Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal

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ARTICLES

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JULIE ROSE O'SULLIVAN*

I. INTRODUCTION

Model Rule of Professional Conduct 5.1(a) requires individual partners to make "reasonable efforts" to ensure that their firm has measures in effect that give "reasonable assurance" that all lawyers in the firm conform to ethical rules.1 Similarly, Model Rule 5.3(a) imposes upon individual partners the obligation of making "reasonable efforts" to ensure that the firm has measures in place giving "reasonable assurance" that the conduct of nonlawyers affiliated with the firm is compatible with the partner's professional obligations.2 These rules were adopted to encourage firms to create firm cultures and institute prophylactic policies and procedures—an "ethical infrastructure"—that would prevent misconduct before it occurred. Although these Model Rules have been widely adopted,3 they are, as far as enforcement goes, asserted to be a disciplinary "dead letter."4 A little over ten years ago, Professor Ted Schneyer argued:

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

* Professor of Law, Georgetown University Law Center. My thanks to Adam Siple for encouraging me to take on this project, and to my research assistant, Andrew Owiti, and the staff of the Georgetown University Law Center Library (particularly Zia Faruqui) for their invaluable research assistance. I am indebted also to Donald Langevoort, David Luban, Niki Kuckes, and Michael Frisch for their excellent comments on earlier drafts. Finally, to Robert F. Muse and Michele Roberts, whose enthusiasm for this project was truly incredible, cheers. Would that I had more input from such subtle and nimble minds.

1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(a) (1983) ("A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.") [hereinafter MODEL RULES].

2. Id. at Rule 5.3(a) ("With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.") [hereinafter MODEL RULES].


of a law firm's ethical infrastructure and the diffuse responsibility for creating and maintaining that infrastructure, a disciplinary regime that targets only individual lawyers in an era of large law firms is no longer sufficient. Sanctions against firms are needed as well.\(^5\)

Although we are accustomed to entity liability in the civil and criminal law arenas, Professor Schneyer's suggestion that firms be sanctioned—with monetary fines yet—for the disciplinary transgressions of their agents was novel and provocative. If this suggestion was not sufficient to grab the attention of the bar, Professor Schneyer's proposed standard of liability certainly was. He argued that firm liability should be tested under the respondeat superior standard that is employed against corporate defendants in most civil and criminal cases.\(^6\) Under that standard, firms would be liable for the wrongdoing of their agents who act within the scope of their employment and with the intention to benefit, at least in part, the firm, even when the agent is acting contrary to express firm policy.\(^7\) Thus, not only would an enforceable obligation to create an ethical infrastructure extend to firms as well as to individual partners, but the Model Rules' "reasonable efforts" standard would be eliminated. Firms, then, could be held vicariously liable for the wrongdoing of their agents even if they had in effect measures that provided "reasonable" (though obviously not perfect) assurance of ethical compliance.

Only two states—New York\(^8\) and New Jersey\(^9\)—expressly authorize disciplinary

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7. Id. Although Professor Schneyer did not say as much expressly, the import of his argument seems to be that judicial glosses on the federal respondeat superior standard should also apply. Thus, disciplinary authorities would be able to sanction firms even if no single culpable agent could be identified. Indeed, consistent with judicial acceptance of inconsistent verdicts in the corporate liability context, if the bar chose not to impose sanctions on implicated individual firm agents it could still impose a sanction against the firm itself. Finally, under the corporate "collective knowledge doctrine," the firm may be found liable for the ethical transgressions of its agents upon a finding that, although no single individual agent had the requisite guilty knowledge, the aggregated knowledge of all the individual firm agents was sufficient to support sanctions. Id.; see also JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME 117, 135-36 (2001) (discussing federal respondeat superior standard).

Professor Schneyer's article concerned the larger question of whether firms should be liable for disciplinary violations, but it did not delve into specific issues regarding the scope of that liability. For example, he did not address whose misconduct within a firm (partners, associates, paraprofessionals, staff) would be imputed to the firm nor whether firms should be vicariously liable for all types of disciplinary violations. I assume, given Professor Schneyer's call for reliance on the federal respondeat superior standard, that he would endorse a rule that permitted the imposition of sanctions on firms for all wrongdoing done within the scope of employment and with the intention to benefit, at least in part, the firm, regardless of the type of violation or status of the wrongdoing agent. See id. at 117-35 (discussing federal respondeat superior standard).


9. See N.J. RULES OF PROFESSIONAL CONDUCT Rule 5.1(a) (1998) [hereinafter N.J. RULES]. It may be worth noting that New Jersey adopted its firm liability rule long before Professor Schneyer's article was published.
enforcement against firms in addition to individual lawyers. Those states have not, however, adopted vicarious firm liability under a respondeat superior standard for the misconduct of firm personnel. Rather, although their wordings differ in some respects, New York’s and New Jersey’s rules, in essence, extended the obligations of the Model Rules to firms by imposing on them an affirmative duty to make “reasonable efforts” to ensure ethical compliance by lawyers within the firm. New Jersey further requires that firms make “reasonable efforts” to ensure nonlawyers’ compliance with lawyers’ ethical norms.

New York mandates that firms must “adequately supervise” the “work of partners, associates, and non-lawyers at the firm,” with the degree of supervision required to be tested under a “reasonableness under the circumstances” standard. It is only if the firm as an entity fails to satisfy these affirmative obligations that the firm may be sanctioned. The controversial nature of even this more tempered approach is demonstrated by the fact that the American Bar Association’s Commission on Evaluation of the Rules of Professional Conduct (commonly known as the Ethics 2000 Commission), in its latest review of the model ethics

Judging from the “Debevoise Report” to which the commentary to New Jersey Rule of Professional Conduct 5.1(a) refers, the rationale for firm liability was not that which Professor Schneyer later suggested. See Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct, N.J. Law J., July 28, 1983. Rather, the report states that the Committee believed that the language of Rule 5.1(a) proposed in the 1982 report of the ABA Commission on Evaluation of Professional Standards (the “Kutak Commission”), with which the Committee was working, ought to be “broadened so as to make it clear that [the obligations of that provision are] applicable as well to forms of association other than partnerships.” Id. at 16. Similarly, with respect to Rule 5.3(a), the Committee stated that, “[a]s with Rule 5.1,” it “would make appropriate changes in the language to make it clear that the rule is applicable as well to forms of practice other than that of partnerships.” Id. at 17. It is not clear whether the Committee was operating under the misapprehension that the Kutak proposal already covered firms and needed to be extended to non-firm entities, or whether the Committee’s change was designed to ensure the individual lawyers within non-firm entities were also subject to the dictates of Rules 5.1(a) and 5.3(a). In any case, the Committee report certainly does not evidence a belief that entity liability was necessary to force firms to adopt an effective ethical infrastructure.

10. See, e.g., N.Y. CODE DR 1-104 cmt. ("Lawyers within a firm will, from time to time, violate the disciplinary rules. DR 1-104(A) does not render law firms strictly liable for all violations of lawyers within the firm. The rule does, however, require law firms to make ‘reasonable efforts’ to ensure that their individual lawyers are complying with the Code.").

11. See N.J. RULES Rule 5.1(a) ("Every law firm and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct."); N.Y. CODE DR 1-104 ("A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.").

12. See N.J. RULES Rule 5.3(a) ("With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) every lawyer or organization authorized by the Court Rules to practice law in this jurisdiction 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.")

