

2005

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Recommended Citation

Margaret Raymond, *THE PROFESSIONALIZATION OF ETHICS*, 33 Fordham Urb. L.J. 153 (2005).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol33/iss1/10>

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Cover Page Footnote

Professor, University of Iowa College of Law. Thanks to Gerald Wetlaufer for helpful suggestions, to the Louis Stein Center for Law and Ethics for the invitation to participate in this Conference, and to Cynthia Lohman and Justin McCarty for excellent legal research assistance.

THE PROFESSIONALIZATION OF ETHICS

*Margaret Raymond**

The discussion of training reflected in this conference largely addresses how, in the current climate, we can turn new law graduates into experienced, capable and competent lawyers. My particular interest is in the importance of teaching law graduates to be ethical lawyers.¹ I start with a provocative hypothesis: that 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.

This development is consistent with the move to specialization in the profession as a whole. Specialization unquestionably has its benefits. The job of ethics advising and professional responsibility decision-making has, through professionalization, been situated somewhere, with a clear set of responsible persons. Nonetheless, these trends are a concern because ethical responsibility cannot be fully delegated. Lawyers can and should turn to ethics specialists to assist with complex issues, but the radar required to spot those issues and the awareness that consultation is necessary are nondelegable skills. It is certainly possible to view ethics as a complex legal discipline, getting—as most disciplines are—more complicated with the passage of time. Mastering vast networks of regulation, a burgeoning body of precedent, and voluminous scholarly commentary makes expertise in any area demanding and difficult. In this, ethics is surely not unique. Yet, all lawyers have a commitment to follow their professional responsibility obligations. They cannot decline expertise

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1. The term “legal ethics” is subject to some critique. *See, e.g.*, Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 441 (2005) (arguing that the phrase “legal ethics” is improper because rules of professional responsibility deal with professional regulation rather than “ethics”). As is commonly done, I will use the term “legal ethics” to reflect compliance with professional responsibility standards for attorneys, recognizing that it is distinct from “ethics” in a philosophical or moral sense.

in this area in the same way they can pass on other substantive issues—tax, or ERISA, or environmental law—which they know they lack the expertise, and perhaps the interest, to handle competently.² 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.

This Article sets out the factors that contribute to the increased professionalization of professional responsibility in large law firms. It argues that we should rethink the ever-growing, elaborate and exegetical texture of ethics rules, and that a version of the professional responsibility rules, more accessible to the ordinary, non-expert practitioner, would be a valuable contribution.

I start with three premises: that new lawyers find themselves in an environment where independent performance at top speed is at a premium, that specialization is a paramount value, and that the rules of legal ethics are getting more and more complex and elaborate. This combination makes it extremely difficult for new lawyers to think of ethics issues as matters for which they can take responsibility. Instead, it becomes a matter for the “professionals”—ethics experts within the law firms. While the 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.

In her paper, Professor Elizabeth Chambliss accuses me of the “nirvana fallacy”—of rejecting approaches to ethics decision-making in favor of a failed and nostalgic ideal of collegial decision-making and individual accountability. I share Professor Chambliss’s skepticism about false nostalgia for the nonexistent golden era of lawyering, and have articulated similar critiques elsewhere.³ More significantly, I think Professor

2. These problems of specialization resemble the ethics problem in that the lawyer consulting a specialist needs to know just enough to see that the expert’s counsel is necessary. Developing and maintaining that sensitivity is critical in the current culture of professionalization. *See infra* notes 35-36 and accompanying text.

3. *See* Margaret Raymond, *Criminal Defense Heroes*, 13 WIDENER L.J. 167, 167-68 (2003) (noting that “I am a little concerned that we are unduly glorifying the past, convinced that the olden days represented some now-bygone era of courageous, committed lawyering I am always a little skeptical of those who wax nostalgic for the old days of lawyering, when a lawyer’s word was his bond and when common ground and common backgrounds obviated the need for civility codes. Those were also the days when advertising and solicitation restrictions were wielded aggressively to keep immigrant lawyers from developing practices; when persons of color were restricted from attending public law schools; and when women, trained as lawyers, were offered positions as secretaries, evidently because they lacked the one necessary accoutrement for the practice of law.”)

Chambliss posits a false dichotomy between bureaucratized systems and individual accountability. Contrary to her assertions, I do not condemn the creation of ethics infrastructure—far from it. Yet ethics infrastructure functions—and its proponents recognize that it functions—only when it harmonizes effectively with individual ethics awareness and accountability. In view of Professor Chambliss’s recognition that even firms with some ethics infrastructure provide little guidance to their lawyers on a range of issues, including proper billing practices, investments in clients, and control of client funds, the need for individual accountability even in a firm with ethics infrastructure remains evident.

Ultimately, Professor Chambliss agrees. She suggests that the true value of compliance specialists is not that, in some “legalistic” fashion, they will increase fear of enforcement and therefore compliance. Instead, using an “institutional” model of regulation, the existence of compliance specialists will alter the norms of firm culture, enabling specialists to play a role “in educating and socializing firm members.” The goal of educating and socializing firm members is, ultimately, an increase in individual accountability. My suggestion in this paper is only that the creation of ethics specialists in an increasingly complex and highly regulated ethics environment may pose some challenges to the continuing goal of individual ethics awareness and accountability. On the need to maintain such awareness and accountability, I would be surprised if we disagree.

I. THE NEED FOR SPEED

The first development that affects this situation is the newly developed expectation that lawyers are constantly accessible and available around the clock, and that they will speedily respond to any inquiry from a superior or client. The most ubiquitous comment from lawyers participating in the conference concerned these expectations of constant access and speedy response.

