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Bruce A. Green

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Cover Page Footnote

Stein Professor, Fordham University School of Law; Director, Louis Stein Center for Law and Ethics. I am grateful to Lauren Attard, Fordham Law '07, and Jessica Berenbroick, Fordham Law '06, for their assistance in researching and writing this foreword; to my colleagues, Russell Pearce and Amy Uelmen, for their comments on an earlier draft; and to Joyce Raskin, the Stein Center's project director, for helping to organize the April 15, 2005 conference on "Professional Challenges in Large Firm Practices," out of which this collection of writings developed. I am equally grateful to the institutions that co-sponsored the conference, to their representatives (Jim Altman, John Berry, Lou Craco, Clark Cunningham, and Paula Patton), who assisted in its organization, and to the moderators and panelists at the conference, all of whom are mentioned in these pages. I also thank Clark Cunningham for inviting the Stein Center to host the presentation of the second annual Award for Innovation and Excellence in Teaching Professionalism in conjunction with the conference.

FOREWORD

PROFESSIONAL CHALLENGES IN LARGE FIRM PRACTICES

Bruce A. Green *

Two years ago, I invited Patrick Schiltz to my professional responsibility class to discuss his 1999 article on large law firm practice.¹ Drawing on his earlier experience as a law firm associate and partner and on copious research, Schiltz argued in his article that the increase in the number of hours worked by lawyers in large firms denied them the ability to lead balanced lives and contributed to disproportionate levels of depression, divorce, substance abuse, and general misery.² Schiltz's article received considerable attention and some notoriety when it was first published. Since so many of my students were interested in beginning their legal careers in large Manhattan law firms, I thought they would be interested in exploring this subject with him.

Afterwards, many students let me know privately that they were both discouraged by Schiltz's account of large firm practice and reluctant to accept it. The students' discouragement was not surprising, but perhaps

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1. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

2. *Id.* at 888-96; see also Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 FORDHAM L. REV. 2207 (2002); Deborah L. Rhode, *The Profession and its Discontents*, 61 OHIO ST. L.J. 1335 (2000).

their skepticism was. Over time, Schiltz's thesis has become increasingly less controversial.

Despite labor-saving advances in information technology and communications, the average number of hours worked by partners and associates in the nation's large law firms has increased progressively over the past ten or twenty years.³ *The American Lawyer*, the profession's leading national monthly publication, has documented this trend.⁴ Some say *The American Lawyer* has also contributed to this trend by fueling competition among law firms that measure their success by the number of hours billed or dollars earned.⁵ One result is that law firm profits and associate salaries have skyrocketed.⁶ But the silver cloud has a black lining. Commentators describe how recent Internet and communication technology makes large firm practitioners available to clients around the clock ("24/7"),⁷ and how forces, including economic pressures and aspirations (some might say "greed")⁸ lead lawyers to let their corporate

3. See, e.g., Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747, 763 (2001) ("[T]he number of billable hours for lawyers has increased from 1700 a few years ago to an average of 2200 to 2300"); John P. Heinz et al., *Lawyers' Roles in Voluntary Associations: Declining Social Capital?*, 26 LAW & SOC. INQUIRY 597, 598 n.1 (2001) ("[B]illable hours had increased from an average of 1,450 per year in the 1960s to 2,000 or more in the late 1990s."); Schiltz, *supra* note 1, at 891 ("Thirty years ago, most partners billed between 1200 and 1400 hours per year and most associates between 1400 and 1600 hours. As late as the mid-1980s, even associates in large New York firms were often not expected to bill more than 1800 hours annually. Today, many firms would consider these ranges acceptable only for partners or associates who had died midway through the year.").

4. See, e.g., Amy Vincent, *On the Move*, AM. LAW., Oct. 2003, at 103 (stating the national average of billable hours per week was 45.6); *Life on a Treadmill*, AM. LAW., Oct. 1996, at 11 ("[I]n 1994 . . . the typical midlevel associate is now billing an average of 41-50 hours a week, compared to somewhere in the range of 31-40 hours a week two years ago."); Alison Frankel, *The Case of the Missing Associate*, AM. LAW., Jul. 2005, at 96 (explaining that in 2004 attorneys' hours were up in many firms, including Sullivan & Cromwell, whose hours were up 7.5 percent from 2003, and Simpson Thatcher, whose hours were up seven percent).

5. See *infra* notes 61, 137-38 and accompanying text.

6. Compare *The Profits Picture Remains Rosy*, AM. LAW., Jul. 2005, at 141 (listing Wachtell, Lipton, Rosen & Katz as the firm with the highest average profits per partner, which is \$3.5 million), with Karen Dillon, *Going to Extremes*, AM. LAW., Jul.-Aug. 1995, at S13 (listing Wachtell Lipton, Rosen, & Katz as the firm with the highest average profits per partner, which was \$1.4 million); see also Deborah K. Holmes, *Learning From Corporate America: Addressing Dysfunction in the Large Law Firm*, 31 GONZ. L. REV. 373, 381 (1995) ("During the 1980s, average partner compensation increased by 90% while associates' average starting salaries grew by 120%.").

7. See, e.g., Molly Peckman, *When Life Was Simple, Blackberries Were Fruit*, LEGAL INTELLIGENCER, Aug. 3, 2004, at 5 (describing the BlackBerry's addictiveness, which has led to its nickname, the "crackberry").

8. See, e.g., Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 251 (1999) (explaining that greed

clients exploit their availability.⁹ Because so much time is devoted to serving paying clients, large firms are challenged in their ability to pursue other professional aspirations and commitments, such as training young lawyers and rendering pro-bono service. Individual lawyers at large firms are challenged in their ability to meet family and other personal commitments outside law practice.

One may disagree about the scale of the problem¹⁰ and whether the billable hour is at the root of it,¹¹ but in recent years, anxiety about the evolution of large firm practice has emanated even from within the professional mainstream. A task force of the Boston Bar Association recently issued a thoughtful and detailed report on the challenges of balancing professional challenges and personal needs.¹² It began with the warning that “[w]e are in danger of seeing law firms evolve into institutions where only those who have no family responsibilities—or, worse, are willing to abandon those responsibilities—can thrive.”¹³ Responding to similar concerns, the American Bar Association (“ABA”) Section of Litigation launched a new initiative this year titled the “Raise the Bar Project.”¹⁴ Its five subjects of inquiry are: “A Delicate Balance—Real life vs. Real work,” “Firm, Inc.—Law as a business,” “Partners and Associates—Can this marriage be saved?,” “Living with Technology—and never sleeping,” and “Sink or Swim—Who is mentoring and training the next generation?”¹⁵ Most recently, recognizing both “that law firm demands on [one’s] time and economic pressures may make it difficult for

motivated already highly paid attorneys to illegally inflate their bills); David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 Hous. L. Rev. 1, 5 (2004) (“[C]orporate lawyers are simply filled with a rapacious greed that will not allow them to forego even an hour’s worth of time that could be billed out at obscene rates to their corporate patrons.”).

9. See *infra* notes 32-34, 55-61 and accompanying text.

10. See, e.g., Kathleen E. Hull, *Cross-Examining the Myth of Lawyers’ Misery*, 52 VAND. L. REV. 971 (1999); Mary A. McLaughlin, *Beyond the Caricature: The Benefits and Challenges of Large-Firm Practice*, 52 VAND. L. REV. 1003 (1999).

11. See generally Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of the Billable Hour Requirements*, 69 UMKC L. REV. 239 (2000); see also *infra* note 55 and accompanying text.

12. Report of the Boston Bar Association Task Force on Professional Challenges and Family Needs, *Facing the Grail: Confronting the Cost of Work-Family Imbalance* (1999), available at <http://www.bostonbar.org/prs/workfamilychallenges.htm>.

13. *Id.*

14. Brad D. Brian, *Opening Statement: Raise the Bar*, LITIGATION MAGAZINE, Summer 2005, at 1, 2 (“[W]hat used to be a ‘profession’ has become a ‘business,’ with the inevitable consequences of increasing hours, greater pressures, reduced loyalties within firms and with clients, less mentoring, less pro bono or public service work, and greater tension between work and personal lives.”).

15. *Id.* at 2.

[a young lawyer] to engage in public service,” and that professional dissatisfaction is leading young lawyers to leave large firms in droves, Michael Greco began his term as ABA President with a call for a “renaissance of idealism in our profession.”¹⁶

Law firms’ worries reverberate throughout the legal profession. For better or worse, large firms exert a gravitational pull on the entire profession. They serve as a training ground for thousands of associates who later move into other practice settings and their lawyers are among the most prominent and powerful and therefore serve as models for the rest of the bar. Therefore, these worries merit a response not only by lawyers practicing in large firms and the future lawyers who aspire to do so, but by the profession as a whole.

This collection of articles reflects the efforts of Fordham Law School’s Stein Center for Law and Ethics (“the Center” or “the Stein Center”) to respond to these issues. In the past, much of the work of the Center has focused on lawyers in public service¹⁷ and public interest practices,¹⁸ but my students’ reaction to Schiltz’s visit prompted us to turn our attention to corporate law firms. By casting further light on the professional challenges these firms encounter and on how they and other institutions of the legal profession are now addressing these challenges or might address them in the future, we hoped to further discussion on these subjects within the profession and ideally to advance the profession’s thinking. Additionally, we hoped to develop writings that would assist our current and future students and others like them seeking careers in large firms to do so with a greater degree of sophistication and with greater insight into how best to benefit personally and professionally from the experience.

Toward these ends, the Stein Center joined with five co-sponsors¹⁹ to organize a full-day conference titled, “Professional Challenges in Large

16. Remarks of Michael S. Greco, Boston College Law School, Aug. 31, 2004, available at <http://www.bc.edu/schools/law/alumni/75celebration/features/fall04/greco/>; see also *infra* note 58 and accompanying text.

17. See, e.g., *The Changing Role of the Federal Prosecutor: In Memory of William Tedy*, Eighth Annual Stein Center Symposium on Contemporary Urban Challenges, 26 FORDHAM URB. L.J. 347 (1999).

18. See, e.g., *Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, 67 FORDHAM L. REV. 2415 (1999); *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1281 (1996).

19. The co-sponsors were: American Bar Association Standing Committee on Professionalism; W. Lee Burge Endowment at the Georgia State University College of Law; NALP Foundation for Law Career Research and Education; New York State Bar Association Committee on Attorney Professionalism; and New York State Judicial Institute on Professionalism.

Firm Practices.” Held at Fordham University School of Law on April 15, 2005, the conference brought together practitioners, legal academics, and others—including the Chief Justice of Georgia and the editor-in-chief of *The American Lawyer*—to examine professional challenges facing large law firms as the nature of legal practice changes in the early twenty-first century. Speakers and attendees were invited to offer reflections and recommendations in response to four broad questions:

- Can law firms continue to meet the challenge of enhancing young lawyers’ professional development?
- Can they maintain a high quality of practice—and their lawyers’ quality of life—given the pressures of the billable hour?
- Can they serve the public good?
- And what, if anything, can other institutions do to encourage and support law firms in the pursuit of new and better management practices?

Additionally, participants were invited to contribute articles and essays expanding on their reflections for inclusion in this book of the *Fordham Urban Law Journal*.

This Foreword has two modest aims. First, it offers a flavor of the discussions at the Conference. Unless otherwise indicated, quotations in the Foreword to comments made by the participants are to the transcripts of the Conference.²⁰ Second, it introduces the writings contained in this collection growing out of the Conference. I commend these writings to lawyers who work in large firms and to future lawyers who seek to do so as well as to others in the legal profession who are rightly concerned about the nature of large firm practice.

I. THE ROLE OF THE LAW FIRM IN THE EDUCATIONAL CONTINUUM

Given how long and hard lawyers in large firms work, do associates have time for professional development—that is, time to learn how to practice skillfully, knowledgeably and ethically, and to develop sound judgment—and do senior lawyers have time to teach them? If not, will associates learn enough anyway in the course of their hard work? These are serious questions for law firms, young lawyers, and the legal profession alike.