13. See N.Y. CODE DR 1-104(C) ("A law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers [sic] who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.").
rules, rejected a proposal authorizing firm disciplinary liability under a "reasonableness," as opposed to a respondeat superior, standard of liability.14

I should confess at the outset that whatever expertise I can claim lies in the criminal law area, particularly in the study of issues relating to white-collar crime enforcement. The organizers of this symposium asked me to comment on Professor Schneyer's proposal in light of the theory and practice surrounding the imposition of vicarious criminal liability on entities such as firms and corporations. It is with some trepidation that I agreed to undertake this assignment given my lack of experience in the area of professional responsibility enforcement.15

My ambitions, then, are modest: I hope in the following pages to raise issues that should be considered more fully in light of the corporate crime literature, as well as some excellent research and writing done in the area of professional responsibility since Professor Schneyer's groundbreaking article. To the extent I have reached a judgment, my conclusion is that the case has not been made that firm liability, at least under the proposed respondeat superior standard, will be fair or effective in furthering the aims of professional discipline. Indeed, I share the ABA's concern that such a rule may actually undermine individual ethical incentives rather than furthering attorney accountability. It is also not at all clear to me that such a change is cost-effective given the existing realities in disciplinary enforcement and more pressing needs facing poorly-funded disciplinary enforcement agencies. Finally, to the extent that any case for firm liability can be made, it should only be imposed under the Rules' "reasonableness" standard as augmented by a list of flexible criteria isolated by the bar for determining what a "reasonable" ethical infrastructure should include.

14. 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) ("The Commission initially proposed to extend the duties in Rules 5.1 and 5.3 to law firms as well as individual lawyers. However, it became persuaded that any possible benefit from being able to extend disciplinary liability firm-wide was small when compared to the possible cost of de-emphasizing the personal accountability of partners and supervisors."); see also ABA Center for Prof'l Responsibility, Comm'n on Evaluation of the Rules of Prof'l Conduct, Minutes 6 (March 24-25, 2000), available at http://www.abanet.org/cpr/c2k-03-16mtg.html (visited May 2, 2002) (noting agreement that firms should not be liable for misconduct "involving scienter or for vicarious liability"); ABA Center for Prof'l Responsibility, Comm. on Evaluation of the Rules of Prof'l Conduct, Nov. 2000 Report (including drafts of proposed amendments to Rules 5.1 and 5.3).

II. BACKGROUND

Traditionally, only individual lawyers have been subject to disciplinary sanction. Although some of the ethics rules govern the conduct of law firms, those rules have not been enforced and may indeed be unenforceable given that most state disciplinary authorities have no jurisdiction over law firms. Vicarious liability, as applied either to individuals or to firms, also has had no place in disciplinary enforcement. When an attorney who has not personally broken the rules is sanctioned, it is for her failure to comply with her affirmative duties of supervision or for aid she lent to the wrongdoer.

Some explain the disciplinary targeting of individual lawyers only for their own complicity in misconduct or their failure of supervision as an accident of dual historical circumstances: “the system's jurisdictional tie to licensing, which the state requires only for individuals, and... the system’s development at a time when solo practice was the norm.” Individual liability may also, however, be an outgrowth of a belief that the ethics rules are profoundly personal and that the most basic function of at least some of the rules is not to provide concrete, specific answers to practice dilemmas, but rather to promote a type of ethical introspection of which firms are constitutionally incapable.

17. For example, “the rules prohibiting representation of opposing parties in litigation or suing one’s own client apply not only to a single practitioner but also to a law firm or law departments. So, also, the rule that prohibits a lawyer from revealing the confidences of a client requires that all lawyers in a firm refrain from revealing confidences of a client served by any lawyer in the firm.” MODEL RULES Rule 5.1 (Discussion Draft 1980) (Introduction to then-numbered Rule 7.1), reprinted in Stephen Gillers & Roy D. Simon, Regulation of Lawyers: Statutes and Standards 288-89 (2000); see also Comm. on Prof'l Responsibility of The Ass'n of the Bar of the City of N.Y., Discipline of Law Firms, 48 THE RECORD 628, 632-35 (1993) [hereinafter New York Bar Report] (noting that rules addressed to firm conduct include rules governing: publicity and advertising; professional notices, letterheads, and signs; identification of practice and specialty; dividing of fees with nonlawyers; refusing employment when the interests of the lawyer may impair independent professional judgment; withdrawal as counsel when the lawyer becomes a witness; and avoiding even the appearance of impropriety.)
18. See Schneyer, Professional Discipline, supra note 5, at 4, 16; Schneyer, S&L Crisis, supra note 4, at 648 & n.39; New York Bar Report, supra note 17, at 635 (“Although [certain] Disciplinary Rules are clearly addressed to firm conduct as well as to the conduct of individual attorneys, there exists no enforcement mechanism to sanction firms which violate these rules.”). The Committee on Professional Responsibility of The Bar of New York City recommended in its report on discipline of law firms that Paragraph 6-a of New York Judiciary Law § 90 be amended to provide authority for firm censures, presumably to provide jurisdiction to bar authorities. Id. at 637. So far as I am able to determine, this proposed amendment was never made. California has provided jurisdiction over certain types of firms, but does not seem to have used it. See Cal. Bus. & Prof. Code §§ 6161, 6167, 6169 (2002) (mandating that law firms organized as professional corporations register with the state bar and requiring those firms to comply with all ethics rules addressed to individual lawyers).
19. See Schneyer, Professional Discipline, supra note 5, at 4; Schneyer, S&L Crisis, supra note 4, at 648 & n.38.
The Model Rules do provide for individual sanctions premised on aiding and abetting conduct and three types of defaults in the supervision of other lawyers or nonlegal staff members. Rule 5.1, "Responsibilities of Partners, Managers, and Supervisory Lawyers," sets forth the standards for imposing liability on one lawyer for the ethical misconduct of another lawyer within the same firm, while the standards for sanctioning lawyers for the misconduct of their nonlawyer staff is contained within Rule 5.3, "Responsibilities Regarding Nonlawyer Assistants." In terms of firm lawyers' obligations to create an ethical infrastructure—that is, prophylaxes to prevent ethical breaches—the Rule presently imposes two obligations on individual lawyers but not the firm as a discrete entity:

(1) Supervisory Duty to Maintain Internal Controls: Rule 5.1(a) provides that:

A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

institutional analysis as a model in which lawyers are persons "who ha[ve] fully integrated the values of the legal system—including all of the conflicts and ambiguities—and [are] honestly struggling to discover and implement the approach that best effectuates its underlying purposes. Independence, therefore, is primarily an 'attitude' or a habit of mind as opposed to a structural condition").

22. There was no rule governing this subject matter in the Model Code of Professional Responsibility. Cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1981) (providing that a lawyer "possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to... authority empowered to investigate or act upon such violation") [hereinafter MODEL CODE].

23. As the commentary makes clear, Rule 5.1(a) "applies to lawyers who have managerial authority over the professional work of a firm. This includes members of a partnership, the shareholders in a law firm organized as a professional corporation and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm." MODEL RULES Rule 5.1 cmt. 1. The duty of direct supervision in Rule 5.1(b), however, only "applies to lawyers who have supervisory authority over the work of other lawyers in a firm." Id.

24. MODEL RULES Rule 5.1(a). The commentary expands slightly on the extent of the lawyers' general obligations:

Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those 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.

Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the
Rule 5.3(a) imposes a similar responsibility for the conduct of nonlawyer assistants, stating:

> With respect to a nonlawyer employed or retained by or associated with a lawyer . . . a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.\(^{25}\)

New York and New Jersey extended to firms as well as individual partners Rule 5.1(a)'s affirmative duty to put in place policies designed to avoid ethical problems.\(^{26}\) New Jersey extended to firms Rule 5.3(a)'s duty to create an ethical infrastructure designed to prevent breaches by nonlegal staff.\(^{27}\) New York also extended to firms the duty of adequate supervision over the work of all personnel of the firm.\(^{28}\) The Ethics 2000 Committee narrowly rejected a proposal that would have extended the obligations of both Rules 5.1(a) and 5.3(a) to firms.\(^{29}\)

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\(^{25}\) See Schneyer, Four Systems, supra note 5, at 253, 277. Although this article concentrates on the supervisory responsibilities included in Rules 5.1(a) and 5.3(a) because those are the most commonly discussed in relation to firm liability, New York in fact has extended firm liability very broadly. See also N.Y. Code EC 1-8 ("A law firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of the lawyers in the firm. Such measures may include informal supervision and occasional admonition, a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior lawyer or special committee, and continuing legal education in professional ethics."), id. at DR 1-102(a) ("A lawyer or a law firm shall not: (1) Violate a Disciplinary Rule. (2) Circumvent a Disciplinary Rule through actions of another. (3) Engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Unlawfully discriminate in the practice of law . . . on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation . . . (7) Engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.").

\(^{26}\) See supra note 9 & 11-12.

\(^{27}\) See supra note 12.

\(^{28}\) See supra note 28 (quoting N.Y. Code DR 1-102(a)).
(2) Duty of Direct Supervision: Rule 5.1(b) requires that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct."30 Similarly, Rule 5.3(b) states that "[w]ith respect to a nonlawyer employed or retained by or associated with a lawyer . . . a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."31

In the more concrete instance where someone in the firm has violated the ethical rules, other lawyers in the firm may be liable for the breach not only for failure to satisfy the above prophylactic obligations but in two further respects:

(3) Failure to Remedy: A lawyer, again, not the firm, is also responsible under Rule 5.1(c)(2) for another lawyer's violation of the rules and under Rule 5.3(c)(2) for a nonlawyer employee's misconduct if "the lawyer is a partner or has comparable managerial authority in the law firm" in which the other lawyer practices or by which the nonlawyer is employed, or "has direct supervisory authority over" the other lawyer or nonlawyer employee, "and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."32

(4) Aiding and Abetting Liability: Not surprisingly, a lawyer (not the firm) is responsible under Rule 5.1(c)(1) (and Rule 8.4(a)) for another lawyer's violation of the rules of professional conduct if the lawyer participates in, or aids and abets, the misconduct of another (that is, orders, or knowingly assists, induces, or ratifies such misconduct).33 Similarly, Rule 5.3(c)(1) provides that "a lawyer shall be responsible for conduct of [a nonlawyer affiliated with the lawyer] that would be a violation of the rules of professional conduct if engaged in by a lawyer" if "the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved."34

In theory, lawyers may be held liable for failing in their duty to maintain reasonable internal controls even if no ethical violation has (yet) occurred. In practice, however, the prophylactic standards in Rules 5.1(a) and 5.3(a) have only been enforced when other rules violations have occurred, and then only rarely.35

30. MODEL RULES Rule 5.1(b).
31. Id. at Rule 5.3(b).
32. Id. at Rules 5.1(c)(2), 5.3(c)(2).
33. See id. at Rule 5.1(c)(1) (a lawyer is responsible for another's misconduct if the lawyer "orders or, with knowledge of the specific conduct, ratifies the conduct involved"); id. at Rule 5.1 cmt. 4 (Rule 5.1(c) "expresses a general principle of personal responsibility for acts of another" also referenced in Rule 8.4(a)); id. at Rule 8.4(a) (it is "professional misconduct for a lawyer to . . . violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another").
34. Id. at Rule 5.3(c)(1); see also id. at Rule 8.4(a) (referencing the "acts of another").
35. In New York, for example, there have been seventeen cases in which DR 1-104 has been implicated in New York disciplinary proceedings since 1993. In only two of those seventeen cases did punishment result for a violation solely of DR 1-104. See In re Levey, 711 N.Y.S.2d 372 (App. Div. 2000); In re Orseck, 692 N.Y.S.2d 766 (App. Div. 1999). However, in Levey, there was a second charge of misrepresentation leveled at the
Professor Schneyer argues that because of the difficulty of identifying which lawyers, if any, are responsible for the firm’s default in putting in place systems that ensure its personnel’s ethical compliance, and the likely disinclination of bar authorities to sanction (or “scapegoat”) each member of the firm, it is unlikely that Rules 5.1 and 5.3 will actually have any effect absent more enforcement “oomph.”36 That “oomph,” Professor Schneyer argues, is firm liability under a respondeat superior standard.

In evaluating this claim, I will first explore whether firm liability is likely to further the aims of disciplinary enforcement and, if so, what standard of liability will most fairly and effectively serve those aims. I will conclude by examining whether, in light of the potential costs of firm disciplinary liability, it is worthwhile given the magnitude of the problem sought to be addressed and the availability of alternative enforcement systems.

III. WILL FIRM LIABILITY SERVE THE PURPOSES OF DISCIPLINARY SANCTIONS?

A. THE PURPOSES OF DISCIPLINARY SANCTIONS

Many courts reject the idea that lawyer disciplinary proceedings result in punishment.37 As a practitioner of the criminal law, I have to side with the defendant, although that charge was not sustained. Thus in only one case was the charge and punishment premised solely on DR 1-104. See Orseck, 692 N.Y.S.2d at 768. Of the seventeen DR 1-104 cases, only four were premised on section (c). See In re Gaesser, 737 N.Y.S.2d 719 (App. Div. 2001); In re Carrigan, 726 N.Y.S.2d 538 (App. Div. 2001); In re Bushor, 709 N.Y.S.2d 326 (App. Div. 2000); In re Chartarpaul, 706 N.Y.S.2d 714 (App. Div. 2000). The cases in which violations of DR 1-104(c) occurred always included violations of other Disciplinary Rules.

Further, in the vast majority of cases where DR 1-104 has been enforced, the defendant himself was directly involved in the other violations that were predicates for, or appeared together with, the DR 1-104 violation. In only two of the seventeen cases was the defendant not directly involved with the other violations that were punished. See Levey, 711 N.Y.S.2d 372, 372; Orseck, 692 N.Y.S.2d 766. In Levey, this was because the sole infraction was a DR 1-104 violation. In Orseck, while Donald Orseck was held primarily responsible for violations of DR 1-102, DR 5-104 and DR 9-102 and was suspended for eighteen months, his law partner and brother, Gerald Orseck, was found to be responsible “by virtue of being his brother’s law partner” and was censured under DR 1-104(d)(2). Orseck, 692 N.Y.S.2d at 768. In the remaining fifteen cases the defendant himself was found to have committed the other violations charged. Thus, it is very rare for a DR 1-104 defendant to be held liable for the misconduct of another that she was not directly involved in herself. Not surprisingly, the type of punishment imposed turns in large part on the extent to which the defendant was found to be involved in the other violations of the Disciplinary Rules. In the two instances where a violation of DR 1-104 was the sole infraction, the punishment meted out was censure. See Levey, 711 N.Y.S.2d 372; Orseck, 692 N.Y.S.2d 766.

