

2005

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### Recommended Citation

Elizabeth Chambliss, *THE NIRVANA FALLACY IN LAW FIRM REGULATION DEBATE*, 33 Fordham Urb. L.J. 119 (2005).  
Available at: <https://ir.lawnet.fordham.edu/ulj/vol33/iss1/1>

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# THE NIRVANA FALLACY IN LAW FIRM REGULATION DEBATE

## **Cover Page Footnote**

Professor of Law, New York Law School. Thanks to Bruce Green and the Louis Stein Center for inviting me to participate in this conference, and to Margaret Raymond for indulging my excited (and belated) response to her paper. Thanks also to Tanina Rostain for helpful comments on earlier drafts.

## THE NIRVANA FALLACY IN LAW FIRM REGULATION DEBATES

*Elizabeth Chambliss\**

“[L]awyers can no longer look back a generation for their managerial models.”<sup>1</sup>

Most commentators would agree that large law firms have outgrown collegial management and self-regulation. With hundreds—and, in some firms, thousands—of lawyers,<sup>2</sup> multiple national and international offices,<sup>3</sup> an increasing number of mergers,<sup>4</sup> and significant lateral mobility,<sup>5</sup> partners no longer can rely on social ties and informal, face-to-face interaction for making decisions, conveying firm policy, or monitoring the quality of lawyers’ work. In the words of one managing partner: “In 1980, we all knew each other and we knew each other’s spouses and we had

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1. Susan S. Samuelson, *Strategic Planning*, in *LAW FIRM MANAGEMENT: A BUSINESS APPROACH* § 1.7, at 1:57 (Susan S. Samuelson ed., 1994).

2. In 2004, the 250 largest U.S. law firms ranged from 162 to 3,194 lawyers, and fourteen firms had over 1000 lawyers. *See The NLJ 250*, NAT’L L.J., Nov. 15, 2004, at S16, available at <http://www.law.com/jsp/law/lawChartNLJ250.jsp?id=1100137001977>.

3. *See The NLJ 250: Branch Offices*, NAT’L L.J., Nov. 14, 2004, at S28 (reporting the size and location of branch offices of the 250 largest firms nationwide); *see also* David Hechler, *As Economy Slows, So Does Firms’ Global Reach*, NAT’L L.J., Nov. 15, 2004, at S10 (reporting “rapid growth” in the number of law firms opening international offices since 2000); Nathan Koppel, *Nation Builder*, AM. LAW., Nov. 2004, at 84 (discussing Western firms’ expansion into India).

4. *See* Leigh Jones, *Training Leaders a Top Priority: Merged Firms Bring New Challenges*, NAT’L L.J., July 18, 2005, at 1 (reporting that Altman Weil, a law firm consultant, counts 170 mergers since 2002); Aric Press & Susan Beck, *Almost a Revolution*, AM. LAW., May 2004, at 77 (“According to consultant Brad Hildebrandt’s figures, 316 firms merged between 1998 and 2003.”).

5. *See Lateral Associates*, PARTNERS’ REPORT FOR LAW FIRM OWNERS, June 2005, at 5 (reporting the results of a National Association for Law Placement survey that found that lateral hiring of associates “increased by almost 8% between 2002 and 2003”); *see also* Leigh Jones, *Lawyers Moving to New Firms by the Group: “Cherry Picking” a Merger Byproduct*, NAT’L L.J., Feb. 21, 2005, at 1 (reporting lateral moves by groups of partners as the result of increased merger activity).

dinner on Saturday night. That was just a different world.”<sup>6</sup> Today, most large law firms are more or less bureaucratically managed,<sup>7</sup> with extensive internal hierarchy<sup>8</sup> and specialized, full-time managers.<sup>9</sup>

Lawyers generally have been slow to recognize the benefits of bureaucratic management, and traditionally have resisted and lamented the move toward more bureaucratic forms.<sup>10</sup> Although partners want their firms to prosper in an increasingly competitive market, many decry the strategies necessary to increase profitability and continue to express nostalgia for an historic collegial ideal.<sup>11</sup> Thus, many lawyers view the infrastructure of bureaucratic management—that is, formal policies and

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6. Vanessa Blum, *In with the Old*, LEGAL TIMES, June 26, 2000, at 40 (quoting Ann Morgan Vickery, then managing partner of Hogan & Hartson’s D.C. office).

7. See RICHARD L. ABEL, AMERICAN LAWYERS 199-200 (1989) (describing how law firms are moving toward bureaucratization of management due to growth in size and complexity); ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 86-124 (1988) (discussing law firms’ increasing tendency toward bureaucratic organization and management).

8. See S. S. Samuelson & L. J. Jaffe, *A Statistical Analysis of Law Firm Profitability*, 70 B.U. L. REV. 185, 197 (1990) (“Simple terms such as ‘partner’ and ‘associate’ must now co-exist with ‘permanent associate,’ ‘non-equity partner,’ ‘of counsel,’ ‘staff attorney,’ ‘junior partner,’ ‘senior attorney,’ and ‘participating associate,’ among others.”); Alison Frankel, *Veil of Tiers*, AM. LAW., July 2004, at 92 (discussing the increase in multi-tier partnerships).

9. See *Behind the Scenes: D.C. Area Administrators on Bosses (Everyone), Budgets, and Business*, LEGAL TIMES, May 21, 2001, at 41 (discussing firms’ use of professional managers); Mike France, *Managing Partner: The Tender Trap*, NAT’L L.J., Feb. 6, 1995, at A1 (“[A]lmost all [large firms] have one full-time (or nearly full-time) leader who sets strategy, speaks to the press and hires lateral partners.”).

10. See NELSON, *supra* note 7, at 77-80, 205-28 (discussing lawyers’ ideological resistance to bureaucratic management); Jonathan E. Smaby, *Kicking the Habit of a Reactive Approach*, NAT’L L.J., Aug. 16, 2004, at S3 (criticizing lawyers’ resistance to centralized management and strategic planning).

11. See Scott Baker & Kimberly D. Krawiec, *The Economics of Limited Liability: An Empirical Study of New York Law Firms*, 2005 U. ILL. L. REV. 107, 146 (discussing partners’ fears that becoming a limited liability partnership would result in a loss of collegiality). “For some partners, particularly older partners, a loss of collegiality resembled a form of nostalgia. These partners often lamented the increasing commercialization of law practice and yearned for the days when all partners knew and trusted each other . . .” *Id.* See also Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 371, 383 (1992) (reporting that lawyers “miss the collegiality, cooperation and respect that may have been present in earlier eras of practice”); Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549, 550-52 (1996) (criticizing “nostalgia for the good old days” in “contemporary discourse about law practice” and noting that such nostalgia “has been a constant accompaniment of elite law practice at least since the formation of the large firm a hundred years ago”). Apparently, this tendency toward nostalgia is not unique to American lawyers. See John Leubsdorf, *On the History of French Legal Ethics*, 8 U. CHI. L. SCH. ROUNDTABLE 341, 346 (2001) (noting that discussions of legal ethics in France are pervaded by nostalgic historical narratives).

procedures and specialized managerial personnel—as necessarily impeding or distracting from some ‘purer’ form of collegial interaction and culture.<sup>12</sup>

Such thinking significantly inhibits the profession’s approach to lawyer regulation. Despite the many thousands of lawyers who work in large law firms,<sup>13</sup> and the broader institutional influence of large firm practice,<sup>14</sup> the profession has yet to come up with a regulatory strategy aimed at large, bureaucratic firms,<sup>15</sup> or even to agree that it needs one. Instead, many lawyers, regulators, and scholars continue to ‘look back a generation’ for their regulatory models, evaluating proposals aimed at large law firms against a nostalgic, collegial ideal.<sup>16</sup>

For instance, most of the debate about law firm discipline has revolved around its likely effect on individual accountability and compliance with ethical rules. Proponents of law firm discipline view it as a means of promoting individual accountability, by promoting the development of centralized monitoring and structural controls within firms.<sup>17</sup> Opponents of

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12. See Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 696-702 (2002) [hereinafter Chambliss & Wilkins, *Ethical Infrastructure*] (discussing lawyers’ tendency to view law firm “structure” as separate from and opposed to “culture”); Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 859-61 (1998) (discussing lawyers’ disdain for formal supervisory structures).

13. Based on firms listed in the 2004-2005 NALP Directory of Legal Employers, there are 31,836 partners, 43,205 associates, and 7,259 summer associates working in law firms with 251 or more lawyers. See Press Release, Nat’l Ass’n for Law Placement, Women and Attorneys of Color Continue to Make Only Small Gains at Large Law Firms (Nov. 5, 2004), available at <http://www.nalp.org/press/details.php?id=53>.

14. As Nelson writes:

The large law firm sits atop the pyramid of prestige and power within the American legal profession. Although comprising but a small fraction of lawyers, through its impact on patterns of recruitment, styles of practice, and the collective institutions of the bar, the large law firm has a significance that far exceeds the number of lawyers it employs.

NELSON, *supra* note 7, at 1.

15. See Elizabeth Chambliss, *MDPs: Toward an Institutional Strategy for Entity Regulation*, 4 LEGAL ETHICS 45, 45 (2001) [hereinafter Chambliss, *Institutional Strategy*] (arguing that the profession “has no coherent strategy” for the regulation of law firms as entities); see also Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1029-30 (2004) (arguing that a “nostalgic, unified vision of lawyers and the legal profession” has undermined efforts to regulate large firm practice); Ted Schneyer, *Nostalgia in the Fifth Circuit: Holding the Line on Litigation Conflicts Through Federal Common Law*, 16 REV. LITIG. 537, 565-66 (1997) (arguing that the Fifth Circuit’s approach to judicial disqualification is “quixotic” as applied to sophisticated business clients and the large law firms that represent them).

16. See *supra* note 1.

17. See Douglas N. Frenkel, *Ethics: Beyond the Rules – Questions and Possible Responses*, 67 FORDHAM L. REV. 875, 878 (1998) (calling for law firm discipline as a means

law firm discipline, however, argue that extending supervisory liability to firms will undermine individual accountability, viewing the centralization of management as per se problematic.<sup>18</sup>

In this volume, Professor Margaret Raymond raises similar concerns about the role of compliance specialists in large law firms.<sup>19</sup> Proponents of specialists, myself included, argue that the creation of specialized management positions, such as ethics advisor and law firm general counsel, will promote individual accountability by promoting ethical awareness and monitoring within firms.<sup>20</sup> Professor Raymond, however, cautions that the designation of a specialist to handle ethical and regulatory matters may lead other lawyers to relax—or relinquish—individual responsibility.<sup>21</sup>

This article questions the empirical basis for such concerns. I argue that the fear that centralized management controls will undermine individual accountability rests on an implicit comparison to a nostalgic, collegial ideal, in which all partners engage in firm management and collective self-

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of encouraging better monitoring among partners); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 11 (1991) [hereinafter Schneyer, *Professional Discipline*] (calling for the regulation of law firms as entities under professional disciplinary rules).

18. Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 4 (2002) (stating that law firm discipline "may actually undermine *individual* ethical incentives rather than furthering attorney accountability"); see also Robert A. Creamer, Attorneys' Liability Assurance Soc'y, Inc., A Risk Retention Group, Comments Concerning Draft Model Rules 5.1 and 5.3 to the A.B.A. Commission on Evaluation of the Rules of Professional Conduct (July 6, 2000), <http://www.abanet.org/cpr/creamer10.html> [hereinafter Creamer, Comments] (stating, "[a]ny shift from the individual responsibility of lawyers to the collective responsibility of the firm" will undermine the deterrent value of disciplinary sanctions); Robert A. Creamer, Joseph R. Lundy & Brian Redding, Attorneys' Liability Assurance Soc'y ("ALAS"), Inc., A Risk Retention Group, Testimony to the A.B.A. Ethics 2000 Commission (Feb. 15, 2001), [http://www.abanet.org/cpr/e2k-witness\\_lundy.html](http://www.abanet.org/cpr/e2k-witness_lundy.html) [hereinafter ALAS, Testimony] ("[A]ny change in the ethics rules that de-emphasizes in any respect the individual responsibility of each lawyer to follow those rules, e.g., by shifting responsibility to the firm, lessens, not increases, focus on the rules and will be counterproductive . . .").

19. See Margaret Raymond, *The Professionalization of Ethics*, 33 FORDHAM URB. L.J. – (2006).

20. See Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 346-50 (2003) [hereinafter Chambliss & Wilkins, *Law Firm Discipline*] (urging the ABA to promote the appointment of in-house ethics specialists); Chambliss, *Institutional Strategy*, *supra* note 15, at 61-63 (same); see generally Jonathan M. Epstein, Note, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011 (1994) (explaining the benefits of in-house ethics specialists).

21. Raymond, *supra* note 19, at – ("Telling pressured and overwhelmed lawyers that this area is, in effect, way too complex for them to master may cause them to lack ownership of ethics principles.").

regulation. Since no large law firm can live up to this ideal, such a comparison inevitably leads to a critique of the proposed regulation. Economists refer to this type of comparison—between an idealized apple and an imperfect orange—as the “nirvana fallacy.”<sup>22</sup>

The proper comparison, I argue, is between actual, more or less bureaucratic law firms, with and without the proposed controls. This type of comparison requires close attention to current conditions in law firms and lawyers’ attitudes and behavior in different regulatory contexts. To the extent that such data are available, they suggest that some forms of centralized management, such as the appointment of compliance specialists, may significantly improve individual accountability and compliance with professional rules.

Part I reviews the recent debate about law firm discipline and shows how opponents of law firm discipline implicitly compare it with a collegial ideal. Part II examines Professor Raymond’s concerns about the professionalization of ethics and shows how she, too, relies in part on an implicit collegial ideal. Part III reviews what little we know about the effects of law firm regulation on individual accountability and compliance. I conclude by defining some questions for future empirical research.

### I. LAW FIRM DISCIPLINE

Professor Ted Schneyer was the first to call for “professional discipline” for law firms in a 1991 article by the same title.<sup>23</sup> Professor Schneyer called for the imposition of an entity duty of supervision under Rule 5.1(a),<sup>24</sup> which currently imposes supervisory duties only on individual lawyers.<sup>25</sup> He argued that the possibility of sanctions against firms is

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22. See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969) (defining the nirvana fallacy). The nirvana fallacy “implicitly presents the relevant choice as between an ideal norm and an existing ‘imperfect’ institutional arrangement. This *nirvana* approach differs considerably from a *comparative institution* approach in which the relevant choice is between alternative real institutional arrangements.” *Id.*; see also NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 6-7 (1994) (criticizing “single institutionalism,” in which the imperfections of one institution are used as evidence of the virtues of another); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1229-30 (1994) (“[T]hrough the ‘nirvana fallacy,’ scholars erroneously compare real-world institutions with some abstract or ideal institution . . . [that] has never existed or . . . has been proven impossible to devise.”).

23. See generally Schneyer, *Professional Discipline*, *supra* note 17.

24. *Id.* at 17-20, 23.

25. Rule 5.1(a) states:

A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make

necessary in the large firm context in order to encourage partners to invest in firm management and the creation of bureaucratic controls, such as ethics and conflicts committees.<sup>26</sup> He referred to such controls collectively as the “ethical infrastructure” of the firm:

[A] law firm’s organization, policies, and operating procedures constitute an “ethical infrastructure” that cuts across particular lawyers and tasks . . . .

Given the . . . importance of a law firm’s ethical infrastructure and the diffuse responsibility for creating and maintaining that infrastructure, a disciplinary regime that targets only individual lawyers in an era of large law firms is no longer sufficient. Sanctions against firms are needed as well.<sup>27</sup>

Professor Schneyer’s article prompted proposals for law firm discipline in several jurisdictions,<sup>28</sup> but only two—New York and New Jersey—have imposed supervisory liability on firms.<sup>29</sup> The American Bar Association Commission on Evaluation of the Rules of Professional Conduct, more commonly known as the Ethics 2000 Commission, included a proposal for law firm discipline as part of its initial recommendations for changes to the Model Rules,<sup>30</sup> but voted 6-5 to withdraw the proposal in response to opposition.<sup>31</sup> The proposed rule would have added “the law firm” to the

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reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (2002).

26. Schneyer, *Professional Discipline*, *supra* note 17, at 17.

27. *Id.* at 10-11.

28. See Mark Hansen, *Taking a Firm Hand in Discipline: New York Ethics Rules Pinpoint Law Firms – Some Say More States Should Follow*, A.B.A. J., Sept. 1998, at 24 (discussing New York’s adoption of law firm discipline and reporting that a similar proposal was considered in California); see also Arthur Burger, *Don’t Be Lulled by Firm Immunity*, LEGAL TIMES, Apr. 17, 2000, at 27 (discussing the D.C Bar’s rejection of a proposal for law firm discipline).

29. See N.J. RULES OF PROF’L CONDUCT R. 5.1(a) (2004) (requiring law firms to make “reasonable efforts to ensure that member lawyers . . . undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct”); N.Y. CODE OF PROF’L RESPONSIBILITY DR 1-104(a) (2004) (requiring law firms to “make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules”).

30. See MARGARET COLGATE LOVE, A.B.A. ETHICS 2000 COMM’N, FINAL REPORT—SUMMARY OF RECOMMENDATIONS (2001), available at [http://www.abanet.org/cpr/e2k-mlove\\_article.html](http://www.abanet.org/cpr/e2k-mlove_article.html) [hereinafter LOVE, FINAL REPORT] (reporting the Commission’s initial support for law firm discipline).

31. See COMM’N ON EVALUATION OF THE RULES OF PROF’L CONDUCT, A.B.A. CENTER FOR PROF’L RESPONSIBILITY, MINUTES (Mar. 16-17, 2001), available at <http://www.abanet.org/cpr/e2k-03-16mtg.html> (reporting the vote “to delete the references to law firm discipline”).

list of those with supervisory responsibility under Rule 5.1(a). The proposed rule stated:

A partner in a law firm, a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, *and the law firm* shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.<sup>32</sup>

Commentators have criticized law firm discipline on a number of grounds,<sup>33</sup> but the key argument leading to the withdrawal of the Ethics 2000 Commission proposal was the concern that entity liability would undermine individual accountability. As the Commission explained:

The Commission initially proposed to extend the duties in [Rule] 5.1 . . . to law firms as well as individual lawyers. However, it became persuaded that any possible benefit from being able to extend disciplinary liability firm-wide was small when compared to the possible cost of allowing responsible partners and supervisors to escape personal accountability.<sup>34</sup>

It is not clear by what mechanism the Commission expected this trade-off to occur. Its language—“allowing responsible partners . . . to escape”<sup>35</sup>—suggests that the Commission was concerned about enforcement; that the availability of the firm as a target would lead disciplinary authorities to relax enforcement against individual lawyers.<sup>36</sup> But this concern makes little sense given the historic absence of enforcement against individual lawyers. Both proponents and opponents of

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32. A.B.A. ETHICS 2000 COMM’N, NOVEMBER 2000 PUBLIC COMMENT DRAFT (emphasis added) (on file with the author).

33. Some argue there is little evidence of ethical misconduct by firms. *See, e.g.*, Symposium Transcript, *How Should We Regulate Large Law Firms? Is a Law Firm Disciplinary Rule the Answer?*, 16 GEO. J. LEGAL ETHICS 203, 206 (2002) (remarks of William P. Smith, III) (“If western democracy was being threatened by all these bad acts of big firms . . . surely at least one of them would have committed a bad act, and we would have a public case on the record as a result of this [New York] law firm discipline rule. But we don’t.”); ALAS, Testimony, *supra* note 18 (“In our experience dealing with actual or alleged misconduct by lawyers in ALAS firms, it is virtually never the case that the firm, *qua* firm, is the problem.”). Others argue that the existing rules governing individuals are effective. *See, e.g.*, ALAS, Testimony, *supra* note 18 (“[T]he Reporter cites no instance in which a state disciplinary authority was unable to deal effectively . . . [with] legal ethics violations because of inability to prosecute a law firm.”). Finally, some criticize the use of Rule 5.1 as the vehicle for entity regulation. *See, e.g.*, Chambliss & Wilkins, *Law Firm Discipline*, *supra* note 20, at 336-41 (criticizing the Rule 5.1 framework).

34. LOVE, FINAL REPORT, *supra* note 30.

35. *Id.*

36. *See* O’Sullivan, *supra* note 18, at 20 (arguing that law firm discipline would make it “too easy for disciplinary authorities to pursue firms rather than invest the time, resources, and effort needed to sanction a truly culpable lawyer”).

law firm discipline agree that Rule 5.1(a) has been a disciplinary “dead letter.”<sup>37</sup>

The Commission also may have been concerned about shirking, that extending supervisory liability to firms would encourage individual partners to shirk their own supervisory duties.<sup>38</sup> But this concern, too, rests on faulty assumptions. First, it assumes that partners’ investment in supervision is influenced primarily by disciplinary rules, rather than the firm’s management structure, compensation system, or firm leaders’ expectations. This is a problematic assumption by both sides in the law firm discipline debate, to which I return in Part III.

