A Solutions-Oriented Approach: Changing How Insurance Litigation Is Handled by Defense Law Firms[1]

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Are clients well-served by their outside law firms? We think that the answer is "not very often," because many of the incentives that law firms use to become (and stay) profitable are at odds with their duties to their clients. As long as those perverse incentives exist, clients and their law firms aren't actually on the same team.[5]

State ethics rules include a laundry list of duties to clients.[6] Among other things, these rules require a lawyer to be competent,[7] diligent,[8] free from conflicts of interest,[9] and careful with the client's confidential information.[10] They also require the lawyer's fees to be reasonable[11]—and we worry that internal law firm incentives push fees from "reasonable" to "too high." The use of billable hours as a way of measuring value to clients was developed as a response to clients who resented one-line "for services rendered" bills,[12] but billable hour quotas also cre-

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5. This breakdown between claims handlers and defense counsel was being discussed as early as 1999. *See, e.g.*, Mark Puccio & Stephen J. Paris, *The Erosion of Communication: The Breakdown of the Bond,* Law Office Economics (1999).

6. Some of the ethical duties don't directly relate to the lawyer-client relationship but rather to the lawyer's duty to keep the system of justice in working order. For a sampling of these rules, *see, e.g.*, Model Rules of Prof'l Conduct (2017) (hereinafter Model Rule) 3.3 (Candor Toward the Tribunal), Model Rule 3.4 (Fairness to Opposing Party and Counsel); Model Rule 3.8 (Special Responsibilities of a Prosecutor); Model Rule 4.1 (Truthfulness in Statements to Others); *see also* the Part 5 rules (governing law firms); the Part 6 rules (public service); and the Part 7 rules (Information About Legal Services).

7. *See* Model Rule 1.1 (Competence).

8. *See* Model Rule 1.3 (Diligence).

9. *See* Model Rules 1.7-1.11 (Conflicts of Interest).

10. *See* Model Rule 1.6 (Confidentiality).

11. *See* Model Rule 1.5 (Fees).

12. *See, e.g.*, George B. Shepherd & Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing,* 1999 U. Ill. L. Rev. 91, 91–92 ("Before 1938, the standard fee arrangement was a fixed fee. Broadened discovery then increased the uncertainty of litigation costs, especially as

ate incentives for slow work and for make-work tasks. We think that there's a better way to serve clients. A few firms have figured out that "better way." Why don't most firms follow suit?

Problem 1: Resistance to Change and the "Retirement Plan Reality"

For defense firms to change how they handle insurance litigation, they must first address the resistance to change that is so prevalent among law firm decision-makers.[13] There are several reasons for this resistance. One major contributing factor is the "retirement plan reality": the reality that most equity holders in a law firm have an established conception of what, exactly, they have to accomplish in their career before they retire. Many equity holders are already traveling on that well-worn path to retirement and thus have no interest (or incentive) to institute any radical changes in their practice. Change would involve risk, and risk jeopardizes retirement plan realities.

Another contributing factor has to do with the personality characteristics of many lawyers.[14] "Lawyers are likely to be more achievement-oriented, more aggressive, and more competitive than other professionals and people in general."[15] Lawyers also tend to be risk-averse.[16] One of our favorite quotes comes from Brian Einhorn, made at the time that he was the president of the Michigan Bar. He wrote:

> There are two primary reasons, I think, for our reluctance to let go of old practices.
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> First and foremost, lawyers are risk-averse-and change is risk. If the old ways still work, we think, only a fool would opt for new ways. Second,

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states copied the Federal Rules over the next two decades. Starting in the mid-1950s, . . . litigators, spurred by their institutional clients, switched to hourly billing. By the late 1960s, society's growing complexity had increased cost uncertainty for transactional lawyers. Thus, . . . the bar soon also shifted to hourly billing for transactional work.").

13. *See, e.g.*, Miles J. LeBlanc, *Resistance is Futile*, 78 TEX. B.J. 856, 857 (2015) (lawyers tend to be change-resistant).

14. These traits tend to manifest in law school. *See* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1341 (1997) ("Attorneys appear to differ from the general population in the way that they approach problems and make decisions, what they value and respond to, and what motivates them. Some of their personality and cognitive characteristics appear to be present prior to law school, and some appear to be amplified by or inculcated in law school.").

15. Daicoff, *supra* note 14, at 1390. In terms of Myers-Briggs characteristics, a sample of around 3,000 lawyers indicated that lawyers tended to be introverts, rather than extroverts who preferred intuiting to sensing, thinking to feeling, and judging to perceiving, though the lawyers who were most satisfied tended to be extroverts. *Id.* at 1393–94 (citing Larry Richard, *How Your Personality Affects Your Practice—The Lawyer Types,* 79 A.B.A. J., July 1993, at 74).

16. *See, e.g.*, Brock Rutter, *Preparing for the Increasing Pace of Technological Change,* 38-FALL VT. B.J. 35, 36 (2012) ("The relatively slow pace of change in law, relative to other industries and professions, can surely in part be attributed to traditional conservatism and risk-aversion among lawyers.").

> there's our sense of history, our desire to practice law in the same ways John Marshall and Clarence Darrow and Abraham Lincoln practiced law. We want to clothe ourselves with the mantle of our forebears.
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> From one perspective, both traits—our natural conservatism and sense of belonging to a profession—are admirable. But from another perspective, they have a less desirable cast. Conservatism, in its more extreme forms, is cowardice.[17]

Risk aversion means that many attorneys decide to practice in firms that behave like other firms of their size and profitability. They raise hourly rates at roughly the same time and pace as do their fellow firms. They use billable hours to measure productivity because their fellow firms do that (although more firms are experimenting with alternative billing structures). They have an up-or-out partnership structure, although many now keep around their most productive associates as "of counsel" and many more use contract attorneys[18] to do repetitive work. And many lawyers leave the practice of law—or at least big-firm practice—because they're miserable with the way that law firms run their businesses.[19]

Another reason for the resistance to change is the partnership structure, which makes decision-making more cumbersome. The partnership structure inherently requires the vote of a majority (a quorum) to make any major changes in law firm operations. In addition, often there is a lack of real decision-making authority conferred on firm leadership to undertake changes.[20]

Finally, disrupting an industry that has survived on largely the same principals and ideals for hundreds of years is hard work. Changing just one person's mindset is not an easy task, let alone an entire firm of lawyers and non-lawyer professionals. The difficulties encountered by anyone who begins to institute such dynamic changes in his/her practice are overwhelming and are enough to cause even the most driven individual to throw in the towel.

The solution for this resistance has to be the selection of decision-makers and team members with the courage and the desire for change/innovation to re-

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17. Brian D. Einhorn, *The Future of the Species,* 93-Aug Mich. B.J. 12, 12 (2014).

18. Or robots.

19. *See, e.g.*, Jerome M. Organ, *What Do We Know about the Satisfaction / Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being,* 8 U. St. Thomas L.J. 225 (2011); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession,* 52 Vand. L. Rev. 871 (1999).

