ON FURTHER REFLECTION: HOW "PROFESSIONAL SELF-REGULATION" SHOULD PROMOTE COMPLIANCE WITH BROAD ETHICAL DUTIES OF LAW FIRM MANAGEMENT

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American lawyers continue to be regulated under a regime that took shape when solo practice was the norm. Overseen by the state supreme courts, that regime enforces a comprehensive code of legal ethics in a disciplinary process that is highly reactive, triggered only after someone files a complaint charging a lawyer with misconduct. This Article questions the adequacy of the regime to promote ethical compliance in today's law firms and other lawyer workplaces, which require extensive management. In these settings, compliance depends not only on the individual lawyer's practice skills and values, but also on the quality of what the Article terms the "ethical infrastructure" of the workplace. The ABA's Model Rules of Professional Conduct recognized this in 1983 by requiring law firm "partners" to make reasonable efforts to ensure (1) that their "firm has in effect measures giving reasonable assurance that [firm lawyers] will conform to the rules" and (2) that the conduct of the firm's nonlawyers will be "compatible with" the lawyers' duties. Many states have adopted these rules, but they are rarely enforced in the disciplinary process. This Article argues that three features of the traditional regime make it hard to enforce these broad duties of management sufficiently to encourage the implementation of sound ethical infrastructures. It then considers how to make enforcement more effective and concludes that the

* Milton O. Riepe Professor of Law, University of Arizona James E. Rogers College of Law. The articles in this Symposium were all written on the occasion of my retirement after twenty-five wonderful years on the faculty of the University of Arizona James E. Rogers College of Law. I am very grateful to the other participating authors for producing an excellent set of articles while somehow finding a way to use my work as a point of departure. Thanks also to my colleague-in-retirement Barbara Atwood, whose initiative made the Symposium possible; to Dean Larry Ponoroff for his support; to Donna Shafer, Janet Brauneis, and other staff members for their time and administrative skill; and to the editors of the *Arizona Law Review* for their hard work and patience. My Article is unusually personal, tracing as it does the evolution of my thinking over the years about certain problems in the regulation of law practice. This seemed appropriate for the occasion.

most promising reform, suggested by recent regulatory reforms in Australia, would be more proactive, management-based regulation.

INTRODUCTION

For many years, the state supreme courts,[1] in tandem with the mainstream bar,[2] have regulated law practice in the system lawyers call "professional self-regulation" (PSR).[3] The defining features of PSR as it has evolved since 1908[4] are these: the courts admit lawyers to practice in their states and promulgate a code of professional conduct to govern them. The codes are comprehensive and general enough to apply to lawyers of every stripe and promote a sense of professional solidarity. Code rules are largely proposed by the bar and interpreted in the bar's advisory ethics opinions.[5] The courts authorize the bar or a judicial agency to receive and process complaints charging lawyers with misconduct. And the courts and disciplinary bodies impose discipline ranging from private warnings to disbarment on lawyers found to have breached code rules.[6]

Until 1975 or so, PSR's primacy in regulating law practice was clear. Since then, however, three other regulatory systems have gained prominence. In those systems, courts and juries impose civil or criminal liability on lawyers for

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1. As used here, the term "state supreme courts" refers to the high courts in each state and the District of Columbia that regulate the practice of law, not all of which bear that title or are the highest courts in their jurisdiction.

2. By the "mainstream bar" I mean the American Bar Association (ABA) and the state and local bar associations but not the many associations of more recent origin that represent lawyers who have a common specialty, clientele, practice forum, or type of workplace.

3. In a bow to common usage, this Article also calls the system "professional self-regulation" or "PSR," though the term is a misnomer (unless one views judges as lawyers in robes). In PSR, the authority to regulate lies with the courts, but the courts delegate various tasks to the mainstream bar or their own agencies, and often rely on bar recommendations concerning regulatory programs and policies. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 33–34 (1986) (discussing bar organizations as regulators).

4. In 1908, the ABA adopted its first legal ethics code. *See* CANONS OF ETHICS (1908), *reprinted in* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395 app. at 1–16 (2003). There were originally 32 Canons; Canons 33–47 were added later. The Canons as amended were renamed the Canons of Professional Ethics and were supplanted in 1969 by the ABA Model Code of Professional Responsibility ("Model Code"). In 1983, the Model Code was supplanted by the ABA Model Rules of Professional Conduct.

5. *See* Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 68–92 (1981). For background on the origin, development, and operation of bar committees that render ethics opinions, see *id.* at 69–71 & nn.4–12. Though not binding, ethics opinions are a proactive form of regulation insofar as they inform lawyers *ex ante* about the conduct that is permissible, required, or prohibited under the rules of professional conduct.

6. *See* WOLFRAM, *supra* note 3, at 22–32, 48–67, 79–117 (providing an overview of PSR's history and structure).

malpractice or professional misconduct;[7] courts directly regulate the lawyers who appear before them;[8] and certain federal agencies directly regulate lawyers who represent clients on matters within their jurisdiction.[9] The prominence of these systems today puts PSR's primacy in doubt[10] and some lawyers worry that regulatory authority is "slipping away from the bar."[11]

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7. The expansion of lawyers' civil liabilities has prompted some malpractice carriers to advise insureds on loss prevention, condition coverage on the use of loss prevention methods, and limit coverage to certain fields of practice. *See* Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1996); Robert E. O'Malley, *Preventing Legal Malpractice in Large Law Firms*, 20 U. TOL. L. REV. 325 (1989). On the criminal side, the U.S. Justice Department has used federal statutes in recent years to patrol fields of practice such as securities class actions, mass tort litigation, and bankruptcy. *See* Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 573 & nn.55–57 (2005); *see also* Jonathan D. Glater, *Big Penalty Set for Law Firm, but Not a Trial*, N.Y. TIMES, June 17, 2008, at A1 (reporting that the securities class action firm Milberg Weiss Bershad Hynes & Lerach had agreed to pay a $75 million fine in order to avoid a criminal trial on federal charges filed after a seven-year investigation).

8. For example, courts regularly disqualify lawyers from participating in cases on conflict of interest grounds. *See, e.g.*, Buckley v. Airshield Corp., 908 F. Supp. 299, 303–05 (D. Md. 1995) (treating disqualification as a tool for preserving public confidence in the judicial process). And they often sanction lawyers for discovery abuse and other procedural violations. *See, e.g.*, Zubulake v. UBS Warburg L.L.C., 229 F.R.D. 422, 431–34 (S.D.N.Y. 2004) (imposing detailed duties on litigators to ensure compliance with E-discovery rules); *see also* Debra Cassens Weiss, *E-Discovery Sanctions Reach All-Time High for Litigants and Lawyers*, A.B.A. J. NEWS, Jan. 13, 2011, http://www.abajournal.com/news/article/e-discovery_sanctions_reach_all-time_high_for_litigants_and_lawyers.

9. For example, as mandated by section 307 of the Sarbanes–Oxley Act, 15 U.S.C. § 7245 (2006), the SEC now has detailed rules for lawyers who "appear[] and practic[e]" before the agency on behalf of public companies. Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. §§ 205.1–.7 (2010). The Treasury Department has long had rules for federal tax practice and, in response to a recent wave of allegedly abusive tax shelters, has issued detailed rules governing the provision of tax advice and rendering of tax opinions. Best Practices for Tax Advisors, 31 C.F.R. §§ 10.33–.37 (2010). And, during the "savings and loan crisis" in the 1990s, federal banking authorities brought crushing lawsuits and administrative enforcement actions against law firms that allegedly violated professional standards as well as banking laws while representing soon-to-fail thrift institutions. *See* Steve France, *Unhappy Pioneers: S&L Lawyers Discover a "New World" of Liability*, 7 GEO. J. LEGAL ETHICS 725 (1994).

10. While there is little coordination and no clear division of labor between PSR and the other systems, there is considerable interplay between the norms they apply. For examples of that interplay suggesting that the direction of influence between the ethics rules that govern lawyers in PSR and the rules of practice that federal agencies apply may be shifting in favor of the latter, see Ted Schneyer, *How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules*, 2008 J. PROF. LAW. 161, 169–70, 179–81.

11. Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. CAL. L. REV. 987, 1017 (1993); *see also* Jack R. Bierig, *Whatever Happened to Professional Self-Regulation?*, 69

Two trends in law practice since 1975 also pose challenges for PSR. First, with many lawyers changing jobs, many law firms operating in multiple jurisdictions, and fewer lawyers confining their practice to one state, it is often unclear whose ethics rules govern a lawyer's conduct. Virtually all states now use the ABA Model Rules of Professional Conduct ("Model Rules") as the template for their codes,[12] but their rules are not uniform in substance and sometimes conflict, raising choice-of-law issues.[13]

Second, law practice has become highly specialized.[14] Specialists are apt to find a one-size-fits-all ethics code too general to provide much guidance, and many specialty bar associations issue their own, non-binding practice guidelines, which are sometimes in tension with the Model Rules.[15] For that and other reasons,[16] the practice norms that specialists follow may now be more bound up with their specialty than with their status as lawyers per se.

Yet PSR has proven to be resilient. The ABA recently amended the Model Rules to adapt to the increase in lawyer mobility[17] and many states have followed suit.[18] The regulatory center of gravity may be shifting toward

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A.B.A. J. 616, 616–17 (1983). For their part, ABA leaders regularly defend PSR against federal inroads. *See* James Podgers, *Off the Mat: After a Beat-Down Nine Years Ago, Multi-Disciplinary Practice May Get Another Look from the ABA*, A.B.A. J. NEWS, Aug. 1, 2009, http://www.abajournal.com/magazine/article/off_the_mat/ (citing examples).

12. Unless otherwise noted, references in this Article are to the Model Rules as of Jan. 1, 2011.

13. *See* Richard Acello, *New York Makes Itself a 'Model' State: California Now the Only Holdout on Adopting the ABA Model Rules*, A.B.A. J. NEWS, Sept. 1, 2009, http://www.abajournal.com/magazine/article/new_york_makes_itself_a_model_state/.

14. *See* JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 37 (2005) (reporting, based on a large field study of Chicago lawyers in 1995, that one-third of the respondents confined their practices to only one of forty-six narrowly defined practice fields).

15. *See, e.g.*, AM. ACAD. OF MATRIMONIAL LAW, THE BOUNDS OF ADVOCACY: STANDARDS OF CONDUCT, Preliminary Statement (1991) (stating that "with rare exceptions, issues relevant to only a specific area of practice cannot be addressed . . . [in the Model Rules and] many Fellows have encountered instances where the [Model Rules] provide insufficient or even undesirable guidance").

16. Because sizable law firms are now divided into practice groups defined by specialty field or clientele, their lawyers "draw many of their norms and much of their practice culture from colleagues working in the same specialty." MILTON C. REGAN, JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER 8 (2004).

17. Recent amendments extend a state's disciplinary jurisdiction to include lawyers who are only admitted elsewhere but provide or offer to provide legal services in that state, MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (2010); provide choice-of-law principles for disciplinary cases when two or more states' ethics rules might apply, but conflict, *id.* R. 8.5(b); permit lawyers admitted in one state to provide services temporarily in another, *id.* R. 5.5(c); and narrow the circumstances in which former-client conflicts of a lawyer who moves from one firm to another are imputed to lawyers in the new firm, *id.* R. 1.10(a).

18. *See* Martin Whittaker, *Admissions: Significant Regulatory Challenges Remain Even Though Most States Have MJP Rules*, 25 Law. Man. on Prof. Conduct (ABA/BNA) 573 (Oct. 14, 2009) (citing reports that a large majority of U.S. jurisdictions

Washington,[19] but only in a piecemeal fashion; there has been no concerted effort to federalize PSR's core functions. And mainstream bar associations, acting as stewards for a system they consider vital to protect lawyers and clients from government over-reaching, fiercely resist federal "intrusions,"[20] with considerable success.[21]

In short, PSR is not moribund, but the situation is fluid and the impetus for federalization will continue.[22] In this environment, PSR's long-term stability

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have adopted recent Model Rules amendments that ease restrictions on multi-jurisdictional practice).

19. *See generally* John Leubsdorf, *Things Fall Apart*, 57 BUFF. L. REV. 959 (2009) (identifying a broad array of federal statutes and regulations that govern lawyers specifically or as members of a broader class of service providers).

20. "Self-regulation . . . helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice." MODEL RULES OF PROF'L CONDUCT, pmbl. cmt. 11 (2010).

21. *See, e.g.*, Am. Bar Ass'n v. Fed. Trade Comm'n, 430 F.3d 457, 471–72 (D.C. Cir. 2005) (upholding an ABA challenge to the claim that the Gramm–Leach–Bliley Act of 1999 authorized the FTC to regulate law firms as "financial institutions"); *see also* Rhonda McMillion, *Let the States Do It: The ABA and Other Bars Are Working to Limit Federal Regulation of Lawyers*, A.B.A. J. NEWS, Dec. 1, 2010, http://www.abajournal.com/magazine/article/let_the_states_do_it_aba_working_to_limit_federal_regulation_of_lawyers/ (stating that "[i]n a major victory for the organized bar," the ABA and twenty state and local bars convinced Congress to exclude lawyers from the class subject to key provisions in the Dodd–Frank Wall Street Reform and Consumer Protection Act, which regulates providers of consumer financial products or services). The ABA has also encouraged the U.S. Trade Representative not to negotiate trade agreements that "unreasonably impinge on the regulatory authority of the states' highest courts." ABA HOUSE OF DELEGATES, REPORT AND RECOMMENDATION 105 (Annual Mtg. Aug. 2006), *available at* http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation.html.

The mainstream bar resists federal initiatives for at least two reasons. First, the bar believes that courts, not legislatures or administrative agencies, should regulate lawyers. State courts often use separation-of-powers doctrines to keep the other branches of government at bay; federal courts do not. *See* WOLFRAM, *supra* note 3, at 27–28. Second, state and federal policy in regulating lawyers sometimes conflicts, with Congress and federal agencies more inclined to "deputize" lawyers as "gatekeepers" to monitor their clients' compliance with law. *See* JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 192–247 (2006) (supporting the use of lawyers as gatekeepers in federal securities regulation); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1409–27 (1992) (arguing that, unlike statutes and federal agency rules, judicial rules of professional conduct, drafted by the bar and construed in the bar's ethics opinions, exalt lawyers' duties to clients over duties to the public or third parties).

22. From time to time, federal officials express doubts about PSR's efficacy. Speaking to business lawyers in 2002, SEC Chairman Harvey Pitt stated that he was "not impressed, or pleased, by the generally low level of effective responses we receive from state bar committees when we refer possible disciplinary proceedings to them." Harvey L. Pitt, Remarks Before the Annual Meeting of the American Bar Association Business Law Section (Aug. 12, 2002), *available at* http://www.sec.gov/news/speech/spch579.htm.

may well depend on how effectively the system promotes—and is seen to promote—competent and ethical lawyering. Reform proposals designed to strengthen PSR and demonstrate its adaptability to new circumstances should be welcome.[23] This Article offers such a proposal.

Current theories of regulation view the soundness of an entity's internal management structure and culture as vital for effective external regulation[24] or, in some cases, as a substitute for ineffective external regulation.[25] On that view, the

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During the savings and loan crisis in the 1990s, the general counsel for the Office of Thrift Supervision implicitly criticized the efficacy of PSR by asserting that some lawyers who had represented failing thrift institutions lacked any commitment to observing the prevailing rules of legal ethics. *See* Harris Weinstein, *Attorney Liability in the Savings and Loan Crisis*, 1993 U. ILL. L. REV. 53, 59–60. Whether that appraisal was accurate, it is true that in contrast to the barrage of lawsuits and enforcement actions that were launched against lawyers who had represented the failed thrifts, nearly all was quiet on the PSR front. *See* Steve France, *Can the Bar Regulate Large Law Firms*, LEGAL TIMES, Jan. 31, 1994, at 28 (criticizing the non-response of state disciplinary officials to allegations by federal banking officials that many lawyers for the thrifts had engaged in conduct that breached the prevailing rules of legal ethics).

23. In August 2009, the ABA president appointed the Commission on Ethics 20/20 and charged it to "assess whether our ethics rules and regulatory regime are up to the challenges of a 21st century profession." Carolyn Lamm, *Now More than Ever: ABA Will Continue Providing Guidance, Delivering Benefits to Boost the Profession*, A.B.A. J. NEWS, Sept. 1 2009, http://www.abajournal.com/magazine/article/now_more_than_ever/ (ABA President's Message). Full disclosure: I am a member of the 20/20 Commission but the views expressed in this Article are mine alone.

24. This is a prominent theme in the work of Orly Lobel. *See, e.g.*, Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within 21st Century New Governance* (Univ. of San Diego Sch. Law Legal Studies, Paper No. 10-022, 2010), *available at* http://ssrn.com/abstract=1612984. Discussing "new governance approaches to organizational compliance," Professor Lobel finds "growing empirical evidence that institutional culture and design have a significant impact on the likelihood that individuals [in an organization] will engage in unlawful behavior." *Id.* at 6, 11; *see also* Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691, 692, 694, 700–06 (2003) (defining "management-based regulation" as requiring firms to engage in their own planning and internal management processes to achieve externally defined but broadly stated public goals and explaining when regulators should make the promotion of sound internal management their primary tool for achieving regulatory compliance). Legislators and regulators now make considerable use of management-based techniques. *See* Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171 (1995) (discussing regulators' growing reliance on "audited self-regulation" rather than more directive regulatory techniques); Christine Parker et al., *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & SOC'Y 466, 470 (2010) (noting increasing use of regulatory techniques "to encourage or force business organizations to put in place effective internal controls, procedures, and habits of practice for complying proactively with legal and ethical obligations").

25. *See* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008) (exploring the power of "*internal* regulation . . . to succeed where external regulation has failed" to control the exercise of discretion in prosecutors' offices) (emphasis added).

ABA was wise to recognize, as early as 1983, that law firm management can play a key role in determining whether a firm's lawyers and staff members conduct themselves in a manner that is consistent with lawyers' ethical obligations. As adopted that year, the Model Rules imposed unprecedentedly broad managerial duties on law firm partners. Rule 5.1(a) required "a partner in a law firm" to make "*reasonable efforts* to ensure that the firm has in effect measures giving *reasonable assurance* that [the firm's lawyers] conform to the rules of professional conduct."[26] Rule 5.3(a) imposed the same duty on partners to assure that the conduct of "nonlawyer[s] . . . associated with" their firm is "compatible with [lawyers'] professional obligations."[27] A substantial majority of jurisdictions adopted these rules,[28] and most of those jurisdictions followed suit when the ABA amended the rules in 2002 to address both partners and lawyers who "individually or together with other lawyers possess . . . comparable managerial authority in a law firm."[29]

We do not know what impact these "second-order ethics rules"[30] have had on either law firm management or the nature and frequency of ethics violations.