20. The transcripts are on file with the *Fordham Urban Law Journal*.

In 1992, the MacCrate Report²¹ began with the premise that law school is just the beginning of a lawyer's professional development and described the "educational continuum" that stretches until the end of one's legal career. As law practice becomes increasingly complex and specialized, the gap has widened between what lawyers can learn in law school and what they need to know to represent clients, especially in the complex commercial matters on which large firms concentrate. Even a century ago, it was well recognized that newly admitted lawyers needed to continue their education. Today, it is understood that junior and senior lawyers alike must do so. Continuing Legal Education ("CLE") requirements underscore the point.²²

While individual lawyers have the primary responsibility for their own education and development,²³ institutions of the legal profession have an important role in supporting lawyers in these efforts. The MacCrate Report, for example, identified the critical need for newly admitted lawyers to receive training in the law firms and other professional settings in which they begin their practices.²⁴ While describing the expansion of in-house training programs at law firms,²⁵ the report also emphasized the importance of learning on-the-job, and thus, the importance of "training senior attorneys to become more effective supervisors, to make better work assignments, to manage the efficient flow of work done under their direction, and to provide effective critiques of that work."²⁶

Large firms express a commitment to educating associates, if only for the firms' own survival.²⁷ Thus, Donald Bradley²⁸ challenged the idea that

21. SECTION OF LEGAL EDUC. & ADMISSIONS, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT, AN EDUCATIONAL CONTINUUM, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (1992) (commonly referred to as the "MacCrate Report" after its chair, Robert MacCrate) [hereinafter MacCrate Report].

22. Mandatory CLE evokes varied responses, however. See, e.g., Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 954 (2001) (explaining that attendance at Continuing Legal Education escalated only when state bars required lawyers to attend); Cameron Stracher, *I Want My CLE, Who Really Benefits from Continuing Legal Education, Rules of Reciprocity, and Other Forms of Attorney Regulation?*, AM. LAW. July 2005, at 73 ("Mandatory CLE is just part of a larger pattern of attorney regulation that is all about gilding the bar, not protecting the public.").

23. MACCRATE REPORT, *supra* note 21, at 225; AMERICAN BAR ASSOCIATION MODEL RULES OF PROF'L CONDUCT R. 1.1, cmt. 6 (2003).

24. See MACCRATE REPORT, *supra* note 21, at 285-317.

25. *Id.* at 314-15.

26. *Id.* at 315.

27. Although not necessarily *all* their young lawyers. See *infra* notes 41-42 and accompanying text.

“mentoring, training, and professional development take a backseat to the demand for the billable hour, to the quest for ever-increasing profits per partner.” He contended that “large law firms recognize very clearly that the long-term success of their institutions rests on developing great lawyers, generation after generation. If they fail in that task, the firm will fail.”²⁹ One might question whether law firms’ self-interest will, in itself, sufficiently motivate them to focus on their associates’ professional development, given increasingly high associate turnover and the highly repetitive nature of some associates’ tasks. But even in firms that are genuinely committed to educating their young lawyers, the nature of professional development has invariably changed dramatically.

a. Impediments to on-the-job training

At one time, large law firms took credit for offering substantial on-the-job training, which contributed to their reputation as the ideal training ground for young lawyers.³⁰ Firms would assign young lawyers small cases on which to cut their teeth and senior lawyers would bring young lawyers along to watch depositions and judicial proceedings. Senior lawyers would painstakingly review young lawyers’ writing. For example, Bradley recalled, “I was a product of on-the-job training and had the pleasure—sometimes pain—of sitting with a senior partner and a mid-level partner for about five years, trying to teach me what it meant to be a lawyer and the values I should possess and the skills I should develop.” No doubt, young lawyers received supervision and mentoring in varying amounts and of varying quality, but generally, they received progressively more challenging work and sufficient feedback to enable them to develop the knowledge and skill to become excellent lawyers.

No one at the conference challenged the premise that “you learn how to practice law by practicing law,” and Drake Colley,³¹ a government lawyer who formerly practiced in a firm, made this the theme of his reflections. Just as the best way to learn to bake a pie is not to listen to a lecture about it

28. General Counsel, Wilson Sonsini Goodrich & Rosati.

29. Likewise, Paul Saunders, the panel moderator, noted: “[I]f we didn’t train our young lawyers to practice law the right way, eventually the firms would disintegrate. That is, we need to be able to train lawyers to practice law the right way for our own selfish reasons, if for no other reason. We need to do that in order to survive.” Paul Saunders is a Partner at Cravath, Swaine & Moore, LLP.

30. Vilia Hayes observed: “When I was a student at Fordham, the conventional wisdom was, you may not like a large law firm, it is maybe going to be a sweatshop—we didn’t really know what that meant but we knew enough to be concerned about it—but, the idea was that you could always go for three years, and you were going to learn something more.”

31. Senior Counsel, New York City Law Department.

but to actually get in the kitchen and bake, he maintained that the best way to learn to practice law is not to attend lectures or similar formal instructional programs but to learn on the job. He offered some illustrations from his own experience how “the practical application is crucial to professional development. . . . [F]or many [litigators]—certainly for myself—the greatest lessons are learned by being forced to rise to the occasion by an adversary.” He compared the training he received as a law firm associate with the training offered by the city law department in which he now works. Like law firms, the law department offers extensive CLE training, but it also gives its young lawyers considerable responsibility for handling cases on their own with mentoring and supervision, resulting in an “accelerated learning experience” that, in Colley’s view, amounted to “training that is probably unmatched in any other organization.”

One might question whether the quality of informal training at law firms was as outstanding two or three decades ago as older lawyers now recall. But nonetheless, there seems to be agreement that in large firms, more so than in the public sector, opportunities for high-quality on-the-job training are on the wane. The pressure to bill many hours is just one culprit, and perhaps not even the prime one. Bradley identified other relevant “forces that have changed the practice of law”: client expectations that work will be performed around-the-clock and at a moment’s notice,³² technological changes,³³ pressure from clients to provide cost-effective services,³⁴

32. Bradley noted: “Thirty years ago, a client would never have called up on a Friday night and said, ‘Hey, we’re doing a deal this weekend, and we want a signed, definitive document announced before the market on Monday.’”

33. Bradley observed:

First we had fax machines—when I started, we didn’t have those—computers, email, cell phones, and what are now affectionately referred to as “crackberries.” They are god-awful instruments, and they radically changed the nature of the delivery of legal services. Lawyers are 24/7, and are expected to give instant responses. It is all about time compression.

Similarly, panelist Paul Saunders noted:

The instant communications that we have in the practice of law, and the [instant] technology available to lawyers . . . have dramatically changed the practice of law in ways that we are just beginning to understand. When I first started practicing, if you were given a legal research project, you would take your yellow pad and . . . spend a week in the library. Today you are required to have the answer within ten minutes, not only [by] the other lawyers in the firm, but [by] your clients, who know that you can do it. So the practice of law has become much more intense.

34. Bradley noted that the general counsel of corporate clients place “tremendous pressure on law firms with respect to their budgets, their discounts, lean staffing, capitalizing on expertise, knowledge management—anything to make the process more efficient and take less time.”

competition and the attendant decline in client loyalty,³⁵ and the advent of “mega-firms” of 3,000 or more lawyers, an environment in which mentoring is “a fairly challenging task.”

The phenomenon that Bradley termed “time compression” seems to have made substantial on-the-job training a thing of the past. One problem is that senior lawyers no longer have time to critique junior lawyers’ work, much less to serve as mentors.³⁶ Vilia Hayes³⁷ recalled that “[f]or years, people learned how to [write a brief or a commercial document] by drafting, by having somebody mark it up, by [having him or her] sitting there and talking to you. Some people remember that fondly. I remember that in excruciating detail, when somebody would sit with you for two hours and go over the brief. I don’t think you have as much time to do that.” Beyond that, senior lawyers do not necessarily see the professional development of young lawyers as an important role for themselves,³⁸ nor do they have an incentive to engage in it.³⁹

Time pressures also impede young lawyers’ ability to teach themselves. Hayes recalled that when she entered practice, “the idea always was that if

35. Bradley noted: “The client doesn’t pick one law firm and one lawyer to serve all his needs. . . Now everything is shopped—expertise, ability to deliver high value quickly . . . All of that, again, compresses time.”

36. Aric Press observed: “[I]t is a curiosity to me why you have to be so good in order to get hired at one of the great law firms, but once you get there, so few are good enough to reach protégé status . . . It is more difficult sometimes, it seems, to get a job at these places than for a wealthy man to get into heaven, and once you are there, the number who then become protégés [is so small].”

37. Partner, Hughes Hubbard & Reed LLC.

38. Bettina Plevin observed:

[T]he people who are senior partners today have a very different mindset about their professional life and balance than at least what you read about people who are coming out of law school today. I think there are a lot of disconnects in attitude, and that more senior people have their focus much more on business than they do on developing people. If you compare it to a corporate structure, you would find . . . people rise, often, because of their ability to manage people and deal with people. This is not really a valued characteristic when you look to make someone a partner. We are a very odd structure, a large law firm. We don’t have a lot of the infrastructure to teach people how to do those things. So I think it is a major issue. I don’t have any great solutions, but I think there needs to be, probably, a lot more recognition, certainly within the bigger institutions, of the need to bridge the gap and pay more attention to mentoring than there has been.

39. Elizabeth Chambliss noted:

[N]o individual partner really has a very big incentive to play that role individually, and the firm doesn’t manage it as an entity, so there is no incentive structure. If we assume that you find your one person you can rely on all the time, that is all you really need at a senior level. You don’t have any individual purchase in trying to develop and mentor more than a handful of people over a junior-partner career.

you went to a law firm and you had cases that were of significance to clients, there was the time to do the job as carefully as you wanted. That afforded a junior person a chance to learn the skill [of practicing law], and there was time to do that.” But today, junior lawyers are under the same time pressure as senior lawyers. Bradley underscored the point, observing that “a lot of young lawyers don’t have time to think, don’t have time to process, and are looking for instant answers somewhere, so that they can get their work done within the time frame that the client expects.” For similar reasons, junior lawyers have difficulty taking advantage of educational opportunities available to them.⁴⁰

Client pressures also reduce young lawyers’ opportunity to learn by taking on responsibility for small matters or by trailing senior lawyers. Clients are no longer willing to pay large firms’ hourly rates in small cases that can be handled by less expensive firms or in-house. Nor are they willing, as they once were, to pay for young lawyers to accompany senior lawyers purely for the young lawyers’ edification.

Further, because of the increasing scale of clients’ matters, and the repetitive nature of some of the assignments parceled out to junior lawyers, young lawyers may not have the chance to undertake progressively more challenging work. As Hayes noted, “If you have [a] case where you are on the privilege team and you are reviewing privileged documents for a year, the firm has to come up with a different way to make sure you are not going to have just that one limited experience, so that at the end of a few

40. Jim Altman described the following experience teaching in-house CLE programs:

[S]ometimes I confront a group of students, so-called—the young associates—who frankly are resentful of having to be there, because they have their concerns about the work that they have to accomplish. They are working under deadline.

We ran a trial training program this year, with modules and instruction about witness testimony and experts and evidence and openings and closings and jury selection—the whole thing—over a period of five months. When we first started, it turned out that we had a couple of open slots, and I offered this program to a couple of our mid-level associates, fourth or fifth-year people. I got a very lukewarm response . . . These are litigators who want to make their career in litigation, and here you are offering this program, which is, I think, an incredible opportunity. But, of course, from their perspective, it wasn’t so incredible, because it was kind of beside the point.

. . . .

[Y]es, I can understand, they are asked to do the billable work. On the other hand, this is their life’s work. The idea that they might not be as interested in a training program that is going to teach them to improve in their skills and the things that they are going to do on a day-to-day basis, presumably, for the next couple of decades, just struck me as strange.

