turow, *The Billable Hour Must Die*, 93 A.B.A. J. 32, 34–35 (2007), available at http://www.abajournal.com/magazine/article/the_billable_hour_must_die/.

46. A.B.A. COMM'N ON BILLABLE HOURS, *supra* note 42, at 53.

47. *Id.*

C. TENSION BETWEEN QUALITY AND QUANTITY

Robert Hirshon, the former President of the American Bar Association, observed, “[t]he billable hour is fundamentally about quantity over quality, repetition over creativity.”⁴⁸ Not surprisingly, then, the labor structure that has emerged from the unchecked use of the billable hour is one that places overwhelming incentives on attorneys as individuals to maximize the hours they and the firm bill.

As a matter of course, most law firms have a “billable hours target” or “requirement” that sets forth how many hours firm attorneys should bill in a given year.⁴⁹ This target and the amount associates bill are usually integral to compensation (through the bonus structure) and performance evaluations.⁵⁰ The billable system “creat[es] a pecking order among lawyers, identifying the best as the busiest and the most costly.”⁵¹ In 1958, the ABA’s target work year was 1300 hours of work for attorneys.⁵² This equated to less than five to six billable hours in day, five days a week in a forty-eight week year.⁵³ As of 2001, that amount has ballooned by 1000 hours a year, with the ABA recommending work hour expectations of 2300 hours annually, 1900 of which would be billable.⁵⁴ Those expectations are conservative when compared to practice; many law firms require between 1900 and 2200 billable hours a year.⁵⁵

48. Hirshon, *supra* note 10.

49. A.B.A. COMM’N ON BILLABLE HOURS, *supra* note 42. While partners are not usually subject to hard hours targets, they are under considerable pressure to bring in as much money as possible. Therefore, cases that will be hour intensive (such as matters involving heavy document discovery) weigh heavily in comparison to standard or smaller matters. Partners are also under pressure to bill directly, which contributes to their overall financial worth to the firm. *Id.* at 43.

50. Fortney, *supra* note 4, at 175.

51. Glater, *supra* note 32.

52. Ronda Muir, *A Short History of the Billable Hour and the Consequences of Its Tyranny*, LAW PEOPLE (June 18, 2007), <http://www.lawpeopleblog.com/2007/06/articles/profitability/a-short-history-of-the-billable-hour-and-the-consequences-of-its-tyranny/>.

53. *Id.* This is based on the assumption that all 1300 hours recommended by the ABA in 1958 would be billable under today’s standards. *Id.*

54. A.B.A. COMM’N ON BILLABLE HOURS, *supra* note 42, at 50. These hours would be “composed of 1900 hours billable to clients plus a total of 400 additional hours for: firm service (100 hours), pro bono (100 hours), client development (75 hours), training and professional development (75 hours) and professional service (50 hours).” Muir, *supra* note 52.

55. Fortney, *supra* note 4, at 175; Kuckes, *supra* note 3, at 41 (reporting that required billable hours in 2001 were 1950–2000 hours per year on aver-

Because many activities do not count towards billable hours requirements, it is commonly estimated that three hours of work time roughly equates to two hours of billable time.⁵⁶ Therefore, to bill 2000 hours in a year, a typical lawyer will need to work 3000 hours.⁵⁷ A simple calculation reveals that the system, as it stands, expects law firm associates to work twelve to fourteen hour days consistently throughout the year.⁵⁸ Two thousand hours is hardly the upper limit in the profession, as lawyers in big cities admit to billing upwards of 3000 hours in a given year.⁵⁹ This equates to an inhuman twelve hours a day, seven days a week, or a seventeen hour workday over a five-day workweek.⁶⁰

With such enormous labor requirements, the incentive to be inefficient, inflate hours, and cut participation in professional activities is obvious.⁶¹ Indeed, an associate has no incentive to work efficiently because when work is finished quickly it is only replaced with more work to continue to maximize hours. In order to have time to sleep or to maintain a personal life—let alone have time to enjoy a weekend or vacation—law firm law-

age); Robert Lennon, *The Memo Heard Round the World*, AM. LAW., Dec. 2002, at 19 (confirming with a Clifford Chance representative that the firm set a 2200 hour “target,” while encouraging associates to spend time outside client billable hours); Memorandum from Clifford Chance Associates to Clifford Chance Partners, (Oct. 15, 2002), available at <http://www.lawcost.com/clifchancememo.htm> (reporting that Clifford Chance required 2200 hours of “hard billable” work and 220 hours of “soft billable” time); *Number of Associate Hours Worked Declines*, NAT’L ASS’N FOR L. PLACEMENT, tbl.3 (Feb. 2011), http://www.nalp.org/assoc_hrs_feb2011 (reporting that a 2007 NALP study reported that over sixty percent of law firms require 1900 billable hours or more of work per year).

56. Kuckes, *supra* note 3, at 42 (citing the 2:3 ratio); William G. Ross, *Kicking the Unethical Billing Habit*, 50 RUTGERS L. REV. 2199, 2203 (1998) (noting experts approximate one-third of office time is “typically consumed by non-billable activities”); Muir, *supra* note 52 (explaining that the standard guideline is that it takes “approximately 10–12 hours to bill 8 hours”).

57. Kuckes, *supra* note 3, at 42.

58. *See id.* These numbers are based on a five-day workweek with forty-eight weeks per year and are rounded to the nearest whole hour. *Id.*

59. Glater, *supra* note 32, at A18.

60. *Id.* The phrase “five-day work week” is laughable amongst law firm associates who rarely spend an entire weekend not working. *See* Kuckes, *supra* note 3, at 42.

61. Kuckes, *supra* note 3 (“The standard [of using quantity of time worked over quality of output] invites inefficiency, not to mention fraud.”); Rehnquist, *supra* note 1.

yers must find ways to bill more time in less time.⁶² This starts with what may seem like relatively innocent multitasking or time management techniques to maximize the number of hours billed. But these practices can easily escalate to outright fraud.⁶³ Common examples of this problem include: reading, editing, or responding to emails while commuting; doing work for client A while billing travel time for client B; responding or reviewing work via mobile device for client A while in a team meeting for client B; being on a call for client A while doing computer-based research, document review, or writing for client B.⁶⁴ Furthermore, because each individual lawyer is constantly multitasking in an attempt to find enough hours in the day, they cannot be focused lawyers; their work will inevitably suffer in both content and judgment. However poor the work product, it still counts towards billable hours, though. To catch the errors arising out of such an arrangement, firms build in substantial redundancies.⁶⁵

No party, even at the top, escapes the institutional pressure to bill and the fear of losing client work. Partners themselves have been found guilty of fraud, disbarred, or resigned over bill padding.⁶⁶ Partners must increase revenue in order to increase firm rankings,⁶⁷ maintain client relations,⁶⁸ secure

62. See Fortney, *supra* note 4, at 177–78 (discussing how associates are rewarded for billing more time and how sources in a NALP survey regarded bill padding as widespread).

63. See Ross, *supra* note 56, at 2204–05.

64. *Id.* In addition, since the minimal interval for billing a client is six minutes, attorneys may make several very short phone calls for different clients, counting each as a full six minutes. Some parties take to writing down their time manually, rather than using the electronic timer, which makes their time accumulate faster. At a minimum, they are recording time by the minute, not the second, and at maximum, this method encourages rounding errors. See Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207, 228 (2000).

65. See Richmond, *supra* note 64, at 230–33. Very little written or produced at a firm is the product of any one person—on the contrary, many people and hundreds of hours are devoted to reviewing and revising any given document. *Id.*

66. Kuckes, *supra* note 3, at 42 (noting that partners at Rose Law Firm; McDermott, Will & Emery; Latham & Watkins; Mayer, Brown & Platt; and Hunton & Williams have all engaged in corrupt billing practices).

67. See Rosemarie Clancy & Russell Miskiewicz, *Profits Show a Healthy Increase*, AM. LAW., May 2011, at 139, 139–40. (indicating that big law firms are ranked, at least in part, by profits per partner).

68. It is a common perception that firm rankings factor heavily into client decisions on representation in “bet the company” scenarios, so no law firm wants to step out of the rat race. See, e.g., Sheila Livadas, *Opinions Mixed on*

their own job stability,⁶⁹ pay firm costs,⁷⁰ and receive better compensation.⁷¹ As such, they have few incentives to push back on unreasonable client demands or expectations. Although partners can be hit hardest by general pressures in the legal services industry—particularly in terms of client responsiveness—they also feel powerless to change the current system of mounting hours, billing pressures, twenty-four-hour availability, and quantity of work over quality.⁷²

Billable time is inflated not by any one of these actions, but by its collective impact on firm culture.⁷³ It is the institutional practice created by the combination of internal and external pressures on firm lawyers that waylays ethical practice. Law firm culture has few, if any, checks on the amount of time a person can bill in a given day or week.⁷⁴ Firm norms place little relative value on the exercise of skill, individual action, or creativity. Because law firms pride themselves on being “client driven,” an outside agent is viewed as controlling the terms of work, giving the institution its own life and trajectory, and absolving individuals of both agency and culpability. The norms and practices in the industry leave individuals feeling powerless within their field of influence. For example, associates feel unable to change their team or firm dynamics, and partners

Local Impact of Magazine Law-Firm Rankings, ROCHESTER BUS. J. (Apr. 30, 2010), http://www.rbj.net/print_article.asp?aID=183880.

69. See Julie Creswell & Karen Donovan, *Happy Birthday. Vacate Your Office*, N.Y. TIMES, Dec. 8, 2006, at C1.

70. Partners often blame the pressure to bill on rising associate salaries. See Fortney, *supra* note 4, at 172.

71. Recent trends indicate that law firms have moved away from lockstep models of compensation—where compensation increases with seniority—and turned to models based on other factors, particularly income generated for the firm. *Leaving Lockstep: Moving Toward Competency-Based Compensation*, AM. LAW INST.-AM. BAR ASS'N (July 29, 2009), http://www.ali-aba.org/index.cfm?fuseaction=courses.course&course_code=RWRM01.

72. Kuckes, *supra* note 3 (“The benefits of seniority rarely include the opportunity to work less—only the most successful rainmakers are exempt from the pressure to bill time. . . . It’s like a pie-eating contest where first prize is all the pie you can eat.”).

73. Cf. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 910–15 (1999) (describing big firm culture that challenges the ethical practice of law).

74. *But see* Kay Holmen, *The 95-Hour Day—Or the Need for Billing Scrutiny*, KNAPP PETERSEN CLARKE (Spring 2006), <http://www.kpelegal.com/publications/billing-scrutiny.php> (noting that “most billing programs have automatic safeguards which will not allow a timekeeper to bill more than 24 hours a day”).

feel powerless in the greater legal market versus other firms.⁷⁵ Despite the obvious downfalls of the current system, “law firms seem to have neither the ability nor the will” to change.⁷⁶

D. OTHER CULTURAL FACTORS

Several other common practices create an institutional culture at modern law firms that undermines ethical behavior. For example, norms regarding the importance of hierarchy,⁷⁷ worker fungibility,⁷⁸ a lack of transparency in cases,⁷⁹ pride in extreme overwork,⁸⁰ and passive aggressive management all converge to create a poor working environment for lawyers—and poor lawyers for clients. Indeed, sleep deprivation is often borne with grudging pride as it provides the illusion of being important or indispensable.⁸¹ These may seem like flexible norms, but they are not. Every lawyer at a firm knows that he or she needs to follow the chain of command. Every big law associate knows that he or she may be fired at any time and that his or her chances of joining the partnership are low.⁸² Some argue that lawyers in this context function as little more than

75. Partners recognize the ethical tensions at play in this system but are equally trapped by the institutional pressures placed on their roles. See Fortney, *supra* note 4, at 179 n.35 (citing comments by a Chicago partner stating, “I think the profession would be better served and I think clients would be better served if [tying salaries to mandatory annual hours’ requirements] became an unethical practice”).

76. Kuckes, *supra* note 3, at 43.

77. Erin J. Cox, Comment, *An Economic Crisis is a Terrible Thing to Waste: Reforming the Business of a Law for a Sustainable and Competitive Future*, 57 UCLA L. Rev. 511, 529 (2009).

78. *Id.* at 513.

79. See, e.g., *id.* at 548–49 (discussing how increased transparency benefits clients).

80. See, e.g., *Career Center Survey Results: Who Worked on Thanksgiving Day?*, ABOVE THE LAW (Dec. 1, 2011, 5:22 PM), <http://abovethelaw.com/2011/12/career-center-survey-results-who-worked-on-thanksgiving-day/> (noting percentages of attorneys who worked on various holidays, including a noteworthy seventy-three percent of attorneys who worked on Presidents’ Day).

81. Cynthia Hsu, *Some Busy Lawyers Sleeping in on Site, Japanese-Style Sleeping Pods*, FindLaw (Aug. 8, 2011, 8:29 AM), http://blogs.findlaw.com/greedy_associates/2011/08/some-busy-lawyers-sleeping-in-on-site-japanese-style-sleeping-pods.html.

82. Cf. Julie Kay, *Making Partner Gets Tougher*, LAW.COM (Sept. 29, 2011), <http://www.law.com/jsp/article.jsp?id=1202517268513&slreturn=1> (describing more obstacles to making partner).

paralegals, and that a law degree, while nice, is not strictly required.⁸³

Under this model, the client hires the partner and is relatively uninvolved in the subsequent staffing. It is often taken as a given that individual attorneys will not know the overall strategy for the cases they are assigned to, will focus exclusively on assigned finite tasks, and will not question the scope or manner of the execution of such tasks. As exhausted as most firm attorneys will get, they will not admit to superiors that they need to work fewer hours and will often brag about how many late nights they spent at the office the previous week.⁸⁴ If a superior asks an inferior what he or she is doing over the weekend, the inferior is expected to volunteer availability.⁸⁵ The general expectation is that there is a seven-day workweek.⁸⁶

The workplace culture at firms also isolates firm lawyers, impeding camaraderie. Lawyers in other sectors are generally viewed as weak, disorganized, less accomplished, and less committed to their clients. A way of showing strength in firm culture is to work inhuman hours and still win. To exacerbate the issue, non-firm lawyers tend to show disdain for those working in the private sector, whom they may view as overpaid, soulless, spoiled egomaniacs who have a bottomless well of support to draw upon.⁸⁷

In the end, these workplace norms lead to teams of unbalanced lawyers who (1) hate or resent clients or each other; (2) are overworked and tired yet are unwilling to recognize how this limits their abilities; (3) have no loyalty to their firm or its clients; and (4) have no sense of pride in being part of a legal profession. This creates an institutional environment rife with motivation and opportunities for poor lawyering.

83. Pearce, *supra* note 25, at 1268–70 (arguing that under a business paradigm model of practice, nonlawyers should also be allowed to provide legal services).

84. ABOVE THE LAW, *supra* note 80.

85. See Will Meyerhofer, *Frying Pan*, THE PEOPLE'S THERAPIST (Jan. 18, 2012), <http://thepeoplestherapist.com/2012/01/18/frying-pan/>.

