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What follows below is excerpt from Deborah Epstein Henry’s book, *Law & Reorder: Legal Industry Solutions for Restructure, Retention, Promotion & Work/Life Balance*, published by the American Bar Association on October 18, 2010. The excerpt is taken from Chapter 2, entitled “The Rise of New Models of Legal Practice.” To review the book’s Table of Contents, read advance praise, read press features, order the book, and learn more, visit www.lawandreorder.com.

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Alternatives to the traditional legal model have been unfolding for some time now. . . . The question remains whether these alternatives to the traditional model will continue to develop at exponential rates and whether there will be multiple future models to legal practice.

Axiom and Other New Law Firm Models

In 2000, Mark Harris founded Axiom. The impetus was simple: both parties to the exchange of legal services—the clients and the lawyers—were unhappy. Clients felt they were overpaying for services that were not always the quality they expected. Attorneys felt overworked and were dissatisfied with their treatment. So Harris decided to “take the traditional [law firm] and put it in a wind tunnel . . . and strip away all the pieces that create drag and waste.”¹ Rather than operate under the large law firm leveraged pyramid of three to four high-priced associates to every one partner, Axiom removed most of the costs associated with large firms including young lawyer training, office space rentals, and leverage-based finances.²

Axiom clients are in-house legal departments, not law firms. The Axiom model relies on contracting directly with corporate clients on a retainer basis, usually for a fixed fee.³ Occasionally, when circumstances dictate, an hourly rate is used, but in such situations, the more the client buys, the more the hourly rate is reduced. Typical assignments involve an Axiom lawyer being staffed on a client matter for 11 months. Axiom lawyers are W2 employees with benefits and 401(k) plans, but when they are not staffed on a matter (when they are “on the beach”), they are not paid.⁴ However, benefits continue when salary shuts off. Axiom does not hire first-year lawyers; typically it hires lawyers with four to five years experience following law school.

By removing traditional cost structures, Axiom freed itself to charge clients half the fees or less.⁵ It removed overhead costs by having its lawyers work at the client site or at a subsidized home office. Axiom also proved that high-level talent was willing to accept a position with some income security risk in exchange for more control and flexibility in the work they do.

Axiom recognized that internal legal departments were getting bigger and were holding on to the more interesting work while sending specialized matters to large firms.⁶ Its goal has been to provide extra help for the work that legal departments keep. Additionally, Axiom advises in-house departments on how to reduce their legal budget. It was ahead of the curve in recognizing that legal work is being disaggregated. That is, such work is being broken out into smaller pieces with different parties handling different pieces of the work. Disaggregated work often requires more case management, and Axiom handles case management for its clients.⁷ Seeing its role as servicing the in-house client and making its needs a priority, Axiom advises in-house legal departments on reducing their legal expenses by unbundling, outsourcing onshore and offshore, and creating processes to more efficiently handle routine work. Rather than being threatened about shrinking legal service needs, Axiom provides advice to in-house departments as part of its client service.

In addition to Axiom, a multitude of new-model firms and variations have cropped up— . . . Many of them mirror the Axiom model of supplementing work directly for in-house legal departments. Some also serve as part-time general counsel for companies that cannot justify hiring someone full-time.⁸

Mae O’Malley started Paragon Legal Group, P.C. in Silicon Valley in 2006 to provide working-mother attorneys well-paid, interesting work with flexible schedules.⁹ Specializing in technology licensing and corporate transactions, Paragon lawyers work with law firms and in-house legal teams on a project basis when, for example, an in-house

attorney is on maternity or medical leave or a company needs overflow support.¹⁰ Paragon lawyers do not work overtime, and they can take as much time off as they like between assignments.¹¹ . . .

The success of the Axiom-type model is intuitive. It has not only been effective in reducing client costs but also in responding to client needs. In 2009, while about two-thirds of general counsel said they were going to bring more work in-house, nearly one-third also said they were planning to cut lawyers and other law department staff.¹⁵ This combination of more work and less in-house staff is the perfect opportunity for Axiom-type outside counsel to handle spillover work of in-house legal departments.

Additionally, the Axiom-type model has been responsive to the needs of many individual lawyers who seek more flexibility and predictability in how, where, and when they work. The model is a good fit for Gen Y, a generation that is generally more willing to take risks and less willing to work within the confines of traditional law firms.¹⁶ The model also has been particularly appealing to working mothers.

Lawyers working for these new-model firms are happier, because of the flexibility they garner and because of the opportunity to work onsite, at the client.¹⁷ Attorneys also see the appeal of project-based work—not only because it gives them flexible hours but because of the exposure to a larger variety of clients.¹⁸ There are risks for the attorneys too. The work is not always consistent and the attorneys' career path may look more disjointed. However, in the recent economic downturn, these risks seem less specific to new-model law firms. Indeed, the traditional law firm path has become much less certain and therefore the new-model law firms will likely continue to gain popularity. These new options, however, do not exist for most junior lawyers. The nontraditional firms are still looking to traditional firms and other established employers to train their lawyers. Once those lawyers are trained, the new-model firms offer what they believe is something better.

Virtual Law Firms

Virtual law firms have been gaining momentum over the past 10 to 15 years. At its core, a “virtual firm is a flattening of the traditional model through tools of technology and a philosophy of sharing, rather than joining by hierarchy and physical space.”¹⁹ For many of the virtual firms, the formula is simple: hire partner-level lawyers with established clients, cut their large law firm rates in half, and let the lawyers keep almost all of what they bill.²⁰ Some virtual firms hire experienced but not partner-level lawyers. Also, some virtual firms expect all of the lawyers to develop business while others relegate business development to

a select few.

There are numerous virtual firms that have evolved. . . .

At one virtual firm, Virtual Law Partners (VLP), founded in 2008, partners with 10 to 15 years of experience work remotely and communicate through video chat and e-mail.²¹ They bill \$275 to \$400 per hour and use a centralized infrastructure for billing, information technology, marketing, and recruiting.²² Clients pay about one-third the cost of large firms. VLP attorneys do not have billing requirements but they are not paid if they don't work.²³ A significant incentive for VLP attorneys is that they earn 65 percent of what they bill and collect. Additionally, attorneys who manage their projects get 85 percent of their collected billables and an additional 20 percent of each working attorney's collected billings on a project.²⁴ The remaining 15 percent goes to firm overhead. Lawyers split the cost of malpractice insurance.²⁵ This revenue allocation is in stark contrast to the traditional law firm model where 33 percent of collections go to overhead, 33 percent go to partner profits, and 33 percent go to the working attorneys.²⁶ . . .

Berger Legal, another virtual firm, handles traditional outside counsel work as well as overflow work from in-house legal departments. It also acts as outside general counsel for smaller businesses and "seconds" (lends) its lawyers to clients on a full-time or reduced hour basis. These seconded lawyers work on specific projects or cover staffing gaps such as those resulting from maternity or medical leaves.²⁸

Rimon Law Group distinguishes itself as a virtual law firm with a "satisfaction-based billing" program where a client can elect to pay up to 20 percent more or less of the firm's normal rates, depending on the client's level of satisfaction.²⁹ The firm uses project management software where all communications, tasks, files, documents, and deadlines are stored in a location to increase collaboration and efficiency. Rimon has also partnered with Virtual Paralegal Services, Inc. (VPS), enabling Rimon to delegate certain tasks to deliver more effective legal services.³⁰

At Chase Sensale Law Group, lawyers are connected by voice-over-IP phones, and the firm has an online database of more than 20,000 files.³¹ This database is a cost-saving measure, as it avoids the overhead of warehouse storage while offering flexibility in how work gets done.³²

Along with some of the larger virtual law firm models, there are numerous smaller virtual practices that focus on individuals and entrepreneurs. At these smaller shops, e-lawyering provides legal services online including non-contested divorces, wills, limited liability company formations, bankruptcy filings and real estate leases and

closings.³³ . . .

The benefits of virtual lawyering are numerous. For clients, they are able to have services provided by top-notch lawyers at significantly reduced prices—sometimes a third to a half of the rates. They benefit from the more flexible infrastructure of virtual law firms that often allows them to structure alternative fee arrangements more freely.³⁵ For individual lawyers, there is the opportunity to work more autonomously and potentially earn more while gaining significantly more freedom and flexibility. Lawyers working from home also avoid wasted time commuting or chatting at the water cooler. Lawyers enjoy having no billable-hour requirements since there is no need to cover associate or staff salaries or expensive office space. Many of the lawyers are also proud to be part of a green business with a small carbon footprint. The virtual firm lifestyle appeals to many working parents and those who seek more control and flexibility in their lives to pursue interests outside the law. Since everyone at virtual firms is working from home, there is no stigma attached to doing it.³⁶

There are also challenges facing virtual firms. A significant one is building a brand. Many of the virtual firms are deliberate in hiring senior attorneys with impressive credentials and prestigious schools as a way to help enhance their credibility and image. Another challenge of a virtual firm is to facilitate camaraderie and make people feel connected, as if they are part of a common experience and community. Virtual firms try to achieve this by fostering attorney collaboration—so it's not just a group of attorneys who share e-mail addresses and a law firm name. Virtual firms also use technology including teleconferencing and Skype video and have regular get-togethers in person with and without family members. . . .