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26. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (1983) (emphasis added). Elaborating on the broad managerial duty recognized in Rule 5.1(a), a comment in the current version adds that "[t]he ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules." MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 3 (2010). The Rule 5.1(a) duty goes well beyond the ethical duty of a lawyer to supervise lawyers working directly under her on particular matters. Other provisions in Rule 5.1 concern that narrower and more familiar duty. *Id.* R. 5.1(b), 5.1(c)(2).

27. MODEL RULES OF PROF'L CONDUCT R 5.3(a) (2010). For a lawyer's narrower duties to supervise nonlawyers working directly under her, see *id.* R. 5.3(b), 5.3(c)(2). Although the breadth of Rules 5.1(a) and 5.3(a) is unprecedented, their tenor was foreshadowed by two rules in the ABA's predecessor code. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(D) (1983) (requiring a lawyer to "exercise reasonable care to prevent his employees, associates, and others whose services [he utilizes] from disclosing or using confidences or secrets of a client"); *id.* DR 7-107(J) (requiring a lawyer to exercise reasonable care to prevent employees and associates from making improper extrajudicial statements that the lawyer would be barred from making in connection with the lawyer's pending litigation).

28. Of the thirty-eight jurisdictions that adopted the ABA's Model Rules by 1995, only North Carolina, Texas, and Virginia failed to adopt Rule 5.1(a). *See* STEPHEN GIILLERS & ROY D. SIMON, REGULATION OF LAWYERS 3, 296 (1999 ed.).

29. MODEL RULES OF PROF'L CONDUCT R. 5.1(a), 5.3(a) (2010). By 2006, at least twenty-two jurisdictions had adopted these amendments. *See* Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 778 & n.211 (2005). The 2002 amendments were intended to clarify that Rules 5.1(a) and 5.3(a) apply not only to partners in conventional law firms but also to "managing lawyers in corporate and governmental legal departments and legal services organizations." ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at 566 (2006).

30. As the term is used in this Article, "second-order ethics rules" call upon lawyer–managers and supervisors to take measures to ensure that the conduct of their firm's lawyers and staff is consistent with lawyers' duties under "first-order rules." First-order

But two things are clear. First, we continue to see many disciplinary cases involving forms of first-order misconduct that sound management systems can often prevent, such as neglecting clients' matters, misappropriating their funds, or becoming embroiled in conflicts of interest. Second, although many state supreme courts have adopted Model Rules 5.1(a) and 5.3(a), the rules rarely serve as a basis for professional discipline.[31]

Two questions arise. First, *can* these rules be effectively enforced in the traditional disciplinary process, a *reactive* regulatory technique ordinarily triggered only after regulators receive complaints against a lawyer? Second, could a *proactive* regulatory program complementing the disciplinary process enable PSR to draw more effectively on firm management in order to promote ethical compliance? My answers are "no" and "yes," respectively. Accordingly, this Article proposes that the state supreme courts adopt a meaningful program of "proactive, management-based regulation" (PMBR). The proposal is inspired by regulatory developments elsewhere and by recent scholarship.[32]

An introductory word is in order about PMBR programs as they could relate to the broad management duties embodied in Rules 5.1(a) and 5.3(a). Let me stress at the outset, however, that the Article does not endorse any particular version of PMBR. Later in the article, I will describe in some detail the ambitious program in effect in New South Wales (NSW), and the following introductory summary also draws on that program. But I focus on the NSW program solely to provide readers with a concrete prototype. I believe PMBR has only two *essential* features and that the state supreme courts could adopt versions that vary considerably in scope, depending on local needs, resources, and regulatory traditions.

PMBR is not only management-based, but also *firm*-based in the sense that it requires "law firms"[33] to designate one or more lawyer–managers[34] to take

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rules lay out the duties that run directly to clients; tribunals or the legal system generally; the profession; certain third parties; or the general public.

31. From September 1992 to December 2006, for example, there were only thirteen recorded violations of Rule 5.1 in Alabama (many of which may not have implicated the broad management duty of Rule 5.1(a)), but 636 violations of a rule prohibiting neglect of client matters. *See* Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 807 n.106 (2009) (citing information provided by the General Counsel of the Alabama State Bar); *see also* Jonathan M. Epstein, Note, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011, 1015 (1994) (noting that there is "a dearth of bar opinions or cases describing what constitutes 'reasonable efforts' by partners to ensure that subordinate lawyers within a firm comply with the Model Rules, [which] . . . may indicate" that the reasonable-efforts standard is "under-enforced or unenforceable," contrary to "the intent of the drafters"). For evidence that the drafters intended the standard to be enforceable, see *id*. at 1015–16 & nn.17–23.

32. *See* Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335 (2003) [hereinafter Chambliss & Wilkins, *A New Framework*]; Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 FORDHAM URB. L.J. 119 (2005) [hereinafter Chambliss, *The Nirvana Fallacy*].

33. The Model Rules define the term "law firm" very broadly, to denote "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or

"enhanced" responsibility[35] for their firm's "ethical infrastructure."[36] Ethical infrastructures consist of the policies, procedures, systems, and structures—in short, the "measures" that ensure lawyers in their firm comply with their ethical duties and that nonlawyers associated with the firm behave in a manner consistent with the lawyers' duties.

"Ethical infrastructure" is an undeniably abstract term but, as Part III will show, New South Wales has given the term content by identifying ten types of recurring problems that infrastructure should be designed to prevent or at least mitigate. For now, it is enough to mention some familiar features of ethical infrastructures, namely, "policies and procedures . . . designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised."[37] At the margin, of course, what counts as ethical infrastructure is debatable.[38] Additionally, whether a designated lawyer–manager has made "reasonable efforts," and whether the measures her firm has in place provide "reasonable assurance," will vary with a firm's size and practice.[39] It may also vary with less obvious features, such as a firm's associate-to-partner ratio, which bears on the adequacy of a firm's training programs and supervision policies.

As for the regulators themselves, a state supreme court following the New South Wales model would assign a proactive and largely collaborative role to court or bar personnel with expertise in law firm and law office management. These

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other association authorized to practice law; or lawyers employed in a legal services [office] or the legal department of a corporation or other organization." MODEL RULES OF PROF'L CONDUCT, R. 1.0(c) (2010). Whether the reforms proposed here can or should be applied in all these settings is beyond the scope of the Article, which uses the term "law firm" for convenience but takes no position on the range of lawyer workplaces to which the reforms could or should apply.

34. A solo practitioner would of course be the designated lawyer–manager for her own practice.

35. *See In re* Bailey, 821 A.2d 851, 853 (Del. 2003) ("[T]he managing partner of a law firm has *enhanced duties*, vis-à-vis other lawyers and employees of the firm, to ensure the law firm's compliance with [its] record-keeping and tax obligations under the Delaware Lawyer's Rules of Professional Conduct." (emphasis added)). Recognizing the enhanced responsibility of *designated* lawyer–managers for firm-wide ethical infrastructure would not relieve heads of practice groups, branch-office managers, or others with managerial authority from responsibility, but it would clarify who regulators look to in the first instance on issues of firm infrastructure.

36. *See* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 10 (1991).

37. MODEL RULES OF PROF'L CONDUCT R.5.1 cmt. 2 (2010); *see also id.* R. 5.1 cmt. 3 (referring to "a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee").

38. For example, a firm's compensation policies or billing expectations for associates might have a positive or negative impact on its lawyers' ethical compliance, but they are likely to have been designed with other functions in mind. *See* Peter J. Winders, *The Ideal Law Firm Compensation System*, PROF. LAW., Summer 2005, at 1 (discussing the impact of compensation systems on a law firm's ethical culture and incentive structure).

39. MODEL RULES OF PROF'L CONDUCT, R. 5.1 cmt. 3 (2010).

regulators would interact with a firm's designated lawyer–manager(s) from time to time—even if no complaints about lawyer misconduct in their firm have been received.[40]

Lawyer–managers would be expected to monitor and regularly assess their firm's infrastructure and file self-assessment forms for their firm with the program office. (This in itself should ensure that firm managers are thoughtful about the components and adequacy of their firm's ethical infrastructure.[41]) The regulators would discuss self-assessments with the lawyer–manager(s), point out possible weaknesses, and suggest possible improvements. In the process, firms and regulators alike might learn of new and promising forms of infrastructure. In addition, the regulators might occasionally audit a firm simply to confirm that its self-assessment was reliable, or, more rarely, audit a firm because they have reason to believe that its ethical infrastructure is seriously deficient. The hope is that a PMBR program would promote the development of more effective ethical infrastructures, thereby preventing misconduct and reducing disciplinary complaints. Professional discipline would play only a minor role in a PMBR program. Disciplinary proceedings based on Model Rule 5.1(a) or 5.3(a) violations might only be instituted against lawyer–managers who refused to cooperate with the regulators or "knowingly failed to exercise even a modicum of diligence"[42] with respect to the creation, implementation, and ongoing assessment of firm infrastructure.

This summary highlights the two essentials of a PMBR program and suggests what a PMBR program could add to the enforcement of broad duties of law firm management. Those essentials are *firm-designated* lawyer–managers and *proactive collaboration* between firms and regulators as a complement to enforcing those duties in adversarial disciplinary proceedings.

Described in the abstract, PMBR may seem incompatible with PSR's tradition of reactive enforcement. But, in thinking about PMBR's value and feasibility as a regulatory add-on, one must bear in mind that PSR has been adding more limited proactive programs for some time, including random audits of lawyers' trust accounts[43] and Law Office Management Assistance Programs

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40. To hold down regulatory costs, however, the program might be "risk-based," giving closer attention to firms with a history of complaints or other characteristics that have been determined to bear on their ethical risk profiles, such as their size or practice fields.

41. *See* Parker et al., *supra* note 24, at 495 (suggesting, based on empirical data, that the self-assessment process in NSW is encouraging many practitioners "systematically to think through practice management issues, including ethics management, for the very first time"). In the United States, Judge Edmund Spaeth proposed a similar idea in 1988. He suggested that bar counsel could enforce a provision such as Model Rule 5.1(a) by requiring firms to report periodically on the measures they take to provide reasonable supervision. Edmund B. Spaeth, *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers*, 61 TEMP. L. REV. 1211, 1234 (1988).

42. *See In re* Bailey, 821 A.2d 851, 865 (Del. 2003) (formulating this standard).

43. The ABA endorsed random audit programs in 1993. *See* ABA MODEL RULE FOR THE RANDOM AUDIT OF LAWYER TRUST ACCOUNTS (1993), *available at* http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/

(LOMAPs).[44] In addition, some jurisdictions now require lawyers to file annual registration statements certifying that they or their firms are in compliance with trust account rules or other requirements.[45]

In making the case for PMBR programs, this Article also follows up on articles I published in the 1990s recommending that state supreme courts bring law *firms* within their disciplinary jurisdiction.[46] My aim then was to make PSR more effective in encouraging firms to maintain sound ethical infrastructures. This

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apreface.html. Under the ABA rule, no firm may be randomly audited more than once every three years. Audits are intended not only to detect and deter trust account violations but also to provide lawyers and law firms with practical advice on managing trust accounts. *See* STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 193–94 (Concise ed. 2011).

44. LOMAP staffers usually have particular expertise in the management of solo practices and small firms. The practice management advisors in some LOMAPs are lawyers, but not in others. *Compare Team Bios*, L. OFF. MGM'T ASSISTANCE PROGRAM, http://www.masslomap.org/about/team-bios (last visited Apr. 7, 2011) (listing credentials of lawyer–advisors in the Massachusetts program), *with Law Office Management Assistance Program: LOMAP Staff*, STATE BAR OF ARIZ., http://www.myazbar.org/Members/LOMAP/staff.cfm (last visited Apr. 6, 2011) (same for nonlawyer-advisors in the Arizona program). Because an overwhelming percentage of the lawyers who are targeted in disciplinary complaints practice alone or in very small firms, *see infra* note 132 and accompanying text, LOMAP staffers are likely to possess the expertise that would be required of regulators who would staff a PMBR program based on the NSW model. LOMAPs serve as diversion programs in the reactive enforcement of ethics rules, working with lawyers whom disciplinary counsel refer to them after receiving complaints alleging minor violations that might reflect deficiencies in office management. But they also "regulate" proactively by advising lawyers who seek assistance on such matters as trust accounting, office technology, client relations and marketing, hiring and training policies, and conflicts checking systems. *See Law Office Management Assistance Program*, STATE BAR OF ARIZ., http://myazbar.org/Members/LOMAP/index.cfm (last visited Apr. 6, 2011).

An ABA commission called for the creation of LOMAPs in 1992. ABA COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY, Recommendation 3 (1992) ("Expanding the scope of public protection"), *available at* http://www.abanet.org/cpr/reports/mckay_report.html; *see also id.* Recommendation 4 ("Lawyer Practice Assistance Committees").

45. For example, the Delaware Supreme Court's Annual Registration Statement instructs lawyers who are "responsible for the maintenance of financial books and records required to be disclosed [in the Statement, such] as the managing partner of a firm," to certify, among other things, that all taxes required to be filed have been filed and taxes due have been paid on a timely basis, that their firm's trust account is maintained with a financial institution that has agreed to comply with overdraft notification procedures, that all fiduciary funds held by their firm are maintained in a trust account in accordance with Rule 1.15(a) of the Delaware Lawyers' Rules of Professional Conduct, that check register balances for all firm bank accounts are reconciled monthly with bank statement balances, and that before preparing their Certificate of Compliance they reviewed Rules 1.15 and 1.15(a). DELAWARE SUPREME COURT, 2009 ANNUAL REGISTRATION STATEMENT AND CERTIFICATE OF COMPLIANCE 10, 15–17.

46. Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. TEX. L. REV. 245 (1998); Schneyer, *supra* note 36.

Article has the same aim, but it focuses on firm management, rather than firms themselves, and identifies some mid-course corrections in my thinking.

The Article is in three parts. Part I identifies five changes in law practice and its regulation over the last century that paved the way for the ABA to include broad ethical duties of law firm management in the Model Rules and bring firm management squarely into PSR's domain.[47]

Part II argues that we cannot rely on the disciplinary process alone to sufficiently enforce Model Rules 5.1(a) and 5.3(a) to encourage law firms to develop sound ethical infrastructures. Part II.A identifies what I now see as the three key shortcomings of that enforcement strategy. Part II.B reviews my reasons for proposing law firm discipline in the past as a cure for the under-enforcement of those rules. Part II.C evaluates the experience with firm discipline in New York and New Jersey, the only two states that have adopted it. Part II.C concludes that law firm discipline as I conceived it has some regulatory value, and the criticisms that have been leveled against it are largely misguided. But, it concedes that providing for firm discipline does not make discipline alone an adequate strategy for enforcing broad duties of law firm management.

Part III presents the positive case for adding PMBR programs to PSR's enforcement arsenal in order to encourage law firms to maintain sound ethical infrastructures. Part III.A describes in detail the PMBR program in New South Wales.[48] Part III.B summarizes the first empirical study of the impact of the NSW program on complaint rates and presents information on the cost of the program, all of which suggests that PMBR can deliver real regulatory benefits at acceptable cost. Part III.C argues that state supreme courts could staff a PMBR program like the one in NSW with personnel that would have the requisite expertise, and Part III.D counters the foreseeable objection that PMBR would be a wasteful redundancy because the vast majority of U.S. law firms already have sound ethical infrastructures, or sufficient motivation to build and maintain them and ready access to expert advice on how to do so.

A brief Conclusion recaps the argument for integrating PMBR programs into the PSR system in the United States. It suggests that state supreme courts and mainstream bar should view PMBR, not as intrusive and unduly expensive command-and-control regulation, but rather as a further commitment to

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47. Of course, a law firm's management systems "might be designed to achieve . . . any number of worthy purposes such as enabling the firm to be more profitable or to reduce its exposure to [malpractice claims, and] the systems that are appropriate . . . to achieve those other worthy purposes [may well] overlap with . . . the systems that are appropriate to achieve [ethical compliance]," but Australian regulators have stressed that "we should not assume that the systems *will be the same or co-extensive*." John Briton & Scott McLean, *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era*, 11 LEGAL ETHICS 241, 245 (2008) (emphasis added).

48. The NSW program is the oldest and most fully developed PMBR program in the world, but similar programs are now operating elsewhere in Australia and will soon go into operation in England and Wales. For discussion of the program in Queensland, Australia, see *id.* at 241–54. For developments in England and Wales, see *News: Moving to an Outcomes-Based Regime*, SOLICITORS REGULATION AUTH. (Dec. 1, 2010), http://www.sra.org.uk/sra/news/moving-to-outcomes-based-regime-speech.page.

professional *self*-regulation, this time in the form of law *firms* regulating practice within their own walls.

I. Five Developments that Paved the Way for Broad Ethical Duties of Law Firm Management

Between the ABA's adoption of the Canons of Ethics in 1908 and the Model Rules in 1983, law practice and PSR both evolved in ways that made the inclusion of broad duties of law firm management in the Model Rules, unthinkable in 1908, a logical step.

First, the 1908 Canons were exclusively concerned with identifying the individual lawyer's first-order ethical duties. The Canons did not even *refer* to law firms until 1928, when the ABA added a canon asserting that law partnerships were "not to be condemned."[49] Since the vast majority of lawyers in 1908 practiced alone and had few, if any, lay employees, the absence of references to firms or firm governance in the 1908 Canons was hardly surprising.[50]

By the 1980s, however, law practice was very different. Two-thirds of the bar practiced in multi-lawyer workplaces, and well over half the lawyers in private practice worked in multi-lawyer firms.[51] Many firms had branch offices, making intra-firm coordination both more difficult and more important.[52] The ratios of associates to partners had also risen markedly, underscoring the need for supervision.[53] And firms were hiring more nonlawyers who required training and supervision, including lay administrators.[54]

Second, many pre-1970 law firms were, in effect, loose "federations of [sole] proprietors."[55] By the 1980s, however, sizable firms had central management and were using bureaucratic controls, such as policy manuals and conflicts-checking and calendaring systems. Law firm management was becoming more specialized;[56] management consultants for law firms were common;[57] risk

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49. CANONS OF PROF'L ETHICS § 33 (1937).

50. Indeed, a majority of American lawyers were solo practitioners as late as the 1950s. *See* AM. BAR FOUND., THE 1971 LAWYER STATISTICAL REPORT 10 (Bette H. Sikes et al. eds., 1972).

51. 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, at 13 (1985).

52. *See, e.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1318–22 (7th Cir. 1978) (disqualifying a law firm whose separate offices were simultaneously representing conflicting interests).

53. ABEL, *supra* note 51, at 315.

54. *See* ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN 244–45 (1964).

