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# PROFESSIONAL DISCIPLINE FOR LAW FIRMS?

Ted Schneyer†

## INTRODUCTION

Consider five well-publicized incidents involving misconduct in large law firms:

1. In 1989 a partner at Baker & McKenzie made improper racist and sexist remarks while interviewing a University of Chicago Law School student for a job with the firm.<sup>1</sup> Shortly after the incident was reported to the firm, the interviewer opted for early retirement. But matters did not end there. Instead of treating the incident as the isolated wrongdoing of a "bad apple," the school insisted that the firm submit a written description of the measures it was taking to prevent similar incidents before the school would allow the firm to recruit on campus again. The firm complied with this demand.<sup>2</sup> Thus, by imposing an informal sanction on the firm, the school promoted appropriate professional behavior by the firm's lawyers.<sup>3</sup>
2. A company represented by Fried, Frank, Harris, Shriver & Jacobson sued the federal government to obtain documents under the Freedom of Information Act.<sup>4</sup> The company's name was to be kept confidential under a protective order. In 1989, Fried, Frank

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<sup>1</sup> Anthony Borden, *Baker & McKenzie Gives a Lesson in Damage Control*, AM. LAW., Apr. 1989, at 30.

<sup>2</sup> *Id.*

<sup>3</sup> The interviewer's conduct was not at the time a violation of any rule of legal ethics. A few states have since adopted, or are considering for adoption, ethics rules that bar lawyers from discriminating by race or gender in hiring and in other respects. See Marjorie E. Gross, *The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility*, 18 FORDHAM URB. L.J. 283, 292-95 (1990-91); Jody Meier, Note, *Sexual Harassment in Law Firms: Should Attorneys Be Disciplined Under the Lawyer Codes?* 4 GEO. J. LEGAL ETHICS 169 (1990); *Michigan Bar Approves Antibias Rules for Codes of Conduct*, B. LEADER, Nov.-Dec. 1990, at 4.

<sup>4</sup> *Anonymous No More: Fried, Frank's Slip-Up Unveils "John Doe Corp."*, LEGAL TIMES,

inadvertently filed in court an unredacted document that divulged the client's name.<sup>5</sup> The person or persons in the firm who allowed the document to be submitted were not identified.<sup>6</sup> The mistake involved not only a breach of confidentiality but a possible violation of the ethical requirement that lawyers take reasonable care to prevent their employees or associates from revealing client confidences.<sup>7</sup>

3. Lawyers in the Chicago office of Kirkland & Ellis represented Westinghouse on antitrust claims against its uranium suppliers. At the same time, Kirkland's Washington office represented the American Petroleum Institute in an effort to convince a congressional committee that there was adequate competition among energy suppliers. In preparing a report to the committee, the Washington office gained information in confidence from Institute members who were also adverse parties in the litigation.<sup>8</sup> As a result, the firm was disqualified from further participation in the lawsuit.<sup>9</sup> The firm's two branches had apparently taken on these matters without a coordinated effort to identify possible conflicts of interest.

4. During the pretrial phase of a major antitrust suit against Kodak, the company's lawyer, a senior partner at Donovan, Leisure, Newton & Irvine, lied to opposing counsel and the judge when he told them that documents sought in discovery no longer existed. Though an associate who worked closely with the partner allegedly reminded him that the documents were still at the firm, the partner did not correct his previous statement.<sup>10</sup> The associate kept the partner's lie to himself, but it later came disastrously to light. The law firm had no ethics committee to which the associate could have referred the problem.<sup>11</sup>

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May 22, 1989, at 6 (discussing a suit under the Freedom of Information Act, 5 U.S.C. § 552 (1988)).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D) (1981). The same principle has been generalized in the ABA's more recent ethics code, which requires law-firm partners to ensure that the conduct of all lawyers and nonlawyers working for their firm conforms to all ethical standards for lawyers. MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.1(a), 5.3(a) (1989).

<sup>8</sup> See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1313-16 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978).

<sup>9</sup> See *id.* at 1322. In fairness to Kirkland & Ellis, the attenuated nature of the conflict should be noted. The firm reasonably could have believed that by representing the Petroleum Institute before Congress, Kirkland & Ellis had no lawyer-client relationship adverse to its client, Westinghouse, in the litigation. The court disqualified the firm, nonetheless, on the ground that in working for the Institute, the Washington office incurred a duty of confidentiality to its members which had given the firm sensitive business information under an assurance of secrecy.

<sup>10</sup> See Walter Kiechel III, *The Strange Case of Kodak's Lawyers*, FORTUNE, May 8, 1978, at 188; Jeffrey A. Tannenbaum, *Judge's Letter Spurs Probe by Prosecutor of Kodak's Lawyer*, WALL ST. J., Apr. 11, 1978, at 1.

<sup>11</sup> The firm might have avoided the problem if it had an ethics committee to clarify

5. A federal judge determined that Lord, Bissell & Brook aided in a violation of the antifraud provisions of the securities laws by failing to notify the shareholders of its client company when the firm learned that the earnings of an intended merger target had been grossly inflated in merger documents.<sup>12</sup> A partner working on the case held stock in the target company and was interested in the deal's success.<sup>13</sup> The judge, however, refused to grant the SEC an injunction that would have required Lord, Bissell & Brook to change its internal procedures to discourage such incidents in the future. The court noted the professional duty of the firm's lawyers to "conform their conduct to the dictates of the law" and expressed confidence that the firm would voluntarily take "appropriate steps."<sup>14</sup> But the firm failed to take those steps and was later sued for securities violations in a similar matter, which resulted in a 24 million dollar settlement.<sup>15</sup>

This article argues that such incidents provide significant insight into the regulation of lawyering in law firms.

Law practice in the United States is regulated in many ways, but most comprehensively through a specialized system that metes out professional discipline to those who violate the rules of legal ethics.<sup>16</sup> Under this system a bar committee or state supreme court agency investigates complaints about the conduct of lawyers licensed in its jurisdiction. If the agency determines that a lawyer may have breached the legal ethics code, it may pursue the case in an administrative hearing or, ultimately, before the state supreme court.<sup>17</sup> If the lawyer is found guilty of code violations, the agency or court may impose the following sanctions: Private reprimand, public censure, probation, payment of restitution and costs, suspension from practice, or disbarment.<sup>18</sup> Disciplinary targets are often afforded procedural protections reminiscent of the criminal process: a right to counsel;<sup>19</sup> a right to reputation-protecting secrecy in preliminary investigations;<sup>20</sup> and a requirement that wrongdoing be

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the associate's duties to partner and firm. See Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 MINN. L. REV. 697, 731-34 (1988); Milton R. Wessel, *Institutional Responsibility: Professionalism and Ethics*, 60 NEB. L. REV. 504, 512-13 (1981); see also L. Harold Levinson, *Ethics Inside the Law Firm*, 36 VAND. L. REV. 847, 858 (1983) (book review) (fiduciary duty requires law firm associates to bring a partner's improprieties to the attention of others in the firm).

<sup>12</sup> SEC v. National Student Mktg. Corp., 457 F. Supp. 682, 712-15 (D.D.C. 1978).

<sup>13</sup> Tim O'Brien, *Some Firms Never Learn*, AM. LAW., Oct. 1989, at 63, 64.

<sup>14</sup> *National Student Mktg.*, 457 F. Supp. at 716-17.

<sup>15</sup> O'Brien, *supra* note 13, at 64.

<sup>16</sup> For an overview of the system of professional discipline for lawyers, see CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 79-144 (1986).

<sup>17</sup> *Id.* at 99-117.

<sup>18</sup> *Id.* at 117-41.

<sup>19</sup> *Id.* at 100.

<sup>20</sup> *Id.* at 107.

shown by clear and convincing evidence or even proof beyond a reasonable doubt, rather than by a mere preponderance of the evidence.<sup>21</sup>

Disciplinary agencies have always taken individual lawyers as their targets. They have never proceeded against law firms either directly, for breaching ethics rules addressed to them, or vicariously, for the wrongdoing of firm lawyers in the course of their work.<sup>22</sup> The traditional focus on individuals has probably resulted from the system's jurisdictional tie to licensing, which the state requires only for individuals, and from the system's development at a time when solo practice was the norm.<sup>23</sup>

Legal practice, however, has changed. While as late as 1951, sixty percent of the bar practiced alone,<sup>24</sup> two-thirds now work in law firms and other organizations; in addition, more lawyers in private practice now work in firms than as sole practitioners.<sup>25</sup> Law firms themselves have also changed. As a result of internal growth and mergers, the top 100 law firms now account for nearly twenty percent of all legal fees.<sup>26</sup> While only thirty-eight American law firms had more than fifty lawyers in the late 1950s, by 1986 over 500 firms did so and over 250 had more than 100 lawyers.<sup>27</sup> As of 1984, 95 of the 100 largest firms had at least one branch office.<sup>28</sup> Branching has made intrafirm coordination both more difficult and more important.<sup>29</sup> Firms have also become highly leveraged—that is, the ratio of relatively inexperienced associates to partners has risen as

<sup>21</sup> *Id.* at 108-10. The Supreme Court has characterized disciplinary proceedings as "quasi-criminal." *In re Ruffalo*, 390 U.S. 544, 551 (1968).

<sup>22</sup> Nor have individual lawyers been subject to vicarious discipline for the ethical infractions of their partners or associates. *See* *Yale v. State Bar*, 105 P.2d 112 (Cal. 1940) (respondent not subject to discipline for unconscionable fee charged by partner without respondent's knowledge); *In re Corace*, 213 N.W.2d 124 (Mich. 1973) (no discipline where respondent neither knew nor had reason to know of improprieties by clerk who was under direct supervision of another lawyer in firm); *In re Kauffman*, 471 N.Y.S.2d 719 (N.Y. App. Div. 1984) (no discipline where respondent was unaware of misleading letter partner sent to clients). Lawyers, however, have occasionally been disciplined for their own carelessness in supervising office operations. *See, e.g., In re Neimark*, 214 N.Y.S.2d 12 (N.Y. App. Div. 1961).

<sup>23</sup> On the evolution of modern disciplinary systems for lawyers, see ORIE L. PHILIPS & PHILBRICK MCCOY, *CONDUCT OF LAWYERS AND JUDGES: A STUDY OF PROFESSIONAL ETHICS, DISCIPLINE AND DISBARMENT* (1952).

<sup>24</sup> AMERICAN BAR FOUNDATION, *THE 1971 LAWYER STATISTICAL REPORT* 10 (1972).

<sup>25</sup> RICHARD L. ABEL, *AMERICAN LAWYERS* 179, 300 (1989); BARBARA A. CURRAN ET AL., *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s* 13 (1985).

<sup>26</sup> *Maturing Market Will Affect Profession in 90s*, B. LEADER, Sept.-Oct. 1990, at 11.

<sup>27</sup> Marc Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 749 (1990).

<sup>28</sup> ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 59 (1988).

<sup>29</sup> *See, e.g., Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th

high as four-to-one.<sup>30</sup> The proportionally larger number of inexperienced lawyers within firms has heightened the need for supervision.<sup>31</sup>

As law firms have grown, firm governance has become more complex. A few large firms may still govern themselves the old-fashioned ways—either as a patriarchy ruled by a single senior partner or as a loose collection of nearly independent practitioners.<sup>32</sup> But most firms now recognize the limits of individual partner control in the face of extensive personal liability for firm malpractice and have adopted a variety of bureaucratic controls to limit their exposure: policy manuals, formal rules, committees, specialized departments, and centralized management.<sup>33</sup> This trend toward law firm bureaucracy is expected to accelerate.<sup>34</sup>

As law firms grow, the potential harm they can inflict on clients,

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Cir.) (separate branches in a large firm simultaneously represented conflicting interests), *cert. denied*, 439 U.S. 955 (1978).

<sup>30</sup> ABEL, *supra* note 25, at 315. Abel reports that the mean and median number of associates per partner in New York City's ten largest firms rose from .6 in 1950 to nearly 3 in 1985. *Id.* at 314. See also Galanter & Palay, *supra* note 27, at 752-53.

<sup>31</sup> Cf. Bevis Longstreth, *Duty to Supervise Is Critical to Effective Self-Regulation*, NAT'L L.J., May 16, 1983, at 24, 25 ("As [brokerage] firms expand their business, they should also be expanding their supervisory procedures, particularly since an increasing number of those doing the selling will lack experience.").

<sup>32</sup> See NELSON, *supra* note 28, at 99-100, 107-14 (describing two large Chicago firms where the partners opted to trade off administrative efficiency for the continuation of "baronial privileges" and independence); Thomas E. Zirkle, *Dynamics of Group Behavior in the Practice of Law*, 11 L. OFF. ECON. & MGMT. 493, 496 (1971) (describing many pre-1970 law firms as loose federations of sole proprietors).

<sup>33</sup> Centralized law-firm management increasingly includes lay administrators who, like paralegals, cannot be directly controlled through the disciplinary process. On the use of lay office managers, see ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 215, 245 (1964); EVE SPANGLER, *LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK* 30-39 (1986); Murtay L. Schwartz, *The Reorganization of the Legal Profession*, 58 TEX. L. REV. 1269, 1288-89 (1980). We may be on the verge of even greater participation by nonlawyers in law-firm management and policymaking. Although prevailing ethics rules prohibit lawyers from admitting nonlawyers to partnership in their law firms, the ABA recently considered a proposal to allow nonlawyers to gain partnership status. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (Proposed Final Draft, May 30, 1981). Moreover, the District of Columbia recently amended its ethics rules to allow nonlawyers to become partners if they agree to abide by the ethics rules and if firm lawyers assume responsibility for their conduct. See *Non-Lawyer Partners Rule Released*, NAT'L L.J., Mar. 12, 1990, at 7. The first nonlawyer admitted to partnership on this basis was an accountant who will work exclusively on matters of internal law-firm management. *First Non-Lawyer is Named Partner of a U.S. Law Firm*, WALL ST. J., Dec. 7, 1990, at B6. If this accountant were responsible for designing and overseeing the firm's billing system, and botched the job in a way that enabled a lawyer in the firm to pad bills and cheat clients, as a nonlawyer he could not be disciplined by the bar. Moreover, it is hard to see how the disciplinary authorities could rationally single out certain lawyers in the firm to hold responsible for the accountant's failures. Thus, any significant movement toward nonlawyer partners will strengthen the need for a system of professional discipline for firms as such.

<sup>34</sup> NELSON, *supra* note 28, at 225.

third parties, and the legal process grows as well.<sup>35</sup> At the same time, the law firm, at least the larger firm, is ripening into an institution that presents new opportunities for bureaucratically controlling the technical and ethical quality of law practice. Indeed, the large firm may now be ready to perform the control or monitoring function for its lawyers "that the hospital [or HMO] performs for the medical profession."<sup>36</sup>

So far, however, those who make disciplinary policy have taken little notice of these developments. True, the latest American Bar Association (ABA) code governing lawyer conduct, the Model Rules of Professional Conduct, notes that "the ethical atmosphere of a firm can influence the conduct of its members."<sup>37</sup> The Model Rules also make clear for the first time that supervisory lawyers are responsible for monitoring their subordinates,<sup>38</sup> an obligation with particular significance in the hierarchical setting of the large firm. But the ABA, the state supreme courts that adopt the ABA codes, and the agencies that assist the courts in disciplinary enforcement have yet to confront the infrequency of disciplinary proceedings against lawyers in firms.