A key question for virtual law firms is whether they will be able to compete to handle large matters or whether a greater infrastructure is necessary for the type of work typically performed by larger firms. Some clients are skeptical of a virtual firm's ability to compete for large, sophisticated matters. . . .

Firms Abandoning the Billable Hour

Some law firms are basing their marketing campaigns on abandoning the billable hour. These campaigns are a way for firms to distinguish themselves and lure away clients who crave predictability in their legal budgets as well as high-quality work. These forward-thinking firms tend to innovate on not just the billable-hour issue—they often bring other new ideas to the table. One example is Summit Law Group, founded in 1997. At Summit, all lawyers and staff members have an equity stake in the business

and all have the same size offices.³⁸ All lawyers at the firm are partners and reduced-hour partners are allowed as well.³⁹ Lawyers and staff are paid based on individual and firm performance (rather than seniority). Financial information, including quarterly budgets and cash flow statistics, is distributed firmwide.⁴⁰ The firm's compensation team asks each lawyer to submit a pay proposal for himself or herself and for each lawyer at the firm based on the circulated financial information.⁴¹ Clients are encouraged to adjust a proposed fee upward or downward through the firm's value-adjustment billing, depending on their level of satisfaction.⁴²

Another example is Valorem Law Group, formed in January 2008 by refugees from traditional firms. The vast majority of Valorem's fees are based on alternative fee arrangements. They use project and case management tools to maximize efficiency. Like Summit, they have a "Value Adjustment Line" in their bills, allowing the client to adjust the agreed-upon fee to reflect the client's satisfaction in the service. They also offer holdbacks where a certain agreed-upon portion of the fee is held until the end of the matter or another predetermined benchmark is reached, when the holdback is paid or refunded.⁴³ . . .

Another example of a firm distinguishing itself on an alternative fee platform is Shepherd Law Group, P.C. It offers what it calls "upfront pricing"—like a general contractor doing home renovations—so clients know the cost of the work before it is done.⁴⁵ If the scope of a job changes, the firm will send the client a change order, setting out the new scope and the associated price change.

Smithline Jha LLP, a firm focused exclusively on technology transactions, markets a specific type of alternative fee. It offers monthly fixed-fee subscription pricing that covers all of the services provided to a client during the month. This fee includes negotiating all of a client's technology transaction deals, creating and updating forms, providing deal and legal counseling, implementing a deal flow process, and attending company meetings and training sessions.⁴⁶ The fee is mutually agreed upon in advance and the client's commitment is month-to-month. The first month of service is exploratory. The firm provides its services and learns about the client's business. At the end of the month, there is another meeting to mutually agree upon a monthly rate going forward, which will continue until either party requests an adjustment.⁴⁷

There are numerous other firms that are based on the alternative fee, rather than the billable hour, model. . . .

Hybrid Firms

Blended Professional Services Firms

Some firms are marketing themselves to appeal to the client seeking both legal and business advice. One example is Resources Global Professionals, providing consulting in fields including accounting, law, finance, information technology, human resources, and other specialties.⁵³ . . .

At Exemplar Companies, Inc., the firm is also bridging different professional realms—selling legal service and business advice. Exemplar calls this approach “convergence” and describes it as “the unique combination of professional services across the disciplines of Law and Business to achieve superior results, add more value, craft more comprehensive solutions, and solve complex problems more effectively.”⁵⁸ Exemplar has also abandoned the billable hour and adopted a satisfaction guarantee. If clients feel dissatisfied with the service, Exemplar will negotiate its price with the client.⁵⁹

Publishing Law Firm

Practical Law Company (PLC) helps attorneys navigate transactional law by providing Web-based tools to lay out the deal-making process and improve efficiency.⁶⁰ It does this by offering subscription-based online resources including document templates, model clauses, practice notes, deal checklists, how-to guides, new law updates, and a searchable database of deals and securities findings.⁶¹ Subscribers are both inhouse and law firm lawyers who access the online training resources on a fixed-fee basis, depending on the number of users. . . . Most of the lawyers PLC employs write content for the Web pages.⁶³ The biggest benefit of the service is facilitating efficiency among practicing lawyers, which Millerchip argues will increase profitability, especially with alternative fees becoming more popular.⁶⁴

Small Firm Alternatives to Practice

Alternative Hour Firms

With client needs front and center, some law firms are seeing opportunities in marketing to clients for work at certain times of the day. For example, E. James Perullo founded Bay State Legal Services as an afterhours law firm that meets with its clients between 6 and 10 p.m. Monday through Friday, and otherwise by appointment.⁶⁵ The firm’s target clients are small business owners and working-class clients, and these clients cannot easily leave work to meet with a lawyer in the middle of the day. . . . Bay State is able to lease the office space only during the evening hours, which gives them affordable space in a prime location. Lawyers affiliated with the firm keep 60 percent of the fees from cases assigned to

them after expenses and 90 percent from cases they originate when they serve as primary counsel.⁶⁷ Another firm, Scott Sagria, is open Saturdays to appeal to clients. The firm offers payment plans instead of up-front retainers.⁶⁸ Currently, small law firms are the largest and fastest-growing sector of the legal community.⁶⁹ We can expect to continue to see creative structures developed to appeal to small firm clients.

Flex-Time Firms

The Law Offices of Joanne R. Sternlieb developed out of founder Sternlieb's desire to practice trusts and estates law while gaining more control over her life. In 2002, Sternlieb started her own firm. She now has four lawyers and two assistants who work from their homes, on their own schedules. Each is an independent contractor who works a flexible schedule with no set hours, no billable-hour requirements, no guaranteed hours, and no guaranteed pay.⁷⁰ When Sternlieb gets a new matter, she contacts the lawyers on her roster to see who is fitting and available to handle the work. If all four of her lawyers decline the opportunity or are not suitable, then she handles the work herself. Sternlieb pays her associates and charges her clients on a preset project basis except for an hourly rate she charges for estate administration.⁷¹

Women-Owned Firms

Litigation and transaction boutique Schoeman, Updike & Kaufman LLP is an example of a woman-owned law firm certified by the Women's Business Enterprise National Council (WBENC) and the National Association of Minority and Women-Owned Law Firms (NAMWOLF). Other women-owned firms may fall into the categories outlined above as well as more conventional structures. Schoeman, Updike is among the largest of the women-owned firms, with about 30 lawyers. It distinguishes itself by emphasizing alternative fee arrangements and welcoming flex-time lawyers, including those interested in project-based work.⁷² The flex-time attorneys have no billable-hour requirements and their pay is adjusted based on hours worked, among other factors. The firm recognizes the value of flex-time attorneys and how they can enhance the practice and complement the work of lawyers with a traditional schedule.

Legal Process Outsourcing (LPO)

Legal Process Outsourcing (LPO) is the process of sending work offshore to a lower-cost jurisdiction. It is becoming increasingly acceptable to law firms and in-house legal departments for legal work to be disaggregated and unbundled, which is what is enabling the LPO process. The types of work that are being parsed out include document review; litigation preparation; deposition summaries; legal research and writing; patent prosecution; contract management;

compliance services; and drafting of memoranda, trial and appellate-level pleadings, and briefs. LPO providers are most often hired by law firms that conduct legal outsourcing on behalf of clients or pharmaceutical, technology, and manufacturing company law departments that hire LPOs directly.⁷³

It is debatable whether a discussion of LPOs belongs in a chapter about new models of legal practice. Most legal outsourcers contend that they are not practicing law. Many say there is nothing inherent in the outsourcing tasks that require an attorney to do them.⁷⁴ Additionally, legal outsourcers typically handle just part of a legal representation, so some would argue that they are not technically a new model of legal practice. That being said, I still believe LPOs belong in this chapter because they have created their own category in law practice.

Global revenues generated by legal outsourcing are already significant, at about \$250 million in 2009, and they are projected to grow to \$4 billion by 2015.⁷⁵ The legal outsourcing sector employed about 10,000 lawyers in 2009, and is expected to expand to 79,000 by 2015.⁷⁶ A majority of the work comes from the United States, the United Kingdom, and Canada. In early 2009, India enacted the Limited Liability Partnership Act, which permits foreign law firms to establish an office in India. Although foreign lawyers will still not be able to practice in India, many view the Act as an opening of the Indian legal market with further growth opportunities.⁷⁷

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The savings in using lawyers in India are considerable. . . .