55. Thomas E. Zirkle, *Dynamics of Group Behavior in the Practice of Law*, 11 L. OFF. ECON. & MGMT. 493, 496 (1971).

56. *See* ROBERT L. NELSON, PARTNERS WITH POWER 275–76 (1988); *see also* Chambliss, *The Nirvana Fallacy*, *supra* note 32, at 123 (calling on firms to make more use of "compliance specialists").

management tools to control liabilities were in vogue;[58] and some malpractice insurers were advising firms on "loss prevention" techniques.[59] To this day, however, these developments have had a far greater impact on large firms than on small ones.

Third, the 1908 Canons said nothing about enforcement. The drafters apparently assumed that most lawyer misconduct resulted from ignorance (curable by socialization and better training) or poor breeding (incurable and grounds for restrictive bar admission policies).[60] The Model Rules, by contrast, are full of references to their role in disciplinary enforcement. They purport to provide a "structure for regulating conduct through disciplinary agencies,"[61] declare that "[f]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process,"[62] and include choice-of-law rules for disciplinary proceedings and a rule expanding disciplinary jurisdiction.[63]

Fourth, disciplinary systems as we know them did not exist in 1908. Indeed, as late as 1970, an ABA study found disciplinary systems around the country "scandalous[ly]" under-developed.[64] But soon afterward, things improved markedly,[65] signifying a new commitment to promoting ethics *compliance*, not just formulating first-order ethical duties. Professor Charles Silver later expressed the new attitude in the most strenuous terms. To improve the technical quality and ethical soundness of lawyering, he insisted, "one must change the institutional structures in which lawyers operate . . . the incentives and monitoring

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57. *See* James F. Fitzpatrick, *Legal Future Shock: The Role of Large Law Firms by the End of the Century*, 64 IND. L.J. 461, 461 (1989) (referring to the use of management consultants by *large* law firms).

58. For risk management purposes, a "risk" is "any danger that, if not controlled, may lead to consequences unintended by and harmful to a law firm or practitioner," including professional discipline. ANTHONY E. DAVIS & PETER R. JARVIS, RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS 3 (2d ed. 2007).

59. *See* Davis, *supra* note 7, at 220–22; O'Malley, *supra* note 7.

60. *See* Finman & Schneyer, *supra* note 5, at 69 n.4. When the 1908 Canons were adopted, the ABA president did express his hope that states might adopt them as positive law, Jacob M. Dickinson, *Address of the President*, 33 ANN. REP. A.B.A. 341, 356 (1908), but the courts and bar generally treated them as no more than guiding principles. *See* Finman & Schneyer, *supra* note 5, at 70 n.4.

61. MODEL RULES OF PROF'L CONDUCT, Scope cmt. 20 (2010).

62. *Id.* Scope cmt. 19.

63. *See supra* note 17.

64. AM. BAR ASS'N SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970) [hereinafter CLARK REPORT]. Supreme Court Justice Tom Clark chaired the Commission.

65. Nationally, between 1969 and 1975, disciplinary rates rose, disciplinary expenditures per lawyer more than doubled, and serving as bar or disciplinary counsel became a specialized field requiring considerable expertise. *See* Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 919, 942, 945–46. However, the disciplinary process remained wholly reactive. *Id.* at 922–23.

arrangements lawyers work under on a daily basis. A good incentive structure . . . is worth a pick-up load of . . . disciplinary rules."[66]

Fifth, a major shift occurred in PSR's sanctioning philosophy. Before 1970, disbarment and suspension from practice were the primary disciplinary sanctions.[67] As disciplinary rates rose after 1970, however, disbarments decreased as a proportion of total sanctions and probationary sanctions increased markedly.[68] With this shift, more sophisticated and better-funded bar counsel could respond to modern caseloads, which include many relatively minor offenses.[69] And broad duties of firm management could be included in the Model Rules because disciplinary bodies would have appropriate sanctions to impose on violators. Rule 5.1(a) and 5.3(a) violations would rarely warrant disbarment or multi-year suspensions. But probation, sometimes coupled with public censure or a brief suspension, is often an ideal sanction. Probation allows a lawyer to continue to practice, but usually under specific conditions and, often, with monitoring.[70] To establish sensible probation conditions, of course, disciplinary counsel need to understand law office management, the very expertise PMBR regulators need.

With these five developments, imposing broad ethical duties on law firm managers became quite "thinkable."

II. Three Obstacles to Disciplinary Enforcement of Rules 5.1(a) and 5.3(a) and the Limits of Law Firm Discipline as a Corrective

To lay a foundation for discussing PMBR in Part III, Part II explains why disciplinary enforcement of Rules 5.1(a) and 5.3(a) has been extremely limited[71] and is likely to remain so. Part II.A presents what I have come to see as the basic reasons for the inactivity. Part II.B explains why I proposed "law firm discipline" as a corrective in the 1990s. Part II.C evaluates the track record of law firm discipline in New York and New Jersey, the only two jurisdictions that have

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66. Charles Silver, *Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis*, 65 FORDHAM L. REV. 233, 242 (1996).

67. In many jurisdictions, the disciplinary authorities had to either dismiss complaints or set them down for an expensive and time consuming formal proceeding. Frequently, only cases that involved misconduct serious enough to warrant disbarment or suspension were thought to justify a formal proceeding. *See* CLARK REPORT, *supra* note 64, at 92–96 (Problem 16: No informal admonitory procedures to dispose of matters involving minor misconduct). Often, the lawyers disbarred had already been convicted of a felony, which simplified the disbarment proceeding. The emphasis was on removing "bad apples" from the profession.

68. For data and sources, see Schneyer, *supra* note 36, at 21–22 & nn.124–29.

69. Steele & Nimmer, *supra* note 65, at 945–46. Discussions of the goals of lawyer discipline began to stress education and rehabilitation as well. *Id.* at 926.

70. William J. Wernz, *Probation as a Disciplinary Disposition*, BENCH & B. MINN., Apr. 1987, at 9.

71. For evidence of the lack of enforcement, see *supra* note 31. Exaggerating slightly, I once called Rule 5.1(a) a "disciplinary dead letter." Ted Schneyer, *From Self-Regulation to Bar Corporatism*: *What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 644 (1994).

adopted it. Part II.D argues, contrary to the critics of firm discipline, that there is no reason to abandon it, and that addressing certain ethics rules to law firms has regulatory value.[72] This section concludes, however, that disciplinary jurisdiction over law firms cannot make broad managerial duties significantly more enforceable in the disciplinary process and thereby promote sound ethical infrastructures.

A. Why the Rules Are Rarely Enforced in the Disciplinary Process

I now think that Rules 5.1(a) and 5.3(a) are rarely enforced in the disciplinary process for three reasons: the diffuseness of responsibility for fulfilling the broad managerial duties the rules impose, the vague reasonableness standards by which compliance with the rules must be judged, and the reactive nature of the disciplinary process itself.

1. Responsibility Under the Rules is Often Too Diffuse to Make Disciplinary Enforcement Practical or Fair

In 1985, Professors Geoffrey Hazard, Jr. and William Hodes posed a hypothetical that drew my attention to a problem that I thought might well hamper disciplinary enforcement of newly minted Rules 5.1(a) and 5.3(a)—namely, whom to charge with violations.[73] In their hypothetical,[74] Partner *L* specializes in real estate transactions at the *A&B* Law Firm, which has ten partners and ten associates. While two litigators at the firm were representing Client *C* in a lawsuit, Associate *D*, unaware of *C*'s matter because the firm had no conflicts-checking system, agreed to represent client *P* in a minor and unrelated lawsuit against *C*. When *C* received a demand letter from *D* written on *A&B* stationery, he realized that an *A&B* lawyer was opposing him and complained. *D* apologized and withdrew from representing *P*.

Hazard and Hodes described *D*'s acceptance of *P*'s case as an unintentional and short-lived violation of conflicts rules that disciplinary authorities would be unlikely to pursue even if it came to their attention. They also concluded that *L* did not violate the narrow supervisory duties imposed by Model Rule 5.1(b) and (c),[75] because *L* was not *D*'s *direct* supervisor and could not have acquiesced in a conflict of which he was unaware. And they were surely correct on both counts. But they also drew a more provocative conclusion: even if *L* played no active role in firm management, he *was* in violation of Rule 5.1(a) simply because he was a partner and his firm "as a whole had no mechanism for avoiding even obvious" conflicts.[76]

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72. *Cf.* Chambliss, *The Nirvana Fallacy*, *supra* note 32, at 129 (stating, in response to critics of law firm discipline, that it can hardly "make matters worse").

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

74. I have slightly altered the hypothetical.

75. *See supra* note 26.

76. HAZARD & HODES, *supra* note 73, at 455–56.

On this reading of 5.1(a), *L and* any or all of his partners could be disciplined, with the possible exception of a partner who fought the good fight for a conflicts-checking system but lost.[77] While this assumes that the reference in the rule to "*a* partner in a law firm" means *each* partner, there is good reason to think that the assumption is correct.[78] But consider the implications. The *A&B* Law Firm has ten partners (and could just as well have more), making it unlikely that disciplinary counsel would proceed against each partner.[79] In addition, disciplinary counsel could justly be accused of "scapegoating" if she proceeded solely against *L* with no rationale for singling him out, such as that *L* was the firm's managing partner,[80] ethics counsel, compliance advisor,[81] or at least a member of the firm's management or ethics committee.[82]

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77. In principle, the partners would also be subject to discipline if they made no effort to implement a conflicts-checking system, even if, by luck, no lawyer in the firm had as yet violated conflicts-of-interest rules. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 42-2, illus. 42-1 (3d ed. 2001 & 2010 Supp.). In fact, however, there is no reason to expect anyone to complain about any such deficiency in firm infrastructure. *See* Long, *supra* note 31, at 807–08 (stating that although a lawyer who works at a firm is the most likely party to complain about an infrastructural deficiency at the firm, various factors, including fear of retaliation, make such complaints extremely unlikely). Only a proactive regulatory program is likely to enable regulators to learn of such deficiencies. *See* Theodore J. Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 AM. B. FOUND. RES. J. 939, 948–49 (discussing the problem).

78. The current Illinois and New Hampshire versions of Rule 5.1(a) remove any ambiguity in the term "a partner in a law firm" by referring instead to "each" partner (and "each" lawyer with comparable managerial authority). A comment to the New Hampshire rule states that this alteration was not substantive; it was simply "intended to *emphasize* that the obligations created by the rule are shared by all of the managers of a law firm and *cannot be delegated* to one manager by the others." *See* STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 334 (2010 ed.) (emphasis added). To suggest that no partner in, say, a 200-partner law firm can delegate any Rule 5.1(a) responsibilities to central management seems absurd. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 11 cmt. d (2000) (stating that "a partner in a law firm may reasonably delegate responsibility . . . to a management committee . . . to put in place and implement particular firm measures").

79. I know of no reported cases in which more than a handful of partners have been charged with 5.1(a) or 5.3(a) violations. For cases enforcing the rules when a firm had only two or three partners who were each active in firm management, see, for example, *Davis v. Alabama State Bar*, 676 So.2d 306, 308 (Ala. 1996) (affirming the disciplining of both partners in a two-partner firm for imposing conditions that made it impossible for associates to represent clients competently), *In re Zang*, 741 P.2d 267, 286 (Ariz. 1987) (disciplining one partner in a two-partner firm after the other partner, without respondent's knowledge, had charged impermissible fees, and noting that respondent played a role in developing the firm's fee policies), and *In re Wallman*, 260 A.D.2d 148, 149–50 (N.Y. App. Div. 1999) (per curiam).

80. *See In re* Phillips, 244 P.3d 549, 553–54 (Ariz. 2010) (rejecting a managing partner's claim that a hearing officer had erred in finding him in violation of Ethical Rules 5.1(a) and 5.3(a) of the Arizona Rules of Professional Conduct); *In re* Bailey, 821 A.2d 851, 853 (Del. 2003) (disciplining the managing partner of a firm on the ground that a managing

A New Jersey Supreme Court decision in 1985 also suggested that accountability under Rule 5.1(a) would often be too diffuse for the rule to be enforced. In *In re Yacavino*,[83] an inexperienced law firm associate was suspended from practice for three years.[84] Yacavino had neglected his cases, made false status reports to clients, and prepared a fake court order to further his deception.[85] But he had also been working alone and unsupervised in the firm's satellite office, and the court had recently revamped its rules of professional conduct to include Rule 5.1.[86] Why, then, was no partner charged?[87]

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partner has "enhanced duties" to ensure compliance with the firm's recordkeeping and tax obligations).

81. *See* Chambliss, *The Nirvana Fallacy*, *supra* note 32, at 129–30 (reporting that sizable law firms are addressing gaps in internal supervision by appointing individual partners to be responsible for monitoring intra-firm compliance with professional regulation; calling such partners "compliance specialists"; and noting that ALAS, a malpractice insurer for large law firms, requires the firms it insures to designate a "loss prevention partner" to serve as a liaison to the insurer, and that those partners often take on additional compliance functions). *But cf.* Long, *supra* note 31, at 810–13 (reporting on a 2008 survey of over 150 Tennessee firms, which showed that nearly two-thirds of the firms with twenty-five or more lawyers, but only 15% of those with ten or fewer, had designated a lawyer to have special responsibility for ethics matters). For an argument that *all* law firms should be *required* to designate one or more lawyers as their "compliance specialists," see Chambliss & Wilkins, *A New Framework*, *supra* note 32, at 336, 344–50.

82. *See In re* Foster, 45 So.3d 1026, 1027 (La. 2010) (publicly reprimanding all five members of a law firm's management committee for violating Rule 5.3 of the Louisiana Rules of Professional Conduct by failing to provide for the supervision of a nonlawyer employee who was given responsibility for the firm's website, which disseminated deceptive information). In larger firms, partners accountable for a Rule 5.1(a) violation might also be the head of a practice group or the managing partner of a branch office.

83. 494 A.2d 801 (N.J. 1985).

84. *Id.* at 804.

85. *Id.* at 802.

86. *Id.* at 802–03.

87. The answer could be that the Court adopted Rule 5.1(a) after Yacavino's underlying misconduct occurred, and neither disciplinary officials nor the court thought it appropriate to apply the rule retroactively. Yet courts have applied disciplinary rules retroactively when a reasonable lawyer would have known that her conduct was improper even in the absence of the rule. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 86 & n.46 (1986). The partners in Yacavino's firm had reason to know that someone should have been assigned to be Yacavino's direct supervisor. Three years earlier, a member of the court had asserted in a dissent that if the respondent in that case had received the support and guidance *expected of supervising attorneys*, the offending conduct might never have occurred. *In re* Barry, 447 A.2d 923, 926 (N.J. 1982) (Clifford, J., dissenting) (pointing out that law firms should have a systematic, organized routine for periodic review of files). Moreover, a reluctance to enforce Rule 5.1(a) against partners was still in evidence four years after *Yacavino*. In *In re* Rutger, 556 A.2d 1201 (N.J. 1989), an associate was suspended from practice for misrepresenting the status of a client's matter, failing to keep a client reasonably informed, and engaging in a pattern of neglect. There was apparently little or no supervision of respondent's work, even after a client had complained about him to the firm and even though the partners knew that in an earlier disciplinary case the court had ordered the respondent *to practice only in supervised settings*. *Id.* at 1203. No lawyer at the

For one thing, no partner was in charge of respondent's cases; the respondent simply took them over from a retiring lawyer.[88] With no direct supervisor, no one was clearly accountable for poor *direct* supervision. A management problem there surely was, however, and quite possibly a problem for which no partner could fairly be singled out for blame.[89]

2. *The "Reasonableness" Standards in Model Rules 5.1(a) and 5.3(a) Discourage Disciplinary Enforcement*

Firm partners and other lawyers with "comparable managerial authority" can only be disciplined for breaching Rules 5.1(a) and 5.3(a) in limited circumstances. Disciplinary counsel must show at a minimum that the lawyer–manager(s) in question failed to make "*reasonable* efforts" to ensure that their firm had measures in place that provide "*reasonable* assurance" that the firm's lawyers will conform to the applicable rules of professional conduct[90] and that the conduct of the firm's staff members is compatible with lawyers' professional obligations.[91]

There is no authoritative list of the measures every firm needs to take in order to have an adequate ethical infrastructure. Nor, for at least two reasons, can there be. First, both the ethical risks that call for "measures" and the measures they call for can change rapidly. For example, new thinking is proliferating on how to protect confidential client information when using electronic technologies,[92] as are ideas about how to guard against the ethical risks that arise as corporate clients

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firm testified in the proceeding, the record did not "fully disclose what efforts were made to oversee [his] work," and no partner was charged with failing to supervise. *Id.* The court did take "the opportunity to remind the bar that when lawyers take on the . . . burdens of overseeing the work of other lawyers," more is required than simply being "'available.'" *Id.* Perhaps the court thought at the time that public criticism, not discipline, was the appropriate response to failures to meet broad, negligence-based management duties.

88. *See In re Yacavino*, 494 A.2d at 801–02. Perhaps the retiree could have been held accountable for not providing or arranging for supervision, but that possibility might not count for much with a retiree.

89. The New Jersey Supreme Court came up with a possible solution twelve years later when it publicly disciplined a law *firm* for the first time. *In re* Jacoby & Meyers, 687 A.2d 1007 (N.J. 1997) (mem.).

90. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2010) (emphasis added).

91. *Id.* R. 5.3(a).

92. For highly detailed opinions on this topic which would have been inconceivable only a few years ago, see Fla. Ethics Op. 10-2 (Sept. 24, 2010), *available at* http://www.floridabar.org/tfb/TFBETOpin.nsf (follow "10-2" hyperlink) (requiring lawyers using devices that contain storage media (such as printers, copiers, scanners, and fax machines) to take reasonable steps to ensure that client confidentiality is maintained, including the following: identifying the potential threat to confidentiality and implementing policies to address the threat; keeping an inventory of devices that contain hard drives or other storage media; supervising staff to ensure that confidentiality is maintained; and sanitizing the devices by requiring both meaningful assurances from the vendor at intake and confirmation of sanitization at the time of disposition); Cal. Formal Ethics Op. 2010-179 (discussing factors that determine whether a lawyer violates the duties of confidentiality and competence by using technologies to transmit or store client information which are susceptible to unauthorized access by third parties).

increasingly parcel out discrete aspects of their legal projects to different law firms, or between a law firm and other service providers.[93] Second, even in dealing with perennial problems, the infrastructure a particular law firm needs varies with firm size, fields of practice, and the like.[94] These realities explain and justify the flexible reasonableness standards in Rules 5.1(a) and 5.3(a).