This development is in part the product of new technologies. Cellphones, Blackberries, and wireless communications have created “a world of invisibility and speed,”⁴ where “new habits of thought . . . emerge from the compression of time and space and the expectation that everyone should be available all the time.”⁵ The existence of these technologies creates the potential for new expectations: that lawyers will be instantly

4. Jeffrey Andrew Weinstock, *Respond Now! E-mail, Acceleration, and a Pedagogy of Patience*, in PEDAGOGY: CRITICAL APPROACHES TO TEACHING LITERATURE, LANGUAGE, COMPOSITION AND CULTURE, Vol. 4, No. 3, 365 (2004).

5. *Id.* at 366.

accessible and responsive to clients or superiors on an around-the-clock basis.⁶

This expectation is not simply the product of technology, but a reflection of an increasingly competitive environment for business development.⁷ While technology facilitates continuous access and availability, the need to provide superior client service drives the notion that such access and availability is a critical component of doing the job.⁸ A firm not providing real-time responsive service to its clients around the clock runs the risk of losing those clients to a firm that will;⁹ the *ability* to respond quickly, and to be accessible on demand, thus becomes an *obligation* to do so.¹⁰

So one factor we have to take into account is that young lawyers are expected to move fast, and to be accessible and responsive around the clock. This means two things for those new lawyers. First, the need to show that you can and will produce an answer on a short timeline reduces the time you have to contemplate a complex issue. Responsiveness is assessed on a different timetable, one which might not allow the kind of

6. See, e.g., Ross E. Davies, *Learning from Laptops*, LEGAL TIMES, Sept. 9, 2002, at 29 (“Standard equipment for your average associate these days includes a laptop and a BlackBerry These technological wonders endow the associate with unprecedented flexibility to get work done and stay in touch with the office without having to be there. This works well for the associate—who can, for example, work at home sometimes and save commuting time. And it works well for the law firm—which can, for example, contact a vacationing associate in the beach via BlackBerry with an emergency assignment for her to complete using her convenient laptop.”).

7. See Angela West, *Meeting Demands With Technology*, NAT’L L. J., Mar. 22, 2004, at S1. West notes that “[t]oday’s legal clients are looking for a law firm that has a solid technology infrastructure and knows how to use technology in order to guarantee excellent customer service,” and that “[h]ow firms keep clients happy through technology will continue to play a key role in effective business development.” *Id.* Important technology includes “handheld wireless devices as a tool for 24/7 access.” *Id.* Further, “[w]ith the nature of international business running on a 24/7 basis, the development of devices that give clients instant access to their legal counsel will also remain important.” *Id.*

8. See Anthony Paonita, *Look, Ma, No Wires*, CORP. COUNS., Sept. 2004, at 69 (describing how one general counsel’s relationship with his outside counsel changed when he switched to a BlackBerry: “He used to engage in unproductive voicemail duels, but now he can email outside counsel and they respond quickly. ‘You can get [the answer] you want when you want it.’”).

9. See Carol L. Schlein, *What Every Firm Needs*, N.J. LAW., May 5, 2003 at 8 (“As technology has matured, it has put increasing demands on legal professionals. [C]ell phones, Blackberries and remote access to e-mail have elevated client expectations. Lawyers must master these tools to meet these expectations.”).

10. I remember being amazed in 1987 that, through the use of the fax machine, we could effectively serve our Australian clients around the clock: what I faxed off at the close of business on our day was faxed back to us with changes and suggestions by the time I got to the office the next morning. That brave new world has advanced extraordinarily; the twenty-four hour workday—even without the benefit of time difference—has become the expectation.

mature reflection most of us would view as important in the development of an ethical sensibility.¹¹ Second, the need to respond quickly adds to the pressure to specialize.

II. THE PRESSURE TO SPECIALIZE

Even new lawyers are encouraged, early on, to become experts in something. Professional development literature urges specialization as a formula for success.¹² It is not enough, as a young lawyer, to work hard at the assignments you are given and develop the skills of a generalist.¹³ Specialization is touted as a way to develop expertise, stand out from the crowd, and do an effective job of marketing yourself.¹⁴ Specialization is urged by insurers as well,¹⁵ and this trend towards specialization is reflected across the profession.¹⁶ The pressure to move quickly only

11. See Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 *FORDHAM L. REV.* 709, 717 (1998) (noting that “Everyone in the firm feels the pressures of overburdened time and the need to make snap decisions on insufficient sleep and reflection: ‘There’s too much to do and no time to think,’ and in any case there is no standard billing category for such things as ‘Time for consultation and deliberation on ethical issues.’”).

12. See, e.g., Ward Bower, *Ten Action Steps for More Profitable, Productive Practices*, *L. PRAC. MGMT.*, April 1999, at 30 (“In today’s economy, no one wants a generalist to handle their problem; everyone wants a specialist. A specialist almost always wins against a generalist. Large-firm lawyers learned this long ago. Solos and lawyers in small firms also should specialize . . .”); Ezra Tom Clark, Jr., *Characteristics of Successful Law Firms*, 24 *L. PRAC. MGMT.* 40 (1998) (“Successful law firms must have a focus or *raison d’être*, and each lawyer should develop specialized expertise consistent with the firm’s mission.”).

13. Noted one commencement speaker, “[L]awyers have not traditionally sought to specialize in any one aspect of the law. Indeed, once you have passed the bar exam . . . you are officially deemed capable of doing almost any legal work You may, understandably, be reluctant to orchestrate the merger between Time Warner and AOL without some help. Luckily for you, Time Warner and AOL are likely to be equally as reluctant to have you do so Increasingly, corporations and other clients are demanding that their lawyers be specialists in the areas for which they are hired Law firms and lawyers throughout the country are responding to these client demands.” Hon. Lee R. West, *Oklahoma City University Law School May 11, 2003 Commencement Address*, 29 *OKLA. CITY U.L. REV.* 453, 457 (2004).

14. William J. Wernz, *The Ethics of Large Law Firms: Responses and Reflections*, 16 *GEO. J. LEGAL ETHICS* 175, 187 (2002) (“Prominent among the assets of large firms is highly specialized knowledge Because much specialized knowledge is highly technical and concerns issues that appear amoral, there is an understandable tendency for the lawyer-specialist to think of himself as a technician.”).

