A CALL FOR NEW ETHICS RULES TO LIMIT BILLABLE HOUR REQUIREMENTS

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The widespread practice by law firms of mandating ever-increasing billable hour requirements casts doubt upon the integrity of our profession, skirt the spirit if not the letter of the Code of Professional Responsibility (CPR), and makes many lawyers miserable. A balance must be reached between the necessity of managing a law firm as a business and maintaining the integrity of the practice as set forth in the First Canon of the CPR. At some point, minimum billable hour requirements cross the line from sound business practice to dubious self interest at the expense of a vulnerable client. The bar has the duty to reign in the excesses of billable hour mandates and it is in their own enlightened self-interest to do so. The ever rising billable requirements are simply bad for the profession as the lamps are lit well past the dinner hour and the divorce, suicide and general unhappiness rate of lawyers increase. If the profession doesn't voluntarily regulate this conduct through promulgation of a new Disciplinary Rule (DR) with express limitations, then it is a matter of time before it is done for us.

The rise of the law firm as a business rather than a profession is well documented in the annals of the *New York Law Journal* and the media at large. By 1987, many New York firms were mandating 1800 billable hours for their partnership track associates and the 1800 became 2000 at many firms within a few years. The minimum billable requirements appear to have been spawned as a business necessity by the "top dollar" law firms, who announced in 1987 that they would pay first year associates the

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unheard of salary of $65,000 a year (which quickly became $70,000 and then $72,000 etc.). The so called "second tier" firms that had lower hourly rates and lower salaries, quickly followed the lead of mandating minimum billable hours, and associates as these firms suddenly found that longer hours were expected of them although perhaps not quite as excessive as the hours at the top dollar firms. Notwithstanding a brief recession and round of lay offs in the early nineties, billable hour requirements, starting salaries and billing rates increased throughout the last decade and culminated in previously unthinkable profitability in the top dollar firms during the boom of late nineties. The bar became enamoured of these economic statistics, with firms regularly flaunting their record breaking financial success like a publicly traded company in published statistics on per-partner profits, associate salaries and "boom year" bonuses. The recent practice of mid-year and late year bonuses to associates based upon firm profitability at the top dollar firms, is simply the latest development of the same business trend and continues the blurring between traditional salaried associates and traditional profit sharing partners. The second tier firms as well as the rest of the profession has generally changed their own policies during the decade although usually not to the extreme of the top dollar firms.

Along the way, many firms evolved "soft" mandates together with the "hard" mandates of billable hours. At some firms, the official policy has hard mandates that still state that 1800, 1900 or 2000 billable hours are required for partnership track associates. The young attorneys are well aware of the reality that far more hours are expected of them. As reported in recent articles in the *New York Law Journal*, many top dollar firms now award bonuses that double and triple based upon billable hours that reach 2400 to 2700 hours. Receiving an extra $20,000 for Christmas for an additional 100

billable hours is a very significant incentive. That is in addition to the "dirty" looks that the associate receives if he leaves before dinner, the firm sponsored brunches on weekends, the free "black car service" after ten o'clock, the "happenstance" telephone calls from partners to the associates at 9:30 PM, and common practice of making sure you never turn your office lights off.

Time sheets have long been the subject of black humor by attorneys, as they roll their eyes at yet another "professional" who claims he billed 2400 hours last year. The math speaks for itself. 2400 hours requires 50 billable hours a week assuming 4 weeks of vacation a year. That is ten billable hours a day for a five day week, 8.33 hours a day for a six day week. Assuming an hour for lunch and that every minute of a day is billable, an associate would have to work from 9 AM to 8 PM non-stop for a five day week, for a year to reach 2400 hours. Assuming an honest billable hour, a 2400 hour biller is almost certainly in the office until well past 10 PM every night and well before 9 AM every morning to permit enough time for non-billable activities such as filling out time sheets, calling a significant other to see if he/she still remembers your name, paying personal bills, picking up casual Friday clothes from the dry cleaners, going to the bathroom and, oh yes, fufilling the minimum of 12 CLE hours each year. That is, if all the billable hours are honest and if you believe that, well, I have a bridge that I would like to show you.

Assuming the billable hours are "on the up and up", a 2400 hour/year biller is routinely working on client matters well past the dinner hour. In fact more than routine, as an absolute necessity a 2400 hour biller is working on legal issues every night after he has already worked eight full hours. Assuming that the legal work is somewhat

more intellectually challenging than photocopying or stuffing envelopes, it is apparent that the biller is not doing his best legal work between 8 PM and 10 PM on a Thursday night. If you were the client with a lawsuit or deal that is life or death for your business, would you want your attorney working on your matter at 9 AM after a full night's sleep or at 8 PM? Don't forget you're paying $250/hr and up for that biller's time. It certainly may be necessary to work long into the night on occasion for a particular rush project but working till 10 PM as a routine matter is not the same thing. Does any attorney truly believe that these extended hours are in the client's best interest? There is a reason why most non-professionals' work hours are limited to 8 per day, 40 per week.

Ethical Consideration (EC) 1 states, "Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer." EC 5-22 strongly suggests that the attorney should be paid directly by the client and not by third parties. Although the CPR drafters were certainly referring to third parties outside the law firm, the law firm itself is a third party. The associate working on the file wants to please the client, but he/she knows that his/her professional future and direct compensation will be decided by the firm and there is no better way to impress a partner than to make him wealthy by working long hours. This is an inherent balance with which all lawyers must contend, but the billable mandates and the monstrous bonuses for additional billable hours strongly tilt the scale towards economic self-interest and away from the client. EC 6-2 states that the careful training of younger associates is "of particular importance" to fulfilling the Canon that a lawyer should represent a client competently. Most firms fell they comply by sending the associate to CLE seminars but soft and hard mandates that require the youngest of our

profession to work virtually all the time is not the way to create great lawyers. It is just a way to make the partners very wealthy.

The advent of young attorneys seeking to unionize, and more commonly, rampant job hopping and talented lawyers leaving the profession in droves, is further evidence of the excesses of billable hour mandates. Numerous articles have appeared that suggest a general malaise over the bar affects both young and veteran attorneys. Go to lunch with some colleagues and you're likely to hear just how unhappy the profession has become. Long work hours leave us tired, unhappy and unfulfilled. The extra money we make usually is wasted quickly on short term entertainment designed to buy instant happiness by escaping the mindset of work, unless the money is spent extricating ourselves from wreck of our personal lives and to pay for all the services necessary to support us as we continue to work all the time.

In short, billable mandates are a beast of the professions' creation that tears at the integrity of who we are and what we do. They provide record short term profits for firms at the expense of our personal and professional souls. The bar can reign in this business tool to a point where there is balance by drafting and supporting a new DR that limits soft and hard billable mandates to 2000 hours. We can debate whether the limit should be 2000, 2100 or 1800 billable hours, but I do not think that any of us can seriously believe that routinely billing more than 45 hours per week and routinely working more than 5 days per week is good for the client, the profession or the person. The bar is a profession and it is time we put some teeth into the CPR to keep it that way.