86. See, e.g., ABOVE THE LAW, *supra* note 80.

87. See, e.g., Sara Rimer, *Revealing the Soul of a Soulless Lawyer*, N.Y. TIMES, Dec. 26, 2004, at 9, available at <http://www.nytimes.com/2004/12/26/fashion/26BLOG.html#>.

II. APPLYING NEW INSTITUTIONALISM: THE SPECIFIC ETHICAL RULES IMPLICATED BY LAW FIRM PRACTICE

Having outlined the basic structural framework of the modern law firm, this Part presents an overview of the major legal ethical issues implicated by current law firm practice.⁸⁸ Specifically, it examines a lawyer's duty to his or her client to inform the client, and to act with loyalty, confidentiality, competence, diligence, promptness, and financial integrity respecting the client's affairs. This Part closes with a brief discussion of professionalism and the duty to the profession.

A. DUTY TO THE CLIENT

At the core of professional responsibility is the duty and privilege of a lawyer to be an advisor to one's client.⁸⁹ In order to effectively tackle this role, the rules of professional responsibility enumerate more specific sub-duties that build the requisite trust a lawyer needs to be an effective advisor.⁹⁰

1. Competence

As an initial matter, a client expects her lawyer, at minimum, to be competent.⁹¹ As the Model Rules require, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁹² The legal competence of a junior lawyer is predicated on good supervision and mentoring.⁹³ The current system cannot sustain a consistent level of competency, since supervising attorneys are unable to provide the oversight needed to either

88. This Article will focus on the Model Rules, their accompanying comments, and the ABA Model Code of Professional Responsibility (Model Code) in discussing general rules of professional responsibility. The Model Rules have been adopted in full or in part by almost every state and represent the majority rule. *Alphabetical List of States Adopting Model Rules*, A.B.A. CTR. OF PROF'L RESP., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Apr. 16, 2012).

89. See MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 2 (2010).

90. See, e.g., *id.* R. 1.1, 1.3, 1.6 (detailing a lawyer's responsibility to be competent, diligent, and to keep confidences).

91. See *id.* R. 1.1.

92. *Id.*

93. See, e.g., *Professional Development*, AKIN GUMP STRAUSS HAUER & FELD L.L.P., <http://www.akingump.com/careers/attorneys/development/> (last visited Apr. 16, 2012).

cultivate competence or take comprehensive corrective measures.

For a number of reasons, the billable hour system does not reward training. First, partners and associates are valued primarily by the income or prestige they generate.⁹⁴ Second, mentoring and teaching is not billable. Third, partners and associates are already short on time for their billable work and themselves. Thus, mentoring falls to the wayside. Formal lawyer-skills training, often used to satisfy continuing legal education requirements, can include valuable stand up advocacy or writing workshops.⁹⁵ However without meaningful mentorship and application to actual work, such programs function more as homage to what lawyering once was, as opposed to preparing attorneys for what lawyering currently is. Under these circumstances, time spent training associates on traditional lawyering skills often seems unnecessary at best, and a cruel tease at worst.

Firm hierarchy also undermines competence. Cases are staffed in a pyramid structure.⁹⁶ This leaves junior associates supervising large teams of contract attorneys, often in matters that they have never handled before.⁹⁷ While junior associates educate themselves, they are given too many subordinates to effectively oversee detailed work. Because the basic workforce is made up of junior associates (who are increasingly transitory) and contract attorneys (who may not be at the firm the next time such a project arrives) training is minimal and often confined to a brief opening memo and answering questions on an ad hoc basis.⁹⁸ There is little or no methodology to structuring cases or large document reviews.⁹⁹ Although thoroughness on

94. See Schiltz, *supra* note 73, at 915.

95. See AKIN GUMP STRAUSS HAUER & FELD L.L.P., *supra* note 93.

96. See *Law Firm Partners Handling Larger Share of Work in Deleveraging Trend*, ALM.COM (Dec. 13, 2011), <http://www.alm.com/pressroom/2011/12/13/law-firm-partners-handling-larger-share-of-work-in-deleveraging-trend-according-to-alm-legal-intelligence-survey-of-law-firm-staffing-models/>.

97. Cf. Robert Hilson, *Contract Attorneys Question Standards Top Law Firms Follow in Document Review Training and Supervision*, DOCUMENT REVIEW ENTER., INC. (July 20, 2011), http://www.documentreviewenterprise.com/site/index.php?option=com_content&view=article&id=9:contract-attorneys-question-standards-top-law-firms-follow-in-document-review-training-and-supervision&catid=8:articles&Itemid=95 (noting an associate is often supervisor of review).

98. See, e.g., *Profile of Legal Career Changes*, ATTORNEYJOBS.COM (2011), <http://attorneyjobs.com/cm/careerdev/jdpreferred/profileoflegalcareerchanges>.

99. *But see id.* (describing a three-tier document review system).

the part of the supervisor can compensate for some of this lack of expertise, it must be thoroughness combined with accuracy.

2. Diligence

A lawyer also owes his or her client a duty of diligence; he or she must be thorough and steadfast in the pursuit of his or her client's needs.¹⁰⁰ This duty is alluded to in Model Rule 1.1 as "thoroughness,"¹⁰¹ and more specifically addressed in Model Rule 1.3 as diligence: "[a] lawyer shall act with reasonable diligence and promptness in representing a client."¹⁰² Diligence is undermined when poor working conditions thwart best efforts to be detail-oriented. For example, physical conditions that are cramped and poorly lit, excessive travel, poor conceptual understanding of a case, and working too many hours in any given day or week lead to generally low morale and poor performance. The human mind is simply unable to concentrate and function effectively when overstressed or without sleep.¹⁰³ The physical work conditions impact stress levels.¹⁰⁴ Particularly during intensive fact discovery, attorneys may be placed in dimly lit rooms with no natural light, reviewing paper and electronic documents elbow-to-elbow with other attorneys.¹⁰⁵ Travelling around the clock through many time zones disrupts sleep patterns and can lead to insomnia, gastrointestinal problems, and depression.¹⁰⁶

Medical studies have shown that functioning without sufficient sleep impairs judgment, memory, and other cognitive functions, and can severely impact work functions.¹⁰⁷ Even "a

100. See MODEL RULES OF PROF'L CONDUCT R. 1.3 (2010).

101. *Id.* R. 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.")

102. *Id.* R. 1.3.

103. See, e.g., Steven W. Lockley et al., *Effect of Reducing Interns' Weekly Work Hours on Sleep and Attentional Failures*, 351 NEW ENG. J. MED. 1829, 1835 (2004).

104. Jacqueline C. Vischer, *The Effects of the Physical Environment on Job Performance: Towards a Theoretical Model of Workspace Stress*, 23 STRESS & HEALTH 175, 175 (2007).

105. Solnik, *supra* note 7.

106. *Jet Lag and Shift Work*, DIV. OF SLEEP MED., HARV. MED. SCH. (Dec. 18, 2007), <http://healthysleep.med.harvard.edu/healthy/science/variations/jet-lag-and-shift-work>.

107. See, e.g., Lockley et al., *supra* note 103, at 1834–35; *Brain Activity is Visibly Altered Following Sleep Deprivation*, UNIV. OF CAL., SAN DIEGO (Feb. 9, 2000), http://health.ucsd.edu/news/2000/2000_02_09_sleep.html.

reduction in sleep of only 1.5 hours per night for one night alone can result in a decrease in daytime alertness by 32%.¹⁰⁸ In particular, “executive functions” such as assessing risk and consequences, adapting to changing environments, engaging in complex and creative decision making, multitasking, and providing innovative solutions are all impaired by relatively minor sleep loss.¹⁰⁹ These are core functions of an attorney, yet they are physically compromised in the current institutional structure. These skills are further undermined by the fact that attorneys in the firm context may only have the most basic understanding of the case as they approach their work.¹¹⁰ All of these factors in combination place the duty of diligence on tentative footing; when an attorney is overtired, unhappy, and under-trained, the attorney makes mistakes—both technical and in judgment—and the duty to be diligent is undermined.

3. Exercising Independent Judgment As an Advisor

Although one of the more amorphous standards, a lawyer’s ability to exercise independent judgment is one of the most important duties a lawyer owes a client, the court, and the profession.¹¹¹ It is this judgment that makes a lawyer a professional with expertise to offer a client.¹¹² Without exercising judgment and advising, a lawyer is merely an access point for legal information that could readily be gleaned from a book, the Internet, or a practice guide.¹¹³ Reflecting this importance, Model Rule 2.1 states that, “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political factors that may be relevant to the client’s situation.”¹¹⁴ Success as an advisor is contingent on the marriage of skills with meticulous factual and legal analysis. Thus, the institutional factors that undermine competency and diligence also fundamentally undercut an attorney’s ability to act as an independent judge

108. Vicki Culpin & Angela Whelan, *The Wake-up Call for Sleepy Managers*, ASHRIDGE J., 2009, at 1–2.

109. *Id.* at 2.

110. *See supra* Part II.A.1.

111. *See* MODEL CODE OF PROF’L RESPONSIBILITY Canon 5 (1980) (“A lawyer should exercise independent professional judgment on behalf of a client.”).

112. *See* MODEL RULES OF PROF’L CONDUCT R. 2.1 (2010).

113. *See, e.g., id.* R. 2.1 cmt. 2.

114. *Id.* R. 2.1.

and advisor. The aforementioned cognitive impairments from sleep deprivation are particularly problematic.¹¹⁵

The ability to fulfill professional advising obligations is further undermined by the internal culture of hierarchy at law firms. This culture does not usually provide an outlet for junior members to express views on issues requiring judgment, much less allow them to take action upon them. Non-partners often have very limited client contact.¹¹⁶ Although an associate may be solicited for her views on a finite issue in the form of an advisory memo to the partner, their judgment is rarely independent.¹¹⁷ Usually, such memos are tailored to preexisting goals and issues raised by the partners, and partners make decisions as to what information is passed on to the client. The strong culture of conformity to hierarchy prevents an associate from raising any concerns directly with the client.

4. Duty to Inform

The duty to inform is central to the integrity of the lawyer-client relationship.¹¹⁸ Without it, clients are unable to meaningfully participate in their own representation.¹¹⁹ Model Rule 1.4(b), governing client communication, states that, “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”¹²⁰ In the current work structure, a lack of understanding of the whole case and of input into case management means that few attorneys, if any, are in a position to truly inform themselves of the issues in a case—much less in a position to inform the client. The only person who theoretically may have all the knowledge and facts necessary to inform the client is the overseeing partner. However, while the partner may be well informed of the law, he or she is completely dependent on associates, staff, and contract attorneys to parse, relay, and discern relevant information.

115. Culpin & Whelan, *supra* note 108, at 2.

116. *But see First Year Associates*, CURTIS, MALLET-PREVOST, COLT & MOSLE L.L.P., <http://www.curtis.com/sitecontent.cfm?pageid=26> (last visited Apr. 16, 2012) (advertising early client contact for junior associates).

117. *But see* MODEL RULES OF PROF'L CONDUCT R. 5.2 (indicating subordinate lawyers have responsibility to act in accordance with professional rules that emphasize independent judgment).

118. *See, e.g., id.* R. 1.4.

119. *Id.* R. 1.4 cmt. 1.

120. *Id.* R. 1.4(b).

The fact finders' unawareness of the true dimensions of the case compromises their abilities to bring pertinent facts to light. As an initial matter, successful fact-finding is dependent on an accurate encapsulation of the issues in a matter at the outset of discovery. Though they may be provided with copies of the relevant pleadings, few if any junior attorneys analyze or make these legal determinations themselves.¹²¹ Rather, associates, staff, and contract attorneys rely on superiors such as partners and senior associates to tell them what facts are relevant and what major legal arguments the firm plans to make.¹²² However, initially anticipated concerns may not turn out to be the actual issues the case turns upon, particularly if certain issues come to light during discovery. As such, the system is often only effective if considerable re-reviewing of documents happens later. Due to turnover, such review may be done by a whole new team of attorneys who do not know the case, facts or documents at all.

Even if the attorneys do know which issues and facts to pull from the information available, the conditions of review make it virtually impossible to do so accurately: fact finders are not able to carefully and analytically review. This is particularly likely in scenarios where junior lawyers are often multitasking to make more hours billable, may lack interest in, or even resent, their clients, or where they are unfocused simply because they are tired and it is late. As such, it may be that no attorney on a given case has an accurate understanding of the facts and law needed to inform the client of their choices or potential conflicts.¹²³

5. Duty of Loyalty

a. *Conflicts with Other Clients*

Of all the duties a lawyer owes to a client, the Model Rules focus most heavily on the duty of loyalty.¹²⁴ One Comment to Model Rule 1.7 lists loyalty and independent judgment as es-

121. See, e.g., Kate Neville, *Why Associates Bail out of Law Firm Life—and Why It Matters*, AMHERST COLLEGE (Nov. 14, 2007), https://www.amherst.edu/alumni/connect/networks/lawyersnetwork/careerplanning/www.amherst.edu_lawyers_associatesbail (discussing the lack of decision-making authority attorneys have until they advance to partner).

122. See, e.g., *id.*

123. See *supra* Part II.A.1. This point also goes to the issue of competency.

124. See MODEL RULES OF PROF'L CONDUCT R. 1.7–1.18.

essential elements in the lawyer's relationship to a client.¹²⁵ However, lawyers cannot be loyal to their clients—which is to say without conflict amongst and with their clients—when they are uninformed of the issues in a case or have conflicting personal interests.¹²⁶ In the context of a modern law firm, lawyers and supervisors often do not have enough information to be aware of conflicts and make reasonable assessments.¹²⁷ Also, when a lawyer's very livelihood is in tension with a broad understanding of what is a conflict, that lawyer is likely to interpret conflicts narrowly.

Generally, the Model Rules do not excuse breaches of loyalty for ignorance.¹²⁸ The general principles governing the Model Rules' articulation of the duty of loyalty place the burden of finding conflicts on the lawyer: "a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved."¹²⁹

The general law firm response to finding conflicts in a rapidly shifting workforce with fluid caseloads has been to create a "conflicts check" procedure to vet new matters. A lawyer submits a "conflicts check request" where he or she lists parties involved in the matter, adverse or not. An administrative department, not necessarily staffed by lawyers, runs a search through the files of the firm for the listed parties. Once a new matter passes this conflicts' check, a partner or senior associate usually signs off on the conflict check. This mechanical search, while a necessity, regularly catches only the most obvious and glaring conflicts.

After this step, the partner or senior associate delegates responsibility for conflicts to the junior associates, contract attorneys, and staff attorneys who are instructed to raise con-

125. *Id.* R. 1.7 cmt. 1.

126. *Id.* R. 1.7(a)(2).

127. *But see id.* R. 1.7 cmt. 3 (indicating that law firms should have appropriate procedures to identify the persons and issues involved so as to determine whether conflicts of interest exist).