The concern about shirking also assumes that lawyers cannot read disciplinary rules, since extending supervisory liability to firms would not eliminate individual liability.<sup>39</sup> For instance, Professor Julie O’Sullivan argues that, against a history of non-enforcement against individual lawyers, adding entity liability would signal that “enforcement authorities are basically throwing in the towel as far as individual cases against large firm lawyers are concerned.”<sup>40</sup> But if there was no enforcement to begin with, what towel is there to be thrown?

Most important, for the present argument, the concern about shirking assumes that, currently, most partners comply with the demands of Rule 5.1(a); that is, partners “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”<sup>41</sup> For instance, Professor O’Sullivan argues that law firm discipline would lead “non-management lawyers” to reduce their investment in building an “ethical superstructure”

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37. Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 644 (1994) (referring to Rule 5.1(a)); see also O’Sullivan, *supra* note 18, at 1, 23 (acknowledging the lack of enforcement of Rule 5.1(a)). One reason for the lack of enforcement of Rule 5.1(a) may be the limited resources of most disciplinary agencies and the lack of demand for enforcement by large firm clients. *Id.* at 58-62. Another reason may be the difficulty of pinpointing responsibility for ethical lapses that occur in large firms. See Schneyer, *Professional Discipline*, *supra* note 17, at 11 (discussing “the evidentiary problems of pinning professional misconduct on one or more members of a lawyering team”). Finally, some ethical lapses in large law firms are “inherently structural,” such that there are no truly culpable individual lawyers. *Id.* at 25 (drawing an analogy to corporate wrongdoing).

38. See O’Sullivan, *supra* note 18, at 20-21 (suggesting that law firm discipline would signal a “lack of personal responsibility for ethics compliance”).

39. Cf. Creamer, Comments, *supra* note 18 (stating that law firm discipline represents a “shift from the individual responsibility of lawyers to the collective responsibility of the firm”); ALAS, Testimony, *supra* note 18 (arguing that law firm discipline “shift[s] responsibility to the firm”).

40. O’Sullivan, *supra* note 18, at 23.

41. MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (2002).

in the firm<sup>42</sup>—as if non-management lawyers currently make such an investment.

None of these assumptions is supported by the data on law firm management. Although Rule 5.1(a) makes all partners equally responsible for maintaining the law firm's ethical infrastructure, one would be hard-pressed to find a large law firm that is actually managed that way.<sup>43</sup> Most large law firms have moved away from decentralized, collegial governance and instead have extensive management hierarchies, including some number of professional (full-time, specialized) managers.<sup>44</sup> Thus, to the extent that firm-wide monitoring occurs, it tends to be a centralized management function.

Further, research suggests that most law firms do a relatively poor job of monitoring firm-wide compliance with professional regulation.<sup>45</sup> For instance, while most firms have formal procedures for identifying conflicts of interest,<sup>46</sup> many firms lack formal procedures for addressing other ethical issues, such as lawyers' investment in clients' businesses<sup>47</sup> and the withdrawal of client funds.<sup>48</sup> Most firms also lack billing guidelines other than those imposed by clients<sup>49</sup> and do little or nothing to train new

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42. O'Sullivan, *supra* note 18, at 23.

43. See Chambliss & Wilkins, *Law Firm Discipline*, *supra* note 20, at 339-40 (criticizing the theory of collective management reflected in Rule 5.1(a)).

44. See *supra* notes 2-9 and accompanying text.

45. See Chambliss & Wilkins, *Ethical Infrastructure*, *supra* note 12, at 696-702 (reviewing research on the development and effectiveness of ethical infrastructure within law firms); Douglas N. Frenkel, et al., Robert L. Nelson & Austin Sarat, *Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 *FORDHAM L. REV.* 697, 704-05 (1998) (summarizing the main findings from focus groups with large firm litigators).

46. See Susan P. Shapiro, *TANGLED LOYALTIES: CONFLICTS OF INTEREST IN LEGAL PRACTICE* 307-08 (2002) (reporting on conflicts detection procedures in 128 Illinois law firms); Lee A. Pizzimenti, *Screen Verité: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?*, 52 *U. MIAMI L. REV.* 305, 321-23 (1997) (reporting on conflict screening procedures in thirty-one law firms in Michigan, Illinois, Pennsylvania and Oregon); Stephen R. Volk et al., *Law Firm Policies and Procedures in an Era of Increasing Responsibilities: Analysis of a Survey of Law Firms*, 48 *BUS. LAW.* 1567, 1580 (1993) (reporting on conflict detection procedures in twenty-six law firms).

47. See Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 *GEO. J. LEGAL ETHICS* 271, 284 (1997) [hereinafter Fortney, *Law Firm Partners*] (reporting that only half of 191 law firms surveyed monitor partners' investment in client business); Volk et al., *supra* note 46, at 1569 (reporting that only five of twenty-six firms require prior approval of stock trades).

48. See Fortney, *Law Firm Partners*, *supra* note 47, at 284 (reporting that only thirty-five percent of firms surveyed require a second partner signature for the withdrawal of client funds); Volk et al., *supra* note 46, at 1575 (reporting that only ten of twenty-six firms require a second signature).

49. See Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 *UMKC L. REV.* 239,

associates about proper billing procedures.<sup>50</sup>

Even firms that have formal procedures tend to do little to monitor compliance.<sup>51</sup> A study of peer review procedures in 191 Texas law firms found that most firms do not monitor partners' compliance with internal procedures other than those related to conflicts and billing,<sup>52</sup> and only half of firms engage in any form of peer review.<sup>53</sup> Many partners view monitoring by their colleagues as an affront.<sup>54</sup> And while most large law firms have a partner or committee designated to handle ethical questions,<sup>55</sup> typically such questions are viewed as a distraction from the primary business of the firm.<sup>56</sup>

Thus, there is little evidence that partners currently engage in the kind of collegial self-governance imagined by opponents of law firm discipline. Law firm discipline may not be the answer to inadequate supervision,<sup>57</sup> but it is hard to argue that law firm discipline could make matters worse. At the very least, extending supervisory liability to firms could help focus partners' attention on the need for better internal monitoring.<sup>58</sup> More

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253 (2000) [hereinafter Fortney, *Soul for Sale*] (reporting that sixty percent of 487 associates surveyed said that their firms lack formal billing guidelines other than those imposed by clients).

50. *Id.* at 254 (reporting that twenty-six percent of associates received no instruction on billing when they joined the firm and thirty-five percent received less than one hour of instruction); see also Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 209-15 (1999) (discussing sixteen cases of billing fraud by senior partners at prominent law firms).

51. See Frenkel et al., *supra* note 45, at 704 (reporting the "irrelevance of formal mechanisms to lawyers' daily discretionary judgments").

52. See Fortney, *Law Firm Partners*, *supra* note 47, at 284-85.

53. *Id.* at 289.

54. See Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 *FORDHAM L. REV.* 809, 825 (1998) (quoting a partner who said "one doesn't monitor one's partners"); Frenkel, *supra* note 17, at 878-79 (discussing the lack of "horizontal monitoring" among partners); Suchman, *supra* note 12, at 860 (reporting that partners "expressed quite a bit of ambivalence about whether formal ethical control was the firm's responsibility at all").

55. See Fortney, *Law Firm Partners*, *supra* note 47, at 289 (reporting that seventy-three percent of firms have a principal or committee to handle ethical problems); Pizzimenti, *supra* note 46, at 322 (reporting that most firms have ethics committees); Volk et al., *supra* note 46, at 1578 (reporting that twenty-five of twenty-six firms have a "system" for dealing with ethical concerns).

56. See Pizzimenti, *supra* note 46, at 322 (reporting that most ethics committees meet only on an ad hoc basis); Suchman, *supra* note 12, at 864 (describing the ethics committee as the "No Business Committee").

57. See *infra* Part III (questioning the impact of disciplinary rules on managerial practices in law firms).

58. See Frenkel, *supra* note 17, at 878 (calling for law firm discipline, despite its "limitations and problems," as a means of "providing colleague-monitoring incentives").

optimistically, such a change could provide momentum for the “professionalization of ethics,”<sup>59</sup> which I argue is a more promising strategy for law firm regulation.

## II. THE PROFESSIONALIZATION OF ETHICS

Some law firms have begun to address the gaps in internal supervision by appointing individual partners to be specially responsible for monitoring compliance with professional regulation.<sup>60</sup> Such specialists go by a variety of titles, such as “ethics advisor,”<sup>61</sup> “loss prevention partner,”<sup>62</sup> and, increasingly, “general counsel,”<sup>63</sup> with some firms defining more than one specialized position.<sup>64</sup> For simplicity’s sake, I refer to such specialists collectively as “compliance specialists.”<sup>65</sup>

The emergence of compliance specialists in large law firms in part reflects firms’ increasing exposure to professional liability<sup>66</sup> and insurers’ increasing insistence that firms improve their internal controls.<sup>67</sup> Some

59. See Raymond, *supra* note 19, at JUMP CITE.

60. See Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 563-66 (2002) [hereinafter Chambliss & Wilkins, *Compliance Specialists*] (examining the role of in-house compliance specialists in thirty-two law firms); see also Jaime Levy, *More Firms See Benefit of Using In-House General Counsel*, CHI. LAW., July 2004, at 28 (reporting firms’ increasing reliance on in-house counsel); Jonathan D. Glater, *In a Complex World, Even Lawyers Need Lawyers*, N.Y. TIMES, Feb. 3, 2004, at C1; Leigh Jones, *More Firms Hire General Counsel: GCs Help Reduce the Risk of Liability*, NAT’L L.J., June 6, 2005, at 1.

61. See generally Peter R. Jarvis & Mark J. Fucile, *Inside an In-House Legal Ethics Practice*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 103 (2000) (referring to themselves as ethics advisors); Epstein, *supra* note 20 (discussing in-house ethics advisors).

62. This is the title preferred by the ALAS for its liaisons. See Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 560 n.4.

63. See Levy, *supra* note 60; Jones, *supra* note 60; see also Nancy Rubin Stuart, *A Lawyer’s Lawyer: More Firms Establish In-House General Counsel Positions*, N.J.L.J., June 20, 2005, at 27 (discussing firms’ appointment of in-house general counsel); Charles Toutant, *General Counsel Posts Popping up at Large Firms, Spurred by Insurers*, N.J.L.J., Nov. 15, 2004, at 1 (noting firms’ increased selection of general counsel from within the firm).