LPOs offer a variety of billing arrangements. Billable hours are still popular with project-based work including legal research, due diligence, and e-discovery.⁸³ Another model offered in LPOs is the full-time equivalent (FTE), where clients effectively have an LPO employee serve as an additional in-house member for a period of time.⁸⁴ Unit pricing is used at times where a client is billed per document or per case, rather than by time.⁸⁵ Flat fees and flat fees with a cap are also popular.⁸⁶ The two key factors influencing pricing for the LPO providers are efficiency and the willingness of clients to commit to longer and larger projects, allowing for greater efficiencies.⁸⁷ The longer and larger projects bring the greater discounts to clients.

The biggest benefit to employers of using LPOs is economic. LPO providers are cutting their clients' legal bills in half—or smaller.⁸⁸ The other significant employer benefit is efficiency. Work can be done on a 24-hour basis, with the outsourced laborers working while lawyers in the United States are asleep.⁸⁹ Another benefit is that law firms and law departments can have teams of lawyers available to do work without

needing to keep associates on the payroll.⁹⁰ Additionally, employees in offshore companies in India and the Philippines are often more educated and dedicated than temporary employees in the United States.⁹¹

A bonus to individual lawyers in the U.S. who work for outsourcing providers is lifestyle. . . .

The most commonly voiced concerns against LPOs are work quality and data security/confidentiality.⁹³ To improve work quality, extensive training has been put into place at the LPO providers. Additionally, U.S. lawyers are sent to most of the LPO providers to manage the process as it has customarily been performed in the United States.⁹⁴ As for the issue of data security and confidentiality, these offshore providers have extensive security measures to ensure no breach of the highly sensitive matters handled.⁹⁵ . . . There are also concerns raised about the difficulty of avoiding conflicts of interest when vendors serve clients with inconsistent interests, or the lack of recourse if an Indian lawyer violates an ethical rule.⁹⁷ These concerns, and others, will continue to arise with increased outsourcing. However, given the economic savings and efficiencies gleaned from outsourcing, LPOs will undoubtedly become more practiced at overcoming these challenges.

The Junior Lawyer Fallout

One significant concern stemming from these new models to legal practice is the fallout for the junior lawyer. Where will junior lawyers in the United States get trained? In the virtual and other new law firm models, only mid- to senior-level lawyers are being hired. There is an expectation that junior lawyers will be trained elsewhere. At present, it is unclear where those venues will be. Due to LPOs, a lot of the entry-level work given to junior associates will be outsourced to India and elsewhere. Also, clients are pushing back and questioning why they should bear the expense of training new lawyers. These questions raise uncertainty for graduating law students and the legal profession pipeline. . . .

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The Rise of New Models of Legal Practice | 31
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LAW & REORDER

Legal Industry Solutions for
Restructure, Retention, Promotion
& Work/Life Balance

DEBORAH EPSTEIN HENRY

What follows below is excerpt from Deborah Epstein Henry's book, *Law & Reorder: Legal Industry Solutions for Restructure, Retention, Promotion & Work/Life Balance*, published by the American Bar Association on October 18, 2010. The excerpt is taken from Chapter 3 entitled, *The Large Law Firm of the Future*. To review the book's Table of Contents, read advance praise, read press features, order the book, and learn more, visit www.lawandreorder.com.

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Many law firms, including the largest firms, are bracing for permanent changes in staffing and non-hourly billing arrangements.¹ According to the "BTI Premium Practices Forecast 2010: Survey of Corporate Legal Spending" study, spending by general counsel on outside counsel fees dropped 10.8 percent, from an average of \$20.8 million in 2008 to \$18.5 million in 2009. Another 4.3 percent drop in spending to \$17.7 million is expected in 2010.² These cuts in spending, among other challenges, are an impetus to change to the traditional law firm model that will be explored below.

Alternative Fees

In April 2009, William Henderson, Professor at the Indiana University Maurer School of Law, and a leading Australian risk manager, Anthony Kearns, convened a group of thought leader lawyers in a role-playing game called FutureFirm. They tried to devise a strategy for a hypothetical law firm to survive another decade.³ The lawyers at FutureFirm agreed that future firms would need to offer alternative fee arrangements to share risk with their clients.⁴

The concept of alternative fees is not new. It has been around for decades and discussed at length. Indeed, the American Bar Association (ABA) launched the Law Practice Management Section Task Force on Alternative Billing Methods in 1989. The Task Force's work culminated in the 2001–2002 ABA report on billable hours, which discussed a range of alternative fee options.⁵ There is greater urgency to heed these recommendations today. While clients are pushing harder, many large law firms are still uncomfortable moving away from billable hours and incurring more risk.⁶ They are concerned about the new level of budgeting, planning, and projecting of lawyer and staff time required to manage alternative fee arrangements.

Although many large law firms fear alternative fees, they no longer have a choice. . . . Law firms will need to be receptive to . . . general counsel demands or lose business. . . . The outlook for 2010 is similarly focused on alternative fees. . . .

With so much discussion of alternative fees, it is important to identify the more popular arrangements and understand what they entail. What follows below is a summary of the pros

and cons of popular alternative fee arrangements. . . . A firm that adopts any of these alternatives, at least initially, should continue to track hours, realization, utilization, and collection. This is important as a means to compare profitability and revenue generation.⁷

Fixed or Flat Fees/Unit Pricing. With fixed or flat fees, there is usually one set fee for a whole matter. Unit pricing sets one fee for each stage of a transaction or proceeding. These approaches are well received by clients because it gives them predictability and removes the problem of receiving astronomical legal bills that have no association with results or value.⁸ For law firms, fixed or flat fees reward efficiency and minimize delays in payments and declining realization rates.⁹ Fixed or flat fees work well with simple transactions like real estate closings, wills, employee contracts, or corporate filings. The risk is that they create incentives for firms to take shortcuts or not assign their talented lawyers to the work.¹⁰

Fixed and flat fees are more difficult to manage when time and workload is less predictable—for example, in litigation, buy-sell transactions, or bankruptcies.¹¹ However, it can be done. . . . Both law firms and corporations have extensive information on the past costs of different types of matters, and this can be a starting point for determining a fixed fee. Also, if a client has repeatedly worked with a law firm, they have a pattern of dealing that should reduce the risk.

Unit pricing, where the fixed fee is broken down based on the various stages of the representation, often makes more sense for complex and high-risk matters.¹² Particularly with unit pricing, it is important to define the scope of the transaction or proceeding clearly.¹³ Also, because certain matters are unpredictable, it is often appropriate to periodically review the pricing structure to ensure that it is fair.¹⁴

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Success, Bonus, or Incentive Fees. Success, bonus, or incentive fees are structured by determining a standard fee and then, prior to engagement, agreeing to reward fees commensurate with varying levels of success. . . . As with unit pricing, it is important to clearly define the success targets.¹⁵ A success fee ensures that law firm lawyers don't cut corners. It usually aligns lawyers' incentives with the clients'.¹⁶ However, the client and law firm interests do not always line up, because resolutions of matters are not always tied to performance. . . .

Holdbacks. A holdback is when a percentage of an engagement or monthly fee is withheld until the end of a matter or a predetermined time when a goal has been reached. . . . Some refer to holdbacks as success fees.

Retainers. With a retainer, a law firm provides certain services for an agreed-upon fee on a monthly basis or another specified period of time.¹⁷ Retainers provide predictability but their fairness depends on how accurate the law firm and client are in estimating the volume of work.¹⁸ Retainers are most popular when there is a large volume of relatively small matters.¹⁹ As with fixed fees, it may be appropriate to agree in advance to regularly review retainers, either monthly or quarterly, to ensure the fairness of the fee.

Contingent Fees. Contingent fees require a lawyer and client to agree on a goal to be achieved to trigger a payment and the consequences of achieving that goal. If the goal is not achieved, the client does not pay for the legal services rendered. Contingent fees are most commonly used with litigation plaintiffs where the lawyer's fee is typically one-third or one-fourth of a settlement or judgment they obtain.²⁰ Contingent fees are a form of "value billing" where the lawyer's fee is directly linked to the value received by the client.²¹ . . .

Alternative Fee Variations of the Billable Hour

There are variations on the billable-hour model that some consider to be alternative fee arrangements. Some firms and clients that struggle with designing creative alternative fees fall back on variations of the billable hour.²²

Discounted Hourly Rates. Some clients negotiate a discount on hourly rates, often for commodity work. Law firms often accede to this for significant clients with leverage.²³ There are risks associated with this arrangement on both sides. For law firms, the clients get accustomed to the discounts and when firms try to revert back to charging regular rates, it is often interpreted as a price increase.²⁴ The risk to the client is that their work will no longer be prioritized and lower-caliber lawyers will be staffed on their matters.²⁵ Also, discounting does not limit the numbers of hours billed and it does not improve efficiency.²⁶ In fact, it might encourage the opposite.

Volume Discounts. Volume discounts occur when clients commit to a certain amount of work if the work is performed at a discounted hourly rate. Thus, a firm agrees to charge a lower percentage of its standard hourly rates when its billable hours reach a negotiated threshold or series of thresholds.²⁷ . . . Clients face the same risk here as with discounted hourly rates.