15. See *ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT* 199 (2002) (noting the importance of specialization and that “dabblers will pay a price” in the insurance arena).

16. Ted Schneyer, *The Future Structure and Regulation of Law Practice*, 44 *ARIZ. L. REV.* 521, 523 (2002) (“American lawyers are becoming ever more specialized. Many now practice in one narrowly defined field of law and serve a very limited clientele.”). Even small firms and solo practitioners tend towards specialization. Leslie C. Levin, *The Ethical*

increases this tendency, since specialized knowledge facilitates speedy response. The need to specialize has extended to the area of professional responsibility. Many firms are creating a culture of expertise in ethics,¹⁷ developing a structure of internal “ethics compliance specialists.”¹⁸ The creation of varied patterns of “ethical infrastructure”¹⁹ in law firms is good news. While these structures involve a range of titles, responsibilities, and authority,²⁰ they reflect that firms are recognizing the need to focus on and attend to ethics issues.²¹ They also create an internal resource and, one hopes, an internal culture of ethics consultation and reflection. It is a significant positive development that there are particular individuals in the firms who view these issues as their responsibility. Firms which in the past lacked a clear structure for internal ethics advice, direction and expertise reflected both a lack of concern and a lack of competence which created the potential for a wholly inadequate response to ethics concerns.²²

World of Solo and Small Law Firm Practitioners, 41 HOUS. L. REV. 309, 316, 325-27 (2004).

17. 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, 692 (2002) (noting that “anecdotal evidence suggests that large law firms increasingly rely on in-house ethics advisors, firm general counsel, and other internal specialists to manage the firm’s compliance with ethics and malpractice regulation”); see also Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 346 (2003) (hereinafter Chambliss & Wilkins, *New Framework*) (noting that “large law firms increasingly are turning to in-house specialists to manage the firm’s compliance with professional regulation”).

18. 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, 565 (2002) (hereinafter Chambliss & Wilkins, *Emerging Role*) (reflecting the fact that such specialists have widely varying titles and responsibilities).

19. See Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 S. TEX. L. REV. 245, 246 (1998).

20. See, e.g., ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT, *supra* note 15, at 199 (describing Winston and Strawn’s “conflict of interest” monitoring mechanism, which involves a partner, two part-time lawyers and thirteen college graduates). Baker and McKenzie described a nine-person professional responsibility committee and a full-time director of professional responsibility. *Id.*

21. Chambliss and Wilkins argue for requiring law firms to designate compliance specialists to “increas[e] firms’ accountability for structural controls,” Chambliss & Wilkins, *New Framework*, *supra* note 17, at 349, and to “increas[e] the authority and effectiveness of specialists within firms.” *Id.*

22. See, e.g., Chambliss & Wilkins, *Emerging Role*, *supra* note 18, at 565 (One of the lawyers interviewed for the Chambliss & Wilkins study commented, “[W]hen I joined the firm 20 years ago, there was a senior partner with a copy of the Model Code in his office and that was the ethics department.”); see also Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 859 (1998) (describing the following comment from an associate: “I’ve worked at two firms, and I think that in both firms, certainly, you would be encouraged to bring anything that you felt was a clear problem to the right place—although, quite frankly, I couldn’t tell you what

The motivation behind this development is multifaceted. In part, it reflects concerns about liability; appropriate infrastructure assures insurers that a compliance system is in place.²³

It may reflect a desire to provide for a separate “ethics counsel” for confidentiality or privilege purposes, to create a climate of awareness, to play a preventive role in avoiding ethics problems,²⁴ or to seek to build trust so that lawyers in the firm will be more likely to approach the designated person for ethics advice. It also reflects the increasing complexity of legal ethics as a substantive discipline,²⁵ whose disregard has a significant downside potential for the firms.²⁶

But the internal focus on ethics specialists also suggests that ethics is just another area of specialization, one in which someone else is developing expertise so you don’t have to.²⁷ This runs the risk of shuttling the consideration of ethics to the designated individuals, taking ethical issues out of mainstream discourse.²⁸ Moreover, except in a specialized practice

the right place was, in either one of those firms, because they didn’t designate anyone in particular, to my knowledge.”)

23. See, e.g., ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT, *supra* note 15, at 135 (discussing National Conference on Legal Malpractice and Risk Management and noting that “[i]nsurers play a major role in insuring that law firms have systems in place”); Chambliss & Wilkins, *Emerging Role*, *supra* note 18, at 559-60; see also Weinstock, *supra* note 4 (noting that ALAS, the Attorneys’ Liability Assurance Society, “has played an important role in promoting the formal appointment of in-house compliance specialists”).

24. See Chambliss & Wilkins, *Emerging Role*, *supra* note 18, at 560 (“proponents argue that in-house specialists may play an important preventive role by increasing firm-wide awareness of ethics and regulatory issues”).

25. See Karen Donovan, *When Big Law Firms Trip Over Their Own Clients*, N.Y. TIMES, October 3, 2004, at 5 (quoting Stephen Gillers as saying “I’ve seen the doctrines become increasingly complex and almost inscrutable, and that’s why lawyers need lawyers to help them stay safe.”); Chambliss & Wilkins, *New Framework*, *supra* note 17, at 346-47 (“Commentators attribute firms’ increasing reliance on in-house specialists to the increasing complexity of professional regulation and the increasing number of claims against lawyers.”).

26. See Chambliss & Wilkins, *Emerging Role*, *supra* note 18, at 578 (noting that participants in their focus groups “cited the increasing complexity of ethics and regulatory issues and the resulting need for individual specialization” as the reason that firms moved from committee-based ethics infrastructure to individual ethics specialists).