128. *See id.* ("Ignorance caused by a failure to institute such [reasonable] procedures will not excuse a lawyer's violation of this Rule."). Thus, an individual lawyer may still be responsible for such oversight if the firm's procedures are found unreasonable. *Id.*

129. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 3.

flicts “as they arise” over the course of fact-finding.¹³⁰ Here, the institutional nature of a large firm and its work structure is all important; this system makes it virtually impossible for any associate, staff attorney, or contract attorney to be aware of the other matters the firm is handling or even the scope of the representation.¹³¹ They simply do not know who or what is important.¹³²

For the associate, the task of identifying and flagging such potential client conflicts is more plausible, but still quite limited. Associates also rarely have the entire relevant picture.¹³³ Some may have been employed with the firm for a short time. Others may have only worked on a limited number of matters in a very specific capacity. Of course, if they have been with the firm longer and are privy to more high-end discussions, associates may have actual knowledge of potential conflicts. Moreover, because of their place in the firm hierarchy, associates may feel more comfortable pointing out an ethical issue to a superior.¹³⁴ Nevertheless, on an individual level, these lawyers are often ignorant of unanticipated conflicts that arise in the course of litigation.¹³⁵

The task of identifying conflicts on an ongoing basis is even more difficult, perhaps impossible, for the staff and contract attorneys who do the bulk of early fact gathering.¹³⁶ Firms deliberately give these attorneys limited access to knowledge of other firm matters to avoid additional potential conflicts and

130. For a discussion of the ethical implications of conflict checking, see generally Paul R. Tremblay, *Migrating Lawyers and the Ethics of Conflict Checking*, 19 GEO. J. LEGAL ETHICS 489 (2006).

131. Cf. James M. Fischer, *Large Law Firm Lateral Hire Conflicts Checking: Professional Duty Meets Actual Practice*, 36 J. LEGAL PROFESSION 167, 174–78 (2011) (discussing the presumption that “what the lawyer knows, the entire firm knows”).

132. See, e.g., *id.*

133. See *supra* Part II.A.4.

134. See Carolyn Elefant, *The Secret Life of Contract Lawyers*, LAW.COM, (Nov. 8, 2007, 4:31 PM), http://legalblogwatch.typepad.com/legal_blog_watch/2007/11/the-secret-life.html (exemplifying the hierarchical relationship between staff attorneys and contract attorneys by referencing an incident in which staff attorneys rebuked contract attorneys for typing too loudly).

135. See Robert C. Rodriguez, *Ethics Opinion 352 Stresses Risks Associated with Temporary Attorneys*, A.B.A. (Apr. 29, 2010), http://apps.americanbar.org/litigation/litigationnews/top_stories/042810-ethics-confidentiality-contract-attorneys.html (noting the ethical risks associated with temporary attorneys).

136. See *id.* (noting that some firms use “safeguards to ensure the contract attorney does not have access to the firm’s client confidential information except for the specific matter on which the contract attorney is working”).

breaches of confidentiality when these parties move onto their next job at another firm.¹³⁷ To exacerbate the problem, contract attorneys may not always be supervised directly by associates, but, rather, by managers hired by the firms to keep costs down.¹³⁸ Finally, for some non-associate attorneys the potential cost of raising a conflict (annoying or embarrassing a superior, appearing ignorant before a superior, leading to less work and eventually being let go) could outweigh the benefit of raising a conflict (protecting the firm from potential ethical issues, satisfaction in upholding professional responsibility standards), something that works against the client's interests.

The Model Rules attempt to deal specifically with conflicts at firms in Rule 1.10, outlining imputations of conflicts of interests.¹³⁹ To a greater or lesser degree, each aspect of this rule has to do with materiality—how important is the conflict, how much does it impede representation, and how to limit conflicts so that the firm may continue representation of a client even if a conflict exist.¹⁴⁰ Unfortunately, all of these rules are only effective with a clear and unbiased reporting of the lawyer's previous engagements.¹⁴¹ As such, they are ineffective at addressing the core issues raised by the current work structure. Law firms are unable to know, factually, whether or not conflicts exist, because they are unfamiliar with the background of their attorneys and the facts implicated in their cases.¹⁴² In addition, attorneys have a strong interest in interpreting materiality and client conflicts in an overly limited fashion to maximize the number or representations the firm can take on and to ensure that they themselves will be allowed to be staffed on a given matter.

b. Conflicts with Lawyers' Interests

Under the current firm structure, perhaps the largest conflicts arise between a lawyer's conscious and subconscious personal interests and the interests of the client. The Model Rules

137. *Id.*

138. *See* Hayes, *supra* note 38, at 13.

139. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2010).

140. *See id.*

141. *See* Todd C. Scott, *Conflict Checking Systems: Three Great (and Cheap) Ways to Effectively Manage Conflict Checking*, LAW TRENDS & NEWS, (Feb. 2006), http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/conflictchecking.html (indicating that a conflict "system is only as good as the information that is put into it").

142. *But see* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 3.

recognize that, “[c]oncurrent conflicts of interest can arise . . . from the lawyer’s own interests.”¹⁴³ In the current system, every attorney in the law firm, from partner to contract attorney, is worried on some level about losing his or her job and remaining valuable to the firm. This makes for a powerful interest. For firm lawyers, a job is contingent on many things—not being conflicted out of a matter is the threshold issue to overcome, with billing enough hours being the long-term issue. A lawyer might, for instance, ignore or minimize a potential conflict of interest in order to avoid being conflicted out of a potentially lucrative case. Thus, livelihood is often in tension with loyalty to the client.

Contract attorneys, more than perhaps anyone else in this group, are constantly under pressure to find a way to work and stay employed. Because contract attorneys are constantly moving between firms and through cases, firms rely on contract attorneys to accurately list and assess “reasonably” the matters they have worked on.¹⁴⁴ The inherently transient nature of contract attorney work, where attorneys are involved only superficially in matters, could lead contract attorneys to “reasonably” assess in their favor that no true conflict exists between them and a party on a matter they would like to work on.¹⁴⁵ However, their own financial interests are in tension with broader disclosure. Because there is no centralized record of attorney activity, firms and agencies are entirely dependent on individual attorneys to be forthcoming.

143. *Id.* R. 1.7 cmt. 1.

144. *See* Fischer, *supra* note 131, at 211.

145. Model Rule 1.7(b) states that:

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; . . . and (4) each affected client gives informed consent confirmed in writing.

Id. R. 1.7(b). Some might argue that clients are fully aware of the conditions under which lawyers at law firms work and the limitations entailed in that work since they receive detailed billing statements and sign a retainer including the billing policy as part of their engagement papers. I would argue in opposition to this that even if such writing constitutes consent that consent is uninformed or based on misinformation. Clients do not understand how contract attorneys are screened in terms of potential conflicts, qualification, or how the firm approaches the partnership track.

6. Confidentiality

The institutional norms of private-sector practice have a greater troubling impact on maintaining client confidentiality. Model Rule 1.6 governs confidentiality between a client and his or her attorney.¹⁴⁶ It provides that “[a] lawyer shall not reveal information relating to the representation of a client.”¹⁴⁷ However, pressure to bill and respond instantly to clients as well as regular institutional turnover undermines this obligation.

Billing and norms of hyper-responsiveness undermine confidentiality because they encourage, and even compel, lawyers to work and render advice in public places.¹⁴⁸ In an attempt to maximize hours, lawyers may read, review, and respond to various client matters during their commutes or travel time.¹⁴⁹ Blackberries and cell phones allow lawyers to respond to client matters outside of a confidential office setting, while norms in the practice provide the expectation that a lawyer will respond to their clients’ questions or calls instantaneously.¹⁵⁰ Therefore, lawyers are expected to discuss client matters while at the lunch counter, walking down the street, in buses or train stations and any number of other public places where there can be no reasonable expectation of privacy.

The current structure of firms, through partnership norms and the increased use of temporary labor, also undermines client confidentiality by creating an increasingly transient legal workforce. Every time a lawyer leaves a firm to go to another job, there is, inherently, an increased risk to client confidentiality.¹⁵¹ People have knowledge, conscious and unconscious, regarding the affairs of the client, adverse parties, and often, given the nature of electronic discovery, the personal lives of people working for or with the client. Despite confidentiality concerns, firms remain structurally predisposed to encourage matriculation and a norm of lawyer fungibility.

146. *Id.* R. 1.6.

147. *Id.* R. 1.6(a).

148. See *Law Firms Discovering ‘New Found Time’ with TimeKM Mobile for BlackBerry*, BLACKBERRY.COM, http://www.blackberry.com/newsletters/connection/business_solutions/i3-2007/defense-lawyer-qa.shtml?CPID=NLC-41 (last visited Apr. 16, 2012).

149. See Sharon D. Nelson & John W. Simek, *Hot Buttons*, 32 L. PRAC. 26, 26 (2006).

150. See *id.*

151. Cf. MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (discussing a lawyer’s obligation to a client associated with the lawyer’s former firm).

First, as a general rule, law firms currently take on far more first-year associates than they could ever sustain as partners.¹⁵² Historically, firms relied on associate matriculation to thin the ranks of the upcoming classes. In good economic times, this would happen organically; associates find other gainful employment that fits their needs—often the need is to have better hours, more interesting work, and other quality-of-life benefits.¹⁵³ In lean times, this matriculation happens by force, through lawyers being unofficially “encouraged to look elsewhere,” mass layoffs, and outright firings through exaggerated negative performance reviews.¹⁵⁴ Associates, who have no right to a severance package or notice, and rarely even have a contract with the firm, have little or no bargaining leverage to oppose the terms of their dismissal. Even if matriculation happens organically, remaining associates do not necessarily stand a strong chance of making partner; firms increasingly draw partners from lateral sources—from other sectors or other firms, rather than elevating associates internally.¹⁵⁵ Finally, some have noted that lawyers uncomfortable with these ethical tensions may feel compelled to leave the firm rather than attempt to change it.¹⁵⁶

Second, firms’ increased dependence on temporary legal staff means lawyers are regularly cycling in and out of the law firm. Each cycle undermines confidentiality. These attorneys

152. Janet Ellen Raasch, *Making Partner or Not: Is It in, up or over in the 21st Century?*, 33 LAW PRAC. 32, 35 (2007) (“In a firm with three associates for each partner—which is considered the ‘sweet spot’—two of every three associates (regardless of their talent) will not make partner. Many highly profitable firms have four or five associates per partner; some consultants are predicting eventual levels of 10 to 1.”).

153. Martha Neil, *Why Associates Leave Is Clear, but What Would Lure Them to Stay?*, A.B.A. J. (Apr. 21, 2008), http://www.abajournal.com/news/article/why_associates_leave_is_clear_but_what_would_lure_them_to_stay/.

154. See Sara Randazzo, *For This Year’s New Partners, Perseverance Pays*, AMERICANLAWYER.COM (Jan. 17, 2012), www.law.com (search “New Partners Perseverance” in Quest box, then follow hyperlink for article title). In this context, lawyers have no rights; they are at-will employees entitled to two weeks’ notice. Severance packages at big law firms have been generous at times but paltry at others. See *Latham Offers Huge Severance Package*, JD J. (Mar. 2, 2009), <http://www.jdjjournal.com/2009/03/02/latham-offers-huge-severance-package/>.

155. Cf. Randazzo, *supra* note 154 (indicating that anecdotal evidence suggests that many of the class of 2011 partners did not take the traditional path to partnership by practicing at the same firm they joined from law school).

156. See, e.g., Fortney, *supra* note 4, at 178 (arguing based on survey data collected from law firm associates and partners, that the billing pressures in law firms encourages “the exodus of ethical associates who leave private law practice rather than rationalizing questionable billing practices”).

are engaged for short periods of time on a case-by-case basis.¹⁵⁷ Such lawyers may be contract attorneys that are brought into the firm, with general access to firm facilities and other files, or off-site attorneys hired through domestic or international outsourcing.¹⁵⁸ The nature of discovery is very fact intensive. These lawyers, who are usually hired to do discovery, have access to voluminous facts. As such, every time temporary attorneys move on to new firms, they carry with them a wealth of information specific to certain companies and people that could slip out in subsequent jobs and become unprivileged. When the rotation of attorneys in and out of various firms is so frequent that it cannot be monitored and disciplined effectively by the bar, turnover becomes a confidentiality problem for the profession as a whole.

One might argue that the use of internal screens within law firms can combat some of these confidentiality issues.¹⁵⁹

157. See, e.g., *Temporary Attorney: Employers*, JURISTAFF.COM, <http://www.juristaff.com/temporary-services-attorney-employers/> (last visited Apr. 16, 2012).

158. The ethical implications of exporting legal work abroad is an issue deserving of the considerable attention it has received elsewhere. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 451 (2008) (reviewing a lawyer's obligations when outsourcing legal and nonlegal services); Joshua A. Bachrach, *Offshore Legal Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8(h)*, 21 GEO. J. LEGAL ETHICS 631, 631-33 (2008); Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law Related Services*, 38 GEO. J. INT'L L. 401, 401 (2007); James I. Ham, *Ethical Considerations Relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States*, 27 PENN ST. INT'L L. REV. 323, 323 (2008); Alison M. Kadzik, *The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices*, 19 GEO. J. LEGAL ETHICS 731, 731 (2006); Michael G. Owen, *Legal Outsourcing to India: The Demise of New Lawyers and Junior Associates*, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 175, 180 (2008); Mark L. Tuft, *Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-examining Current Ethical Standards*, 43 AKRON L. REV. 825, 826 (2010); Keith Woffinden, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 BYU L. REV. 483, 495-502. This Article will not address these ethical implications of international practice issues in detail at this time. However, since such practices are profit driven, if attorney unionization were to take place and require minimum pay for such attorneys commensurate with domestic pay, the instances of offshore contract lawyering would most likely decrease.

159. Screening is defined as "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law."

Model Rule 1.9 allows a lawyer to be screened with the consent of the relevant client(s),¹⁶⁰ while recent revisions to Model Rule 1.10 allow attorneys, in some cases, to be screened with notice, rather than formal former client consent.¹⁶¹ However, screening precautions are only effective insofar as they are based on accurate knowledge of the attorneys' prior representations and an accurate sense of the adversarial scope of the current client's case.¹⁶² Therefore, screening itself is subject to the same pragmatic limitations as any confidentiality or conflicts rules in so far as it relies entirely on self reporting and transparency.

7. Financial Integrity

Model Rule 1.5 governs financial integrity.¹⁶³ It requires that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."¹⁶⁴ A lawyer's duty to act with financial integrity toward his or her client is often viewed as an issue of honesty and candor.¹⁶⁵ In the law firm setting, however, it is married with, and mired in, far more quotidian concerns of billing structures.¹⁶⁶ Fees in the modern law firm are predominately dictated by time spent on a given matter.¹⁶⁷ However, Model Rule 1.5 lists

MODEL RULES OF PROF'L CONDUCT R. 1.0(k) (2010). Courts also refer to a "screen" as a "cone of silence," a "Chinese Wall," a "firewall," or a "wall." Susan R. Martyn, *Screens: The Brave New World?*, A.B.A., http://www.americanbar.org/publications/young_lawyer_home/young_lawyer_archive/screens_the_brave_new_world.html (last visited Apr. 16, 2012).