20. *See* Matthew S. Winings, *The Power of Law Firm Partnership: Why Dominant Rainmakers Will Impede the Immediate, Widespread Implementation of an Autocratic Management Structure*, 55 Drake L. Rev. 165, 194 (2006). In a majority of law firms, partners are not likely to give real authority to a single source to lead, or believe no partner is capable of strongly leading. In firms that follow the partnership structure there is a barrier to changing the management structure. There is a conflict between rainmaking partners and the interests of the firm because the rainmakers hold a lot of control over whether the firm will succeed. These rainmakers are resistant to having a centralized leader and refuse to surrender power and influence.

spond to the market demand.[21] Identifying these kinds of individuals may require us to look outside the box in terms of candidate qualifications. This category of individuals may or may not have what most would consider the "best" credentials, but an individual with the right mindset will make a contribution to the firm that is as important as (or maybe more important than) the "right" pedigree.

There's hope. Some law firms have found new ways of serving clients while preserving a good work/life balance. A recent article by Joan Williams, Aaron Platt, and Jessica Lee describes some promising new models of practicing law.[22] The new models do their best to recapture both the notion of a fiduciary relationship to clients and the ability to enjoy the practice of law.

Problem 2: The billable hour model is inconsistent with client goals to keep fees reasonable.

Billable hours measure time spent, but they don't create a clear relationship between the time spent and the value of the work to the client. As one of us has written, "not every billable hour is created equal. Inefficient time billed by the hour drains away value to the client, and exhausted lawyers often work inefficiently. . . . The more slowly that a lawyer work[s], the more billable hours he or she [will] rack up."[23] So why do so many firms focus on billable hours in terms of measuring value to clients?

For one thing, measuring billable time is easy—sort of. Starting and stopping a clock is easy, even if the clock measures time in six-minute increments. But what if someone only spends 30 seconds on a task? Should that task be worth 1/10 of the person's billable hourly rate, given a minimum six-minute billing increment? Or should the person bill the full six minutes for that 30-second task? What if the person thinks about six different matters in two minutes? How should the person record his time for those six things? Should he "comp" the client? Or should each of those tasks generate a .1 on his timesheet? Is driving to work bill-

21. "I always wanted to be part of a startup" was the remark of one team member in the newly-formed Hermes Law.

22. Joan C. Williams, Aaron Platt & Jessica Lee, *Disruptive Innovation: New Models of Legal Practice,* 67 HASTINGS L.J. 1 (2015). The authors discuss five non-traditional models of law practice:

> The first type, Law and Business Companies, marries legal with business advice and services. Next, Secondment Firms place in-house counsel in corporations on a part-time or temporary basis. Third, Law Firm Accordion Companies provide law firms with lawyers to work as overload capacity or to provide specialized skills. Then, in Virtual Firms, everyone works from home. Finally, a large and variegated group of Innovative Law Firms offer some or all of the following: innovations in billing and personnel policies, better work-life balance, and women-friendly practices.

Id. at 5.

23. Nancy B. Rapoport, *"Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms,* 4 ST. MARY'S J. LEGAL MAL. & ETHICS 42, 53 (2014).

able? Is thinking about a matter while getting coffee billable? Without proper training, new professionals at a firm may inadvertently overcharge the client.[24]

Not only is there a risk of professionals overcharging clients if the rules aren't clear, but there's also the risk of undercharging the client. A professional's day is often extremely busy, and it's difficult to remember what one has done in tenths of an hour over the course of a 10- or 12-hour day. Without making contemporaneous notes of the tasks, the professional may well forget what he or she did for the client (or clients). And for those professionals who don't record their time on a daily basis, the risks of undercharging—or, frankly, overcharging—multiply exponentially.

Billable hours also penalize the fast worker: the fast reader, the fast writer, the fast thinker. If a firm sets a minimum billable hour requirement, it's not unheard of for people to be tempted to cheat,[25] especially when there's not a lot of work to go around. Best practices for billing time involves clear policies and procedures, providing training on those policies and procedures, spot-checking time records for accuracy and honesty, and regular conversations with each client to understand what the client considers to be reasonable practices.

Another aspect of billable time is that it puts the risk of a matter's complexity squarely on the client—the more complex the matter, the faster the hours add up.[26] Litigation provides the perfect example. Lawyers can ballpark the cost of

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24. Here's a description of how a professional can engage, inadvertently, in unethical behavior:

> A junior associate sits in on a meeting with a mid-level associate, a senior associate, and a partner. They talk about six different matters for a total of thirty minutes. Firm policy, at least in this hypothetical, is that the minimum billable increment is .25. (Yes, I know that most firms bill in tenths of hours now. Humor me.) The partner says, "OK, that's .25 for each of six matters. Not bad: 1.5 hours for thirty minutes' worth of work." The senior associate nods, as does the mid-level associate. The junior associate now has to face the ethical dilemma: does she likewise record 1.5 hours of billable time, or—for those matters that only took a few minutes—does she decide only to bill .25 to those matters for which the discussion took at least ten minutes? My guess is that, unless one of the other associates speaks up, the junior associate is not only going to record 1.5 hours of time, but she's also going to justify her choice by thinking, "firm policy says that I need to put down at least .25 every time I work on something." Maybe some of the lawyers in the firm use an unwritten rule that certain very small increments stay "unbilled," or they wait until the number of very small increments add up to around .25, but if the junior associate doesn't get some clarification, she's just taught herself something that will eventually greatly annoy her clients.

Id. at 64–66 (footnotes omitted).

25. *See generally* Susan Saab Fortney, *Soul For Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements,* 69 UMKC L. REV. 239 (2000).

26. *See, e.g.*, Jim Calloway & Mark A. Robertson, *Client Directed Billing: Shifts in Who Defines the Value of Legal Services*, 80 OKLA. B.J. 2606, 2611 (2009) (discussing clients' discomfort with the cost of legal services).

certain tasks, but they can't anticipate all of the costs, such as dealing with discovery data dumps or discovery fights, preparing expert witnesses for testimony, or handling multi-party infighting. Flat fees put the risk of complexity on the law firm.[27] The simpler the matter, the more profitable the flat fee will be, if the law firm has calculated the flat fee appropriately.[28]

One solution is to supplant the use of billable hours with other, better metrics of value. If one takes to heart Stephen Covey's Habit Number 2[29]—"begin with the end in mind"—it is possible to discuss with a client what constitutes a successful representation and then calculate metrics that reflect that success. These metrics include average case life, budget accuracy, evaluation accuracy and return on investment measures. When a firm has a menu of metrics from which a client can choose to measure the value of the firm's representation and when the firm works with the client to identify benchmarks for those metrics, the relationship begins to look much more like a true partnership.