At the same time, however, those standards make *disciplinary* enforcement very difficult. Disciplinary proceedings are quasi-criminal.[95] This puts a premium on giving lawyers fair notice of the conduct that is subject to discipline, and makes negligence-based duties of law firm management problematic.[96] To be sure, if *the* managing partner of a law firm made *no* effort over time to ensure that her firm had even a minimal conflicts-checking system, the vagueness of the standards in Rule 5.1(a) would pose no obstacle to discipline. But whether a lawyer–manager has made "reasonable efforts" to implement measures that provide "reasonable assurance" will often be highly contestable.[97]

The uncertain application of these reasonableness standards undoubtedly makes, and should make, disciplinary officials and state supreme courts reluctant to second-guess law firm managers.[98] Consequently, although Rules 5.1(a) and 5.3(a) are negligence based, disciplinary counsel ordinarily look for evidence of knowing or reckless violations in order to counter the predictable defense that they are seeking to hold lawyer–managers *vicariously* responsible for first-order

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93. *See* Kirk Swanson, *Clients' Desire to Parcel Out Legal Tasks Heightens Need for Firms' Risk Management*, 26 Law. Man. on Prof. Conduct (ABA/BNA) 175 (Mar. 17, 2010). This phenomenon is referred to as disaggregation.

94. *See supra* note 39 and accompanying text.

95. *See In re* Ruffalo, 390 U.S. 544, 551 (1968). In a concurrence, Justice White took the position that a federal court "may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct." *Id.* at 552, 556 (White, J., concurring).

96. The difficulty of successfully prosecuting negligence-based crimes is widely recognized. *See, e.g.*, Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 32–33 (1980). Even in civil malpractice suits, whether a lawyer breached the professional standard of care turns not so much on "reasonableness" in the abstract as on whether the lawyer conformed to prevailing professional norms and practices. *See, e.g.*, Darby & Darby, P.C. v. VSI Int'l, Inc., 739 N.E.2d 744 (N.Y. 2000) (refusing to hold a law firm liable for not advising a client about a "questionable theory" concerning the client's insurance coverage in the absence of evidence that prevailing professional norms required such advice).

97. *See* Epstein, *supra* note 31, at 1015 (reporting a "dearth" of authority on these issues).

98. I have argued elsewhere that, in contrast to federal agencies that regulate lawyers who appear and practice before them, PSR's disciplinary officials rarely seek or impose sanctions on lawyers based on interpretations of ethics rules that are widely opposed or highly controversial within the bar. Schneyer, *supra* note 71, at 640 (noting that in the early 1990s, when federal banking agencies launched a "barrage of lawsuits and enforcement actions" based in part on novel interpretations of legal ethics rules against banking lawyers who had represented soon-to-fail thrift institutions, "nearly all [was] quiet on the disciplinary front").

misconduct by others at their firms.[99] This dynamic may be one reason why Professors Hazard and Hodes consider "an entirely negligence-based disciplinary system for lack of proper supervision . . . as inadvisable as a negligence-based disciplinary system for isolated instances of malpractice."[100]

A recent and controversial case in Arizona illustrates the difficulty of using Rules 5.1(a) and 5.3(a) effectively and fairly in the disciplinary process. In particular, the case shows how fuzzy the line can be between holding a lawyer–manager personally responsible for failing to make "reasonable efforts" to have appropriate measures in place and holding him vicariously responsible for the first-order misconduct of others at his firm. *In re Phillips*[101] held that the founder, sole principal, and manager of a "consumer law firm" specializing in criminal defense, bankruptcy, and plaintiffs' personal injury matters committed multiple violations of Rule 5.1(a) or 5.3(a) relating to disciplinary complaints that alleged misconduct on the part of other firm personnel between 2004 and 2006.[102] During that period, the firm represented roughly 33,000 clients and had 250 employees, including thirty-eight lawyers.[103]

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99. *See* Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 285–86 (1994) (stating that the "handful of disciplinary cases disapproving of blatant lack of supervisory efforts is not the kind of strong message that should be sent considering the great value to be gained by preventing misconduct through supervision").

100. HAZARD & HODES, *supra* note 77, § 42.6. The Texas Supreme Court appears to concur. The text of Texas Rule 5.01 has no equivalent to Model Rule 5.1(a). Instead, a comment to Texas Rule 5.01 provides:

> Wholly aside from the dictates of these rules for discipline, a lawyer in a position of authority in a firm or government agency . . . should feel a moral compunction to make reasonable efforts to ensure that the office, firm, or agency has in effect appropriate procedural measures giving reasonable assurance that all lawyers in the office conform to these rules.

TEX. R. PROF'L CONDUCT R. 5.01 cmt. 6. Texas also relegates Model Rule 5.3(a) to a comment. *Id.* R. 5.03 cmt. 2.

101. 244 P.3d 549 (Ariz. 2010) (en banc).

102. ARIZ. RULES PROF'L CONDUCT ER 5.1(a), 5.3(a) (2010). The Arizona rules are identical to Model Rules 5.1(a) and 5.3(a) but are referred to as Ethical Rules (ERs). *See* ARIZ. SUP. CT. R. 42 (2010). Robert Arentz, a co-respondent with supervisory duties in the firm, was also charged, but I consider here only the charges against Phillips.

103. *In re Phillips*, 244 P.3d at 550. To my knowledge, Phillips & Associates is the largest U.S. firm in which a lawyer–manager has been publicly disciplined under state equivalents of Model Rules 5.1(a) or 5.3(a). However, the Massachusetts Board of Bar Overseers recently lamented its lack of authority to discipline "a large international professional corporation" that became embroiled in a conflict of interest because the firm's "system for detecting conflicts . . . was deficient." The Board had to settle for sanctioning two lawyers in the firm for violating conflicts rules. Mass. BBO Admonition No. 08-11 (2008), *available at* http://www.mass.gov/obcbbo/admon2008.htm. According to the Board, the firm "initially failed to enter into its [conflicts-checking] database" the names of a client and of entities owned by other clients. *Id.* As a result, the firm rendered services directly adverse to a client. Moreover, when apprised of this, the firm cited its own failure to detect the problem sooner as an excuse not just for the past conduct, "but also for continuing the conflicting representation." *Id.* The Board noted that "a number of the firm's partners,

This was not the first time Phillips was charged with 5.1(a) and 5.3(a) violations. He had consented to discipline in 2002 for violating the same rules, and the sanctions at that time included public censure and two years' probation. The judgment and order included detailed probationary terms requiring changes in the firm's intake procedures, accounting procedures, and ethics training.[104]

In 2007, the Arizona State Bar again charged Phillips with violating these rules, even though his firm had made all the changes required in the 2002 order.[105] After an eleven-day hearing, the Hearing Officer concluded that Phillips committed multiple violations of Rule 5.1 and 5.3.[106] The Hearing Officer recommended that Phillips be suspended for six months and one day, followed by two years' probation, again with a detailed order to (a) rectify the firm policies and procedures the Officer found objectionable and (b) take any additional measures the State Bar's LOMAP might recommend after auditing the firm.[107]

The Hearing Officer linked two of Phillips's 5.1(a) violations to several client matters in which the firm's bankruptcy lawyers neglected to appear at meetings their clients were required to attend.[108] The Officer attributed this neglect to "the high volume of cases" the lawyers were assigned, and found that Phillips violated ER 5.1(a) by "establishing and maintaining *a business model in which such ethical violations were likely to occur*."[109] Apparently, however, the Hearing Officer did not consider a high likelihood of such violations essential in order to find Phillips in violation of the rule for adopting the business model, because there was testimony that firm lawyers missed meetings in only a "small percentage" of their many cases. Instead, the Hearing Officer found that the model reflected a "willingness to tolerate a few errors for the sake of volume and efficiencies," and concluded that such a business model cannot "defend itself against a violation of ER 5.1."[110] Tellingly, the Hearing Officer added that "[e]ach individual client is entitled to have his or her lawyer comply with the Rules of Professional Responsibility."[111] True enough. But it hardly follows that every client is entitled to be represented by a law firm whose policies *guarantee* that no lawyer or nonlawyer in the firm will neglect her matter. Disciplining a managing partner for violating Rule 5.1(a) because the firm's business model offers no such guarantee

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including its conflicts and ethics committee, had a hand in encouraging this conduct," and stated that "if it were permitted under our rules, *we would discipline the firm for what is truly a systemic failure.*" *Id.* (emphasis added). In New York or New Jersey, firm discipline would have been an option. *See infra* notes 184–90 and accompanying text.

104. *See In re Phillips*, 244 P.3d at 550. With respect to intake procedures, for example, the order provided that "[b]onuses paid to intake personnel cannot be based *exclusively* on either the number of clients who retain the firm or the amount of fees received from those clients." *Id.* (emphasis added). The Arizona State Bar monitored the firm during Phillips's probation to ensure that the required changes were made.

105. *Id.* at 551 (stating that Phillips successfully completed his probation in 2004).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* (emphasis added).

110. Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendation at 34, *In re* Phillips, 244 P.3d 549 (Ariz. Mar. 31, 2009).

111. *Id.*

seems to amount to vicarious liability, which the Arizona Supreme Court in 1990 declared inconsistent with the rules imposing managerial and supervisory duties.[112]

Phillips was also found in violation of 5.1(a) on the ground that his firm's client-intake practices did not require, as they should have, "a *knowledgeable* attorney to speak with . . . potential client[s] before entering into a fee agreement."[113]

One of Phillips's violations of Rule 5.3(a) was linked to the "high pressure tactics" the firm's "legal administrators" used in an effort to "dissuade [clients] from terminating representation."[114] Although the tactics in question violated a written policy the firm had adopted (with State Bar approval) to satisfy the terms of the 2002 consent order, the Hearing Officer concluded that this was no defense because another firm policy, which tied legal administrators' bonuses *in part* to their success in retaining clients, provided "*the motive for the[ir] misconduct*."[115] The written ban on high-pressure client retention tactics was

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112. *See In re* Galbasini, 786 P.2d 971, 975 (Ariz. 1990) (stating that the rules imposing managerial and supervisory duties do not provide for vicarious responsibility, but instead "mandate an independent duty of supervision"); *see also In re* Miller, 872 P.2d 661, 663 (Ariz. 1994) (stating that a lawyer supervising a nonlawyer assistant is not "required to guarantee that the assistant will never engage in conduct that is not compatible with the professional obligations of the lawyer").

113. *In re Phillips*, 244 P.3d at 552 (emphasis added). Prospective clients were able to speak briefly with a lawyer, but, in many cases, not with a lawyer who was knowledgeable about the kind of legal problem they presented.

114. The firm's legal administrators were nonlawyers who dealt with clients wishing to cancel their engagements. In one instance, a client retained the firm for defense of a DUI charge. As the legal administrators knew, the client was in the process of becoming a U.S. citizen. After the client asked to terminate the firm's representation, he was warned that he was "looking to lose his citizenship," which insinuated that if he stopped payment on his retainer check, the firm could have the police investigate his immigration status. *Id.*

115. *Id.* (emphasis added) (internal quotation omitted). The policy tying bonuses *in part* to the legal administrators' success in retaining clients was apparently adopted to satisfy the requirement in the 2002 Consent Order to abandon the previous policy of tying the bonuses *exclusively* to retention rates. The later policy identified the following additional factors: work ethic, work product, client complaints, compliance with firm policies and procedures, attitude, appearance, and number of phone appointments set. The Hearing Officer found that the added factors were virtually irrelevant because, unlike retention success, most were not measurable; that the firm had complied with the letter of the 2002 Order but not the spirit; and that the new policy was put in place to circumvent the Order. When the Hearing Officer's Report was adopted by the Arizona Supreme Court's Disciplinary Commission, two Commissioners dissented on the ground that the recommended sanctions were too harsh. The Commissioners noted that there was no specific evidence that retention success was the most significant factor in determining the size of bonuses and that the finding that the policy was adopted to circumvent the 2002 Order arguably had no support in the record. Matter of Phillips, Disciplinary Commission Report at 18, *In re Phillips*, 244 P.3d 549 (Ariz. Dec. 14, 2009) (Flores and Katzenberg, Comm'rs, dissenting). The dissenters added that *most* law firms offer their personnel financial incentives tied to productivity, and they did not believe that "any reasonable manager would assume a financial incentive [used] as one factor in determining a bonus

"insufficient to insulate [Phillips] from ethical responsibility [because] the actual ongoing practices [of the employees] were to the contrary."[116]

Finally, the Hearing Officer found that the firm employees failed to respond promptly to repeated client requests to terminate an engagement and receive a refund of unearned fee advances. Here, Phillips's violation consisted of failing to have practices in place "*to prevent difficulty in obtaining a refund*."[117]

In each instance, then, the Hearing Officer linked Phillips's violation of ER 5.1(a) or 5.3(a) to first-order misconduct by others. The Officer found that Phillips had no knowledge of that misconduct until after it occurred, but he should have known that it was likely to occur.

The Arizona Supreme Court's Disciplinary Commission reviewed the Hearing Officer's report and recommended by a vote of 6 to 2 that the Court adopt his findings, conclusions of law, and recommended disposition.[118] Phillips then petitioned the Court for further review, and the Court agreed to consider two issues: whether the Commission erred by using a vicarious liability standard that predicated Phillips's violations of ERs 5.1 and 5.3 on subordinates' violations of firm policies, and whether the recommended sanctions, including an extensive list of probationary conditions, were appropriate.[119]

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will lead to unethical conduct by staff." *Id.* at 18 n.9. However, no evidence appears to have been introduced concerning firm managers' assumptions on this point.

116. *In re Phillips*, 244 P.3d at 552. This is an important point. Whether lawyer–managers have made reasonable efforts should not rest solely on the formal policies, procedures, and systems their firm has in place ostensibly to promote ethical compliance. Management must also consider whether firm personnel can and do adhere to those measures and whether other aspects of firm policy or culture create perverse incentives not to adhere to them. *See* Briton & McLean, *supra* note 47, at 246 (stating that firm policies and procedures "may bear little, if any, resemblance to what actually happens in practice," and that attention must be paid to other factors that "motivate and sustain the firm's lawyers to conduct themselves ethically, . . . leave them to their own ethical devices, . . . [or actually encourage them] to conduct themselves unethically").

117. *In re Phillips*, 244 P.3d at 553 (emphasis added).

118. Disciplinary Commission Report, *supra* note 115, at 4.

119. *In re Phillips*, 244 P.3d at 553. The Court imposed twenty-one probationary conditions, most of which call for detailed upgrades in the firm's ethical infrastructure. Some were addressed directly to Phillips, others to the firm. For a directive that appears to be addressed to the *firm* but is written in the passive voice, perhaps to downplay the fact that the firm was not a party, *see id.*, app. at 559, requiring "utiliz[ation]" of standard intake forms including a standard fee agreement. For a detailed directive to Phillips, see *id.* app. at 560, requiring Phillips to develop a system in which he is promptly advised of "all client complaint(s) against the firm or [firm] lawyers . . . , which implicate the provisions of ERs 5.1 and 5.3"; to "document, in writing, his or the firm's response to each such complaint"; and to "maintain a file of such complaints and responses." The dissenters on the Disciplinary Commission suggested that the Hearing Officer, in determining the sanctions to recommend, may not have focused on violations attributable to Phillips "as opposed to the firm." Disciplinary Commission Report, *supra* note 115, at 15–16. Since Phillips was *the* managing partner of the firm and could make all decisions on firm policy, the import of this distinction is unclear.

On the first issue, Phillips stressed that Rules 5.1(a) and 5.3(a) are not vicarious liability rules,[120] and argued that the "pertinent question" was whether Phillips made reasonable efforts *overall* to ensure that the conduct of the firm's lawyers and staff was consistent with lawyers' ethical duties, not whether firm employees engaged in improper conduct.[121] To show that the Hearing Officer and Commission majority had focused on the wrong question, Phillips quoted the dissenting Commissioners' view that the Hearing Officer failed to weigh undisputed evidence that went directly to the pertinent question.[122] The dissent stated:

> We would expect that most attorney–managers would be pleased to know that out of 33,000 cases, *less than 1% had issues* indicat[ing that] the policies and procedures in place failed to ensure conduct compatible with or conforming to the professional obligations of a lawyer. Our rules do not dictate perfection and these . . . numbers just cannot be ignored. To do otherwise would leave every attorney manager . . . in the untenable hot-seat that it is truly impossible to comply with ER 5.1 or ER 5.3.[123]

Instead of considering his undisputed evidence that the firm's supervisory and managerial efforts were *generally* effective, Phillips asserted, the Hearing Officer and Commission "simply equated employee violations of Firm policies with violations by managers and supervisors of ERs 5.1 and 5.3."[124] In any event, he added, the Hearing Officer and Commission applied a standard so "unrealistic" that it may not be possible "*to meet the expectations of the State Bar as a managing attorney under ER 5.1 or E.R. 5.3*."[125]

The Supreme Court rejected the argument that disciplining Phillips under Rules 5.1(a) and 5.3(a) amounted to vicarious liability. The Court acknowledged that those rules "mandate an independent duty of supervision" and that, although the Hearing Officer linked all the charges against Phillips to misconduct by others at the firm,

> the supervisory and managerial breaches for which Phillips was found liable . . . were independent. . . . Indeed, on a number of counts . . . the Hearing Officer found that someone [at the firm] had violated an ethical rule, but that Phillips had *not personally* violated

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120. This is correct as a matter of Arizona law. *See supra* note 112; *cf.* HAZARD & HODES, *supra* note 77, § 42.2 (stating that Model Rules 5.1(a) and 5.3(a) "do not establish vicarious liability [for] supervisory lawyers, [or] make supervisory lawyers . . . guarantors of the professional conduct of their subordinates").

121. Petition for Review at 11, *In re* Phillips, 244 P.3d 549 (Ariz. Feb. 23, 2010). Given the reactive nature of disciplinary enforcement, one would expect virtually all charges under Rules 5.1(a) and 5.3(a) to be predicated on complaints alleging first-order violations by others in a respondent's firm, an enforcement strategy that invites respondents to argue that the charges rest on vicarious liability.

122. *Id.* at 12.

123. Disciplinary Commission Report, *supra* note 115, at 21 (emphasis in original).

124. Petition for Review, *supra* note 121, at 13–14.

125. *Id.* (emphasis added).