Proceedings against lawyers in large or even medium-sized firms are very rare. In 1981-82, for example, more than eighty percent of the lawyers disciplined in California, Illinois, and the District of Columbia were sole practitioners, and none practiced in a firm with over seven lawyers.<sup>39</sup> Yet, judging from the frequency with which larger firms and their lawyers are the targets of civil suits, motions to disqualify, and sanctions under the rules of civil proce-

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<sup>35</sup> This results not only from the sheer volume of law firm activity, but also from the opportunities that well-institutionalized organizations give individual wrongdoers to cover their tracks and from the greater public trust placed in these organizations. See Stanton Wheeler & Mitchell Lewis Rothman, *The Organization as Weapon in White-Collar Crime*, 80 MICH. L. REV. 1403, 1412-13, 1424 (1982).

<sup>36</sup> F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 205. On the important role that bureaucratic controls have come to play in assuring quality in the delivery of medical services, see Barry R. Furrow, *The Changing Role of the Law in Promoting Quality in Health Care: From Sanctioning Outlaws to Managing Outcomes*, 26 HOUS. L. REV. 147, 154-55 (1989).

<sup>37</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 comment ¶ 2 (1989). See Geoffrey C. Hazard, Jr., *Firm Culture Sets the Tone on Behavior*, NAT'L. L.J., Feb. 20, 1989, at 15.

<sup>38</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1989).

<sup>39</sup> ABEL, *supra* note 25, at 145. Little other data exists on this point. It appears, however, that the incidence of grievances against lawyers may be much higher in areas where solo and small-firm practice predominates than in areas in which large firms and law offices are concentrated. Thus, in 1986, authorities received one complaint for every two lawyers in upstate New York (a small-practice area) but received only one complaint for every 42 lawyers in the District of Columbia (many large firms and government agencies). *54,600 Complaints Filed Against Lawyers*, NAT'L. L.J., Dec. 7, 1987, at 19.

dures,<sup>40</sup> disciplinable offenses occur with some regularity in those firms.<sup>41</sup> Some observers attribute the paucity of disciplinary actions against larger-firm lawyers to an informal immunity from disciplinary scrutiny that those lawyers, as the most prestigious segment of the bar, supposedly enjoy.<sup>42</sup> Others point out that the types of misconduct that most often generate grievances and disciplinary sanctions—neglect of cases<sup>43</sup> and misappropriation of client property,<sup>44</sup> respectively—occur much more often in small practices than in larger firms.<sup>45</sup> Still others cite the reactive nature of disciplinary enforcement; the authorities do not normally investigate until clients (or, occasionally, nonclients) complain about a lawyer's conduct.<sup>46</sup> On this theory, the businesses that predominate on the client lists of large firms rarely report complaints against their lawyers. Unlike the "one shot" individuals whom sole practitioners tend to represent,<sup>47</sup> regular business clients may not view the disciplinary process

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<sup>40</sup> See, e.g., *A Question of Integrity at Blue-Chip Law Firms*, Bus. Wk., Apr. 7, 1986, at 76 (noting the surprising frequency with which charges of wrongdoing are now leveled at large law firms in non-disciplinary forums).

<sup>41</sup> Data suggest, for example, that a significant proportion of malpractice claims arise from conduct that also violates professional responsibility rules. See William H. Gates, *The Newest Data on Lawyers' Malpractice Claims*, A.B.A. J., Apr. 1984, at 78, 80 (figure 5). Similarly, it is not uncommon for large and respected corporations to commit crimes. Eleven percent of the largest 1000 American corporations were involved in bribery, fraud, price-fixing, or other crimes between 1970 and 1980. Irwin Ross, *How Lawless Are Big Companies?*, FORTUNE, Dec. 1, 1980, at 56, 57.

<sup>42</sup> ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 3 (Final Draft 1970) [hereinafter cited as CLARK REPORT, after Justice Tom Clark, who chaired the Committee]; JETHRO K. LIEBERMAN, CRISIS AT THE BAR 206 (1978); SHARON FISHER ET AL., BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS 102-06 (1977); Martin Garbus & Joel Seligman, *Sanction and Disbarment: They Sit in Judgment*, in VERDICTS ON LAWYERS 54 (Ralph Nader & Mark Green eds., 1976). On the positive correlation between firm size and lawyer prestige, see ABEL, *supra* note 25, at 205-06.

<sup>43</sup> On the high frequency of lawyer neglect as the basis for disciplinary grievances, see Marks & Cathcart, *supra* note 36, at 210-14.

<sup>44</sup> On the high proportion of disciplinary sanctions that are imposed in cases involving misappropriation, see David E. Johnson & Lucinda Long, *Lawyer, Thou Shalt Not Steal*, 36 RUTGERS L. REV. 454, 456 (1984) (53% of all public discipline imposed on New Jersey lawyers from 1948 to 1982 involved lawyer theft); Gregory Dunbar Soule, Comment, *Attorney Misappropriation of Clients' Funds: A Study in Professional Responsibility*, 10 U. MICH. J.L. REF. 415, 416 n.5 (1977).

<sup>45</sup> See Johnson & Long, *supra* note 44, at 490 (84% of New Jersey lawyers disciplined for misappropriating client funds from 1948 to 1982 were sole practitioners; 12% worked in two-lawyer offices).

<sup>46</sup> See, e.g., Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 919, 922 (with few exceptions, disciplinary agencies maintain no capacity for self-initiated investigation).

<sup>47</sup> The proportion of law firm income from individual rather than organizational clients varies sharply and inversely with firm size. ABEL, *supra* note 25, at 203. Moreover, large firms tend to have longer relationships with their clients than do small firms and sole practitioners. *Id.* at 204.



as a "governance mechanism"<sup>48</sup> for their relations with lawyers, and may instead rely on their ability to take their business elsewhere to protect them.<sup>49</sup>

These factors may help to explain the infrequency of disciplinary proceedings against large-firm lawyers, but additional explanations, so far neglected, have important implications for disciplinary policy. These explanations stem from the nature of group practice. First, even when a firm has clearly committed wrongdoing, courts may have difficulty, as an evidentiary matter, in assigning blame to particular lawyers, each of whom has an incentive to shift responsibility for an ethical breach onto others in the firm. Many, perhaps most, of the tasks performed in large firms are assigned to teams.<sup>50</sup> Teaming not only encourages lawyers to take ethical risks they would not take individually,<sup>51</sup> but also obscures responsibility, which makes it difficult for both complainants and disciplinary authorities to determine which lawyers committed a wrongful act.<sup>52</sup>

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<sup>48</sup> Individual, "one shot" clients are much more apt than "repeat" business clients to invoke the disciplinary process to gain leverage over their lawyers in order to recover funds or force their lawyers to complete work. See JOEL F. HANDLER, *THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY* 83 (1967); Steele & Nimmer, *supra* note 46, at 975 n.64. For a typology of contractual relations in terms of the governance mechanisms that parties rely upon to protect themselves, see OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 72-78 (1985).

<sup>49</sup> Large business clients may have so much leverage over their law firms that wrongdoing in large firms is more likely to victimize third parties than clients. See LIEBERMAN, *supra* note 42, at 206-07; Robert E. O'Malley, *Preventing Legal Malpractice in Large Law Firms*, 20 U. TOL. L. REV. 325, 328 (1989) (majority of severe malpractice claims against large law firms come not from clients, but from various third parties). Thus, although client-serving misconduct accounted for fewer than 5% of all the lawyer discipline cases reported to the ABA in 1983, Steven G. Bené, Note, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907, 924 n.86 (1991), it probably accounted for a much higher percentage of the misconduct in large firms. That a substantial percentage of law-firm wrongdoing injures third parties, rather than paying clients, is an important reason why one cannot rely on market pressures to regulate law firms adequately. Cf. Longstreth, *supra* note 31, at 25 (many abuses by securities brokers damage the market as a whole and not the firm's clients).

<sup>50</sup> SMIGEL, *supra* note 33, at 225-28; SPANGLER, *supra* note 33, at 66; Twitchell, *supra* note 11, at 701 (exploring the distinctive ethical problems associated with the performance of legal tasks in teams).

<sup>51</sup> Cf. John C. Coffee, "No Soul to Damn; No Body to Kick": *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 395 (1981) (businessmen in role playing experiments show pronounced tendency to make riskier choices when decision is reached collectively); Diane Vaughan, *Toward Understanding Unlawful Organizational Behavior*, 80 MICH. L. REV. 1377, 1391 (1982) (organizational processes "create an internal moral and intellectual world in which the individual identifies with the organization and the organization's goals.").

<sup>52</sup> Disciplinary agencies, having no authority to proceed against law firms as such, sometimes insist that a complainant specify which lawyers in a firm committed the alleged wrongdoing before they will process a complaint. In one recent instance, a charge was reportedly filed with the Illinois Attorney Registration and Discipline System (ARDC) against a Chicago firm that had written an allegedly misleading offering memo-

The mystery as to just who at Fried, Frank allowed an unredacted document to be submitted to the court<sup>53</sup> illustrates the problem. So might a case in which a law firm filed a frivolous claim or motion within the meaning of Model Rule 3.1.<sup>54</sup> Though a single lawyer signs the complaint or motion, such filings are often the joint product of "background preparation and drafting by several attorneys,"<sup>55</sup> not every one of whom—conceivably none of whom—personally has the information needed to recognize their frivolousness.<sup>56</sup>

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randum. The memorandum claimed that the general partner in the relevant venture had a significant net worth, even though he was broke and had defaulted on a million dollar loan; the law firm presumably knew about the misrepresentation because it had represented the general partner in the lawsuit growing out of the default. The ARDC told the complainant he would have to collect information singling out particular lawyers in the firm before it would initiate an investigation, and the matter went no further. Letter from Ronald Rotunda to the author (Feb. 26, 1991) (on file with the *Cornell Law Review*).

<sup>53</sup> See *supra* text accompanying notes 5-7.

<sup>54</sup> Model Rule 3.1 provides in part: "A lawyer shall not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1989). Frivolous pleadings are, of course, also prohibited by rules of civil procedure. See, e.g., FED. R. CIV. P. 11. Some commentators have called for greater use of disciplinary sanctions rather than sanctions under the rules of procedure to deal with the problem. See, e.g., Ronald D. Rotunda, *Learning the Law of Lawyering*, 136 U. PA. L. REV. 1761, 1774 (1988) (reviewing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986)).

<sup>55</sup> *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1479 (2d Cir. 1988), *rev'd sub nom. Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120 (1989). Cf. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd on other grounds*, 801 F.2d 1531 (9th Cir. 1986) (Kirkland & Ellis firm sanctioned for filing frivolous memorandum that was argued by local, associated counsel but prepared by lawyer in the firm). Some law firms have a policy requiring at least two lawyers to review all important documents before they are filed in court or released. See Lloyd N. Cutler, *The Role of the Private Law Firm*, 33 BUS. LAW. 1549, 1550 (1978).

<sup>56</sup> Recent cases involving two large New York City law firms illustrate the point as well. In one case, Sullivan & Cromwell represented the petitioner in a suit against a trustee for an accounting. *In re Beiny*, 517 N.Y.S.2d 474 (N.Y. App. Div. 1987). See also *On Wall Street, Blues for a Blue Chip Firm*, N.Y. TIMES, Dec. 18, 1987, at B6. According to the court, an associate improperly obtained privileged documents from another firm that had once represented the trustee. The associate obtained the documents under a subpoena that was never disclosed to the trustee's present lawyers, who thus had no opportunity to challenge on grounds of privilege. *Beiny*, 517 N.Y.S.2d at 476. Having improperly obtained the documents, the firm then used them to surprise the trustee at her deposition and at other times. As a result, the court disqualified the firm from the case. *Beiny*, 517 N.Y.S.2d at 485. In the other case, a partner at Milbank, Tweed, Hadley & McCloy improperly met with an adverse party without the consent of opposing counsel. *Papanicolau v. Chase Manhattan Bank*, 720 F. Supp. 1080 (S.D.N.Y. 1989). The Milbank lawyer gained confidential information in that meeting and shared it with other lawyers in the firm; the information was suppressed, and the firm disqualified. *Id.* at 1085, 1087-88.

Because the issue in these cases was whether to disqualify the firm, the court had no need to determine which lawyers behaved improperly. Suppose, however, that the cases had become disciplinary matters. Any lawyers in the two firms who had used the pertinent information knowing it was improperly obtained presumably committed a disciplin-

Second, even when courts and disciplinary agencies can link professional misconduct to one or more lawyers in a firm as an evidentiary matter, they may be reluctant to sanction those lawyers for fear of making them scapegoats for others in the firm who would have taken the same actions in order to further the firm's interests.<sup>57</sup> For example, at a time when lawyers were forbidden to publicize their services, a court refused to discipline associates who had given *Life Magazine* material for a story on their firm.<sup>58</sup> Although no general defense of superior orders exists in disciplinary proceedings,<sup>59</sup> the court found that the associates were not responsible for the offending publication since the decision to cooperate with the *Life* reporter was "one for the partnership."<sup>60</sup>

Third and most important, a law firm's organization, policies, and operating procedures constitute an "ethical infrastructure" that cuts across particular lawyers and tasks. Large law firms are typically complex organizations. Consequently, their infrastructures may have at least as much to do with causing and avoiding unjustified harm as do the individual values and practice skills of their lawyers. Lord, Bissell & Brook's re-involvement in securities violations after the *National Student Marketing* case,<sup>61</sup> for example, may well have resulted from the firm's failure to change its procedures for identifying improperly interested firm lawyers. Similarly, in the Westinghouse case, when separate Kirkland & Ellis offices found themselves improperly representing clients with conflicting interests,<sup>62</sup> the lack of an adequate mechanism for identifying conflicts presumably was more to blame than the ethical sensibilities of the lawyers immediately involved. But who was—and who was not—responsible for the arguable failure of these firms to develop the appropriate infrastructure? In such matters, the locus of individual responsibility seems inherently unclear, in part because it is difficult

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able offense. Yet a disciplinary agency might never have been able to identify those lawyers or determine what they knew about the provenance of the information.

<sup>57</sup> This Article is chiefly concerned with unethical conduct which, if undetected, may benefit the law firm either directly or, by benefiting the client, indirectly. It is not concerned with lawyer wrongdoing at her firm's expense, as when a partner secretly pockets fees that belong to the firm.

<sup>58</sup> *In re Connolly*, 240 N.Y.S.2d 126 (N.Y. App. Div. 1963).

<sup>59</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(a)-(b) (1989) (lawyers bound by rules of professional conduct even when they act at the direction of superior except in response to superior's reasonable resolution of an arguable question of professional duty).

<sup>60</sup> *Connolly*, 240 N.Y.S.2d at 139-40. See also *In re Barry*, 447 A.2d 923, 926 (N.J. 1982) (Clifford, J., dissenting) (judge reluctant to impose substantial discipline on associate for neglecting client matters, since firm gave the associate numerous files to handle without guidance).

<sup>61</sup> See *supra* text accompanying notes 12-15.

<sup>62</sup> See *supra* text accompanying note 9.

to attribute omissions to specific individuals in a group.<sup>63</sup> Even a firm with a well-defined management structure does not delegate the duty to make firm policy and maintain an appropriate infrastructure solely to management.<sup>64</sup> To varying degrees this remains every partner's business—and sometimes, as a result, no one's. In no aspect of law firm work is teaming, and thus collective responsibility, more important than in the development of firm structure, policy, and procedures.<sup>65</sup>

Given the evidentiary problems of pinning professional misconduct on one or more members of a lawyering team, the reluctance to scapegoat some lawyers for sins potentially shared by others in their firm, and especially 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.