In developing those metrics, though, it's important not to create bad incentives.[30] Here's a perfect example of a bad incentive, contrasted with a good incentive. One of us[31] is a fee examiner, and she measures her success based on the time that she saves the court in analyzing fees and in whether her comments on the fees help to shape the professionals' behavior over time. Her fee is a combination of a flat monthly rate plus an hourly rate for any testimony.[32] That fee structure provides good incentives for careful work, and she is compensated fairly for her time. But paying a fee examiner a percentage of fees for finding and disapproving "unreasonable work" would be a bad incentive. The more "unreasonable" fees that the examiner finds, the larger her own income becomes; thus, there is every incentive to nitpick. Good fee examiners don't ask for a bounty. With the proper metrics, plus spot-checks on whether those metrics create appropriate incentives, fees can reflect value to the client much more accurately than billable hours ever can.

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27. *See, e.g.*, *A New Program Provides Legal Help for Those over 60; Attorneys and Paralegals Needed,* 34 MONT. LAW. 23, 2 (2009) (discussing the risks and rewards of flat fees).

28. If the law firm underestimates the true cost of the work to the firm, then the flat fee becomes unprofitable. Ethics rules, though, don't permit the lawyer to stop working on a matter just because the lawyer is losing money on it. In litigation matters, the lawyer must seek tribunal permission to withdraw. *See* MODEL RULE 1.16 (withdrawal).

29. *See* STEPHEN COVEY, THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE (1989).

30. *See, e.g.*, *A New Program Provides Legal Help for Those over 60; Attorneys and Paralegals Needed,* 34 MONT. LAW. 23, 2 (2009) (discussing some negative parts of the billable hour, including the temptation to stretch out how long something should take).

31. Nancy Rapoport has worked on bankruptcy fees in several large chapter 11 cases, most recently as the Independent Member of the Fee Committee in *In re* Caesars Entertainment Operating Co., Inc., U.S. Bankruptcy Court, Northern District of Illinois, Case No. 15-01145.

32. She learned the necessity for an hourly rate for testimony after she was deposed for objecting to a professional's expenses for charging a shirt to the bankruptcy estate.

Problem 3: Lack of Transparency by Law Firms

The legal profession has traditionally been one where the client is largely in the dark about the services for which the client is paying. The client has a desired end result, but has little to no idea how the lawyer(s) intend to achieve the desired result. In addition, the client has no way of measuring or knowing whether the lawyer was successful in his or her representation other than to look at the final outcome and the legal fees incurred.

The solution to the lack of transparency is for law firms to develop a system of tracking and reporting on metrics/data that will affect the client. Firms should publish metrics for individual cases and should present the aggregate data for all cases handled on behalf of a single client. The larger the volume of cases handled on behalf of a single client, the more the law firm can measure the impact of its case handling on the client's bottom line. Consider publishing metrics on cases that meet certain criteria, such as a financial threshold, whether based on potential indemnity and/or expense. Law firms can truly partner with clients by benchmarking the firm's results against the client's past results. In addition to producing metrics, law firms can produce a quarterly self-audit of each case that includes the court deadlines in the case, any applicable carrier deadlines, and any internal deadlines imposed by the firm. Finally, law firms can produce metrics measuring attorney performance. These metrics include valuation and budget accuracy, average case life, adherence to internal deadlines, and billed/budget percentages.

Problem 4: Lack of Creativity in Working Toward Resolution

Due to the traditional and methodical nature of how most law firms operate, law firms generally lack creativity in working toward resolution of client matters. Most firms and attorneys have a cookie-cutter approach that they apply to almost every case from inception to resolution, only deviating from that path when required to do so by a client or by facts or applicable law in a given case. The solution to this problem is to develop early resolution strategies that focus on identifying the specific facets of the case that can help the case move aggressively toward resolution. In doing so, lawyers should be keenly aware of the particular style/methodology of the claims professional and adapt to that particular claims professional's direction. On the theory that the best claim is a closed one, lawyers should always remain an advocate of an early resolution by providing recommended settlement parameters with every report and soliciting the client's input on such assessments.

Another layer to the early resolution approach is to institute a fast track program whenever early resolution appears to be viable. The idea is to obtain agreement from the opposing counsel to refrain from filing suit (or to stay litigation, if it has already been filed) and work informally to resolve the claim within a given period (the goal may be 30–35 days). Although all cases should be worked with an eye toward resolution, certain cases merit a targeted approach toward early resolution. The fast track concept provides a framework for cases that fall within

that category. Typical cases that qualify for a fast track approach are cases in which the liability is admitted and the only issue left to resolve is damages.

In addition to fast-tracking certain types of cases, law firms may choose to institute informal collaborative resolution strategies. Collaborative resolution has been present in the family law context for many years but has yet to officially enter general civil litigation.[33] In short, collaborative law entails identifying the obstacles to settlement and working with the other parties to overcome those obstacles. To be successful, the collaborative law process requires agreement by all parties. In addition, the parties must be willing to look at the case from the perspective of their opponents and consider that perspective when reviewing options for resolution.[34] One of the most important elements of collaborative resolution is the information-gathering stage, when the parties exchange documents and information informally.[35] The benefits of a collaborative approach to resolution include civility among litigants, reduction of the cost of litigation by reducing (or eliminating) the need for formal discovery and reduction of the length of the case.

Problem 5: Delayed Valuation/Reporting Impedes Insurer from Setting Aside Reserves

Due to the uncertainties that inherently exist when placing a value on a case, lawyers tend to delay valuation for as long as possible, which impedes the carrier from setting aside reserves.[36] The solution to this problem is early valuation(s) with caveats and explanations. Everyone involved knows that there is limited information available at the beginning of the case. Therefore, the lawyer should provide the best valuation with the information available at the time, explaining how the valuation may differ as the fact-finding evolves. The valuation should be updated through systematic quarterly reporting (or a timeframe specified by the client). Setting expectations for a good assignment on the front end provides the attorney the best possible basis to provide an early evaluation. By "good client assignment," we mean a claim file with as much relevant information about the claim as possible. Receipt of a complete claim file enables defense counsel to

33. The State Bar of Texas ADR and Collaborative Law Sections made a joint proposal to the State Bar that the Uniform Collaborative Law Act be included in the State Bar's Legislative Program. The bill was opposed by the Texas Association of Defense Counsel and other lawyer associations.

34. Frankly, we think that all litigation should include taking a look at the other side's perspectives on the case.

35. Dwayne J. Hermes & Erica R. Lay, *Collaborative Law Strategies for the Insurance Defense Practice,* ABA JUST RESOLUTIONS E-NEWSLETTER (June 2016), *available at* http://www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/june2016-e-news.html.

36. *See, e.g.*, Michael Palmer, *Insights into Case Valuation: A Review of How Leading Lawyers Think*, 26 ALTERNATIVE RESOL. 24, 30 (2017) (even the most experienced lawyers can find case valuation difficult).

get up to speed much more quickly and be that much more proactive at the onset of the assignment.