Blended Rates. For blended rates, one hourly rate is negotiated for all the time spent by different timekeepers on a project. . . . While the benefit is potentially more efficient staffing, the detriment is an incentive to inflate hours or produce lower quality of work by delegating to less senior or less capable lawyers or paralegals.²⁸

Frozen Rates. Frozen rates are adopted when a law firm agrees not to raise its rates by more than an agreed-upon percentage for the length of a matter or during a certain period of time.²⁹

Per Diem Rates. Some clients prefer a daily rate, rather than an hourly rate, for certain lawyer time. . . .

Fee Cap. A fee cap places a limit on the maximum number of hours that will be billed for a matter or task. Law firms incur the loss if the maximum number of hours is exceeded.³⁰ Meanwhile the client risk, as with blended or discounted rates, is that they may receive lower-quality work and unwittingly provide an incentive to the firm to delegate their work to less senior or less capable lawyers.³¹

Hybrid. A hybrid is a combination of alternative fee arrangements and demonstrates the flexibility that can be exercised—for example, a flat fee plus an hourly fee or an hourly fee plus a contingency.³² Or, another hybrid might be a fixed fee plus a negative contingent fee.³³

There are some common elements among the alternative fee arrangements described above. In most, law firms share the risk with clients, and the law firm and client interests are aligned. Some firms fear shared risks but this can be mitigated by quarterly, or even monthly, assessments. Most alternative fee arrangements (that are not variations of the billable hour) focus on efficiency and results and present the opportunity for firms and clients to return to relationships founded on trust and fairness.

Alternative Fee Opportunities for Women and Work/Life Balance

Alternative fees also present significant opportunities for women and those working flexible and reduced hours. Women have been largely unsuccessful competing over time. Since 40 percent of women law firm lawyers with children work reduced hours in any one year,³⁴ these women will be hard pressed to ever achieve the same level of success when the measure of value is simply hours worked. However, with alternative fees, if the measure of value becomes quality of work, efficiency, and results, then women have the opportunity to level the playing field.

Additionally, firms that support flexible and reduced hours stand to benefit from the transition to alternative fees. The link between flexibility and increased productivity has been clearly demonstrated in other industries and should prove to be the same in law. For example, in 2005, the BOLD Initiative, a workplace diversity advocacy organization, found that ten large employers reaped sizeable economic gains after implementing workplace flexibility programs.³⁵ The BOLD Initiative arranged pilot projects for companies including the Chubb Corporation; Gannett Company, Inc.; Johnson & Johnson Services, Inc.; PepsiCo Inc.; Macy's Northwest; and Prudential Financial, Inc., among others. The pilot projects yielded compelling findings. Programs such as telecommuting, flex-time, and compressed workweeks resulted in decreased overtime, fewer unscheduled absences, increased productivity, and more efficient work processes. Each employer increased productivity by 5–10 percent.³⁶ Thus, lawyers working flexible and reduced hours will likely be even more profitable to firms adopting alternative fees.

Changes in Legal Staffing

Use of Temporary Attorneys

Another change to the large law firm model is the disaggregation and unbundling of legal services. . . . [M]uch of the work previously performed by junior associates will be outsourced to India and elsewhere.³⁷ Some firms have resisted the pressure to work with Legal Process Outsourcing (LPO) firms while others have embraced them.

In London, large firms are now considering using temporary attorneys. . . .

Employers that are not already rethinking their staffing model should do so. The use of temporary attorneys is a smart alternative for firms that are less certain of their staffing needs. Creating or turning to a team of pre-vetted attorneys is preferable to ensure quality control.

Shrinking Associate Classes and Increasing Use of Staff and Non-Partnership Attorneys

Due to the disaggregation and unbundling of legal services, among other factors, other staffing needs at large law firms are changing. In an *American Lawyer* survey of the top 200 law firm leaders, 72 percent said they expect their 2010 first-year associate class to be smaller.³⁸ This is because the traditional “leveraged associate” staffing model used by large law firms, which typically relies on a billing ratio of at least three associates for every partner, is being challenged.³⁹ . . .

With shrinking associate classes, another staffing trend emerging is the increased role of staff attorneys or two tiers of associates, with one a partnership track and one not. These staff or non-partnership attorneys do more routine work for less pay and at lower rates, and they are not on a firm's partnership track.⁴⁰ . . . Firms also plan to have larger pools of non-lawyer professionals who work at a reduced cost and increase efficiency for the client.⁴¹

Some firms are developing other creative solutions to combat the trend toward shifting work to LPOs or midsize and regional firms.⁴² At Orrick, for example, the firm has created an “insourcing” model in an office in West Virginia, where real estate and hourly labor are less

expensive than in urban centers. . . . The firm also announced plans to expand the number of attorneys doing routine legal work who can be paid and billed at lower rates.⁴³ . . .

Levels/Tiers of Associates

Another change to the large law firm staffing model is to create levels or tiers of associates. . . . The level system replaces lockstep associate promotion with typically three or four tiers of associates within its partner track.⁴⁴ . . .

Temporary, Staff, and Non-Partnership Track Attorney Work: The Impact on Women

The increased need for temporary, staff, and non-partnership track attorney work presents both risks and opportunities for women attorneys. Nearly one-third of women lawyers leave law firm practice⁴⁵ and many become full-time caregivers because of, among other reasons, the difficulties in managing a career with erratic hours and demands. But with an increased temporary, staff, and non-partnership attorney presence, these women may be more inclined to stay. . . .

If talented lawyers announce their plans to leave because of practice demands, temporary, staff, and non-partnership attorney positions should be offered as an alternative. Additionally, employers should recognize that if they can hire at-home mothers to do temporary work on an hourly basis, they will benefit. These lawyers will be more engaged in the work because of the lifestyle it offers them for the period of time that their kids are young. In turn, employers will benefit from having a stable pool of reliable workers rather than transitory lawyers looking toward their next move.

With the increased role of staff and non-partnership attorneys, there is a significant risk that more women will be “mommy tracked” and fewer will pursue the challenging alternative. The risk stems from the fact that generally, two groups of attorneys pursue the staff and non-partnership attorney path. One group of these attorneys is not as well credentialed or otherwise would not be hired for or cannot manage the higher paid, partnership track work. The other group of attorneys who pursue these roles are high-caliber lawyers who are seeking the less challenging work because it is more predictable and consistent with their lifestyle needs. This second group of lawyers is often women who work flexible or reduced hours in the staff or non-partnership attorney role. The bottom line is that many women have left the workforce entirely or have left law firms. If we provide women with another opportunity to remain engaged in the profession, these alternative positions should better serve them in the long run as long as certain cautionary measures are taken. In other words, it is better that women continue practicing law in a less challenging capacity than leave the profession entirely—as long as the overall representation of women in the profession increases, including the representation of women at the top.

There are critical safeguards law firms should implement to minimize the risk that the increased role of staff and non-partnership attorneys will be detrimental to women. These include the following:

1. *Track All Levels of Female Representation:* The representation rates of women at all levels of seniority needs to be tracked annually. The objective is to increase representation of women at the equity partner level and overall. In other words, the increased role of staff and non-partnership attorneys will only be beneficial if it results in more women staying in the profession overall *and* more women being represented at the highest level.

2. *Create an On-Ramp for Talented Attorneys to Return to Partnership Track:* Law firms need to recognize that some lawyers seek staff or non-partnership track work only temporarily during a certain life stage. Those staff or non-partnership attorneys capable of doing the more sophisticated, higher-paid work (often with irregular hours) should be given the opportunity to resume doing so if the business needs exist.⁴⁶ At some firms, it may be appropriate to separately label the non-partnership attorneys who are capable of doing the more sophisticated, higher-paid work but who have sought the less challenging and predictable work for lifestyle reasons. These high-caliber lawyers can be called “Fixed hour attorneys” rather than staff attorneys. The term “Fixed” suggests the predictability that this high-caliber talent is seeking and also separates this group of attorneys from those who do not have the capacity to do partnership-level work. If firms separately label these two groups of non-partnership track attorneys, attention must be paid not to degrade those attorneys who are in the permanent staff attorney role.

3. *Educate to Inform and Avoid Stereotyping:* Firm lawyers need to be educated about the different career paths that are available to them, what each path entails, and what are the risks and tradeoffs of electing the different career paths. Law firms must be vigilant that women are not being disproportionately steered into the staff and non-partnership attorney positions. Firms must also guard against assumptions that all women or all mothers belong in these positions. The message must be clear that many women with and without children will seek the highly challenging and higher-paid work that is often accompanied by more irregular hours. Additionally, the option for high-level talent to pursue staff or non-partnership attorney work should be available to men and women for reasons in addition to parenting.

Compensation

Over the past 10 to 15 years, there has been a growing pay gap between large law firms and the rest of the profession. . . .