36. See Schneyer, Professional Discipline, supra note 5, at 18-20.
37. See, e.g., Ex parte Wall, 107 U.S. 265, 288 (1882) (noting that a disbarment proceeding is “not for the purpose of punishment”); In re Brown, 910 P.2d 631, 634 (Ariz. 1996); In re Imbriani, 694 A.2d 1030, 1035 (N.J. 1997); Office of Disciplinary Counsel v. Zdrok, 645 A.2d 830, 834 (Pa. 1994); STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 1.1 cmt. (Am. Bar Ass’n 1991 & Supp. 1992) (“As the courts have noted, while sanctions imposed on a lawyer obviously have a punitive aspect, nonetheless, it is not the purpose to impose such sanctions for punishment.”); Stephen G. Bene, Note, Why Not Fine Attorneys?: An Economic Approach to
authorities who refer to disciplinary sanctions as punitive and consider disciplinary proceedings to be quasi-criminal in nature and effect.\textsuperscript{38} Brief reference to the remedies available through, and the articulated aims of lawyer discipline should suffice to illustrate the point.

Most bar complaints are filed by clients.\textsuperscript{39} Further,

the dominant pattern [of client complaints] focuses on contractual matters, most of which are tangential to the [ethical] code. The problems most often involve the speed, quality, nature, and cost of the legal services agreed upon and delivered. The client’s objective is not to punish but to recoup losses or obtain performance.\textsuperscript{40}

Although they are the most frequently lodged, these types of complaints rarely eventuate in serious sanctions “because the conduct alleged does not violate the rules of professional conduct.”\textsuperscript{41} Attention to the types of sanctions most commonly employed in disciplinary proceedings further demonstrates that,
despite the evident need for a greater attention to the consumer protection dimension of professional discipline,\footnote{2} such proceedings are generally not directed toward compensation of those harmed by the attorney misconduct.\footnote{3} Some disciplinary dispositions include restitution,\footnote{4} but the most widely used sanctions are disbarments and suspensions from practice, private reprimand, public censure, and probation, none of which remedy any harm suffered by the victim of an ethics violation.\footnote{5}

The Supreme Court has held that, because disciplinary sanctions are not punishment in the constitutional sense, the administration of such sanctions need not include all the constitutional procedural protections afforded defendants in criminal cases.\footnote{6} The Court, however, has also recognized that lawyer disciplinary proceedings are “quasi-criminal” in nature and has mandated that the

\footnote{42. See generally McKay Report, supra note 40, at vi-vii, 9-11; Levin, supra note 37, at 25-28 (discussing momentum toward consumer-oriented approach to attorney regulation); Steele & Nimmer, supra note 39, passim.}  

\footnote{43. See, e.g., McKay Report, supra note 40, at 10 ("Discipline primarily offers prospective protection to the public. It either removes the lawyer from practice or seeks to change the lawyer’s future behavior. Protection of clients already harmed is minimal."); Schneyer, Four Systems, supra note 5, at 261 ("[D]isciplinary proceedings rarely serve remedial purposes"); Wilkins, Who Should Regulate, supra note 15, at 806 ("[D]isciplinary agencies primarily focus on punishment and deterrence. Compensation, although allowed under limited circumstances, remains a secondary goal.").}  

\footnote{44. But see In re Robertson, 612 A.2d 1236, 1239-40 (D.C. 1992) (reading restitution authorized as confined to “a payment by the respondent attorney reimbursing a former client for the money, interest, or thing of value that the client has paid or entrusted to the lawyer in the course of the representation”; restitution should not “aim at making the client whole” and should not include consequential damages “which are more appropriately determined in a civil adjudication . . .”).}  

\footnote{45. See, e.g., Schneyer, Four Systems, supra note 5, at 261; Schneyer, Professional Discipline, supra note 5, at 20-21.}  

\footnote{46. Ex Parte Wall, 107 U.S. at 288; see also In re Williams, 513 A.2d 793, 796 (D.C. 1986). In evaluating what constitutes “punishment” for constitutional purposes, the Supreme Court has recently endorsed a two-part test. First, a court must determine whether the legislature intended to establish a civil or criminal penalty. Hudson v. United States, 522 U.S. 103 (1997) (articulating factors to be considered in evaluating whether a given sanction is punishment for purposes of double jeopardy analysis). Second, the court must determine whether nominally civil penalties are “‘so punitive in form and effect as to render them criminal despite Congress’ intent to the contrary.’ ” Id. at 104 (quoting United States v. Ursery, 518 U.S. 267, 290 (1996)). In conducting the second inquiry, courts are to evaluate the statute on its face, and only the “clearest proof” will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty. Hudson, 522 U.S. at 100. That proof should include reference to seven nonexhaustive factors: “(1) ‘whether the sanction involves an affirmative disability or restraint’; (2) ‘whether it has historically been regarded as punishment’; (3) ‘whether it comes into play only on a finding of scienter’; (4) ‘whether its operation will promote the traditional aims of punishment—retribution and deterrence’; (5) ‘whether the behavior to which it applies is already a crime’; (6) ‘whether an alternative purpose to which it may rationally be connected is assignable to it’; and (7) ‘whether it appears excessive in relation to the alternative purpose assigned.’ ” Id. at 99-100 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (employing same factors to analyze whether a given sanction could be imposed without the procedural safeguards guaranteed by the Fifth and Sixth Amendments)). Although disciplinary proceedings would likely fail the first part of this test, at least some of these seven factors would militate toward a finding that they are, at the least, “quasi-criminal.”}
imposition of sanctions must comport with basic due process guarantees.\textsuperscript{47} Obviously, the sanctions of disbarment and suspension actually deprive an attorney of her ability to earn her livelihood in her chosen profession.\textsuperscript{48} Sanctions such as reprimands, censures, and probation may seriously impair that livelihood in as much as they threaten the loss of professional standing, professional reputation,\textsuperscript{49} and may cause clients, colleagues, and the larger legal community to question the attorney’s competence or honesty. Indeed, the economic effect of disciplinary sanctions may be more profound, and more long-lasting, than criminal penalties such as fines or restitution.

Perhaps more important is the unique stigma that flows from a professional sanction. Such sanctions inevitably reflect a normative judgment regarding a lawyer’s conduct that is much more akin to a criminal conviction than a civil remedial award. There is said to be a consensus that professional codes are not intended to define moral behavior or set a standard for how “good people” behave; the ethics code is supposed to prescribe conduct that is “peculiarly appropriate for lawyers, as lawyers, rather than conduct that is ‘ethical’ for moral individuals.”\textsuperscript{50} Yet the earliest and still predominant rationale for disciplinary sanctions calls to mind the dictionary definition of “stigma”—that is, a “mark of disgrace or reproach” which indicates that “something is not considered normal or standard.”\textsuperscript{51} Thus, professional sanctions are intended first and foremost “to identify and remove from the profession all seriously deviant members (the ‘cleansing’ function).”\textsuperscript{52} “The deviant attorney is defined as unfit, a malefactor. The attorney’s deviance sets him apart from other members of the profession, and he is removed by disbarment or suspension.”\textsuperscript{53}

Even if persons sanctioned in disciplinary proceedings are not “cleansed” from the practice, sanctions such as censure drive a wedge between the lawyer and her community. “[O]ne of the legal profession’s most important constitutive beliefs

\textsuperscript{47} In re Ruffalo, 390 U.S. 544, 550 (1968) (stating that disbarment is “a punishment or penalty imposed on the lawyer” and characterizing disbarment proceedings as “quasi-criminal” in nature); Wall, 107 U.S. at 288-90; Schneyer, S&L Crisis, supra note 4, at 664 (noting that professional discipline is often viewed as punitive in nature). Although lawyers subjected to disciplinary proceedings are not entitled to the constitutional criminal indictment and trial procedures,

\textsuperscript{48} See Statewide Grievance Comm. v. Botwick, 627 A.2d 901, 906 (Conn. 1993) (noting that “[a] license to practice law is a property interest that cannot be suspended without due process”).