Problem 6: Outdated Technology (or Lack of Technology at All)

The legal profession is behind the curve in many areas, including technology. While other professions have been forced to advance technologically, the legal profession has, for the most part, refused to adapt to the latest technological advancements.[37]

The solution to this approach is a Richard Susskind approach to legal practice. Lawyers should ask themselves what processes can be automated with technology and seek to implement that automation.[38] This approach frees up lawyers to focus on the aspects of their practice that truly require human judgment. Along with automation, lawyers and law firms should work toward being truly paperless, implementing cloud-based programs and soft phone/videoconferencing capabilities that enable full mobility. Of course, law firms must continue to monitor the issue of protecting client confidentiality as firms move toward more up-to-date technology.[39]

Problem 7: Attorneys Holding On To Clients / Not Sharing Business

With the possible exception of some law firm management courses, nothing in law school prepares lawyers to run businesses. Law school prepares students to form businesses (and to sue them), but not to generate paying business that keeps their own doors open. Some lawyers, of course, have business backgrounds, and others manage to have good business instincts, but there are too many examples of bad law firm decisions based on rewarding rainmakers to the exclusion of others in a firm.[40] Bankruptcy dockets are littered with the failure of several BigLaw

37. *See, e.g.*, Betsy Brandborg, *Why You Must Stop Avoiding Technology*, 37 Mont. Law. 6, 8 (2012). Aging lawyers know how to avoid advances in technology by leaving before they have to learn to adapt. *See also* Paula K. Barnes, *Technology: The Double-Edged Sword*, 33 Legal Mgmt. 1, 1 (2014) (indicating that many Baby Boomers are resistant to change and yet they're the ones heading up law firms these days).

38. Budding lawyers need to be clear about the changes that technology will bring to the practice of law. For example, many firms are moving to artificial intelligence for the first cut in document production. *See, e.g.*, Steve Lohr, *A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet.,* N.Y. Times (Mar. 19, 2017), *available at* https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html.

39. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility. Formal Op. 477R (2017) Securing Communication of Protected Client Information), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_477.authcheckdam.pdf.

40. For a wonderful discussion of the collapse of Dewey & LeBeouf, see James B. Stewart, *The Collapse,* New Yorker (Oct. 14, 2013), *available at* http://www.newyorker.com/magazine/2013/10/14/the-collapse-2.

name-brand firms that did just that (among other fatal errors).[41] As Jonathan Fields has explained, "[t]he few lawyers who make the leap and hit the ground running [are] really entrepreneurs in lawyers' clothing."[42] Part of the problem is that too many firms create a hierarchy of finders, minders, and grinders:[43]

> Client development, while always important, has now clearly become job number one. A recent article in the *Washington Lawyer* aptly categorizes lawyers as belonging in the respective categories of " Finders, Minders, and Grinders." The Finders bring in the business. The Minders make sure the clients are happy once they are in the door. The Grinders do the day-to-day heavy lifting—researching, writing, and rarely (if ever) seeing the client. In today's large law firm world, the Finders deserve to be rewarded the most. In the past, law schools have specialized primarily in training the Grinder, who resides at the lower end of the trilogy. In the future, however, law schools must also teach students how to become Finders and Minders.
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> Interestingly, in today's legal market, it may not be enough to be only a Finder. Many rainmakers are highly qualified lawyers who attract business because of their expertise. Those who focus more on personal relationships and marketing than on the practice of law to attract clients, however, may lack high[-]level legal skills and rely on others to support them. More sophisticated clients now demand to meet the lawyers who will actually perform the legal services. Quality must be kept at a high level and sales ability must not be confused for legal competence.[44]

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41. *See, e.g.*, Jessica D. Gabel & Paul R. Hage, *The Belly of the Beast: Law Firm Insolvencies, Unfinished Business, and Jewel Waivers,* 2013-AUG BUS. L. TODAY 1, 1 ("The last decade has seen an unprecedented rise in bankruptcy filings by some of the nation's largest law firms. Powerhouse firms such as Brobeck, Coudert Brothers, Heller Ehrman[], Thelen, Thacher Proffitt, Howrey, and Dewey & LeBoeuf have literally disappeared before our eyes and rumors of continuing problems at other big-law firms can be found in the legal blogs almost every day. Numerous theories abound as to the cause of these problems including: clients bringing more work in-house and trimming expensive outside counsel work, alternative fee arrangements, increased lateral movement by attorneys with large books of business, excessive compensation practices by firms to lure such attorneys, failed mergers and expansions across the globe, and increased debt load."); *see also* Stewart, *supra* n. 40; Steven J. Harper, *Another Big Law Firm Stumbles*, THE BELLY OF THE BEAST (Dec. 19, 2016) (discussing the downfall of King & Wood and Mallesons), https://thelawyerbubble.com/tag/dewey-leboeuf/.

42. Jonathan Fields, *Why Most Lawyers Make Terrible Entrepreneurs,* JONATHAN FIELDS (July 2013), http://www.jonathanfields.com/why-most-lawyers-make-terrible-entrepreneurs/.

43. *See, e.g.*, Jim Calloway, *The Grind,* 87 OKLA. B.J. 296, 297 (2016) (discussing finders, minders, and grinders).

44. Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education,* 70 MD. L. REV. 341, 356 (2011) (footnotes omitted).

We take issue with the idea that Finders deserve the lion's share of compensation, leaving Minders and Grinders to fight over the scraps. Distinguishing lawyers' contributions to the bottom line solely on the basis of who brings in a particular client creates negative incentives. There are better ways to reward lawyers.

One such firm that has found a way to encourage collaboration is Duane Morris, which was featured in a Harvard Business School case study.[45] The firm compensates its lawyers by starting with a Matter Contribution Analysis (MCA), which compares collected revenue less actual costs with the target hours related to the lawyer's projected compensation.[46] The MCA gives the firm information on whether the lawyer is profitable. In addition to the MCA, the firm calculates compensation in part based on whether the lawyer's team[47] has been efficient. Although this description is a vast oversimplification of how Duane Morris calculates compensation, in essence, the firm has discovered a way to reward not just finders, but minders and grinders as well. It's not an "eat what you kill" system. It thus encourages efficient collaboration.

At Hermes Law, attorney compensation is determined in part by a number of metrics that are in alignment with client interests.[48] These metrics include early resolution, reduction in case life, budget accuracy, case valuation accuracy, case resolution cost versus original demand, reporting compliance, case closure compliance, client satisfaction rating and client retention. In addition, the firm has devised a profit-sharing plan whereby every member of the firm (attorneys and non-attorneys) share in the profit of the firm.[49] The success of the individuals is determined by the success of the firm as a whole.

The benefit of treating each client as the firm's client, rather than the originating lawyer's client, not only helps the client—because work can go to the lawyers best equipped to perform that work—but also reduces the cutthroat nature of an "eat what you kill" system. When each lawyer has a duty to cultivate client relationships, and when there are no distinctions about compensation based on who contacted the client first, then every new client, and every retained client, is a cause for celebration.