> the rules requiring supervision. Had the Hearing Officer or the Commission applied a vicarious liability standard, Phillips would have been held liable for those violations as well.[126]

Nor was the court impressed by the "mountain of undisputed evidence" Phillips introduced of the firm's supervisory efforts and the "relatively rare . . . ethical breaches" by firm personnel.[127] Instead, the court emphasized that the firm's policy changes pursuant to the court's 2002 order "did not alleviate Phillips's *ongoing* duty to ensure that his subordinates *complied* with the revised policies and . . . rules."[128]

From the standpoint of promoting sound ethical infrastructures in law firms, I applaud the decisionmakers' bold effort to give effect to Rules 5.1(a) and 5.3(a) in *Phillips*. Still, the vague reasonableness standards built into those rules, along with the Hearing Officer's rather breezy characterization of Phillips's "independent" violations,[129] leave open the possibility that Phillips's liability was at least in some respects vicarious, rather than negligence-based. At a minimum, the case illustrates the confusion that can arise when regulators try to enforce broad negligence-based duties of law firm management solely in the reactive disciplinary process. In petitioning the Court for review, Phillips claimed that "no Arizona case—let alone cases from other jurisdictions—ha[s] dealt in any detail with the contours of ERs 5.1 and 5.3 in a way that provides meaningful

126. *In re* Phillips, 244 P.3d 549, 554 (Ariz. 2010). On this point the Court's logic is escapable. The fact that the Hearing Officer did not find that Phillips violated Rule 5.1(a) in connection with every instance of underlying misconduct hardly proves that the violations he did find could not have been based on vicarious liability. The Hearing Officer might have imposed vicarious liability, but inconsistently. Furthermore, the mental state associated with a respondent's violation(s) is critical in determining the appropriate sanction. The Hearing Officer found that Phillips's "knowingly" violated ERs 5.1(a) and 5.3(a), which, if correct, justified Phillips's suspension. Phillips challenged that finding in his petition for review, but the court declined to review it. *Id.* at 555. Only a year earlier, however, the court held that "for a lawyer's conduct to be knowing with regard to [an ethics violation], she must be consciously aware that her conduct does not conform to the requirements of [the pertinent rule(s)]." *In re* White-Steiner, 198 P.3d 1195, 1198 (Ariz. 2009). As Phillips argued, it was far from clear that the Hearing Officer applied this test, and applied it correctly, when making his findings. *See* Petition for Review, *supra* note 121, at 14–19.

127. *In re Phillips*, 244 P.3d at 554.

128. *Id.* (emphasis added). The point that a lawyer–manager's duties under Rules 5.1(a) and 5.3(a) include *ongoing* monitoring and assessment of her firm's infrastructure suggests that a proactive regulatory program requiring lawyer–managers to discuss their firm's management systems with regulatory personnel from time to time may be a better approach to enforcement than the reactive disciplinary process.

129. One wonders, for example, how many instances of first-order misconduct would have to be at least plausibly traceable to Phillips's "business model," *id.* at 551, before one might fairly conclude that his "efforts" were "unreasonable." Or traceable to his failure to take measures "to prevent [client] difficulty in obtaining a refund." *Id.* at 553. Or traceable to the policy tying employee bonuses in part to their success in retaining clients. *Id.* at 552.

guidance."[130] In my opinion, this claim, insofar as it refers to the broad managerial duties in Rules 5.1(a) and 5.3(a), was accurate before *Phillips* and is accurate still.

3. *The Reactive Nature of the Disciplinary Process Discourages Enforcement of Rules 5.1(a) and 5.3(a)*

Lawyer disciplinary agencies receive many complaints every year.[131] Most are filed by unsophisticated clients against lawyers who practice alone or in small firms.[132] Complainants are unlikely to specify any rules of professional conduct as grounds for their allegations. Instead, disciplinary counsel must consider which rules, if any, are pertinent when deciding when and how to investigate and whether to file charges. Complaints referring to Rules 5.1(a) or 5.3(a) or even suggesting on their face that broad duties of law firm management might be implicated must be rare indeed. Surely, no client who complains that her lawyer missed several hearings in her case will allege that the lawyer's office has an inadequate calendaring system, though that might well be the case.

How, then, do lawyer–managers *ever* get charged with violating Rules 5.1(a) or 5.3(a)? Like *Phillips*, most reported cases in which lawyers have been publicly disciplined under these rules are probably spawned by multiple complaints that, taken together, suggest that poor management may be implicated and that, without regulatory intervention, additional complaints are likely. When disciplinary agencies investigate clusters of complaints with Rules 5.1(a) and 5.3(a) in mind, find substantial evidence of infrastructural deficiencies, and identify appropriate targets, they may file charges.

Yet, investigating such cases, prosecuting them, and negotiating the sorts of corrective measures violators should take[133] is time-intensive.[134] With few precedents on the books, outcomes will be uncertain unless violations are blatant.

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130. Petition for Review, *supra* note 121, at 14.

131. *See* ABA STANDING COMM. FOR PROF'L RESPONSIBILITY, 2006 SURVEY ON LAWYER DISCIPLINARY SYSTEMS, Chart 1 (2007) (reporting that state disciplinary authorities in the U.S. received 123,927 complaints in 2006).

132. In 2001, approximately 56% of the lawyers in California practiced alone or in firms with fewer than ten lawyers, but accounted for 95% of disciplinary investigations, and 98% of sanctions. DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 997 n.54 (5th ed. 2009). Solo and small firm lawyers often practice in fields such as family law, criminal defense, personal injury, and consumer bankruptcy—fields in which clients often lack the sophistication and economic leverage that protect corporate clients from being harmed by their lawyers. The most common grounds for disciplinary sanctions were misappropriation of funds, criminal convictions, neglect of client matters, and failure to communicate with clients. *Id.* at 997–98; *see also* Maridee F. Edwards, *Report of the Office of Chief Disciplinary Counsel for the Year 2002*, 59 J. MO. B. 238, 246 (2003) (reporting that in 2002 in Missouri, the most common disciplinary complaints concerned communication problems, lack of diligence, dishonesty, conflicts of interest, and the safekeeping of client property).

133. In some cases, respondents can be "diverted" to LOMAPs for advice on office management issues. *See supra* note 44.

134. For example, formal charges against Phillips were filed in 2007, and the case ended with the Arizona Supreme Court's decision in December 2010.

Unless proceedings result in public discipline, the nature of deficiencies uncovered in disciplinary proceedings will not come to the attention of other firms or law offices, limiting the educational value of the enterprise. And no lawyer constituencies or public interest organizations are likely to press disciplinary agencies to process more complaints with a view towards ferreting out infrastructural deficiencies.[135] Disciplinary agencies with tight budgets have always focused, and presumably will continue to focus, on lawyers who commit first-order transgressions such as misappropriating client funds, neglecting client matters, or failing to communicate with clients.

B. Why I Thought Law Firm Discipline Might Be a Solution

Struck by the complexities of managing modern law firms and law offices, even rather small ones, and by the growing use of management systems to control risks in business organizations generally, I became interested around 1990 in the potential value of law firm policies, procedures, and systems, not only to enhance the competence and efficiency with which a firm's work is performed, and to reduce the risk of malpractice liability, but also to reduce the risk of professional misconduct as it is more broadly understood. Since developing, implementing, and assessing a firm's ethical infrastructure are tasks for management, I was also troubled by the paucity of cases in which lawyer–managers were being disciplined for Rule 5.1(a) or 5.3(a) violations. I took this as evidence of a serious, but curable, enforcement problem.

I proposed law firm discipline as a possible solution in 1991[136] and supported the idea again in 1998.[137] I recommended that state supreme courts expand their disciplinary jurisdiction by modifying Model Rules 5.1(a) and 5.3(a) to address not only law firm partners but also the firms operating in their jurisdictions[138] and by providing for the imposition of appropriate disciplinary sanctions on firms found to be in violation of those rules.[139]

Among the factors that moved me to propose law firm discipline at the time, three stood out. The first, discussed above and requiring no further elaboration, was the diffuse responsibility under rules that imposed broad ethical

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135. One scholar did recently suggest that the agencies could make it their policy to "investigate whether a *firm* has complied with . . . Rule 5.1 *every time* an ethics complaint against a lawyer in the firm is filed." Long, *supra* note 31, at 813 (emphasis added). Except in New York and New Jersey, however, Rule 5.1(a) is not addressed to firms. *See infra* notes 184–190 and accompanying text.

136. *See generally* Schneyer, *supra* note 36.

137. *See generally* Schneyer, *supra* note 46.

138. Schneyer, *supra* note 36, at 27.

139. *Id.* at 20–23. Disbarring firms or suspending them from operating for a fixed period seemed to call for a new system of licensing firms and to be inappropriate when not all firm personnel were blameworthy. Some proponents of firm discipline have suggested introducing fines as a sanction for firms, see Ass'n of the Bar of the City of New York, Committee on Prof'l Responsibility, *Discipline of Law Firms*, 78 RECORD 628, 636–37 (1993), while I favored the use of probation, sometimes accompanied by orders to correct deficiencies in infrastructure. *See* Schneyer, *supra* note 36, at 22–23.

duties on law firm management while purporting to make each partner accountable for violations.[140] The second and third factors require some elaboration.

1. The Use of Entity Liability in Other Regulatory Systems to Promote Sound Ethical Infrastructures in Law Firms

The second factor was my observation that, in contrast to PSR, the three other regulatory systems mentioned in the Introduction were all using entity liability in ways that seemed likely to promote sound ethical infrastructures:[141] judges and juries were holding law firms liable for any on-the-job crimes or torts committed by firm personnel (most commonly professional malpractice); courts were sanctioning law firms and law offices for violating rules of procedure; and federal agencies were sanctioning law firms for misconduct in matters within the agencies' jurisdiction.[142] For practical as well as jurisdictional reasons, none of these systems are generally available to address the misconduct most commonly alleged in disciplinary cases and to sanction the respondents against whom those complaints are filed.[143] Why, I wondered, should firms not also be subject to professional discipline?

Making law firms vicariously liable for harm caused by negligence on the part of their lawyers and staff undoubtedly gives firms an incentive to adopt internal controls to reduce their malpractice exposure, especially if the cost and availability of malpractice insurance depend on their loss experience.[144] This is not

140. Making each partner in a law firm responsible in principle for the firm's ethical infrastructure seemed especially fatuous in the case of large firms. As Elizabeth Chambliss has written, "one would be hard-pressed to find a large law firm that is actually managed [by all of its partners]. Most large firms have moved away from . . . collegial governance and instead have extensive management hierarchies, including some . . . professional (full-time, specialized) managers." Chambliss, *The Nirvana Fallacy*, *supra* note 32, at 127.

141. *See* Schneyer, *supra* note 36, at 37–45.

142. *See supra* notes 7–9 and accompanying text.

143. As Professor David Wilkins has argued, a large percentage of meritorious disciplinary complaints stem from misconduct that constitutes a low-level "agency problem," such as a client's overpayment of fees, a lawyer's unwillingness to return unearned fees, a lawyer's failure to stay in touch with a client or timely attend to a client's matter, and the like. For the generally unsophisticated clients who file such complaints, the disciplinary process is likely to be the only "game in town" and therefore the only legal process that could motivate lawyers to improve firm or office infrastructure in order to avoid the problems. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 874 (1992). For evidence suggesting that most clients who have meritorious malpractice claims against their lawyers and law firms sustain losses too modest to justify suing, see GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 583 (3d ed. 1994) (reporting that in the mid-1980s over 70% of the individuals eligible to recover damages for legal malpractice would have been entitled to less than $1000 in damages).

144. I focus here on vicarious civil liability because firms (and lawyer–managers) are rarely held personally liable for "second-order" negligence. *But see, e.g.*, Dresser Indus., Inc. v. Digges, No. JH-89-485, 1989 WL 139234 (D. Md. Aug. 30, 1989); Dresser Indus., Inc. v. Digges, No. JH-89-485, 1989 WL 139240 (D. Md. Sept. 5, 1989) (holding two partners in a three-partner firm liable for negligently failing to have a system in place that

to say, however, that courts impose vicarious liability chiefly to encourage firms to develop satisfactory infrastructure. Ensuring that a plaintiff can collect on a malpractice judgment is probably a more important rationale.[145]

By contrast, the sanctions trial courts impose on law firms and law offices when their lawyers violate rules of procedure cannot rest on a "deep pocket" rationale, and some of those sanctions are clearly meant to encourage firms to review and, if necessary, improve their ethical infrastructures. In *Harrell v. United States*,[146] for example, the court initially fined an Assistant U.S. Attorney (AUSA) for failing to appear at a final pretrial conference. When the AUSA claimed that he was never notified of the conference, the court concluded that responsibility for the failure lay, at least in part, with his office.[147] "Any reasonable tickler system," the court observed, "would have alerted counsel long before [the conference date] to check the status of this case . . . ." Reasoning that a high volume law office must have an adequate system to keep track of deadlines, court dates, and meetings, the court found that the U.S. Attorney's Office "negligently failed to monitor the case," and censured the Office as well.[148]

The recent history of Rule 11 of the Federal Rules of Civil Procedure is notable here because it reflects a felt need to hold *firms* accountable when their lawyers file frivolous pleadings and motions. After the Supreme Court held in 1989 that only the lawyer who signed frivolous papers,[149] not the lawyer's firm, may be sanctioned for a Rule 11 violation, the rule was amended. The rule now provides that "[a]bsent exceptional circumstances, a law firm *must* be held jointly responsible for a violation committed by its partner, associate, or employee."[150] In this respect, the sanctions federal courts may impose for Rule 11 violations contrast sharply with the sanctions that disciplinary authorities in PSR may impose on respondents for violating Rule 3.1 of the Model Rules of Professional Conduct, which closely tracks Rule 11.[151]

Moreover, it is clear that the Rule 11 amendment calling for the imposition of sanctions on firms was clearly intended to bolster deterrence. Since

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could have detected that the third partner fraudulently overcharged a client by $3,000,000). And even when firms (or firm partners) are held vicariously liable, the decisions rarely identify deficiencies in firm infrastructure or ways in which deficiencies can be rectified. Malpractice insurers, if they provide loss prevention advice, may be helpful on that score, however.

145. *See* DAN B. DOBBS, THE LAW OF TORTS 908 & n.3 (2d ed. 2001) (Practitioner Treatise Series).

146. 117 F.R.D. 86 (E.D.N.C. 1987).

147. *Id.* at 87, 91.

148. *Id.* at 91.

149. Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126–27 (1989).

150. FED. R. CIV. P. 11(c)(1).

151. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2010). Rule 3.1 forbids a lawyer to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." *Id.* In principle, law firm partners, but not the firm itself, could be disciplined under Model Rule 5.1(a) if firm lawyers had filed frivolous papers on multiple occasions but the partners made no reasonable effort to prevent such violations. I have found no such disciplinary cases, however.

Rule 11 was amended in 1993, sanctions imposed under the rule must be designed to deter future violations. Sanctions may include "nonmonetary directives" (similar, perhaps, to the probation order in *Phillips*), but may not be designed primarily to ensure that compensation is available for parties who incur costs in responding to frivolous papers.[152] In *that* respect, the current approach to Rule 11 enforcement jibes with PSR's enforcement philosophy, which treats public protection and deterrence as appropriate aims but does not recognize compensation as a disciplinary sanction.[153]

Finally, consider two instructive cases in which a federal agency sanctioned a law firm for improprieties in the course of appearing and practicing before the agency. In *Keating, Muething, and Klekamp*,[154] the Securities & Exchange Commission (SEC) instituted its own disciplinary proceeding against an Ohio law firm in which all twenty lawyers did transactional work for the firm's largest client.[155] The SEC initiated the proceeding after an investigation revealed that disclosure forms filed on the client's behalf unlawfully omitted material facts about self-dealing transactions between the client and its principal owners.[156] The lawyer who prepared the filings claimed not to have known the pertinent facts.[157]

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152. *See* FED. R. CIV. P. 11(c)(4) (providing that "[a] sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated [and] may include nonmonetary directives"). For an example of such a directive, see *Nault's Automobile Sales, Inc. v. American Honda Motor Co.*, 148 F.R.D. 25, 37 (D.N.H. 1993), which required counsel who filed frivolous papers to have any additional filings in the case reviewed first by a "Rule 11 committee" of two or more experienced partners in counsel's firm. Before the 1993 amendments, providing compensation for parties who incurred costs in responding to frivolous filings was itself a sanctioning objective, but that is no longer the case. *See* Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37, 46 (1993) (stating that the amendments were "chiefly concerned with channeling attention away from compensation and toward deterrence"). An order directing a Rule 11 violator to pay a moving party some or all of the reasonable attorney's fees and other expenses directly resulting from the violation is still permissible but only "if imposed on motion and warranted for effective deterrence." FED. R. CIV. P. 11(c)(4).

Another nonmonetary sanction a federal court may impose on a Rule 11 violator is referral to a disciplinary agency. *Id.* But such referrals are rare. *See* Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 791–92 (2004). Disciplinary charges under state equivalents of Model Rule 3.1 are also rare. *See* Edwards, *supra* note 132, at 246 (noting that none of the 729 complaints opened by the Office of Disciplinary Counsel in Missouri in 2002 involved a potential charge under that state's Rule 3.1).

153. *See* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS PT. III.B (1992) (listing the disciplinary sanctions that may be imposed, including restitution of client funds, but excluding any other compensation for victims of lawyer misconduct).

154. Exchange Act Release No. 15,982, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,124, at 81,981 (July 2, 1979).

155. *Id.* at 81,981–82. At the time the SEC had disciplinary authority under Rule 2(e) of its Rules of Practice. *See id.* at 81,989. In 1995, the SEC revised its Rules of Practice and Rule 2(e) was renumbered as Rule 102(e).

156. *Id.* at 81,982, 81,987–88.

157. *Id.* at 81,984, 81,986.

The SEC asserted that if the lawyer had known what other lawyers in the firm knew about the client, the lawyer would have recognized that the filings were misleading and also that the lawyer should have known these things.[158]

But assigning individual blame was not the SEC's chief concern. Every lawyer in the firm may have been blameworthy; the SEC concluded that partners who had material information failed to communicate it to the partner who prepared the disclosure forms, and that partner failed to exercise due diligence in gathering information.[159] Instead of focusing on individual fault, the SEC focused on the *firm*'s "lack of comprehensive internal procedures . . . to gather and evaluate [the] information."[160] Because the underlying wrong was a breach of the supervisory duty to maintain reasonable internal controls, the firm itself was the appropriate target. The SEC wrote:

> A law firm . . . has a duty to make sure that disclosure documents . . . include all material facts about a client of which *it* has knowledge . . . . The Commission does not believe it should dictate to law firms how they should structure their internal procedures . . . [b]ut it is clear that substantial additional procedures were required here.[161]

Under the *Keating* consent agreement, the firm agreed to "adopt, maintain, and implement additional . . . supervisory procedures" that would avoid a recurrence of problems.[162] By this route, the SEC presumably strengthened the firm's ethical infrastructure.

In 1992, another federal agency sought to improve a law firm's infrastructure by proceeding against the firm. *In re Fishbein*[163] was an administrative enforcement action that the Office of Thrift Supervision (OTS) instituted in the wake of the savings-and-loan crisis against Kaye Scholer (KS) and certain partners in the firm. The action concerned KS's representation of Charles Keating's soon-to-fail thrift, Lincoln Savings & Loan. The OTS filed ten charges against the firm for violations of basic ethical duties as well as banking regulations.[164]

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158. *Id.* at 81,988–89.