27. See, e.g., Peter R. Jarvis & Mark J. Fucile, *The Inside Story*, THE PROF. LAW. 22 (“in light of the increasing complexity of legal ethics issues, it makes no more sense to have everyone at the firm be an expert in legal ethics issues than it would to have everyone in a general practice firm be an expert in the details of ERISA or workers’ compensation law”). As one associate in another study noted, “ethics is talked about the first day and never talked about again.” Austin Sarat, *Enactments of Professionalism: A Study of Judges’ and Lawyers’ Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 826 (1998).

28. See Chambliss & Wilkins, *Emerging Role*, *supra* note 18, at 579 (“[T]he use of specialists involves fewer partners in day-to-day-decisions and may serve to limit internal

that does ethics work for clients, the development of ethics expertise probably looks to junior lawyers like a specialization best avoided:²⁹ it is largely of internal service,³⁰ may be unlikely to generate increased compensation,³¹ and is better deferred to more experienced and more senior colleagues.

Moreover, the availability of the ethics expert is uneven. Larger firms tend to have a more developed “ethical infrastructure” than small firms.³² Even within large firms that have committed to such infrastructure, the models of how it is structured and made available vary widely.³³ And some—including Professor Chambliss—have expressed doubts that ethical infrastructure will truly be an effective resource for junior lawyers, particularly those concerned about the professional responsibility of partners.³⁴ More important, the mere existence of specialists in firms—available for consultation and advice—does not assure adequate attention to matters of professional responsibility because lawyers need to know

dialogue about ethical issues.”).

29. Noted one associate, “There is no . . . market for ethical practice.” Gordon, *supra* note 11, at 716.

30. See Chambliss & Wilkins, *Emerging Role*, *supra* note 18, at 572 (noting the comment of one lawyer that he believed the “firm management” tasks he was undertaking as an ethics compliance lawyer were “ignored . . . at compensation time”); *cf. id.* at 573; see also Model Rule 1.8, *infra* note 46 (describing a firm that treats “in-house and outside work equivalently for compensation purposes”). Other sources view this more frankly—one commentator notes that “in a setting where the Ethics Committee is known as the ‘No Business Committee,’ the routine ceremonies of business production can inadvertently convey the symbolic message that ethical consultation is just one step above napping at one’s desk.” Suchman, *supra* note 22, at 864.

31. One such full-time ethics specialist commented that his arrangement had fundamentally altered his compensation arrangements: “I’m still a partner, but I have given up my rights to be compensated like a partner.” Chambliss & Wilkins, *Emerging Role*, *supra* note 18, at 573. The article goes on to note that uncompensated ethics specialists term the work a “burden,” while compensated specialists “tend to play a much broader and more proactive role in their firms.” *Id.* at 574. Suchman notes that none of the attorneys in the “Ethics Beyond the Rules” study “saw anything to be *gained* in their firm’s compensation and promotion process from exceptionally *high* ethical conduct.” Suchman, *supra* note 22, at 859 n.39 (emphasis added).

32. Chambliss & Wilkins, *Emerging Role*, *supra* note 18, at 576; see generally Susan Saab Fortney, *Ethics Counsel’s Role in Combating the “Ostrich” Tendency*, 2002 THE PROF. LAW. 131. Professor Fortney’s data, from Texas, reflect that the percentage of firms with formal ethics specialization increases as the firms get larger. *Id.* at 136.

33. Chambliss & Wilkins, *Emerging Role*, *supra* note 18, at 570-83.

34. See, e.g., Robert L. Nelson, *Uncivil Litigation: Problematic Behavior in Large Law Firms*, J. KANSAS B. ASS’N, Mar. 1997, at 24 (some lawyers in a study were skeptical about the value of ethics committees or advisers, “observing that associates would still be reluctant to raise concerns about the ethical practices of their superiors, and partners would be unlikely to know or pursue questions about the conduct of their peers”); see generally Chambliss & Wilkins, *Emerging Role*, *supra* note 18, at 572-75.

when they need to consult the experts. One significant concern voiced by ethics specialists is that their colleagues are not attuned to the ethics issues that will inevitably arise in their practice and will not know enough to seek help.³⁵ The experts, moreover, resist any suggestion that the advice be mandatory, viewing it as more palatable if the impetus for seeking advice comes from the lawyer.³⁶ Ethics awareness is far from intuitive; systems of ethical infrastructure are only likely to be as responsive as a sensitized population of lawyers can make them.

Not only are junior lawyers expected to work fast and develop expertise, the pressure of the large salaries they are paid means that the opportunities for collaborative work are reduced.³⁷ These staffing pressures leave junior lawyers isolated, working in large part on their own, without adequate opportunities for mentorship,³⁸ and lacking a venue for dialogue and engagement on ethics issues.³⁹ One commentator describes them as “raised by wolves,” learning their ethics-related behavior by observing their colleagues in the wild.⁴⁰

35. Chambliss & Wilkins, *Emerging Role*, *supra* note 18, at 587 (specialists “worry that some questions never come to their attention,” worry about how to get colleagues “to raise rather than ignore ethical questions,” and express concern that there is “a tremendous amount of ignorance about ethics”). Noted one participant, “Ninety percent of the problem is getting people to spot the issues and pick up the phone and call you.” *Id.*

36. Jarvis & Fucile, *supra* note 27, at 24 (“We believe that our advice will be best received if it is voluntarily sought. We have, in fact, opposed efforts at the firm to make consultation with us mandatory in some or all situations that raise ethics issues.”).

37. Susan Zentay, *After the Gold Rush*, MIAMI DAILY BUSINESS REVIEW, Oct. 12, 2004 at 7 (“[S]alary increases ‘put an absurd amount of pressure on associates [and fostered a] notion of shut up and produce.’”).

38. Patrick Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 739-40 (1998) (“Thus pressure to bill hours—pressure to ‘bill or be banished’—is necessarily pressure not to mentor.”). In one study, forty-three percent of associates agreed with this statement: “Because of the pressure on partners to bill and generate business, partners in my firm do not provide the mentoring and training that I need and want.” Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 U.M.K.C. L. REV. 239, 283 (2000).