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45. Heidi K. Gardner & Annelena Lobb, *Collaborating for Growth: Duane Morris in a Turbulent Legal Sector,* HARVARD BUSINESS SCHOOL CASE STUDY 9–10 (July 26, 2013).

46. *Id.* at 9.

47. "Team" is defined as "including anyone who received 25% or more of their work from the focal partner." *Id.* at 10.

48. *See, e.g.*, Ari Kaplan, *Accountability, Metrics and Change: Legal Administration in the Perpetual New Normal*, 32 LEGAL MGMT. 41, 46 (2013) (when clients demand efficiency and control, metrics for accountability can help).

49. *See* MODEL RULE 5.4 ("A lawyer or law firm shall not share legal fees with a non-lawyer except that: . . . (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing plan . . .").

Problem 8: Imbalanced Case/Work Loads (Feast or Famine)

Law firms are notorious for unpredictable workloads and an ongoing "feast or famine" cycle.[50] It is not uncommon for an associate to bill 130 hours one month and 200+ hours the next month. Some may believe that, due to the nature of the profession, there is no solution to the feast or famine phenomenon, which will all even out in the end; however, this unpredictability creates many problems, from partners hoarding billable work during the lighter months to the general anxiety and stress associated with this model.

Although there is uncertainty related to the litigation practice, in that no one can perfectly predict when the next file will come in the door, there are processes and strategies that can be implemented to lessen the effects of this uncertainty. One such process is instituting a 90-day budget with projected hours for every case. Monthly benchmarking of the hours worked can determine whether the hours worked are on target with the 90-day budget. Benchmarking against the 90-day budget enables the firm to make adjustments accordingly, including addressing staffing needs, reassigning cases, etc., before the end of the month arrives and the firm discovers that one attorney is short on hours while another is over-capacitated. In addition, there should be monthly discussion and monitoring of inventory with specific attention to which cases will likely close/settle within the next 30 days.

As the firm continues with benchmarking against the 90-day budget, the firm will be generating valuable data along with the way. This data aggregated over time should enable the firm to predict by file type the number of hours typically worked in a given month over the entire life of a case. The firm can use that data to determine (1) the number of hours a team can support and (2) the frequency by which new files must be added to sustain (or re-organize, re-position) the teams.

Problem 9: Lack of Consistency in Service Delivery Within the Firm

Clients generally say, "We hire the lawyer, not the firm." Why is this? Clients know that they will not receive the same level of service across the firm, so when they find a lawyer who provides top-notch service tailored to the client's needs, the client becomes loyal to the lawyer at the expense of the firm. This practice is common because law firms do not set a standard for service delivery. They expect all the lawyers to provide excellent service but do not provide a definition for what excellent service looks like.

There are a number of solutions that provide for a uniform level of service delivery across the firm. The first is knowledge management, and by that we mean ensuring that the best practices and documents are shared across the firm.[51] If the

50. *See, e.g.*, Bahi Okupa, *The View from the In-House Department,* 55 ST. LOUIS B. J. 16, 23 (2008) (outside law firms tend to be feast-or-famine, while inside law departments have a more constant workflow).

51. *See, e.g.*, J. Michael Jimmerson, *Knowledge Management 101*, 17 GP SOLO 64, 1 (2000) (knowledge management is intellectual capital).

thirty-year lawyer shares her best pleading with a second-year lawyer, the more-junior lawyer is able to raise the caliber of his practice closer to the level of the thirty-year lawyer.[52] Another solution is a case-handling workflow.[53] The workflow is a timeline, with tasks and reminders throughout the life of the case. The timeline ensures that all tasks are completed when they need to be, and that all issues that should be considered throughout the life of the case are considered when it is appropriate to consider them. These practices ensure that the client knows what kind of service it will receive, no matter which attorney is assigned to the file. Furthermore, it enables the client to work with different attorneys within the firm who may have specialized knowledge of the subject matter of the case without the fear that the case handling will be of lesser quality. Obviously, the firm should still promote one-on-one relationships with clients. Many times, it is the relationship that will keep the client at the firm. But the processes described above ensure a level of excellence across the firm, and this excellence reflects on the firm as a whole and not just the attorney handling the case.

Problem 10: Services Fail to Meet Client-Specific Needs

Another typical problem in defense firms is that the services provided are not tailored to the specific client.[54] Legal services are sold in a one-size-fits-all manner, with very little consideration of the client's specific processes, objectives, or needs. Legal service providers tend to assume that they know what the client wants, but focused conversations with clients on this issue often reveal that clients may differ on what they consider to be a successful representation. Most, if not all, clients want to save on defense costs, but *how* they want to achieve this cost savings may vary. Some clients want to resolve every case as early as possible and are willing to pay more in indemnity to do so; other clients are unwilling to pay defense cost/nuisance value settlements. Beyond the cost of legal services, there are other considerations for clients when they evaluate the legal service provider. Many companies have Key Performance Indicators (KPIs) that they use to evaluate their employees. KPIs are a good starting point for determining how the company defines success.[55]

To understand how to service a client in a way that meets the client's specific objectives, the legal service provider should institute an onboarding process. The goal of onboarding is to understand the client's business and internal goals/objec-

52. Yes, we understand that exemplars don't obviate the need for experience and the judgment that comes with experience. But sharing best practices is a good start.

53. *See, e.g.*, Jack E. Urquhart, *Controlling Litigation Costs through Advance Planning*, 2 Prac. Litig. 45, 54 (1991) (planning, even with some flexibility built in, helps to ensure efficient work).

54. *See, e.g.*, Kwamina T. Williford & Steven H. Wright, *Tips for Managing Client Relationships During Challenging Economic Times*, 53 Boston Bar J. 18, 19 (2009) (tailoring work to the client's objectives helps to achieve cost efficiencies).

55. *See, e.g.*, Paula Tsuratani, *Budgeting Basics*, 34 Legal Mgmt. 1, 2 (2015) (key performance indicators help to monitor success and should be part of strategic planning).

tives and then tailor every aspect of the service delivery to the individual client. Reporting should be customized to the client's preferences, both in terms of time and content. Best practices of communication should be discussed—for example, does a client prefer phone calls or emails? How frequently does a client want to hear from the firm? Furthermore, attorneys should learn about the preferences of the individual client contact so as to tailor not only hard skills but also soft skills to that person. Examples of soft skills include personality traits, social skills, and demeanor. In the insurance defense context, it is important for the service provider to gain a clear understanding of the carrier's relationship with the insured(s).

A firm can provide added value to the client by entering into a strategic partnership with the carrier, based on trust and shared objectives so that the firm and the carrier work together and share the benefits of that relationship. In addition, the firm can bring added value by providing continuing education courses to the client. CEs are an opportunity for the firm to educate the client on the latest developments of legal issues affecting the carrier and its business lines.