. . . .

I chalked it up to just weariness, given the number of hours that people are working, truthfully.

years, you are going to [know how to] practice.” Some firms have apparently responded by creating two tiers of associates⁴¹ or by hiring “contract lawyers” to conduct much of the less challenging work,⁴² but the result has been to provide for a better education of one tier of junior lawyers at the expense of another.

Finally, when it comes to mentoring female associates in particular, an additional impediment is what Elizabeth McManus⁴³ calls, in her fine contribution to this book, “the intimidation factor.”⁴⁴ McManus stresses the importance of mentoring, especially informal mentoring, for young lawyers’ professional development, but says that women’s opportunities for informal mentoring are constricted by law firms’ “culture of avoidance.” “Young associates are afraid to approach busy partners for help, women partners are afraid to turn away from their primary job responsibilities and saddle themselves with an added time demand, and men are afraid of violating the cultural norm of avoidance that has emerged because of the fear of sexual harassment in the workplace.”⁴⁵

b. How should firms respond to the problem?

Given the evolution of large firm practice, what can firms do to preserve their important role in promoting junior lawyers’ professional development? Hayes suggested that, among other things, law firms should attempt to stem the tide by making conscious efforts to promote traditional, on-the-job training. She proposed that given clients’ unwillingness to bear the cost of on-the-job training, law firms should pick up the expense of bringing young lawyers to meetings and court proceedings, and that firms

41. See, e.g., David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1609-14 (1998) (explaining that certain associates are given the training and work necessary to become partner, while the others are given paper work).

42. See, e.g., Leigh Jones, *More Firms Using Temporary Attorneys*, NAT’L L.J., Oct. 10, 2005, at P1, 10 (reporting that a “survey of the nation’s 250 largest law firms reported this year that they hired significantly more temporary attorneys, also known as contract attorneys, than in 2004,” and referring to one firm currently employing 220 attorneys as well as approximately forty-four staff attorneys, lawyers who work full time, but are not on a partnership track); Karl A. Schieneman & Valerie Horvath, *From the ACBA: Law Firms Address Compensation Issues*, 2 LAWYERS J. 4, 16-17 (2000) (suggesting that firms hire “contract attorneys” at a lower rate than associates only to perform labor intensive, entry-level tasks).

43. Associate, Proskauer Rose LLP.

44. Elizabeth McManus, “*The Intimidation Factor*”: *Gender and Mentoring in Big Firm Practice*, 33 FORDHAM URB. L.J. ___ (2005).

45. *Id.* at ___.

should encourage young lawyers to take on pro bono cases not only as a matter of moral obligation but to promote their own development. She also suggested that law firms should institutionalize the provision of “feedback” and “one-on-one mentoring,” which in the past would have occurred informally, and noted that partner compensation can take into account the contributions made by senior lawyers as mentors—ideas with which McManus’s essay concurs.⁴⁶

Additionally, more forethought might be given to the role of formal education—in-firm and outside CLE programs—complementing on-the-job training.⁴⁷ Bradley described the efforts at his firm to compensate for insufficient mentoring by ramping up the firm’s training program, which includes a one-week “boot camp” for new lawyers and new lateral attorneys, ongoing formal training in substantive law, an ongoing professional skills program, mandatory training in risk management, and an “academy” for fifth-year associates who are “beginning to look down the path of partnership” to develop additional skills, such as “managing the client relationship.”

Bradley’s description suggests the particular importance of identifying the skills and knowledge that junior lawyers need to develop as they progress in their careers and ensuring that they have opportunities to develop them, if not through work assignments and supervision, then through formal educational programs. Professor Margaret Raymond’s contribution focuses on this problem and, in particular, on the challenge of training junior lawyers to deal with problems of professional responsibility.⁴⁸ Raymond argues that the movement toward specialization in large firm practice has spread even to the subject of professional responsibility. As professional standards become increasingly complex and

46. *Id.* at __.

47. For example, Paul Saunders responded to the perception both “that the role of the lawyer in practice is one of continuing education and continuing learning” and “that law itself is so complicated and so difficult that law schools simply don’t have the time to sufficiently educate students to become practitioners.” He noted that his own firm, Cravath, Swaine & Moore, developed “a very extensive and elaborate in-house training program,” offering 125-150 classes a year to young associates. Increasingly, the professional literature includes discussions by law firm “professional development coordinators” and others about how to foster education in law firms. *See, e.g.,* Dimitra Kessenides, *Revitalizing Corporate Law Training Programs*, AM. LAW., Sep. 1993, at 42 (detailing the efforts in 1992 of the professional development coordinators from several North American law firms to create a model associate training program); *Using Training to Improve Productivity and Retention*, ACCOUNTING OFF. MGMT. & ADMIN. REP., July 2004, at 1 (citing to a professional development coordinator to explain the training initiatives at a Denver Firm).

48. Margaret Raymond, *The Professionalization of Ethics*, 33 FORDHAM URB. L.J. __, __ (2005). Professor Raymond is a professor of law at the University of Iowa College of Law.

junior lawyers are pressured to specialize, she argues, they come to rely excessively on the law firm's ethical infrastructure (e.g., compliance specialists, ethics consultants and conflict committees) to resolve and perhaps even identify ethics problems.⁴⁹ While placing considerable blame on the ethics rules themselves, which she says should be supplemented by "a straightforward expression of the principles underlying the ethical practice of law,"⁵⁰ Raymond encourages firms to focus on ethics training that is specifically directed at the areas of practice in which their junior lawyers work.⁵¹ Additionally, she proposes that firms emphasize the importance of ethics to legal practice by enhancing the status of their ethics advisors.⁵²

Finally, Paula Patton's⁵³ contribution to this book looks more broadly at the elements of an excellent training and education program.⁵⁴ She focuses on three elements: formal training based on a curriculum with developmental benchmarks, performance standards, and core competencies; work assignments that are made with an eye toward associates' capabilities and that are designed to strengthen and expand them by challenging them and teaching them new skills; and systematic evaluations that motivate young lawyers to improve their work.

II. BALANCING QUALITY OF LIFE AND DELIVERY OF LEGAL SERVICES WITH THE DEMANDS OF THE BILLABLE HOUR

Given the number of hours lawyers are expected to bill in large firms, and the even larger number of hours they must spend at work to meet these expectations, can lawyers in large firms remain happy, healthy and ethical? Whatever may have been the reaction six years ago when Patrick Schiltz called law an "Unhappy, Unhealthy, and Unethical Profession," there is now a broadly shared perception that professional satisfaction is on a sharp decline in law practice, especially large firm practice, and that the "billable hour" deserves much of the blame.⁵⁵ At the conference, Professor Susan

49. *Id.* at ___.

50. *Id.* at ___.

51. *Id.* at ___.

52. *Id.* at ___.

53. CEO/President, NALP Foundation.

54. Paula A. Patton, *Large Law Firms and Their Role in the Educational Continuum*, 33 FORDHAM URB L.J. ___ (2005).

55. As Kenneth Standard, the panel moderator noted, the problem is not simply billable hours, it is also "the cultural and technological changes that have overcome all of us." Kenneth Standard is a Member of Epstein, Becker & Green P.C. Bradley's reflections at the Conference elaborated on this point:

Quite frankly, at sixty-one, I didn't expect to be answering a hundred voice mails

Fortney⁵⁶ summarized research that underscored the point that billable hour pressures were causing associates to leave large firms. In particular, she noted, the pressures were borne by ethical associates, those who were unwilling to meet expectations by padding their hours.⁵⁷ Precisely for this reason, the Conference keynote speaker, Michael Greco, chose “a renaissance of idealism” as the overarching theme of his year as ABA President.⁵⁸

a day, two hundred emails a day, and on my way home at night, having my partner, who is in Beijing, call me to discuss some issues, and when I got home, having my wife look at me and say, “You had three or four calls from folks. Such-and-such a client wants you to call back tonight.” It has a very significant impact on the quality of life. But the legal profession—it is that slavish mistress. You can either practice a hundred percent or you can stop practicing. It is very hard to practice part-time.

56. Associate Dean, Professor, Texas Tech University School of Law. For earlier works by Professor Fortney on large firm practice, see Susan Saab Fortney, *An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 65 TEX. B.J. 74 (2002); Susan Saab Fortney, *Are Law Firms Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 47 DEF. L.J. 115 (1998); Susan Saab Fortney, *Law Firm Risk Management and Peer Review*, 51 CONSUMER FIN. L.Q. REP. 98 (1997).

57. For other discussions of this problem, see, for example, Susan Saab Fortney, *I Don't Have Time to be Ethical: Addressing the Effects of Billable Hour Pressure*, 39 IDAHO L. REV. 305, 315 (2003) (“Those associates who refuse to engage in unethical billing practices such as double-billing must work harder and longer than those associates who cut corners. One respondent in my study captured the dilemma of ethical associates in stating, ‘I can’t compete with estimator, but I’m not willing to compromise my strict billing practice either.’”); see generally Lisa G. Lerman, *The Slippery Slope From Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879 (2002) (attributing the unethical “padding” of hours to the financial incentives for lawyers to increase their billable hours); Lisa G. Lerman, *Scenes from a Law Firm*, 50 RUTGERS L. REV. 2153 (1998) (recounting the story of chronic over-billing at the firm of an anonymous whistle-blower).

58. As Greco explained at the Conference:

There are easily twenty different challenges that I could have selected. Why this one? The answer is that, for the last year-and-a-half, I have been listening to lawyers throughout America, especially the young lawyers When I saw these best and bright young lawyers, who have been in firms three to five years, express such sadness about their career choice—they want to leave their firms.

The American Bar Foundation validated what I heard these young people say to me. In the ABF survey, five years ago—three to five years out of law school—sixty-seven percent said that they were thinking of changing their place of employment; thirty-seven percent of them said that they made a mistake in becoming lawyers

So I decided that things are not right with our profession. All of us have allowed it to become what it has become. There is no one person to blame, no one size firm. But it is what it is today. We have disenchantment. We have young people who are not going to law school because . . . they know what they are going to encounter

. . . .

One question is why the average number of hours billed by lawyers in large firms has increased so markedly in recent years. Among the causes identified were the declining use of lock-step compensation for partners⁵⁹ and the increasing movement of partners—particularly “rainmakers”—from firm to firm.⁶⁰ James Towery⁶¹ pointed to three others: (1) “the development of the computer and its ability to analyze time records for law firms”; (2) *The American Lawyer’s* publication of profits per partner, which led “managing partners [to set] forth explicit goals about what they want profits per partner to be, to help them in that great race”; and (3) the “associate salary race”—that is, the increase in associate salaries by law firms competing to attract the best and the brightest law graduates.

This last factor was where Steven Krane⁶² placed the principal blame in a deliberately provocative set of comments:

Let’s talk about why we are where we are. The simple answer is associate salary escalation. When I returned from my clerkship in the court of appeals back in 1985, my take-home pay actually decreased from my clerking days to coming back to private practice because of some differentials in tax from being a state employee to a private employee. There was really no difference in terms of what I was getting before and what I was getting after. It was actually a little bit less.

[L]awyers aren’t allowed the time to devote to other endeavors, whether it is family or whether it is doing pro bono work, doing public service. Whether we keep the billable hour model or not, law firm decision makers have to understand that we have to free up time in the law offices for lawyers who want to do public service, who want to do other things, so that they can do it. And they will stay at the firm—not all of them, but most of them will stay. They will be happy. The morale will be great for the rest of the firm. But the billable hour is a key issue, a key problem with this.

59. Krane observed:

I think that has made a tremendous change. It puts a great deal of pressure on everyone, from the most senior partner down to the most junior associate, to produce. Productivity, at least in the partner ranks, is measured essentially by hours billed and dollars collected from clients. Then there are some intangibles that they throw in, or at least they say they do—“they” being the people who set the compensation. That goes for whether you are compensated by allocations from profits or percentage points that get determined from year to year.