\textsuperscript{50} Zacharias, supra note 21, at 227-28.

\textsuperscript{51} WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1788 (2d ed. 1979).

\textsuperscript{52} Steele & Nimmer, supra note 39, at 999.

\textsuperscript{53} Id. at 925.
is] that it is a single profession bound together by unique and specialized norms and practices distinct from the norms and practices of laypeople.\textsuperscript{54} Although this conception of professional solidarity may in fact be "an idealized notion of the past that bears little relationship to current reality,"\textsuperscript{55} what is important for present purposes is that it is felt to exist. Professional sanctions may act in many to alienate or divorce an attorney from a community that constitutes an important part of her identity.

These quasi-criminal sanctions are enlisted in service of aims that mirror most—but, it is important to note for purposes of later analysis, not all—of the purposes of criminal punishment. Disciplinary sanctions are not deemed appropriate to exact retribution on wrongdoing lawyers—that is, lawyers are not disbarred, suspended, or censured based on moral judgments that such sanctions constitute the lawyers' "just deserts" for their misconduct.\textsuperscript{56} In all other respects, however, the rationales advanced for disciplinary sanctions reflect the justifications provided for criminal sentences. Thus, the ABA, many courts, and most commentators identify the primary aim of disciplinary proceedings to be protection of the public and the administration of justice from incompetent or unethical lawyers.\textsuperscript{57} The bar, then, is seeking first and foremost to incapacitate attorneys\textsuperscript{58} who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and

\textsuperscript{54}. Wilkins, \textit{Making Context Count, supra} note 15, at 1148.

\textsuperscript{55}. \textit{Id.} at 1219.

\textsuperscript{56}. Under a "retributionist" or "just deserts" theory of criminal punishment, "punishment should be scaled to the offender's culpability and the resulting harms. Thus, if a defendant is less blameworthy, he or she should receive less punishment, regardless of the danger that he or she may pose to the public and the need to deter others from committing similar crimes." Ilene H. Nagel, \textit{Forward, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines}, 80 J. CRIM. L. \\& CRIMINOLOGY 883, 916-17 n.197 (1990).

\textsuperscript{57}. See \textbf{STANDARDS FOR IMPOSING LAWYER SANCTIONS} Standard 1.1 cmt. (Am. Bar Ass'n 1991 & Supp. 1992) ("As identified by the courts, the primary purpose [of lawyer sanctions] is to protect the public."); \textit{In re} Merrill, 875 P.2d 128, 131 (Ariz. 1994) (maintaining that the purpose of lawyer discipline is not to punish the offender, but to protect the public, the profession, and the administration of justice); \textit{In re} Abrams, 689 A.2d 6, 12 (D.C. 1997) (asserting that disciplinary sanctions are designed to protect the public and the courts, and to deter other attorneys from engaging in similar conduct); \textit{In re} Brown, 674 So. 2d 243, 246 (La. 1996) (stating that the purpose of lawyer disciplinary proceedings is to maintain appropriate standards of professional conduct to safeguard the public); Bd. of Overseers of the Bar v. Dineen, 557 A.2d 610, 614 (Me. 1989) (noting that disciplinary action is required for the protection of the public and the courts); Attorney Grievance Comm'n v. Garland, 692 A.2d 465, 472 (Md. 1997) (stating that the purpose of disciplinary proceedings is not to punish the errant attorney, but to protect the public and preserve the public confidence in the legal system); \textit{In re} Olson, 577 N.W.2d 218, 220 (Minn. 1998) (articulating that the primary purpose of attorney discipline is protection of the public); \textit{In re} Harris, 890 S.W.2d 299, 302 (Mo. 1994) (same); \textit{In re} Imbriani, 694 A.2d 1030, 1035 (N.J. 1997) (same); \textit{In re} Curran, 801 P.2d 962, 974 (Wash. 1990) (reasoning that "protecting the public from unworthy practitioners" is a more important purpose of disciplinary action than maintaining public confidence in the bar); Levin, \textit{supra} note 37, at 17 (primary goal of attorney discipline is protection of the public); Steele & Nimmer, \textit{supra} note 39, at 999.

\textsuperscript{58}. \textit{See, e.g.}, Bene, \textit{supra} note 37, at 913 (stating that "courts seem to agree on an incapacitative role for attorney discipline").
the legal profession."

A second major objective is ensuring the effective administration of justice. Again, the objective here appears to be incapacitating those attorneys who pose a threat to the integrity of the legal system, although a subsidiary purpose appears to be preserving public confidence in the legal profession. Other articulated purposes are specific deterrence—that is, deterring the erring lawyer from recidivating—and rehabilitation of the lawyer. Finally, some courts point to general deterrence as a goal of disciplinary sanctions, arguing that such penalties “educate other lawyers and the public, thereby deterring unethical behavior among all members of the profession.”

Given the extent to which disciplinary proceedings seek many of the aims of criminal law and employ similarly punitive and stigmatizing penalties, might one then conclude that what works for criminal law enforcement—vicarious entity liability—should also work for disciplinary enforcement? It seems to me that such


60. See, e.g., In re Brady, 923 P.2d 836, 840 (Ariz. 1996) (stating that the purpose of disciplining lawyers is to maintain the integrity of the administration of justice); Statewide Grievance Comm. v. Botwick, 627 A.2d 901, 906 (Conn. 1993) (noting that courts discipline attorneys so that the administration of justice may be safeguarded); In re Quaid, 646 So. 2d 343, 350 (La. 1994) (stating that the purpose of lawyer discipline proceedings is to protect the administration of justice); In re Hartke, 529 N.W.2d 678, 683 (Minn. 1995) (asserting that sanctions are not imposed to punish but to guard the administration of justice); In re Bouricius, 939 P.2d 604, 608 (Or. 1997) (reasoning that the purpose of a lawyer disciplinary proceeding is to protect the administration of justice); see also Standards for Imposing Lawyer Sanctions Standard 1.1 cmt. (a second purpose of lawyer sanctions cited by courts is “the need to protect the integrity of the legal system, and to ensure the administration of justice”); Levin, supra note 37, at 17-18.

61. See, e.g., In re Astigian, 632 A.2d 80, 81 (Del. 1993) (noting that disciplinary proceedings serve to foster public confidence in the bar); In re Addams, 579 A.2d 190, 199 (D.C. 1990) (reasoning that the purpose of the sanction is to maintain public confidence in the bar); In re Hahm, 577 A.2d 503, 506 (N.J. 1990) (holding that disbarment was necessary to preserve the confidence of the public in the bar); In re Berk, 602 A.2d 946, 950 (Vt. 1991) (insisting that the purpose of sanction is not to punish but to maintain public confidence in the bar); In re Felice, 772 P.2d 505, 509 (Wash. 1989) (stating that the purpose of lawyer discipline is to preserve confidence in the legal profession and judicial system); Levin, supra note 37, at 17-18; Bene, supra note 37, at 912.