159. *Id.* at 81,986.

160. *Id.* at 81,988.

161. *Id.* at 81,989 (emphasis added) (footnote omitted).

162. The firm also agreed not to accept new securities matters for two months, while the "additional procedures" were put in place. *Id.*; *see also* SEC v. National Student Mktg. Corp., [1977–1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,027, at 91,600 (May 2, 1977) (holding that in a law firm's future securities work, the partner handling a transaction must consult with at least two other partners if faced with possible client misconduct, and that an "experienced partner" must review certain registration statements and opinion letters prepared by other lawyers).

163. OTS AP-92-19, 1992 WL 560939 (Mar. 1, 1992) (Notice of Charges and of Hearing for Cease and Desist Orders to Direct Restitution and Other Appropriate Relief). For further discussion of the case, see Schneyer, *supra* note 71, at 646–64.

164. *See* OTS AP-92-24, 1992 WL 560945 (Mar. 11, 1992) (Order to Cease and Desist for Affirmative Relief from Kaye, Scholer, Fierman, Hays & Handler). Harris Weinstein, then general counsel of the OTS, asserted that the bar had adequate ethics rules before the savings-and-loan crisis but some lawyers who had represented failing thrift

In this and other actions arising out of the savings-and-loan crisis, federal regulators sought not only to recover funds for the depleted federal deposit insurance programs, but also to prevent future bank failures by enlisting banking lawyers *and their firms* as regulatory "gatekeepers."[165] Accordingly, in their consent agreement, the OTS extracted a commitment from KS to follow a number of protocols in future banking work.[166] For example, the firm agreed to review the finances of new banking clients; come to a written understanding with each banking client about the scope of its engagement; have any legal opinion concerning a client's compliance with federal banking laws prepared under the supervision of a partner with at least ten years of banking-law experience and approved by a second banking partner; and have other banking work monitored by a designated partner with at least ten years experience.[167]

In discussing these two federal cases, I do not mean to endorse federal agencies aggressively using their disciplinary or administrative-enforcement authority to (a) sanction private law firms for breaching controversial and less-than-clearly codified duties[168] to monitor their regulated clients or (b) dictate the precise measures a firm must take to improve its infrastructure. Any federal agency with a vital enforcement mission but limited resources may be tempted to enlist the lawyers and law firms that represent its regulatees in that mission, posing a danger of overreaching.[169] One of PSR's strengths is that the decisionmakers in lawyer disciplinary proceedings have no other enforcement axe to grind. Still, these two cases, like some cases in which trial courts have sanctioned law firms for violating rules of procedure, use firm-directed sanctions in hopes of improving law firm infrastructure, an enforcement tool that remains unavailable in lawyer disciplinary cases in nearly every state.

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institutions "lacked a commitment to observing" them. Harris Weinstein, *Attorney Liability in the Savings and Loan Crisis*, 1993 U. ILL. L. REV. 53, 64. However, the pertinent ethics rules were vague, and the ABA challenged the OTS's interpretations. *See* Schneyer, *supra* note 71, at 650–64, 673 & n.150.

165. For discussion of the apparent federal penchant for "deputizing" private lawyers as "gatekeepers" with duties to monitor their federally-regulated clients, see *supra* note 21.

166. *See, e.g.*, *In re Fishbein*, OTS AP-92-24, at *2, *4.

167. *Id.*

168. Under the SEC Rules of Practice and Rules on Fair Fund and Disgorgement Plans 102(e), codified at 17 C.F.R. § 201.102(e), any professional practicing before the agency may have her practice privileges suspended or revoked if she is found (1) to lack "the requisite qualifications to represent others," (2) to be "lacking in character or integrity or to have engaged in unethical or improper professional conduct," or (3) "to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder." This authority is conveyed in 15 U.S.C. § 78d-3 (2006). Grounds for discipline under (2) are vague because the SEC has no comprehensive code of legal ethics, and, over time, the SEC has relied on (3) whenever possible. *See* Edward F. Greene, *Lawyer Disciplinary Proceedings Before the Securities and Exchange Commission*, 14 SEC. REG. & L. REP. (BNA) 168 (1982) (announcing an SEC policy not to institute disciplinary proceedings except under the third prong of the rule).

169. *See* Martin Whittaker, *Speakers Identify Dangers in SEC Discipline but Add That Problems Are Mostly Potential*, 26 Laws. Man. on Prof. Conduct (ABA/BNA) 357 (June 9, 2010) (discussing concerns expressed by scholars at a recent conference).

2. "Loose Talk" About Law Firm Duties in Ethics Rules and Opinions

The third factor that moved me to propose law firm discipline in 1991 was the "loose talk" about the ethical duties of law *firms* that I found (and continue to find) in supposedly enforceable ethics rules and in the bar's advisory ethics opinions interpreting those rules. Referring to law firm duties in ethics rules and opinions seemed anomalous at the time because no state supreme court had ever asserted the authority to discipline a law firm. But because these references were far from rare, I doubted that they were mere slips of the regulatory tongue. Instead, with so many lawyers working in firms and other group settings, I suspected that the references to firm duties reflected a growing intuition that some ethical duties are most naturally expressed, and best conceived, as collective duties. From this, it seemed to follow that law firms *should* be subject to discipline for breaching firm-directed ethics rules and that Model Rules 5.1(a) and 5.3(a), as second-order rules concerning broad duties of firm management, should be addressed to, and made enforceable against, law firms as well as partners.

Law Firm Discipline[170] identified four self-described *Disciplinary* Rules (DRs) in the ABA Model Code of Professional Responsibility[171] that expressly addressed firms as well as lawyers. Three DRs barred lawyers *and* law firms from using certain professional signs and letterheads,[172] sharing legal fees with nonlawyers,[173] and making certain out-of-court statements about pending cases.[174] The fourth required lawyers *and* firms to maintain client trust accounts in order to segregate client funds from their own.[175] In addition, an ABA ethics opinion from the Model Code era concluded that when a lawyer who is handling a client's matter leaves his firm, the Code's withdrawal provisions, though addressed only to individual lawyers, required "the *firm*" to continue representation.[176] Where multi-lawyer firms were concerned, it seemed entirely sensible to me to address to firms as well as lawyers rules that prohibit sharing legal fees with nonlawyers, require trust accounts, and require continued representation when the lawyer in charge of a matter departs.

One also finds "loose talk" about law firm duties today in certain Model Rules[177] and even in some bar association ethics opinions that purport to construe

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170. Schneyer, *supra* note 36, at 15–16.

171. MODEL CODE OF PROF'L RESPONSIBILITY (1981). The *Model Code* was the predecessor to the *Model Rules.* The Code contained DRs as well as Ethical Considerations (ECs), but only the former were "mandatory in character." *Id.* Preliminary Statement para. 5.

172. *Id.* DR 2-102(A).

173. *Id.* DR 3-102(A).

174. *Id.* DR 7-107.

175. *Id.* DR 9-102(A). For an argument that the duties recognized in these rules can be understood as collective duties, see Schneyer, *supra* note 36, at 16.

176. ABA Informal Ethics Op. 1428 (1979) (emphasis added).

177. *See* MODEL RULES OF PROF'L CONDUCT R. 1.17 & cmt. 1 (2010) (permitting a lawyer *or* a law firm to sell or purchase a law practice); *id.* R. 5.4(a) (barring a lawyer *or* law firm from sharing legal fees with a nonlawyer, with certain exceptions); *id.* R. 7.6 (barring a lawyer *or* law firm from accepting government engagements or judicial appointments if they made or solicited a political contribution in order to be considered for

state rules that do not refer to law firms and come from states that do not provide for law firm discipline. In one such opinion,[178] the Arizona State Bar's ethics committee considered the respective duties of a law firm and a lawyer departing from the firm regarding client matters on which the lawyer was working while at the firm. Citing Arizona's ER 5.1 and other rules, the committee concluded that before terminating a lawyer, "the *firm* must consider the possible effect"[179] on clients; that "when terminating a lawyer, the *firm* . . . must take steps to avoid prejudice"[180] to clients; that both the lawyer and the *firm* have a duty "to provide timely notice [of the termination] to affected clients";[181] and that "the *firm* may not take any actions that impedes or prevents the departing lawyer's compliance" with ethics rules.[182]

C. An Assessment of the New York and New Jersey Experience with Law Firm Discipline

My call for state courts to take disciplinary jurisdiction over law firms and address certain ethics rules to firms (or, more precisely, to firms as well as "lawyers with managerial authority") has gotten a mixed reception at best, both on the regulatory front and in commentary. On the regulatory front, New York and New Jersey took the plunge in the 1990s, but no other jurisdiction has followed suit. Since 2000, moreover, the ABA's Ethics 2000 Commission and a California State Bar Commission appointed to suggest revisions in California's ethics rules have both rejected proposals to adopt law firm discipline.[183] Part II.C assesses the experience with firm-directed ethics rules and firm discipline in New York and New Jersey. It concludes that neither state has made effective use of their *disciplinary* authority as of yet, but New York's firm-directed ethics rules have

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such an engagement or appointment); *see also id.* R. 6.1 cmt. 9 (stating that in fulfilling their aspirational duty under Rule 6.1(a) to render at least fifty hours of pro bono service each year, it may be more feasible at times for lawyers to satisfy the duty "collectively, as by a firm's aggregate pro bono activities"). Arizona's Rule 6.1 elaborates on this possibility, stating that a firm's designation of one or more lawyers to work on pro bono matters "may be attributed to other lawyers within the firm . . . who support the representation." ARIZ. SUP. CT. R. 42, ER 6.1(c).

178. Arizona Ethics Op. 10-02 (Mar. 2010), *available at* http://www.myazbar.org/ethics/opinionview.cfm?id=706; *see also* Utah Ethics Op. 98-08 (Sept. 11, 1998), *available at* http://webster.utahbar.org/committees/eaoc/1998/12/ (concluding that a law *firm* may "wholly own an accounting-practice subsidiary that is staffed by employees other than the firm's lawyers and would perform services for the lawyer[s]'s clients and others," but that "the law firm" will be subject to the Utah Rules of Professional Conduct with respect to the provision of these law-related services in certain circumstances).

179. Arizona Ethics Op. 10-02 (Mar. 2010) (emphasis added).

180. *Id.*

181. *Id.*

182. *Id.*

183. *See* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 470–71 (2002); *see also* STATE BAR OF CAL., COMM'N FOR THE REVISION OF THE RULES OF PROF'L CONDUCT, RULES AND CONCEPTS THAT WERE CONSIDERED, BUT ARE NOT RECOMMENDED FOR ADOPTION 24–25 (2010) (on file with Author).

been a catalyst for the production of valuable guidance from New York bar associations on matters of law firm infrastructure and careful thinking about how to coordinate the ethical accountability of law firms and individual lawyers in the area of conflicts of interest.

1. The Experience with Law Firm Discipline in Disciplinary Proceedings

In 1993, the ethics committee of the Association of the Bar of the City of New York recommended that the state courts extend their disciplinary jurisdiction to include law firms.[184] The courts did so in 1996,[185] and since the courts changed their ethics code to a Model Rules format in 2009,[186] the key provisions addressed to law firms are Rules 1.10(e), (f), and (g);[187] 5.1(a);[188] and 5.3(a).[189] The New

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184. Ass'n of the Bar of the City of New York, Committee on Professional Responsibility, *The Discipline of Law Firms*, 48 RECORD 628, 629 (1993). The grounds for the committee's recommendation included the prospect of improving the ethical atmosphere and infrastructure of firms, furthering the tradition of professional self-regulation, and addressing problems that are inherently organizational, such as associate-to-partner ratios so high that adequate supervision becomes impossible. *Id.* at 629–32.

185. The rules providing for firm discipline were announced in a joint order of the four Appellate Divisions of the New York Supreme Court, which regulate law practice in New York, rather than the state's highest court, the New York Court of Appeals. *See New York Adopts New Rules Subjecting Firms to Discipline*, 12 Law. Man. on Prof. Conduct (ABA/BNA) 191 (June 12, 1996).

186. N.Y. R. PROF'L CONDUCT ii (2009) (codified at N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (2009)). As codified, the rules are not accompanied by comments. But they were adopted with extensive comments by the New York State Bar Association and are available in that form at http://www.nysba.org (click on "For Attorneys," then scroll down and click on "Professional Standards for Attorneys").

187. N.Y. R. PROF'L CONDUCT 1.10(e), (f), (g). Rule 1.10 concerns the imputation of conflicts of interest between lawyers in a firm as well as the elements of an adequate conflict-checking system. Rule 1.10(a) provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8, or 1.9, except as otherwise provided therein." Rule 1.10(e) lists the recordkeeping requirements for a conflict-checking system and imposes the duty to meet those requirements on firms:

> (e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:
>
> (1) the firm agrees to represent a new client;
>
> (2) the firm agrees to represent an existing client in a new matter;
>
> (3) the firm hires or associates with another lawyer; or
>
> (4) an additional party is named or appears in a pending matter.

Rule 1.10(f) provides that "[s]ubstantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules." In other words, there can be a violation of the recordkeeping duties of Rule 1.10(e) even if no improper conflict results, though one wonders how likely it is that a violation of Rule 1.10(e) alone would come to the attention of disciplinary authorities.

Rule 1.10(g) expressly allocates responsibility in cases in which "a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by

Jersey Supreme Court has had disciplinary jurisdiction over law firms for some time but publicly disciplined a firm for the first time in 1997.[190]

If one measures the regulatory value of the New York and New Jersey experiments with law firm discipline to date by the number of cases in which firms have been disciplined and the quality of the analysis those cases provide, one can only conclude that the availability of firm discipline has done very little to promote better ethical infrastructures. Since 1997, law firms have been publicly disciplined in only four New Jersey cases and one New York case.[191] It may have been appropriate to discipline the firms in these cases on the theory that the misconduct in question was a product of collective action or decisionmaking,[192] but the scant opinions in the cases are completely uninformative. No other New Jersey or New York firms would find the opinions illuminating, and the opinions do not suggest that the courts and disciplinary authorities have thought much about when to

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a lawyer." In such cases, "the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a)."

188. *Id.* 5.1(a). Rule 5.1 provides in part as follows:

> (a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these rules.
>
> (b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.
>
> (c) A law firm shall ensure that the work of partners and associates is adequately supervised . . . .

189. *Id.* 5.3(a) (providing in part that "[a] law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate"). New York Rule 8.4, also addressed to law firms as well as lawyers, prohibits several broad categories of conduct, including conduct "prejudicial to the administration of justice." *Id.* 8.4(d).

190. Discipline of Members of the Bar, N.J. CT. R. 1:20-1 (West) (2010) (subjecting "every . . . business entity authorized to practice law" to "the disciplinary jurisdiction of the Supreme Court"). New Jersey's Rule of Professional Conduct 5.1(a) begins by addressing "[e]very law firm . . . and organization authorized by the Court Rules to practice law in this jurisdiction." N.J. R. PROF'L CONDUCT 5.1(a) (2011). Rule 5.3(a) provides that "every lawyer . . . or organization authorized . . . to practice law . . . shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer."

191. The New Jersey cases are *In re Sills Cummis Zuckerman, Radin Tischman Epstein & Gross*, 927 A.2d 1249 (N.J. 2007), *In re Rovner, Allen, Seiken, and Rovner*, 754 A.2d 554 (N.J. 2000); *In re Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein*, 715 A.2d 216 (N.J. 1998); and *In re Jacoby & Meyers*, 687 A.2d 1007 (N.J. 1997). The lone New York case is *In re Wilens & Baker*, 777 N.Y.S.2d 116 (N.Y. App. Div. 2004). As of 2002, there were reportedly two instances in which law firms were privately admonished as well. Chambliss & Wilkins, *A New Framework*, *supra* note 32, at 340.

192. *Ravich*, for example, concerned the improper solicitation of prospective clients at the scene of an explosion near a large apartment complex. 715 A.2d at 217–18. Apparently the partners decided, collectively, that the firm should rent a large RV to serve as a firm office at the accident scene. *Id.* at 220. The victims and their families were in no condition to be importuned by lawyers. *See id.* at 218. One of the six partners was directly involved in the solicitation. 715 A.2d at 220–21. The firm and that partner were publicly reprimanded. *Id.* at 227–28.

invoke their authority to proceed against law firms or how to sanction firms to good effect.

For example, none of the decisions put a firm on probation with orders to improve its infrastructure, as the Arizona Supreme Court did in *Phillips*. Only *In re Sills* disciplined a firm for failing to meet its broad managerial duties under Rule 5.1(a).[193] But the "opinion" in *Sills*, barely more than a page long, merely reprimands the firm and says nothing about the nature of its misconduct.[194] The only case that even refers to matters of firm infrastructure is the New York case *In re Wilens and Baker*.[195]

The Wilens & Baker firm represented aliens with immigration problems. The firm and Mr. Wilens, a name partner, were each publicly censured for engaging in a "pattern of misconduct,"[196] one aspect of which was neglect of clients' matters. The more disturbing aspect was that clients and their family members were often demeaned in the office and pressured to pay additional fees on the spot. If they could not make these payments when they came to the office to inquire about their cases, Wilens or an employee apparently yelled at them and ordered them to leave immediately—actions found to be in violation of ethics rules prohibiting "conduct that adversely reflected on the fitness of the firms' lawyers to practice" and "conduct prejudicial to the administration of justice."[197] Neither Rule 5.1(a) nor 5.3(a) was cited as a basis for the discipline, but the Hearing Panel called the case one of the "rare instances" in which a firm should be disciplined, since the pattern indicated a firm-wide problem and the "highly visible misconduct of a name[d] partner must have been apparent to everyone" at the firm.[198]

The respondents argued for private admonitions rather than public censure on the ground that the firm had already "instituted significant administrative changes to improve attorney–client relations in [a] high-volume practice."[199] The court was impressed by the firm's "significant strides" in improving its operations but concluded that the Hearing Panel had duly considered the reforms before recommending public censure.[200]

2. *Proactive Use of Firm-Directed Ethics Rules Outside the Disciplinary Process*

Notwithstanding the oblique reference to firm infrastructure in *In re Wilens & Baker*, the use of law firm discipline in New York and New Jersey has been quantitatively and qualitatively disappointing. But if one defines "regulation" broadly, then discipline is not the only way in which PSR regulates law practice, and New York's firm-directed rules appear to be making a valuable contribution to PSR more broadly conceived.

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193. 927 A.2d at 1249.
194. *Id.* at 1249–50.
195. 777 N.Y.S.2d at 119.
196. *Id.* at 118.
197. *Id.* at 117–18.
198. *Id.* at 118.
199. *Id.*
200. *Id.* at 119.