Rising compensation appears to be disappearing as a result of the recession, like other bygone practices. The factors that are driving the decline in associate compensation include

clients' resistance to rate hikes, a decreased demand for legal services, and an increase in contract lawyers, LPOs, and virtual law firms.⁴⁷ . . . Regardless of whether firms abandon lockstep compensation, it seems that compensation among most associates in the United States will decline. It remains to be seen, however, whether UK firms will follow the United States' downward compensation trend. . . .

As of February 2010, almost 30 Am Law 200 firms (America's 200 top grossing firms, according to a law firm ranking by *The American Lawyer*) abandoned lockstep in favor of a merit-based system.⁴⁸ The new structure being established by nearly all of the firms has three tiers, with bonuses, raises, and promotions tied to annual evaluations.⁴⁹

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In terms of future compensation for associates, the picture is not entirely bleak. Top associate talent may earn more than associates do today.⁵⁰ Many think the issue is not that all associates are overpaid, just that many are.⁵¹ . . .

If compensation declines for most associates, there will likely be other accompanying trends. Perhaps the long hours will go by the wayside with the high compensation.⁵² It also may result in fewer graduating law students taking top law firm jobs as a means to repay their law school debt. These lawyers entering the profession may have the opportunity to choose work that is more closely aligned to their interests⁵³ or pursue midsize or regional firms where the pay gap with large law firms may be shrinking.

Changes in Recruiting

As large law firms change staffing, the recruiting process will become another ripe area for a market correction. Recruiting changes have been discussed widely since the economic downturn began in 2008 and even before. The recruiting problems start with the unrealistic premise that a legal employer should be able to accurately predict its hiring needs two years before a lawyer's start date. The problems are compounded by the fact that the leveraged associate pyramid model at law firms relies on the attrition of most of the associates hired.

The result is that law firms plan to shrink the number of law students hired to fill summer and first-year associate classes. A handful of firms took a stark approach and canceled on-campus interviewing in the fall of 2009 and their 2010 summer associate programs.⁵⁴ Most other firms shrunk the sizes of their summer associate classes, hoping they could reduce attrition by being more effective at screening applicants.⁵⁵ . . . The goal at many firms now is to cut the incoming class in half and expect a higher percentage of the class to be promoted to partner, rather than expecting only a 10 to 15 percent promotion rate.⁵⁶ Executing on this goal will prove challenging if firms do not significantly change their talent management system .

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Ultimate Challenge Facing Large Law Firms: Determining Value

With all of the challenges facing large law firms, one theme is consistent throughout: the challenge of measuring value. This challenge resonates in three ways.

1. Measuring the value of a case or matter is a challenge that makes alternative fee arrangements hard to effect. Firms and clients need measures to assess the value of a representation. Neither side wants to incur more than its fair share of risk.

2. Measuring the value and profitability of a law firm is another challenge. Firms are looking for new metrics and may move away from profits per equity partner as a defining measure to assess performance.⁵⁷ It is uncertain whether firms will develop varying metrics to measure profitability or if a new standard for all firms will evolve. If the measure moves away from profits per equity partner, then it is likely that the partnership structure itself will change. With all of the structural shifts being discussed regarding large law firms, there is an unusual silence about the future of law firm partners. Partner roles will inevitably need to evolve given all of the expected changes with law firm associates.

3. Measuring the value of associates for promotion purposes is a third challenge as firms move away from lockstep promotion and compensation. This is made more difficult by the use of blended methods. For example, if 30 percent of a firm's revenue is earned from alternative fees and the rest from billable hours, does that confuse the evaluation process? How much should billable hours be considered in evaluating associates, if at all? As firms transition from lockstep to competency-based evaluations, this concern may diminish. However, the challenge of assessing a lawyer's value based on a measure other than time will remain. . . .

One thing is clear: as large law firms face the obstacles of today, they should look closely at the new models emerging around them. These new-model firms have been built on the inefficiencies and imperfections of traditional law firms and the failures of the billable-hour model. In turn, traditional firms can improve their productivity and profitability through close examination and lessons learned from their alternatives.

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² Sheri Qualters, *Outside Counsel Spending Projected to Drop by 4.3 Percent Next Year*, Nat'l L.J., Oct. 9, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202434410545>.

³ Aric Press, *Legal Professionals Role-Play the Future of Big Law*, Am. Law., Apr. 21, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202430052156>.

⁴ *Id.*

⁵ Am. Bar Ass'n, ABA Commission on Billable Hours Report 2001–2002 (2002), available at <http://www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf> [hereinafter ABA Commission Report].

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⁷ Alan G. Badey, *The Alternative Billing Debate Continues*, N.Y.L.J. (2009).

⁸ Ben W. Heineman Jr. & William F. Lee, *Two Veteran Lawyers Say Now Is the Time for Fixed Fees*, Corp. Couns., Aug. 24, 2009, available at <http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202433261281>.

⁹ *Id.*

¹⁰ David Gialanella, *Taming the Billable Beast*, A.B.A.J., Feb. 1, 2008, available at http://www.abajournal.com/magazine/article/taming_the_billable_beast/.

¹¹ Badey, *supra* note 7.

¹² Heineman & Lee, *supra* note 8.

¹³ Badey, *supra* note 7.

¹⁴ Evan R. Chesler, *Kill the Billable Hour*, Forbes, Jan. 2009, available at <http://www.forbes.com/forbes/2009/0112/026.html>.

¹⁵ Badey, *supra* note 7.

¹⁶ Chesler, *supra* note 14.

¹⁷ Richard J. Rawson, et al., *Fee Arrangements*, in *Successful Partnering Between Inside and Outside Counsel*, at 8-17 (Robert L. Haig ed., 2000). . . . Note that the term “retainer” can also be used to refer to an up-front payment made by a client to assure payment (rather than as an alternative fee arrangement). *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ ABA Commission Report, *supra* note 5, at 18.

²¹ Rawson, et al., *supra* note 17, at 8-18.

²² Rachel M. Zahorsky, *Majority Say Law Practice Is Undergoing a Sweeping Evolution, Survey Says*, A.B.A.J., Mar. 26, 2010, available at http://www.abajournal.com/news/article/majority_say_law_practice_is_undergoing_a_sweeping_evolution_survey_says/.

²³ ABA Commission Report, *supra* note 5, at 17.

²⁴ Badey, *supra* note 7.

²⁵ *Id.*

²⁶ ABA Commission Report, *supra* note 5, at 17.

²⁷ Rawson, et al., *supra* note 17, at 8-15.

²⁸ Rawson, et al., *supra* note 17, at 8-14.

²⁹ *Id.* at 8-15–8-16.

³⁰ *Id.* at 8-14.

³¹ *Id.*

³² ABA Commission Report, *supra* note 5, at 18.

³³ Jeanne Graham, *Alternative Billing Increasingly Important for Texas Firms, Survey Shows*, Tex. Law., July 1, 2009, available at <http://www.law.com/jsp/law/sfb/lawArticleSFB.jsp?id=1202431903623>.

³⁴ Mona Harrington & Helen Hsi, *Women Lawyers and Obstacles to Leadership*, in A Report of MIT Workplace Center Surveys on Comparative Career Decisions and Attrition Rates of Women and Men in Massachusetts Law Firms 32 (2007), available at http://web.mit.edu/workplacecenter/docs/law-report_4-07.pdf.

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³⁷ David Lat & Elie Mystal, *The New Biglaw Business Model*, According to O'Melveny & Myers, Above the Law, Sept. 16, 2009, available at <http://abovethelaw.com/2009/09/the-new-biglaw-business-model-according-to-omelveny-myers/>.

³⁸ Debra Cassens Weiss, *40% of Firms Cut Starting Associate Pay, While 44% Consider 2010 Cut*, A.B.A.J., Dec. 1, 2009, available at http://www.abajournal.com/news/article/40_of_firms_cut_starting_pay_for_associates_while_44_consider_2010_cut/.

³⁹ David A. Scherl, *Leverage and Rates*, N.Y.L.J., 2009, available at <http://www.morrisoncohen.com/downloads/NYJL%20Report%20Mid%20Size%20Firms.pdf>; see also Dan Slater, *At Law Firms, Reconsidering the Model for Associates' Pay*, The New York Times, Apr. 1, 2010, available at <http://www.nytimes.com/2010/04/01/business/01LEGAL.html>; Debra Cassens Weiss, "O'Melveny Aims to Become Fixed-Fee Leader, Leaked Plan Says," A.B.A.J., Sept. 17, 2009, available at http://www.abajournal.com/news/article/omelveny_aims_to_become_fixed-fee_leader_leaked_plan_says/.

⁴⁰ Scherl, *supra* note 39.

⁴¹ Lynne Marek, *DLA Piper Plans to Keep Reducing Associate Classes, Discard Lockstep System*, Nat'l L.J., June 25, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202431748925>.

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⁴³ Jill Redhage, *Orrick Shakes Up Big-Firm Staffing Model*, Daily J., July 2, 2009.