62. See, e.g., In re McInerney, 451 N.E.2d 401, 405 (Mass. 1983) (holding disbarment appropriate to prevent further misconduct by the offending individual); see also Standards for Imposing Lawyer Sanctions Standard 1.1 cmt. (“Another purpose [of lawyer sanctions] is to deter further unethical conduct and, where appropriate, to rehabilitate the lawyer.”); Levin, supra note 37, at 23-25 (“Increased recognition of the pressures under which lawyers practice today and the relationship of those pressures to lawyer misconduct have heightened interest in the possibility of rehabilitation and expanded the range of sanctions imposed on lawyers . . . . Two commonly used rehabilitative sanctions are probation and mandatory education in professional responsibility.”); Schneyer, Professional Discipline, supra note 5, at 22 (“[R]eferences to the goal of removing unfit attorneys from practice have been coupled with an emphasis on the deterrent and educational functions of the disciplinary system.”); Steele & Nimmer, supra note 39, at 926.

63. Standards for Imposing Lawyer Sanctions Standard 1.1 cmt.; see also In re Carroll, 602 P.2d 461, 467 (Ariz. 1979) (stating that discipline is imposed to deter other lawyers from the temptation to violate their ethics); Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983) (stating that discipline must be severe enough to deter others who might be prone or tempted to become involved in like violations); Comm. on Prof'l Ethics v. Gross, 326 N.W.2d 272, 273 (Iowa 1982) (reasoning that nature and extent of discipline turns on what penalty is required to deter others); Levin, supra note 37, at 18-19; Schneyer, Professional Discipline, supra note 5, at 22, Steele & Nimmer, supra note 39, at 926, 999.

64. See Levin, supra note 37, at 18-29.
a conclusion should not be drawn without closer analysis. Whether the imposition of corporate criminal liability is fair or efficient in furthering the goals of criminal punishment is still very much an open question among commentators, if not courts. Why is this diversity of opinion troubling? Primarily because the imposition of vicarious liability, through the doctrine of respondeat superior, "is contrary to the basic Anglo-American premise of criminal justice that crime requires personal fault on the part of the accused." This departure was effected with precious little analysis; as Gerhard O.W. Mueller noted, "[m]any weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these . . . is corporate criminal liability. . . . Nobody bred it, nobody cultivated it, nobody planted it. It just grew." In particular, the civil law standard of vicarious liability was transplanted into the criminal realm without consideration of the different aims of criminal and civil liability. As one court argued in the context of examining vicarious criminal liability but in terms that resonate in the quasi-criminal context of disciplinary enforcement:

65. See, e.g., Albert W. Alschuler, Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand, 71 B.U. L. REV. 307, 311, 313 (1991) (noting that it is "too late to reconsider the error that the Supreme Court made in 1909" when it upheld the imposition of criminal responsibility on a corporation "uttering something vague about 'public policy' and the power of the corporation in 'modern times'" but arguing that "[n]evertheless, we should recognize the beast for what it is—not criminal punishment as we customarily understand punishment—but a form of instrumental regulation with which ordinary principles of culpability do not fit."); Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. REV. 687 (1997) (arguing that "commentators broadly agree that corporate [criminal and civil] liability usefully enlists the firm in interdicting or deterring its wayward agents and assures that it fully internalizes the cost arising from its activities"); Pamela H. Bucy, Corporate Ethics: A Standard for Imposing Corporate Criminal Liability, 75 MINN. L. REV. 1095, 1096 & nn.1 & 3 (1991) (stating that "criminal prosecution of corporations has routinely occurred in American courts for almost a century. Commentators, however, have consistently questioned this use of the criminal law," and collecting sources); Daniel R. Fischel & Alan O. Sykes, Corporate Crime, 25 J. LEGAL STUD. 319, 319 (1996) (concluding that "there is no need for corporate criminal liability in a legal system with appropriate civil remedies"); Brent Fisse, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions, 56 S. CAL. L. REV. 1141, 1143-44 & n.2 (1983) (stating that "corporate criminal liability is in such a weak and undeveloped state that many commentators urge that corporate criminal sanctions be displaced by civil monetary penalties, injunctions and negotiation and guidance, backed up when necessary by individual criminal sanctions," and collecting sources); Lawrence Friedman, In Defense of Corporate Criminal Liability, 23 HARV. J.L. & PUB. POL'Y 833 (2000); V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 HARV. L. REV. 1477, 1477 (1996) (questioning the fundamental basis for imposing criminal liability on corporations and concluding that "a modified form of corporate civil liability could make corporate criminal liability obsolete by capturing the advantages of corporate criminal liability while avoiding or mitigating its disadvantages").


68. See Bucy, supra note 65, at 1114 ("In devising the parameters of corporate criminal liability, courts borrowed the respondeat superior principle from tort law and applied it to criminal law. The problem is that they did so without addressing the jurisprudential questions of whether, or how, this principle has a place in criminal law."); Fisse, supra note 65, at 1143 ("Modern corporate criminal law owes its origins and design more to crude borrowings from individual criminal and civil laws than to any coherent assessment of the objectives of corporate criminal law and of how those objectives might be attained.")
The distinction between respondeat superior in tort law and its application to the criminal law is obvious. In tort law, the doctrine is employed for the purpose of settling the incidence of loss upon the party who can best bear such loss. But the criminal law is supported by totally different concepts. We impose penal treatment upon those who injure or menace social interest, partly in order to reform, partly to prevent the continuation of the anti-social activity and partly to deter others. If a defendant has personally lived up to the social standards of the criminal law and has not menaced or injured anyone, why impose penal treatment? 69

Why indeed? A number of rationales are commonly tendered to support corporate criminal liability, and many of those same rationales have been pressed into service in support of firm liability for disciplinary infractions.

B. EVIDENTIARY OR INSTRUMENTAL CONCERNS: THE INDIVIDUAL CULPRIT IS DIFFICULT TO IDENTIFY OR DISCIPLINARY AUTHORITIES ARE RELUCTANT TO "SCAPEGOAT"

The case for corporate criminal liability is often founded on evidentiary or instrumental considerations: organizational liability will ease the conviction of some offender (organization or individual) for what would otherwise be difficult-to-prove violations. First, because of "the evidentiary difficulty of penetrating the corporate 'black box' to locate the appropriate agent or agents to prosecute for a crime," "proceeding against the enterprise is often less costly and more fruitful." 70 This is so because, at least under the federal respondeat superior standard, a criminal conviction may be secured against an entity even when no single agent who both possessed the requisite guilty intent and performed the guilty act can be identified:

[I]ntent may be imputed to the corporation from a person distinct from the one who commits the actus reus [of the crime], such as the supervisory official who realized the significance of the act. Nor has it been necessary for the prosecutor to identify the actual agent who committed the crime if the prosecutor can show that some person within the corporation must have so acted. Even more significantly, inconsistent verdicts are tolerated under which the corporation is convicted but all conceivable individual agents are acquitted. Finally, some decisions have accepted a theory of "collective knowledge," under which no single individual had the requisite knowledge to satisfy the intent requirement,

69. Commonwealth v. Koczwara, 155 A.2d 825 (Pa. 1959); see also Harvey L. Pitt & Karl A. Groskaufmanis, Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct, 78 Geo. L.J. 1559, 1572 (1990) ("The primary objectives of tort law and criminal law differ: 'Tort law distributes the loss of a harmful occurrence' but criminal law 'coerce[es] the actual or potential wrongdoer to compliance with the set standards of society through the threat or application of sanctions.' ") (quoting Mueller, supra note 67, at 37-38).