39. See Suchman, *supra* note 22, at 863; see also Molly Peckman, *On the Care and Feeding of Associates*, LEGAL INTELLIGENCER, Feb. 3, 2004, at 7 (“In fact, the need for mentoring new lawyers has never been greater, since BlackBerrys, e-mails, cell phones and facsimiles have destroyed most lawyer-to-lawyer contact Gone are the days when new lawyers served internships or apprenticeships before beginning to practice and were welcomed into the profession by preceptors. And while most prominent attorneys credit their success to mentors, many young lawyers wither for lack of such attention.”).

40. Suchman, *supra* note 22, at 869. Comments another author, “In the absence of mentoring, the individual is often left to her own perceived self-interest and moral code and, faced with this climate, looks to rules—including those sanctioning the default norms of ‘tough’ adversariness—or outside reference groups for guidance in making decisions.” Douglas N. Frenkel, *Ethics Beyond the Rules—Questions and Possible Responses*, 67

This phenomenon may be hard to perceive because firms view themselves as providing more training opportunities to their junior lawyers than they did in the past. As was clear in the presentations at this conference, large law firms have broadly expanded their formal training activities, and give the appearance that younger lawyers are being taught more and trained more. But this more formalized programming may be usurping for more informal opportunities for the hands-on participation and mentoring that may have been prevalent in the past. Economic pressures mean that “[w]hat was once an easy, accepted part of big-firm practice has taken on a more studied and formal character.”⁴¹ While this seems satisfactory to firm managers, it may be less so to associates, who may not find that the formal programming meets their needs.⁴² Associates in one study complained in particular about inadequate ethics training, arguing “that formal ethical training tended to neglect day-to-day issues, and that it provided insufficient guidance in dealing with the sharp practices of opponents.”⁴³ Junior lawyers are doing more and therefore are expected to exercise judgment and discretion more often than in the past. Yet they may be doing so with less in the way of knowledge and judgment.

As junior lawyers are expected to move faster, and respond in real time to the needs of their clients and perhaps their supervisors as well, as they are being urged to specialize early and develop expertise, as they’re being encouraged to rely on an infrastructure of ethical consultation and support, as they work in an increasingly independent and sometimes isolated professional environment, what’s happening to the materials we’re expecting them to absorb to appreciate their ethical obligations? They’re getting longer and more complex.⁴⁴

FORDHAM L. REV. 875, 880 (1998).

41. Sarat, *supra* note 27, at 825. He continues:

“[f]irms create Professional Responsibility Committees, institute lunches among partners to discuss targeted questions about professional conduct, and/or designate ombudsmen to whom questions about ethics and professionalism can be referred. Thus, if one just looked at the organization chart, one would think that firms were deeply invested in their socialization and social control functions.”

Id.

42. In one study, associates “were much less satisfied with the current training regime than were partners.” Suchman, *supra* note 22, at 862.

43. *Id.*

44. I am not the first to note this. See Wernz, *supra* note 14, at 187-88 (noting that “in the last decade the law of conflicts of interest for lawyers has become increasingly complicated,” that the Restatement (Third) of the Law Governing Lawyers devotes 181 pages to conflicts, and that Model Rule 1.7 has thirty-five comments).

III. THE IMPERMEABILITY OF DOCTRINE

The ABA's first venture into the articulation of standards for ethics was the 1908 Canons of Ethics. There were thirty-two of them, and they covered about nine pages of the ABA reports.⁴⁵ Today's ABA Model Rules of Professional Conduct encompass fifty-seven rules, but that's not really a fair count, because most of those rules encompass multiple subparts, incorporating many different rules.⁴⁶ A fairer assessment of how dense these rules are might be understood by looking at the Comments, which purport to provide helpful interpretive guidance for the rules.⁴⁷ The current version of the Model Rules includes 444 comments.

One place to look for evidence that these rules have gotten too dense and complex to be relevant to the average lawyer is to consider whether members of the bar have participated in commenting on proposed rule changes. One might hypothesize that as the rules become denser and more complex, ordinary practitioners participate less in the process of reviewing and commenting on proposed changes.⁴⁸ Recent efforts by various jurisdictions to adopt various portions of the post-Ethics 2000 revisions to the Model Rules create an opportunity to consider that hypothesis. For the most part, jurisdictions that have completed the process of making such

45. See Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, n.2 (2004) (citing AMERICAN BAR ASS'N, REPORT OF THE THIRTY-FIRST ANNUAL MEETING 575-84 (1908)). Earlier approaches were briefer still; David Dudley Field, the author of New York's Field Code, offered a series of eight statutory duties which were adopted in several states. See *id.* at 1423-25 & n.278. David Hoffman's "Resolutions in Regard to Professional Deportment" numbered fifty duties. DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752-775 (1836). Hoffman's fiftieth resolution was to urge lawyers to reread these fifty resolutions twice a year. See *id.* at 775.

46. For example, Model Rule 1.8, which deals with a series of miscellaneous conflict-of-interest rules, actually encompasses eleven distinct rules (denominated 1.8(a)-(k)); Model Rule 3.4 has six distinct subparts, but actually includes more than six separate rules.