A firm can provide added value to the insured (and to the carrier indirectly) by providing risk management recommendations to the insured at the conclusion of the case. These recommendations would describe things that the insured could have done differently to reduce its liability or to make the claim more defensible. Firms can take these recommendations one step further by providing consulting services[56] to clients to achieve insights and improve outcomes and risk management prevention. Attorneys may provide consulting services in addition to legal services. However, consulting services provided by a non-attorney must be housed in a separate company.

Problem 11: Traditional Law Firm Management Creates Unhappy Employees

As we've discussed above, the traditional hierarchy of finder-minder-grinder devalues all but the "finders"[57] and completely ignores those additional professionals who support the lawyers in their work: the legal assistants, the administrative assistants, the business managers, the information technology workers, and countless others who help a law firm be successful. Over-rewarding the finders puts considerable pressure on junior lawyers to get their own book of business and can contribute to some finders' belief that their next big payday is available only by switching firms.[58] As in the Dewey & LeBoeuf debacle, over-rewarding

56. But make sure that you don't run afoul of the "no splitting legal fees with non-lawyers" rule. *See* n. 49, *supra.*

57. *See* nn. 41–47 *supra* and accompanying text.

58.

> While work-life balance is the most prevalent motivation for joining New Models firms, it is not the only one. Also prevalent is dissatisfaction with the well-nigh universal pressure on law firm partners to become "rainmakers"—those who bring new clients into the firm. . . . The finders were the rainmakers. This system worked because strong norms of firm loyalty made it difficult for the finders to join another firm and take their clients with them. Doing so was considered disloyal and bad form. In recent decades,

finders can also lead to exaggeration of what a partner's book of business actually can bring into the new firm.[59] Not only is over-valuing finders bad for overall law firm morale, but it also ignores the fact that not every lawyer enjoys the process of rainmaking.[60] Perhaps more junior lawyers who aren't natural rainmakers will grow into strong rainmakers eventually, but putting pressure on them to do so means that they aren't focusing first and foremost on becoming great lawyers. Becoming a great lawyer takes time and experience, and there are only 24 hours in any day.[61]

Happy junior lawyers (and happy other types of employees) are a very good investment. For one thing, happy employees generally tend to contribute more to, and stay longer at, a firm.[62] For another thing, there are hard costs associated with early loss of associates. Back in 2005, Catalyst studied Canadian law firms to come up with a stark calculation: the average cost of losing an associate to turnover was $315,000, which was roughly twice the average associate's salary—and the breakeven point to avoid a turnover loss was 1.8 years.[63] Now that salaries are much higher, it's safe to assume that turnover losses are higher as well. In addition to the costs to the firm, there are also losses to clients when people in the firm

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> this norm eroded, enabling rainmakers to insist on a larger slice of the pie, on pain of jumping ship. These pressures were institutionalized when the *American Lawyer* began printing profits per partner, putting firms under pressure to post high profits per partner in order to attract new rainmakers and keep those they had. Gradually, rainmakers' status and salaries soared, and those of both minders and grinders fell, leading to two-tier partnerships in which most partners were glorified employees, also known as "income partners."

Williams et al., *supra* note 22, at 18–19 (footnote omitted).

59. *See generally The Collapse, supra* n. 40.

60.

> While work-life balance is the most prevalent motivation for joining New Models firms, it is not the only one. Also prevalent is dissatisfaction with the well-nigh universal pressure on law firm partners to become "rainmakers"—those who bring new clients into the firm. . . . The finders were the rainmakers. This system worked because strong norms of firm loyalty made it difficult for the finders to join another firm and take their clients with them. Doing so was considered disloyal and bad form. In recent decades, this norm eroded, enabling rainmakers to insist on a larger slice of the pie, on pain of jumping ship. These pressures were institutionalized when the *American Lawyer* began printing profits per partner, putting firms under pressure to post high profits per partner in order to attract new rainmakers and keep those they had. Gradually, rainmakers' status and salaries soared, and those of both minders and grinders fell, leading to two-tier partnerships in which most "income partners."

Williams et al., *supra* note 22, at 19.

61. Except for those lawyers who have managed to bill more than 24 hours in a one-day period. We wish that such stories were merely apocryphal.

62. *See generally* James S. Granelli, *How to Keep Your Lawyer Happy*, 3 L.A. LAW. 16, 32 (1981) (more benefits encourage junior lawyers to stay longer at their firms).

63. *Beyond a Reasonable Doubt: Building the Business Case for Flexibility* 10–18, CATALYST (2005), *available at* http://www.catalyst.org/knowledge/beyond-reasonable-doubt-building-business-case-flexibility.

leave, either because the rainmakers are seeking more lucrative firms or because people are miserable. Understanding a client's needs and preferences takes time, so whenever clients have to start over by educating new people, that cost is significant as well.

Miserable work conditions lead to health problems of all sorts, including depression, and they prevent junior lawyers from taking reasonable risks as a way of learning new skills. Happy working conditions—where each employee feels valued and engaged—create a safe space for people to try new approaches and learn from them.

Creating the kind of firm culture where employees feel engaged, valued, and challenged doesn't happen through minor adjustments. Firm leadership must have a different mindset altogether and be willing to implement protocol and organization changes that are radical in order to achieve radical changes.

One mindset change is a focus on the team versus the individual.[64] The focus on the team does not mean that individual successes are not recognized, but rather that there is a focus on the success of the organization as a whole, recognizing that every member's contribution (no matter his or her level of education or daily responsibilities) is equally valuable. A flattened organizational structure is one way to move the firm toward a team orientation.[65] Law firms are chockfull of hierarchy and differentiators among employees. We like to classify employees not only on their education level but also on their seniority within it. Hence, we have equity partners, senior partners, partners, junior partners, senior associates, associates, junior associates, and soon down the line. If the differentiation of titles comes with differentiation of perks, maintaining a team orientation is difficult. Flatten the structure, and promote the team.

An open workspace also promotes team-orientation by providing an environment that fosters collaboration.[66] The "hot desk" concept, where workstations are unassigned, provides a further layer of collaboration, especially when employees are required to change workstations and sit with different people every day.[67] To make sure that the team-oriented approach is being adopted, it is important to have individuals in the firm devoted to working with those teams to build unity and make sure that all are complying with the team model. The firm should

64. *See, e.g.*, Mary Kate Sheridan, *Building a Team Culture: Tips for Fostering Connections and Collaboration within Your Law Firm,* 31 LEGAL MGMT. 44, 50 (2012) (part of building a team culture is reducing the need for internal competition among employees).

65. *See, e.g.*, ELIZABETH A. HOFFMANN, CO-OPERATIVE WORKPLACE DISPUTE RESOLUTION: ORGANIZATIONAL STRUCTURE, OWNERSHIP, AND IDEOLOGY 9 (2016) (Hoffman provides an explanation of flattened organizational structure and a discussion of how the right organizational structure can help to resolve workplace disputes).