60. Bruce MacEwen observed:

[T]he maturation and increasing sophistication of the market for lateral partner mobility has changed everything. If that market ceased to exist, half these pressures would go away. What, in my analysis, absolutely drives the perceived need for ever-increasing profits per partner is the fear of losing good people and the desire to attract good people.

61. Partner, Hoge, Fenton, Jones & Appel, Inc.; past president, California State Bar Association.

62. Partner, Proskauer Rose LLP; past president, New York State Bar Association.

Associate salaries at the time were in a creeping period. Associate salaries have moved in leaps and creeps. We were in a creeping period at the time. We had the great leap forward of 1968 from \$10,000 to \$15,000. There were some leaps in the early 1980s and the late 1980s, and then the Silicon Valley-driven leap in 1999, I believe it was. These leaps are usually led by one or more law firms, and the rest of the large firms follow.

Conscious parallelism? Yes, absolutely. That is the case. You have to follow the lead of the other large firms, because, otherwise, you are second-rate. If you are not first, you are last. If you are not in the top tier, you are second-rate. You don't want to be perceived as second-rate. Why not? Because you want to attract the best and the brightest law students. What objective criteria do law students have to differentiate one firm from another? Not much. What criteria do law firms have in the hiring practice when they are looking at the so-called best and the brightest? Not much.

All these decisions are made on the basis of imperfect information. You do the best you can. As an employer, you try to get the top students from the top schools. You want to be able to tell your clients, "We have top students from top schools. That is who is doing your work for you."

So you go to look for them, and you make your decisions based on, essentially, first-year grades, a résumé, maybe the results of a writing competition where they got on a journal—maybe not—and half-hour interviews. You have no idea whether they are going to be good lawyers, but when they come out and they start working for you, you are going to pay them \$125,000 a year or more. That is the reality of law firm economics.

Law firms are not eleemosynary institutions. They are in it for making profit. That is part of the business of the practice of law.

Besides making lawyers unhappy, their expanded work day threatens the quality of their work. The fatigue that sets in when lawyers work long hours makes it hard for them to work at their best.⁶³ James Towery

63. Kenneth Standard noted:

There have been studies showing that physicians make far more errors—particularly those who are in their residency programs—because of fatigue. As you probably recall, there has been a reduction that has occurred in the hours that interns have to work. The hours are reduced to eighty per week. But even eighty is stretching anyone beyond his limits. When you hear the concern expressed among medical practitioners about malpractice lawsuits, you think about how many of those malpractice lawsuits might have been avoided if the physicians had been less tired. I think that could relate to us in the legal profession also, though I don't think we work, generally, the same sorts of hours.

suggested that the quantity of time spent representing clients was overvalued at the expense of the quality of lawyers' work:

[F]undamentally, the economics of large law firms—and it is absolutely an economic perspective—are putting so much pressure on things now that the message that we are sending to partners and associates alike is that it is not the quality of the work that you do, but rather it is the quantity, and that is what you are going to be measured by. I think that is fundamentally wrong for the profession.

Professor Fortney made a similar point:

If you think about attorneys who pride themselves on doing quality work, they may find themselves at what we view as a kind of competitive disadvantage when firms put more and more weight on hours produced, such as the bigger bonuses only kicking in at a certain income level. If we view it from the standpoint of the firm, the profession, the public, we all, I think, are hurt when we have this kind of quantification. Lawyers may feel the pressure to cut corners, to overwork files, possibly pad [bills], rationalize questionable practices.

At one time, associates might have thought that they had a fighting chance of being rewarded at the end of their ordeal by winning the “partnership tournament.”⁶⁴ But even as hours have risen, partnership prospects have declined, Larry Fox argues in one of his contributions to this book.⁶⁵ And besides, becoming a partner has lost some of its allure.

Adding to her important scholarship on the billable hour and its implications, Fortney's contribution to this book⁶⁶ describes a recent National Association of Law Placement (NALP) survey of associates and managing partners which confirms many of the widely shared views about

Similarly, Susan Saab Fortney observed: “Clients pay lawyers to think critically, to be creative. The question becomes: Is that something that a lawyer is able to do when he or she is consistently billing over 2,400 hours a year?”

64. See, e.g., Wilkins & Gulati, *supra* note 41, at 1627-34 (“[T]he tournament metaphor remains an important building block for constructing a plausible model of the internal labor markets of elite firms.”); Marc Galanter, “*Old and in the Way*”: *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1091 (1999) (“Firms organized around a promotion-to-partnership tournament contain an inherent growth dynamic; they tend to grow exponentially.”); Kevin A. Kordana, Note, *Law Firms and Associate Careers: Tournament Theory Versus the Production-Imperative Model*, 104 YALE L.J. 1907, 1918-19 (1995) (arguing that the “partnership tournament” purposefully and successfully provides incentive for all associates, not just those with a natural inclination towards partnership, to work hard).

65. Lawrence J. Fox, *The End of Partnership*, 33 FORDHAM URB L.J. ___ (2005). Fox is a Partner at Drinker Biddle & Reath, LLP.

66. Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB L.J. ___ (2005).

high billable hour quotas and targets. Associates perceive that they are judged based on the number of hours they work.⁶⁷ The expectation that they will bill 2,000 hours, 2,200 hours, or sometimes even more, impedes both their ability to think critically and creatively when they are at work and their ability to maintain a satisfactory, balanced life outside work.⁶⁸ The consequences include associate dissatisfaction, attrition and padding of hours.⁶⁹

b. What can be done about it?

One way to respond to the tyranny of the billable hour may be for law firms to bill in a different way. Jim Stuckey⁷⁰ suggested that attorneys consider negotiating for fees based on the result achieved, not the number of hours spent. Bruce MacEwen⁷¹ argued that, wholly apart from its effect on lawyers' lifestyle, hourly billing was unsound from an economic perspective:

When I look at the phenomenon of the billable hour, it strikes me that it ties price to cost of production as opposed to value to client. Fundamentally, that offends logical economics.

There are a couple of other things I want to say about it. I think that there is a sense that the value of legal services is ineffable, so we are going to put a falsely precise measure in place. I think everybody would admit that it is a false precision. I think we would admit that in a heartbeat. It is almost a transparent absurdity to think that the tonnage of time that you throw at a matter is more important than the inspiration you may have when you are running in Central Park that morning that cuts to the heart of things, which is not even worth a tenth of an hour in terms of billable time.

One of the other aspects of it is that I think it kind of institutionalizes a structural conflict between the client's desire for efficiency and high productivity and a certain level of confidence around what this legal service quantum here is going to cost—so that is the client's desire on one side: efficiency, high productivity, certainty about price.

The law firms, on the other hand, their interest, pretty self-evidently, is profitability. That usually starts with revenue. That means a lot of

67. *Id.* at __.

68. *Id.* at __.

69. *Id.* at __.

70. Partner, Nelson Mullins Riley & Scarborough LLP.

71. Creator and host of *Adam Smith, Esq.*, a weblog "inquiry into the economics of law firms," <http://www.bmacewen.com/blog/> (last visited Oct. 24, 2005).

billable hours. It also discourages, of course, firms from being more productive. To some extent, it goes back to the first panel, in that maybe you don't want to get your associates up to speed too fast; they won't be able to bill all the hours

I have a little thought experiment for you. Rather than nitpicking over the first-year associate's write-offs, wouldn't you rather have a truly high level, thoughtful, economically grounded conversation with some of your important clients about how your firm can deliver compelling value to them in the area of legal services? That conversation, to me, seems like the most interesting conversation you could have as a lawyer and as a businessman.

Another possible response to the pressure on large firm lawyers to bill (and actually work)⁷² an escalating number of hours each year is for firms to establish compensation systems permitting associates to work fewer hours for reduced salaries. Responding to the premise that billable hours were driven by associates' demand for high salaries, Fortney argued that "more and more associates are willing to make less to work less," and urged law firms to "eliminate these high billable hour expectations and bonuses that are based on numerical benchmarks." Stuckey suggested the importance of crediting pro bono work toward billable hour requirements.

Relatedly, Fortney and others noted the need for law firms to eliminate barriers that make it difficult for lawyers to take advantage of part-time work arrangements and other programs that are already in place to allow lawyers to work fewer hours for less compensation. Fortney observed:

[M]ost fundamentally, firms should rethink this all-or-nothing model of promotion to partnership and consider having multiple tiers and opportunities within the organization. The concern now that we find among associates is that they are afraid of reduced-hour arrangements because it will affect their long-term treatment and advancement. Some of these attorneys want to do quality work, but at the same time, they understand that if they ask for a reduction, it will mean them being treated as second-class attorneys and would be kind of professional suicide.⁷³

72. Noting the tendency of billable hour expectations to encourage lawyers to pad their bills, Fortney emphasized the need for law firms to discourage unethical billing practices, such as by auditing billings over a certain level, "rather than rewarding the heavy-handed biller."

73. While not taking issue with the point that part-time associates may receive less status and lower quality assignments, Krane did suggest that associates were not significantly disadvantaged in seeking promotion to partnership, for the simple reason that the partnership tournament is becoming a thing of the past:

Now what we have is a stick with a rope attached, and nothing at the end of it. Promotion from within has become so rare as to be no longer a realistic incentive for associates. The mantra is that true growth occurs only by acquisition, that you

Additionally, as Deborah Rhode⁷⁴ noted, policies in place for part-time work are not necessarily implemented as intended.⁷⁵ Krane suggested that technology can promote flexibility in work arrangements by enabling lawyers to perform more work from home. Professor Clark Cunningham⁷⁶ added that, as a step toward changing a culture in which part-time lawyers are viewed as failures, “large law firms experiment with sabbaticals for both promising associates and productive partners, very much along the line of academic sabbaticals—three months, full pay, as a reward for particularly promising, productive, exceptional members of the firm.”

The cultural impediments to part-time and flexible work arrangements are explored more fully in the contributions to this book by Amy Uelmen⁷⁷ and Deborah Rhode.⁷⁸ Uelmen’s article is an important addition to the already impressive body of academic and professional literature on the “part-time paradox”—that is, “the struggle [of young women associates] to

do not grow the pie by promoting associates from within; it is only from bringing in outside partners with portable business that you increase overall profitability. Every now and then, you have to make an associate into a partner, just to maintain the illusion that there is some prospect of elevation at some point.

74. Ernest W. McFarland Professor, Stanford University Law School.

75. Rhode observed:

[T]he whole issue of balanced lives and how you make it work is an issue not just for women. If you look at polling data, increasing numbers of men say they want it, too. Whether they are willing to do the next step and vote with their feet—obviously, women are more likely and willing to do that than men.

. . . . [O]ne of the central challenges that we will talk about some in the afternoon is making the policy that looks good in principle actually work in practice. Part of the problem is in dealing with just the issue about availability that was mentioned earlier. Ninety percent of firms now offer part-time policies. Only three percent of women actually take them.

The reasons have to do not just with the second-class status that people feel, but also because the way that they are implemented, it turns out that you have “schedule creep.” People feel a lot of pressure to demonstrate commitment during those off-hours, and the liberating aspects of the technology also tether them to the workplace at times when they thought they were going to be off. The schedules aren’t respected, and the more the woman tries to maintain a professional persona of being totally committed, just not putting in the face time, the more the situation unravels. So a lot of people end up feeling like they are doing close to the functional work of a hundred percent availability, only part-time paid, and it is not worth it So figuring out a way to solve it in practice is where I think the key issues are. We could learn some from the accounting professions and other organizations that have done it better.

76. Professor and W. Lee Burge Chair in Law & Ethics, Georgia State University School of Law.

77. Amelia J. Uelmen, *The Evils of “Elasticity”: Reflections on the Rhetoric of Professionalism and the Part-Time Paradox in Large Firm Practice*, 33 FORDHAM URB L.J. ___ (2005).