While there has been little attention to these points in the field of lawyer discipline, scholars and policymakers have given considerable attention to analogous matters. Commentators have considered the significance of bureaucratic or structural variables in accounting for corporate crime;<sup>66</sup> the pros and cons of making corporations, and not just their agents, liable for crimes committed in the furtherance of organizational interests;<sup>67</sup> and the appropriate mix of criminal sanctions for organizational offenders.<sup>68</sup> This Article draws on the organizational crime literature to assess the desirability of allowing agencies and courts to impose disciplinary sanctions on law firms and concludes that such sanctions are needed.

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<sup>63</sup> See L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 MICH. L. REV. 1508, 1518 (1982).

<sup>64</sup> See, e.g., SMIGEL, *supra* note 33, 279-86 (describing law-firm policymaking by partners as collegial and democratic); S.S. Samuelson, *The Organizational Structure of Law Firms: Lessons from Management Theory*, 51 OHIO ST. L.J. 645, 650-52 (1990) (same). But see NELSON, *supra* note 28, at 275 (Though law firms have moved from one- or two-man leadership systems to management systems in which more partners participate, management is also becoming a specialized firm activity.).

<sup>65</sup> Cf. ROBERT AARON GORDON, *BUSINESS LEADERSHIP IN THE LARGE CORPORATION* 99 (1945) (collective rather than individual decisionmaking a striking characteristic of management in large companies).

<sup>66</sup> See, e.g., Ann Foerschler, Comment, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1298-1311 (1990).

<sup>67</sup> See, e.g., Coffee, *supra* note 51; Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980).

<sup>68</sup> See, e.g., Peter A. French, *Publicity and the Control of Corporate Conduct: Hester Prynne's New Image*, in *CORRIGIBLE CORPORATIONS AND UNRULY LAW* 159 (Brent Fisse & Peter A. French eds., 1985); Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513 (1989).

Part I of the Article tries to disarm those who may consider law firm discipline too radical a departure from tradition. It focuses on ways in which the disciplinary system has already established the necessary preconditions for imposing sanctions on law firms.

Part II explores the analogy between the regulation of organizational behavior through the criminal law and the regulation of law practice through the disciplinary process. It shows that arguments in favor of recognizing corporate criminal liability and of using fines, probation, and adverse publicity as corporate criminal sanctions apply with equal or greater force to the imposition of professional discipline on law firms.

The analogy to corporate criminal liability developed in Part II suggests that, in view of emerging governance patterns that make law firms comparable to corporations, a system of law firm discipline should supplement individual discipline for lawyers. However, since law practice is or could be regulated through many techniques besides professional discipline, some of which already focus on law firms, law firm discipline should only be instituted if the alternative techniques leave regulatory gaps that firm discipline could efficiently and effectively help to close. Part III therefore canvasses those alternative techniques: civil liability, peer review, disqualification, judicial sanctions under the rules of civil procedure, and direct regulation by federal administrative agencies. This Part identifies important limitations of each alternative and concludes that these limitations leave a significant regulatory niche for firm discipline.

One preliminary point. A disciplinary system for law firms may not be immediately attractive to the lawyers who practice in firms. It could, after all, encourage their firms to monitor their work and limit their individual discretion more sharply—phenomena to which many lawyers are hostile.<sup>69</sup> Yet a system of law firm discipline may actually benefit these lawyers. It could promote firm practices that reduce the risk not only of discipline but also of civil liability, disqualification, and other nondisciplinary sanctions. It could encourage disciplinary authorities *not* to proceed against firm lawyers individually when proof problems, fairness, or deterrence considerations point to the firm itself as the more appropriate target. It could give firms a new and attractive basis on which to compete for clients by helping them develop *firmwide* ethical track records over time—assuming, of course, that a good ethical reputation draws clients. And, in an era of unprecedented lawyer mobility,<sup>70</sup> it could

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<sup>69</sup> See SMIGEL, *supra* note 33, at 216, 250, 299 (some large firms resist bureaucratic controls, seeing them as a threat to the individual autonomy their lawyers consider a hallmark of professionalism); NELSON, *supra* note 28, at 88 (same).

<sup>70</sup> See ABEL, *supra* note 25, at 187-88; James F. Fitzpatrick, *The Role of Large Law Firms*

strengthen the link between ethical practice and firm stability by encouraging good lawyers to stay and bask in their firm's discipline-free ethical reputation rather than bolting to less reputable firms for more money.<sup>71</sup> But whatever the reaction to my proposal among lawyers in firms, it is offered in the belief that the legal profession is committed to making professional discipline more effective.<sup>72</sup>

## I

THE EMERGING STATUS OF LAW FIRMS AS APPROPRIATE  
DISCIPLINARY TARGETS

While law firm discipline would depart from the traditional disciplinary focus on the individual, the idea is not as radical as it may seem. Close administrative analogies exist. The stock exchanges and the Securities and Exchange Commission maintain disciplinary systems for brokerage houses, and not just for the individuals who work in those firms.<sup>73</sup> Similarly, dramatic growth in the size and complexity of accounting firms prompted the American Institute of Certified Public Accountants in 1977 to create a mechanism for periodically assessing the practices of accounting firms and for sanctioning firms whose practices were substandard; the Institute viewed as

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by the End of the Century, 64 IND. L.J. 461, 464 (1989); Nelson, *Lateral Hiring Established as Major Component of Recruiting Process*, OF COUNSEL, May 18, 1987, at 8 (among the 500 largest law firms in 1987, over 25% reported that more than half of their new partners came from other firms).

<sup>71</sup> See ABEL, *supra* note 25, at 200 (Firm reputation "attract[s] lawyers and clients when it is rising but produc[es] panicked flight when it is declining."). In their work on the economics of corporate law firms, Gilson and Mnookin point out that one way for firms to generate "firm-specific" capital, which binds lawyers to their firms, is to enhance the firm's, rather than the individual lawyer's, reputation for quality and rectitude. Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 353-68 (1985). For some evidence of the preoccupation of large firms with their ethical reputations, see David Gering, *Law Firms Adopt Credos*, A.B.A. J., Jan. 1989, at 56, 57 (discussing the recent phenomenon of firms adopting professional creeds emphasizing that their lawyers practice "as a firm, not as individuals").

<sup>72</sup> California's recent enhancement of disciplinary enforcement (see STATE BAR OF CALIFORNIA, *LAWYER DISCIPLINE IN CALIFORNIA: A PROGRESS REPORT FOR 1988 AND 1989*, at 6, 15-16 (1990)); the ABA's maintenance of a Standing Committee on Professional Discipline since 1973; and the recent activity of a second ABA Commission on the Evaluation of Disciplinary Enforcement (see ABA COMM'N ON EVALUATION OF PROFESSIONAL DISCIPLINE, *REPORT TO THE HOUSE OF DELEGATES* (May 1991); Robert McKay, *Commission Begins Evaluation of Lawyer Discipline Systems*, PROF. LAW., Fall-Winter 1989-90, at 5) are signs of such a commitment. So is a recent poll of ABA members. Only 26% of those questioned think lawyers are presently doing an adequate job of policing lawyer misconduct. *Lawyers' Perspective*, A.B.A. J., May 1991, at 40.

<sup>73</sup> See 15 U.S.C. § 78o (1988); 1988 N.Y.S.E. Guide (CCH) Rule 342 ¶ 2342; Nat'l Ass'n of Securities Dealers Manual—Rules of Fair Practice art. III § 27, 1989 N.A.S.D. Manual (CCH) ¶ 2177. For a description of the New York Stock Exchange's disciplinary system, see David P. Doherty et al., *The Enforcement Role of the New York Stock Exchange*, 85 Nw. U.L. REV. 637 (1991).

inadequate the accounting profession's traditional reliance on rules of conduct addressed solely to individual CPAs.<sup>74</sup> And of course law firms as such are already subject to civil liability,<sup>75</sup> fee denials, and disqualification;<sup>76</sup> these sanctions complement lawyer discipline as a regulatory technique. Moreover, four developments in modern ethics rules and disciplinary techniques suggest that the legal profession is already edging toward the use of law firm discipline.

### A. Prophylactic Ethics Rules

The chief reason to allow disciplinary authorities to proceed directly against law firms is prophylaxis—the promotion of firm practices that prevent wrongdoing by individual lawyers. Modern ethics rules already require lawyers to take certain prophylactic measures to prevent misconduct. For example, as mentioned in connection with the Fried, Frank incident, lawyers must take reasonable steps to prevent breaches of confidentiality by their employees and associates.<sup>77</sup> Similarly, the Model Rules forbid lawyers to commingle client funds with their own and require lawyers to place client funds in trust accounts.<sup>78</sup> They do so not because commingling is itself an evil, but largely because commingling tempts lawyers to treat client funds as their own.<sup>79</sup>

Among today's prophylactic ethics rules, one might also include certain conflict of interest provisions. The ABA Canons of Professional Ethics,<sup>80</sup> first promulgated in 1908, address this subject in a canon that requires a lawyer not to do for one client what her duty to another client forbids.<sup>81</sup> This provision focuses on the lawyer embroiled in an actual conflict. The Model Rules, on the other hand, restrict the representation of multiple clients with even potentially conflicting interests.<sup>82</sup> They do so not just because potential conflicts can themselves cause harm by clouding a lawyer's judgment, but also because the restriction prevents lawyers from later becoming embroiled in an actual conflict.<sup>83</sup> The rules thus make certain client representations involving potential conflicts of interests a secondary wrong—a wrong because these representations

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<sup>74</sup> See A.A. Sommer, *The Accounting Profession's Peer Review Program*, 20 U. Tol. L. Rev. 375, 376 (1989).

<sup>75</sup> See *infra* notes 219-37 and accompanying text.

<sup>76</sup> See *infra* notes 248-54 and accompanying text.

<sup>77</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D) (1981).

<sup>78</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15(a) (1989).

<sup>79</sup> See WOLFRAM, *supra* note 16, at 177.

<sup>80</sup> ABA Canons of Professional Ethics (1969).

<sup>81</sup> *Id.* Canon 6.

<sup>82</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 & comment (1989).

<sup>83</sup> *Id.* Rule 1.7 comment ¶ 4 (lawyer in taking case should consider "the likelihood that a conflict will eventuate").

tend to promote more fundamental wrongs. The Model Rules also make it clear that when one lawyer in a firm is barred from handling a case on conflict grounds, other lawyers in the firm are generally barred as well.<sup>84</sup> This rule seeks to avoid the risk that a lawyer who possesses confidential information about a client will be tempted or pressed to communicate that information to others in the firm.<sup>85</sup>

When one views ethics rules in this modern light, as a tool to minimize lawyers' opportunities to commit fundamental wrongs, disciplining law firms for failing to take preventive, institutional measures hardly seems a radical step.

## B. Firm-Directed Ethical Norms

A second and more curious point about modern ethics rules is that occasionally they directly address law firms. The Model Code of Professional Responsibility (CPR),<sup>86</sup> adopted by the ABA in 1969 and still in effect in some states, contains several rules of this type.<sup>87</sup> Disciplinary Rule (DR) 2-102(A) bars lawyers *and* law firms from using certain professional signs and letterheads.<sup>88</sup> DR 3-102(A) orders lawyers *and* firms not to share legal fees with nonlawyers.<sup>89</sup> DR 7-107 bars lawyers *and* firms from making certain out-of-court statements about pending cases.<sup>90</sup> And DR 9-102(A) requires lawyers *and* firms to use trust accounts to segregate client funds.<sup>91</sup> More-

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<sup>84</sup> *Id.* Rule 1.10(a).

<sup>85</sup> *See* WOLFRAM, *supra* note 16, at 391-92.

<sup>86</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) [hereinafter CPR].

<sup>87</sup> One also finds professional standards addressed to practice entities and not just to individual lawyers in the ABA Standards for Criminal Justice. *See, e.g.*, 1 ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 5-4.3 (2d ed. 1980) (public defender *organizations* should reject added cases that will necessitate inadequate representation). While this Article focuses on bringing private law firms under the jurisdiction of disciplinary agencies, the rationale for doing so extends to other practice entities such as prosecutors' offices, legal services offices and corporate law departments.

<sup>88</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A) (1981).

<sup>89</sup> *Id.* DR 3-102.

<sup>90</sup> *Id.* DR 7-107.

<sup>91</sup> *Id.* DR 9-102. Some states also prescribe the types of accounts and accounting procedures necessary to comply with this rule, and make the attorneys in a firm collectively responsible for compliance. Soule, *supra* note 44, at 434 & nn.120-21. Geoffrey Hazard proposes that law firms be required to go further to avoid misappropriation; under his proposal, all firm lawyers would certify that they had paid their income taxes, and firms would appoint a firm monitor to review the work of any firm lawyer serving as an executor or other fiduciary. Geoffrey C. Hazard, Jr., "Borrowing" Client Funds is Defalcation, NAT'L L.J., Jan. 29, 1990, at 13, 14.

The phenomenon of making law firms or their lawyers collectively responsible for discharging special ethical duties may be growing. The California State Bar recently recommended that all California law firms adopt policies on alcohol and drug use by their members and employees. *Board Action*, CAL. LAW., June 1991, at 72. The Arizona Supreme Court recently established a detailed, though voluntary, program that calls on lawyers to provide at least 50 hours of pro bono service a year. ARIZ. SUP. CT. RULES 42,



over, bar association ethics opinions sometimes construe ethics rules that do not explicitly address law firms as if they did. For example, one ABA opinion holds that when a lawyer who is handling a client's matter leaves her firm, the withdrawal provisions of the CPR, though addressed only to individual lawyers, require the *firm* to continue representation.<sup>92</sup> Another opinion finds that an associate who believes his supervising partner has committed an ethical violation should first ensure that the perceived misconduct is "considered within the firm" before notifying the disciplinary authorities.<sup>93</sup> This arguably transforms the individual lawyer's reporting duty under the CPR into a law firm obligation.

Since only licensed individuals are now subject to professional discipline, these rules and interpretations seem odd. No law firm as such has ever been disciplined for breaching the firm-directed CPR rules, and the CPR does not explain how authorities could discipline a firm. Yet the rules may not be mere slips of the professional tongue. They have a common theme: each rule deals with matters that in law firms require collective action or at least collective acquiescence. All lawyers in a firm use its signs and letterhead; they are firm, not lawyer-specific, assets. Sharing law firm fees with nonlawyers is a firm decision in the sense that undistributed fees belong to the firm. Since a lawyer might issue an improper press release about a pending case under her law firm's name, some firms have policies on the subject.<sup>94</sup> And the management of a client's funds is properly a centralized function, not the function of the lawyers who work directly with that client. Well-managed law firms do not permit their lawyers personally to handle client receipts or disbursements. A separate accounting staff that reports to the management committee receives and disburses these funds, and partners not involved in the pertinent representation may have to approve such transactions.<sup>95</sup>

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Ethical Rule 6.1, as amended Oct. 10, 1990. The rule allows lawyers in a firm to satisfy the rule "collectively." *Id.* If this duty were made mandatory, one wonders how disciplinary authorities would proceed if a firm had elected to satisfy its duty collectively but failed to do so.

<sup>92</sup> ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1428 (1979).

<sup>93</sup> Ass'n of the Bar of the City of New York, Opinion 82-79 (1982). See also *Wieder v. Skala*, 544 N.Y.S.2d 971 (N.Y. Sup. Ct. 1989), *aff'd on opinion of court below*, 563 N.Y.S.2d 930 (N.Y. App. Div. 1990) (dismissing wrongful discharge claim against law firm by associate who was allegedly fired for insisting that the firm report another associate who had committed a disciplinable offense).

<sup>94</sup> SMIGEL, *supra* note 33, at 223.

<sup>95</sup> Hazard, *supra* note 91, at 13-14.