47. The Preamble includes twenty-one comments. Below is a list of each of the current Model Rules, followed by the number of comments associated with each rule:

Rule 1.0: 10; Rule 1.1: 6; Rule 1.2: 13; Rule 1.3: 5; Rule 1.4: 7; Rule 1.5: 9; Rule 1.6: 18; Rule 1.7: 35; Rule 1.8: 20; Rule 1.9: 9; Rule 1.10: 8; Rule 1.11: 10; Rule 1.12: 5; Rule 1.13: 14; Rule 1.14: 9; Rule 1.15: 6; Rule 1.16: 9; Rule 1.17: 15; Rule 1.18: 9; Rule 2.1: 5; Rule 2.3: 6; Rule 2.4: 5; Rule 3.1: 3; Rule 3.2: 1; Rule 3.3: 15; Rule 3.4: 4; Rule 3.5: 5; Rule 3.6: 8; Rule 3.7: 7; Rule 3.8: 6; Rule 3.9: 3; Rule 4.1: 3; Rule 4.2: 9; Rule 4.3: 2; Rule 4.4: 3; Rule 5.1: 8; Rule 5.2: 2; Rule 5.3: 2; Rule 5.4: 2; Rule 5.5: 21; Rule 5.6: 3; Rule 5.7: 11; Rule 6.1: 12; Rule 6.2: 3; Rule 6.3: 2; Rule 6.4: 1; Rule 7.1: 4; Rule 7.2: 8; Rule 7.3: 8; Rule 7.4: 3; Rule 7.5: 2; Rule 7.6: 6; Rule 8.1: 3; Rule 8.2: 3; Rule 8.3: 5; Rule 8.4: 5; Rule 8.5: 7.

48. The Iowa Supreme Court's recent promulgation of a new version of the ethics rules produced a draft of about two-hundred single-spaced pages. As one might imagine, few practitioners undertook the lengthy process of reviewing those pages when comments were solicited by our Supreme Court. See *infra* note 49.

changes note scant comment from members of the bar on these proposed changes.⁴⁹ By contrast, the American Bar Association's solicitation of comments on a draft of the 1908 rules drew more than one thousand letters of comment.⁵⁰

49. A telephonic survey of jurisdictions making recent changes to their ethics rules in response to Ethics 2000 reflected that few comments on those changes were received from members of the bar. Telephone Survey conducted by Justin McCarty, Research Assistant, University of Iowa Law School, Iowa City, Iowa (August 2005) (on file with the author). Delaware reported fewer than two dozen comments, Indiana approximately twenty-five, and Montana "just a handful." *Id.* New Jersey noted "a dozen or so," but they came from bar associations rather than individual lawyers. *Id.* North Carolina reported fewer than fifty (the precise number was twenty-three), Oregon reported "only a handful," Pennsylvania received "fewer than a dozen" comments, and South Dakota reported receiving none. Three states indicated more significant comment on recent changes; Arizona reported "hundreds" of comments; and Louisiana and Maryland reported "a fair number." *Id.*

The Maryland comments take up eighty-four pages of the final report. The multiple comments, when analyzed, came from only twenty-three commenters. *See* REPORT OF THE SELECT COMMITTEE APPOINTED BY THE COURT OF APPEALS OF MARYLAND TO STUDY THE ETHICS 2000 AMENDMENTS TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (Dec. 16, 2003) [hereinafter *Maryland Report*], available at www.courts.state.md.us/lawyersrope_finalrept03.pdf. The breakdown of those comments is edifying. One came from bar counsel, six from representatives of professional organizations, two from law school faculty members, and four from bar associations. *Id.* Only ten came from individual lawyers. Of those, one came from members of a firm ethics committee and one from a lawyer in his capacity as the attorney for a lawyer-client in a disciplinary proceeding. *Id.*

The North Carolina experience was almost eerily similar. The North Carolina State Bar received twenty-three comments in response to its draft revisions to the state legal ethics rules prepared in light of Ethics 2000. 2003-2004 Letters of Comment on Proposed Changes to the North Carolina Rules of Professional Conduct (on file with author). Of the twenty-three, one came from a judge, four came from lawyers speaking on behalf of professional organizations, one came from a lawyer speaking on behalf of a client, and three came from the same U.S. attorney. *Id.* Of the remaining fourteen comments, ten were e-mails, one reporting a typo, and four consisted of eight lines or less. *Id.*

The results were even more striking in Iowa. When the Iowa Supreme Court solicited comments on its recent and significant revisions to the state's ethics rules, the Court received nineteen comments. Public Comments Received by Clerk in the Matter of the Proposed Adoption of the Iowa Rules of Professional Conduct (on file with author). One was from the Drafting Committee appointed by the Supreme Court to propose revisions and one was from the Reporter of that committee. *Id.* Two comments were from government departments, three from professional organizations, and one from a state task force, one from Legal Aid and one from a law firm. *Id.* Two comments appeared to be from individuals who are not lawyers. There were seven comments from individual lawyers. Despite the fact that the revisions proposed significant changes to, inter alia, the rules on confidentiality (including the novel institution of a mandatory disclosure provision) and on multijurisdictional practice, few lawyers appeared to note or comment upon those changes. *Id.*

More and more systematic research would certainly be appropriate, but the conclusion that the average practitioner has little interest in the process of rule revision seems borne out by this experience.

50. *See* Andrews, *supra* note 45, at 1440.

The density of these rules has the potential to have a significant impact.⁵¹ The theory of the rules is no longer, as perhaps it was with the early ethics codes, that lawyers would review them regularly and remind themselves of the principles governing the lawyer's role.⁵² That cheerful naivete of earlier eras—that a single, relatively simple, code of behavior would be enough to advise lawyers of their ethical obligations—is gone. But no concept of how the average lawyer should become or remain familiar with the principles of professional responsibility has replaced it.