70. Schneyer, Professional Discipline, supra note 5, at 24.
but various individuals within the organization possessed all the elements of such knowledge collectively.\textsuperscript{71}

Second, juries are reluctant to criminally sanction individuals in situations where the "bulk of harm-causing corporate conduct does not typically have, at its root, a particular agent so clearly "to blame" that he or she merits"" sanction.\textsuperscript{72} Juries reluctant to "scapegoat" individuals may, however, be willing to convict an impersonal entity such as a corporation, thus filling a "gap in enforcement."\textsuperscript{73}

Finally, corporate criminal liability may help the government secure sanctions against culpable individuals. The threat of criminal sanctions may force organizations to cooperate with prosecutors, identifying the malefactors in their ranks, in order to avoid liability. The potential for corporate criminal liability makes more likely, then, that the "black box" will be successfully penetrated and the culpable individuals prosecuted.\textsuperscript{74} In the federal realm, at least, this is not an insubstantial consideration given the weight that both the Department of Justice’s policy on charging corporations\textsuperscript{75} and the U.S. Sentencing Guidelines applicable to organizational defendants\textsuperscript{76} accord to corporate cooperation in the investigation and disciplining of errant employees.

Applying these arguments to the disciplinary context, firm liability certainly will ease disciplinary authorities’ burden when confronted with situations in which it is difficult to identify an individual with primary responsibility for an ethical violation that flowed from a group decision or work product. Thus, it is true that firm liability may be more “fruitful,” if by “fruitful” we mean that more


\textsuperscript{72} Schneyer, Professional Discipline, supra note 5, at 25 (quoting Christopher D. Stone, The Place of Enterprise Liability in the Control of Corporate Conduct, 90 YALE L.J. 1, 31 (1980)).

\textsuperscript{73} New York Bar Report, supra note 17, at 632; see also Coffee, Corporate Criminal Responsibility, supra note 71, at 260 ("An argument frequently made against corporate liability is that it may interfere with the assignment of individual liability. Here, anecdotal evidence does suggest that juries have sometimes compromised, acquitting all individual defendants while convicting the corporation. The pervasiveness of this pattern cannot be estimated.").

\textsuperscript{74} See Coffee, Corporate Criminal Responsibility, supra note 71, at 260. As Professor Coffee notes:

\begin{quote}
[Corporate] liability may make it easier to convict the individual defendants. In any multidefendant prosecution, the interests of the defendants are at least potentially adverse, since each can generally gain concessions by implicating another. The corporation is no exception to this rule and is in a position to provide evidence against individual defendants or to discipline them, in return for leniency for itself.
\end{quote}

\textit{Id.}


\textsuperscript{76} See U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.5(g), 8C4.1 (2001).
sanctions will be imposed.\textsuperscript{77} It may also relieve disciplinary authorities of concerns that their decision to sanction individual members of a legal team will scapegoat some persons for the aggregated misconduct of all.\textsuperscript{78} My sense is that ethics enforcement officers are expected to hew to standards different from criminal prosecutors.\textsuperscript{79} It is unclear to me, then, the extent to which disciplinary authorities could, at least explicitly, threaten firms with liability unless they “cooperate” in making cases against individuals.\textsuperscript{80} Thus, the extent to which the threat of firm sanctions may actually be used to force firms to identify their wrongdoing agents is, for me, an open question.

Granting that firm liability will ease disciplinary authorities’ burden in imposing sanctions on someone (firms, if not individuals), however, does not justify such liability. It seems to me that proponents of firm liability first need to establish that such sanctions are fair, effective, and/or necessary to further the aims of disciplinary enforcement because only then are these evidentiary or instrumental considerations relevant. Stated alternatively, if vicarious firm liability will not serve the purposes of incapacitation, deterrence or rehabilitation posited above, the fact that it facilitates sanctioning should be troubling rather than reassuring.

One could formulate an argument grounded on individual lawyers’ incentives that does make easing disciplinary authorities’ evidentiary burden relevant to actually furthering disciplinary goals. The failure to hold anyone accountable for clear ethical transgressions because no one person can be reliably identified and bar authorities are reluctant to scapegoat may create incentives for individual lawyers working on teams to skate too close to the ethical line, confident that the chain of accountability is sufficiently diffuse that they will be safe from disciplinary scrutiny.\textsuperscript{81} Because this argument touches upon a question that is

\textsuperscript{77} But see infra text accompanying notes 232-274 (discussing the low likelihood of apprehension and conviction of disciplinary wrong-doers and arguing that firm liability is not likely to change the incidence of sanctioning).

\textsuperscript{78} But see infra text accompanying notes 336-39 (arguing that disciplinary authorities may be just as disinclined to impose vicarious responsibility on firms where “flow-through” effects of the sanction fall on “innocent” partners).

\textsuperscript{79} See, e.g., In re Sablowsky, 529 A.2d 289 (D.C. 1987) (stating that ethics enforcement officers could not commission other lawyers to conduct undercover investigation of a lawyer who had proposed an unethical course of action to other lawyers).

\textsuperscript{80} Enforcement authorities may not find these threats necessary to the extent that Model Rule of Professional Conduct 8.1(b) has any force. That rule, of course, provides that a lawyer in connection with a bar admission application or a disciplinary matter shall not “fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.” Model Rules Rule 8.1(b).

\textsuperscript{81} See New York Bar Report, supra note 17, at 631-32. In discussing the reasons why the difficulty of assigning blame to individual lawyers counseled for a rule of vicarious firm liability, the New York City Bar Committee argued that
ultimately at the heart of the debate about firm liability—its effect on individual compliance incentives—I will treat this argument at some length.

Assuming for the sake of argument that the premise is likely, the fundamental issue here is whether firm liability is likely to change the line-skating incentive posited. In particular, the central questions are whether the possibility that the firm will be sanctioned will either (1) encourage firm agents to hew more closely to ethical standards or (2) give firms an incentive that would not otherwise exist to sanction through internal discipline its wrong-doing agents.

1. Does Firm Liability Encourage Individuals to Avoid Ethical Line-Skating?

Two experts in the area of corporate crime, Brent Fisse and John Braithwaite, identify "[t]wo major problems of accountability [that] confront industrialised countries in their attempts to control wrongdoing committed by larger scale organisations":83:

First, there is an undermining of individual accountability at the level of public enforcement measures, with corporations rather than individual personnel typically being the prime target of prosecution. Prosecutors are able to take the short-cut of proceeding against corporations rather than against their more elusive personnel and so individual accountability is frequently displaced by corporate liability, which now serves as a rough-and-ready catch-all device.84

Although I am not persuaded that American prosecutors "typically" proceed against corporations and ignore culpable individuals, certainly it happens with sufficient frequency to be a concern. That concern seems to have two faces. First,

Teaming tends to obscure responsibility and may encourage lawyers to take ethical risks. A firm which uses teaming should have an incentive to implement policies, such as identification of work done by each team member and random checks on work product, which discourage team members from taking ethical risks. The availability of sanctions against firms for ethical violations will create the incentive to implement such safeguards.