64. See Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 565-66 (reporting the most common titles in a sample of thirty-two law firms).

65. *Id.* at 563-65 (defining “compliance specialist” as a unit of analysis). This functional label is theoretically useful but empirically inaccurate. Law firms do not refer to their in-house specialists as “compliance specialists.”

66. See Epstein, *supra* note 20, at 1012, 1030-31 (discussing the “growth in the number and size of awards for legal malpractice”); Gary Taylor, *Counsel to Firms Goes In-House: Legal Costs Are Leading Firms, Like Their Clients, to Look Inside for Advice*, NAT’L L.J., July 18, 1994, at A1 (discussing firms’ increasing vulnerability to malpractice claims).

67. See Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 559-60, 590;

insurers, such as the Attorneys' Liability Assurance Society ("ALAS"), require firms to designate a partner to act as a liaison to the insurer,<sup>68</sup> and over time such partners may take on various compliance functions.<sup>69</sup> Insurers may even offer discounts to firms that have in-house compliance specialists.<sup>70</sup>

The emergence of compliance specialists is also part of a broader trend toward the professionalization of law firm management; that is, the treatment of management as a full-time job requiring its own special skills. Until recently, most law firms were run by practicing partners who managed on the side,<sup>71</sup> and some large law firms continue to be run that way.<sup>72</sup> These days, however, most large law firms are run by full-time managing partners who leave practice,<sup>73</sup> sometimes forever,<sup>74</sup> to fill this increasingly specialized role. Some firms have even begun to send their

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Levy, *supra* note 60; Glater, *supra* note 60; Toutant, *supra* note 63 (discussing the role of liability insurers in promoting risk management within firms).

68. ALAS has played an important role in promoting the formal appointment of in-house compliance specialists. See Chambliss & Wilkins, *Law Firm Discipline*, *supra* note 20, at 347 (discussing ALAS's role).

69. *Id.* at 348. As one partner observed, "Being anointed the ALAS representative does not require you to know anything about ethics . . . but once you are named [the loss prevention partner], it's hard to avoid some involvement." *Id.*

70. See Levy, *supra* note 60 (reporting the availability of discounts); Glater, *supra* note 60 (same).

71. See NELSON, *supra* note 7, at 74 (noting that law firm managers traditionally have had tenure in the firm and access to clients, distinguishing them from corporate and industrial managers, who have neither).

72. See *The Not-So-Fun Part; Firm Leaders Share What Aspects of Their Job They Find the Most Challenging*, LEGAL TIMES, Feb. 23, 2004, at 31 (reporting the challenges faced by managing partners at nine large Washington D.C. firms). According to Richard Wiley of Wiley Rein & Fielding, "[M]anaging our firm while also engaging in the active practice of law . . . amounts to two full-time positions." *Id.*

73. See James Jones & Carl Leonard, *The Price of Leadership: A New Look at Setting Compensation for Managing Partners*, N.Y.L.J., Sept. 10, 2002, at 5 (noting that "in larger firms . . . the managing partner's job is usually a full-time position" and that "most managing partners . . . serve five to seven years"); see also France, *supra* note 9 (reporting that most large law firms have full-time managing partners).

74. It can be difficult to return to practice after spending five or more years away from it and firms struggle with how to compensate ex-managers while they rebuild their practices. See Jones & Leonard, *supra* note 73; *What Your Partners Should Know About Their Compensation*, COMPENSATION & BENEFITS FOR L. OFFICES, Jan. 2002, at 3 (discussing compensation for managing partners). Some managing partners decide not to return to practice and go on to other law-related careers. See, e.g. *Briefly*, NAT'L L.J., Nov. 13, 1995, at A5 (reporting that James W. Jones, who managed D.C.'s Arnold & Porter for eight years, was stepping down to become vice chairman of APCO Associates Inc., a public relations and lobbying firm that he helped found as an Arnold & Porter subsidiary). Jones is now a law firm consultant. See Terry Carter, *Homegrown v. Lateral: In the Race to Partnership, Both Have Advantages*, A.B.A. J., Aug. 2005, at 30 (quoting Jones and identifying him as a law firm consultant).

partners to business school, teaming up with leading universities for short courses on law firm management.<sup>75</sup> Within this context, it is no surprise that some firms have begun to define additional management specialties, such as ethics advisor and firm general counsel.

There are no systematic data on the prevalence of compliance specialists within law firms, but most evidence suggests that their number is increasing. A 2004 survey of AmLaw 200 law firms<sup>76</sup> by Altman Weil, a law firm consultant, found that thirty-five of the fifty-six firms that responded have “in-house general counsel”; typically, “a partner who spends just under half of his/her time in that function.”<sup>77</sup> A follow-up survey of the AmLaw 200 in 2005 found that fifty-three of seventy-seven firms have in-house general counsel (sixty-nine percent), almost a third of whom are full time in that role.<sup>78</sup> In most firms, the primary role of in-house counsel is to advise firm management about general and professional liability issues and to oversee the firm’s conflicts function.<sup>79</sup>

Professor Raymond views firms’ increasing reliance on in-house compliance specialists with ambivalence. Although she acknowledges the many benefits of devoting special attention to professional ethics,<sup>80</sup> she shares with opponents of law firm discipline a distrust of centralized

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75. See Leigh Jones, *Training Leaders a Top Priority: Merged Firms Bring New Challenges*, NAT’L L.J., July 18, 2005, at 1 (describing law firm management training programs at Harvard Business School, University of Pennsylvania’s Wharton School of Business, and Northwestern University’s Kellogg School of Management). The per-partner cost of such programs, which may be specifically tailored to each firm, can run “into the tens of thousands of dollars,” plus the loss of each partner’s billings. *Id.*

76. AmLaw200 firms are the 200 top-grossing U.S. law firms, as measured by *The American Lawyer*. See John O’Connor, *A Guide to Our Methodology*, AM. LAW., Aug. 2005, at 89.

77. Press Release, Altman Weil, Inc., Majority of Major U.S. Law Firms Have In-House General Counsel, Survey Reports (Mar. 25, 2004), available at <http://www.altmanweil.com/news/release.cfm?PRID=38> (“[A]lmost two-thirds of those responding (62.5%) have an in-house General Counsel . . .”); see also ALTMAN WEIL, INC., RESULTS OF CONFIDENTIAL “FLASH” SURVEY ON LAW FIRM GENERAL COUNSEL (2005), <http://www.altmanweil.com/pdf/2005LawFirmGCsurvey.pdf> [hereinafter ALTMAN WEIL, 2005 SURVEY] (reporting that fifty-six firms responded to the 2004 survey).

78. See ALTMAN WEIL, 2005 SURVEY, *supra* note 77, at 1, 3; see also Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 573 (reporting that ten of the twenty-nine specialists for whom data were available, or thirty-four percent, were full-time in that role).

79. See Press Release, Altman Weil, Inc., New Survey Reports on General Counsel in Law Firms (May 24, 2005), available at <http://www.altmanweil.com/news/release.cfm?PRID=51> (noting the growing importance of conflicts management due to increased merger activity); see also Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 573 (finding that most compliance specialists’ core substantive jurisdiction is conflicts).

80. See Raymond, *supra* note 19, at – (calling the emergence of in-house ethics specialists “a significant positive development”).

strategies for promoting compliance with ethical rules. According to Professor Raymond, firms' reliance on specialists, coupled with the increasing complexity of the rules, risks alienating non-specialists from professional values and causing "pressured and overwhelmed lawyers" to "lack ownership of ethics principles."<sup>81</sup>

Professor Raymond suggests several mechanisms by which such alienation could occur. First, like the opponents of law firm discipline, she is concerned about shirking.<sup>82</sup> Given the increasing pressure on lawyers to work quickly and specialize narrowly, Professor Raymond worries that the presence of an ethics specialist will encourage non-specialists to relinquish their own ethical responsibilities.<sup>83</sup> According to Professor Raymond, the presence of a specialist signals that "someone else is developing expertise so you don't have to," and "runs the risk of . . . taking ethical issues out of mainstream discourse."<sup>84</sup>

Professor Raymond also is concerned about the socialization of new lawyers. She fears that firms' increasing reliance on specialists and the increasing complexity of the rules will lead new lawyers to view ethics as "just another area of specialization"<sup>85</sup> that is "way too complex for them to master,"<sup>86</sup> rather than an integral part of their own practice. Further, given firms' tendency to undercompensate specialists,<sup>87</sup> Professor Raymond notes that "the development of ethics expertise probably looks to junior lawyers like a specialization best avoided."<sup>88</sup>

Finally, Professor Raymond is worried about non-specialists' ethics education and training. As she notes, certain ethical responsibilities cannot be fully delegated to specialists, such as the radar required to spot ethical issues and the awareness that consultation is needed.<sup>89</sup> While most firms have expanded formal training, including formal ethics training, Professor Raymond worries that such training "may be substituting for more informal opportunities for hands-on participation and mentoring that may have been more prevalent in the past."<sup>90</sup> Thus, she concludes, "[w]hile the

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81. *Id.* at —.

82. *Id.* at —.

83. *Id.* at —.

84. *Id.* at —.

85. *Id.* at —.

86. *Id.* at —.

87. See Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 572-74 (reporting that some lawyers volunteer as many as 500 hours per year to in-house ethics advising).

88. Raymond, *supra* note 19, at —.

89. *Id.* at —.

90. *Id.* at —; see also Suchman, *supra* note 12, at 862-63 (discussing associates'

development of an institutional infrastructure of expertise is undoubtedly beneficial, we need to consider carefully how to maintain the connection of new lawyers to their own ethical responsibilities.”<sup>91</sup>

Professor Raymond raises important questions about the potential trade-off between the role of specialists and individual lawyers’ awareness of and compliance with ethical rules. Like opponents of law firm discipline, she questions whether centralized management necessarily will improve individual conduct and accountability within firms. Her focus on the socialization of junior lawyers is particularly helpful, given that the effects of centralization, including the role of compliance specialists, may be very different for associates than for partners.<sup>92</sup>

One must be careful, however, to separate questions about the role of compliance specialists from more general concerns about the pace and culture of practice in large law firms. Most of the conditions that Professor Raymond describes—the need for speed,<sup>93</sup> the pressure to specialize,<sup>94</sup> and the growing isolation of associates<sup>95</sup>—are true of large law firms generally, whether or not they have in-house compliance specialists.<sup>96</sup> Likewise, much of the alienation from legal ethics that she fears will result from specialists, via shirking, avoidance, and inadequate training, is already present in many firms.<sup>97</sup>

For instance, Professor Raymond’s concern that the presence of specialists will “[take] ethical issues out of mainstream discourse”<sup>98</sup> implies that ethical issues currently are part of mainstream discourse. Yet Professor Raymond’s own analysis suggests that this is not the case.