160. MODEL RULES OF PROF'L CONDUCT R. 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.")

161. *Id.* R. 1.10(a)(2)(ii). Thirteen jurisdictions allow screening of a lateral lawyer without former client consent. Martyn, *supra* note 159.

162. See Andrew J. Drucker, Note, *Explanations, Suggestions, and Solutions to Conflict Tracking and Prevention in Response to the Growth and Expansion of the Larger Law Firm*, 24 DEL. J. CORP. L. 529, 549–50 (1999).

163. MODEL RULES OF PROF'L CONDUCT R. 1.5.

164. *Id.*

165. See George L. Blum, Annotation, *Attorney's Charging Excessive Fee as Ground for Disciplinary Action—Business and Tax, Employee Benefits and Termination, Civil Rights, and Other Limited Civil Matters*, 27 A.L.R.6th 1, 1 (2007).

166. See Josh Dickinson, *Great Expectations (Part 2): The Billable Hour, Bane of Your Existence*, ABOVE THE LAW (Sept. 20, 2010, 12:11 PM), <http://abovethelaw.com/2010/09/great-expectations-part-2-the-bane-of-your-existence/>.

167. A.B.A. COMM'N ON BILLABLE HOURS, *supra* note at 42, at 3.

eight factors to be considered in assessing the fee structure of a given representation:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.¹⁶⁸

Note that only factors (1) and (5) directly pertain to hours spent on a given matter.¹⁶⁹ The Model Rules give equal weight to several other factors related to competency, experience, and outcome.¹⁷⁰ By contrast, the modern law firm emphasizes, almost exclusively, the amount of time spent on a matter as the appropriate measure of a lawyer's fair wage.¹⁷¹ In so doing, firms are overemphasizing time's role in the billing structure, at the expense of numerous other meaningful factors. Rather than modifying their billing structures, however, firms persist in using the billable hour as an easy-to-administer (though inaccurate) proxy for the actual value of attorney work.¹⁷²

Unfortunately, law firms are institutionally unable to combat this imbalance. Their customs and conventions—such as prioritizing billing as the primary measure of value; normalizing routine overwork; sleep deprivation; and extreme workforce matriculation; and imposing rigid work-flow hierarchies—prevent implementation of a more nuanced value structure for attorney work.¹⁷³ Indeed, a fee structure that would balance all

168. MODEL RULES OF PROF'L CONDUCT R. 1.5(a).

169. *Id.* For a discussion on the practical application of this rule, see Turow, *supra* note 45, at 35 (“[D]espite the fact that our profession’s guiding ethical rule [regarding fees] encourages lawyers to look to other factors, dollars times hours remains the near universal standard of commercial litigation.”).

170. MODEL RULES OF PROF'L CONDUCT R. 1.5(a).

171. A.B.A. COMM'N ON BILLABLE HOURS, *supra* note at 42, at 3.

172. *Id.*

173. See Ashby Jones, *On Working Mothers at Big Firms: A Blistering Critique*, WSJ L. BLOG (Feb. 16, 2010, 1:58 PM), <http://blogs.wsj.com/law/2010/02/16/on-working-mothers-at-big-firms-a-blistering-critique/> (noting the rigorous working conditions of a large law firm associate).

of the factors listed in Model Rule 1.5 would require a more detailed and ongoing relationship between firms and employee lawyers, one in which law firms would know their attorneys' respective skill levels and expertise as well as the quality of their attorneys' work.

The current private-sector model impedes a lawyer's ability to be diligent and skillful. This, in turn, limits opportunities to expedite litigation,¹⁷⁴ which leads to unreasonably high fees. In essence, the financial integrity of any lawyer working in the private sector is compromised by the conditions under which he or she works. Efficiency is compromised in several ways. First, attorneys are tired, so redundancies must be put in place to catch errors.¹⁷⁵ It is unclear how a lawyer may fairly bill a client for an hour of that lawyers' time when that lawyer's work will be highly variable depending on whether it is the first hour in the day or sixteenth.¹⁷⁶ Second, the firm's institutional commitment to specialized and meaningful lawyer training is weak.¹⁷⁷ This undermines the legitimacy of the high hourly rate that firms charge clients for alleged expertise. Third, employees are strongly motivated to inflate hours.¹⁷⁸ Because the reputation of a law firm is tied, at least in part, to profits per partner, pressure to bill is high for all attorneys.

Beyond this subconscious gaming of the system, poor working conditions also necessitate increased working hours for a number of reasons. First, mistakes are costly. They require hours of review to catch and hours of duplicate work. Second, because people have too much on their plate to coordinate or are unable or unwilling to concentrate further, lapses in plan-

174. See *supra* Part II.A.1–4.

175. See Eve Tahmincioglu, *Health Aides, Lawyers Are Most Sleep Deprived*, MSN, http://lifeinc.today.msnbc.msn.com/_news/2012/02/27/10518575-health-aides-lawyers-are-most-sleep-deprived (last visited Apr. 16, 2012).

176. See, e.g., Michelle Conlin, *Smashing the Clock*, BLOOMBERG BUSINESSWEEK (Dec. 11, 2006), www.businessweek.com/magazine/content/06_50/b4013001.htm (noting an increase in productivity when work hour requirements are relaxed).

177. *But cf.* David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1 available at <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=1&sq&st=nyt&scp=1> (“[A]t Drinker Biddle, first-year associates spend four months getting a primer on corporate law. During this time, they work at a reduced salary and they are neither expected nor allowed to bill a client. It's good marketing for the firm and a novel experience for the trainees.”).

178. See James P. Schratz, *I Told You to Fire Nicholas Farber—A Psychological and Sociological Analysis of Why Attorneys Overbill*, 50 RUTGERS L. REV. 2211, 2216 (1998).

ning occur that require scrambling at the last minute to get work done before a deadline.¹⁷⁹ Finally, in an attempt to impress clients or partners, attorneys set unreasonable and arbitrary deadlines for the completion of work.¹⁸⁰ These unnecessary fire drills run up costs to clients as they require round-the-clock work and significant additional redundancies.

Ultimately though, the billing structure itself creates a conflict when billable hours must be maximized for a lawyer to protect his livelihood. In other words, a lawyer may have a financial interest in billing more time even though the client will not benefit from the extra lawyering. Contract attorneys, staff attorneys, associates, and partners alike all need to bill hours to build clout, job security, and increase their mobility within the industry.¹⁸¹ Thus, work becomes a race to the bottom, rewarding those who work all hours of the night and file all possible paperwork, over those who manage cases more leanly.

Law firms are institutionally embedded in a greater legal culture where they fear that if they push back on clients or provide service less hastily, the client will simply go to another firm willing to treat its lawyers worse.¹⁸² Moreover, the Model Rules themselves perpetuate this time-based culture by incorporating, and therefore validating, unreasonable norms.¹⁸³ This environment undermines a lawyer's ability to serve clients ethically.

8. Professionalism and Duty to the Profession

Finally, the current private-sector system of working and interacting with clients severely undermines the dignity of the profession as a whole. The preamble to the ABA Code of Professional Responsibility argues that “[t]he continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government.”¹⁸⁴ The legal

179. See Amiram Elwork, *A Lawyer's Guide to Dealing with Burnout*, 24 PA. LAW. 24, 25 (2002).

180. See *id.*

181. See *id.* at 26.

182. See generally *Law Firms, A Less Gilded Future*, ECONOMIST, May 5, 2011, at 74 (noting the impact of the economic downturn on law firms).

183. See MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(3) (2010) (using “the fee customarily charged in the locality for similar legal services” as a measure of the validity of a given fee structure).

184. MODEL CODE OF PROF'L RESPONSIBILITY pmbl. (1980) (citation omitted).

profession is charged with upholding this dignity. However, it is difficult to see how the profession can protect human dignity for others when it fails to safeguard the dignity of its own colleagues.

The public view of lawyers has been in a steady and marked decline over the last thirty years.¹⁸⁵ Indeed, much of the public views lawyers as greedy, uncaring, manipulative, and corrupt.¹⁸⁶ It is understandable that the public has lost respect for law as a profession when lawyers allow themselves and their fellow lawyers to be treated without dignity, and as expendable parts in the law firm machinery. Because of the strong influence firms and firm lawyers have over the bar, and their prominence in the public eye, the institutional failures of law firms are magnified. Hierarchies of attorneys within firms, inequitable distributions of firm wealth, unclear expectations, variable and unclear benefits, a lack of agency or knowledge, job insecurity, and general overwork all render a firm attorney subhuman. If we are to hope or expect the profession to be rehabilitated in the public eye, then it must begin with the dignified and just treatment of lawyers.

185. See generally LEO J. SHAPIRO & ASSOCS., PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 8, 18 (2002), available at <http://www.cliffordlaw.com/abaillinoisstatedelegate/publicperceptions1.pdf> (“Consumers tell stories of lawyers who misrepresent their qualifications, overpromise, are not upfront about their fees, charge too much for their services, take too long to resolve matters, and fail to return client phone calls.”); Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 808–10 (1998) (discussing statistical data regarding public attitudes about lawyers and the lack of public trust in lawyers); Gary A. Hengstler, *Vox Populi the Public Perception of Lawyers: ABA Poll*, 79 A.B.A. J. 60, 60–62 (1993) (reporting, among other things, that only twenty-two percent of the public believed lawyers are honest and ethical); Chris Klein, *Poll: Lawyers Not Liked*, NAT’L. L.J., Aug. 25, 1997, at A6 (noting that the public’s view of the profession of law as one of “very great prestige” dropped by nearly half from 1977 to 1997).

186. In a 2004 Gallup Poll asking the public to rate twenty-one professions based on honesty and ethical standards, lawyers ranked 19th, ahead of only “advertising practitioners” and “car salesmen.” David W. Moore, *Nurses Top List in Honesty and Ethics Poll*, GALLUP NEWS SERVICE (Dec. 7, 2004), <http://www.gallup.com/poll/14236/nurses-top-list-honesty-ethics-poll.aspx?version=print>; see also LEO J. SHAPIRO & ASSOCS., *supra* note 185, at 4, 8 (noting that consumers generally describe lawyers as “greedy, manipulative and corrupt” with sixty-nine percent of respondents agreeing with the statement that “lawyers are more interested in making money than in serving their clients”); Symposium, *Improving the Professionalism of Lawyers: Can Commissions, Committees, and Centers Make a Difference?*, 52 S.C. L. REV. 443, 490 (2001) (noting that the public thinks lawyers are “greedy . . . dishonest, deceitful, manipulative, and uncaring” and citing a 1993 survey by Peter Hart for the ABA).

III. POTENTIAL SOLUTIONS

Surprisingly, little of the academic literature focuses on potential solutions to ethical problems caused by the labor norms of attorneys in the private legal sector. This Part will explore several of the possibilities for how to deal with these issues.

A. BANISH THE BILLABLE HOUR

While many have argued that the billable hour system ought to be abolished,¹⁸⁷ there is little likelihood that this movement will prevail. The billable hour is pervasive across both the private and public sector.¹⁸⁸ While strong arguments have been made in favor of replacing the billable hour with a “fixed fee structure,”¹⁸⁹ a broad movement towards fixed fees has not materialized. Proponents of this change argue that clients are ultimately interested in value and outcomes over the amount of time it takes to reach those outcomes and that law firms would benefit from the administrative costs saved.¹⁹⁰ While there is some evidence that these views are gaining more traction in the context of client demands for alternative billing structures,¹⁹¹ there is still no wide-scale shift away from the billable hour on the horizon.

187. See, e.g., Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money and Professional Integrity*, 30 HOFSTRA L. REV. 879, 916 (2002) (arguing the practice of imposing billable-hour requirements should be abandoned); Turow, *supra* note 45, at 35.

188. While public-sector attorneys do not often have billable hour *requirements*, many do bill their time to the municipality or state by the hour and are compensated based on their timekeeping. See, e.g., *CJA Panel Attorney Information*, U.S. DIST. COURT, N.Y.W. DIST., <http://www.nywd.uscourts.gov/document/CJAPANEL.pdf> (last visited Apr. 16, 2012) (noting hourly compensation structure for attorneys appearing through the federal Criminal Justice Act); *Contra Costa County Court's Appellate Panel*, CONTRA COSTA CNTY. B. ASS'N, <http://www.cccba.org/attorney/build-your-practice/paying-appellate-panel.php> (last visited Apr. 16, 2012) (noting that attorneys who appear representing indigent clients on behalf of the state are compensated at a rate of \$65 per hour for out-of-court work, and \$120 for court appearances); *Fee Schedule For Criminal Cases*, ALAMEDA CNTY. B. ASS'N (July 1, 2010), <https://www.acbanet.org/UserFiles/files/PDFs/LinksLibrary/CAAPFeeSchedulePostedSept2010.pdf> (noting hourly rates and reporting requirements for attorneys representing indigent clients through the Criminal Court Appointed Attorneys Program).

189. J. Benjamin Stevens, *Make Time Work for You: Handling Cases on a Fixed-Fee Basis*, LAW PRACTICE TODAY, A.B.A. (July 2010), <http://apps.americanbar.org/lpm/lpt/articles/ft07103.shtml>.

190. *Id.*

191. Glater, *supra* note 51.

Moreover, it is not clear that a move away from the billable hour, without corresponding cultural and labor changes in law firm practice, would address the ethical issues endemic in current institutions. On the contrary, some have argued that flat fees lead to minimal representation and encourage laziness.¹⁹² In addition, the rules of ethics regarding fees clearly state that consideration of time as a factor in fees is warranted.¹⁹³ As such, the key to a functional billing system is to treat time spent on a matter as one balanced element in the equation of ethical lawyer fees, rather than as the dispositive force.

B. RELY ON FIRMS TO POLICE ETHICS

The current system relies on internal safeguards in the firm and lawyer discipline through the bar to enforce ethical norms. For reasons detailed in Part II, a firm's internal measures are usually not effective in policing the systemic issues that undermine the firm's ability to create an ethical work environment as a whole.¹⁹⁴ Specifically, lawyers are strongly motivated to downplay ethical issues and conflicts in order to maintain their status and job stability.¹⁹⁵ Furthermore, lawyers often do not have the information or agency necessary to make strong advisory decisions for clients and lack perspective on the reasonable limits of their capabilities.¹⁹⁶ In short, because of a culture of questionable professional norms, law firms are not objective or effective arbiters of their own actions.