66. *See, e.g.*, Jay L. Brand & Thomas J. Smith, *Effects of reducing enclosure on perceptions of occupancy quality, job satisfaction, and job performance in open-plan offices*, PSYCEXTRA DATASET (explaining that an open work space facilitates communication and helps to improve performance and productivity).

67. At Hermes Law, employees are permitted to sit at the same workstation no more than two days per week.

be working to train and develop leaders who are fully invested in the model and who will inspire other team members to follow suit. Finally, creating opportunities for team members to recognize other team members for a job well done (in person or via firm-wide correspondence) is key in developing a team-oriented culture.

Employees will be more engaged in their work if they believe that the firm is being transparent with them. One of the areas where firm employees are used to feeling like they are in the dark is in the area of firm finances. Open-books management is the concept of sharing the finances, including financial goals, with all employees—attorneys and non-attorneys alike. This information can be shared in writing or at a monthly firm-wide meeting along with other firm news and updates. Similarly, it is a good practice to make all firm meetings "open"—in other words, to refrain from holding meetings for certain categories of employees based on their titles. This practice reinforces the idea of a flattened organizational structure in which all employees are treated equally.

Employees need to know what is expected of them and what they must do to be successful at the firm. In that regard, the firm should create a list of core competencies that incorporate the values and skills that should be embodied by every employee.[68] There should be regular discussion and training on the core competencies. In addition, an assessment of each employee's performance as measured by the core competencies should be reviewed with each employee on a regular basis. This process ensures that employees are fully aware of the areas where they are doing well and the areas where they can improve. At Hermes Law, the core competencies are team orientation, humility, focused/disciplined behavior, data/fact-driven decisions, results orientation, technical expertise, and proactive problem-solving. These competencies are taught and emphasized through formally distributed information that provides examples of how to demonstrate a given competency at Hermes Law and through recognition of team members who demonstrate the core competencies.

Moreover, employees will respond more favorably to what is required of them if they feel that they are trusted and treated as professionals.[69] When a firm demonstrates a lack of trust toward employees, the culture becomes an "us versus them" culture, as opposed to a team-oriented culture. In that situation, morale will rapidly decline. As we all know, with great trust comes great responsibility. Firms should work to instill a sense of responsibility in all employees so that they take ownership over their role in the firm and feel personally responsible to make sure that they fulfill the role they have been given. One of the ways to show employees that they are trusted is by providing flexibility regarding work-

68. *See, e.g.*, Ann Rainhart, *The Evolving Practice of Law: Competency Development in Law Firm Combinations*, 11 U. ST. THOMAS L.J. 87, 98 (2013) (explaining the role of articulating necessary work skills at each stage of an attorney's development).

69. *See generally* Pascale Daigneault, *Cultivating a Positive Work Environment*, 37 LAW PRAC. 42, 43 (2011) (encouraging the value of respect in a work environment).

ing hours and location. Typically, firms are very inflexible when it comes to working hours, making it very difficult for employees with children to advance in their careers.[70] Employees should be given the option to work remotely, although with encouragement to continue in-person communication. In addition, an unlimited paid-time-off policy that lets employees manage their own time off (with a requirement to coordinate within their teams) instills a sense of responsibility to others. It goes without saying that there should be some parameters around these privileges that keeps some employees from abusing the policy at the expense of the others. There are number of new firm models that embody this idea of flexible working hours and time off.[71]

> The most established New Model consists of companies that place lawyers in-house, either on temporary assignment (the original meaning of "secondment") or on a more permanent but part-time basis.[72] Generally, lawyers at these companies have elite law school and Big Law credentials, followed by experience working in-house. Lawyers work virtually from their own homes and/or on-site at companies they serve, at salaries consonant with those of lawyers in-house[73]—which enables fees at a fraction of those at Big Law. Secondment Firms take pains to differentiate themselves from temp agencies such as Robert Half Legal. Temp agencies typically do entry-level or routine legal work; Secondment Firms are careful to insist that they do high-level legal work. When asked to differentiate, one informant analogized the comparison to that of the Dollar Store versus Bloomingdale's.

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70. *See* Maureen E. Lally-Green, *Flexibility in the Legal Workplace: An Idea Whose Time Is Long Overdue,* 34 ST. LOUIS U. L.J. 643, 668 (1990) (discussing work-life balance issues as they relate to law firm profitability); *see also* Darrell G. Mottley, *Flexibility: Managing Lawyer Talent,* 26 WASH. LAW. 5, 5 (2012) (a lack of flexibility contributes to worker burnout).

71. *See* Williams et al., *supra* note 22, at 13–14:

> Because law firms have not done this [changing the norms surrounding flexibility of schedules], New Models have: working part-time is the norm in some, while in many others full-time is defined as sharply fewer than the 2000-plus-hours expectation common in Big Law. By hard-baking into their business models flexibility or shorter hours for everyone, New Model firms have largely or completely eliminated the flexibility stigma. Some New Models founders are also very explicit about their desire to eliminate the stigma for lawyers that do not fit the traditional mold. As one founder said, "I think they need to be assured that they're not going to be second-class citizens. [T]hey're highly trained, talented lawyers, so they don't want to be in a situation where they feel second string."

72. *See generally* David Gialanella, *Attorney at Loan*, 94 A.B.A. J. 28, 29 (2008) (discussing the concept of secondment).

73. *See* Jim Calloway, *The Virtual Law Practice: Are We All Virtual Lawyers Now,* 84 OKLA. B.J. 1787, 1789 (2013) (discussing the phenomenon of working while outside the office).

Secondment Firms seek to offer high-level work at bargain basement prices. As mentioned, several firms noted that their fees averaged a third to a half of the fees of Big Law. One way Secondment Firms deliver this lower rate is that their lawyers do not get a guaranteed annual salary. They only get paid for the work they do. So lawyers take a risk: they work without the guarantee of a steady income in exchange for a release from many of the pressures of law firm life, most notably the pressures to bill long hours and to bring in clients. Most Secondment Firms split fees between the lawyer who does the work and the firm itself, and the percentages vary widely, even within a firm. One founder noted that the attorney who does the work gets between one-third and two-thirds of what is billed depending on the type of work "and the relationship I have with that attorney."