⁴⁴ Amanda Royal, *Orrick Breaks Lockstep in Response to Clients' Cost Concerns*, Recorder, July 2, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202431956146&rss=newswire>.

⁴⁵ Harrington & Hsi, *supra* note 34, at 8.

⁴⁶ Deborah Epstein Henry, *Facing the FACTS: Introducing Work/Life Choices for All Firm Lawyers Within the Billable Hour Model*, Diversity & the Bar, Nov./Dec., 2007, available at <http://www.flextimelawyers.com/pdf/art10.pdf>.

⁴⁷ Debra Cassens Weiss, *Associate Pay May Need to Return to 1998 Levels, Consultant Says*, A.B.A.J., Nov. 5, 2009, available at http://www.abajournal.com/news/article/associate_pay_may_need_to_return_to_1998_levels_consultant_says/.

⁴⁸ Julie Triedman, *Are Merit-Based Pay Switchovers Simply Hidden Salary Cuts?*, Am. Law., Feb. 18, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202443769098>.

⁴⁹ *Id.*

⁵⁰ Dan Slater, *At Law Firms, Reconsidering the Model for Associates' Pay*, N.Y. Times, Apr. 1, 2010, available at <http://www.nytimes.com/2010/04/01/business/01LEGAL.html>.

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⁵² Adam Cohen, *With the Downturn, It's Time to Rethink the Legal Profession*, N.Y. Times, Apr. 1, 2009, available at <http://www.nytimes.com/2009/04/02/opinion/02thu4.html>.

⁵³ *Id.*

⁵⁴ See, e.g., Rachel Breitman, *Morgan Lewis Cuts 2010 Summer Program*, Nat'l L.J., July 20, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202432352838>; Debra Cassens Weiss, *Triple Bad News for Law Students: Three Firms Ax Summer Associate Programs*, A.B.A.J., July 20, 2009, available at http://www.abajournal.com/news/article/triple_bad_news_for_law_students_three_firms_ax_summer_associate_programs.

⁵⁵ Lisa Smith, *Report from Law Firm Leaders Forum—Change Is the Name of the Game*, Hildebrandt blog, Mar. 12, 2010, available at <http://www.hildebrandt.com/blog/archive/2010/03/12/change-is-the-name-of-the-game.aspx>; see also Jeff Jeffrey, *Howrey Introduces Apprenticeship Program for Associates*, Nat'l L.J., June 22, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431654426&rss=nlj242&hbxlogin=1>.

⁵⁶ *Id.*

⁵⁷ *Id.*



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What follows below is excerpt from Deborah Epstein Henry's book, *Law & Reorder: Legal Industry Solutions for Restructure, Retention, Promotion & Work/Life Balance*, published by the American Bar Association on October 18, 2010. The excerpt is taken from Chapter 5 entitled, *Designing a Woman-Friendly Employer*. To review the book's Table of Contents, read advance praise, read press features, order the book, and learn more, visit www.lawandreorder.com.

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Why Design a Woman-Friendly Employer?

A threshold issue in designing a woman-friendly employer is: Why is it necessary? Is this about preferential treatment? The statistics demonstrate that the answer is no. . . . With women making up nearly half of law school graduating classes for 25 years, this is more than a pipeline problem. It is a problem that impedes the success of the profession. Half of the talent pool is being underutilized or not being used at all. . . .

How to Design a Woman-Friendly Employer

Creating a woman-friendly environment starts with leadership support and openness. This requires legal employers to be open about their efforts to support women lawyers internally to their fellow lawyers and externally to clients, competitors, law schools, the media, and beyond.

In designing a woman-friendly employer, there are five key areas to focus on:

- Workforce Profile
- Family-Friendly Benefits and Policies
- Flexibility
- Leadership, Compensation, and Advancement of Women
- Development and Retention of Women

These five areas are the bases used to evaluate a woman-friendly law firm in a national survey conducted by Working Mother Media and Flex-Time Lawyers LLC entitled Best Law Firms for Women. These areas are also based on *The Cheat Sheet*, a guide to selecting, creating, and ensuring a woman-friendly employer released by the New York City Bar, Committee on Women in the Profession and Flex-Time Lawyers LLC

Within the five subject areas identified above, the Best Law Firms for Women survey addresses topics including:

- Female representation at all levels of the law firm
- Parental leave
- Childcare
- Flex-time
- Reduced hours
- Reentry
- Billable hours
- Vacation
- Compensation
- Partnership and advancement
- Presence and leadership on committees and in departments
- Mentoring
- Business development and networking
- Women's initiatives
- Training
- Diversity
- Accountability

. . . In designing a woman-friendly employer, the Best Law Firms for Women survey is a guideline for employers to use. The aggregate statistics of the 50 winning firms . . . are valuable benchmarks that law firms can use to assess how they measure up. The ultimate objective of the survey and list of winning firms is to start a dialogue, measure where we are, provide firms with information to change, and create competition among firms to raise the bar of what makes a best law firm for women.

In the Best Law Firms for Women survey, every time a policy question is posed, it is followed by either a representation or a usage rate question. This is because asking about employer policies is not enough. The real assessment of whether an environment is women-friendly is based on two factors—high representation and high usage rates.

- Representation reflects whether women are represented at all levels of seniority and leadership within a place of employment.
- Usage rates reflect whether lawyers are availing themselves of the work/life policies without stigma.

Workforce Profile

Representation

Workforce profile looks at the representation of women at all levels of seniority. This is an important starting point because it is critical that employers have strong female representation at every level. According to a challenge set by the National Association of Women Lawyers (NAWL), by 2015 women should constitute 30 percent of all equity partners, 30 percent of all chief legal officers, and 30 percent of all tenured law faculties. In the Best Law Firms for Women survey, we looked at representation of women across the seniority levels. . . . The representation of female equity partners, in particular, is critical in assessing a woman-friendly law firm. The equity partnership title is held by the most powerful and most highly compensated lawyers at a firm. . . .

Recruitment and Attrition

Legal employers should also track their recruitment and attrition rates to determine whether their environments are ones that women intend not only to join but to stay. Recruitment of Caucasian women has not been a recent challenge in the profession. However, recruitment continues to be a problematic for lawyers of color of both genders To assess recruiting trends, employers should look at their own recruiting numbers of men versus women at each of the seniority levels over a five-year period. Once an employer has a baseline for its recruitment trends, it should look at its attrition rates.

Attrition of women is an issue that plagues employers. Designing a woman-friendly workplace requires that employers evaluate the numbers of women leaving and their reasons for doing so. As with recruiting, to assess attrition trends, employers should look at their own attrition numbers of men versus women at each of the seniority levels over a five-year period. . . .

To understand attrition rates, it is important for employers to keep track of their alumni to determine where their lawyers go. . . . The preferred new workplaces of former employees often shed light on what inherent workplace problems exist and what would have made the work environment more hospitable.

When women leave the profession entirely, employers need to obtain honest feedback about why they leave. Exit interviews performed by independent evaluators more accurately trace the real reasons behind departures. Many employers automatically assume that when mothers leave the workforce, it is solely because of work/life balance issues. While work/life balance is an important factor in why women leave, there are other compelling factors that drive women out the door. . . .

Family-Friendly Benefits and Policies

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Parental Leave

Designing a woman-friendly employer includes providing strong parental leave and support policies for both men and women. . . .

With parental leave, as with other work/life policies, an employer should assess not only the offerings of its policies but the usage rates. High usage rates are typically indicia of the viability of an employer's policies.

Parental leave usage rates at law firms are typically high, although they decrease with lawyer seniority. . . . The gap in usage among female equity partners may be attributable to the fact that many equity partners are concerned about relinquishing their role as a primary contact to clients for fear they will lose their valued relationships. It also may partially be explained by the lack of written maternity leave policies for equity partners at many firms. . . .

It is also instructive to look at parental leave policies and usage rates relating to men. . . .

Phase Back

Parental leave policies are an important means for employers to support working parents. What is equally important is for employers to support working parents as they transition back to work and once their children are beyond the newborn stage. A trend among employers is to have a written phase-back policy, giving women the automatic option to work reduced hours for up to one year when transitioning back from maternity leave. This policy is helpful because parental leave is a critical transition point, and easing a lawyer's successful return will enhance the likelihood of the lawyer staying and thriving in the workforce. . . .

Childcare

Employers can provide additional support by having on-site or near-site full-time childcare facilities, emergency backup corporate childcare, and at-home emergency backup care. . . . With work/life coverage, one must also be mindful of the double-edged sword. Coverage should not become so great that the end result is that lawyers are always working.

Reentry

It is also important for employers to support lawyers' transitions into and out of the profession. According to the Center for Work-Life Policy, 31 percent of women lawyers take a leave from practice of more than six months at some point in their careers. With nearly one-third of women lawyers on a nonlinear career trajectory, these paths should no longer be viewed as unconventional. Legal employers need to design their environments to be receptive to welcoming back those who have left in order to enable more women to be integrated and promoted in the profession. . . .