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dissatisfaction with the quality and timing of formal training).

91. Raymond, *supra* note 19, at —.

92. See Frenkel et al., *supra* note 45, at 705 (reporting “widely divergent perceptions of senior and junior lawyers about the climate in their firms and the prescription for addressing problems”); Sarat, *supra* note 54, at 826 (“[T]he world of the firm seems quite different from the perspective of associates than it does from the perspective of partners.”).

93. See Raymond, *supra* note 19, at —.

94. *Id.* at —.

95. *Id.* at —.

96. See Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 *FORDHAM L. REV.*, 709, 717 (1998) (reporting that large firm lawyers are overburdened and there is “no time to think”); Suchman, *supra* note 12, at 869 (noting the absence of associate mentoring); William J. Wernz, *The Ethics of Large Law Firms—Responses and Reflections*, 16 *GEO. J. LEGAL ETHICS* 175, 197 (2002) (noting the pressure to specialize).

97. See Frenkel et al., *supra* note 45, at 705 (noting lawyers’ “avoidance or suspicion of any moral calculus in their daily choices”); Suchman, *supra* note 12, at 858-59 (reporting that large firms conduct “very little routine ethical evaluation” and that “formal . . . controls on ethicality . . . are remarkably weak”).

98. Raymond, *supra* note 19, at —.

According to Professor Raymond, junior lawyers currently are isolated, unmentored, and lack “a venue for dialogue and engagement on ethical issues.”<sup>99</sup> Instead, they are left to learn their ethical norms “by observing their colleagues in the wild.”<sup>100</sup>

Similarly, Professor Raymond’s concern that the presence of an undervalued specialist will send the wrong message to associates could be read to suggest that the absence of a specialist might be preferable. To be fair, this is not Professor Raymond’s explicit argument. On the contrary, she urges firms to ensure that ethics specialists receive “adequate compensation, institutional respect, and appropriate authority”<sup>101</sup> so as to send the message that ethics are important.<sup>102</sup> Implicitly, however, Professor Raymond seems to blame specialists, and other formal infrastructure associated with the professionalization of ethics, for the very conditions that specialists are meant to address.

She opens her article by contrasting the “professionalization of ethics” with “connecting all practitioners to the values of professional responsibility,” as if the two are necessarily opposed.<sup>103</sup> She argues that the “creation of ethics specialists . . . may pose some challenges to the continuing goal of individual ethics awareness,”<sup>104</sup> as if those challenges would not otherwise be present. She notes that “we should be profoundly concerned if the professionalization of ethics results in less individual connection to professional responsibility.”<sup>105</sup> And, like the opponents of law firm discipline, she compares the fast-paced and complex world of specialists to an earlier, simpler time, when lawyers were less accessible to clients<sup>106</sup> and ethics rules were more accessible to lawyers.<sup>107</sup>

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99. *Id.* at —; *see also* Suchman, *supra* note 12, at 864 (noting that increasingly cost-conscious clients “will no longer subsidize apprenticeship, socialization, or indulge ethical back-talk”).

100. Raymond, *supra* note 19, at — (citing Suchman, *supra* note 12, at 869).

101. *Id.* at —.

102. I agree. *See* Chambliss, *Institutional Strategy*, *supra* note 15, at 61-62 (urging professional associations to promote the authority of in-house ethics specialists); Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 589 (emphasizing the importance of “economic incentives and visible management support” for in-house specialists); *see also* Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1748-49 (2005) [hereinafter Chambliss, *In-Firm Privilege*] (arguing that the scope of the attorney-client privilege between firm counsel and other members of the firm should turn in part on whether firm counsel is compensated for in-house service).

103. Raymond, *supra* note 19, at — (“The current versions of our ethical rules and the structure of law firms have the potential to encourage the professionalization of ethics rather than connecting all practitioners to the values of professional responsibility.”).

104. *Id.* at —.

105. *Id.* at —.

106. *Id.* at — (ruining the “newly developed expectation that lawyers are constantly

I do not mean to suggest that Professor Raymond's concerns about the potential drawbacks of specialists are necessarily misplaced. On the contrary, I applaud her attention to the challenging conditions of practice in large law firms and share her concerns about promoting ethical awareness among lawyers. My point is merely to call attention to her implicit standard of comparison and to the prevalence of this standard in current regulatory debates.

Probably we all can agree on the virtues of the collegial ideal, in which lawyers get informal, hands-on training, opportunities for collaborative work, and time for dialogue and engagement on ethical issues. But this is not a fair standard for evaluating the role of specialists or any other proposal for improving professional self-regulation in large, bureaucratic law firms. The choice is not between specialists and individual ethical engagement. The choice, rather, is between big firms with specialists and big firms without specialists. Thus, rather than comparing the role of specialists to our collective ideal, the role of specialists and other strategies for law firm regulation must be evaluated "in the wild,"<sup>108</sup> and compared to their realistic, imperfect alternatives.

### III. THE EFFECTS OF LAW FIRM REGULATION ON INDIVIDUAL COMPLIANCE

The arguments for law firm discipline, in-house compliance specialists, and other forms of law firm regulation do not stand or fall on the issue of individual compliance. Just as certain individual ethical and legal duties are "nondelegable,"<sup>109</sup> proponents of law firm regulation argue that law firm management has nondelegable duties as well.<sup>110</sup>

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accessible and available around the clock").

107. *Id.* at – (noting that the 1908 Canons of ethics covered "about nine pages," and arguing that the Model Rules of Professional Conduct "have gotten too dense and complex to be relevant to the average lawyer").

108. *See supra* note 100 and accompanying text.

109. *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126-27 (1989) (holding that the purpose of Rule 11 was "to bring home to the individual signer his personal, nondelegable responsibility" to prevent frivolous motions). In response to *Pavelic*, Congress amended Rule 11 to provide for entity liability. *See* FED. R. CIV. P. 11 (allowing sanctions for a violation of the Rule to be imposed "upon the attorneys, law firms, or parties" responsible).

110. *See* Schneyer, *Professional Discipline*, *supra* note 17, at 25 (arguing that some forms of wrongdoing are "inherently structural"); *see also* Chambliss & Wilkins, *Law Firm Discipline*, *supra* note 20, at 336-38 (arguing that the design and monitoring of structural controls in large law firms is a management, not individual, duty); Chambliss, *Institutional Strategy*, *supra* note 15, at 48 ("[M]any of the ethical issues large firm lawyers face . . . are matters governed by firm-wide policy rather than individual decision-making.").

In large law firms, for instance, some ethical rules, such as the rules governing conflicts of interest and the management of client funds, could not possibly be observed without some form of centralized management.<sup>111</sup> Law firm management likewise is responsible for personnel decisions, marketing decisions, and a host of other business decisions that have ethical and legal implications.<sup>112</sup> In most firms, no individual lawyer controls such decisions or can be held accountable for them. Thus, one can argue in favor of regulating large law firms without making any claims about the effect of such regulation on individual compliance.<sup>113</sup>

Nevertheless, a key argument for law firm discipline, in-house specialists, and other efforts to improve law firm management is that better management will promote individual accountability and compliance within firms. By what mechanisms do proponents of law firm regulation expect this to occur?

### A. Two Models of Regulation

#### 1. The Legalistic Model

There are two different models of regulation at work in this debate. The first, which predominates among both proponents and opponents of law firm discipline, is what might be called a “legalistic” model. This model emphasizes the content of formal rules and the direct enforcement of those rules as the chief determinants of lawyers’ conduct.<sup>114</sup> The legalistic model

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111. Rule 5.1(a) as currently written recognizes the need for centralized management in these areas. *See* MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. 2 (2002) (stating that Rule 5.1(a) requires lawyers with managerial responsibility to establish “internal policies and procedures” to “detect and resolve conflicts of interest . . . [and] account for client funds and property”).

112. *See* Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 575-76 (discussing the types of matters handled by in-house compliance specialists); Jarvis & Fucile, *supra* note 61, at 108-11 (discussing the types of matters the authors handled as in-house ethics advisors); *see also* ALTMAN WEIL, 2005 SURVEY, *supra* note 77, at 6, 8-11 (reporting the types of matters about which in-house general counsel advise their firms).

113. *See* Chambliss & Wilkins, *Law Firm Discipline*, *supra* note 20, at 338 (“The primary purpose of law firm discipline is to promote compliance efforts by *firms*; thus, firms—not individuals—are the object of regulation.”).

114. This model is common among lawyers, who are taught to assume the centrality of legal rules. Elizabeth Chambliss & Lauren B. Edelman, *Sociological Perspectives on Equal Employment Law*, at 1 (May 24, 1999) (unpublished manuscript, on file with author) (discussing “legal” versus “sociological” models of equal employment opportunity regulation); *see also* Chambliss & Wilkins, *Ethical Infrastructure*, *supra* note 12, at 703 (“[L]egal ethics scholars and bar regulators tend to focus on the content of formal rules and the scope of potential liability . . .”).

tends to portray lawyers as “bad men,” in Holmes’ terms;<sup>115</sup> that is, as tending toward noncompliance in the absence of direct enforcement.

For instance, Professor Schneyer begins his article on law firm discipline by citing five examples of misconduct in large law firms.<sup>116</sup> He uses these examples to argue that individual discipline is inadequate and that “[s]anctions against firms”<sup>117</sup> are needed in order to enable enforcement of Rule 5.1(a).<sup>118</sup> According to Professor Schneyer, the threat of sanctions against firms will encourage firms to improve their internal controls, which in turn will promote individual compliance (by reducing individual misconduct).<sup>119</sup> Thus, Professor Schneyer’s regulatory model looks something like this: (1) changing Rule 5.1(a) will increase the threat of enforcement; (2) the threat of enforcement will prompt better management; and (3) better management will reduce misconduct.