For one thing, these rules have spawned new thinking, as exemplified by one ethics opinion that relies on what is now Rule 5.1(a) to reassess a previously settled issue and another that tackles an issue of first impression. The first opinion, NYSBA Opinion 814,[201] addressed whether the New York office of a multi-state firm may be staffed solely by a non-partner who is admitted to practice in New York but supervised by a firm partner who is only admitted in another state. A NYSBA opinion in 1971 had concluded that this arrangement was impermissible.[202] Reconsidering the question, Opinion 814 notes that, since the earlier opinion was published, the New York rules of ethics were amended to regulate law firms as entities and established the broad managerial and supervisory duty of a law firm to make reasonable efforts to ensure that lawyers in its New York office meet their ethical responsibilities.[203] Insofar as the earlier opinion was based on the view that only a partner can ensure associates in a firm conform to ethical standards, and Opinion 814 recognized that firms had come to have their own broad duties of management and supervision, it was no longer necessary to have a firm partner (and not just associates) practicing in the New York Office.[204]

NYSBA Opinion 789[205] addressed an issue of first impression for ethics committees around the country[206]—whether a law *firm* that seeks advice from one of its own lawyers concerning its legal and ethical obligations in representing a client, and does so without first obtaining the client's consent, necessarily embroils itself in an impermissible conflict between the firm's interests and those of the client. The opinion begins by noting that New York law firms now have an ethical duty to take steps to ensure that its lawyers comply with their duties. A key aspect of the firm's duty, according to the opinion, is to "establish protocols [that] enable the firm to enforce its standards internally,"[207] a formulation that seems closely linked to the idea of maintaining an appropriate "ethical infrastructure."[208] Given the firm's duty, and a firm's frequent need for immediate ethics advice, the committee saw no reason to presume that every in-house consultation of the sort contemplated by the opinion would foreseeably be adverse to the interests of the relevant client and therefore improper without the client's informed consent. On the contrary, the client would more often than not benefit from such consultations, which help to ensure ethical representation. Consequently, the firm would ordinarily be impliedly authorized to consult with its in-house counsel, though it may sometimes have to disclose to the client the conclusions reached, as when the firm concludes that it has made a significantly detrimental error to the client.[209]

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201. N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 814 (Mar. 3, 2008) (revised and reissued).

202. N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 175 (1971).

203. N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 814 para. 7. The committee's reference was to a provision in DR 1-104 of the New York Code of Professional Responsibility that is now Rule 5.1(a).

204. *Id.*

205. N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 789 (Oct. 26, 2005).

206. *Id.* para. 4.

207. *Id.* para. 6.

208. *Id.* para. 9.

209. *Id.* para. 21.

Similarly, the three firm-directed sections of New York Rule 1.10 concerning the recordkeeping duties associated with a firm's conflict-checking system[210] have spawned some of the most detailed and useful guidance that exists on the subject. That guidance is embodied in the *unenforceable* comments that the NYSBA has appended to Rule 1.10,[211] an opinion rendered by the NYSBA ethics committee,[212] and a comprehensive opinion rendered by the ethics committee of the Association of the Bar of the City of New York (ABCNY).[213]

I submit that the rich guidance that has been generated in New York as a result of addressing Rule 5.1(a) and portions of Rule 1.10 to law firms is professional self-regulation no less than the imposition of discipline, though it is only "soft law"—advisory rather than binding, and is actually more valuable regulation than the uninformative New York and New Jersey cases in which law firms have been publicly disciplined to date. I would also call this guidance, provided to law firms in the absence of any disciplinary complaints, a form of proactive rather than reactive professional self-regulation.

3. My "Bottom Line" on Law Firm Discipline

On reflection, I was wrong in thinking that law firm discipline could substantially enhance the disciplinary enforcement of rules such as Model Rules 5.1(a) and 5.3(a), which create broad ethical duties of firm management. Providing for firm discipline can somewhat mitigate the problem of diffuse responsibility for ethical infrastructure that arises when such rules are addressed indiscriminately to "partners and lawyers with comparable managerial authority." But my error lay in failing to give adequate attention to the two *other* reasons why I *now* think it is virtually impossible to enforce Model Rules 5.1(a) and 5.3(a) fairly and effectively in the traditional disciplinary process. The New York and New Jersey experience strongly suggests that the difficulty of enforcing such rules, turning as they do on vague reasonableness standards, plagues firm-directed no less than partner-directed versions. And because disciplinary authorities in those states have proceeded against law firms for violating those rules no more, and no more effectively, than any state authorities proceed against "partners," I infer that the reactive nature of discipline is as much an obstacle to disciplinary enforcement of

210. *See supra* note 187 (quoting those provisions).

211. N.Y. R. PROF'L CONDUCT 1.10 cmts. 9, 9A–9E (2009); *see also supra* note 186.

212. N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 720 (Aug. 27, 1999) (concluding that when a lawyer moves from Firm A to Firm B, Firm B must request, and the moving lawyer may disclose, for conflicts-checking purposes the names of clients the moving lawyer represented at Firm A and, "depending on the size of Firm A, the name of all clients of Firm A for a reasonable period," as long as such information is not protected as confidential information of the clients of Firm A and disclosing the information to Firm B does not violate any contractual or fiduciary duties of the lawyer to Firm A).

213. N.Y.C. Bar Comm. on Prof'l and Judicial Ethics, Formal Ethics Op. 2003-03, *available at* http://www.abcny.org/nycbar/index.php/ethics/ethics-opinions-local/2003-opinions/819-checking-for-conflicts-of-interest (discussing the type and quality of records a law firm must keep for purposes of its conflicts checking system and how these requirements may vary depending on a firm's size and the nature of its practice).

rules imposing broad managerial duties on firms as it has been for rules addressed to partners.

On the other hand, and contrary to the arguments that opponents have leveled against law firm discipline, I see no downside to retaining that enforcement tool where it exists or adopting it elsewhere. As Elizabeth Chambliss has shown,[214] the arguments against law firm discipline have no basis in reality and may simply reflect nostalgia for a fading ideal of collegially managed law firms.[215] Most of the opposition posits that providing for firm discipline would have perverse effects on the charging decisions of disciplinary authorities, on the commitment of individual partners to fulfilling broad ethical duties of management, or of both. For example, the ABA Ethics 2000 Commission ultimately took the view that any possible benefit from being able to extend disciplinary liability firm wide was small when compared to the possible cost of allowing responsible partners and supervisors to escape personal accountability.[216] Chambliss responds to this argument, first, as it bears on disciplinary bodies:

> It is not clear by what mechanism the Commission expected this trade-off to occur. Its language . . . suggests that the Commission was concerned . . . that the availability of the firm as a target would lead disciplinary authorities to *relax* enforcement against individual lawyers. But this concern makes little sense given the historic *absence* of enforcement against individual lawyers.[217]

Responding directly to the claim that extending managerial accountability to firms will encourage individual partners to shirk their supervisory duties, Chambliss writes that the assertion

> assumes that lawyers cannot read disciplinary rules, since extending supervisory liability to firms would not eliminate individual [partner] liability. . . . Professor Julie O'Sullivan argues that, against a history of non-enforcement against individual lawyers, adding entity liability would signal that "enforcement authorities are basically throwing in the towel as far as individual cases against large firm lawyers are concerned." But if there was no enforcement to begin with, what towel is there to be thrown?[218]

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214. Chambliss, *The Nirvana Fallacy*, *supra* note 32, at 126–27.

215. *Id.* at 119–21.

216. This was the position the ABA's Ethics 2000 Commission took by a vote of six to five after initially recommending that law firms be added to the list of those with supervisory duties under Model Rule 5.1(a). *Id.* at 125–26 & n.34 (citing source).

217. *Id.* at 126 (emphasis added).

218. *Id.* at 126–27 (internal citations omitted). Professor O'Sullivan has also argued that providing for law firm discipline would make it "too easy for disciplinary authorities to pursue firms rather than invest the time, resources, and effort needed to sanction a truly culpable lawyer." Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 20 (2002). But I fail to see why disciplinary authorities would find it easier to proceed against a firm than a partner for violating Rule 5.1(a) or 5.3(a)—unless, of course, it would be hard for them to ascertain *which* of a firm's partners to charge. As noted earlier, one of my concerns in proposing law firm discipline was precisely that the diffuse responsibility of

Chambliss adds that any assumption that most law firm partners are shouldering the broad ethical duties of firm management is unwarranted.[219] She cites empirical evidence that many law firms lack procedures governing their lawyers' investments in client businesses, lack billing guidelines other than those imposed by clients, and do "little or nothing" to train new associates about proper billing procedures.[220] She cites a study of peer review in 191 Texas law firms which found that in most of them no one monitored partners' compliance with internal policies and procedures other than those that related to conflicts and billing.[221] And she cites studies indicating that many law firm partners view monitoring by their partners as an "affront."[222]

Some critics argue that law firm discipline is simply unfair because it raises "the specter of the innocent being punished along with the guilty, . . . [which] will inevitably create a sense of unfairness about the lawyer disciplinary process [and], . . . in the case of many 'firm violations'[,] . . . would undoubtedly penalize far more innocent firm lawyers than guilty or responsible ones."[223]

This proves too much, however, because the same "unfairness" could be said to exist whenever courts sanction law firms for violating rules of procedure, or federal prosecutors proceed against law firms, or a federal agency disciplines or brings a successful enforcement action against a law firm.[224]

At a deeper level, the point may be that legal ethics is a species of morality and that individuals have moral responsibility, but institutions, including law firms much like than business corporations, do not.[225] But it is surely the case

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firm partners for compliance with those rules may discourage counsel from enforcing the rules against *any* partner.

219. Chambliss, *The Nirvana Fallacy*, *supra* note 32, at 127.

220. *Id.* at 127–28 & nn.47–50.

221. *Id.* at 128 (citing Susan Saab Fortney, *Are Law Firm Partners Islands unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 284–85 (1997)).

222. *Id.* at 128 & n.54 (citing sources).

223. Douglas R. Richmond, *Law Firm Partners as Their Brothers' Keepers*, 96 KY. L.J. 231, 262–63 (2007–2008) (quoting Am. Bar Ass'n, Ctr. For Prof'l Responsibility, Testimony of Robert A. Creamer, Joseph R. Lundy, and Brian J. Redding, Attorneys' Liability Assurance Society, Inc. to the American Bar Association Ethics 2000 Commission (Feb. 15, 2001)).

224. *See supra* notes 144–67 and accompanying text. One wonders whether the critics of law firm discipline would be just as critical of firm-based sanctions under these other regulatory regimes.

225. For the argument that standards of professional responsibility are "peculiarly personal" and, therefore, that a law firm "should not be held liable in a disciplinary proceeding (as it could be in a damage action) for the conduct of its partners," see Keating, Muething & Klekamp, Exchange Act Release No. 15,982 [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 82,124, at 81,997 (July 2, 1979) (Karmel, Comm'r, dissenting). For philosophic arguments that it is sometimes legally appropriate to treat entities as morally responsible, see PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 44 (1984); LARRY MAY, THE MORALITY OF GROUPS 69–72, 89–106 (1987), and Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991). Because the ABA Canons of Ethics, issued in 1908 when solo practice was the

that at least some misconduct in law firms has its roots in organizational deficiencies much like individual wrongdoing.[226]

Finally, some critics charge that law firm discipline is simply unnecessary because the structural controls that I found lacking in large law firms in my 1991 article now exist in almost all large law firms.[227] This is broadly true today and, unfortunately, my article invited the charge by emphasizing infrastructural weaknesses in large firms.[228] But in view of the disproportionately large number of disciplinary proceedings that continue to be instituted in the United States against solo practitioners and lawyers in small firms,[229] the development of appropriate infrastructures in smaller firms certainly needs attention. The question is: what form of attention? The elaboration on firm-directed management duties that New York bar associations are providing proactively in ethics opinions and comments to the pertinent New York rules leads me to think that compliance with PSR's broad ethical duties of firm management can be most effectively encouraged by proactive means.

III. THE POSITIVE CASE FOR PROACTIVE, MANAGEMENT-BASED REGULATION IN THE UNITED STATES

Part II argued that relying solely on disciplinary enforcement of Model Rules 5.1(a) and 5.3(a) to encourage law firms to maintain adequate ethical infrastructures is unsatisfactory. Part III[230] presents the positive case for state supreme court adoption of proactive management-based regulation (PMBR) as a complement to disciplinary enforcement. Part III.A describes in detail the ambitious PMBR program in New South Wales (NSW). Part III.B.1 presents evidence that the NSW program is successfully reducing the number of complaints filed against lawyers in incorporated legal practices (ILPs), which in turn is presumably reducing the total cost of processing complaints.[231] Part III.B.2

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norm, were written in highly moralistic language, concerned only lawyers' first-order duties rather than duties of firm management, and made no reference to enforcement, it was plausible to think they were premised on the idea that professional responsibility was "peculiarly personal." In all these ways, however, the 1908 Canons stand in sharp contrast to the Model Rules of Professional Conduct. *See supra* notes 49–63 and accompanying text.

226. *Cf.* Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 31 (1980) (arguing that it is appropriate to impose criminal liability on corporations when the misconduct in question "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").

227. *See, e.g.*, Richmond, *supra* note 223, at 261–62.

228. Schneyer, *supra* note 36, at 1–11.

229. *See supra* note 132.

230. Part III draws substantially on a portion of an earlier article. *See* Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice*, 2009 J. PROF. LAW. 13, 30–37.

231. Lawyer regulation in NSW is often described as "co-regulation" because the Office of the Legal Services Commissioner (OLSC), an executive branch agency that was created in 1994 and reports to the state attorney general, shares authority with the Law Society of NSW (the professional body for solicitors) and the NSW Bar Association (for barristers). The OLSC receives all complaints about NSW solicitors and barristers, but if an

identifies other steps the Office of the Legal Services Commissioner (OLSC) in NSW is taking to control the cost of administering the program. Taken together, these two subsections support the conclusion that the PMBR program in NSW is likely, in the long run, to substantially improve the ethical infrastructures of law firms while *diminishing*, or at least not significantly raising, the total cost of lawyer regulation.

The ultimate question, of course, is whether PMBR programs in the United States would also be worthwhile in cost-benefit terms or at least promising enough to justify experimentation in some jurisdictions. Given our very limited experience with proactive regulation, the key issue on this point is whether state supreme courts could find personnel with sufficient expertise to staff such programs. Part III.C argues that they can. Finally, Part III.D counters the foreseeable argument that any benefits from adopting PMBR programs here would be negligible because U.S. law firms, including solo practices and small firms, already have more effective ethical infrastructures, stronger motivation to build and maintain effective infrastructures, and readier access to expert advice on how to do so than firms in New South Wales.

A. The Mechanics of PMBR: The New South Wales Program as Prototype

According to Steve Mark, the NSW Legal Services Commissioner, NSW's PMBR program began in earnest in 2001, when state legislation first permitted law firms to be organized as ILPs.[232] To allay concerns that the limited liability of ILPs might encourage misconduct, Commissioner Mark laid great

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initial investigation suggests serious professional misconduct the matter is forwarded to the appropriate professional body for possible discipline. *See* Steve Mark, Regulating for Professionalism: The New South Wales Approach 2 (Aug. 5, 2010) (unpublished manuscript) (on file with Author).

232. Steve Mark, *Views from an Australian Regulator*, 2009 J. PROF. LAW. 45 [hereinafter Mark, *Australian Regulator*]. Commissioner Mark's office administers the PMBR program. ILPs include traditional law firms organized as limited liability partnerships, as well as multidisciplinary practices (MDPs) and even law firms that issue stock and are listed on the public stock exchange. *Id.* MDPs and law firms that have passive investors are said to have "alternative business structures." As of February 2010, there were approximately 902 ILPs in NSW, representing about 20% of the law firms and the approximately 25,000 legal practitioners in the state. The ILPs tend to be quite small, as are most law firms in the state. The ILPs included 685 solo practices, 137 firms with two principals, 40 with three principals, and 34 with four or more principals. The largest ILP had thirty-two principals. Memorandum from Esther Bedggood to Steve Mark, NSW Legal Services Comm'r (Feb. 10, 2010) (on file with Author). Two ILPs were law firms listed on the Australian Stock Exchange and fifty-eight were multi-disciplinary practices. A "considerable number of other [law] firms" have expressed an interest in reorganizing as an ILP. Mark, *Australian Regulator*, *supra*, at 45. There are a number of large law firms in Sydney, NSW's largest city, but for tax reasons they have not reorganized as ILPs. Parker et al., *supra* note 24, at 481 n.52. Although most firms in NSW continue to be "unincorporated," new firms in Australia do tend to incorporate. Moreover, a national task force has proposed that the proactive regulatory program for ILPs should be extended to all law practices. *See* Andrew Grech, *Most New Legal Practices Are Taking Advantage of the Benefits of Incorporation*, AUSTRALIAN, July 9, 2010.

stress on the responsibilities of firm management. He required all ILPs to develop an "ethical infrastructure,"[233] which he defines as the "formal and informal management policies, procedures, and controls, work-team cultures, and habits of interaction . . . that support and encourage ethical behavior."[234] His aim was to reduce the risk of misconduct by motivating *and* helping firms to learn how best to do so.[235]

Further legislation in 2004[236] provided a mechanism for enforcing an ILP's duty to maintain a satisfactory infrastructure. Every ILP is now required to *designate* at least one licensed NSW solicitor as a "legal practitioner director" (LPD),[237] and must have "appropriate management systems" in place to ensure that its legal services are provided in accordance with professional obligations.[238] LPDs are not only generally responsible, like all ILP principals, for managing their firm's delivery of legal services, but also responsible for the implementation and maintenance of "appropriate management systems."[239] Failure to meet that specific responsibility is professional misconduct for which an LDP can be sanctioned, or in a serious case, disqualified from further service as an LPD.[240] LPDs must also take reasonable steps to respond to any professional misconduct or "unsatisfactory professional conduct" (UPC) by a firm solicitor.[241]

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233. Mark, *Australian Regulator*, *supra* note 232, at 46 & n.3.

234. *Id.* at 46.

235. *Id.* (calling the program a "quasi-educative mechanism" that moves away from "sole reliance on complaints-based regulation to compliance based regulation" in hopes of providing far greater protection to consumers).

236. *Legal Profession Act 2004* (NSW) (Austl.).

237. *Id.* § 140.

238. *Id.* § 141.

239. *Id.* § 140.

240. *Id.* §§ 140(5), 141(1A).