Some organizations are organized as law firms, while others are organized as companies. Two quite different Secondment models have emerged. The Independent Contractor Secondment Model (including Avökka, The General Counsel, Limited, InnovaCounsel, LLP, Outside GC, Phillips & Reiter, Conduit Law) stems from the desire of senior lawyers (typically men) to work more flexibly and escape the billable hours "rat race" or, less frequently, to avoid "putting all their eggs in one basket" after having been displaced by corporate takeovers. These lawyers usually have prior experience as general counsel or other senior positions in-house. Typically they work full-time "flex," with time off as needed to attend to family matters or other interests. These firms reflect the fact that many men—even those who work very long hours—typically say they want to work forty hours a week. Attorneys typically are titled "partners," even in organizations that are companies, not law firms. Lawyers are independent contractors on an "eat what you kill" arrangement—they have no guaranteed salary but keep what they earn (or collect), with the Secondment Firm taking a percentage of their fees. Some firms require attorneys to have their own book of business, while others do not. Many are members of the General Counsel Services Alliance.[74]

Accordion Companies provide law firms with the ability to "accordion up" when there is a surge of work, and fold back down when that work is completed.[75] These five Law Firm Accordion Companies provide law firms with a network of carefully curated lawyers to tap into those situations. Sometimes the Companies offer a firm access to specialists it might not have, but more often the Companies provide

74. Williams et al., *supra* note 22, at 26–27.

75. *See, e.g.*, Mary Kate Sheridan, *Modern (Staffing) Makeover*, 33 Legal Mgmt. 1, 4 (2014) (discussion "accordion staffing").

firms access to outside help that otherwise might overtax the attorneys employed by the firm. By far the largest is Counsel on Call, which has 900 attorneys and was worth nearly $ 50 million in 2013. Most of the other companies have networks of about 100 attorneys.

. . . .

Accordion Companies are not law firms. Typically, they are solely owned companies. Like Secondment Firms, they are matchmakers, but typically they connect lawyers with law firms rather than directly with clients[76]—although some work both with law firms and companies as in-house lawyers. Conflicts of interest are avoided because the attorney-client relationship is with the individual lawyer—not the Accordion Firm. Rainmaking is generally the province of the founder or head of the company. Some Accordion Company networks were founded, very self-consciously, by former Big Law attorneys and aimed at former Big Law attorneys; others throw a wider net.[77]

Virtual law firms preserve a lot more of the traditional law firm structure than do the organizations discussed thus far,[78] not the least of which is that most are law firms. Some Virtual Firms are really law companies, typically businesses solely owned by one or two lawyers. Yet even those organized as companies tend to present themselves as law firms. They typically include only, or predominantly, senior level partners. Those that include non-partners typically eschew the term "associate" and instead call non-partners "of counsel."[79]

The other main difference between Virtual Firms and traditional law firms—other than that they are virtual—is that attorneys only get paid when they work (or, often, when they collect). One founder said, "We stopped paying salaries. We just shifted entirely to a basically results-oriented system." This eliminates many of the pressures visited on law firm lawyers, but it also introduces an element of risk: if you don't work (or collect), you don't get paid. "We're really focused more on senior lawyers who are a little bit more financially secure and confident in their abilities and can ride the ups and downs of the workflow," one founder explained. Summarized one founder, "We run our business like a business. The bottom line is the bottom line." He commented, "It sounds terribly radical because we happen to live in this

76. *Id.* at 3. These companies are useful to smaller firms, allowing those firms to save costs by cutting down payroll.

77. Williams et al., *supra* note 22, at 47 (footnote omitted).

78. *See, e.g.*, Chad E. Burton, *How Real Are Virtual Law Firms?*, 29 GPSOLO 47, 51 (2012).

79. *See, e.g.*, G. M. Filisko, *The Job-Name Game*, 100 A.B.A. J. 27, 27 (2014) (discussing the proliferation of employee titles and the relationship of titles to salaries and to work assignments).

> weird world of lawyers." Some firms use traditional billable hour arrangements while others offer flat fees. Much more so than other New Models, these firms seek to send the message that they offer legal services similar to Big Law.[80]
>
> Many of the fourth group of organizations retain much of the traditional law firm model: most are organized as law firms and have physical offices. Yet these firms pride themselves on doing things differently than traditional law firms. There is more variation in this group. Some are well-established firms that have been around for decades; others are only a few years old. Some have over a hundred attorneys, while others only two; most have between fifteen and fifty lawyers. Many, but not all, of the firms have specialized practices.[81]

It is important that firms look for ways to help each employee maximize his or her potential. Firms should help to move each employee to the next level of expertise and competency.[82] Many times, employees have expertise or specialized knowledge that would be very beneficial to the firm but which is not being utilized.[83] Taking the time to learn about the employees and what each of them can contribute to the firm will help all employees to feel valued and appreciated. It takes time and effort to build relationships with employees, but those relationships will pay dividends. A great way to facilitate these discussions is for each employee to be assigned a mentor who is committed to helping the employee grow in his or her current position and who will also be charged with helping the employee develop in other areas that align with the firm's goals and objectives.[84]

Employees need to know that the firm cares about their well-being and wants them to enjoy their work. Firms need to create space for fun and casual interaction among employees. Some ideas include having ping-pong and foosball tables for employees to use on breaks.[85] Happy hours and firm-wide retreats are another opportunity for firms to promote fun and relationship building.[86] Firms may

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80. Williams et al., *supra* note 22, at 59–60.

81. *Id.* at 78.

82. "I've grown the most of any year" and "I've never worked harder, never been asked to do so much and I've never enjoyed my job more" were some of the comments received by Hermes Law employees soon after the firm's formation.

83. One Hermes Law employee, Robert, had always worked as a case clerk. After Hermes Law formed, he became the go-to person for all questions regarding the new technology. No one knew that he had a specialized knowledge in IT. Robert's role at the firm is now devoted solely to IT.

84. *See, e.g.*, Valarie L. Brown, *Niche Marketing: Considerations in Defining a Legal Specialty*, 19 COLO. LAW. 2069, 2072 (1990) (mentor programs can decrease turnover).

85. At Hermes Law, a variety of employees play ping-pong on a regular basis in the afternoons. Also, there are employee-organized ping-pong tournaments.

86. Hermes Law took its entire firm (with their families) to Colorado for a long weekend.

choose to implement wellness initiatives.[87] Offering regular chair massages at the office can be a great perk.

Finally, creating a culture of service and humility is another way to engage employees and help them to feel that they are part of the team. Firms should promote the concept of servant-leadership so that every person in the firm has the opportunity to serve others and to lead by example. Firms should also give employees opportunities to participate in philanthropic activities.

Conclusion

The ways that defense firms have been delivering their services and running their businesses is, indeed, in need of major overhaul. The good news is that the solutions to many if not all of the problems identified are within reach. The biggest obstacle to overcome is a change of mindset. There are new models of legal practice—people who are blazing the trail—that show us that it can be done, that we don't have to continue with the inefficiencies and miserable working conditions that have plagued the profession for far too long. The question is how long will it take before those new models become the norm and how long will it be before clients are demanding that firms change their ways of doing business? As more practitioners adopt new models of legal practice, the adopters will begin to take over the market share. The laggards will struggle to retain their share of the market. Change is coming. The question is who will be at the forefront.

87. *See generally* Chris Mittelstaedt, *Wellness at Work,* 26 LEGAL MGMT. 81, 85 (2007) (promoting the use of workplace wellness initiatives, including healthy meal options, fitness programs, and seminars on stress management).