Opponents of law firm discipline do not question this legalistic regulatory model; instead, they question whether the threat of enforcement will, in fact, prompt better management. According to opponents, the threat of enforcement against firms will undermine individual incentives to manage.<sup>120</sup> Like Professor Schneyer, however, opponents emphasize the importance of formal liability rules, and the centrality of disciplinary enforcement in shaping partners’ incentives to manage.<sup>121</sup>

## 2. *The Institutional Model*

The promotion of compliance specialists is based on an “institutional” model of regulation.<sup>122</sup> The institutional model views firm culture as the

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115. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”).

116. See Schneyer, *Professional Discipline*, *supra* note 17, at 1. This focus on misconduct and noncompliance is typical among law firm discipline proponents. See Chambliss & Wilkins, *Law Firm Discipline*, *supra* note 20, at 337 (criticizing proponents’ focus on individual, intentional misconduct).

117. Schneyer, *Professional Discipline*, *supra* note 17, at 11.

118. *Id.* at 8-11, 20. Schneyer argues that the nature of large firm practice makes individual discipline difficult, and that “if we are to pursue the regulatory aims of MR 5.1(a) . . . [we] may have to give disciplinary authorities the options of fining or censuring the firm . . .” *Id.*

119. *Id.* at 12 (“A disciplinary system for law firms . . . could promote firm practices that reduce the risk not only of discipline but also of civil liability, disqualification, and other nondisciplinary sanctions.”).

120. See *supra* note 18 and accompanying text.

121. See, e.g., O’Sullivan, *supra* note 18, at 41-43.

122. See Chambliss, *Institutional Strategy*, *supra* note 15, at 56-64 (explaining the

primary determinant of lawyers' conduct, rather than formal rules or direct disciplinary enforcement.<sup>123</sup> The institutional model does not deny the importance of direct enforcement (where it exists), but argues that, in the absence of full enforcement, individual conduct is driven primarily by cultural norms and expectations.<sup>124</sup>

The institutional model does not assume that individual lawyers are resistant to compliance; on the contrary, it assumes that most lawyers conform to the norms and expectations of their firms—including the firm's definition of "compliance."<sup>125</sup> Thus, the institutional model depicts lawyers as tending toward compliance with professional regulation (though the meaning of "compliance" may be contested).<sup>126</sup>

The institutional model views in-house specialists as a powerful mechanism for promoting conformity between local and formal standards for compliance.<sup>127</sup> Specialists tend to serve as conduits for information about formal standards and to promote the development of compliance procedures within firms.<sup>128</sup> Moreover, to the extent that in-house

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institutional theory of organizations and its implications for the regulation of law and other professional firms).

123. *Id.* at 56 (discussing institutional theory's emphasis on cultural versus material concerns); see also Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 484-506 (1997) [hereinafter Edelman & Suchman, *Legal Environments*] (contrasting "material" versus "cultural" theories of organizations). Although the institutional model is primarily associated with the regulation of organizations, its emphasis on cultural determinants applies to individuals as well. See Mark Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY, 903, 922-23 (1996) (arguing that there is considerable empirical support for the notion that "compliant behavior is motivated more by cultural norms and accounts than by the imminent threat of legal sanctions").

124. The role of culture is greatest where legal rules are ambiguous. See Edelman & Suchman, *Legal Environments*, *supra* note 123, at 501-02 ("If all legal doctrine were substantive and unequivocal and if all legal implementation were coercive and undeviating, then one could imagine a simple feedback loop, in which organizations would adjust their behaviors exclusively in response to existing laws . . . . In the [institutional] account, however, the plot-line is much messier than this.")

125. See Chambliss & Wilkins, *Ethical Infrastructure*, *supra* note 12, at 714 (stating that "consistent with its emphasis on cultural norms and expectations," institutional theory assumes that most lawyers seek compliance with professional rules).

126. *Id.*

127. See Chambliss, *Institutional Strategy*, *supra* note 15, at 60-63 (emphasizing the role of in-house specialists in promoting regulatory compliance within firms); Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 560 ("From a regulatory standpoint, the emergence of in-house compliance specialists is a pivotal development.")

128. See e.g., Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 560 n.11 (reviewing research on the role of compliance specialists in promoting internal compliance procedures); Edelman & Suchman, *Legal Environments*, *supra* note 123, at 498-501 (same); see also Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 74-79 (1992) (arguing that compliance

specialists organize into external networks, they may play a powerful role in defining industry standards for compliance,<sup>129</sup> which in turn may affect formal standards.<sup>130</sup>

Specialists need not act like cops to promote compliance. Although some corporate counsel play the role of “cop” in their firms,<sup>131</sup> and some law firm counsel may do so as well (though most tend to downplay this role),<sup>132</sup> specialists’ influence on individual compliance does not depend on direct enforcement of ethics rules or firm policy. As explained above, the institutional model does not rely on direct enforcement. Instead, the institutional model emphasizes the cultural influence of specialists and their role in educating and socializing firm members.

For instance, from an institutional perspective, the mere appointment of a compliance specialist is a cultural statement by the firm.<sup>133</sup> As Professor Raymond points out, it may be the wrong statement: if the specialist is incompetent, or undervalued, or has no preexisting authority in the firm, the appointment may be “merely symbolic,”<sup>134</sup> signifying management’s disrespect for the job.<sup>135</sup> Such an appointment could drive firm culture even further from formal standards.

Even merely symbolic appointments may take on a life of their own, however, such that management’s values are not ultimately determinative

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specialists have a professional incentive to promote internal compliance procedures even in the absence of a significant legal threat).

129. See Chambliss & Wilkins, *Ethical Infrastructure*, *supra* note 12, at 711 (discussing the role of specialist networks); Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 561 n.12 (citing research on the role of professional networks in shaping industry standards for compliance).

130. See Chambliss, *Institutional Strategy*, *supra* note 15, at 59 (arguing that where formal standards are ambiguous, regulators tend to take their cues from industry norms and practices); see also Chambliss & Edelman, *supra* note 114, at 26-28 (reviewing research supporting this point).

131. See Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *LAW & SOC’Y REV.* 457, 462-64 (2000) (discussing corporate counsel who “are primarily concerned with policing the conduct of their business clients”).

132. See Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 587-88 (quoting several in-house specialists on this point). “If you say no all the time, people will go underground,” said one specialist. *Id.* at 588.

133. See Chambliss & Wilkins, *Ethical Infrastructure*, *supra* note 12, at 713 (arguing that the creation of internal compliance structures is culturally significant whether or not such structures are effective).

134. “Merely symbolic” structures are those that an employer creates without providing the resources to make them effective. See Lauren B. Edelman & Stephen M. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 *RESEARCH SOC. STRATIFICATION & MOBILITY* 107, 109 (1999).

135. See Raymond, *supra* note 19, at —.

of the specialist's influence.<sup>136</sup> For instance, if the specialist is personally committed to promoting compliance with formal rules, a merely symbolic appointment may lead to conflict, mobilizing previously passive constituents inside and outside the firm.<sup>137</sup> Or, if the specialist is part of an external professional network, the specialist may be able to draw on that network to challenge local culture.<sup>138</sup> Or, if the specialist becomes frustrated and quits (or is fired), the specialist may carry tales of the firm to competitors, clients, and potential recruits, thus imposing reputation costs.<sup>139</sup>

Of course, specialists' power to promote compliance with formal rules and policy typically will be greater when law firm management invests in and supports the specialist, making clear that management values compliance.<sup>140</sup> The nature of specialists' influence also depends on specialists' own commitments. If specialists are captive to deviant interests or simply skills for bad managers, their positive effect on firm culture obviously will be diminished.<sup>141</sup>

The point is, from an institutional perspective, these are the central variables of interest—the firm's investment, the specialist's commitment, and the make-up of internal and external constituencies—rather than the content of formal rules or the threat of liability. The institutional model focuses on the dynamics of cultural change within firms and treats the firm

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136. See Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 LAW & POL'Y 73, 75 (1991) (arguing that, once implemented, symbolic structures tend to take on a life of their own); see also Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941, 981 (1999) ("[E]ven 'merely symbolic' compliance can exert lasting substantive effects as it redirects organizational attention, alters the organization's public identity, and draws new sets of participants into the organization's dominant coalition.").

137. See Edelman et al., *supra* note 136, at 75 (discussing the role of politically motivated specialists); see also Elizabeth Chambliss, *Title VII as a Displacement of Conflict*, 6 TEMP. POL. & CIV. RTS. L. REV. 1, 23-33 (1996) [hereinafter Chambliss, *Title VII*] (discussing conflicts between affirmative action officers and their employers).

138. For instance, a lawyer who acts as a liaison to the firm's liability insurer may be able to use the insurer's requirements to motivate changes in the firm. See Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 590 (discussing the role of ALAS in creating networks among in-house specialists).

139. See Chambliss, *Title VII*, *supra* note 137, at 33-40 (discussing the negative publicity that resulted after the City of Madison, Wisconsin fired a vocal affirmative action officer).

140. See Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 582 ("[T]he most important source of credibility for . . . [in-house] specialists is the visible support of firm leaders.").

141. See Chambliss, *In-Firm Privilege*, *supra* note 102, at 1766-67 (urging ongoing research on the role of firm in-house counsel and cautioning against blind support).

as the central arena—and agent—of professional regulation.<sup>142</sup>

### B. Empirical Findings

In the present context, neither model has any direct empirical support. Only two states have imposed law firm discipline<sup>143</sup> and no one has systematically studied the consequences.<sup>144</sup> And while I and others have begun to study the role of compliance specialists in large law firms,<sup>145</sup> no one has attempted to measure how in-house specialists affect individual compliance.

Further, given the obstacles to measuring compliance, direct evidence would be difficult to produce. Like deterrence, compliance is measured by its absence, rather than being directly observable.<sup>146</sup> And since lawyers cannot be expected to report their own noncompliance, or allow researchers to observe it,<sup>147</sup> even noncompliance would be difficult to measure in any systematic way.<sup>148</sup>

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142. See Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 177, 198-202 (Robert L. Nelson et al. eds., 1992) (arguing that the workplace is a central arena for the formation of professional ideology and that “different practice contexts exhibit fundamentally different conceptions of appropriate professional conduct”).

143. See *supra* notes 28-29 and accompanying text.

144. See O'Sullivan, *supra* note 18, at 21-22. O'Sullivan notes that “[w]e are operating . . . in an empirical vacuum” as to the effects of law firm discipline. *Id.* at 22.

145. See generally Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60 (reporting the findings from focus groups with compliance specialists in thirty-two law firms); Jarvis & Fucile, *supra* note 61 (reporting their own experience as compliance specialists).