### C. Ethics Rules on Matters of Law Firm Governance

With the ABA Model Rules of Professional Conduct,<sup>96</sup> adopted in 1983 and now widely in effect, ethics rules have also begun to regulate matters of law firm governance that bear on ethical compliance. These rules, themselves prophylactic in nature, so far are addressed only to individual lawyers. Model Rule (MR) 5.1(b) deals with direct supervision. It exposes a supervising lawyer to discipline for failure to make reasonable efforts to monitor a direct subordinate. MR 5.1(c) prohibits knowing acquiescence in the wrongdoing of other lawyers in one's firm. It exposes a partner to discipline for failure to take reasonable remedial steps to avoid or mitigate the effects of another lawyer's known misconduct.

Of special interest here is MR 5.1(a), which recognizes that the duty to prevent ethical breaches within a law firm is a matter of indirect as well as direct supervision. The rule requires lawyers who have "supervisory authority over the professional work of a firm" to "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>97</sup> At present, the "efforts" necessary and the measures that would give "reasonable assurance" are largely anyone's guess. Aided by an infant industry of management and ethics consultants, law firms are only beginning to explore the monitoring techniques available to them.<sup>98</sup> Clearly, though, MR 5.1(a) is concerned with matters of ethical infrastructure. At least in large firms, partners might be expected under MR 5.1(a) to adopt such structural arrangements as an ethics committee to which lawyers could confidentially refer ethics problems<sup>99</sup> and a new-business committee to detect potential conflicts of interest.<sup>100</sup> The partners

<sup>96</sup> MODEL RULES OF PROFESSIONAL CONDUCT (1989).

<sup>97</sup> *Id.* Rule 5.1(a) & comment 1 (1989). For discussion of the implications of this rule for law firms, see George W. Overton, *Supervisory Responsibility: A New Ball Game for Law Firms and Lawyers*, ILL. B. J., Sept. 1990, at 434, 435-37.

<sup>98</sup> See, e.g., Fitzpatrick, *supra* note 70, at 461 (management consultants for law firms a burgeoning business); Mark Voorhees, *Advising Colleagues on the Ethics Minefield*, AM. LAW., Dec. 1989, at 38 (same for ethics consultants).

<sup>99</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 comment 2 (1989); ABA COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, 112 F.R.D. 243, 273 n.82 (1986). For evidence of the need for ethics committees in large law firms, see Steven Brill, *When A Lawyer Lies*, ESQUIRE, Dec. 19, 1975, at 23, 24 (informal survey showed that associates in several large law firms would keep their knowledge of a partner's wrongdoing to themselves rather than discuss the matter with other partners).

<sup>100</sup> The risk of a large firm's involvement in a conflict of interest is sufficient to justify the creation of a formal avoidance program. Lloyd Cutler has estimated that whereas one in 20 matters involving new clients presented conflicts problems when his Washington, D.C. firm had 20 lawyers, one in three presented such issues when his firm grew to over 100 lawyers. Cutler, *supra* note 55, at 1549. The magnitude of the conflict

might be expected to adopt such policies as a ban on accepting new matters without approval by the new-business committee. They might also be expected to use computer programs with sophisticated databases as a procedure for identifying both potential conflicts of interest<sup>101</sup> and billing irregularities, as well as an office "tickler" system to keep track of court dates.

Although the importance of an ethical infrastructure would seem to vary directly with firm size,<sup>102</sup> the prospects for using MR 5.1(a) as an effective tool for promoting the appropriate infrastructure are likely to vary inversely with size. The prospects are best where small firms are involved. The rule could have been invoked easily, for instance, in a disciplinary response to the billing improprieties involved in a recent case in which one of the three partners in a Maryland firm collected several million dollars in false billings from a single client.<sup>103</sup> The two "innocent" partners, who made no effort to oversee the firm's billing practices<sup>104</sup> surely could have been disciplined under MR 5.1(a); these two partners were the only ones in a position to maintain a system to detect their partner's billing irregularities. Even with such a small firm, however, disciplinary authorities might not proceed against the "innocent" partners under MR 5.1(a), out of a reluctance to impose the stigma of professional discipline on individual lawyers for merely negligent omissions.<sup>105</sup>

As one moves up the scale toward firms of intermediate size, the prospects for enforcing MR 5.1(a) dim. In *In re Yacavino*,<sup>106</sup> a new associate who worked without supervision in the satellite office of a twenty-lawyer New Jersey firm was suspended from practice for making false status reports to clients and preparing a false court order to aid his deception.<sup>107</sup> Though a New Jersey supreme court

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problem in large law firms is one reason why they may never reach the size of the biggest accounting firms.

<sup>101</sup> See Brad W. Robbins & Martin L. Stalnaker, *Large Firms Polled: Trend Toward Conflict-System Automation*, NAT'L L.J., Oct. 12, 1987, at 17, 22.

<sup>102</sup> An empirical study of Chicago law firms found a strong correlation between firm size and bureaucratic forms of firm governance. See NELSON, *supra* note 28, at 33.

<sup>103</sup> *Dresser Industries, Inc. v. Digges*, No. JH-89-485, 1989 U.S. Dist. LEXIS 16186 (D. Md. Sept. 5, 1989). For a discussion of the case, see Cornelia H. Tuite, *Partner Liability*, A.B.A. J., Sept. 1990, at 90.

<sup>104</sup> Tuite, *supra* note 103, at 90. As a result, the partners were found liable to the client for negligent supervision. *Id.*

<sup>105</sup> *But see In re Zang*, 741 P.2d 267, 286 (Ariz. 1987) (member of two-lawyer firm subject to discipline when his partner had charged an excessive fee, since "innocent" partner had participated in setting up firm's general fee system), *cert. denied*, 484 U.S. 1067 (1988). For signs of a reluctance to punish corporate executives when their negligent supervision facilitated crimes by other corporate agents, see *infra* notes 150-52 and accompanying text.

<sup>106</sup> 494 A.2d 801 (N.J. 1985).

<sup>107</sup> *Id.* at 801-02.

justice had warned in an earlier case that law firms should maintain an "organized routine for periodic review of a newly admitted attorney's files,"<sup>108</sup> no disciplinary charges were filed in *Yacavino* against any partner. The court stated that Yacavino's "office was lacking in the essential tools of legal practice"<sup>109</sup> and that MR 5.1(a) could be an appropriate basis for partner discipline in such cases.<sup>110</sup> No partner, however, was specifically in charge of the case Yacavino neglected; he had taken the case from a lawyer who was retiring.<sup>111</sup> The problem was not that someone given the task of monitoring Yacavino did it poorly; rather, the *firm* had failed to give anyone the task. One wonders, therefore, how any particular partner could have been singled out as an appropriate disciplinary target. The spectacle of disciplining *all* the partners in the firm remains a possibility of course, but not a very realistic one in a mid-sized firm.

With still larger firms, MR 5.1(a) has so far been a disciplinary dead letter. So long as the rule's up-to-date recognition of the importance of firm infrastructure is tied to the horse-and-buggy of individual discipline, the rule seems likely to remain so. To grasp the problem, consider a hypothetical posed by Professors Hazard and Hodes.<sup>112</sup> Partner *L* works in his firm's real estate department and has no involvement with firm litigation. Certain litigators at the firm are representing client *C* in a lawsuit. Associate *A*, unaware of that matter, unilaterally agrees to represent client *P* in an unrelated suit against *C*. When *C* finds out that a firm lawyer is opposing him and complains to the firm, *A* apologizes and withdraws from representing *P*. Hazard and Hodes assert that *A*'s acceptance of the case was an "unintentional (and temporary) violation" of the conflict of interest rules (probably so brief and unintentional that disciplinary authorities would not proceed against him).<sup>113</sup> *L*, they say, did not violate MR 5.1(b) or (c), even if *A* was carelessly supervised, since *L* was not *A*'s direct supervisor and could not have acquiesced in a conflict he never knew about. Yet, even if *L* played no active role in firm management, Hazard and Hodes find that he did violate MR 5.1(a), because his firm "as a whole had no mechanism for avoiding even obvious" conflicts like this one.<sup>114</sup>

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108 *In re Barry*, 447 A.2d 923, 926 (N.J. 1982) (Clifford, J., dissenting).

109 *Yacavino*, 494 A.2d at 803.

110 *Id.* at 803.

111 *Id.* at 802. Perhaps the retiring lawyer should have monitored the handling of his former cases, but for obvious reasons the disciplinary process has little leverage over a retiree.

112 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 455-56 (1985).

113 *Id.* at 456.

114 *Id.*

On this reading of MR 5.1(a), *L* and any or all of his partners could in principle be disciplined—except perhaps a partner who had unsuccessfully waged the good fight for a conflict avoidance program.<sup>115</sup> Yet the problem is that the firm “as a whole” had no avoidance program. Disciplinary authorities may have difficulty pinning this structural defect on particular partners (even on a managing partner), and they may be reluctant to try, for fear of scapegoating some lawyers for sins shared by others. Thus, authorities probably would not proceed against *L* or any other individual partner, even if Hazard and Hodes’s assertion that MR 5.1(a) offers a theoretical basis for doing so is correct. Accordingly, if we are to use professional discipline to encourage *L*’s firm to adopt a conflict-avoidance program, and, more generally, if we are to pursue the regulatory aims of MR 5.1(a) in the very firms where such programs are most important, then we may have to give disciplinary authorities the options of fining or censuring the *firm* or putting *it* on probation.<sup>116</sup>

#### D. The Growing Use of Firm-Appropriate Disciplinary Sanctions

Before 1970, many states used disbarment or suspension from practice as their chief disciplinary sanction.<sup>117</sup> A system of law firm discipline could never rely heavily on analogous sanctions. Unless the violation reflected a chronic pattern of serious misconduct, dissolving a law firm or temporarily shutting its doors would be inappropriate. Not only would dissolution generally deal too harshly with a firm’s entire legal and nonlegal staff, it might also be ineffective. The dissolved firm could simply open shop under a new name

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<sup>115</sup> *But cf.* *United States v. Starr*, 535 F.2d 512 (9th Cir. 1976) (corporate executive criminally liable for underlings’ acts even when he had made some efforts to stop them).

<sup>116</sup> *Cf.* *Stone*, *supra* note 67, at 31 (When the source of corporate wrongdoing lies primarily in bureaucratic shortcomings rather than in the isolated and deliberate act of any particular employee, the better policy is to focus the sanction on the enterprise.). This analysis would apply to collective firm decisions as well as to omissions; for example, it would apply both to a collective partnership decision to fire an associate who refused to participate in an overbilling scheme or to a partnership decision not to report to disciplinary authorities a firm member who committed a serious ethical violation. *See Wieder v. Skala*, 544 N.Y.S.2d 971 (N.Y. Sup. Ct. 1989) (dismissing wrongful discharge claim by associate who was allegedly fired for insisting that his law firm report another associate to disciplinary authorities), *aff’d on opinion of court below*, 563 N.Y.S.2d 930 (N.Y. App. Div. 1990); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1989) (duty to report other lawyers’ serious violations to disciplinary authorities); Los Angeles County Bar Ass’n Formal Op. 391 (1981), *cited in* Law. Man. on Prof. Conduct (ABA/BNA) 1704 (1984) (unethical to discharge an associate for refusing to approve fraudulent billings).

<sup>117</sup> Thus, 90% of the public sanctions imposed on New York City lawyers as late as 1968-69 were disbarments or suspensions. CLARK REPORT, *supra* note 42, at 95.

with slightly different personnel.<sup>118</sup>

Two reasons existed for the pre-1970 emphasis on disbarment as a disciplinary sanction. Both have lost their force, however, and sanctions that are quite appropriate for law firms—private reprimand, public censure, probation, and restitution—are now common.

One reason for the prevalence of disbarment as a sanction was that disciplinary agencies were so underfunded<sup>119</sup> that they could respond to only the most egregious offenses, often piggybacking on a criminal investigation of lawyer wrongdoing.<sup>120</sup> This began to change after the ABA's Clark Report found in 1970 that lawyer discipline was "scandalous[ly]" underdeveloped.<sup>121</sup> Between 1969 and 1975, disciplinary expenditures per lawyer more than doubled nationally<sup>122</sup> and discipline rates rose as well,<sup>123</sup> but disbarments *decreased* as a proportion of sanctions.<sup>124</sup> Commentators attributed the decrease to a new willingness of the increasingly professionalized disciplinary staffs to develop responses "appropriate to their caseload,"<sup>125</sup> which included many relatively minor offenses.

These trends have continued. From 1974 to 1975, the national rate of disciplinary spending per lawyer in practice was only \$17.73.<sup>126</sup> By 1989, to take a pace-setting example, each active member of the California State Bar was paying well over \$200 a year to fund the disciplinary system,<sup>127</sup> which in turn spent a whopping \$3800 per complaint processed.<sup>128</sup> Meanwhile, whereas the total number of public disciplinary sanctions imposed by the states grew by 162% from 1979 to 1988 (from 1230 to 3218), non-consensual disbarments increased by only about 100% (from 136 to 275) while probations grew by 450% (from 50 to 275) and impositions of fines,

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118 Cf. LARRY MAY, *THE MORALITY OF GROUPS* 100-01 (1987) (describing corporate reformation as a way to circumvent the criminal sanction of dissolution). However, temporarily debarring a firm from certain types of cases might be a practical and effective sanction. See *infra* text accompanying note 274.

119 CLARK REPORT, *supra* note 42, at 19.

120 Steele & Nimmer, *supra* note 46, at 923 (disciplinary agencies in the 1970's still relied heavily on public information concerning the criminal prosecution of an attorney to trigger an investigation).

121 CLARK REPORT, *supra* note 42, at 1.

122 Steele & Nimmer, *supra* note 46, at 942.

123 *Id.* at 945; Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 710-11 (1981).

124 Steele & Nimmer, *supra* note 46, at 945.

125 *Id.* at 945-46.

126 *Id.* at 942.

127 Mandatory state bar dues in California rose to \$417 in 1989, and 78% of bar revenues (some from non-dues sources) were used to fund the disciplinary process. Clyde Leland, *Why Pay More?*, CAL. LAW., July 1989, at 21.

128 *Id.*

restitution, or costs grew by 478% (from 149 to 861).<sup>129</sup>

The second reason why disbarment was the sanction of choice before 1970 is that discipline was then conceived largely as a device for "clean[ing] house";<sup>130</sup> discipline rid the profession of the presumably few lawyers who lacked the moral character to practice law. The severity of taking away a person's livelihood made disbarment appropriate only in cases of truly reprehensible conduct, and, conversely, such conduct carried a sufficient moral stigma to justify ouster from the profession. However, the philosophy of lawyer discipline has changed. Beginning with the Clark Report, references to the goal of removing unfit attorneys from practice have been coupled with an emphasis on the deterrent and educational functions of the disciplinary system.<sup>131</sup> Even if one believes that law firms, as artificial entities, cannot be morally culpable, law firm discipline has become an appropriate response to ethical infractions since discipline today need not imply serious moral blame.<sup>132</sup>

The post-1970 development of probation as a sanction illustrates the shift toward a disciplinary philosophy compatible with firmwide discipline. In Minnesota, for example, probation became a common sanction in the 1980s; the supreme court may now impose probation or disciplinary counsel and the lawyer involved may arrange for it by stipulation.<sup>133</sup> Probation is used "to help lawyers who have violated the disciplinary rules, but whose conduct likely

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<sup>129</sup> Compare ABA COMM. ON PROFESSIONAL DISCIPLINE, STATISTICAL REPORT: PUBLIC DISCIPLINE OF LAWYERS BY DISCIPLINARY AGENCIES, 1979-1983, at 70 (Aug. 1984) (Chart II, Pt. 1) with ABA COMM. ON PROFESSIONAL DISCIPLINE, STATISTICAL REPORT: SANCTIONS IMPOSED IN PUBLIC DISCIPLINE OF LAWYERS, 1984-88, at 25 (June 1989) (Chart II, pt. 1) (The point is not that the frequency of professional discipline rose dramatically in this period. Relative to the growth in the size of the legal profession, it may not have. The point is that there was a significant shift of attention toward less serious misconduct and milder sanctions.).