Retirement

Retirement is another transition point where employers should provide more support. . . . Baby Boomers make up 70 percent of law firm partners and many of them are interested in phasing into retirement over five to ten years rather than retiring outright. This trend, which had already taken hold, has perpetuated during the recent economic downturn. As lawyers' personal equity dropped because of the declines in the stock and housing markets, they plan to stay longer before retiring, perhaps at a flexible or reduced-hour pace. . . .

Flexibility

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<p>A woman-friendly employer must have viable work/life policies in place. It is also critical that employers make their work/life policies available to men. If we can move work/life balance away from being a "mommy" issue, the stigma will be minimized and historically low usage rates will improve.</p>

In developing a supportive work/life environment, written policies are an important starting point. Also, it is important that an employer have different types of flexible and reduced hour policies to meet the needs of different practice areas, individuals, and work arrangements.

Flexible and Reduced Hour Arrangements

At a minimum, employers should offer a range of the following flexible and reduced hour arrangements:

1. **Full-time flex-time**
2. **Core hours**
3. **Reduced hours**
4. **Job shares**
5. **Annualized hours**
6. **Telecommuting**
7. **Fixed Hours**
8. **Contracting/Consulting**

Reduced-Hour Usage

Among the 2009 Best Law Firms for Women, 96 percent of the 50 winning firms had written policies for reduced-hour lawyers and 8 percent of the lawyers from these firms worked reduced hours. . . . The Best Law Firms for Women usage rates are higher than the national usage rates but still relatively low. According to the National Association of Law Placement, Inc. (NALP) 2009 study, only 5.9 percent of law firm lawyers worked reduced hours and reduced hours were offered in 98 percent of the 1,475 law offices nationally surveyed. . . . The meager usage rates in the NALP study reveal that lawyers are not generally availing themselves of reduced-hour schedules despite the almost universal availability of this benefit. The low usage rates become even more apparent when comparing law to other industries. . . .

Significantly increased usage rates would demonstrate that reduced hour arrangements are accepted without stigma. Some employers have historically put childcare references into policies in an effort to steer usage to only women or to only parenting reasons. Taking out childcare references in work/life policies and having male leaders use these policies will help de-stigmatize them and increase usage for men and women for reasons in addition to parenting.

Reduced-Hour Promotion

The promotion rate among reduced-hour lawyers is another area on which legal employers need to focus. . . . [W]hen reduced hour lawyers are doing high-level work and meeting the criteria for advancement, they too should be eligible for promotion. . . . Until there are higher promotion rates at the partner level, the stigma associated with work/life policies will prevail.

Full-Time Flex-Time

In addition to reduced-hours policies, employers should have full-time flex-time policies. . . . I anticipate full-time flex-time will become more popular and firms

will allow their lawyers to regularly telecommute more and work less conventional hours. Twenty years ago, most firms did not have written reduced-hours policies and it resulted in secrecy, favoritism, and ad hoc treatment. . . . I anticipate the same will be true with full-time flex-time policies. Through full-time flex-time, legal employers can offer greater flexibility and satisfaction among lawyers without impacting the bottom line.

Some employers are resistant to embracing full-time flex-time because they fear an opening of the floodgates—that affording broad-based flexibility will negatively impact training and mentoring and threaten the corporate culture. However, given the technological opportunities for all lawyers to work flexibly, the demands of Generation Y lawyers entering the profession, and the interests of Baby Boomers to gradually phase into retirement, full-time flex-time is an issue that is not going away. Particularly in the law firm context, firms that can harness and capitalize on the flexibility of the billable hour will be at a competitive advantage.

The ability to afford lawyers more flexibility in where and how they work without impacting the bottom line is an opportunity that firms should not pass up. . . . [T]he way to ensure that lawyers who use these policies thrive is to impose parameters around the work arrangements and provide training and programming to help breathe life into the policies.

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Leadership, Compensation, and Advancement of Women

Leadership

To design a woman-friendly firm, it is critical to focus on the advancement of women, and specifically their leadership, promotion, and compensation. . . . Examples of key leadership roles at firms include being the chairperson or managing partner, or chairing practice groups, departments, or committees. . . .

Leadership at law firms should also be assessed by looking at representation on the most influential committees at a firm. . . .

Employers should seek out and groom women for leadership opportunities so that they are equally comfortable assuming and performing in such roles. . . .

By placing qualified women onto influential committees at law firms, the change could be dramatic. Such leadership may bring fast results. . . . By increasing female representation to 30 percent on the three most powerful committees at law firms, women would immediately have more of a voice on firm governance, pay, and promotion, and in turn could strongly influence firm policies as well as women's presence and power.

Promotion

Promotion is another area where employers need to pay close attention in designing a woman-friendly environment. When assessing an employer's promotion trends for women, it is important to review a five year period, because one or two years may be outliers and not representative of a trend. . . .

Some of the impediments to women's promotion stem from not understanding what is underlying women's stalled progress. . . .

Compensation

Employers must ensure that women are being fairly and equitably compensated. According to the 2010 *New Millennium, Same Glass Ceiling?* study, key factors in determining law firm partner compensation are origination of client work, revenue collected, and a partner's own billable hours. . . .

When assessing the fairness of compensation, employers must look at how many women are above and below the mean profits per equity partner, paying close attention to how many women are in the bottom quartile of profits per equity partner. They should also assess the average compensation differential among male and female full-time equity partners. . . .

Development and Retention of Women

Training and Business Development

National statistics reflect that law firms need to more effectively support women's efforts in business development. . . . Women's low representation in the rainmaker ranks must be improved by transparency and standardization. . . . Specifically, there must be transparency about: how decisions are made about who attends pitches; whether attorneys who attend pitches will work and be awarded credit on the new matters that result from the pitches they attend; whether and how credit is shared for expansion of work or otherwise; how matters are inherited; how to become a billing or relationship partner; how origination credit is awarded and for how long; how the executive and compensation committees impact the award of credit; and how self-advocacy impacts the award of credit. . . .

In addition to creating transparency, it is important that firms create an infrastructure for lawyers to share credit for business. Rather than just award credit for origination, firms should also award credit to those who service the clients and expand the business. . . .

Employers also need to develop and seek out effective training for women. Employers should provide management, leadership, and networking/business

development training for their women lawyers internally, externally, or both. Most women face specific challenges with respect to leadership, networking, and self promotion. Training in these issues will help develop women lawyers and make them become more valuable lawyers. . . .

In addition to paying for training, employers should reimburse their lawyers for participation in networking organizations and trade associations. Employers should also consider an online women's network to facilitate further connections. Law firms should have a budget specifically targeted for women's business development training and initiatives.

Firm-hosted women's initiatives should include specifically tailored events with clients of the firm. Many women's initiatives at firms have spearheaded events in creative ways by hosting art openings, auctions, cooking classes, golf clinics, self-defense workshops, spa outings, book readings, wine tastings, and the like. . . . By aligning a venue more closely to the interests of women lawyers for these events, it will help with engagement and participation.

Mentoring

Mentoring programs are also critical for employers committed to developing their women lawyers. Mentoring can take shape in a variety of ways. Some employers have a formal mentoring program, with a program coordinator, linking a mentor and mentee and providing a framework for the relationship. Like any attempt at matchmaking, the process of matching mentors and mentees is an imperfect one. Ideally, mentees should provide input into the type of mentor they are seeking and all participants should be willing and interested. There are different types of mentors. Some help navigate the less obvious aspects of the workplace and convey internal politics. Others help develop a mentee's career, and still others advocate, vouch for, and provide opportunities for a mentee. To be successful, the relationship needs to be mutual and the mentee needs to engage the mentor and give something back.

Some employers have had greater success with mentoring circles than one-on-one mentoring. A mentoring circle is typically composed of five to ten lawyers at varying levels of seniority who meet regularly in a group. These group sessions provide more opportunities for different people to connect. The arrangement also helps with continuity, because an individual is not as subject to the whims of one person's erratic schedule and the core group of people interested in participating usually can meet with regularity. Mentoring circles work well when there is a designated facilitator who may vary meeting to meeting.

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Some law firms have adopted the successful model of targeted mentoring like Ernst & Young's "Career Watch," where mid- to senior-level associates identified as high-potential women are matched with senior leaders to help guide their career development.⁷⁶ For each participant, there is a plan that identifies strengths and weaknesses and the skills and qualities they need to develop to get to the next level. The goal is to ensure that these women get both the necessary experience and the necessary exposure to advance to their highest promotional opportunity. . . .

Diversity and Accountability

Affinity Groups

A woman-friendly employer needs to be supportive of diversity, a term that should be defined as broadly as possible to include lawyers from different racial and ethnic groups, female lawyers, lawyers who are lesbian, gay, bisexual, and transgender (LGBT), lawyers with disabilities, lawyers seeking work/life balance, etc. The diversity focus should be on inclusiveness. . . . Yet, in being inclusive, it is equally important not to diminish the varied challenges that different disadvantaged groups have faced. For example, the experiences and issues facing African American women are quite distinct from those that Asian men may confront and they should be addressed differently.