Professor Chambliss accuses me of a misplaced nostalgia for a time that never was, when individual lawyers thoroughly understood the ethics rules and attended conscientiously to their obligations under them. Her criticism is fairly taken; such a golden age of individual responsibility probably never existed. But to say that is not to abandon the notion that individual awareness and sensitization to the issues presented by the governing principles remains important. For a lawyer previously unfamiliar with the fifty-seven Model Rules and their 444 comments. Reviewing them would require a lengthy period of intense study.⁵³ Such study, moreover, would not seem to be what an unschooled reader was looking for. It would not be a general reminder of lawyerly principles, but rather like a research exercise, more appropriate for a specialist.⁵⁴

51. One author argues that the effect of the repeated redrafting of the rules of lawyer behavior is “to maximize the number of lawyers who know and follow the minimum rules of the profession,” or “to make it easier to follow the minimum standards.” Benjamin H. Barton, *The ABA, The Rules and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 421 (2005). The increased complexity of the Model Rules suggests that, if this is the goal of what Professor Barton terms the “minimalist” project, it is not particularly effective. One comment received by the North Carolina State Bar during its notice and comment period is pertinent here: “I am as I have been for several years, truly disturbed that we have 50 pages of ethics. To my mind, a lawyer has no ability to determine what is ethical, all is left up to a small group who, essentially, sit on a throne in a distant city to make that judgment Can't you people come up with shorter rules? How in the world can you expect a lawyer to know and understand pages of small typed pages of rules.” Letter from Richard L. Griffin to Alice Neece Mine, Assistant Executive Director, The North Carolina State Bar (Sept. 30, 2002)(on file with author).

52. Hoffman's fiftieth Resolution in Regard to Professional Department was that lawyers should read the first forty-nine twice a year during their professional lives. *See supra* note 45.

53. Perhaps this is why the many lawyers in one study indicated no knowledge of changes to their state professional responsibility rules. *See Levin, supra* note 16, at 369-70 (lawyers in her study “freely admitted that they did not keep up-to-date” on the state ethics code “and that they had not consulted it since law school”).

54. I note parenthetically that the mechanism of rules revision may not make changes easily accessible to members of the practicing bar. Techniques like underlining proposed changes, preparing executive summaries, and creating easily accessible and readable online documents might facilitate broader participation in rule revision. Note one attorney's

Many of these rules, moreover, are irrelevant to large areas of the practice; while all lawyers may be interested in the rules regarding confidentiality, client loyalty, or competence, rules regarding the special obligations of prosecutors or the management of pretrial publicity may be of more limited interest.

The rules are long because legal ethics issues are complex.⁵⁵ But we often boil complex issues down to simpler, though perhaps less clear and less precise rules.⁵⁶ The command that “thou shalt not kill” does not take account of the need for self-defense or the exigencies of war, but it articulates a pretty good basic principle for governing conduct. It is not the only text available; an expert has access to tools that can facilitate a more complete exegesis in the case of a more complex or nuanced problem. Ordinarily, however, we do not assume that the expert and the man on the street must be guided by identical texts. The general principle can be relied upon to govern most people most of the time.

One might ask whether the professionalization of ethics is exacerbated by our existing rules, which fail to distinguish between the complex and specialized guidance needed for the ethics expert and the general principles that should guide every lawyer. One might conclude from this that there are no such immutable principles, that all ethics issues are technical issues to be attended to by the experts, and that the ordinary practitioner need not trouble himself about them very much.⁵⁷ A complex and professionalized ethics system, while it provides resources for lawyers in an environment where there is ethics infrastructure, may provide little for those who are not. In one study, when asked how they resolved ethical dilemmas,

comment on Maryland’s proposed changes:

“I am writing to suggest that the process of viewing proposed changes would be a[sic] 1,000 times easier if the Committee adopted a form . . . to clearly differential [sic] the current from the proposed. I am not sure how arduous a task it will be to try to compare the two. Also, I would suggest that the Committee publish only the *changed* Rule section and any altered or added Comment(s). The document will be much more handleable and easier to compare.”

Maryland Report, *supra* note 49, at 406.

55. Wernz, *supra* note 14, at 182, 186 (explaining that “Morality for lawyers, especially advocates, is, in special ways, deep, complicated and inherently ambiguous,” and “[E]thics for lawyers, as opposed to other professions and occupations, is an especially knotty and ambiguous challenge.”).

56. See H.L.A. HART, *THE CONCEPT OF LAW* 124 (2d ed. 1994) (noting that the law’s “successful operation over vast areas of social life depends on a widely diffused capacity to recognize particular acts, things, and circumstances as instances of the general classification which the law makes”).

57. See Wernz, *supra* note 14, at 187 (“Lawyers in large firms are faced with an important, but hidden, ethical issue—the temptation to think that their practices do not involve moral issues.”).

respondents answered that they “mostly fly by the seat of their pants.”⁵⁸

IV. RECOMMENDATIONS FOR THE FUTURE

What prescription can we take from this for training our young lawyers? I offer three: focus on specialty-specific ethics education, acknowledge the contribution of the ethics specialists, and (this is a much more complex proposition) draft our ethics rules differently.

A. Specialty-Specific Ethics Training

First, specialty-specific ethics education is important. It retains its relevance even for a specialization-driven practice; education about who the client is in an estate planning practice, or what Sarbanes-Oxley requires in a corporate practice, or how litigators should deal with email communications, provides training directly relevant to the lawyers’ current practice. It also narrows somewhat the breadth of what must be understood. Rather than suggesting that every lawyer must master a complex body of what appears, to some, to be irrelevant doctrine, such training makes the concepts relevant to a particular practice more accessible and gives lawyers more confidence that they can reason knowledgeably and appropriately in this area.⁵⁹ Of course, there are limits to the categorization of ethics; there are many areas we can imagine, from client confidentiality to conflicts of interest, where general education is still critical.

B. Valuing the Ethics Specialist

If the “ethical infrastructure” of law firms is to play a significant role in helping young lawyers to recognize the importance of professional responsibility to their practices, then the ethics specialists must be acknowledged as full and valued contributors to the practice. Actions speak louder than words; if ethics expertise is a backwater for the practice, that will signal to junior lawyers that it is an area that should be avoided.

58. Robert Granfield & Thomas Koenig, “*It’s Hard to Be a Human Being and a Lawyer*”: *Young Attorneys and the Confrontation With Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 512 & n.73 (2003).