<sup>130</sup> JULIUS H. COHEN, *THE LAW: BUSINESS OR PROFESSION?* 109 (1916); see *Ex Parte* Wall, 107 U.S. 265, 288 (1882) (discipline designed to remove attorneys unfit to practice); Steele & Nimmer, *supra* note 46, at 925 ("The traditional perspective" is to "cleanse or purify the profession. The attorney's deviance sets him apart from other members of the profession, and he is removed by disbarment or suspension.").

<sup>131</sup> Steele & Nimmer, *supra* note 46, at 926.

<sup>132</sup> On the appropriateness of viewing artificial entities as morally responsible, see PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984). French argues that insofar as corporate behavior is shaped through an internal decisionmaking system and furthers corporate interests, that behavior may be described as "corporate intentional" and thus as something for which moral responsibility may properly be ascribed to the corporation. *Id.* at 44. Philosopher Larry May argues that corporations can be morally culpable under some circumstances but rejects French's view that one may attribute intentionality to a corporation. MAY, *supra* note 118, at 69-72, 89-106. See also Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991) (defining corporate intent in terms of corporate "ethos").

<sup>133</sup> William J. Wernz, *Probation as a Disciplinary Disposition . . .*, BENCH & BAR OF MINN., Apr. 1987, at 9. In 1986, Minnesota had 90 attorneys on probation. *Id.*

can be corrected so that they can continue to serve the public.”<sup>134</sup> It is often used in cases where attorneys have neglected files or maintained inadequate books and records.<sup>135</sup> To minimize the disciplinary agency’s burden in overseeing probations, supervising lawyers may be appointed to monitor a probationer’s practice. When probationers work in a firm, their partners are used as supervisors and are required to ensure that the probationers use proper office practices. In this respect, individual probation relies on the monitoring practices of the probationer’s law firm or, at a minimum, of his designated supervisor in the firm. From this arrangement, it would take no great leap to impose conditional probation on a *firm* whose monitoring practices have been proven deficient within the meaning of MR 5.1(a), as that rule might be extended to cover law firms.

### E. Summary

With the advent of prophylactic ethics rules, rules that address law firms directly, rules concerned with law firm monitoring, and firm-appropriate disciplinary sanctions, the bar and the courts have shaped professional discipline into a system that is suitable for regulating law firms as well as lawyers. The question that remains is whether it would be desirable to add that function to the system’s responsibilities.

## II

### THE ANALOGY TO CORPORATE CRIMINAL LIABILITY: THE USES OF INSTITUTIONAL RESPONSIBILITY

In recent years, society has come to rely heavily on collective criminal sanctions to shape the activity of private organizations, and especially business corporations.<sup>136</sup> From 1984 through 1987, over 1600 organizations were prosecuted in the federal courts alone.<sup>137</sup> Were it not for the common use of special disciplinary systems to regulate law practice and certain other professions, one suspects that the criminal law would be more widely used to regulate law firms and other professional entities.<sup>138</sup> Therefore, in evaluating

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<sup>134</sup> *Id.*

<sup>135</sup> *See id.*

<sup>136</sup> *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1229 (1979) [hereinafter *Developments in the Law*].

<sup>137</sup> Mark A. Cohen et al., *Report to the U.S. Sentencing Commission on Sentencing of Organizations in the Federal Courts, 1984-1987*, at 5, in U.S. SENTENCING COMM’N, DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS (July 1988) [hereinafter DISCUSSION MATERIALS].

<sup>138</sup> A few penal statutes target law firms. Under the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704 § 1, 102 Stat. 4677 (1988), for example, law firms, as “controlling persons,” can become civilly or criminally liable for insider trading violations by their employees. *See* George J. Mazin, *Avoiding Liability for*



the desirability of complementing the legal profession's system of individual discipline with law firm discipline, one can consider as an analogy the nature and function of corporate criminal sanctions vis-a-vis sanctions for individual corporate agents. Lawyers are to their firms, after all, as corporate agents are to their companies.

### A. The Role of Corporate Criminal Liability

Corporations and other artificial entities were once neither criminally nor civilly liable for the wrongs of their agents. As Christopher Stone explains, "[t]he size and structure of the early corporations were so unprepossessing that when a wrong was done, it was ordinarily not difficult to reach within the corporation to locate a responsible member or agent—a 'culprit'—and apply the sanctions of the law, quite sensibly, to him or her."<sup>139</sup> With the growth of complex enterprises in the United States, however, corporations and other artificial entities have become liable for both strict liability crimes and crimes of intent.<sup>140</sup> Generally, both a corporation and its agents can be convicted for the same offense.<sup>141</sup> In recent years, about half of the federal convictions of corporations have occurred in cases naming corporate employees as codefendants.<sup>142</sup>

Corporate criminal sanctions have become common for some of the same reasons that individual lawyer discipline alone may not effectively promote ethical practice in law firms. One such reason is the evidentiary problem of penetrating the corporate "black box" to locate the appropriate agent or agents to prosecute for a crime. Proving which individuals within an organization are responsible for a wrongful act is often difficult, and proceeding against the enterprise is often less costly and more fruitful.<sup>143</sup> Two other reasons

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*Employees Who Trade on Confidential Data*, LEGAL TIMES, June 12, 1989, at 22, 23 [hereinafter *Avoiding Liability*]. Law firms are advised to adopt written procedures and an ongoing monitoring system to avoid such liability. *Id.* More characteristically, Congress has been reluctant to regulate law practice through criminal law, largely on the ground that lawyers are already regulated at the state level in a specialized disciplinary system. In 1983, Senator Arlen Specter introduced a bill to amend the federal Mail Fraud Act, 18 U.S.C. § 1341 to require lawyers to "blow the whistle" on clients who intend to commit economic crimes; this whistleblowing would have been inconsistent with the lawyer's duty of confidentiality under the then pending Model Rules of Professional Conduct. See S. 485, 98th Cong., 1st Sess., 129 CONG. REC. 51219 (1983). After ABA leaders testified that lawyers should be regulated primarily at the state level and by courts, this bill died in committee. See *Lawyer's Duty of Disclosure Act: Hearings on S.485 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 33, 56 (1983) (statements of George Bushnell, Jr., Chairman, House of Delegates Comm. on Rules and Calendar, ABA, and Robert Hetlage).

<sup>139</sup> Stone, *supra* note 67, at 3-4.

<sup>140</sup> *Developments in the Law*, *supra* note 136, at 1246.

<sup>141</sup> *Id.* at 1244.

<sup>142</sup> Cohen et al., *supra* note 137, at 5, 15.

<sup>143</sup> Stone, *supra* note 67, at 29.

extend beyond problems of proof and apply even when one or more wrongdoing agents can be identified: the inherently structural nature of some corporate wrongdoing and the danger of scapegoating. Stone combines the points:

[T]he bulk of harm-causing corporate conduct does not typically have, at its root, a particular agent so clearly "to blame" that he or she merits either imprisonment or a monetary fine extracted in a public ceremony. . . . [To focus the sanction on the enterprise] has appeal when, for example, the society wishes to denounce the conduct and rehabilitate the actor, but the source of the wrongdoing seems to lie in bureaucratic shortcomings—flaws in the organization's formal and informal authority structure, or in its information pathways—rather than in the deliberate act of any particular employee.<sup>144</sup>

To say that the *bulk* of unethical conduct in law firms has organizational rather than individual roots may exaggerate the case. Yet it would be foolhardy to suppose, especially for the larger firms, that bureaucratic failings and collective decisions do not play a significant causal role.

A fourth justification for corporate criminal liability stems from the separation of ownership and management in many modern corporations. If the state sanctions only the corporate agent who commits a crime that is intended or likely to benefit the company, then the owners will often have no incentive to prevent, detect, or remedy such crimes, at least when the perpetrator has no indemnification right by which to pass her penalty on to the company. The owners, on this theory, will be both unjustly enriched by corporate crimes and uninterested in their prevention. On the other hand, imposing fines or other sanctions on the corporation will adversely affect corporate profits and give owners an incentive to monitor for wrongdoing.<sup>145</sup>

Critics of this view point out that if ownership and management are truly separate, then the owners cannot fairly be implicated in corporate wrongdoing and will have no leverage to reshape corporate practices so as to prevent it.<sup>146</sup> Most critics fall back on sanctions against the wrongdoing agents as the crucial safeguard;<sup>147</sup> others favor the imposition of corporate sanctions, such as probation, that directly intervene in corporate governance to rectify bu-

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<sup>144</sup> *Id.* at 31 (footnotes omitted). See also John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1125-29 (1977).

<sup>145</sup> See RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 226 (1976).

<sup>146</sup> See Comment, *Increasing Community Control over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280 (1961).

<sup>147</sup> See Coffee, *supra* note 51, at 409.

reaucratic shortcomings.<sup>148</sup> One might reasonably conclude that the case for organizational sanctions such as fines, restitution, or adverse publicity is strongest when ownership and management are somewhat distinct, yet not so sharply separated as to leave owners powerless to shape entity practices. The modern law firm is just such an organization; firms have increasingly specialized management, but all owner-partners are directly involved in the firm's operations.

### B. The Limits of Individual Agent Liability

Despite the modern development of corporate criminal liability, individual corporate agents remain liable for their work-related crimes. Liability attaches not only to actors who personally carry out the crimes but also to indirect actors. Indirect criminal action generally requires wilful or knowing complicity in the underlying crime. Under the Model Penal Code,<sup>149</sup> agents can be liable as indirect actors for ordering or specifically authorizing a corporate crime, for knowingly acquiescing in a crime they had the power and duty to prevent, or for wilfully ignoring the evidence of a corporate crime. However, there has been considerable reluctance to go further and make corporate officers liable as principals in a corporate crime for negligent or reckless supervision, or for negligent "failure to institute necessary safeguards" against corporate crime.<sup>150</sup> This reluctance exists even though the recognition of such broad managerial duties would help to remove a perverse incentive for executives to avoid knowledge of wrongdoing by their subordinates. While reforms calling for executive liability for negligent or reckless supervision have been proposed,<sup>151</sup> scholars point out that such reforms may be both unworkable, because supervision or monitoring is often the joint responsibility of many individuals, and ineffective, because juries and prosecutors are apt to nullify individual crimes that involve only negligence or recklessness.<sup>152</sup>

The implications for lawyer and law firm discipline are fairly clear. In imposing ethical duties of reasonable supervision solely on individual lawyers in firms, as MR 5.1 does, policymakers have probably been unrealistic. Just as legislatures, prosecutors, and juries are reluctant to sanction individual corporate agents for such offenses, disciplinary authorities may resist proceeding against law

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<sup>148</sup> See Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, 89 YALE L.J. 353 (1979).

<sup>149</sup> See MODEL PENAL CODE § 2.06(3)(a) (1962).

<sup>150</sup> *Developments in the Law*, *supra* note 136, at 1270.

<sup>151</sup> *Id.* at 1270-74.

<sup>152</sup> Stone, *supra* note 67, at 32-33.

firm partners. This, of course, strengthens the case for requiring law firms to supervise the ethical conduct of their lawyers.

### C. Two Categories of Corporate Criminal Liability

#### 1. Firm-Directed Standards

Two varieties of corporate criminal liability are of particular note in evaluating whether to implement a system of law firm discipline. First, some penal statutes directly address corporations and impose liability for failure to discharge a "specific duty of affirmative performance,"<sup>153</sup> such as a duty to file reports with an administrative agency. Taking this approach, a system of law firm discipline might address to law firms those ethics rules that implicate centralized firm functions, such as rules dealing with the handling of client funds, files, and property.<sup>154</sup> It might also address directly to law firms prophylactic ethics rules dealing with matters of ethical infrastructure; these rules might include a provision such as MR 5.1(a). The disciplinary system might go even further down this road and give specific content to the "reasonable efforts" standard of MR 5.1(a) by, for example, requiring law firms over a certain size to have new-business and ethics committees.<sup>155</sup>

Disciplinary rules that specify monitoring requirements in detail would have the desirable effect of giving law firms notice of their precise ethical obligations. Such prior notice would help foster in the legal community a stronger sense that firms deserve to be disciplined for violations.<sup>156</sup> Specific rules would also help to steer firms toward more ethical conduct without waiting for a long series of "common law" adjudications and ethics opinions to determine whether various monitoring practices satisfy the "reasonable efforts" test of MR 5.1(a).<sup>157</sup> The resulting reduction in adjudications and opinions would preserve disciplinary resources for other purposes.<sup>158</sup>

On the other hand, problems may arise if the specification of law firm monitoring practices becomes a boom industry. Whenever the law tells an enterprise precisely how to monitor its own work, it is "meddling in a process" about which policymakers are likely to know less than the enterprise managers themselves.<sup>159</sup> Given the enormous range in law firm size, as well as the structural diversity

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<sup>153</sup> MODEL PENAL CODE § 2.07(1)(b) (1962).

<sup>154</sup> See *supra* notes 88-95 and accompanying text.

<sup>155</sup> See *supra* notes 99-100 and accompanying text.

<sup>156</sup> See Stone, *supra* note 67, at 42-43.

<sup>157</sup> See *id.* at 41.

<sup>158</sup> See *id.*

<sup>159</sup> *Id.* at 38.

that exists among firms of comparable size,<sup>160</sup> few specific monitoring practices are likely to be worthwhile in all firms. Only when a monitoring practice is obviously worthwhile and could be imposed on a sufficiently uniform set of firms should it be crystallized into a disciplinary rule.<sup>161</sup>

## 2. *Respondeat Superior*

The second relevant type of corporate criminal liability is *respondeat superior*. Under federal law, organizations are liable for crimes committed by agents who act within the scope of their employment and with the intention of serving organizational interests.<sup>162</sup> These organizations are vicariously liable for their agents' job-related crimes, even when an agent acts without the knowledge or authorization of management and even if management has forbidden the conduct in question.<sup>163</sup> Moreover, the government need not prove that any specific agent acted illegally, but only that *some* agent committed the underlying crime. Thus, when a corporation is prosecuted on this theory, no individual codefendants are needed. Even when they exist, if a jury convicts the corporation but acquits the individuals, the conviction will stand.<sup>164</sup> Furthermore, a corporation is deemed to have acquired the collective knowledge of its employees; it cannot avoid a guilty verdict by showing that the relevant knowledge "was not acquired by any one individual employee who then would have comprehended its full import."<sup>165</sup>

The case for vicarious corporate criminal liability extends to disciplinary liability for law firms. Authorizing vicarious discipline for law firms when someone in the firm has committed an ethical infraction would enable a court or agency to impose discipline even when it cannot practically determine who committed the underlying offense or it is reluctant to proceed against specific lawyers because such action would amount to scapegoating. If a disciplined *firm* then considered it important to assign individual blame for the underlying infraction, it could do so on the basis of its own internal investigation. Geoffrey Hazard has examined the efficiency of internal firm investigations relative to formal disciplinary proceedings, which are

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<sup>160</sup> For structural variations among four large Chicago firms, see NELSON, *supra* note 28, at 91-124. See also Gilson & Mnookin, *supra* note 71, at 392 (noting drastically different approaches to lawyer compensation in two large and highly successful New York City firms).

<sup>161</sup> See Stone, *supra* note 67, at 39-40.

<sup>162</sup> MODEL PENAL CODE § 2.07 (1962); *Developments in the Law*, *supra* note 136, at 1247. Many states, however, treat the active participation of corporate officers or directors as a prerequisite to most corporate criminal liability. *Id.* at 1251-52.