241. *Id.* §§ 141, 143. Australian regulators distinguish between "professional misconduct" and "unsatisfactory professional conduct." The former consists of serious violations of lawyers' ethical obligations; UPC consists of lawyer conduct that "falls short of the standard of competence and diligence that a member of the public is entitled to expect." *See* LEGAL PROFESSION MODEL BILL § 4.2.1 (2d ed. 2006), *available at* http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=12402143-1E4F-17FA-D2A4-45B866C82286&siteName=lca. Examples of UPC might include delays in handling client matters, poor communication, mishandling of documents, and failure to clarify fee terms—i.e., the common stuff of consumer complaints. *See* Steve Mark, *The Office of the Legal Services Commissioner – Consumer Protection*, PRECEDENT (NSW), Jan–Feb. 2009, at 12, 14 (noting that more than 50% of the complaints filed with Commissioner Mark's Office can be classified as consumer complaints).

In the United States, disciplinary authorities have generally not pursued complaints alleging conduct that might well be unsatisfactory from a client's standpoint but does not appear to violate rules of professional conduct. In 1992, this prompted strong criticism from an ABA commission and a call for reforms including bar mediation services, mandatory arbitration, and law office management assistance programs. ABA COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *supra* note 44, Recommendation 3. Some states now have such programs, but none provides as much "consumer protection" as NSW. *See* Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?*, 2008 J. PROF. LAW. 53, 61–65.

Although the 2004 legislation does not define “appropriate management systems,” the OLSC, in collaboration with the NSW Law Society, a large malpractice insurer, academics, and practitioners, developed a test for determining whether an ILP has “appropriate systems in place.”[242] The test is whether the firm has and utilizes procedures that evidence compliance with objectives associated with ten traditional problem areas for law firms, as revealed by client complaints over time.[243] By spelling out these objectives, thereby putting firms on notice of the potential problem areas for which they must have appropriate measures in place, the OLSC has given “ethical infrastructure” concrete meaning.

The ten objectives include: timely provision of services; competent work practices to avoid negligence; adequate documentation and explanation of fees; clear terms for the payment of expenses, billing practices, and the like; timely resolution of liens and timely file transfers; identification and resolution of conflicts of interest; sound records management and document retention policies; adequate means to ensure compliance with the notices, orders, and other requirements of regulatory authorities; adequate supervision of the practice and staff; and the capacity to account for client property and comply with rules governing client trust accounts.[244]

Importantly, when a firm becomes an ILP, its LPD(s) must assess its management systems. The OLSC has developed a self-assessment instrument for that purpose. Customized for an ILP’s size, practice areas, and operations, the instrument suggests criteria for LPDs to use in determining whether the firm is in compliance with each objective and provides examples of what would count as evidence of compliance. For example, with respect to the objective of maintaining competent work practices to avoid negligence, the self-assessment instrument (1) suggests as a compliance criterion whether firm lawyers practice “only in areas where they have appropriate competence and expertise” and (2) indicates that a “written statement setting out the types of matters” in which the ILP will accept engagements would count as evidence that that criterion was being met.[245]

When preparing a firm’s self-assessment, an LPD must state whether the firm is “fully compliant plus,” “fully compliant,” “compliant,” “partially compliant,” or “noncompliant” with each objective.[246] After the OLSC receives an ILP’s self-assessment and prepares a report, there may be follow up discussions between OLSC personnel and the firm’s LPD(s). If warranted by subsequent complaints, adverse publicity, or other events, the OLSC may conduct a further review and, if necessary, formally audit the firm.[247] Although the self-assessment,

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242. Parker et al., *supra* note 24, at 471.

243. *Id.* at 471–72.

244. *Id.* at 472; Mark, *Australian Regulator*, *supra* note 232, at 48–49.

245. Mark, *Australian Regulator*, *supra* note 232, at 49.

246. *See* Parker et al., *supra* note 24, at 474 tbl. 2.

247. At present, the OLSC performs seven to eight formal audits a year, as well as some informal and less comprehensive reviews of firms. E-mail from Tahlia Gordon, Researcher, OLSC, to Author (Dec. 12, 2010) (on file with Author). In one case, a practice review was conducted after the OLSC received several complaints relating to the supervision provided by a firm’s LPD. The OLSC had the LPD reassess the firm’s management systems. When the reassessment indicated that the firm was only partially

review, and audit processes may reveal disciplinable misconduct, noncompliance only or partial compliance with a program objective is not in itself a disciplinable offense. Instead, the self-assessment process is primarily intended as a tool for educating firms toward compliance.[248] Rule violations and objectives not yet met are two different things.

From this description, several regulatory themes emerge that distinguish the PMBR program in NSW from disciplinary enforcement of broad managerial duties in the United States, including the contrast between proactive and reactive enforcement.[249] The NSW program can be viewed as a risk management program in which the regulators, like some malpractice insurers, provide advice and collaborate with firm managers in thinking about the appropriate management systems to implement. In contrast, the rare disciplinary sanction imposed on a law firm partner for violating Rule 5.1(a) or 5.3(a) is apt to be a private reprimand, public censure, or suspension from practice—sanctions that in themselves teach firm managers nothing about how to avoid further problems. And surprisingly, although NSW-style PMBR is proactive, it is not nearly as *directive*[250] as the probationary conditions that can be imposed on a law firm manager in the United States who is found to have violated Rule 5.1(a) or 5.3(a).[251]

B. The Benefits and Costs of the PMBR Program in NSW

I would not expect our state supreme courts or the mainstream bar to jump on the PMBR bandwagon without evidence that doing so could deliver substantial regulatory benefits at acceptable cost and that the courts could muster the expert personnel needed to staff the program. This is especially so at a time when the budget woes of state judiciaries are substantial and any significant

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compliant with eight of the ten objectives, an audit was conducted. The audit report noted several areas for improvement, prompting the LPD to institute new systems. *See* Schneyer, *supra* note 230, at 32 n.72.

248. For that reason, the self-assessments are likely to be candid. *See* Parker et al., *supra* note 24, at 482 (noting that the self-assessment form is designed to give ILPs several "face-saving" options to admit less than full compliance and that many ILPs have been "willing to rate themselves as non- or partially-compliant" with one or more objectives).

249. It is worth noting that PMBR in NSW is not as proactive as regulatory programs in other field can sometimes be. For example, the OLSC decides which ILPs to review or audit largely in response to the volume of complaints filed against their lawyers. E-mail from Tahlia Gordon to Author, *supra* note 247.

250. According to a recent study of the regulation of ILPs in NSW:

> The OLSC does not require all firms to put in place exactly the same procedures and systems no matter the nature and size of the practice. Indeed the OLSC has been very clear that its intention is to encourage ILPs to build up ethical behaviors and systems that suit their own practices rather than imposing complex management structures on practices regardless of what actually makes sense for them. This is also intended to encourage practitioners and firms to take responsibility for developing their own ethical judgments, rather than just seeing compliance with professional conduct rules as the sum total of ethics.

Parker et al., *supra* note 24, at 473.

251. The order in *Phillips*, for example, was quite directive. *See supra* note 118.

increase in the regulatory fees lawyers are required to pay may be quite unpopular.[252] In hopes of overcoming the skepticism my proposal may engender, Part III.B offers evidence about the value and cost of PMBR as exemplified by the NSW program.

1. Evidence of Regulatory Benefit

Because the PMBR program in NSW only became fully operational in 2004, it does not have a long track record. Still, a sophisticated empirical study of approximately 630 ILPs—each of which had been through the initial self-assessment process and were in operation as of 2008[253]—has examined the rate of complaints per practitioner per year for each ILP, both before and after self-assessment. The findings are startling: on average, the complaint rate for self-assessed ILPs dropped *two-thirds* from their pre-assessment rate.[254] Interestingly, the study also found little evidence the compliance ratings the ILPs gave themselves made a difference.[255] From that finding, the authors infer that going through the self-assessment process after incorporation, which presumably prompts learning and infrastructural changes, is what makes a difference in complaint rates, not the self-assessed level of compliance at the outset.[256]

The investigators who conducted the study acknowledge that complaint rates are the most practical, but not the only, or even an ideal, measure of a firm's ethical infrastructure or ethical commitment.[257] Nonetheless, they conclude that

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252. Of course, any increase in regulatory fees is unpopular with American lawyers—and not simply because they would rather keep the money. As a former disciplinary counsel in California and Missouri observed, there "may be a perception by bar leadership that it is their responsibility to protect their membership from increased regulation" and that "[i]ncreased funding is . . . synonymous with increased regulation." *See* Maute, *supra* note 241, at 63 n.39 (quoting E-mail from Maridee F. Edwards to Professor Judith Maute (June 25, 2008)).

253. Parker et al., *supra* note 24, at 481.

254. *Id.* at 485. Moreover, the drop in complaints against ILP lawyers was not an artifact of any overall drop in complaints against NSW practitioners over the relevant period. The rate of complaints per practitioner per year for *non-incorporated firms* over the same period hovered within a very narrow range with no discernible pattern of movement up or down, and the methodology used in the study ruled out the possibility that the dramatic drop was caused by an external event such as a publicity campaign by the OLSC. *Id.* at 486. For an explanation of how pre-assessment and post-assessment complaint rates were calculated, see *id.* at 485–86 & nn.56–59.

255. *Id.* at 488–91.

256. *Id.* at 491, 494. The authors add that although the insignificance of the ILPs' self-assessed level of compliance might suggest that the ILPs did not take the assessment process seriously, the fact that many ILPs were willing to assess themselves as non-compliant or only in partial compliance with some objectives suggests the opposite, as do the facts that 63% of the self-assessment forms were returned to the OLSC with substantial comments about the ILP's management systems (though no comments were required), and that 56% of the ILPs in the study engaged in substantial dialogue with the OLSC and made substantial changes to their management systems as a result of the process. *Id* at 493.

257. *Id.* at 478–80.

their findings offer considerable reason to hope that management-based regulation for law firms can provide real benefits.[258]

The PMBR program in NSW is also getting a positive reception from the ILPs themselves. Although a number of ILPs were "initially nervous about the self-assessment or practice review process," they all cooperated and the OLSC has received thanks from ILPs who completed the self-assessment process, went through a practice review, and believe they have improved themselves as a result.[259]

2. Evidence of Manageable Cost

Putting aside any extra burden PMBR might place on law firms in NSW, a remarkable fact about the cost of administering the OLSC's PMBR program is that it is entirely funded by interest generated on lawyers' trust accounts.[260] Moreover, the OLSC goes to considerable lengths to hold down that cost.

A good example is the OLSC's development of an ambitious Legal Practice Management and Audit System (LPMAS). The LPMAS is an online portal to be launched in 2011,[261] and it promises to provide substantial regulatory savings. The LPMAS automates a number of manual processes within the OLSC and consists of four related modules, which automate the self-assessment process; permit electronic tracking of OLSC audits; allow all available complaints data to be accessed through a single gateway; and facilitate "risk profiling," a cost-saving regulatory strategy that calls for further discussion.[262]

Risk profiling assumes that certain factors (a) create or magnify risks that professional misconduct will occur, (b) can sometimes be identified before a risk materializes, and (c) if identified, can be controlled in order to reduce the risk. To the extent the OLSC can discern "lead indicators" of potential misconduct at particular firms, it can determine the firms to monitor most closely. The OLSC's experience is that misconduct is not randomly distributed across law firms and that a minority (often a recognizable minority) of firms are responsible for the lion's share of complaints and misconduct.[263]

Resource limitations constrain the OLSC from auditing more than a few firms per year. So far, it has identified audit targets reactively on the basis of triggering events such as a disproportionate number of complaints or a referral from the NSW trust account inspector.[264] Using data collected through LPMAS, the OLSC hopes to increase the proportion of audit targets that can be identified through risk profiles based not only on firms' complaint history but also on factors

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258. *Id.* at 500.

259. Mark, *Australian Regulator*, *supra* note 232, at 52.

260. E-mail from Tahlia Gordon to Author, *supra* note 247.

261. Steve Mark, *The Legal Practice Management and Audit System (LPMAS)*, WITHOUT PREJUDICE 2–3 (Oct. 2010), *available at* http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/WP_Issue52_Oct2010.pdf/$file/WP_Issue52_Oct2010.pdf.

262. *Id.*

263. *Id.* (discussing Module 4—Risk Profiling).

264. E-mail from Tahlia Gordon to Author, *supra* note 247.

such as a firm's practice field(s), clientele, and number of lawyers.[265] The aim is to economize by deploying scarce resources where they are most needed and to help "at risk" firms reduce the number and severity of their ethics violations.[266]

C. The Availability of Expert Personnel to Staff PMBR Programs in the United States

One might suppose that even if state supreme courts in the United States come to see PMBR as a desirable regulatory add-on in principle, they could not implement a PMBR program under current circumstances because they lack personnel with the requisite expertise. Although the court or bar personnel who administer our complaint-based disciplinary process might be thought to possess drastically different skills, that assumption is questionable.

For one thing, judging by the NSW experience, the requisite expertise need not take many years to develop. The regulatory system Commissioner Mark encountered when he became the NSW Legal Services Commissioner in 1994[267] was largely the system we still rely on. His office has undoubtedly developed much of its firm management expertise since 2004, when the self-assessment program to encourage appropriate management systems for ILPs took shape.[268] For another thing, since the 1970s and 1980s, disciplinary counsel and their staffs in most if not all U.S. jurisdictions have surely developed some expertise in solo-practice and small-firm management by interacting with the numerous solo and small-firm lawyers who have been charged in disciplinary cases with misconduct that may well be attributable to office management problems.[269] And the individuals who staff the Law Office Management Assistance Programs have precisely the expertise that would be required.[270]

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265. Evidence bears out the common belief that solo practices and small firms tend to be at greater risk for ethics violations than large firms. That is the experience in the U.S., see *supra* note 132, and in New South Wales as well. Parker et al., *supra* note 24, at 481. Moreover, new trends in law practice may be putting solo practitioners and small firms at even greater risk. According to a U.S. expert on legal ethics and risk management, "many solo and small firm lawyers" have neither "the time, the resources, [n]or the inclination to keep up with the latest technological threats and advances that may impact their . . . practices." Michael Downey, Solos, Smaller Firms, and Technology Risks 1 (Oct. 15, 2010) (unpublished manuscript) (on file with Author) (presented to the ABA Commission on Ethics 20/20). Mr. Downey believes that technological change in law practice today is "felt most severely by those lawyers, often solos or at smaller firms, [who] provide cost-sensitive services primarily to consumers." *Id.* at 2–3.

266. Mark, *supra* note 261.

267. *See* Mark, *Australian Regulator*, supra note 232, at 45 n.*.

268. *See supra* notes 232–48 and accompanying text (chronicling the development of the NSW PMBR program).

269. *See* Schneyer, *supra* note 36, at 22–23 & nn.133–35 (discussing the modern expansion of probation as a disciplinary sanction and the kinds of cases in which the sanction tends to be used).

270. *See supra* note 44 and accompanying text.

D. PMBR Programs in the United States Will Fill a Regulatory Gap

There is certainly some overlap between disciplinable lawyer conduct and lawyer malpractice, but the two categories are far from congruent.[271] Although malpractice insurers and risk-management consultants provide many law firms with loss-prevention advice and the prospect of malpractice liability provides some incentive to maintain sound firm infrastructures, these factors have not and cannot overcome the disproportionately high percentage of disciplinary complaints that are filed against solo practitioners and small-firm lawyers. Most of the clients who file these complaints have sustained no monetary loss, or losses too small or speculative to support a malpractice claim.[272] There is also reason to think that a disproportionate number of the targeted lawyers have no malpractice insurance.[273]

But in the end, even if the management problems that are more apt to plague solo practices and small firms than large firms are somewhat mitigated by fears of malpractice liability and advice from malpractice insurers, it seems unseemly that a profession that has long prided itself on its self-regulatory institutions has not structured those institutions in a manner that does much to improve the ethical infrastructures of small firms in particular, which remain a substantial percentage of U.S. law firms.[274] Professors Chambliss and Wilkins "subscribe to a . . . vision of professional self-regulation . . . that demands that the profession offer its own regulatory strategy"[275] for encouraging sound ethical infrastructures in all law offices and law firms. I do, as well.

CONCLUSION

This Article shows the disjuncture that exists between (1) the broad ethical duties of law firm management that the ABA and many state supreme courts have recognized since the 1980s and (2) the reactive disciplinary process that they have relied on almost exclusively to enforce those duties and promote stronger ethical infrastructures. The Article explains why that disjuncture exists and why without reforms it will almost certainly continue to exist. It argues that Model Rules 5.1(a) and 5.3(a), which embody those duties, can be better enforced

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271. *See* Briton & McLean, *supra* note 47, at 245.

272. *See* HAZARD & RHODE, *supra note* 143, at 583.

273. For many years there was a huge discrepancy between the percentage of large and small firms that have malpractice insurance, at least in some states. A study of a large sample of Wisconsin lawyers that was published in 1979 revealed that 58% of the uninsured respondents practiced alone and another 22% shared office space but were not otherwise associated. At the same time, only 22% of the respondents in private practice were solo practitioners and only 12% shared space. Yet, 99% of the respondents who practice in firms with ten or more lawyers were insured. The data were disturbing because among the Wisconsin lawyers who *were* insured at the time a disproportionately large percentage of solo practitioners were sued. Theodore J. Schneyer, *Mandatory Malpractice Insurance for Lawyers in Wisconsin and Elsewhere*, 1979 WIS. L. REV. 1019, 1034–35. The insurance discrepancy may be smaller today, but my impression is that it remains sizable.

274. *See* CLARA N. CARSON, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 (reporting that in 2000 nearly 90% of the law firms in the U.S. consisted of ten or fewer lawyers).

275. Chambliss & Wilkins, *A New Framework*, *supra* note 32, at 341.

by proactive means, as exemplified by the New South Wales PMBR program. Courts that do not wish to go as far as New South Wales could nonetheless make a start by adopting more LOMAPs and beefing up the ones that already exist. Courts could also require law firms to designate a lawyer–manager to file periodic reports on the measures their firms take to achieve the sort of objectives identified on the New South Wales Legal Services Commissioner's self-assessment form.

Finally, I hope American lawyers can overcome the impulse to dismiss the New South Wales program as top-down, command-and-control regulation that is utterly out of step with our regulatory traditions. That is not what PMBR is in Australia,[276] even in the hands of executive branch regulators. *A fortiori*, it is not what PMBR would be under the auspices of the state supreme courts, which the mainstream bar and most American lawyers have long viewed as the profession's most trustworthy regulators. Professional self-regulation, including regulation by lawyers in robes, is perhaps our deepest tradition and most cherished conceit. But regulatory traditions can and must evolve as circumstances change and PMBR should be seen as a further commitment to professional self-regulation, this time in the form of law firms taking steps to ensure that ethical compliance and ethical judgment prevail within their walls.

276. *See* Parker et al., *supra* note 24, at 470 (stating that the NSW regulatory program for ILPs "is best characterized as mostly self-regulatory 'management-based regulation'").