C. DISCIPLINING LAWYERS THROUGH THE BAR

Hypothetically, the bar could regulate and enforce ethics violations regarding individuals at law firms. However, this is impracticable for several reasons. First, the rules of ethics are

192. Mark Bennett, *Flat Fee Fight: What's Really Going On?*, DEFENDING PEOPLE (Feb. 15, 2012, 11:45 AM), <http://blog.bennettandbennett.com/2011/01/flat-fee-fight-whats-really-going-on.html> (reporting on Texas state bar finding that flat fees for public defense work were ethically dubious); Meredith Hobbs, *Some Lawyers Say Flat Fees Pose Ethics Issues*, LAW.COM (Jan. 10, 2011), http://www.law.com/jsp/law/article.jsp?id=1202477784052&Some_Lawyers_Say_Flat_Fees_Pose_Ethics_Issues (stating that this would lead to ethics concerns).

193. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2010) (listing eight factors to consider in fees).

194. See *supra* Part II.

195. See Elwork, *supra* note 179.

196. See *id.* at 25–26 (“[Lawyers] tend to be . . . obsessed with control but unconvinced that they have it.”).

ineffective at curtailing many institutional issues in law firms because they provide neither a break with harmful institutional cultures,¹⁹⁷ nor sufficiently clear standards.¹⁹⁸ Indeed, one might argue that these rules can facilitate harmful institutional norms. For example, the factors to be considered in determining the reasonableness of a fee do not include the working conditions of the lawyers or whether it is possible to do the work more efficiently.¹⁹⁹ Rather, the factors look principally at norms in a given locale for similar legal services.²⁰⁰ Such a focus is ineffective in curtailing costs associated with institutional flaws in labor (or other structures) since other firms almost all embrace the same set of flawed institutional components.²⁰¹

Furthermore, in their application to law firms, the Model Rules are also peppered with amorphous terms that de facto assimilate and normalize prevailing firm culture. Such terms are ultimately both ambiguous and overly pliable. The term “reasonable” is pervasive.²⁰² While the Model Rules clearly state that associates, staff attorneys and contract attorneys are subject to ethical discipline for their actions,²⁰³ they are excused from accountability if they act “in accordance with a supervisory lawyer’s *reasonable* resolution of an arguable question of professional duty.”²⁰⁴ Similarly, partners and supervisors are excused from accountability for ethical violations so long as they made “*reasonable* efforts” either “to ensure that the firm has in effect measures giving *reasonable* assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”²⁰⁵ Discipline for failing to supervise is only allowed in limited contexts where the supervisor meets a multi-pronged

197. See MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(3).

198. See, e.g., *id.* R. 5.1.

199. See Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 276 (2006) (noting that rules invoking the reasonableness of fees have no limiting principals on their face).

200. Model Rule 1.5(a)(3) allows for the consideration of “the fee customarily charged in the locality for similar legal services.” MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(3) (2010).

201. See Turow, *supra* note 45, at 36 (noting that the billable hour standard has proliferated so much that there are now firms that specialize in disputing other firms' hourly billing).

202. See Green & Zacharias, *supra* note 199, at 277.

203. MODEL RULES OF PROF'L CONDUCT R. 5.2(a) (“A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.”).

204. *Id.* R. 5.2(b) (emphasis added).

205. *Id.* R. 5.1(a) (emphasis added).

test, again contingent on what is “reasonable.”²⁰⁶ It is not clear if this lack of clarity in the firm context is deliberate. Regardless, it is enabling and provides cover against malpractice allegations to law firms stretching ethical bounds.

Second, even if the rules themselves were clearer, the bar has shown reluctance in disciplining lawyers at larger firms.²⁰⁷ Some argue this is due to institutional biases in the type of complaints bar agencies choose to investigate or the severity of the sanctions they impose.²⁰⁸ Firm lawyers may also receive less formal public sanctions due to their ability to pay monetary fines and restitution. The bar associations of over twenty states provide “diversion” programs rather than formal disciplinary action to deal with lesser ethical violations.²⁰⁹ Participation in a diversion program is usually contingent on paying for this program.²¹⁰ Large firms and lawyers from large firms may also have more funds available to avoid or lessen disciplinary action through the prompt payment of restitution.²¹¹

Third, discipline through the bar is relatively rare.²¹² This may be because the bar has limited resources.²¹³ Generally

206. *Id.* R. 5.1(c) (“A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”).

207. See Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 4 n.30 (2007) (noting that the bar historically has disciplined lawyers at large law firms at much lower rates than their small firm counterparts and that large firm lawyers are subjected to relatively little public lawyer discipline).

208. *Id.* at 4.

209. *Id.*

210. See COLO. R. CIV. P. 251.13(d) (2012).

211. See, e.g., *In re Edelman*, No. SB-02-0095-D, 2002 Ariz. LEXIS 131, at *16 (Ariz. Aug. 7, 2002) (treating restitution as a mitigating factor when imposing discipline); *In re Fischer*, 89 P.3d 817, 821 (Colo. 2004) (same); *In re Arabia*, 19 P.3d 113, 118 (Kan. 2001) (same).

212. See *Survey on Lawyer Discipline Systems 2004*, A.B.A., charts I, II (2005), <http://www.americanbar.org/content/dam/aba/migrated/cpr/discipline/04-full.authcheckdam.pdf> (indicating that of the 127,171 complaints received in 2004, only approximately 5,600 resulted in disciplinary action).

213. *Bar’s Restructuring Plan Featured in ABA Article*, N.H. BAR ASS’N (Sept. 6, 2002), www.nhbar.org/publications/archives/display-news-issue.asp?id=708 (noting the bar association’s volunteer, staff, and financial resources were “stretched too thin”).

speaking, the bar may have the staffing to investigate and pursue only the most egregious complaints.²¹⁴

Fourth, the bar may be motivated to accommodate workplace norms that it suspects are at odds with the core principles of professional responsibility.²¹⁵ This may be due to limited resources or a vested interest in constructing rules that protect its members from malpractice suits.²¹⁶ Regardless, the bar's ability to be a reliable barrier between the client and unethical lawyer behavior is compromised.

Finally, even if the bar had strong motivation and more resources at its disposal, it is not clear that it would be aware of the violations that are occurring. Under the current system, it is likely that violations are underreported because clients are not aware of how cases are run or the ethical obligations of lawyers,²¹⁷ and because lawyers internally lack motivation and perspective to come forward. Like law firms, the bar suffers from a deficit of information that severely limits its ability to perform its policing function.

D. NEGOTIATE AGREEMENTS BETWEEN INDIVIDUAL LAWYERS AND FIRMS

One solution to the ethical problems associated with the current private-practice model would be for individual lawyers to negotiate formal work agreements with their employers, rather than work in conditions that make it very difficult to effectively and ethically perform their jobs.²¹⁸ Indeed, associate committees in law firms seek to perform this function. However, they are ineffective at combating internal pressures and norms that go beyond any individual law firm. As an initial matter, firm committees do not include many of the types of attorneys who work at firms, specifically contract and staff attor-

214. Levin, *supra* note 207, at 3 n.28 (discussing how a diversion program lessens backlog of ethical investigations).

215. See, e.g., Hirshon, *supra* note 10.

216. N.H. BAR ASS'N, *supra* note 213 (noting the bar association's volunteer, staff, and financial resources were "stretched too thin").

217. See *Report Card: Summary of Findings*, HELP ABOLISH LEGAL TYRANNY, http://www.halt.org/reform_projects/lawyer_accountability/report_card/summary_of_findings.php (last visited Mar. 3, 2012) (on file with *Minnesota Law Review*) ("Of that small subset of misconduct that does constitute a rule violation, Stanford Law Professor Deborah Rhode notes that the majority of it goes unreported. Clients frequently lack sufficient information or incentives to file grievances and many individuals have little understanding of their rights in disputes with lawyers.").

218. See *supra* Part II.A.2.

neys. Secondly, these committees can only make suggestions to firms that are non-binding and ultimately place the party proposing change in a vulnerable position.²¹⁹ As such, they function as a very rough means for the firm to gauge and defuse associate discontent before it rises to a point where drastic measures, such as unionization or going to the press, are considered. The issues truly plaguing associates—overall hours requirements, training, responsibility, and the hours worked in a given day—are only collaterally discussed.²²⁰ Instead, these committees are often limited to covering a narrow range of ancillary (though very nice) perks—like a lounge area, tech allowances, and inclusion of gym memberships.²²¹

In good economic times, when both attorneys and the firms have leverage, this type of a system can work as a temporary fix. But, without a union, all the perks and privileges negotiated by these committees are: (1) confined to associates and not all lawyers; (2) not rights but benevolent grants of benefits that are not guaranteed for any set period of time; and (3) limited to the bounds of a single law firm, leaving intact industry-wide pressures to offer clients labor-hostile services (such as twenty-four-hour responsiveness).

Times of economic pressure clarify the inherent power dynamic of the law firm institution. Indeed, all attorneys at the firm, with the exception of equity partners, are at-will employees.²²² Because they can be terminated at any time, there is a strong disincentive for such attorneys to bargain for changes that the firm, as an institution, might truly resist (such as a cap on the number of work hours in a day).²²³ In tight economic

219. Cf. Tiffani N. Darden, *The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85, 97–98 (2009) (noting one associate’s experience with associate committees in the context of diversity initiatives, because “issues go unaddressed” and there is a desire not to “make waves”).

220. See, e.g., Jill Schachner Chanen, *You Rang, Sir?*, 86 A.B.A. J. 82, 84 (2000) (describing issues raised by one associates committee as “adding juices to its array of free beverages to loosening the vacation policies so that lawyers do not get docked for exceeding their allotted vacation time, given the amount of hours they work”).

221. On occasion these discussions turn to more substantive topics such as mentoring, leave policies, or diversity initiatives; however, associate input in these contexts is advisory and often concessions gained are symbolic or only occur in response to client or other market forces. See *id.*

222. See *supra* Part I.B.2.

223. For a discussion of changes that firms may strongly resist for economic purposes, see *supra* Part I.

times, the firm would just refuse the request and the only recourse for the attorneys would be to quit, since pressing the matter would be to risk their jobs. Simply put, for associates in particular, the current incentive structure provides no reason to rock the boat. Attorneys staying at the firm need to make partner under unclear and often malleable standards that are inevitably colored by how colleagues and, specifically, superiors feel about a given attorney. While associates not aiming for partnership have no long-term commitment to the firm, they still need recommendations and professional connections moving forward. Thus their personal interests are not aligned with pursuing institutional change. Law students entering the recruitment process have attempted to encourage labor changes voluntarily, but this has not led to reforms.²²⁴

E. MAKE AGREEMENTS AMONGST JUNIOR LAWYERS AT FIRMS

Another potential solution would be for firm lawyers, most likely associates across firms, to meet together and make agreements about the proper treatment of lawyers in the workplace, hours, pay, other benefits and working conditions. The attorneys would then approach their respective firms with that proposal. If the firms disagreed with those terms, then associates at every firm would agree to respond by refusing to work. If the partners agreed, every firm would inform its clients that the firms' rates and the way work would be structured would be changing and that all firms would be bound by similar labor limitations.²²⁵ Without the collective bargaining structure of a union, however, federal antitrust laws bar such action.

The Supreme Court dealt with the issue of attorney agreements and boycotts directly in *FTC v. Superior Court Trial Lawyers Association*.²²⁶ This case involved a group of trial lawyers who regularly accepted court appointments in Wash-

224. In 2007, a group of Stanford law students wrote and circulated a white paper to law firm hiring partners regarding the negative effects of increasing billable hour requirements at private law firms and seeking a better quality of life as related to billable hours. Our Mission, BUILDING A BETTER LEGAL PROF., <http://www.betterlegalprofession.org/mission.php> (last visited Apr. 16, 2012). This paper received significant media buzz. *Id.* However, it did not change or alter firm practices. *See supra* Part I.B.3.

225. Since the reputation of a firm and the expertise they could claim would not necessarily be equal, this would not mean rate packages would necessarily be the same. What it would mean, however, is that no firm would be able to work their staff beyond a given number of hours in a day and would have to adjust the management of cases and the intake of cases accordingly.

226. 493 U.S. 411, 412 (1990).

ington, D.C., to provide criminal defense services to indigent clients.²²⁷ The attorneys felt they were underpaid and agreed through their professional association to refuse to take on additional criminal defense cases until the legislature increased their hourly pay.²²⁸ When the District of Columbia failed to pass legislation increasing the attorneys' fees, the lawyers refused to take new cases.²²⁹ The system was paralyzed and within two weeks the city council voted for the increase.²³⁰ Then, despite resolution of the issue, the FTC sued the lawyers with allegations of price fixing and won.²³¹ Since the attorneys were not collectively bargaining, their agreement was viewed as an anti-trust violation.²³² Subsequently, no lawyer agreements of this kind have been attempted.

F. MAKE AGREEMENTS BETWEEN FIRMS REGARDING LABOR NORMS FOR LAWYERS

As a threshold matter, discussions between law firms to agree on the cost and structure of labor would almost undoubtedly fail as an antitrust violation.²³³ However, even were such discussions legal, institutional norms of the law firm world pressure partners away from adopting that course of action. For a partner to state an interest in creating a labor system where lawyers work less per day would be to admit an inability to "play on the level" of other firms that would not agree to such coddling and pampering.²³⁴ In the big law world, there is enormous pressure to appear tough and invincible; a law firm lawyer must be able to handle anything, anywhere, under any conditions. Going to other firms with a set of labor norms that undermines this modern "I can do anything and give up anything for my client" mentality would equate to saying "I don't belong in the big leagues." Thus, the new institutionalist framework suggests that partners see certain options, like a

227. *Id.* at 415.

228. *Id.* at 415–16.

229. *Id.* at 416.

230. *Id.* at 417–18.

231. *Id.* at 418–21, 436 (vacating the appellate court's finding that the attorneys' boycott was protected by the First Amendment based on freedom of expression).

232. *Id.* at 428 ("[The attorneys'] concerted action in refusing to accept further [criminal defense] assignments until their fees were increased was thus a plain violation of the antitrust laws.").

233. *Cf. id.* (preventing price fixing between lawyers and legislature).

234. *See supra* Part I.B (discussing general practices at law firms).

ten-hour workday, as choices that are unavailable to them.²³⁵ Because that could mean the loss of business and prestige, much of what partners have worked and sacrificed for their entire careers, such options are virtually unimaginable.

The irony is that this type of law firm culture obscures the main function of a lawyer—to advise the client. The advice every law firm should be giving their clients is that a tired, overworked, unhappy lawyer is a dangerous one, a bad one. No one would dispute that a worker wielding a blowtorch on her seventeenth hour in the day, on the third day in a row of sleeping fewer than six hours, is a liability—both dangerous and costly.²³⁶ But working in precisely those kinds of conditions has become relatively commonplace in law firms, and nearly every lawyer has had something like that experience at some point in his or her career.²³⁷ Law firms often seem blind to the dangers of having exhausted and depressed lawyers making pivotal decisions for clients.²³⁸ Attorneys should tell clients, “there are working hours in the day, let’s work during those and I’ll answer the rest of your questions with a clear and sound mind tomorrow.”²³⁹ But sadly, law firms, as institutions, both internally and vis-à-vis each other, do not allow partners to do this.