<sup>163</sup> Parker, *supra* note 68, at 524.

<sup>164</sup> *Id.* at 523; *Developments in the Law*, *supra* note 136, at 1248-49.

<sup>165</sup> United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974).

“quasi-criminal, entail an intensely adversary process,” and “threaten the [individual] lawyer’s livelihood and standing in the community.”<sup>166</sup> Assessing the internal investigations that have been prompted by some civil suits against the larger firms,<sup>167</sup> Hazard notes that the firms are in a good position to obtain information from the lawyers in question, have ready access to the necessary records, and know the identity of relevant witnesses.<sup>168</sup>

Some commentators argue that blameworthiness should always be a prerequisite to criminal liability and that an entity cannot be blamed when it has taken reasonable steps to prevent wrongdoing by its agents. These commentators would allow a corporation to show as an affirmative defense in criminal cases based on *respondeat superior* (though not in civil suits, where compensation is involved) that it had implemented “reasonable safeguards designed to prevent [the underlying] crimes.”<sup>169</sup> Since this “due diligence” showing would constitute an affirmative defense, the prosecutor would not have to prove the corporation’s lack of reasonable preventive measures, but would have to rebut company evidence that reasonable measures were taken.

In designing a system of vicarious law firm discipline, policy-makers will have to decide whether to recognize a due diligence defense, which has already been built into the SEC’s disciplinary system for broker-dealers.<sup>170</sup> This defense avoids the overdeterrence that might result if sanctions were imposed on law firms which had already taken all cost-justified precautions to promote ethical behavior. Overdeterrence could occur whenever the gravity of the disciplinary sanctions, coupled with any malpractice liability or other nondisciplinary sanctions the firm experiences, is greater than the losses that the underlying ethical infraction has caused.<sup>171</sup> In

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<sup>166</sup> Geoffrey C. Hazard, Jr., *Fast Lane for Dispute Resolution*, NAT’L L.J., May 21, 1990, at 13. Cf. Coffee, *supra* note 51, at 408 (corporations are in a better position than the state to detect and punish crimes by their employees, partly because their use of internal sanctions is not subject to due process controls).

<sup>167</sup> *Id.*

<sup>168</sup> Professor Hazard has suggested to me that law firms will be no less aggressive than individual lawyers in defending against disciplinary charges. As often happens in criminal prosecutions of regulatory offenses, some proceedings against firms will be protracted and will tend to result in negotiated orders. Sanctions may therefore be “somewhat blunted,” he adds, “but by the same token the process is part of the punishment.” Letter from Geoffrey C. Hazard, Jr. to the author (Feb. 12, 1991) (on file with the *Cornell Law Review*).

<sup>169</sup> *Developments in the Law*, *supra* note 136, at 1257-58. For a strong criticism of the due diligence defense as resting on unrealistic assumptions about corporate governance, see Seth Maxwell, Comment, *The Foreign Corrupt Practices Act and Other Arguments Against a Due Diligence Defense to Corporate Criminal Liability*, 29 U.C.L.A. L. REV. 447 (1982).

<sup>170</sup> 15 U.S.C. § 780(b)(4)(E) (1976). For an overview of the defense as it operates in SEC disciplinary proceedings, see Longstreth, *supra* note 31.

<sup>171</sup> Parker, *supra* note 68, at 555.

such cases, the disciplinary system would encourage firms to take monitoring precautions that cost more than they are worth in terms of the harm prevented.

Rather than establishing a due diligence defense to safeguard against overdeterrence, disciplinary authorities would probably do better to seek only modest firm sanctions in many cases and to exercise their discretion in others to proceed solely against individual lawyers and not their firms. In the context of law firm discipline, a major drawback of the due diligence defense is that the decisionmaker would have to determine in each case whether a firm had exercised due diligence. These determinations may often be expensive and unreliable, because law firms have not yet standardized their monitoring techniques nearly to the degree that large brokerage houses and accounting firms have. Although disciplinary agencies are specialists in professional regulation and might eventually become experts on law firm operations and the meaning of due diligence, it seems wiser for now to give the agencies the option of subjecting law firms to vicarious discipline for their lawyers' job-related ethical infractions and to give the firms the discretion to then decide whether to abandon a questionable policy or develop new monitoring programs.<sup>172</sup> For example, if a firm was disciplined because an associate had padded her hours, the firm could decide for itself whether its policy of requiring associates to bill 2300 hours a year posed unacceptable ethical risks.

Alternatively, disciplinary agencies could allow a firm to show that it was exercising due diligence (even if it only began to do so after the underlying infraction occurred), not for purposes of exoneration, but in order to determine the appropriate sanction.<sup>173</sup> If, for example, a firm had a well-structured new-business committee in place (even if the committee only came into being after an improper conflict of interest had occurred), it would be senseless to sanction the firm by putting it on probation pending the creation of a satisfactory conflict-avoidance program.

If a system of law firm discipline provided for vicarious liability without a due diligence defense, one might ask why the system should also include the firm-directed rules calling for reasonable supervision that were suggested earlier. After all, in enforcing those rules the authorities would also have to make difficult determina-

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<sup>172</sup> Cf. POSNER, *supra* note 145, at 222 (to base antitrust liability on an inquiry into costs and benefits of each defendant's activity would unduly burden the courts and produce mistakes; it is better to impose sanctions and leave it to the defendant to decide whether the benefits of taking steps to avoid future violations are worth their costs).

<sup>173</sup> Cf. Coffee, *supra* note 51, at 445 (in criminal cases, organizational due diligence is better used as a consideration in sentencing than as a defense).

tions of the reasonableness of a firm's monitoring practices. The answer is that those rules would serve an indispensable function when the authorities discovered a clear lack of appropriate firm infrastructure or monitoring, yet lawyers in the firm had not yet committed an underlying ethical infraction. Concededly, such a discovery would be rare in a disciplinary system that has always relied heavily on reactive rather than proactive enforcement. However the system need not remain static in this respect; the authorities could enforce these particular rules proactively. Disciplinary agencies could, for example, require firms to report periodically on the measures they have taken to comply with the duty of reasonable supervision (and proceed against firms whose reports reveal clear inadequacies),<sup>174</sup> much as lawyers in some states must now report the location and nature of client trust accounts and allow those accounts to be audited.<sup>175</sup> If firm infrastructure is clearly deficient, a disciplinary agency should no more wait for harm to result than the police should wait for a driver with obviously poor brakes to hit someone before stopping him.

#### D. Corporate Criminal Sanctions

The criminal sanctions that are recognized as appropriate for convicted corporations can easily be converted into a sensible scheme of disciplinary sanctions for law firms. These sanctions include fines, restitution, adverse publicity, and probation.

##### 1. *Fines and Restitution*

Convicted corporations must often make restitution to their victims, as must lawyers in the disciplinary process.<sup>176</sup> Restitution, however, is sometimes not feasible; and in any event, restitution alone would insufficiently deter misconduct because it fails to reflect the fact that wrongdoing often goes undetected or unpunished.<sup>177</sup> As a result, the vast majority of corporate sentences include fines.<sup>178</sup>

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<sup>174</sup> Judge Edmund Spaeth has suggested that such reports be required of individual lawyers in order to aid in the enforcement of MR 5.1(a). See Edmund B. Spaeth, Jr., *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers?*, 61 TEMP. L. REV. 1211, 1234 (1988). He believes the requirement would force lawyers to attend to the need for proper monitoring. *Id.* See also Theodore J. Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 AM. B. FOUND. RES. J. 939, 948 (questioning whether MR 5.1(a) is intended as a prophylactic rule, in which case it may have to be enforced proactively, or is instead intended to simply fix responsibility within a law office once an underlying infraction has occurred).

<sup>175</sup> See, e.g., ARIZ. SUP. CT. RULES, Rule 43(b), (c) (1990).

<sup>176</sup> STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS § 6.12 & commentary (1979) [hereinafter cited as ABA STANDARDS].

<sup>177</sup> See POSNER, *supra* note 145, at 223-24.

<sup>178</sup> Parker, *supra* note 68, at 528.



Fines "speak" a corporation's language. They come directly out of corporate earnings but, unlike probation with conditions, do not require an intrusion into internal corporate affairs.<sup>179</sup>

Fines have traditionally not been authorized as a disciplinary sanction for lawyers. The *Standards for Lawyer Disciplinary and Disability Proceedings* reject fines because they are "punitive and criminal in nature" and "would erroneously imply that [disciplinary] proceedings are criminal and require proof beyond a reasonable doubt, trial by jury, and other standards of criminal due process."<sup>180</sup> This seems a very flimsy reason for rejecting fines as a disciplinary sanction. Lawyers, after all, are already subject to sanctions in the nature of fines for breaching the Federal Rules of Civil Procedure<sup>181</sup> or improperly preparing tax returns,<sup>182</sup> and are not afforded criminal due process protections in either of these instances.<sup>183</sup> Moreover, the Canadian<sup>184</sup> and English<sup>185</sup> legal professions, as well as the American nonlegal professions,<sup>186</sup> use fines as disciplinary sanctions.

Other reasons of course may support excluding fines as a disciplinary sanction for lawyers or law firms. Fines might be too difficult to gear to the losses occasioned by lawyer wrongdoing, but only

<sup>179</sup> As to the appropriate amount of the fine, Jeffrey Parker has suggested that the total corporate sanction for a crime should generally equal the loss caused by a corporate wrong multiplied by the chance of nondetection. *Id.* at 573-76. In calculating the appropriate fine, it may be important to consider not only the fine but also the reputational loss a company sustains when its crime is publicized. Jonathan Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Corporate Fraud 1-2* (March 1991) (unpublished manuscript on file with the *Cornell Law Review*). In the case of consumer fraud, a recent empirical study suggests that the market losses from a tarnished reputation can be extensive, often dwarfing criminal sanctions in significance. *Id.* at 18-27. By the same token, the reputational damage a law firm sustains as a result of public discipline might in some cases be substantial. See *supra* notes 47 & 71 and *infra* text accompanying notes 207-08.

<sup>180</sup> ABA STANDARDS, *supra* note 176, standard 6.14 & commentary.

<sup>181</sup> See *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (purpose of awarding attorneys fees as sanction for violation of Rule 11 of Federal Rules of Civil Procedure is not reimbursement of adverse party but "sanction"; the Rule visits "retribution" on the lawyer-violator); Arthur W. Andrews, *Rule 11 and the Nondeductibility of Monetary Sanctions Imposed upon Attorneys*, 32 ARIZ. L. REV. 279 (1990) (same).

<sup>182</sup> See, e.g., I.R.C. §§ 6694, 6695, 6713 (1986).

<sup>183</sup> On the limited procedural rights of lawyers charged with violating Federal Rule of Civil Procedure 11, compared with the rights of those charged with criminal contempt, see *Donaldson v. Clark*, 819 F.2d 1551, 1558-61 (11th Cir. 1987).

<sup>184</sup> See, e.g., British Columbia Legal Profession Act, ch. 226.5 R.S.B.C. § 55 (1988) (the Act authorizes disciplinary fines up to \$10,000).

<sup>185</sup> The Law Society's disciplinary system for English solicitors makes fines the sanction of choice for ethics violations that are not deemed to warrant disbarment. WOLF-RAM, *supra* note 16, at 141 n.6. The fines often amount to 750 pounds or more for each violation. *Id.*

<sup>186</sup> See, e.g., N.Y. EDUC. § 6511 (McKinney Supp. 1985) (providing for fines, not to exceed \$10,000 as a disciplinary sanction for professional infractions).

when the offense tends to cause intangible damage to the integrity of the legal system rather than monetary damage to clients or third parties.<sup>187</sup> The disciplinary agencies and state supreme courts might lack the constitutional authority to spend the proceeds of disciplinary fines; however, this seems unlikely because courts have occasionally imposed fines in the past<sup>188</sup> and routinely tax disciplined lawyers with the costs of their disciplinary proceedings.<sup>189</sup> Clearly, though, the traditional objection to disciplinary fines is a make-weight. Regardless of whether fines should be imposed on individual lawyers,<sup>190</sup> they should play a role in the disciplining of law firms, which as a practical matter, cannot be disbarred or suspended, are more capable of paying fines,<sup>191</sup> and are, like corporations, attentive to the bottom line. Fines could also help to defray any additional cost the disciplinary system incurred by taking jurisdiction over law firms.<sup>192</sup>

## 2. *Adverse Publicity*

Commentators have expressed considerable interest in adverse publicity as a corporate criminal sanction. For example, the *1970 Study Draft of the U.S. National Commission on the Reform of Federal Criminal Laws* made the following proposal for the reform of federal sentencing law: “[w]hen an organization is convicted of an offense, the court may in addition to or in lieu of other sanctions, . . . require the organization to give appropriate publicity to the conviction . . . by advertising.”<sup>193</sup> Adverse publicity works as a sanction by tarnishing a company’s reputation among customers and in the business community. Philosopher Peter French has argued that it is particularly suited to organizational offenders “because image and reputation are at the very heart of modern corporate life.”<sup>194</sup> He cites empiri-

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<sup>187</sup> On the difficulty of “monetizing” some harms as a drawback to using criminal fines as a sanction for organizational offenders, see Parker, *supra* note 68, at 584-85.

<sup>188</sup> See, e.g., *In re Reed*, 369 A.2d 686 (Del. 1977) (disciplined lawyer ordered to pay fine into client security fund); *In re Hanratty*, 277 N.W.2d 373 (Minn. 1979) (censure plus \$5000 fine imposed for false affidavit).

<sup>189</sup> WOLFRAM, *supra* note 16, at 141.

<sup>190</sup> For a forceful economic argument that fines should be used extensively as a disciplinary sanction for lawyers, see Bené, *supra* note 49.

<sup>191</sup> Cf. Parker, *supra* note 68, at 586 (organizations have advantages over individuals in satisfying criminal fines).

<sup>192</sup> By improving the disciplinary system’s capacity to deter lawyer misconduct, law firm discipline might actually reduce its overall expense. If not, any additional cost could be funded by a special levy on law firms (varying the payment with the number of lawyers in the firm), supplemented by costs and fines collected from firms that are found to have committed violations.

<sup>193</sup> U.S. NAT’L COMM’N ON REFORM OF FED. CRIMINAL LAWS, STUDY DRAFT OF A NEW FED. CRIMINAL CODE § 405(1)(a) (1970).

<sup>194</sup> *Id.*

cal evidence that corporate executives are often more concerned about the loss of corporate prestige from adverse publicity than about paying a fine.<sup>195</sup> More recently, economists Jonathan Karpoff and John Lott have shown that large companies suffer major market losses as a result of adverse publicity occasioned by fraud convictions, which suggests that the publicity itself is sometimes an adequate sanction for such offenses.<sup>196</sup>

One might argue that adverse corporate or law firm publicity is a redundant and thus undesirable sanction when a corporate agent is also convicted of a crime or when an individual law firm member is publicly disciplined.<sup>197</sup> On this theory, the publicized sanctioning of the individual would itself tarnish her firm's reputation. If, however, the convicted official or disciplined lawyer is regarded as simply a "bad apple," the opprobrium attached to that official may not tarnish her firm. Moreover, public reports of individual sanctions may not even link the individual to her organization. One study finds that when corporate executives were sentenced for work-related crimes, "fewer than a handful" of the surveyed newspapers that covered the stories mentioned the name of the perpetrator's corporation.<sup>198</sup> With respect to lawyer wrongdoing, press reports may mention the wrongdoer's firm,<sup>199</sup> but firm spokesmen often distance the firm from the wrongdoer and limit the reputational damage to the firm by claiming that the individual acted alone and in violation of firm procedures. Baker & McKenzie originally did this when its partner was cited for racist and sexist remarks in recruiting.<sup>200</sup>

Despite the potential effectiveness of adverse publicity as a sanction for corporate crime, the idea has been resisted in debates over sentencing policy. Thus, when the National Commission on Reform of the Federal Criminal Laws issued its *Final Report* in 1971, a majority held that although it would be appropriate to require a company to give notice of a conviction to the persons "harmed by the offense," presumably to maximize their opportunity for private

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<sup>195</sup> *Id.*

<sup>196</sup> Karpoff & Lott, *supra* note 179, at 18-27.