146. On the difficulties of measuring deterrence, see Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 *EMORY L.J.* 937, 944 (1983) (“The question of . . . deterrence is always counterfactual . . .”). On the difficulties of measuring compliance, see William Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, 36 *ARIZ. ST. L.J.* 1243, 1245 (2004) (“Whether, and, if so, why states elect to comply with international law are now the most central questions within the international legal academy . . .”); Gregory Mitchell, *Case Studies, Counterfactuals, and Causal Explanations*, 152 *U. PA. L. REV.* 1517, 1555-61 (2004) (questioning legal scholars’ use of single-observation case studies, such as the Enron scandal, to generate causal explanations for corporate compliance and noncompliance).

147. See Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 586 (reporting compliance specialists’ resistance to direct observation).

148. See Hugh P. Gunz & Sally P. Gunz, *The Lawyer’s Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 *AM. BUS. L.J.* 241, 246 (2002) (“[E]mpirical ethics research is . . . notoriously difficult.”). See generally Andrew Crane, *Are You Ethical? Please Tick Yes or No: On Researching Ethics in Business Organizations*, 20 *J. BUS. ETHICS* 237 (1999) (critically reviewing the current state of empirical ethics research).

We do know a few things about lawyers' attitudes and behavior, however, that tend to suggest some limits of the legalistic model. For instance, we know that formal ethics rules and their enforcement through lawyer discipline tend to have little direct effect on lawyers' day-to-day conduct. Professor Schneyer argues that this is true in large law firms because disciplinary enforcement historically has been weak or non-existent in that context.<sup>149</sup> Recent research suggests, however, that the ethics rules and the threat of disciplinary enforcement play a relatively marginal role even where disciplinary enforcement is strongest; that is, among solo and small firm practitioners.<sup>150</sup>

In her 2004 study of ethical decision-making among solo and small-firm practitioners,<sup>151</sup> Professor Leslie Levin reports that "many of the lawyers I interviewed did not appear to think much about the ethical issues they encountered in their day-to-day work lives,"<sup>152</sup> or "consider the issues they confronted in moral or ethical terms."<sup>153</sup> To the extent that lawyers did recognize questions as "ethical," and seek answers, they tended to rely on other lawyers for advice,<sup>154</sup> or on a "stock response" developed in their initial years of practice,<sup>155</sup> rather than researching the rule. According to Professor Levin:

[T]he lawyers I interviewed indicated that they rarely consulted bar codes when deciding how to handle ethical issues. . . . Many freely admitted that they did not keep up-to-date on changes in the New York Code and that they had not consulted it since law school. . . . Many lawyers maintained the attitude that they need not consult the New York Code or other ethical rules because they considered themselves ethical or they "know what to do."<sup>156</sup>

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149. See Schneyer, *Professional Discipline*, *supra* note 17, at 6-13 (summarizing the obstacles to disciplinary enforcement in the large firm context).

150. See Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 HOUS. L. REV. 309, 312 (2004) [hereinafter Levin, *Small Firm Practitioners*] (noting that "[s]olo and small firm lawyers are disciplined at a far greater rate than other lawyers," and presenting evidence from a variety of sources); see also GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 1148 (4th ed. 2005) (reviewing statistics on disciplinary enforcement).

151. Levin's random sample covered forty-one lawyers who practice in the New York City metropolitan area. See Levin, *Small Firm Practitioners*, *supra* note 150, at 318-20 (describing her sample and methods).

152. *Id.* at 335.

153. *Id.* at 336.

154. *Id.* at 362-64 (reporting the strategies used by new lawyers).

155. *Id.* at 364-66 (emphasizing the importance of lawyers' early experiences on subsequent responses).

156. *Id.* at 368-69.

Professor Levin's findings are consistent with the findings from large law firms, discussed in Part II, showing that large firm lawyers typically devote little time or attention to ethical issues<sup>157</sup> and tend to view such issues as tangential to the primary business of the firm.<sup>158</sup> A 1998 study of litigators from five large law firms found that the dominant attitude among lawyers was a kind of "ethical pragmatism," which assumed that "the 'real' meaning of ethical rules was consistent with pragmatic concerns, even when the letter of the rules was not."<sup>159</sup>

These findings suggesting the marginal relevance of formal rules are also consistent with recent research reporting the limited impact of partnership form on partner supervision and monitoring. In their 2005 study of 147 New York City law firms, Professors Scott Baker and Kimberly Krawiec found that the move from a general partnership (GP) to a limited liability partnership (LLP)<sup>160</sup> had no significant effect on partners' relationships with each other, including their willingness to pitch in on matters or monitor each others' work.<sup>161</sup> Instead, partners cited "a concern with maintaining the firm's reputation and maximizing the firm's billable rates" as the primary factors that motivate monitoring, and "the size, decentralization, and specialization of the modern law firm" as the primary factors that impede it.<sup>162</sup> These findings contradict the conventional wisdom in legal ethics scholarship that the move to a limited liability form will undermine internal supervision.<sup>163</sup>

Finally, as discussed in Part I, we know that firms' formal policies and

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157. See *supra* notes 98-100 and accompanying text.

158. See *supra* notes 82-91 and accompanying text.

159. See Suchman, *supra* note 12, at 844 (using the rules governing deposition defense as an example).

160. The main difference between a general partnership and a limited liability partnership is that, in a limited liability partnership, "partners are liable only for debts stemming from their own conduct, or the conduct of someone under their supervision" rather than the conduct of all partners. Baker & Krawiec, *supra* note 11, at 110.

161. *Id.* at 146, 148 (reporting no significant effect on collegiality and no significant impact on monitoring).

162. *Id.* at 148.

163. See, e.g., Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1728 (1998) ("[U]nlimited liability . . . arguably provides an important assurance to clients that law firms will discipline shirking and other self-interested conduct by their members."); Allan W. Vestal, *Special Ethical and Fiduciary Challenges for Law Firms Under the New and Revised Unincorporated Business Forms*, 39 S. TEX. L. REV. 445, 475 (1998) (noting that partners in an LLP "have less incentive to supervise than they would in a general, nonlimited liability partnership setting"); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, *Scholar*, 66 S. CAL. L. REV. 1147, 1213 (1993) (stating that partners in an LLP will have fewer incentives to monitor and "less opportunity to detect and prevent misconduct").

procedures may have a minimal impact on lawyers' day-to-day conduct, especially if formal policies and procedures are inconsistent with informal (cultural) expectations.<sup>164</sup> The study of big firm litigators, discussed above, found that the structural controls in those firms seemed designed primarily to symbolize that "ethicality matters to people like us," and that there was no real threat of repercussions for "anything but the most egregious of ethical failures."<sup>165</sup> Instead, the study concluded that the firms operate on the basis of a "logic of confidence [that] the firm's ethical health is 'confirmed' by the absence of negative feedback from control structures that have been allowed to atrophy precisely because of a belief that the firm is too ethically healthy to really need them."<sup>166</sup>

This is not to say that the existence of formal policies and procedures is inconsequential. As with specialists, even merely symbolic policies and procedures may be culturally significant.<sup>167</sup> The extent to which formal policies and procedures control lawyers' day-to-day conduct cannot be taken for granted, however, and must be examined empirically.

### C. Research Questions

Given the paucity of research to date on large firm lawyers' ethical attitudes and behavior, just about any additional research would make a useful contribution. Except for the study of large firm litigators,<sup>168</sup> Professor David Wilkins' and my research on in-house compliance specialists,<sup>169</sup> and Professor Susan Saab Fortney's surveys of Texas lawyers (some of whom worked in large law firms),<sup>170</sup> there has not been any systematic research on how large firm lawyers think or act in different regulatory and/or management contexts.

This lack of research is not unique to the large firm context. As Professor Fred Zacharias has observed, "Hard evidence concerning lawyers' common behavior and reactions is virtually nonexistent . . . . [T]he ethics codes and the scholarly literature are replete with empirical

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164. See *supra* notes 51-56 and accompanying text.

165. Suchman, *supra* note 12, at 859.

166. *Id.*

167. See Chambliss & Wilkins, *Ethical Infrastructure*, *supra* note 12, at 713 ("[I]nstitutional theory draws a distinction between a firm with no formal policy, and one in which the formal policy is inconsistent with actual conduct.").

168. See Frenkel et al., *supra* note 45, at 701-02; Suchman, *supra* note 12, at 839-42 (explaining the research design of that study).

169. See Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 561-62 (explaining our research design).

170. See Fortney, *Law Firm Partners*, *supra* note 47, at 275-78 (explaining her research design); Fortney, *Soul for Sale*, *supra* note 49, at 243-45 (same).

assumptions that require empirical testing and justification.”<sup>171</sup>

That being said, future research on lawyers’ ethics should take care to be as specific as possible about: (1) the type of ethical issue or conduct of interest; and (2) the type of lawyer of interest. More specificity would go a long way toward breaking some of the seeming impasses in legal ethics scholarship, and might improve the effectiveness of bar regulatory efforts.

### 1. *Type of Ethical Issue or Conduct*

Different people mean different things when they talk about ‘ethics.’ Some people mean ‘morals,’ whereas others mean ‘topics covered by the ethics rules,’ yet these are very different subjects. Some of the debate between proponents and opponents of law firm regulation stems from a lack of specificity about the type of ethical issue or conduct that is being discussed.

Proponents of law firm discipline, in-house specialists, and other forms of law firm regulation are primarily concerned about the quality of law firm management. Probably no one would deny that the quality of management has ethical implications, and Rule 5.1(a),<sup>172</sup> governing supervision, clearly implicates law firm management; but while proponents have mainly structural concerns, and focus their attention on the firm as a whole, opponents are concerned primarily about individual lawyers and their personal sense of morality. This difference sometimes leads proponents and opponents to talk past each other.

A lack of specificity about the type of conduct at issue also accounts for some of the tension between the legalistic and institutional models of lawyer regulation. Some types of knowing, egregious misconduct lend themselves to legalistic treatment and a focus on enforcement. Lawyers who make racist remarks while interviewing potential associates,<sup>173</sup> lie about the existence of documents in discovery,<sup>174</sup> or steal money from their clients and partners,<sup>175</sup> are knowingly violating widely-shared ethical

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171. Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 235 n.39 (1993).

172. MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (2002).

173. See Schneyer, *Professional Discipline*, *supra* note 17, at 1 (discussing racist and sexist remarks made by a Baker & McKenzie partner while interviewing a University of Chicago Law School student).

174. *Id.* at 2 (discussing the misconduct of a partner at Donovan, Leisure, Newton & Irvine).