59. Enhanced specialty-specific ethics training would be a welcome contribution; noted one senior associate in a study, “it is very hard, in my opinion, to find ABA ethics classes that actually speak to somebody who faces the dilemmas that I face. For example, I am a mid-level associate. I have just started now dealing with expert witnesses It would be really useful to me if somebody were to give a seminar on the ethical dilemmas that I might face and how to deal with those, but the ABA and the [State Bar Association] don’t seem to have that, and it’s something my firm is not providing.” Suchman, *supra* note 22, at 862.

Adequate compensation, institutional respect, and appropriate authority for the ethics specialist will reflect law firms' intention to treat such specializations as valuable and productive.

C. Revisit the Rules

Many scholars have critiqued the character of the Model Rules, arguing that they are legalistic rather than aspirational, impose a minimalist rather than lofty standard for lawyer conduct, and fail to create adequate opportunity for the lawyer's exercise of her own ethical judgment. My claim here is much more modest: when rules are too long and complex, they lose their pertinence for lawyers who are not ethics specialists. The need to write rules which provide examples and analyses of every possible issue or concern has made it more and more difficult for practitioners to independently utilize ethics resources; they may come to think of ethics as a specialty area, where they are incompetent to render our own decisions and must consult an expert. While ethics consultation is a lucrative business for many, we should be profoundly concerned if the professionalization of ethics results in less individual connection to professional responsibility.

We have two alternatives in thinking about this problem. First, we could move to a shorter and simpler rules model, perhaps one which separates the comments from the text of the Model Rules and treats them instead as advisory committee notes. The rules, standing alone, would be a much more manageable document for lawyers to digest, while the comments would remain available to anyone seeking further guidance on a particular issue.

While this would be a functional solution, it would not be an optimal one, because the rules alone reflect a floor, not a ceiling. Encouraging lawyers to look to the disciplinary rules alone to guide their conduct as lawyers is, in a larger sense, a bit like encouraging citizens to use state penal codes to govern their behavior. They'll err on the side of lawful conduct, but not by much. Our goal is somewhat loftier, perhaps embodied in Professor Sarat's view that:

At the heart of this idea of lawyer professionalism is a vision of autonomy and ethical practice, of civility and decorum in the daily life of lawyers, and of lawyers committed to and regulated by a set of principles encoded in the profession's Model Rules. The image of lawyer as statesman looms large as the unspoken model to which lawyers should aspire. In this image, lawyers' ethics go beyond strict adherence to professional rules. Rather, they reflect the dictates of practical wisdom, a capacious sense of the public interest, and a judicious ability to see and reconcile the client's long-term interest with the best interest of both law and the society it

serves.⁶⁰

Besides, lawyers already tend to perceive ethical issues as purely legal issues—rules to be “lawyered,” subject to the analysis, interpretation and hair-splitting that many lawyers view as their obligation when serving the interests of a client.⁶¹ Only breaches of the disciplinary rules are ethically unacceptable.⁶² And the rules are perceived as “easy” because, to the non-ethics expert, “the rules are mostly clear.”⁶³ One scholar writes, “As long as their behavior breaks none of the canons of professional responsibility, respondents are absolved of guilt. One respondent dislikes representing toxic polluters, but following the principle of zealous advocacy, he reports that; ‘I just close my eyes and do it.’”⁶⁴ The rules are not intended to be a replacement for thinking ethically, but such comments and practices might suggest they are. Moreover, disciplinary rules are unlikely to matter much to large-firm lawyers. “They’re rarely subjected to discipline for rule violations the consequences of unethical conduct for lawyers in large firms tend to be internal rather than external.”⁶⁵

Instead, perhaps we need a new document—a straightforward expression of the principles underlying the ethical practice of law. Too general? Sure. Unenforceable? Probably.⁶⁶ But a document that would be easily reviewable by every practicing lawyer, twice a year, one which would create a shared set of norms acknowledged and reinforced even by those

60. Sarat, *supra* note 27, at 816.

61. See Barton, *supra* note 1, at 453-54 (arguing that the “black letter” format of the rules “trigger[s] a particular heuristic in lawyers: we are trained to carefully read and analyse rules to find (as precisely as possible) the boundary between legal and illegal behavior When lawyers apply this boundary seeking process to issues of legal ethics the technical legal question (what am I allowed to do?) frequently eclipses the broader moral question (what should I do?).”).

62. See Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 *FORDHAM L. REV.* 709, 710 (1998) (noting based on a series of interviews with large-firm lawyers that “[e]thically inappropriate behavior (in the standard take) is defined narrowly as a violation of the rules”).

63. *Id.* at 711. Gordon indicates that this is the first layer, which he refers to as the “standard take” on legal ethics issues in large law firms, and reflects a considerably more complex and nuanced perception in subsequent discussion. See *id.* at 712.

64. Granfield & Koenig, *supra* note 58, at 514.

65. See Frenkel, *supra* note 40, at 877 (individual discipline “tends to be rather private, rare in the segment of the bar [large private firms] we studied, limited by the scarce resources of enforcement offices and confined to after-the-fact policing of conduct that has clearly crossed the line”).

66. But see Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 *NOTRE DAME L. REV.* 223, 236 (1993) (noting that “[t]o the extent the professional codes appropriately rest on the assumption that lawyers will respond to guidance, clear rules and punishment for violation of those rules are not always necessary to produce desirable conduct”).

lawyers too busy to spend much time on ethics, would be a valuable start.⁶⁷ Such an approach would play some role in “de-professionalizing” ethics and reminding each lawyer of her obligation to be an ethical practitioner.

67. Professor Gordon notes the need to “reinvigorate” professional ideals of obligations to the framework of justice. As he notes, “successful systems of norms depend on shared understandings and informal sanctions of communities. Externally imposed rules and sanctions of regulatory regimes can reinforce, but cannot substitute, for such informal norms and sanctions.” Gordon, *supra* note 11, at 737.