<sup>197</sup> Public discipline means disbarment, suspension or public censure, rather than private reprimand.

<sup>198</sup> Comment, *supra* note 146, at 289 n.35.

<sup>199</sup> See, e.g., Patricia Bellew Gray, *Legal Nightmare: Multiple Allegations of Impropriety Beset Sullivan & Cromwell*, WALL ST. J., Aug. 3, 1987, at A1; *On Wall Street, Blues for a Blue Chip Firm*, *supra* note 56; *A Question of Integrity at Blue-Chip Law Firms*, *supra* note 40.

<sup>200</sup> See Borden, *supra* note 1, at 30 (firm spokesman originally took the position that the incident was a "complete anomaly"); see also Tannenbaum, *supra* note 10, at 23 (lawyer who falsely told judge that documents sought in discovery had been destroyed insisted that "nobody in [his] firm had the slightest knowledge or suspicion or reason to suspect what [he] was doing").

actions, it rejected a broader proposal authorizing the courts to require notice to the "sector of the public interested in or affected by the conviction."<sup>201</sup> The broader proposal was rejected on the ground that it too closely approximated the use of "social ridicule as a sanction."<sup>202</sup> Concerns have also been expressed about the civil liberty implications of forcing organizations to adversely publicize themselves.<sup>203</sup>

The concern about social ridicule is that adverse publicity, because it relies heavily on "shaming," smacks of the pillory and is thus at odds with modern sentencing philosophy. This concern appears to be losing its force, however, both as to individual offenders<sup>204</sup> and, more to the point, as to organizations. In fact, the U.S. Sentencing Commission has recently promulgated guidelines that authorize the federal courts to order an organizational offender as a condition of probation to publicize, at its own expense and in a format and medium specified by the court, "the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses."<sup>205</sup>

As a disciplinary sanction for law firms, public censure, long used against individual lawyers, has all the attractions of adverse publicity as a criminal sanction and none of its drawbacks. On the upside, law firms would presumably be quite sensitive to the threat of public censure. In making extensive use of public relations, today's law firms display no less an interest than corporations in maintaining and enhancing their reputations.<sup>206</sup> Law firms also rely more heavily than sole practitioners on the "brand" loyalty of repeat clients<sup>207</sup> who may be scared away by adverse publicity. In addition, "shaming" sanctions are most effective when imposed on offenders who belong to a reasonably well-defined ethical community.<sup>208</sup> More so than the business world, the legal profession arguably is such a community, as evidenced by its specialized ethics codes.

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201 NAT'L COMM. ON REFORM OF THE FED. CRIMINAL LAWS, FINAL REPORT § 3007 (1971) (compare *Final Report's* unbracketed version with its bracketed alternative version).

202 *Id.* § 3007 comment.

203 Coffee, *supra* note 51, at 428.

204 See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1935-36 (1991) (criticizing the growing use of adverse publicity and other forms of "shaming" sanctions in criminal cases).

205 United States Sentencing Comm'n, *Sentencing Guidelines for Organizational Defendants*, § 8D1.4(a), 49 Crim. L. Rep. (BNA) 2059, 2086 (May 8, 1991).

206 See *supra* note 71 and accompanying text.

207 See *supra* note 47.

208 See Massaro, *supra* note 204, at 1916.

As for the alleged drawbacks of adverse publicity as a sanction, law firms as artificial entities lack the dignitary interests that make us uncomfortable about imposing shaming sanctions on individuals. For just this reason, law firms and other entities have no Fifth Amendment privilege against self-incrimination.<sup>209</sup> Moreover, there would be no need in a system of law firm discipline for adverse *self*-publicity. Public censure of individual lawyers traditionally has involved notices in court reports and in bar journals which the trade press or general circulation newspapers sometimes republish. A few jurisdictions also issue general press releases to publicize the names of disciplined attorneys and the nature and extent of their discipline.<sup>210</sup> While the *ABA Standards* regard the adverse publicity associated with public censure as largely for the "guidance of other lawyers,"<sup>211</sup> the ABA has not discouraged newspaper republication to the larger community. The press might consider the censuring of law firms, in contrast to individual lawyers, especially newsworthy.

### 3. Corporate Probation

In response to some corporate crimes, courts have begun to impose sentences of probation with conditions as a tool to correct bureaucratic practices that might facilitate further organizational misconduct.<sup>212</sup> This technique essentially extends to the criminal sphere the equitable remedies already available in civil and administrative actions against corporate defendants.<sup>213</sup> However, because probation conditions are intrusive and may not be cost-justified (considering both the company's compliance costs and the court's costs in monitoring for compliance), the U.S. Sentencing Commission has taken the position that courts should only use "preventive" probation when the offending company is otherwise unlikely to avoid a recurrence of criminal conduct.<sup>214</sup> Under the Commission's proposals, the court may require the company to submit a plan, per-

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<sup>209</sup> See, e.g., *Bellis v. United States*, 417 U.S. 85 (1974) (grand jury subpoena of law firm records in hands of former partner not subject to self-incrimination plea because he retained records in his custodial and not in his personal capacity); *In re Zisook*, 430 N.E.2d 1037 (Ill. 1981), cert. denied sub nom. *Zisook v. Attorney Registration and Disciplinary Comm.*, 457 U.S. 1134 (1982) (Fifth Amendment protects records of sole practitioner but not of professional corporation). The unavailability of the privilege to law firms as such may in some cases make it easier for disciplinary authorities to proceed against law firms rather than individual lawyers.

<sup>210</sup> See F. LaMar Forshee, *Professional Responsibility in the Twenty-First Century*, 39 OHIO ST. L.J. 689, 697 (1978) (discussing the practice in California).

<sup>211</sup> ABA STANDARDS, *supra* note 176, § 6.9 commentary.

<sup>212</sup> See John C. Coffee et al., *Standards for Organizational Probation* 2-3, in DISCUSSION MATERIALS, *supra* note 137.

<sup>213</sup> *Id.* at 7-8.

<sup>214</sup> United States Sentencing Comm'n, *supra* note 206, § 8D.1.1(a)(6).

haps based on an internal investigation,<sup>215</sup> for avoiding recurrences of the crimes in question, and may require periodic reports and inspections to ensure implementation of the plan.<sup>216</sup>

Disciplinary agencies already use probation to sanction individual lawyers.<sup>217</sup> The courts' use of probation for corporations suggests that it could also be effective against law firms. In order to avoid the danger of overdeterrence, however, a disciplinary agency should only resort to probation after finding that the firm can institute cost-justified institutional reforms that would be likely to prevent a recurrence of the offenses involved. For the same reasons that rulemakers should be slow to impose specific monitoring requirements on all law firms, disciplinary agencies should be slow to impose probationary conditions on an offending law firm. Nevertheless, if institutional reform is necessary, disciplinary agencies can narrowly tailor probation conditions to the circumstances of the firm in question.<sup>218</sup> If, for example, a law firm clearly needs a conflicts avoidance program to prevent recurring offenses, the disciplining authority could place the firm on probation until it adopts an adequate program but give the firm considerable leeway to define the parameters of the program.

### III

#### A REGULATORY NICHE FOR LAW FIRM DISCIPLINE?

Part II establishes the theoretical similarity between the accepted practice of imposing criminal liability on corporations and the proposed practice of imposing professional discipline on law firms. Whether this similarity warrants the creation of a system of professional discipline for law firms turns on the adequacy of other existing and proposed regulatory techniques. This section examines those techniques, some of which focus on law firms as well as individual lawyers, and considers whether law firm discipline is a desirable ingredient to add to the regulatory mix.

##### A. The Malpractice Claim

Clients and occasionally third parties who are injured by lawyer wrongdoing may bring civil claims to recover their losses—these claims include malpractice suits and claims grounded in other law.<sup>219</sup> In some cases, plaintiffs have based malpractice claims on

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<sup>215</sup> See Coffee et al., *supra* note 212, at 8.

<sup>216</sup> United States Sentencing Comm'n, *supra* note 206, § 8D.1.4(b), (c).

<sup>217</sup> See *supra* notes 134-35 and accompanying text.

<sup>218</sup> Cf. Stone, *supra* note 67, at 40-41 (making similar point about probation as a criminal sanction for corporations).

<sup>219</sup> WOLFRAM, *supra* note 16, at 206-41.

breach of an ethics rule that is deemed to set a professional standard of care,<sup>220</sup> though the organized bar has drafted its ethics codes so as to discourage such suits.<sup>221</sup> Under the doctrine of *respondet superior* and the law of partnership, law firms are liable for the work-related wrongs of all partners and associates. Moreover, firm partners or the shareholders of a professional corporation are personally responsible for the firm's professional liabilities; they do not enjoy the limited liability feature of corporate ownership,<sup>222</sup> a feature that can frustrate the use of civil actions as a deterrent to corporate misconduct.<sup>223</sup> Furthermore, rules of legal ethics bar lawyers from limiting by contract their malpractice liability to clients.<sup>224</sup>

While the prospect of civil liability alone should give firms considerable incentive to properly monitor attorney conduct, professional liability insurers provide additional pressure. Insurers have become increasingly interested in locating the causes of professional malpractice and pressing law firms to take precautions to avoid exposure.<sup>225</sup> One such company, the Attorneys' Liability Assurance Society (ALAS), which is owned and managed by the nearly 400 large law firms it insures,<sup>226</sup> employs a loss prevention counsel to consult with the insured firms on issues of loss prevention. Through these consultations, firms have been encouraged, for example, to maintain new-business and ethics committees.<sup>227</sup>

Civil liability is undoubtedly a powerful engine for promoting good law firm infrastructure. Yet civil liability also has significant limitations as a regulatory technique. First, to the extent that malpractice insurance premiums do not reflect a law firm's loss experience and risks, civil liability sends the firm an inadequate signal regarding the extent to which it should invest in avoiding losses.<sup>228</sup> By contrast, firms cannot insure against the costs associated with

220 See, e.g., *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir.), cert. denied, 449 U.S. 888 (1980); *Kirsch v. Duryea*, 578 P.2d 935 (Cal. 1978).

221 See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT, Scope ¶ 6 (1989); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677, 727-28 & n.289 (1989).

222 WOLFRAM, *supra* note 16, at 235-37.

223 Stone, *supra* note 67, at 65.

224 MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.8(h) (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102 (1981).

225 Geoffrey C. Hazard, Jr., *How to Cut the Cost of Malpractice*, NAT'L L.J., Dec. 17, 1990, at 15.

226 O'Malley, *supra* note 49, at 327.

227 *Id.* at 347, 362.

228 See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 47-50, 147 (1990). On the other hand, most malpractice insurance policies contain deductibles which give the insured firm a direct financial stake in avoiding liability. Deductibles may be especially large for large law firms which often work in high-risk fields such as securities and tax. RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 28.4 (3d ed. 1989).

disciplinary sanctions such as probation and adverse publicity. In addition, public policy could dictate that disciplinary fines imposed on law firms be neither tax deductible<sup>229</sup> nor insurable.<sup>230</sup>

Second, the requirement that a party suing a law firm have standing significantly limits civil liability's usefulness as a regulatory technique. Broadly speaking, only clients or others in privity with a lawyer may bring suit in the absence of intentional wrongdoing.<sup>231</sup> Yet attorney misconduct often victimizes adversaries, or the legal system itself. Such victimization would have occurred in the Kodak case, for example, had the attorney's lie about the existence of documents sought in discovery gone undetected before the case was decided.<sup>232</sup>

Third, even clients face formidable obstacles to recovering for malpractice. Clear instances of malpractice, such as failing to meet deadlines, often cause losses too small or too speculative to pursue in a malpractice claim.<sup>233</sup> Filing a grievance in the disciplinary process, on the other hand, costs a client nothing, though of course no pot of gold waits at the end of the disciplinary rainbow, either. Moreover, clients injured through loss of the opportunity to have their case properly handled often cannot surmount the legal hurdle of proving that the results would have been more favorable had their attorney represented them properly.<sup>234</sup> This is particularly true when the wrongdoing takes the form of bureaucratic failings, which by their nature relate in only a diffuse way to particular losses.<sup>235</sup> Thus, the practice in some firms of having two or more lawyers inspect all documents to be filed in court<sup>236</sup> might well be cost-justified, so that failure to take this precaution would constitute professional negligence; yet there is no assurance that this precaution would have prevented, say, Fried, Frank's filing of an unredacted document that accidentally disclosed damaging confi-

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<sup>229</sup> Cf. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126-27 (1989) (sanctions imposed on lawyer for filing frivolous pleading in violation of Rule 11 of Federal Rules of Civil Procedure are intended primarily to deter, and not to reimburse one's adversary); Andrews, *supra* note 181 (Rule 11 sanctions are fines and thus not tax deductible as business expense).

<sup>230</sup> Cf. Cary Caglianese, Note, *Insuring Rule 11 Sanctions*, 88 MICH. L. REV. 344 (1989) (discussing insurability of Rule 11 sanctions).

<sup>231</sup> WOLFRAM, *supra* note 16, at 223-26.

<sup>232</sup> See *supra* notes 3-4 and accompanying text.

<sup>233</sup> GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 288 (2d ed. 1988) (as of mid-1980s, over 70% of those eligible to recover for lawyer malpractice would have been entitled to less than \$1000 in damages).

<sup>234</sup> WOLFRAM, *supra* note 16, at 218-21.

<sup>235</sup> See Schneyer, *supra* note 174, at 948.

<sup>236</sup> See, e.g., Cutler, *supra* note 55, at 1550.



dential information about a client's identity.<sup>237</sup>

## B. Peer Review

In a peer review system, a professional organization articulates practice standards which a professional's peers then use to review and evaluate her work. Peer review generally focuses on issues of quality control and is designed not so much for discipline as for guidance and corrective purposes.<sup>238</sup> With the encouragement of either government agencies or private insurers, peer review systems already operate in the accounting, medical, and engineering professions.<sup>239</sup>

The bar has considered the creation of peer review programs since at least 1980, when an ALI/ABA group proposed a peer review system that stressed effective office management and infrastructure in promoting competent law practice.<sup>240</sup> This proposal called for two important types of peer review. The first involved voluntary consultation with an expert panel that operated like a management consulting firm.<sup>241</sup> The second, more formal system called for lawyers and judges who observed incompetence to refer the practitioner or firm to a Lawyer Competency Review Board established by a court for the judicial district.<sup>242</sup> The Board would articulate minimum standards of competence, investigate referrals and, if necessary, ask the referred party to participate in a remedial program. If the party refused, the Board could then refer the matter to disciplinary authorities.<sup>243</sup> One impetus for this referral program was a concern that the disciplinary system was too busy with more serious issues to deal effectively with problems of incompetence.<sup>244</sup>

The legal profession's hostility to these proposals has prevented their adoption. Many lawyers object to referral peer review because it would create a new level of regulatory bureaucracy and would intrude too greatly into a law firm's affairs, including matters involving client confidences. Thus, although peer review could encourage law firms to develop sound ethical infrastructures, the bar is unlikely to establish significant peer review programs anytime

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<sup>237</sup> See *supra* notes 6-7 and accompanying text.