78. Deborah L. Rhode, *Profits and Professionalism*, 33 FORDHAM URB L.J. ___ (2005).

build a career and a family at the same time.”⁷⁹ She argues that part-time work for reduced pay makes perfect sense from an economic perspective,⁸⁰ and explores the philosophical and rhetorical obstacles that seem to stand in the way of the success of part-time work arrangements. Among these are the idea that excellent “client service” requires every individual lawyer to be available around the clock—a notion that is belied by, among other things, the specialized nature of work in large firms and the consequent allocation of work among many lawyers, any one of whom is working on multiple client matters.⁸¹ Similarly, she argues that the concepts of law as a “calling” or “vocation” and other prevalent conceptions reinforce the idea that being a lawyer in a large firm makes a “total claim over one’s life.”⁸² Ultimately, she argues, “large firm practice can benefit from the sanity, balance, and even creative energy of attorneys for whom work is neither the exclusive focus of their lives nor their ultimate source of identity.”⁸³

Rhode, of course, is one of the preeminent academic commentators on issues of the professional workplace (among so many other subjects). Her article in this book examines the cost of excessive hours—including the human toll and the impact on recruitment.⁸⁴ Rhode identifies the economic and cultural barriers to “humane hours, alternative work arrangements and other family-friendly policies,” but argues that they are not insurmountable.⁸⁵ She points out studies that contradict some lawyers’ assumption that clients resist lawyers’ part-time arrangements, and proposes how firms can minimize internal resistance to such arrangements.⁸⁶ Rhode also emphasizes the need for large firm practitioners to rethink their priorities.⁸⁷ She cites studies showing that money is not the primary source of satisfaction, and offers a strategy for changing the culture of law firms, both through the internal efforts of law firm leaders, and through the influence of clients, courts, bar associations and law schools.⁸⁸

The articles by Uelmen and Rhode suggest that, whatever the utility of structural solutions such as changes in billing and compensation systems or work arrangements, lawyers in large firms will not succeed in recapturing

79. Uelmen, *supra* note 77, at ___ & n. 4 (citing literature).

80. *Id.* at

81. *Id.* at

82. *Id.* at

83. *Id.* at

84. Rhode, *supra* note 78, at ___.

85. *Id.* at

86. *Id.* at

87. *Id.* at

88. *Id.* at

balanced lives unless they rethink the attitudes and values that underlie the financial competition among firms that led to spiraling hours. Notably, it was a large firm partner, Steven Krane, who made this point most forcefully at the conference itself, when he observed:

The change needs to come at a more fundamental level. . . . We need to look at our business model and the way we go about organizing ourselves as a profession, get back to our roots as a learned profession, as a great and honorable profession, and start rethinking when enough is enough. When have we maximized our profits? Do we really need to squeeze the next \$100,000 in the profits-per-partner margin? I think there are a lot of partners out there in large firms who, if you ask them that question, will say, "we've reached the point where enough is enough. We'd love to roll it back, but we don't want to get left in the dust." Competitive pressures are great. But I think you are definitely on the right track in focusing the firms around the country on how they look at themselves as businesses.

Krane's prescription raises the hard question: What forces from within or outside large firms will persuade law firm partners to resist the business pressures to work more hours and make more money?

III. CAN LAW FIRMS DO GOOD WHILE DOING WELL?

Whether as a matter of self-worth or as a matter of reputation, law firms generally want to be thought of as "doing good" for clients and society, not just "doing well" for themselves economically. A threshold question, however, is what it means for law firms to "do good." The ordinary answer is often the importance of rendering pro bono services as an aspect of lawyers' personal or professional responsibility,⁸⁹ and that was at the

89. There is extensive literature on attorney pro bono work. See, e.g., DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* (2005); Cynthia Fuchs Epstein, *Stricture and Structure: The Social and Cultural Context of Pro Bono Work in Wall Street Firms*, 70 *FORDHAM L. REV.* 1689 (2002); Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1 (2004); Martha F. Davis, *Access and Justice: The Transformative Potential of Pro Bono Work*, 73 *FORDHAM L. REV.* 903 (2004); Claudio Grossman, *Introductory Remarks to "Historical Perspectives of Pro Bono Lawyering"*, 9 *AM. U. J. GENDER SOC. POL'Y & L.* 59 (2001); Deborah L. Rhode, *Cultures of Commitment: Pro Bono Work for Lawyers and Law Students*, 67 *FORDHAM L. REV.* 2415 (1999); Tanina Rostain, *Professional Commitments in a Changed World*, 70 *FORDHAM L. REV.* 1811 (2002); *Symposium on Mandatory Pro Bono*, 19 *HOFSTRA L. REV.* 739 (1991). This literature includes the recent collection of writings in this journal on the legal community's extraordinary response to the legal needs arising out of the 9/11 terrorist attacks. See Martha F. Davis, *Preparing for the Worst: Re-Envisioning Disaster Relief in the Era of Homeland Security*, 31 *FORDHAM URB L.J.* 959 (2004); Russell Engler, *Normalcy After 9/11: Public Service as the Crisis Fades*, 31 *FORDHAM URB L.J.* 983 (2004); Judith S. Kaye, Foreword, *The Legal Community's Response to 9/11: Public Service in a Time of Crisis: A Report and Retrospective on the Legal Community's Response to the Events of*

forefront of the conversation at the conference. But lawyers also have traditionally assumed public responsibilities outside the context of client representation, for example, in working to improve the law⁹⁰ and participating in public discourse on issues of public policy.⁹¹

Two panelists, Louis Craco⁹² and Professor Russell Pearce⁹³, maintained that if law firms serve their clients well, they serve the public good in all

September 11, 2001, 31 FORDHAM URB L.J. 831 (2004); Esther F. Lardent, *Pro Bono Writ Large: The New York Legal Community's Response to September 11*, 32 FORDHAM URB. L.J. 309 (2005); Judith L. Maute, *Reflections on "Public Service in a Time of Crisis"*, 32 FORDHAM URB L.J. 291 (2005); Deborah Rhode, *Pro Bono in Times of Crisis: Looking Forward by Looking Back*, 31 FORDHAM URB. L.J. 1011 (2004); Ronald J. Tabak, *A Practitioner's Reflections: The Ongoing Relevance of the Pro Bono Response to 9/11*, 31 FORDHAM URB. L.J. 953 (2004).

90. See, e.g., ABA MODEL RULES OF PROF'L CONDUCT, R. 6.4 (2003); Mary Ann Glendon, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 13 (1994) (discussing lawyers who "subordinate self interest to client representation and public service"); Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397, 1402 (2003) ("With the rise of corporate capitalism . . . the lawyer as statesman and courtroom advocate gave way to the lawyer as counselor and corporate board member . . ."); James Regan, Note, *How About a Firm Where People Actually Want to Work?: A "Professional" Law Firm for the Twenty-First Century*, 69 FORDHAM L. REV. 2693, 2698-99 (2001) (describing the lawyer-statesman ideal as both "emphasiz[ing] the importance of 'prudence or practical wisdom,' which enables the lawyer to best advise his or her clients and effectively serve the public interest" and allowing the lawyer to "tell clients (especially new clients) that they are damned fools and they should stop") (internal citation omitted).

91. Larry Fox observed:

[T]he last two years have brought to the legal profession some of the most serious crises we could possibly face. I can just list them: the Patriot Act, what has happened with the people at Guantanamo, our country's use of rendition, the torture, the destruction of the privilege that was discussed this morning, Sarbanes-Oxley, and the fallout from the *Schiavo* case.

I think our bar associations have done a wonderful job of responding to these issues, but I submit that the private bar has not. I think too many of us lawyers—and I consider myself one of those—have let the bar associations be our proxy. The bar association is a wonderful advocate, but it gets marginalized.

What we really need to do is have the leaders of these great law firms in America, who provide these outstanding legal services to these wonderful enterprises in America, stand up and be counted on these issues. We can no longer let the City Bar write the most extraordinary report on rendition but not have leaders of law firms individually let their clients know why these issues are so important.

So another way, I think, that law firms can do well by doing good is by stepping up, being more courageous on some very controversial issues, and letting the world know where lawyers stand on these important matters.

92. Chair, N.Y.S. Judicial Institute on Professionalism; retired partner, Willkie Farr & Gallagher; past president, Association of the Bar of the City of New York.

93. Professor, Fordham University School of Law.

aspects of their practice, and not exclusively or even primarily when they render pro bono services or engage in public service outside the representation of clients. Craco urged that lawyers should practice, and in fact continue to do so, in the spirit of one of his personal heroes, Louis Brandeis:

Brandeis exhibited a certain number of qualities that I think it is not impertinent to bring up.

He was a superstar lawyer in Boston and across the country. He was a multi-millionaire, which he earned by practicing law at a high level of aggressive profitability. In order to achieve socially useful ends which made him declare himself “the people’s lawyer”—not a bad publicity stunt—he used instrumental advice to produce from his clients what he thought were socially useful results—the famous *Brown Shoe* case,⁹⁴ in which he was able to achieve a reconciliation between the claims of labor and the claims of management. In his own article about it, he demonstrates it was done by showing management why it was cost-efficient for them to do what he thought was the socially right thing to do. It is no disgrace—indeed, it is part of the lawyer’s art—to find the instrumental reasons, the ways in which to induce hardheaded businessmen to accompany you on the road to a right result . . .

[M]y proposition is that same paradigm happens every day in lawyers’ offices across this City, and gets no notice. There is no publicity given to the train wrecks which have been avoided and super-publicity given to those which have occurred. I think that behavior by corporate lawyers in transactional settings, day in and day out, not only in big firms but in small firms across this state and across the country, is itself a public good. It is itself, as was pointed out by prior speakers, a service that lawyers perform in the public interest.

My thesis . . . is that the private practice of law is a public good. That is not normative. That is descriptive.

We preach to China, we preach to the former republics of the Soviet Union, that the first step in creating a liberal democracy and an efficient economy is the creation of the rule of law that permits reliable arrangements to be made and the impulse of the majorities to be restrained. That is done through law. It is as true of a developed economy and a developed democracy as it is true of those which are developing. The rule of law is indispensable to an efficient economy, a liberal democracy, and to the experiment that is America.

That rule of law is delivered in practice every day by lawyers. As Paul

94. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

Saunders once put it in another forum, the practice of law is where the rubber meets the road in terms of delivering the rule of law to real-life people. Zakaria's analysis of liberal democracy in his book *The Future of Freedom*⁹⁵ makes the same point.

My proposition is that concealed beneath the horror stories and the social data is a fact of enormous importance: That lawyers, in fact, give Brandeis-like advice to corporations and their executives all the time. They give prudential reasons—I have given prudential reasons why clients ought to do what I conceive to be the right thing: “You can do this or you can do that. If you do that, did you see the perp walk that the last guy who did that took? You like it? You want to join it?” There are all sorts of ways of putting it.

But my first proposition is that the Brandeis model is not dead, and, in fact, is thriving in the actual practice of law, and that it is, in itself, activity in the public interest.

Returning to a theme of his prior scholarship,⁹⁶ Pearce endorses Brandeis's vision of the corporate lawyers' role in promoting the public good through their day-to-day work, which “required the skills and moral judgment of a statesman.”⁹⁷ Consequently, while acknowledging the value of pro bono work as an aspect of a lawyer's service to society, Pearce decries the idea that lawyers can “do good” only by serving the poor. His disagreement with Craco is over whether this vision is alive and well. Pearce argues that since the 1960s, the prevailing view of the corporate lawyer's role has shifted, and that corporate lawyers now view themselves as extreme partisans who are morally unaccountable.⁹⁸ The result, he says, is that the legal profession has been divided metaphorically into “sinners” and “saints” and that in lawyers' minds, “doing good” has become the exclusive domain of pro bono and public interest lawyers.⁹⁹

a. Impediments to doing good

As large law firms evolve, it seems to be getting harder for them to “do good,” at least as far as pro bono contributions are concerned. Larry Fox

95. FAREED ZAKARIA, *THE FUTURE OF FREEDOM* (W.W. Norton & Co., Inc. 2003).

96. See, e.g., Russell G. Pearce, *Model Rule 1.0: Lawyers are Morally Accountable*, 70 *FORDHAM L. REV.* 1805 (2002); 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* 831, 388-89 (2001).