IV. UNIONIZATION AS THE SOLUTION

Having examined other options, it seems clear that unionization is the most effective way private-sector attorneys can overcome institutional and legal obstacles and combat the ethical problems inherent in private practice today. Specifically, unionization overcomes obstacles to institutional change by eliminating the need for individual actors to become agents for

235. See GORDON, *supra* note 18, at 17.

236. See UNIV. OF CAL., SAN DIEGO, *supra* note 107 (declaring the diminished ability to form tasks when deprived of sleep).

237. See *supra* notes 49–60 and accompanying text.

238. For many firm lawyers an eight-hour day would be incomprehensible; therefore this amount of time might be settled at ten hours or even more. In terms of morale, what some lawyers resent is not purely the length of hours but the haphazard nature of the hours and resulting inability to plan their day effectively. See Owen Kelly, *Coping with Stress and Avoiding Burnout: Techniques for Lawyers*, CANADIAN B. ASS’N, <http://www.cba.org/cba/practicelink/bwl/stresscoping.aspx> (last visited Apr. 16, 2012) (stating that “daunting billable hour targets, unpredictable schedules and unreasonable clients—all of which can seem inescapable, uncontrollable and unremitting” provide stressors for lawyers).

239. Ironically, clients themselves may also appreciate a respite from work issues being present twenty-four hours a day.

that change. For the reasons discussed above, law firms, as entities, and law firm partners, in particular, will not take actions that they view as potentially harmful to their standing with clients in relation to other firms. Therefore, only limitations that apply across firms and to clients, regardless of which law firm they select, will actually change the institutional structure of firms.

As discussed earlier, two main facilitators of unethical behavior in private practice are systemic: (1) firms have highly leveraged associate-to-partner ratios, leading to little training, poor oversight, and a lack of agency and decision making on the part of non-partners;²⁴⁰ and (2) firms use a billable hour system that pressures all parties to maximize billable hours.²⁴¹ Unionization would counter both of these problems. First, in terms of leverage, union contracts would likely change at-will employees into employees requiring formal termination proceedings, severance packages, and other job loss compensation. This would encourage firms to hire people they plan to retain, lowering the partner-to-junior lawyer ratio and encouraging investment in training and retention. Turnover would likely be lower. These changes would create a work environment that better fosters diligence, competence (both technical and advisory), loyalty, and confidentiality.

In relation to billable hours, a union that includes associates from all or most law firms could demand reforms of billable structures to make them more reasonable, attainable, and amenable to ethical legal work. Specifically, a private-attorney union could demand different minimum billable targets; set overall billable maximums; include firm activities, professional development, and training as part of billable hours; set maximum working hours and regular break times and durations; and negotiate for additional breaks or other time off for occasional overtime scenarios. Currently, no formal limits on the billable hour are in place beyond the number of hours in a day.²⁴² However, with limitations on the manner in which time could be billed, the systemic incentives to inflate time could be eliminated and replaced by an emphasis on efficiency, the qual-

240. See Press Release, Nat'l Ass'n for Law Placement, Law Firm Leverage Drops to Levels Last Seen 10 Years Ago (Dec. 18, 2007), available at <http://www.nalp.org/lawfirmleveragedrops> (stating leverage ratios by firm size and office location).

241. See Turow, *supra* note 45, at 34–36.

242. See Holmen, *supra* note 74.

ity of work, and strategic decision making. Unionization is the only way for attorneys from different firms or companies to meaningfully negotiate for the binding contracts that would give them the leverage with firms and clients to change how the billable hour is used. Only by controlling labor conditions and the maximum billable hours in a given day, week, or month can lawyers reclaim their professionalism, sense of self-worth, and capacity to render good judgments.

A. THERE ARE NO LEGAL IMPEDIMENTS TO ATTORNEY UNIONIZATION

Since relatively few attorneys have unionized, one might wonder if it is illegal for attorneys to do so. This Section outlines how private-sector lawyers can lawfully unionize and why doing so would be to their advantage. Forming a union provides unparalleled legal protection and leverage for the workers involved.

1. Lawyers Can Unionize Legally

The legal process of unionization can accommodate lawyers.²⁴³ The core of federal labor law is the National Labor Relations Act (NLRA), passed in 1935.²⁴⁴ The NLRA granted “employees” the rights to self-organize; to form, join, and assist labor organizations; and to bargain collectively through representatives.²⁴⁵ It also created the National Labor Relations Board (NLRB) to administer and adjudicate employment matters.²⁴⁶ To form a union, a group must be certified by a local NLRB office²⁴⁷ as a valid “bargaining unit” under the NLRA.²⁴⁸ Later, Congress amended the NLRA to explicitly cover “professional employees.”²⁴⁹

243. There are many other professional unions, for example, the Office and Professional Employees International Union, AFL-CIO, the Marine Engineers’ Beneficial Association, and the Union of American Physicians and Dentists.

244. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006); *see also* FRED WITNEY & BENJAMIN J. TAYLOR, LABOR RELATIONS LAW 13 (7th ed. 1996) (confirming that the year of passage was 1935).

245. *See generally* 29 U.S.C. §§ 151–69 (stating the federal statutes applicable to labor relations).

246. *See id.* § 153(a) (establishing the NLRB as the agency to administer the NLRA).

247. *See id.* § 153(b) (authorizing delegation of power to regional offices and directors).

248. *Id.* § 159(b).

249. *See id.* § 152(12)(a) (defining a professional as “any employee engaged in work (i) predominantly intellectual and varied in character as opposed to

Moreover, as a matter of general law and as confirmed by the NLRB, lawyers in law firms and private corporations have the same rights as any other employees under the NLRA.²⁵⁰ The fact that lawyers are officers of the court in no way detracts from their protections under the NLRB.²⁵¹ In *Lumbermen's Mutual Casualty Co. of Chicago*, the NLRB explicitly recognized an attorney's right to unionize in the private sector.²⁵² Existing case law adopts this standard and recognizes the legal right of the private sector to collective bargaining pursuant to the NLRA.²⁵³ Finally, since 1977, the NLRB has explicitly exercised jurisdiction over law firms that gross \$250,000 or more.²⁵⁴

Although relatively rare, lawyers are members in unions, and the NLRB has recognized such membership.²⁵⁵ Currently,

routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes"); David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775, 1794 (1989).

250. The Restatement of the Law Governing Lawyers states that, "A lawyer who hires a lawyer or nonlawyer as an employee is subject to applicable law governing the employment relationship, such as contract law, antidiscrimination legislation, unjust-discharge law, and labor relations law." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 56(k) (2000); see also Kennedy, Schwartz & Cure, P.C., No. 2-RC-22718, slip op. at 24–25 (NLRB June 20, 2003), available at <http://www.nlr.gov/case/2-RC-22718> (follow "View" hyperlink to the right of "RD Decision and Order") (rejecting law firms' reasoning that lawyers should be treated differently than other groups of employees).

251. *Lumbermen's Mut. Cas. Co. of Chi.*, 75 N.L.R.B. 1132, 1136–37 (1948).

252. See *id.* at 1137–39 ("That the attorneys have a statutory right to self-organization cannot be denied."); see also *Air Line Pilots Ass'n, Int'l*, 97 N.L.R.B. 929, 939 (1951) (ruling that nonprofessional and professional airline employees—including attorneys—may form a bargaining unit), *overruled by Oregon Teamsters' Sec. Plan Office*, 113 N.L.R.B. 987, 991 n.7 (1955).

253. See *Chiles v. State Emps. Attorneys Guild*, 714 So. 2d 502, 505 (Fla. Dist. Ct. App. 1998), *aff'd*, *Chiles v. State Emps. Attorneys Guild*, 734 So. 2d 1030, 1036 (Fla. 1999), *rev'd on other grounds*, *N. Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612 (Fla. 2003).

254. *David Van Os & Assocs., P.C.*, 346 N.L.R.B. 804, 808 (2006) (stating that gross receipts must exceed \$250,000); *Camden Reg'l Legal Servs., Inc.*, 231 N.L.R.B. 224, 224 (1977) (setting income cap at \$250,000); *Foley, Hoag & Eliot*, 229 N.L.R.B. 456, 457 (1977) (establishing jurisdiction over law firms).

255. See, e.g., *Wayne Cnty. Neighborhood Legal Servs., Inc.*, 229 N.L.R.B. 1023, 1024 (1977) (allowing a unit of staff attorneys).

there are also unionized lawyers who are part of broader unions that include nonlawyers and other members of the same company.²⁵⁶ Notably, lawyer unionization from the private sector is beginning to gain more traction. In 2003, a group of attorneys from Parker Stanbury LLP, a private Los Angeles-based law firm, joined the Teamsters Union after failed discussions regarding working conditions and pay.²⁵⁷ To date, no legal or disciplinary action on the part of the bar against the attorneys has been reported.

2. Arguments Against Certifying Attorney Unions: The Law Firm's Case

While lawyers do have a right to unionize as a matter of law, law firms may challenge their status as employees under the NLRA.²⁵⁸ Law firms may also contest the formation of unions of lawyers. Specifically, they may argue that unionization is unavailable to their associates, staff, and contract lawyers because they act as confidential employees, managerial employees, or supervisors, all of which are exempt from NLRA protections.²⁵⁹

For several reasons, such claims would most likely fail. First, "confidential employees" is a term of art in labor law, denoting employees who have access to the confidential labor information of a company, and therefore would skew the collec-

256. Kennedy, Schwartz & Cure, P.C., No. 2-RC-22718, slip op. at 25–29 (NLRB June 20, 2003), <http://www.nlr.gov/case/2-RC-22718> (follow "View" hyperlink to the right of "RD Decision and Order") (ordering an election to choose between a unit of attorneys or of attorneys, secretaries, legal assistants, receptionists, and bookers ordered); Am. Fed'n of State-Cnty.-Mun. Emps. Council 93, Case No. 1-RC-21569, at 9 (NLRB Dec. 5, 2002), <http://www.nlr.gov/case/1-RC-21569> (follow "View" hyperlink to the right of "RD Decision and Order") (ordering a self-determination election to determine if attorneys should be in a separate unit or in a unit including field staff representatives, senior field staff representatives, and organizers); cf. *Lumbermen's Mut. Cas. Co. of Chi.*, 75 N.L.R.B. at 1138–39 (approving a separate unit for attorneys employed by an insurance company).

257. Ryan F. Gabrielson, *Lawyers Set Precedent, Join Teamsters Union*, ARIZ. BUS. GAZETTE (Mar. 27, 2003, 12:00 AM), <http://www.azcentral.com/abgnews/articles/0327union27.html?&wired> (noting the unionization of the firm's Phoenix office).

258. Laura Midwood & Amy Vitacco, *The Right of Attorneys to Unionize, Collectively Bargain, and Strike: Legal and Ethical Considerations*, 18 HOFSTRA LAB. & EMP. L.J. 299, 303 (2000).

259. Parties asserting such claims bear the burden of proof. See LeMoyné-Owen Coll., 345 N.L.R.B. 1123, 1128 (2005).

tive bargaining process.²⁶⁰ In 2003, the NLRB rejected outright the claim that lawyers act as confidential employees, and it is unlikely to reverse its position.²⁶¹

Courts are also unlikely to exclude non-partner law firm lawyers from unionization by classifying them as “managerial employees.” Although the NLRA does not contain the term “managerial employees,”²⁶² the Supreme Court defined the term to include employees who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.”²⁶³ In implementing this exclusion, the NLRB and subsequent courts have found that it does not apply to rank-and-file employees with routine duties,²⁶⁴ but only to executives,²⁶⁵ whose duties are “outside the scope of duties routinely performed by a similarly situated professional.”²⁶⁶ Were it otherwise, “the managerial exclusion . . . would sweep all professionals outside the Act in derogation of Congress’ expressed intent to protect them.”²⁶⁷

The key factor in determining whether an individual is exempted from NLRB protections as a “managerial employee” is whether the party involved may make discretionary decisions on his or her own regarding company policy.²⁶⁸ Although the NLRB has not addressed this issue in relation to private-sector lawyers, it is longstanding precedent that staff doctors and

260. Mitchell H. Rubenstein, *Attorney Labor Unions*, N.Y. ST. B. ASS’N J., Jan. 2007, at 23, 23–24.

261. See *Kennedy, Schwartz & Cure, P.C.*, Case No. 2-RC-22718, at 22 n.12 (rejecting law firms reasoning that lawyers were excluded from unions as “confidential employees”).

262. While the Act is silent on this point, the legislative history of the Act indicates that such employees were meant to be excluded. ROBERT A. GORMAN & MATTHEW W. FINKIN, *BASIC TEXT ON LABOR LAW* § 3.7 (2d ed. 2004).

263. *NLRB v. Bell Aerospace Inc.*, 416 U.S. 267, 288 (1974) (quoting *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323 n.4 (1947)).

264. *Evergreen Am. Corp. v. NLRB*, 362 F.3d 827, 838 (D.C. Cir. 2004).

265. *Bell Aerospace Inc.*, 219 N.L.R.B. 384, 385–86 (1975).

266. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690 (1980); *Nurses United*, 338 N.L.R.B. 837, 840 (2003).

267. *Yeshiva Univ.*, 444 U.S. at 690.

268. *Id.* at 683 (stating a key factor in this determination is whether an employee “represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy”); *LeMoyne-Owen Coll.*, 345 N.L.R.B. 1123, 1128–29 (2005) (holding that faculty were managerial employees because they effectively make decisions in critical areas such as curriculum, course content, determination of honors, grading, admission standards, and participation in tenure decisions).

dentists are not excludable as managerial employees.²⁶⁹ This is relevant because staff doctors and dentists, like the general non-partner attorney pool at a law firm, are professionals with professional obligations who have historically had autonomy over their work and oversight over other semiprofessionals (such as nurses or technical assistants).²⁷⁰ However, the legal consideration in determining managerial status is whether an employee—professional or not—has discretionary authority over company policy and not just over matters within his or her limited sphere of influence, even where such influence requires considerable professional training or expertise.²⁷¹ A key evidentiary factor that the NLRB considers in a managerial employee inquiry is whether there are “comprehensive manuals and instructions” limiting discretion.²⁷² Most law firms have practice manuals delineating procedures for dealing both with intra-firm matters and with clients or the media.²⁷³ Because associates, staff, and contract attorneys working for firms exercise limited discretion in routine situations, within the confines of firm protocols and reviews, the managerial exception will most likely not apply.

The best argument that law firms have against associate unionization is that associates act as supervisory employees.²⁷⁴

269. Third Coast Emergency Physicians, P.A., 330 N.L.R.B. 756, 756 (2000) (finding that “ultimate decision-making authority . . . is retained by the two medical directors rather than the physicians”); Montefiore Hosp. & Med. Ctr., 261 N.L.R.B. 569, 571–72 (1982) (refusing to find “that the managerial participation . . . so aligns the staff doctors with management or places them sufficiently within the managerial structure as to warrant their exclusion”). *But see* Chief Judge of the Sixteenth Judicial Circuit v. Ill. State Labor Relations Bd., 687 N.E.2d 795, 799 (Ill. 1997) (holding that government attorneys—assistant public defenders—were managerial employees and therefore not subject to the collective bargaining provisions of the Illinois Public Labor Relations Act).