175. See Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 209-15 (1999) (discussing sixteen cases of billing fraud by senior partners at prominent law firms); see also Thomas A. Kuczajda, *Self-*

and legal norms—they *are* bad men, by most people’s standards—and are unlikely to be responsive to cultural expectations for compliance. Thus, some “ethically challenged lawyers”<sup>176</sup> probably are beyond the reach of soft, cultural controls. Other types of professional conduct may be more susceptible to social cues, such as billing practices,<sup>177</sup> or the acceptable level of aggressiveness in discovery.<sup>178</sup> Future research should take care to specify what type of individual or management conduct is at issue and what mechanisms the researcher imagines will affect that conduct.

## 2. *Type of Lawyer*

Large firm lawyers traditionally were thought to be more ethical than small firm and solo practitioners,<sup>179</sup> in part because they could afford to be.<sup>180</sup> Whether this was ever true, or has become less true as large firm practice has become more competitive, there is little evidence that the process of ethical decision-making differs between large and small firm lawyers. On the contrary, as the institutional model would predict, most lawyers appear to make “ethical” decisions by investigating community standards; that is, asking their officemates, friends, relatives or—increasingly—inquiring on a listserv.<sup>181</sup>

Lawyers’ professional communities differ, however, and those differences may have profound effects on the way lawyers view and resolve ethical issues, as well as the type of day-to-day conduct that they

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*Regulation, Socialization, and the Role of Model Rule 5.1*, 12 GEO. J. LEGAL ETHICS 119, 121-26 (1998) (discussing billing fraud by the managing partner at Butler & Binion).

176. Creamer Comments, *supra* note 18.

177. See Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 912-20 (1999) (explaining how large firm lawyers are socialized to pad their time sheets).

178. See Sarat, *supra* note 54, at 821-24 (discussing adversarial norms in discovery); Suchman, *supra* note 12, at 853-54 (defining the “asshole attorney” as someone who crosses the line between acceptable and unacceptable aggressiveness).

179. See Levin, *Small Firm Practitioners*, *supra* note 150, at 311-15 (critically reviewing the evidence for this view).

180. See Suchman, *supra* note 12, at 865 (noting the effect of financial stability on ethicality and quoting one partner as saying, “those who can afford ethics do it”).

181. See Levin, *Small Firm Practitioners*, *supra* note 150, at 362-67 (reporting how small firm and solo practitioners solve ethical problems); Suchman, *supra* note 12, at 863 (quoting one associate who said “you learn by osmosis; that is, by copying others”). See generally Leslie C. Levin, *Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers*, 37 ARIZ. ST. L.J. 589, 591 (2005) [hereinafter Levin, *Lawyers in Cyberspace*] (examining how members of the New York State Trial Lawyers Association use their General Forum listserv to “form their understanding of accepted conduct within their community of practice”).

simply take for granted.<sup>182</sup> Future research should specify what type of lawyer is being studied and the main professional community to which such lawyers belong.

For instance, existing research finds that associates and partners have different perspectives on their firms and different incentives for ethical (and unethical) conduct.<sup>183</sup> Thus, one might expect that different forms of law firm regulation would affect associates and partners differently. From a legalistic perspective, law firm discipline has little importance for associates, who are not liable for firm-wide supervision under Rule 5.1(a).<sup>184</sup> Law firm discipline might be culturally important—for instance, it might change management expectations for associate conduct—but presumably the cultural effects of law firm discipline would also differ for associates and partners.

The role of specialists, likewise, may be different at different levels of the law firm hierarchy. Specialists may be more attentive to partners' concerns (like managing conflicts of interest) than the concerns of associates. The Altman Weil survey found that in almost half of firms that have in-house counsel, associates do not have access to them.<sup>185</sup> To encourage questions from associates, some firms have created more than one specialist; for instance, firm counsel (to handle conflicts and claims) and an ombudsman (to be available to associates).<sup>186</sup> Associates may be reluctant to raise questions about partners' conduct, however, no matter how the specialist's role is defined.<sup>187</sup> Future research on specialists should be attentive to this issue, and take care to specify the specialist's primary functional role within the firm.

Finally, future research should pay close attention to the age and career path of lawyers being studied. Professor Levin finds that lawyers' initial

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182. See, e.g., Levin, *Small Firm Practitioners*, *supra* note 150, at 346-49 (discussing ethically questionable but widespread office-sharing practices among solo and small firm practitioners).

183. See *supra* note 92 and accompanying text.

184. See MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2002) (referring to "[a] partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority . . .").

185. See ALTMAN WEIL, 2005 SURVEY, *supra* note 77, at 7 (reporting that associates have access to in-house counsel in only twenty-eight of fifty-three firms).

186. See Elizabeth Chambliss, *The Ideology of Firm Counsel*, 84 N.C. L. REV. (forthcoming 2006) (discussing firms' use of ombudsmen); see also Epstein, *supra* note 20, at 1030-31, 1037 (noting that ethics committee members sometimes play the role of ombudsmen).

187. See Robert L. Nelson, *Uncivil Litigation: Problematic Behavior in Large Law Firms*, J. KAN. B. ASS'N, Feb.-Mar. 1997, at 8, 24 (noting that associates may be reluctant to come forward with questions about partners' conduct).

practice experiences play a powerful role in defining their “stock responses” to ethical issues,<sup>188</sup> which suggests that lawyers’ initial practice setting may profoundly affect their professional ideology.<sup>189</sup> Moreover, she reports that “once lawyers choose a particular response to an ethical issue . . . [they tend] not to reexamine the decision in the future.”<sup>190</sup> These findings point to an intriguing process of ethical imprinting that, among other things, may help explain lawyers’ (and scholars’) nostalgia for past norms and practices. Close study of ideological differences among lawyers of different ages, and same-age lawyers who start off in different practice settings, could yield interesting findings.

### 3. *Compensation and Mobility*

I conclude with two variables that deserve special mention in any self-respecting subsection on research questions about lawyers’ ethics: compensation and mobility. The importance of compensation is obvious: not only do compensation systems affect the material rewards of practice, they also send loud cultural messages about the type of conduct the firm values. At the partnership level, the role of client origination credits<sup>191</sup> and the system for compensating partners who invest in firm management<sup>192</sup> directly shape partners’ incentives to manage the firm, monitor their colleagues, and mentor junior lawyers. At the associate level, what counts as “billable” likely has a significant effect. According to one associate in the big firm litigation study, the best way to make large firm lawyers more ethical would be to create a billing number for “time spent in ethical give and take.”<sup>193</sup>

The importance of mobility may be somewhat less obvious, but my

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188. See Levin, *Small Firm Practitioners*, *supra* note 150, at 364-67, 376-80 (emphasizing the importance of “stock responses” for experienced lawyers).

189. See Nelson & Trubek, *supra* note 142, at 198-202 (emphasizing the importance of the workplace in shaping lawyers’ professional ideologies); Tanina Rostain, *Waking Up from Uneasy Dreams: Professional Context, Discretionary Judgment, and the Practice of Justice*, 51 STAN. L. REV. 955, 965 (1999) (suggesting the longer a lawyer stays at a firm, the more influence the firm will have on her professional self-conception).

190. Levin, *Small Firm Practitioners*, *supra* note 150, at 379.

191. See Peter J. Winders, *The Ideal Law Firm Compensation System*, PROF. LAW., Summer 2005, at 1 (criticizing overemphasis on origination credits in partner compensation formulae).

192. *Id.* at 6-8 (emphasizing the need to compensate lawyers who invest in firm management); see also Chambliss & Wilkins, *Compliance Specialists*, *supra* note 60, at 572-77 (emphasizing the importance of direct compensation on compliance specialists’ role within firms); Jones & Leonard, *supra* note 73, at 5 (emphasizing the importance of adequate compensation and the treatment of partners when they leave management roles).

193. Suchman, *supra* note 12, at 864.

hypothesis is this: some of the current weakness of informal controls within law firms<sup>194</sup> results not so much from their size as from the increasing mobility of their members. Although firms have grown and some are enormous, from an institutional perspective it is workplace or office culture that is most immediate, rather than the “official” culture or self-understanding of the firm as a legal entity. Even big firms have smaller offices, departments, and workgroups that can serve as the location of cohesive professional communities.

Increased mobility, on the other hand, affects all offices and work groups and appears to undermine group ties and the strength and salience of the group norms. The big firm litigator study, for example, emphasized lawyers’ derision for laterals, who were viewed as more likely to flout local norms than lawyers native to the firm.<sup>195</sup> It would be interesting to investigate whether firms (or offices, or practice areas) with higher attrition or mobility tend to exhibit lower professional standards (assuming for the moment that we can measure high and low) or less agreement about standards than firms or offices with less mobility. It also would be interesting to investigate where increasingly mobile and/or isolated lawyers look for their professional community and sense of community norms. Listservs?<sup>196</sup>

### CONCLUSION

This Article has argued that nostalgia for an idealized collegial form has prevented legal scholars and regulators from coming to terms with the realities of practice in large law firms. Despite the many thousands of lawyers who work in large law firms and large firms’ collective institutional influence on the profession, the profession has yet to come up with a credible strategy for self-regulation in the large firm context. We need to do better. In the wake of recent accounting scandals and the increasing threat of federal oversight, it is indefensible for the profession to continue to look back a generation for its regulatory or managerial models. It may be Arthur Andersen and KPMG today,<sup>197</sup> but it is likely to be one of

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194. See Frenkel et al., *supra* note 45, at 704-05 (noting that most observers of the focus groups with big firm litigators agreed that firm cultures seemed very weak); Suchman, *supra* note 12, at 858-66 (remarking on the weakness of traditional informal controls).

195. See Suchman, *supra* note 12, at 868.

196. See Levin, *Lawyers in Cyberspace*, *supra* note 181, at 591.

197. See, e.g., *Judge Approves First Settlement of an Enron Suit*, N.Y. TIMES, Nov. 8, 2003, at C4 (noting judicial approval of settlement where AWSOC Societe Cooperative, which used to include Arthur Andersen, would pay \$40 million to plaintiff Enron investors and former employees); Kathy M. Kristof & Josh Friedman, *KPMG Tax Case Grows; Ten More People Are Indicted over Alleged Fraudulent Shelters Promoted by the Firm*, L.A.

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ours tomorrow. How will the public judge the debate about law firm regulation in that context?

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TIMES, Oct. 18, 2005, at C1 (reporting ten additional indictments in the prosecution of KPMG).