97. Russell Pearce, *How Law Firms Can Do Good While Doing Well (And the Answer is Not Pro Bono)*, 33 *FORDHAM URB L.J.* __ (2005).

98. *Id.* at __.

99. *Id.* at __.

emphasized the pressure to perform increasing hours of billable work for paying clients,¹⁰⁰ and noted that even if firms said that pro bono work would be counted toward the hours expected of their lawyers, lawyers were unlikely to believe it.¹⁰¹ Craco acknowledged that “the business emphasis” discussed throughout the conference constrains “the ability to perform free legal advice, because it displaces the time that would otherwise be spent on providing for paid legal advice,” but he identified what he regarded as a more important, yet admittedly odd, constraint: large firms’ reluctance to do controversial work.¹⁰²

Panelists disagreed on the extent to which constraints in large firms were actually impeding their pro bono contributions—that is, whether the cup is half full or half empty. On one hand, moderator Gail Flesher¹⁰³ cited a

100. Fox asked,

“How could we get in a position where the top 200 law firms, the top 100 law firms, earning all this money, cannot generate better pro bono? The truth is that the pressures on these law firms are real. The pressures to increase billable hours are unbelievable. Part of it is to pay salaries. Part of it is competition. Part of it is that money is never enough. You make \$1 million this year, you have to make \$1.1 million next year, whether you need \$1.1 million or not. But I think the biggest factor is competition. The law firms measure their worth by the *AmLaw* 100, and not their pro bono hours.”

The pressure Fox identified may not be limited to large firm practices. According to a recent survey of lawyers generally, “[t]he main discouragement from doing—or doing more—pro bono, is lack of time.” ABA STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 5 (Aug. 2005).

101. Fox recounted:

I chaired the ABA Death Penalty Project for six years. I went around the country trying to get law firms to take death penalty cases. Death penalty cases require an enormous number of hours. It cannot be done by having twenty-five lawyers at a law firm each spend ten hours on the case. You have to dedicate at least the time of one partner and one associate, half-time, for the time when the case is active, and maybe more than that.

That is what I got back: “Well, we’d love to do a death penalty case, but it won’t fit in with our matrix. What will we do with this poor associate who will spend 500 hours on a death penalty case?”

Maybe you will give him credit. The problem is that the associate will never believe that the associate is getting credit.

102. Craco observed:

In my experience, the very diversity of the profession as it has emerged and the political polarization of the last fifteen or twenty years has rendered almost all causes controversial. If you want to invite a firm to allow its assets to be contributed freely to the advocacy of a cause—be it amnesty cases for Middle Eastern refugees or reproductive rights or legal access to housing court or the Patriot Act—there will be controversy in the firm as to whether or not it is something that the firm, *qua* firm, ought to do. That is a constraint on the ability to mobilize firms, *qua* firms, behind some of these things.

103. Partner, Davis Polk & Wardwell, LLP.

study on which she and others had worked, describing the extraordinary outpouring of pro bono work by lawyers in and around New York City in the wake of the September 11, 2001 terrorist attacks in lower Manhattan.¹⁰⁴ Likewise, Craco lauded the extraordinary pro bono contributions made by his former firm and others throughout New York City over the years:

I would argue that, despite all those constraints, whether business constraints or political constraints, pro bono still thrives. I understand what the *Am Law* 100 displays, and I understand what the data display. But twenty years ago I had the chance to put together an organization called Volunteers of Legal Services in this City, which exacted from big firms in the city a pledge of thirty hours per lawyer per year of public service. Just last year, we celebrated our twentieth anniversary. Thirty-nine major law firms in the city reported to us—and reported convincingly to us—their compliance with that pledge. The aggregate amount of time spent on pro bono by those thirty-nine firms was in the range of 663,000 hours during that year. . . .

The roll of honor of these thirty-nine firms—Arnold & Porter, Cadwalader, Cahill, Cleary, Clifford Chance, Cravath, Davis Polk, so forth and so on—are not the cheapskates; they are not the small ones; they are not the ones who practice on the fringe. They are somehow not captured by the data in both the quality and quantity of what they do. . . .¹⁰⁵

104. See Kaye, *supra* note 89 at 831; Lardent, *supra* note 89 at 309 (highlighting the efforts and the lessons from the work after 9/11); Maute, *supra* note 89 at 291 (explaining which efforts lawyers exerted for 9/11 can be applied to future disasters, large and small); see also Rhode, *supra* note 89 at 1011 (analyzing the “forces that influence lawyers’ public service”).

105. Craco gave the following examples:

We were able to provide services to children with special needs in eleven hospitals in New York City. We had a program for the elderly poor, in which volunteers made house calls to those who couldn’t get out. We dealt with a whole variety of issues that the elderly poor experience. We created an innovative program for low-income micro-entrepreneurs, which attracted sixteen major corporate law firms to provide corporate lawyers to create business opportunities for persons who were ousted from welfare by the Welfare Reform Act and wanted to go into business.

We had volunteers in the women’s prisons, providing legal services to incarcerated mothers who faced such problems as the fact that if a sentence exceeds two years and they don’t see their children within those two years, a federal act—can you imagine?—a federal act automatically terminates their parental rights.

When we speak of it only being the younger people who do it, I remember the initiation of our project to provide life-ending advice to persons with AIDS, and the senior partner of Milbank, Tweed going out to the hospitals and working with teams of people from that firm and others to do wills and proxy and living wills and the rest of it.

The art, it seems to me, is how we can take the insights that motivate firms like these to do those things and encourage them. They are there, and indeed, big firms can do good while doing well.

On the other hand, looking at the pro bono hours that large firms report to *The American Lawyer*, Larry Fox argued at the conference, as he does in his second contribution to this book, that large law firms are not doing enough.¹⁰⁶ Aric Press, *The American Lawyer*'s editor, confirmed Fox's reading, noting that "even in the very best firms, the most active firms, the firms where a pro bono culture isn't just a statement but is a reality, no more than sixty percent of the lawyers in those firms are doing twenty hours—twenty hours a year—which . . . [comes down to] eight minutes a week."

b. What's to be done?

From law firms' perspective, the solution is for their lawyers to do good—or more of it—however that is defined. Much discussion focused on how other institutions of the legal profession should encourage them to do so.

We have created neighborhood law offices, where interns from the big firms go. We in Willkie Farr send an associate, whom we pick as a prize from the people who apply for it, from among our most promising associates, to go for six months to Chinatown and work in the Housing Court and the Domestic Relations courts there. . . .

One last example, if I may. I don't know how you get this out to the people who say that they would like to have free legal advice as the first element of their improvement of the view of lawyers. How do you tell them about Cravath, Swaine & Moore's long tenure in the *Census* case, which brought better representation to the City of New York? How do you tell them about my daughter-in-law, who just became a Partner at Kaye Scholer, who is about to go on trial in an antitrust case and for three years has been working on one of those death-penalty cases that we have been discussing?

How do you suppose City Harvest got created to go out and collect spare food from the restaurants of New York and distribute it to the poor? Corporate lawyers at Willkie Farr did it for free. How do you suppose the regulations that turned Soho into a vibrant community of artists and merchants happened? Real estate lawyers from Willkie Farr did it for free. How do you suppose the regulations to reform Riker's Island prison regulations got created? Litigators from Willkie Farr did it for free. How do you suppose the sergeant's exam for the New York Police Department took different account of patrol experience, which had the practical effect of excluding women? Litigators from Willkie Farr did it for free. Where did the inventive use of nuisance law to civilly oust drug dealers from apartments where they were harassing other clients come from? Litigators from Willkie Farr did it for free. I don't claim—indeed, I insist to the contrary—that Willkie Farr is special in this. I insist that it is usual.

106. Lawrence J. Fox, *Should We Mandate Doing Well By Doing Good?*, 33 FORDHAM URB L.J. __ (2005).

ABA Model Rule 6.1 urges lawyers to “aspire to render” at least fifty hours of pro bono services each year. One question is whether, to promote more pro bono work among all lawyers, not exclusively large firm practitioners, the rules of professional conduct should *require* lawyers to perform pro bono work. Such a requirement has failed to win the ABA’s support in the past, but Larry Fox urged its adoption in the future.¹⁰⁷

Courts, bar associations and the professional media can support and encourage large firms to perform pro bono work by holding them accountable and recognizing their contributions. Press reflected on *The American Lawyer*’s role:

Our view is that pro bono is one of the core values of the profession and that when we find interesting projects worth writing about, we will write about them, mostly to grab the attention of the reader, but partly to serve as models.

A couple of months back, we did a long story about an IP litigator at Latham & Watkins who didn’t know enough about criminal procedure to know he faced a lost cause, and managed, after ten years, to free an innocent man on death row in Texas, putting a lie to the idea that in Texas, if you are innocent and on death row, the best you can hope for is a commutation to life imprisonment.¹⁰⁸

Long before I got there, back in the days when Steve Brill was running the place . . . the magazine always ran lists and rankings of pro bono activity for the 100, 200 top-grossing law firms. What I discovered a couple of years ago, as we went through this annual exercise, was that we would publish this, and the firms at the very top—by which I mean places one, two, and three—would be very pleased, and not many others would pay a whole lot of attention to that. At this stage of my life, I don’t mind many things, but I am not delighted at being ignored. So I decided instead to come up with a set of rankings that would, I hoped, reflect the values of the profession and would encourage some behavior. With very careful planning and thought—and many backs of envelopes—my staff and I came up with a plan that ranked revenues, revenue per lawyer, and pro bono twice, overweighted for that, on the theory that revenue per lawyer was as close as we could come to a measure of client satisfaction and high-value work (on the theory that people who would pay anything would know enough to pay the most for the best), and pro bono, because we thought it was important to rank that as highly as revenue, as a statement for the profession and a statement from the magazine.

In addition to that, we ranked firms based on diversity and we ranked

107. *Id.* at ___.

108. Douglas McCollum, *The Accidental Defenders*, AM. LAW., Jan. 2005, at 98.

firms based on associate satisfaction. Every year we take a survey of the third and fourth-year associates in the large firms.

We compiled this all together and came up with something that we call the A List. I have a copy of it here. The top twenty firms on the *Am Law* 200 are on the A List. Those twenty firms are very happy.

When we did it the first time, there was some hope on the part of the 180 other firms that we would never do it again. Then, when we did it the second time, we had three responses: from many of the firms on the list who were very happy to be there again; second, from some of the firms on the list who wondered why anyone needed to tell them how great they were; and third, from the other 180—this is a slight exaggeration—many of whom set out to make that list, on the theory of “damn all lists,” but if there is going to be one, and if it purports to rank the best in the business, they want to be there This has had some influence on pro bono activity—on the margins, but it has had some influence.

Law schools may also attempt to influence large law firms. One way is by reinforcing students’ interest in serving the poor either through a mandatory service requirement¹⁰⁹ or through a strong volunteer program,¹¹⁰ so that when they graduate, those who go into large firms will

109. Fox recounted:

I teach as an adjunct at [University of Pennsylvania Law School, which] has a public-service hour requirement that second- and third-year law students are required to fulfill, by either working with a law firm or a public-interest law firm, actually undertaking, I think, seventy hours across the two years on a particular assignment. They can have as many as two different assignments.

My sense is that the law students—and this is only anecdotal—all fulfill their requirement. They have to [in order] to graduate, so they do it. I think, in that sense, they do it conscientiously. Among some of them, there is great resentment. They will mouth the same words that people who talk about mandatory pro bono for lawyers will say—“involuntary servitude; why is this law school making me do this?” Some of them are so gratified and excited about the opportunity to spend that short period of time working on an assignment—I suspect that a lot of it turns not so much on their ingrained attitudes toward pro bono, but whether they, in fact, get themselves a rewarding assignment with somebody who is willing to sit down and spend the time with them working.