270. *See Montefiore*, 261 N.L.R.B. at 572 (holding that while doctors performed some managerial duties, those duties did not “fall outside the professional duties primarily incident to patient care”).

271. *Id.* at 570 (“As professional employees, the doctors may also be managerial, but their managerial status may not be based on decision making which is part of the routine discharge of professional duties.”).

272. Bell Aerospace Inc., 219 N.L.R.B. 384, 386 (1975).

273. *See* T. Jackson Bedford Jr., *Managing by Manual*, 77 A.B.A. J. 103, 103 (1991) (declaring a law firm manual to be “as indispensable as a computer system for law office management” because a manual “details the day-to-day policies and procedures to be followed . . . by staff and attorneys” and thereby “reduces the time spent by lawyers in managing”).

274. Notably, few of these arguments hold water in relation to staff attorneys or contract attorneys who, due to their transient and uncertain employ-

Originally, the NLRA took an expansive view of the term employee, but Congress revised that view in the Taft-Hartley Act of 1947, divesting supervisory employees of NLRA protections.²⁷⁵ Today, supervisors are still specifically excluded from the NLRA's protections.²⁷⁶ Ironically, while the NLRA explicitly defines the term "supervisory employee," application of the term has been highly contested. The Supreme Court has stated that, to be a supervisory employee, a worker must: (1) participate in one of twelve activities specifically enumerated in the NLRA;²⁷⁷ (2) exercise independent judgment;²⁷⁸ and (3) hold the authority in the interest of the employer.²⁷⁹ Participation in a single supervisory activity establishes supervisory status if independent authority is wielded in the interest of the employer.²⁸⁰

In 2006, the NLRB issued a series of three administrative decisions aimed at clarifying the scope of the supervisory exception.²⁸¹ These cases currently define what it means to assign

ment status, are not placed in supervisory roles, even over nonlegal staff. *See Chief Judge of the Sixteenth Judicial Circuit*, 687 N.E.2d at 801 (holding that although public defenders were managerial employees, that classification should not be interpreted to mean all publicly employed attorneys are deemed managerial employees, but should be limited to only those attorneys with a similar amount of discretion and control).

275. *See* 29 U.S.C. § 52 (2006) (declaring that injunctive relief in employment cases should not be granted unless absolutely necessary); *N.L.R.B. v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 717–18 (2001) (discussing history of the supervisory exclusion).

276. 29 U.S.C. § 152(3).

277. The twelve statutory activities are the ability:

to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

278. *NLRB v. Health Care & Ret. Corp.* 511 U.S. 571, 589 (1994).

279. *Id.* at 573–74.

280. *See Pub. Serv. Co. of Colo. v. NLRB*, 271 F.3d 1213, 1217 (10th Cir. 2001) (declaring that "the existence of any one of the listed powers, as long as it involves the use of independent judgment, is sufficient to support a determination of supervisory status"); *Bryant Health Ctr., Inc.*, 353 N.L.R.B. No. 80, 742 (Jan. 30, 2009) (finding that the twelve statutory acts are meant to be read disjunctively); *Fred Meyer Alaska, Inc.*, 334 N.L.R.B. 646, 649 (2001) (holding that "a person needs to possess only one of the specific criteria listed").

281. *See Croft Metals, Inc.*, 348 N.L.R.B. 717, 717 (2006) (noting that the *Croft Metals*, *Oakwood Healthcare, Inc.*, and *Golden Crest* cases were filed together to determine the "supervisory issues on review"); *Golden Crest Healthcare Ctr.*, 348 N.L.R.B. 727, 727 (2006) (calling the three companion

work, direct another employee, and act with independent judgment.²⁸² Although these cases leave open the question of whether associates at law firms would be viewed as supervisors under the law, they are by no means clearly dispositive in the negative. Rather, recent NLRB decisions show that the supervisory exception will not be interpreted so broadly as to overwhelm the inclusion of all professionals under NLRA.²⁸³ Since the party seeking to prove supervisory status bears the burden of proof by a preponderance of the evidence,²⁸⁴ a law firm seeking to prevent its associates from unionizing would have to show that the associates in question acted as supervisors. Given that analogous employment case law holds that even law firm partners do not necessarily exercise sufficient control over firm matters to be excluded from employment law protection,²⁸⁵ this burden may prove difficult to meet. This is particularly so where changes to federal pleading standards, requiring more specific pleadings, are also limiting how many claims go to court.²⁸⁶

cases “identical filings” to clarify Section 2(11) of the NLRA); *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 686 (2006) (characterizing the decision as an attempt to come up with a method for interpreting Section 2(11) of the NLRA).

282. See *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 689–94 (discussing those three key phrases in depth); see also *Golden Crest*, 348 N.L.R.B. at 727 (adopting *Oakwood’s* standards and exploring them in different factual scenarios); *Croft Metals, Inc.*, 348 N.L.R.B. at 718–19 (focusing on assignment and direction).

283. *Bryant Health Ctr., Inc.*, 353 N.L.R.B. at 742–45 (rejecting claim that licensed nurse practitioners at a nursing home were supervisors exempt from protection under the NLRA).

284. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 686–87 (stating that the party asserting a supervisory authority claim bears the burden of proof); *Dean & Deluca New York, Inc.*, 338 N.L.R.B. 1046, 1047 (2003) (stating that the party asserting a supervisory status must establish that fact by a preponderance of the evidence).

285. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 699 (7th Cir. 2002) (finding that Sidley Austin’s arguments that partners were employers and not employees were unconvincing given the relative lack of authority the partners wield on behalf of the firm).

286. Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 120 (2010), <http://yalelawjournal.org/2010/10/27/michalski.html> (discussing the implications of recent changes in federal pleading standards in state courts for civil rights and employment discrimination cases).

3. Activity by State Bars

The legitimacy of unionization is confirmed by the fact that, in the limited cases where lawyers have unionized, they were not disbanded by the state or local bar. In a 1975 opinion, the New York County Bar Association's Committee on Legal Ethics (NY Committee) considered whether a strike by unionized Legal Aid Lawyers was ethical under the New York Code of Professional Responsibility (New York Code).²⁸⁷ The NY Committee did not question, indeed it assumed, (1) the legal right of attorneys to form unions and (2) the legal right of those unions to strike.²⁸⁸ The NY Committee found that in exercising these legal rights, lawyers maintained an obligation during the strike not to disrupt the proceedings of the court or deprive their clients of proper representation and a speedy trial, which in this specific case was found improper.²⁸⁹ However, subsequent strikes have proceeded without ethical action from the state bar.²⁹⁰ Moreover, in later decisions, the NY Committee defended and expanded the right of attorneys to join unions by allowing attorneys to join unions that include nonlawyers.²⁹¹

B. THERE ARE NO FORMAL ETHICAL IMPEDIMENTS TO ATTORNEY UNIONIZATION

One critique of lawyers joining or forming unions is that, by doing so, they would violate the rules of professional ethics. Specifically, the concern is that zealous, competent, and diligent representation will be neglected in service of labor goals and union activity.²⁹² This Section makes clear that: (1) the

287. N.Y. Cnty. Bar Ass'n Comm. on Legal Ethics, Op. 645, 1 (1975).

288. *Id.* at 2.

289. *Id.* at 4.

290. See Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 395-96 (1993) (noting that in October 1982, the Legal Aid Society in New York conducted a successful ten-week strike that ended in a favorable contractual settlement); see generally *NY Legal Aid Lawyers Return*, 147 LAB. REL. REP. 221, 221 (1994) (reporting on the New York Legal Aid Society's 1994 strike).

291. N.Y. State Bar, Op. 578 (Dec. 4, 1986), available at http://www.nysba.org/AM/PrinterTemplate.cfm?Section=ethics_opinions&ContentID=55423&template=/CM/ContentDisplay.cfm (upholding the right of an attorney to join a union even if the union has nonlawyer members, provided that the lawyer does not represent the State in disciplinary proceedings in certain situations).

292. The argument that unionization is incompatible with professional values is longstanding, though not as specifically applied to lawyers. Henry Mintzberg, *A Note on the Unionization of Professionals from the Perspective of Organization Theory*, 5 INDUS. RELATIONS L.J. 623, 631-32 (1983).

rules of ethics allow attorney unionization; (2) existing court and administrative decisions affirm that there is no conflict between a lawyer's professional responsibility and unionization; and (3) a lawyer may be ethically obligated to pursue better working conditions since they are intimately related to the ability to serve the client.

1. The Rules of Ethics Allow Attorney Unionization

Current interpretations of the Model Code clearly permit attorney unionization.²⁹³ This is notable because the ABA Commission on Ethics opposed unionization of attorneys until as recently as 1967.²⁹⁴ When the Model Code was adopted, the ABA Commission revisited the issue of attorney membership in unions and took a more expansive and permissive approach.²⁹⁵ In Informal Opinion 1325, the Commission stated that Ethical Consideration 5-13 (EC 5-13) under the ABA Model Code provides guidance concerning union membership.²⁹⁶ EC 5-13 provides:

A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.²⁹⁷

Although the opinion acknowledged potential tension between certain union activity and disciplinary rules, it did not find striking to be categorically unethical.²⁹⁸ Rather, the Com-

293. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1325 (1975) (interpreting ABA Model Code of Professional Responsibility EC 5-13).

294. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 986 (1967) (holding that salaried, employee-lawyers could join a union or organization—comprised entirely of lawyers working for the same employer—to negotiate wages and working conditions, but that they could not strike or withhold their services); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 917 (1966) (stating the fear was that through union membership the lawyer would be “surrendering his independent judgment” and would become “subject to the direction of the union and its officers”).

295. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1325 (1975) (“[L]awyers are not forbidden *per se* to belong to unions Earlier pre-Code opinions took a somewhat different view.”).

296. See *id.*

297. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-13 (1983).

298. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1325 (1975).

mission set forth a fact-specific inquiry that pragmatically weighs the strike's actual impact on client representation.²⁹⁹ This inquiry provides a pragmatic framework, allowing state bars to differ over the ethics of any particular attorney strike depending on the given circumstances.³⁰⁰

2. Case Law and Administrative Decisions Support a Lawyer's Right to Unionize

Moreover, existing case law rejects the assertion that there is an ethical bar to lawyers forming unions. Specifically, courts have held that attorneys suing for wages or other conditions of employment do not violate their duty of loyalty.³⁰¹ *Santa Clara County Counsel Attorneys Association v. Woodside* is particularly notable for the purpose of considering whether a court would view union activity as unethical. In *Santa Clara*, public sector lawyers sued to enforce their rights to bargain collectively under statutory law.³⁰² The court in *Santa Clara* found that such suits do not categorically undermine a lawyer's traditional duty of loyalty or "any other ethical obligation" owed to the lawyer's employer or client.³⁰³ Rather, the court recognized that "[t]he growing phenomenon of the lawyer/employee requires a realistic accommodation between an attorney's professional obligations and the rights he or she may have as an employee."³⁰⁴

The NLRB has separately concluded that there is no conflict between union membership and a lawyer's professional duties. Repeatedly, the NLRB has rejected the allegation that union activity is professionally irresponsible or unethical.³⁰⁵ In

299. *See id.* (noting that neglecting a legal matter could require discipline, but in other cases a strike may be "no more disruptive of the performance of legal work than taking a two week vacation").

300. *See, e.g.*, N.Y. Cnty. Bar Ass'n Comm. on Legal Ethics, Op. 645, 1-4 (1975) (finding a strike by a union of legal aid lawyers to be unethical when it impedes the administration of justice); *Mendecino Public Attorneys Strike*, CAL. REP. (Mar. 8, 2007), <http://www.californiareport.org/archive/R703080850> (reporting an attorney strike in California where no subsequent bar disciplinary measures were taken).

301. *E.g.*, *Santa Clara Cnty. Counsel Attorneys Ass'n v. Woodside*, 869 P.2d 1142, 1157-58 (Cal. 1994).

302. *Id.*

303. *Id.* at 1157.

304. *Id.*

305. *See Kennedy, Schwartz & Cure, P.C.*, No. 2-RC-22718, slip op. at 20-25 (N.L.R.B. 2003), <http://www.nlr.gov/case/2-RC-22718> (follow "View" hyperlink to the right of "RD Decision and Order"); *Foley Hoag & Eliot*, 229 N.L.R.B. 456, 457-58 n.12 (1977); *Lumbermen's Mut. Cas. Co. of Chic.*, 75 N.L.R.B. 1132, 1140 (1948).

examining EC 5-13,³⁰⁶ the NLRB explicitly considered and rejected the assertion that membership in a union undermines a lawyer's ability to act free of outside influence on his or her client's behalf.³⁰⁷

3. An Affirmative Ethical Obligation to Strike? Attorney and Client Interests Are Aligned in Relation to Working Conditions

The creation of a fair workplace with a reasonable workload and transparent work structure is actually aligned with, rather than opposed to, a lawyer's ethical obligations to a client. The Model Code requires that "[a] lawyer shall not . . . [n]eglect a legal matter entrusted to [him/her]."³⁰⁸ It also states that "[a] lawyer shall not . . . [h]andle a legal matter which he/[she] knows or should know that he/[she] is not competent to handle . . ."³⁰⁹ Indeed, the New York Code makes clear that lawyers unable to render adequate legal representation to their clients must withdraw.³¹⁰ Like the Model Code, these rules forbid a lawyer from "handl[ing]" a legal matter which the lawyer knows or should know that he or she is not competent to handle,³¹¹ and from "hand[ling] a legal matter "without preparation adequate in the circumstances."³¹²

Poor working conditions embedded in current firm labor practices undermine lawyers' abilities to meet these obligations because they are too tired, ill-informed, dissatisfied, and disillusioned to behave truly professionally or ethically. Indeed, the current system breeds inadequate preparation—sloppiness, loss of judgment and skill due to overwork, and self-aggrandizement prioritized over candor—none of which benefits the client, the court, or the profession.

Under conditions that make ethical representation impossible, some courts have found that it is appropriate, even ethical, to withhold representation. For example, in New Orleans, public defender Rick Teissier refused to go to trial when there

306. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-13 (1983).

307. *Kennedy, Schwartz & Cure, P.C.*, No. 2-RC-22718, at 10–25.

308. MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101(A).

309. *Id.*

310. "A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment . . . if . . . [t]he lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule." N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-110(B)(2) (2007).

311. *Id.* DR 6-101(A)(1).