The challenges facing women of color are particularly acute. . . .

More generally, employers can support diversity through affinity groups. Employers provide a venue and opportunity for similarly situated individuals to meet regularly (usually monthly or quarterly) to speak freely about the specific challenges they face, provide a forum to discuss professional concerns, and build a sense of community within an organization. . . .

Accountability

Accountability is an important part of diversity, as it holds an employer responsible for its actions with regard to hiring, retaining, and promoting diverse lawyers. Employers can take steps to ensure that diverse lawyers are getting the same opportunities and exposure. Some areas where diverse lawyers have historically not gained equal access include opportunities to assume leadership roles or exposure to influential partners and assignments. Other areas where more accountability is necessary are in determining how client pitches are staffed, how clients are inherited when senior lawyers retire, and how credit is attributed when new matters are originated or sustaining.

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To create more accountability, employers should tie performance evaluations or bonuses to benchmarks that lawyers seek. Employers should also implement training around diversity issues. For example, antiharassment, antidiscrimination, and diversity sensitivity training are important to provide. Employers should solicit information anonymously by conducting lawyer opinion surveys to assess the work culture. Challenges and successes and a plan to address those challenges should be tracked and reported.

In sum, the current law firm model needs to be rethought to enable women to succeed. The benchmarks and statistics reveal the gaps. . . . When women are provided with the identified support, training, and opportunities, they will be able to achieve greater success and earn their equal place in the profession.



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What follows is an excerpt from Deborah Epstein Henry’s book, *Law & Reorder: Legal Industry Solutions for Restructure, Retention, Promotion & Work/Life Balance*, published by the American Bar Association on October 18, 2010. The excerpt is taken from Chapter 16 entitled, “*Blueprinting Women Law Students and Lawyers for Success*. To review the book’s Table of Contents, read advance praise, read press features, order the book, and learn more, visit www.lawandreorder.com.

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Selecting, Creating, and Ensuring a Woman-Friendly Employer

In the spring of 2006, I approached the New York City Bar Committee on Women in the Profession with a proposal to partner on developing a guide for women law students called *The Cheat Sheet*. . . . *The Cheat Sheet* was meant to help train women law students about how to select women-friendly employers. My goal was simple: help women law students chart their success and avoid the traditional stumbling blocks of their female predecessors *before* those same patterns repeated themselves. . . .

The Cheat Sheet

The Cheat Sheet is organized around six sections with questions under each topic area that identify an employer’s commitment to women’s retention and advancement. The first section, Statistical and Background Information, lays the foundation. The next five sections each reflect an area where women need to

focus. These include Partnership & Advancement, Leadership & Accountability, Business Development & Networking, Workplace Flexibility, and Mentoring.

The Cheat Sheet is intended to be used by women law students during the process of deciding where to work—when they are contemplating where to apply, when they are evaluating callbacks, and when they are weighing offers. . . .

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Although *The Cheat Sheet* was initially conceived as a guide for law students selecting an employer, its use has become broader. It has become a guide for practicing lawyers to assist them when contemplating lateral moves. For legal employers, the same questions have been used as a checklist to determine their strengths, weaknesses, and gaps to improve the role of women. Additionally, *The Cheat Sheet* provides tips for legal employers and law schools. There is also a resources section at the end that lists key online sources providing information on work/life balance, women’s issues, and diversity in the law. . . .

“Blueprinting” – Training Women Law Students and Junior Lawyers for Success

Since the release of *The Cheat Sheet* in 2006, in my talks at law schools I initially focused on educating women law students about how to identify women-friendly employers. From my work, it became clear that the next step is in training women law students and junior women lawyers to plan for success. Women have the capacity to become talented lawyers. The question is whether women lawyers can overcome the intangibles that have traditionally caused many women to stall. Thus, the goal is to enable women law students and junior women lawyers to design what I call “blueprints”—plans for success—by training them at the law school and junior associate level before they face the traditional obstacles.

“Blueprinting” programs are the flip side of the popular reentry programs designed to retool women professionals who have left the profession and who are positioning themselves to return. By focusing on blueprinting at the entry level, ideally it will ensure that more women will not need to leave their careers midstream.

Law schools, legal employers, and bar associations need to incorporate blueprinting programs into their curriculum and train students and junior lawyers. . . . Blueprints will empower women to navigate the hidden obstacles to success, to plan for the challenges they will face, and to gain the awareness and skills they need to succeed.

Here are the five Blueprinting areas of focus from *The Cheat Sheet*:

- Partnership and Advancement
- Leadership and Accountability
- Business Development and Networking
- Workplace Flexibility
- Mentoring

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Designing Your Blueprint

What follows is your Blueprint of skills to develop as you chart your success. The Blueprint is organized around the categories identified in *The Cheat Sheet*. In their “Dear Debbie” e-mails, lawyers tell me that they wished they had known what they were supposed to be doing—in addition to their substantive work—when they started out. The Blueprint tells you just that.

Blueprinting for Success

The Blueprint is your checklist of things to do—or to seek advice or training on—to ensure your success as a lawyer. Rather than being a “how to,” the Blueprint is a “what to do.” Depending on your place of employment, not all of the suggestions may apply to your set of circumstances. To be successful, you need to take charge of your career with an entrepreneurial spirit rather than wait for someone to show you the way. The Blueprint outlines the intangibles to success that you need to develop, beyond merely delivering high-quality work.

Partnership and Advancement

- Identify the partnership or promotion criteria for each level of seniority.
- Set goals of skills to develop to get to the next promotion level or competency.
- Determine the criteria for bonus eligibility and set that as part of your goals.
- Seek substantive training in skills that are needed in your practice area.
- Identify the type of work that you need to seek to get to the next level.
- Identify the colleagues and clients with whom you will need to work to be considered for promotion.
- Learn the variety of ways compensation is awarded and develop the associated skills to have your efforts rewarded.
- Track and report your contributions and any recognition you

receive and summarize them yearly in a memo to present at your annual review.

- Learn to take credit and self promote.

Leadership and Accountability

- Seek out leaders you admire and interview them on their strategies for success.
- Take steps to become a leader in areas of interest to you.
- Seek leadership roles in committee work in professional venues.
- Assume leadership roles in your community and outside organizations.
- Seek training in leadership skills and opportunities.
- Embrace your ambition rather than fear or stifle it.

Business Development and Networking

- Perfect your “elevator pitch.”
- Plan to attend events and programs of interest.
- Prioritize organizations and networks to become involved in and selectively assume a leadership role in one, two, or a few.
- Get comfortable interacting with new people and telling them what you do.
- Keep in touch with classmates and contacts.
- Network internally with the assigning partner or supervisor.
- Network internally with the marketing department to be considered for pitches.
- Network internally with influential colleagues.
- Seek out affinity groups (of similarly situated individuals) with which to affiliate.
- Attend and participate in women’s initiative events.
- Seek business development and networking training.
- Learn the internal rules of awarding business development credit as a result of originating clients, inheriting clients, and expanding existing business.

Workplace Flexibility

- Identify your work/life needs and priorities.
- Decide if and when to seek flexible or reduced hours.
- Establish reliable and flexible childcare or eldercare, if applicable.
- Consider the impact on promotion if working flexible or reduced hours.
- Consider the impact on compensation if working flexible or reduced hours.
- If you seek flexible or reduced hours, understand the business case

for why it is in your employer's interest and convey it.

- If you work flexible or reduced hours, learn the skills to be responsive and accessible, in addition to delivering top-notch work.
- Develop time-management skills.

Mentoring

- Be prepared as a mentee to help your mentors in return for their help.
- Develop skills to update and keep in touch with your mentors.
- Seek out different mentors from different aspects of your life and for different needs:
 - mentors who are role models or whom you relate to in terms of identity;
 - mentors whose practice area or expertise is one you are trying to develop;
 - mentors who can share wisdom and contacts;
 - mentors who convey internal politics and unwritten rules;
 - mentors who can endorse, advocate for, and vouch for you; and
 - mentor peers who can give you advice, support, and camaraderie.
- Participate in mentoring circles (a group of mentors and mentees).
- Participate in formal mentoring programs.

In sum, there are two critical steps that women can take to increase their likelihood of success. First, women need to identify women-friendly employers. Women should use *The Cheat Sheet* as a tool to show them what makes a women-friendly employer; using it, they can garner the information to make an educated decision of where to work. Second, once a woman decides where to practice, she needs to Blueprint her plan for success. This means identifying the skills to develop in these areas — Partnership & Advancement, Leadership & Accountability, Business Development & Networking, Workplace Flexibility, and Mentoring. In doing so, women will no longer be blindsided by opportunities they lost or feel they have no other choice but to leave. Instead, they will be empowered with the tools to become successful.