But I think the idea itself is brilliant. Penn continues to be very happy with it and continues to support it. It takes a huge allocation of resources in order to run a program like that, but it is a great way to start. It is a great way to instill the idea. Somebody is going to catch a cold, even if they all don’t catch a cold.

See also Caroline Durham, *Law Schools Making a Difference, An Examination of Public Service Requirements*, 13 *LAW & INEQ.* 39 (1994) (outlining successful strategies for mandatory pro bono at law schools).

110. Rhode recounted her recently published study of law school pro bono programs:

On the pro bono point, a word about what my study found. Part of the reason I did it was to find out whether different experiences in law schools translate into different commitments towards public service in practice. I looked at six different

want to do pro bono work.¹¹¹ In preparing students for employment interviews with large firms, law schools could educate students to ask detailed questions about law firms' policies¹¹² and encourage their students to take firms' pro bono policies into account in deciding for which firm to work.¹¹³ Visible student interest may influence firms to improve their pro

schools, with three different kinds of policies: Penn and Tulane, which had the first mandatory programs and probably have the best supported; Fordham and Yale, which I classified as two of the schools with the best voluntary, really well-supported program, reinforced by the culture; and then two schools which didn't have an active pro bono program, didn't have a coordinator, but who were on a similar sort of status level as the others.

To make a lot of data crunching very short, what the study suggested is that having a good experience doing public-service work matters, but you don't have to have that in a pro bono program. You can have it, for example, in a clinic. Just being in a pro bono program doesn't guarantee that you have that kind of experience. I had a lot of people talking, for example, about the Penn experience, and where people were unhappy, it was because of the quality of the placement opportunities that were there. But those problems were much less substantial than people often estimate.

I think a really good thing would be if all law schools moved in the direction of either having mandatory policies or very well-supported voluntary policies, where a lot of students get reinforced.

See also DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 172 (2005) ("[S]urvey results do not demonstrate that pro bono requirements are necessarily more effective in accomplishing those objectives than well-designed voluntary programs, coupled with strong institutional support and ample clinical opportunities."); Richard A. Matasar, *Skills and Values Education: Debate About the Continuum Continues*, 22 N.Y.L. SCH. J. INT'L & COMP. L. 25, 37-38 (2003) (outlining some of the changes law schools have made to their curricula, including both mandatory and voluntary pro bono programs, in response to a need for better educated lawyers).

111. For other writings on law schools' role in inculcating a commitment to pro bono work, see Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 45 (2000) ("[P]ro bono strategies need to be part of broader efforts to encourage a sense of professional responsibility for the public interest."); Rhode, *supra* note 89, at 2416 ("By enlisting students early in their legal careers, these initiatives attempt to inspire an enduring commitment to public service. The hope is that, over time, a greater sense of moral obligation will 'trickle up' to practitioners.").

112. Fox said, "I have told my students, 'When you go to your interviews, please ask them what their commitment is to pro bono. After they say, 'We have a commitment to pro bono,' ask them what it is. 'What are your statistics? Are you really doing it?'" Rhode added that students should also ask more probing questions such as, "What is the actual number of hours, and do you count it towards it towards billable hours? How many lawyers make partner who have had substantial pro bono commitments?"

113. Rhode observed:

[I]f you ask why most people pick law as a profession, financial reward and intellectual challenge are two at the top of the list. But some desire to do good is a large motivating factor for a substantial number. So reinforcing that is a possibility. Contrary to what some of the empirical literature suggests, many students graduate with that commitment intact. What changes the desire about placement for those who come in with public-service orientations is the job

bono policies and practices to attract the best and the brightest.¹¹⁴

Rhode's article in this book further explores the question of how to encourage pro bono work in large firms. She points to studies showing that lawyers themselves benefit professionally and personally in various ways by providing pro bono services to others, but she also sees value in encouraging lawyers to do this work for its intrinsic value.¹¹⁵ Drawing on her earlier research, Rhode identifies "best practices" for law firms, endorses reporting requirements, and urges law schools to focus greater attention on pro bono activities.¹¹⁶

Two other contributions to this book focus on "doing good" in the broader sense. Pearce's reflections emphasize that if lawyers are to find satisfaction in their work, they must perform a public service in all aspects of their professional work, not only in pro bono service.¹¹⁷ If corporate lawyers view themselves as narrow, amoral technicians on behalf of corporate clients, rather than as wise counselors in the tradition of Louis Brandeis, he suggests, corporate lawyers are bound to be unhappy.¹¹⁸ The

market and the gap in salaries and the lack of positions available in the public-service sector.

....

Nonetheless, [my study showed] that the pro bono experience did not bear a statistically significant relationship with what you did in the real world. Even if you had a great experience, the structures in which you found yourself in practice just sort of dwarfed a lot of those inclinations. So people have to make a commitment to go to an employer that is going to provide sufficient recognition for doing the kind of work they want, if they are going to do it on a sustained basis. They need to vote with their feet . . .

114. Craco observed:

You are not going to be able to achieve systemic change in big law firms about things like the billable hour or alternate work styles or things like that by preaching to the senior partners of those law firms that they should take less money home. You may have some success if you surround them with the constituencies to which they do pay attention. One of those is their clients, who might find, as was suggested in an earlier panel, that the billable hour is offensive to them, for a variety of instrumental reasons, and their pool of talent, which is the law schools, which can as easily create, if they were so minded, a list of best practices about diversification or about alternate lifestyles or about billable hours, just like they did about the Sullivan Principles on apartheid not too many years ago, and send the law students off to the placement interviews asking the law firms, "Do you do this?" If that kind of pincer movement can be developed, constituencies that the decision makers at law firms pay attention to can start to have an incremental influence, over time, but not if the law schools don't believe it.

115. Rhode, *supra* note 78, at ____.

116. *Id.* at ____.

117. Russell G. Pearce, *How Law Firms Can Do Good While Doing Well; Profits and Professionalism*, 33 FORDHAM URB. L.J. ____ , ____ (2005).

118. *Id.* at ____.

dominant legal culture, he argues, has become one “which does not support conversation about the morality of the client’s conduct.”¹¹⁹ Others have recently explored similar concerns.¹²⁰ Lawyer dissatisfaction, they argue, is not simply—or perhaps even primarily—a problem of billable hours and insufficient time left over for pro bono work; it’s a problem of how lawyers understand and carry out their daily role.

Finally, Professor Elizabeth Chambliss¹²¹ examines the challenge of ensuring large law firms’ compliance with professional regulation¹²²—that is, one might say, the challenge of “doing good” in the sense of serving ethically. In part, she responds to Margaret Raymond’s point that law firm bureaucratization, with the delegation of ethical decision making to ethics specialists, may not be the best way to train associates who will later work in smaller institutional settings to recognize and resolve ethics issues. While this may be so, Chambliss says, there is no turning back the clock.¹²³ Given the size of large law firms, “the professionalization of ethics” appears to be the best way to promote their compliance with ethical and professional obligations.¹²⁴ Chambliss also enters the debate over whether law firms should be subject to discipline, and maintains that participants on both sides of the debate may be overemphasizing the importance of direct enforcement of formal rules.¹²⁵ She suggests that “firm culture [is] the primary determinant of lawyers’ conduct” in large firms, and that in-house ethics specialists can have an important role in aligning the firm culture with the formal rules.¹²⁶ But ultimately, she emphasizes, there is little real data on how best to promote ethical decision making by large firm lawyers, and therefore, there is a need for empirical study.¹²⁷

IV. CAN BAR ASSOCIATIONS, COURTS, LAW SCHOOLS, THE MEDIA OR OTHERS INFLUENCE LAW FIRMS’ PROFESSIONAL PRACTICES?

As noted, much of the discussion of the pro bono challenge in large firm

119. *Id.* at ___.

120. *See, e.g.*, STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (1999); JEAN STEFANCIC & RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS* (2005).

121. Professor, New York Law School; Reporter, ABA Commission on Racial and Ethnic Minorities in the Profession.

122. Elizabeth Chambliss, *The Nirvana Fallacy in Large Firm Regulation Debates*, 33 *FORDHAM URB. L.J.* ___ (2005).

123. *Id.* at ___.

124. *Id.* at ___.

125. *Id.* at ___.

126. *Id.* at ___.

127. *Id.* at ___.

practices focused on the potential influence of bar associations, courts, law schools and the media. But if the billable hour and other economic, cultural, and technological forces are pushing so hard against large firms' professional commitments and aspirations in such areas as professional development and public service,¹²⁸ can other institutions successfully push back? James Altman, the panel moderator,¹²⁹ observed that law firms do not exist in an institutional vacuum. He invited conference participants to explore whether and how other institutions can positively influence large firms¹³⁰ with respect to some specific aspects of professionalism¹³¹ and, generally, in "developing a firm culture that takes a broader view of professional success than a laser-beam focus on money making."

a. "It takes a bar association . . ."

Bar association efforts to promote racial, ethnic and gender diversity in law firm hiring and retention were identified as a model of how other institutions can influence large law firms for the better.¹³² Bettina Plevin

128. James Altman summed up the perceived impact of the billable hour and related changes in large firm practice:

[There is an] inexorability [to] the financial imperatives gripping large law firms. As a result of their size and impersonality, their business orientation, the competitive legal marketplace, and many societal factors . . . that are beyond the control of large law firms, large law firms seem to have a built-in resistance to initiate and support certain professionalism activities—such as pro bono legal services, which we have heard about, mentoring and training associates, engaging in bar association activities generally—that are viewed sometimes, or oftentimes, as antithetical to billing more hours and making more money. At least in some respects, economic and organizational dynamics seem to discourage large law firms from improving the quality of their lawyers' professional lives and serving the public good.

129. Partner, Bryan Cave LLP; Chair, NYSBA Committee on Attorney Professionalism.

130. Altman observed:

Law firms do not exist just in the economic marketplace or in an institutional vacuum. They are part of a network of institutions that mutually influence each other. That network includes the judiciary, which oversees the workings of litigators in our courts; law schools, which educate law students, who, upon graduation, become the next-generation professionals; bar associations, where lawyers work together on matters affecting the legal system and the profession as a whole; and the trade media, which reports on and analyzes the actions and lives of lawyers in the network.

131. Altman identified five specific issues: "hiring, retaining, and promoting minority and women lawyers; increasing large law-firm pro bono activities; mentoring and training associates; developing and improving the ethical infrastructures of large law firms; [and] increasing the involvement of their lawyers in bar association activities."