312. *Id.* DR 6-101(A)(2).

was not enough money available to fund a necessary expert witness.³¹³ Then, after considering briefing on the issue, the court reversed a finding of contempt and instead ordered a structural overhaul of the public defender system on grounds that the system was institutionally flawed.³¹⁴

The integrity of the lawyer as an employee and a person is irrevocably intertwined with broader interests, particularly client interest. It is integrity in both mind and body that fortifies a lawyer so that he or she can exercise good judgment and be a loyal, diligent, discreet, and measured advisor. A client hires a lawyer to be a professional. When lawyers are not treated as professionals and no longer have the physical capacity to act with clarity, they do not act professionally.³¹⁵

Ultimately, the current firm work structure hampers a lawyer's ability to fulfill his or her duties to clients and the courts and undermines the already poor standing of the legal profession in the public eye. If lawyers cannot act as professionals and thereby fulfill their duty to their clients, they have an ethical obligation to take measures to ensure that they can provide adequate representation and fulfill those duties. As discussed above, the only means to achieve this goal in the private sector is for firm attorneys to unionize. Therefore, private-sector attorneys have an ethical duty to unionize.

C. ALL IMPEDIMENTS TO UNIONIZATION ARE CULTURAL AND THEREFORE NONBINDING

The only actual barriers that exist to private attorney unionization are cultural—in both the legal profession and society at-large. Like most professionals, lawyers have a culture and tradition of not unionizing.³¹⁶ Unions are associated with blue-collar positions and, to some extent, economic hardship, rather than workplace mistreatment.³¹⁷ At first blush, the idea of unionizing firm attorneys seems laughable. Firm attorneys, particularly associates, often feel ashamed that they are unhappy or have complaints regarding their jobs because of their high

313. Mark Hansen, *P.D. Funding Struck Down*, 78 A.B.A. J. 10, 18 (1992).

314. *Id.*

315. *Cf.* Schiltz, *supra* note 5, at 729 (explaining how the professional dissatisfaction can lead to unethical behavior by young attorneys).

316. See CHARLES B. CRAVER, *CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT* 54 (1995).

317. *Cf. id.* (describing the characterization of American unions as “lower class”).

salaries.³¹⁸ However, it is well known among attorneys that firm lawyers tend to be profoundly unhappy, largely due to the long hours, the insecurity of their job positions, the lack of ownership in their jobs, and a sense that they went to law school to be a lawyer, not a widget.³¹⁹

Previously, a lack of willpower and willingness to break with convention rendered the likelihood of unionization low.³²⁰ However, the current economic downturn in the legal market and the accompanying sense of disenfranchisement that lawyers are experiencing may provide the needed impetus to push private attorneys to action. Unions in the United States have a long history of being forged in the fires of economic turmoil.³²¹ Indeed, it is in the moments when labor is weakest that collective action provides the most meaningful way to negotiate for improved working conditions.³²²

D. HOW UNIONS WILL BALANCE FIRM INSTITUTIONS AND FOSTER PROFESSIONALISM

The 1947 Taft-Hartley Act added a provision to the NLRA stating that the duty to bargain requires the parties to meet and “confer in good faith with respect to wages, hours, and other terms and conditions of employment.”³²³ There are many issues that a firm lawyer union could pursue as a basic contract platform. Specifically, a union of law firm lawyers could negotiate to set reasonable hours’ targets, a maximum number of hours that may be worked in a given day, and a total number of hours worked in a given week or thirty-six hour period.³²⁴ A un-

318. Daniel Lukasik, *How Stress and Anxiety Become Depression*, LAWYERS WITH DEPRESSION (May 22, 2011), <http://www.lawyerswithdepression.com/articles/how-stress-and-anxiety-become-depression-2/>.

319. See generally Schiltz, *supra* note 73, at 886 (discussing the high instances of depression, anxiety, divorce, and job dissatisfaction amongst lawyers and noting that for both associates and partners, “[l]awyers in large law firms are often among the least happy” (citation omitted) (quotation omitted)).

320. See Eric E. Johnson, *Law-Firm Associates Should Unionize*, PRAWFSBLAWG (Feb. 28, 2008), <http://prawfsblawg.blogs.com/prawfsblawg/2008/02/law-firm-associ.html>.

321. *Key Events in Labor History*, AFL-CIO, <http://www.aflcio.org/About/Our-History/Key-Events-in-Labor-History> (last visited Apr. 16, 2012).

322. See, e.g., *Labor History Timeline*, AFL-CIO, <http://www.aflcio.org/About/Our-History/Labor-History-Timeline> (last visited Apr. 16, 2012).

323. See Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 158(d) (2006).

324. For a list of some of the potential benefits of lawyer unionization, see Mitchell H. Rubinstein, *Attorney Labor Unions*, 79 N.Y. ST. B.A. J. 23, 23 (2007).

ion could also negotiate for fixed required break times—for example, break times would count as part of hours targets and would have to be scheduled in regularly, such as a half hour off for every five hours worked.³²⁵

Related to this, a union could push to set clear policies on how much travel may be asked of a lawyer in any given twenty-four hour period and what amount of rest is required afterwards.³²⁶ Other issues to be considered might include salaries and contracts regarding sick leave and vacation time for non-associate lawyers, as well as working conditions (e.g., crowding, lighting, equipment used in the workplace, and workplace-related injuries)³²⁷ and granting vacation time for work on holidays.³²⁸ A union-negotiated contract could seek to explicitly lay out the circumstances under which an attorney has the right to refuse a work assignment and when overtime or additional compensation is required. A clear work contract could also lay out promotion and termination terms as well as compensation for termination.

Beyond any one demand, unionization would have a positive effect on morale. First, morale would be improved by workers having a sense of agency and security. It would give lawyers a sense of protection that would allow them to act definitively in favor of their clients' interests. Second, by unifying all firm lawyer employees—from associates to contract attorneys—in a common set of rights, unionization would produce better teamwork and work product. Third, unionization would focus the competitive energy of attorneys on improving the quality of their work in the long-run, rather than merely attempting to survive from one case to the next. As such, time invested in acquiring skills, developing specialized expertise, becoming measured advisors, participating in bar activities, and producing quality work would be viewed as essential, allowing attorneys to reconnect with a broader sense of professionalism.

325. *See id.*

326. *See id.*

327. Work-related injuries do occur in office settings but they are often the slow and gradual injuries of repetitive motions or poor working positions. Beyond typical slip and fall incidents or being injured while transporting evidence or documents, carpal tunnel, eye damage, and back issues are commonplace. WASH. INDUS. SAFETY & HEALTH ACT SERVS. DIV., WASH. STATE DEP'T OF LABOR & INDUS., OFFICE ERGONOMICS: PRACTICAL SOLUTIONS FOR A SAFER WORKPLACE 3–4 (2002), available at <http://www.lni.wa.gov/IPUB/417-133-000.pdf>.

328. *See id.*

Unionization may also alleviate some of the confidentiality issues created by the increased use of contract attorneys. Specifically, if contract attorneys themselves were unionized, firms would be able to bargain for the creation of a database of matters that each attorney had worked on, a running conflicts list of sorts, for each union member. Unionization may also lead to the diminished use of contract attorneys. If unionized, contract attorneys would likely demand benefits, better work environments, and clearer contract terms. This would eliminate some of the motivations firms now have to hire contract attorneys in the first place: contract attorneys are attractive to firms in a large part because they are entirely fungible, the ultimate at-will employees.³²⁹ With increased bargaining power, particularly in a union aligned with associates, this balance will change, encouraging law firms to think long and hard about the role of contract attorneys in the firm structure.

E. NO PLAUSIBLE ALTERNATIVE: WHY NOW?

Since the financial sector crash of 2008, the balance of power between associates and law firms, and law firms and their clients, has shifted indelibly.³³⁰ Associates fear losing their jobs.³³¹ New graduates and other laid-off attorneys flood the market with cheap contract or temporary labor.³³² Partners feel additional pressure to bring in business (especially in firms that are not lockstep)³³³ and keep profits up.³³⁴ Some firms in

329. Kathryn M. Fenton, *Use of Temporary or Contract Attorneys*, 13 ANTI-TRUST 23, 26 (1998) (characterizing the contract attorney-firm relationship as “inherently limited in nature”).

330. Law Shucks, a blog dedicated to large law firms, reports that between January 1, 2008, and December 11, 2011, over 15,435 people have been laid off by major law firms alone (5872 lawyers/9563 staff). *Layoff Tracker*, LAW SHUCKS, <http://lawshucks.com/layoff-tracker/> (last visited Apr. 16, 2012).

331. *See id.*

332. *See* Matt Masich, *Law School Career Offices Seek Fix for More Lawyers, Fewer Jobs*, L. WEEK COLO. (Oct. 21, 2009), <http://www.lawweekonline.com/2009/10/career-offices-seek-fix-for-more-lawyers-fewer-jobs/> (on file with *Minnesota Law Review*) (discussing the impact of the recession on graduate recruitment at a top fifty law school); Debra Cassens Weiss, *Downturn's Losers: BigLaw, 'Entitled' Associates, Top Schools*, A.B.A. J. (May 7, 2009, 9:12 AM) http://www.abajournal.com/news/article/downturns_losers_biglaw_entitled_associates_top_schools (commenting on how the recession has affected the recruitment of graduates of elite law schools).

333. “Lockstep” firms are firms where partners are compensated based on years in the partnership, rather than ability to bring in revenue. Although a historically prominent means of compensating lawyers in firms, it is now unusual. *See* William D. Henderson, *An Empirical Study of Single-Tier Versus*

this context sense an opportunity to maintain or increase their bottom line and regain control over the power dynamic between associates and the firm.³³⁵ As firms take steps to save money, the lawyer workforce may bear the burden. In particular, in this economic environment, law firms can avoid filling vacant positions and place heavier workloads on remaining associates, using an underclass of “staff attorneys” to do particularly repetitive and rote tasks, while filling in epic peaks of work (e.g., discovery periods) with the most fungible and transient of workforces—the contract attorney.³³⁶

During the comfortable, pre-recession days, the forgiving benevolence of plenty masked the inherent and complete lack of power lawyers have in big law, because most lawyers had a trump card up their sleeves—most attorneys, and certainly associates or partners, could leave and get a job elsewhere. With this leverage gone, the true nature of the firm as an institution is apparent; firms are on a mission to generate maximum work output by all attorneys for the benefit of firm profit, without regard for attorney wellbeing or compatibility with ethical practice. Ultimately, only unionization can break this cycle.³³⁷ Asso-

Two-Tier Partnerships in the Am Law 200, 84 N.C. L. REV. 1691, 1706–09 (2005–2006) (documenting the growth of two-tier, non-lockstep, partnerships); James D. Cotterman, *Lockstep Compensation. Does it Still Merit Consideration?* A.B.A. L. PRAC. TODAY (Aug. 2007), <http://apps.americanbar.org/lpm/lpt/articles/fin08071.shtml>.

334. Amanda Ripley, *Seniority Complex*, AM. LAW., June 2000, at 84 (quoting Sidley Austin executive committee chair Thomas Cole’s statement that the firm’s falling profits from the partnership ranks “could ultimately affect future retention and recruiting and possibly even the way prospective clients would assess the firm”).

335. *Id.*

336. Fenton, *supra* note 329, at 23.

337. A typical argument against unions is that they drive up costs and incentivize outsourcing. In this context, unionization may actually decrease costs as it may increase efficiency and allow associates to negotiate for lower pay in return for concessions regarding their hours. Furthermore, since attorney unionization and strikes are far more typical abroad than domestically, outsourcing of legal work internationally would not allow firms to avoid dealing with collective action by lawyers. *See, e.g.*, Algerian Lawyers Strike Against ‘Repression,’ ASSOCIATED FREE PRESS (Oct. 25, 2011), www.google.com/hostednews/afp/article/ALeqM5hHmws44xml7FaHEk6M9FX5RJ307w (Algeria); John Nalianya, *CJ Mutunga Blamed for Lawyers’ Strike*, NAIROBI STAR (January 11, 2012), <http://allafrica.com/stories/201201120043.html> (Kenya); John Spano, *Italian Lawyers Strike over New Mandatory Mediation*, L. FORWARD (Mar. 14, 2011), <http://lawforward.legalzoom.com/competition/italian-lawyers-strike-over-new-mandatory-mediation-american-legal-pundits-pile-on-consumerism-debated/> (Italy); *Lawyers’ Strike Cripples Delhi District Courts*, TIMES OF INDIA (Jan. 12, 2012), <http://timesofindia>

ciates need all firms to be bound to the same standards so that partners feel free from fear of losing business to competitors. Partners can use union requirements as a basis to go back to clients and insist on more reasonable working conditions, such as maximum hours in a given day or week. Contract and staff attorneys are virtually powerless today, so a union that unites all firm lawyers would beneficially serve their interest.

CONCLUSION

Law firms are keystone fixtures of the legal and business communities. As such, they shape and drive the development of civil law and practice, the structure of companies, and the enforcement of important state and federal regulations. Law firms fund, staff, and support much of the profession's charitable, pro bono, and non-profit work. They employ thousands of lawyers throughout the world and have a strong voice in directing the legal profession.³³⁸ They aid in business development and are instrumental to the economy. If law firms work poorly, all of these areas are negatively affected. If law firms work well, benefits flow far beyond their walls.

The application of new institutionalism to big law reveals that the ethical tensions present in law firms are structural and require structural solutions. How firms process work creates incentives and situations where ethical violations are more likely to occur and go unnoticed. New institutionalism explains that this is a structure that undermines an individual actor's ability to remedy professional misconduct. Essentially, firm attorneys have internalized institutional norms that hinder their ability to change or counter the flaws of the system on their own.

.indiatimes.com/city/delhi/Lawyers-strike-cripples-Delhi-district-courts/article-show/11459631.cms (India).

338. See *Lawyer Demographics*, A.B.A., http://new.abanet.org/market-research/PublicDocuments/Lawyer_Demographics.pdf (last visited Apr. 16, 2012) (illustrating that in 2000, seventy-four percent of U.S. lawyers worked in private practice and fourteen percent of those were employed by law firms with more than 100 lawyers, accounting for more than ten percent of all U.S. lawyers). The percentage rose between 2000 and 2007 as large law firms continued to grow and recruit a larger percentage of law graduates. The National Association of Law Placement reports that between 2001 and 2006 law firms recruited over fifty-five percent of all law graduates: large law firms with over 100 lawyers recruited approximately forty percent of those graduates, accounting for an astonishing twenty-two percent of all graduates nationwide. See *Trends in Graduate Employment—1985–2006*, NAT'L ASS'N FOR L. PLACEMENT (July 2007), <http://www.nalp.org/2007julgraduateemployment/>.

This impotence extends throughout the chain-of-command, from partners to associates and beyond.

Ultimately, the most effective solution to the ethical dilemmas this institutional culture raises is for private-sector attorneys to unionize, reform common labor practices in the sector, and restore a stronger sense of human dignity, pride, and professionalism in a core part of the legal community. In the current system, the private-sector attorney as an individual has very little control or real leverage over his or her own work product, working conditions and environment. Only a fundamental shift in the labor structure of the law firm and the norms of private practice will allow the parties involved to reset their corporate culture to one where every lawyer may fulfill their ethical duties without impediment. Not only do firm attorneys have a right to unionize, they may have an ethical obligation to do so.