<sup>238</sup> See Martyn, *supra* note 123.

<sup>239</sup> *Id.* at 305-09. Peer review is encouraged by the SEC in accounting, the U.S. Department of Health in medicine, and malpractice insurers in engineering. *Id.*

<sup>240</sup> ALI-ABA COMM. ON CONTINUING PROFESSIONAL EDUC., A MODEL PEER REVIEW SYSTEM 21, 24-25 (Discussion Draft Apr. 15, 1980).

<sup>241</sup> *Id.* at 41-44.

<sup>242</sup> *Id.* at 27-40.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 2.

soon.<sup>245</sup> Nevertheless, the system of law firm discipline outlined in Part II would give law firms some incentive to examine and improve their structure, policies and procedures without the intrusiveness of referral peer review; such self-examination would help close the regulatory gap between the legal profession and those professions that employ peer review programs. Moreover, a system of law firm discipline could piggyback on the existing disciplinary system and would not require a new judicial bureaucracy. Nor would it involve regular intrusions into law firm affairs so long as disciplinary agencies refrain from initiating investigations without first receiving a complaint. Should the disciplinary agencies go further, as suggested earlier,<sup>246</sup> and require law firms to report periodically on compliance with regulations such as MR 5.1(a), the occasional disciplinary investigation that might result would still be less intrusive than a full-blown referral peer review program.<sup>247</sup>

### C. Disqualification by Courts

Courts can use their authority to directly police the ethics of the lawyers appearing before them by disqualifying offending lawyers from further participation in a case.<sup>248</sup> A disqualification order typically runs against an entire law firm and not only against the offending lawyers.<sup>249</sup> The absence of adequate alternative regulatory techniques for use against law firms may result in the overuse of disqualification. At the same time, disqualification has serious limitations as a technique for regulating law firms. Since disqualification only responds to unethical conduct in litigation, it cannot regulate the large bulk of legal work that occurs out of court, including the transactional work that predominates in many large law firms. Even in the litigation context, courts are reluctant to disqualify except in response to unethical behavior that fundamentally taints the process,<sup>250</sup> such as cases involving conflicts of interest.<sup>251</sup> Courts sometimes refuse to disqualify because opposing counsel is

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<sup>245</sup> Martyn, *supra* note 123.

<sup>246</sup> See *supra* note 174 and accompanying text.

<sup>247</sup> A proactive system of law-firm discipline would intrude neither as regularly nor as deeply as a peer review program, which might implicate many aspects of lawyer competence beyond office management.

<sup>248</sup> See, e.g., WOLFRAM, *supra* note 16, at 329-37.

<sup>249</sup> *Id.* at 391-96. See also cases discussed in note 56 *supra*.

<sup>250</sup> See, e.g., Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (given the availability of state disciplinary machinery, no need to deal with many ethical violations in the very litigation in which they surface); Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975) (no disqualification; "if any corrective action is to be taken, it should be accomplished under the auspices of the appropriate bar association"); M. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 185 (1990).

<sup>251</sup> See WOLFRAM, *supra* note 16, at 391-96.

using the motion as a tactic to remove a party's counsel of choice.<sup>252</sup> Courts also recognize that disqualification motions can drive a wedge between lawyer and client as they decide how to respond<sup>253</sup> and that disqualification can have the unfortunate effect of visiting a lawyer's sins on his innocent client, who must then find and pay new counsel.<sup>254</sup> In the end, although disqualification motions provide an occasion for reviewing the ethical behavior of law firms, they are no substitute for law firm discipline.

#### D. Civil Sanctions

Rules of civil procedure govern the conduct of lawyers (and parties) in civil litigation. Courts can impose monetary or other sanctions for such procedural violations as discovery abuse, unnecessary delay, and frivolous motions or pleadings.<sup>255</sup> Some rules of civil procedure track the rules of legal ethics, and ethics rules ban the habitual or intentional flouting of rules of procedure.<sup>256</sup> Consequently, the civil sanction and professional discipline systems sometimes overlap, and disciplinary authorities often defer to the trial courts in policing this specialized field. Yet even here, the law has recently developed in a direction that supports the recognition of law firms as potential targets of professional discipline.

In 1989, the Supreme Court decided in *Pavelic & Leflore v. Marvel Entertainment Group*<sup>257</sup> that a court may only impose sanctions under Rule 11 of the Federal Rules of Civil Procedure against the lawyer who signs a frivolous pleading or motion. The lawyer's firm, though counsel of record, is not liable, even if other lawyers in the firm worked on the filing in question.<sup>258</sup> The Court based this conclusion largely on the plain meaning of Rule 11,<sup>259</sup> while the lower court decisions, finding that the law firm could be liable for sanctions, made policy arguments that recapitulate some of the arguments offered here in favor of a system of law firm discipline. The district court argued that the firm "should have as much of a stake in

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<sup>252</sup> See, e.g., *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979).

<sup>253</sup> See James Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. B. FOUND. RES. J. 419, 432-33.

<sup>254</sup> See, e.g., WOLFRAM, *supra* note 16, at 318; Comment, *The Availability of the Work Product of a Disqualified Attorney: What Standard?*, 127 U. PA. L. REV. 1607 (1979).

<sup>255</sup> See GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 137-40 (1990); WOLFRAM, *supra* note 16, at 593-600.

<sup>256</sup> See HAZARD & KONIAK, *supra* note 255, at 139-40.

<sup>257</sup> 493 U.S. 120 (1989).

<sup>258</sup> *Pavelic*, 493 U.S. at 124.

<sup>259</sup> *Id.* However, the Court suggested that it might be sound policy to focus all responsibility for a frivolous pleading on the signing attorney rather than diffusing that responsibility by imposing sanctions on his or her firm. *Id.* at 125-26.

certifying the factual and legal basis of a paper as the individual who signs it on the partnership's behalf, for only then will the potential of the rule in curbing abuses be fully recognized."<sup>260</sup> On appeal, the Second Circuit found that pleadings and motions are often the joint products of "background preparation and drafting by several attorneys."<sup>261</sup> Consequently, under the district court and Second Circuit's rationales, courts can assign responsibility where it belongs only by holding firms accountable for the signature of their partners and associates. Moreover, holding only the actual signer responsible "might encourage the sharp practice of having the most junior (or most impecunious) attorney sign a potentially offending paper."<sup>262</sup>

Rule 11 as construed in *Pavelic* may well deter law firms too little from filing frivolous motions and pleadings. If so, law firm discipline could fill that gap. Model Rule 3.1 already parallels Rule 11 by making the filing of frivolous documents a disciplinable offense;<sup>263</sup> it could be amended to address firms as well as lawyers. In any event, direct judicial sanction for violations of the rules of civil procedure is too specialized a regulatory system to deal with much of the unethical behavior that occurs in law firms.<sup>264</sup>

### E. Administrative Sanctions

An even more highly specialized system for regulating lawyers bears mention because bar complaints about its existence support the case for giving state disciplinary authorities the power to proceed directly against law firms. Some federal agencies claim the authority to discipline the lawyers who appear before them.<sup>265</sup> The

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<sup>260</sup> *Calloway v. Marvel Entertainment Group*, 650 F. Supp. 684, 687 (S.D.N.Y. 1986).

<sup>261</sup> *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1479 (2d Cir. 1988).

<sup>262</sup> *Id.* Though law firms cannot be sanctioned after *Pavelic* for Rule 11 violations, policy considerations should still justify the imposition of sanctions on firms or offices for violating other rules of civil procedure. *See, e.g., Harrell v. United States*, 117 F.R.D. 86, 92 (E.D.N.C. 1987) (censuring an assistant U.S. attorney "and the Office of the United States Attorney" after the attorney failed to appear for a pretrial conference, in violation of Federal Rule 16(f); the failure was apparently due to the lack of an effective "tickler" system in the office). Presumably on these policy grounds, the Standing Committee on Rules of Practice and procedure of the Judicial Conference of the United States has circulated for public comment a proposed amendment that would authorize judges to impose Rule 11 sanctions on a signing lawyer's law firm. *See Federal Rules: Major Changes Sought by Judicial Conference Working Group*, 60 U.S.L.W. 2158 (Sept. 10, 1991).

<sup>263</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1989).

<sup>264</sup> *See WOLFRAM, supra* note 16, at 687.

<sup>265</sup> *See generally* Michael P. Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, 34 CASE W. RES. L. REV. 173 (1983); Arthur Best, *Shortcomings of Administrative Agency Discipline*, 31 EMORY L.J. 535 (1982). At the state level, courts have sometimes struck down on separation-of-powers grounds legislation authorizing administrative agencies

most aggressive agency in this respect has been the SEC, which has exercised disciplinary authority over lawyers under Rule 2(e) of its Rules of Practice.<sup>266</sup> The SEC has used its authority under Rule 2(e) sparingly. It has declined to develop its own standards of legal ethics,<sup>267</sup> and has usually proceeded under Rule 2(e) only against lawyers already found to have violated or aided in violation of the securities laws.<sup>268</sup> Even so, the organized bar has never accepted the SEC's disciplinary authority, arguing that state supreme courts, not federal agencies, should regulate the practice of law.<sup>269</sup>

The merits of the bar's position turn in part on whether state authorities have disciplinary power that is as extensive as the authority the SEC or other agencies have exercised over lawyers practicing before them.<sup>270</sup> In this respect it is interesting to note that the SEC has proceeded under Rule 2(e) against a law firm, not just against individual lawyers.<sup>271</sup> In *In re Keating, Muething & Klekamp*,<sup>272</sup> the SEC instituted disciplinary proceedings against a law firm whose chief client had extensively violated the securities laws. The client accounted for as much as eighty percent of the firm's billings. Finding that almost every member of this "captive" law firm was aware of or involved in one or more of the client's offending securities transactions, the agency entered into a consent decree whereby the firm was not only debarred briefly from SEC work, but undertook to

to discipline the lawyers who appear before them. See, e.g., *Husted v. Workers' Compensation Appeals Bd.*, 636 P.2d 1139 (Cal. 1981).

<sup>266</sup> 17 C.F.R. § 201.2(e) (1990). The SEC has also occasionally sought injunctions against law firms for violating the securities laws, as in the *National Student Marketing* case. See *supra* notes 12-15 and accompanying text.

<sup>267</sup> See Daniel L. Goelzer, *The Role of Government*, in LAW PRACTICE QUALITY EVALUATION: AN APPRAISAL OF PEER REVIEW AND OTHER MEASURES TO ENHANCE PROFESSIONAL PERFORMANCE 211, 213 (Sept. 10-12, 1987) (ALI/ABA Report on the Williamsberg Peer Review Conference).

<sup>268</sup> *Id.* at 214-15.

<sup>269</sup> *Id.* at 211-12. See generally ABA Resolution 103 (adopted by ABA House of Delegates, Feb. 6-7, 1989) (resolving that the ABA "opposes the regulation of the practice of law by executive or legislative bodies, whether national, state or local").

<sup>270</sup> For other relevant policy considerations, see Note, *SEC Disciplinary Proceedings Against Attorneys Under Rule 2(e)*, 79 MICH. L. REV. 1270 (1981).

<sup>271</sup> The SEC also proceeds under Rule 2(e) against accounting firms and not just individual accountants. For a discussion of such cases, see Daniel L. Goelzer & Susan Ferris Wyderko, *Rule 2(e): Securities and Exchange Commission Discipline of Professionals*, 85 Nw. U. L. REV. 652, 663-64 (1991). Congress has also given the SEC authority under the Insider Trading and Securities Fraud Act of 1988 to proceed civilly or criminally not only against individuals who violate insider trading rules, but also against the organizations, including law firms, who employ such individuals. Mazin, *supra* note 138. Thus, any law firm is at risk if it does not take reasonable steps to prevent insider trading abuses by its employees which if committed by lawyers would themselves be grounds for professional discipline.

<sup>272</sup> *In re Keating, Muething & Klekamp*, Exchange Act Release No. 15,982 [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,124 (July 2, 1979), 17 SEC Docket 1149, 1156 (July 17, 1979).

adopt "internal and supervisory procedures which are reasonably designed to ensure" that a lawyer preparing disclosure documents to be filed with the Commission includes all material facts about the client which are known to other lawyers in the firm.<sup>273</sup> In other words, the SEC asserted that the law firm had violated a professional standard much like Model Rule 5.1(a) as applied to securities work, and employed a probation-like remedy to prevent further misconduct.

Assuming that the SEC had authority to proceed under Rule 2(e) in *Keating*,<sup>274</sup> the involvement of many of the firm's lawyers in the misconduct made it both fair and wise for the agency to proceed against the law firm as a whole. The case therefore lays down a challenge to the organized bar. If the bar continues to oppose the disciplinary authority of the SEC and other administrative agencies, it should arguably work to give local disciplinary authorities the same weapons against lawyer wrongdoing that the SEC has developed. This arsenal includes the authority to proceed against law firms as such.

#### F. Summary

Law firms, like individual lawyers, can be directly regulated through malpractice litigation, disqualification, civil sanctions, peer review, and oversight by the administrative agencies before which they sometimes practice. But just as the availability of these alternative controls has not obviated the need for individual lawyer discipline, so these techniques, even in tandem, are either too little used or too limited in reach to make law firm discipline a superfluous reform. As they presently operate, these techniques are, at best, complements to state-supreme-court administered discipline for law firms, not substitutes for it.

#### CONCLUSION

The trend toward law firms, and large firms in particular, as a practice setting makes it important to consider whether to extend to law firms the professional disciplinary system that has long existed for lawyers. Emphasizing the increasingly bureaucratic nature of law firm governance, this Article argues for such an extension by analogy to the regulation of corporate crime. It also argues that recent developments in legal ethics and disciplinary enforcement have

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<sup>273</sup> *Id.* ¶ 81,989, 17 SEC Docket at 1157.

<sup>274</sup> In a dissent, Commissioner Roberta Karmel questioned the authority of the SEC to proceed under Rule 2(e) against lawyers and, especially, against law firms. *Id.* ¶¶ 81,992-96, 17 SEC Docket at 1151-63. The law firm's consent to the decree left this issue unresolved.

brought us to the point where firm discipline would only be an incremental, not a radical, step forward. Finally, this Article argues that other modes of professional regulation, existing or proposed, do not undermine and may actually strengthen the case for law firm discipline.

A number of questions remain concerning the implementation of a system of law firm discipline which this Article has not fully addressed—how to fund the system,<sup>275</sup> how disciplinary bodies will gain jurisdiction over law firms,<sup>276</sup> whether they should also take jurisdiction over other entities in which lawyers practice,<sup>277</sup> and who should have jurisdiction over a firm with branches in several states.<sup>278</sup> These matters are secondary. For now, debate should focus on the merits of the general proposal.

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<sup>275</sup> See *supra* note 192.

<sup>276</sup> The system would presumably require law firms to register with disciplinary agencies, as individual lawyers do, for identification and record-keeping purposes. The California State Bar Act already requires registration for law firms organized as professional corporations. CAL. BUS. & PROF. CODE § 6161 (West 1986). Interestingly, the Act also requires law corporations to comply with all ethics rules addressed to individual lawyers and provides a mechanism (apparently unused so far) by which disciplinary sanctions can be imposed on firms that fail to comply. *Id.* §§ 6167, 6169. Agencies could gain jurisdiction over law firms, however, without actually licensing firms. The state supreme courts could simply require lawyers to work only in firms that make themselves amenable to disciplinary actions.

<sup>277</sup> See *supra* note 87.

<sup>278</sup> Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 & comment 2 (1989) (addressing the problem of disciplining lawyers admitted to practice in more than one jurisdiction).