132. For discussions of gender diversity issues in large firms and in the legal profession, see generally Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession: A Report to the Committee on Women in the*

described the work of the New York City Bar (“City Bar”), over the course of the past quarter century. In 1991, the City Bar adopted Statements of Principles, to which 144 law firms subscribed, setting hiring goals that were largely met, but eventually realized that it was necessary to focus on retention issues and on practices and programs that support firms’ efforts to promote diversity. Accordingly, in 2003, the City Bar adopted a new set of principles, which commit firms to disclose statistical information in confidence and enable the firms and the bar association to measure the firms’ progress. Further, the City Bar undertook initiatives to assist law firms in meeting the diversity goals. These included establishing an Office of Diversity, appointing an office director, and holding monthly sessions for the signatory firms on such topics as “how to establish a diversity committee, how to select a consultant, how to keep statistical information and monitor what kind of training to do,” as well as regular all-day programs and periodical programs for firms’ managing partners. Although the City Bar is far from declaring victory,¹³³ Plevin concluded that “this is

Profession, the Association of the Bar of the City of New York, 64 *FORDHAM L. REV.* 291, 358 (1995) (finding that for first-year associates starting from 1973 to 1986, nineteen percent of men made partner, but only eight percent of women made partner); Cynthia Grant Bowman, *Bibliographic Essay: Women and the Legal Profession*, 7 *AM. U. J. GENDER SOC. & L.* 149 (1999) (discussing the discrimination women face in all aspects of the legal profession); Christine Jolls, *Is There a Glass Ceiling?*, 25 *HARV. WOMEN’S L.J.* 1 (2002) (arguing that the glass ceiling still exists for women). For discussions of racial diversity issues in large firms and in the legal profession, see Leonard M. Baynes, *Falling Through the Cracks: Race and Corporate Law Firms*, 77 *ST. JOHN’S L. REV.* 785 (2003) (discussing the discrimination minority lawyers face and possible solutions); J. Cunyon Gordon, *Painting By Numbers: “And, Um, Let’s Have a Black Lawyer Sit at Our Table,”* 71 *FORDHAM L. REV.* 1257 (2003) (arguing for the integration of large law firms); Anthony Lin, “City Bar, NYCLA Set Initiatives for Diversity,” *N.Y.L.J.*, Dec. 15, 2003, at 1 (discussing the “establishment of a full-time Office of Diversity as part of a broad initiative to increase the presence of minorities in the New York corporate bar, particularly at senior levels”); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 *CAL. L. REV.* 493 (1996) (attributing some of the hiring and retention problems in large firms to their training and strategic decisions).

Recently, some bar associations have expanded their diversity efforts to incorporate diversity based on sexual orientation. John Woods, *Report Cites Retention as a Key Factor in Improving Diversity*, *N.Y.L.J.*, Feb. 21, 2002, at 1, 4 (quoting a NYCLA report: “the legal profession must demonstrate its commitment to diversity by ensuring that individuals are not denied employment or career advancement opportunities because of their sex, race, religion, national origin, sexual orientation, age or disability”).

¹³³ For example, Press noted that “[t]he enormous success of Asian-Americans in the nation’s law schools makes the situation look far better than it actually is. . . . In our last *Minority Law Journal* report, 48.6 percent of all the minorities in the nation’s 250 largest law firms were Asians. While there are still a few more African-American partners than there are Asian partners, that is soon to change. So if you were one to erase the Asian-Americans—and I am not here to do racial politics—the situation would not appear to be quite as good as the numbers might lead you to think.”

a pretty good example of an area where it takes a bar association, in a way, to provide not just the impetus, but also the tools, because no one law firm is equipped or has the knowledge . . . to do this.”

Plevin and others also described bar associations’ efforts to recruit lawyers to attend sponsored pro bono activities as well as other bar association efforts to encourage lawyers to render pro bono services. John Berry¹³⁴ identified this as “one area where bar associations can make a difference,” and suggested that, in general, bar associations should not assume that large firms do not need their help.¹³⁵ Altman further identified the role of law firms in “consciousness raising” regarding large firm practitioners’ professional values and aspirations and how to promote them.¹³⁶

b. The power of the press

The influence of *The American Lawyer* was a theme that ran throughout discussions at the conference. Publications such as *The American Lawyer* share a role with bar associations in gathering information and holding firms accountable, but their reports are a double edge sword. Elizabeth Chambliss noted with respect to diversity that, while law firm rankings can be a valuable tool to hold law firms accountable, their superficial criteria may encourage superficial efforts by law firms to hire minorities but to

134. Executive Director, Michigan State Bar; Chair, ABA Standing Committee on Professionalism.

135. Altman observed:

[T]here is a disconnect between bar associations and large firms that we need to begin to look at. I think bar associations, in many ways, write off large firms . . . It is assumed that large firms can help themselves. It is assumed that it is the solo practitioners . . . that need the help. They tend to get more discipline complaints, and we are going to put all of our energies there. . . . [W]e are seeing the impact of large firms. Quality of life and other issues impact our profession in a dramatic way. . . . [B]ar associations should not forget about large firms, nor should large firms forget about bar associations

136. Berry observed:

I think that bar association activity really is a good way to approach some of the practical problems, but also to broaden the consciousness of lawyers who work in large firms. If you can get a large-firm lawyer talking at bar association meetings with legal educators, with small-firm practitioners, with bar association executives, you get them outside the context in which they normally practice. You get them in a situation where they are not thinking about their clients’ interests, where they are thinking about themselves as a part of a legal profession, more broadly, not parochially. They are not thinking about it from the standpoint of the billable hour or anything else. It is really an opportunity to get outside the consciousness with which they actually practice most of the day. Certainly, my experience in terms of being involved in bar association activities is that it has been incredibly broadening.

overlook the importance of supporting and mentoring them. And, as others noted, rankings based on law firm earnings fuel the economic competition that undermines firms' ability to achieve other professional ideals. But even so, Chambliss underscored the influence of research and measurement in the legal press and elsewhere regarding law firms' progress on issues such as diversity,¹³⁷ and she and others urged *The American Lawyer* to consider expanding the benchmarks by which it evaluates large firms.¹³⁸ Anecdotal reports of law firms' work may have a similar influence. Georgia Chief Justice Norman Fletcher described how law firm practitioners' pro bono efforts had been recognized in his state by both the media and by professional and civic organizations. Such public recognition offers models to other lawyers, and the prospect of public recognition provides an incentive to perform pro bono work that may offset the reputational benefits of high earnings. Moreover, Chief Justice Fletcher noted, such accounts help "to restore a little bit of . . . moral authority for our profession."

c. The courts' role

Berry suggested that, on issues such as pro bono, state "supreme courts . . . ultimately are the ones that can do the most to set the tone," and others concurred that courts can play an important role in helping large law firms meet their professional challenges generally. Chief Justice Fletcher described the work of his state supreme court's Commission on Professionalism,¹³⁹ which others identified as a national model. Through the commission's work, for example, the state court has established CLE requirements and assisted lawyers in satisfying them—one illustration of

137. Chambliss observed:

[T]he best thing that programs like [the City Bar diversity program] do is create accountability measures. I think disaggregating groups by race is helpful in that regard. . . . [The ABA Commission on Racial and Ethnic Minorities in the Profession] sponsors a statistical report . . . trying to kind of serve as a clearinghouse for national data on progress of minority lawyers. One of the things we have been very attentive to is trying to break down the data by race, by gender, because a much larger proportion of minority lawyers are women than white lawyers. So many of the problems in diversifying firms are both gender and race problems, because we are talking about minority women, who are the least represented, especially African-American and Hispanic women.

138. For example, Cunningham suggested gathering specific information on law firms' professional development efforts (e.g., how much time they spend mentoring associates, what type of training and experience they provide in dealing with ethical issues).

139. The Commission's programs are described on its website: http://www.gabar.org/related_organizations/chief_justices_commission_on_professionalism (last visited October 26, 2005).

how other institutions can support and supplement the work of law firms and other legal institutions in the area of professional development. But the most recent, and innovative, program in this area is addressed to mentoring. Effective 2006, Georgia lawyers will be required to complete a mentoring program within a year after their admission to the bar. The requirement, which is one aspect of the state court's requirement of transitional education for new lawyers, takes account of the different settings in which newly admitted lawyers work, and allows law firms to design their mentoring programs to fit the particular teaching needs of their new lawyers.

d. What law schools can do

The potential role of law schools goes beyond fostering students' interest in pro bono work, and encouraging students to convey that interest to law firms. Berry focused more broadly on law schools' role in inculcating professional values.¹⁴⁰ Further, law schools can educate law students about the nature of law firm practice, so that students can make better informed decisions whether to work in large firms, and so that, if they do so, they may be better equipped to seek out mentors and take charge of their own education, to pursue their interest in pro bono service, and to achieve balance in their lives. This conference was meant to be a step in that direction.

Clark Cunningham's contribution to this book suggests, further, that law schools' educational contribution should not necessarily be directed only at law students.¹⁴¹ To move young lawyers farther along the "educational continuum," and to compensate in part for the challenges of on-the-job training, law schools might collaborate to a greater extent with other institutions of the legal profession to educate lawyers after law school. Cunningham describes, and takes inspiration from, Scotland's three-year basic competency program for law graduates and from England's

140. Berry observed:

We . . . subtly send a message in law schools and law firms that you are the best lawyer if you get to the best large firm with the most money, and you have the most prestige. There is almost a subtle thing that if you go out and make \$25,000 working for Legal Aid or you go down and work as a prosecutor prosecuting domestic abuse cases and you stay there, somehow you couldn't possibly be the best and the brightest, because you do something else. . . . I think, from law schools, from bar associations, and from all of us, we need to make sure that we send the message that there is more to the practice of law than being the most intelligent and the richest.

141. Clark D. Cunningham, *Legal Education After Law School: Lessons from Scotland and England*, 33 FORDHAM URB L.J. __ (2005).

accreditation requirement for criminal defenders.¹⁴² He also describes new collaborations underway in the United States to address effective lawyer-client communication and the identification and resolution of ethical dilemmas.¹⁴³

Finally, law schools and their faculty, together with research foundations such as the NALP Foundation, can serve as a source of research and writings on large firm practices. They can explore further how different procedures and structures within firms, and other institutions of the legal profession, can support large firms' efforts to promote professional education, to enable their lawyers to lead more balanced lives, and to promote efforts to serve clients skillfully and ethically and to serve the public good both through pro bono work and through everyday representations of paying clients. Fortney and Rhode, among others, demonstrate the value of empirical work in particular, while Chambliss underscores the need for much more empirical work in this area. The Fordham conference was meant to be a step in that direction as well.

V. CONCLUSION

The Fordham conference, and the writings in this book that grow out of it, reinforce the prevailing view that large law firms face significant professional challenges, including challenges to their ability to train young lawyers effectively, to meet their pro bono aspirations and otherwise serve the public good, and to enable their lawyers to live balanced lives. These challenges have many and varied causes, and consequently, there is no magic bullet. Meeting these challenges will require attention, consideration, creativity, and hard work on the part of large firms and other institutions of the legal profession. The Fordham conference was designed to make a modest contribution by shedding light on the problems large firms face and by advancing the dialogue about how to meet them.

I close, first, by thanking all of those whose work enabled us to make this contribution. These include the Stein Center's five co-sponsors, who helped develop the conference's themes; the four outstanding moderators and nineteen panelists who offered thoughtful and engaging reflections over the course of the day; the authors whose additional reflections are contained in the pages that follow; and the editors and staff of the *Fordham Urban Law Journal* whose tireless editorial efforts produced this book.

Second, I want to thank the family whose ongoing support has been so instrumental to the Stein Center's work, and note with sadness the loss of

142. *Id.* at ___.

143. *Id.* at ___.

two of those family members in the past year. For more than a decade, the Stein Center has organized conferences and symposia bringing together representatives from all corners of the legal profession to develop ideas to improve the profession, promote ethical practices and serve the public good.¹⁴⁴ The Center's Stein Scholars Program offers training to Fordham law students in public interest law and ethics that is unequaled anywhere. The concept of the Center grew out of the singular vision of Louis Stein of the law school class of 1926, who was a source of inspiration and guidance until he passed away in 1996.¹⁴⁵ Mr. Stein's daughter and son-in-law, Marilyn and Edward Bellet, shared his vision and carried on his support over the years for the law school, its faculty and its students. All of us at the Center mourn their passing, and we thank the *Fordham Urban Law Journal* for dedicating this book to their memory.

144. See, e.g., Bruce A. Green & Nancy Coleman, Foreword, *Ethical Issues in Representing Older Clients*, 62 FORDHAM L. REV. 961, 970 (1994); Bruce A. Green & Bernardine Dohrn, Foreword, *Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1291 (1996); Foreword, *Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 FORDHAM L. REV. 1713, 1735-36 (1999).

145. See *Dedication to Louis Stein*, 64 FORDHAM L. REV. 1279 (1996); John D. Feerick, *In Memory of a Wonderful Friend*, 64 FORDHAM L. REV. 280 (1996).