Id.82. As an initial matter, the underlying premise here—that there exists an errant agent who will be able to hide or be hidden from disciplinary authorities—may be questionable. The dynamic in these situations is likely to be complex, with power relationships, friendships, and other factors complicating the equation. Yet it seems to me at least arguable that, given the nonculpable others' fear of being unfairly targeted and the severity of the possible sanctions, the rational reprobate would not necessarily count on nonculpable others to shelter him at their own possible risk and perhaps in violation of their ethical duties. See, e.g., MODEL RULES Rule 8.3(a) ("A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."); MODEL CODE DR 1-103(A) (providing that "[a] lawyer possessing unprivileged knowledge of a violation of [a Disciplinary Rule] shall report such knowledge to . . . authority empowered to investigate or act upon such violation."); see also MODEL RULES Rule 8.3(b) (obligation to report judicial misconduct); id. at Rule 8.1(b) (lawyer's disclosure obligation in connection with bar admission, application or disciplinary proceeding); MODEL CODE OF JUDICIAL CONDUCT Canon 3D(2) (1990).
84. Id.
in many cases, proceeding against an individual may be more difficult than (as happens more often than not) pressuring a corporation to plead out. Applying this dynamic to the disciplinary enforcement context, the problem is that it may be too easy for disciplinary authorities to pursue firms rather than invest the time, resources, and effort needed to sanction a truly culpable lawyer. Should firm fines be authorized, this unfortunate dynamic may be magnified by strapped bar authorities looking to augment their enforcement budget through the fines (if authorized) that would flow from “easy” cases made against deep-pocketed firms. As Professor John Coffee has noted, there is another “externality” to corporate criminal enforcement that may be relevant here: innocent entities may be forced to settle. A rational entity may be “extorted” to plead out if the authorized penalties are high enough. Further, the difficulty of identifying responsible individuals is posited to be much more difficult in large firms than small firms; thus, the prospects of using individual liability to enforce Rules 5.1(a) and 5.3(a) are “best when small firms are involved.” If this dynamic plays out as projected, an unfortunate message may be sent: large-firm lawyers can “buy” their way out of discipline through firm fines while solo practitioners and small-firm lawyers will continue to be subjected to more severe individual sanctions such as suspension and debarment.

Second, whether because of this enforcement dynamic or because of the

85. One could express this in more positive terms, that is, as a “fairness” rather than a “cop-out” concern. Fisse and Braithwaite also note (perhaps inconsistently) that corporate criminal responsibility plays an important role as “a safety valve which avoids the need to impose harsh forms of liability on individual managers or employees”:

Corporations provide convenient surrogates in situations where it is harsh to impose individual criminal liability, whether by reason of corporate pressures, oppressive rules of criminal liability or resort to exemplary punishment. . . . From the standpoint of retributive theory, the punishment of corporations may preserve the distributive principle of desert by avoiding the imposition of undeserved or disproportionate forms of criminal liability on individual personnel.

Id. at 51. I do not find this argument persuasive to the extent that it boils down to the proposition that when an injustice is threatened, it is better inflicted on an impersonal entity than an individual. For example, if the case for the imposition of sanctions is weak because the rules of criminal liability are deemed oppressive, it seems to me that the case should be declined regardless of the target. This argument is only persuasive if the authors are contending not that one should let culpable individuals off in favor of penalizing the corporation in borderline cases, but rather that fairness dictates that when it is the corporation truly at fault (e.g., because the individual did the crime “by reason of corporate pressures”), it should be sanctioned rather than the individual. This argument is treated infra.


87. Id. at 403.

88. Schneyer, Professional Discipline, supra note 5, at 18 (“Although the importance of an ethical infrastructure would seem to vary directly with firm size, the prospects for using MR 5.1(a) as an effective tool for promoting the appropriate infrastructure are likely to vary inversely with size.”); see also Irwin D. Miller, Preventing Misconduct by Promoting the Ethics of Attorneys’ Supervisory Duties, 70 Notre Dame L. Rev. 259, 305-06 (1994) (same); Creamer Testimony, supra note 29, at 2 (“[I]n the case of small firms, it is entirely practical, and much more effective, to discipline all partners for a firm’s ethical violations.”).
message it sends concerning the lack of personal responsibility for ethics compliance, individuals may actually be more likely to line-skate than formerly. The Supreme Court articulated this concern in Pavelic & LeFlore v. Marvel Entertainment Group when interpreting the scope of Federal Rule of Criminal Procedure 11, a context in which many of the same dynamics—that is, the incentives punitive sanctions created for lawyers and their firms—were at issue. At the time Pavelic was decided, Rule 11 provided that pleadings and other papers shall be signed by at least one attorney of record in the attorney’s name and shall certify that he has read the paper and believes it to be well grounded in law and fact. The rule further provided that sanctions could be imposed on the person who signed the paper and/or a represented party if the paper was signed in violation of the rule, but did not in terms address the question of firm liability for sanctions. In holding that the plain language of Rule 11 did not permit the imposition of monetary sanctions against the law firm of the signing attorney, the Supreme Court further noted that:

[I]t is not at all clear that respondent’s strained interpretation [of the Rule’s language] would better achieve the purposes of the Rule. It would, to be sure, better guarantee reimbursement of the innocent party for expenses caused by the Rule 11 violation, since the partnership will normally have more funds than the individual signing attorney. The purpose of the provision in question, however, is not reimbursement but “sanction”; and the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility. It is at least arguable that these purposes are better served by a provision which makes clear that, just as the court expects the signer personally—and not some nameless person within his law firm—to validate the truth and legal reasonableness of the papers filed, so also it will visit upon him personally—and not his law firm—its retribution for failing in that responsibility. The message thereby conveyed to the attorney, that this is not a “team effort” but in the last analysis yours alone, is precisely the point of Rule 11. Moreover, psychological effects aside, there will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will impose its sanction entirely upon him, and not divert part of it to a partnership of which he may not (if he is only an associate) be a member, or which (if he is a member) may not choose to seek recompense from him. To be sure, the partnership’s knowledge that it was subject to sanction might induce it to increase “internal monitoring,” but one can reasonably believe that more will be achieved by directly increasing the incentive for the individual signer to take care.

Obviously, reasonable minds can differ on how these incentives play out. For example, Congress responded to the Court’s reasoning in the Pavelic case by amending Rule 11 effective December 1, 1993 to provide that “[a]bsent

90. Id. at 126-27; see also Roberts v. Lyons, 131 F.R.D. 75, 84 (E.D. Pa. 1990).
exceptional circumstances, a law firm shall be held jointly responsible for
violations committed by its partners, associates, and employees."

We are operating here in an empirical vacuum, and how firm liability is likely to affect
individual compliance is something of a judgment call.

I find persuasive the arguments tendered by opponents of the Ethics 2000
Commission’s proposed amendments to extend the coverage of Model Rules
5.1(a) and 5.3(a) to firms. First, opponents of firm liability plausibly place the
burden of persuasion on proponents of change. Thus, an unsubstantiated belief
that this change will create stronger individual compliance incentives is an
insufficient basis upon which to base a sweeping change in a foundational
principle in American ethics enforcement: the primacy of individual responsibil-
ity. The ABA Ethics 2000 Commission concluded that providing for firm
liability creates an unacceptable risk that individual compliance incentives would
in fact be compromised. In light of the burden of persuasion, and my own
personal experience, I believe that this judgment is correct.

My own belief, no doubt formed by my experience both as a criminal defense
lawyer and as a prosecutor, is that nothing grabs the attention of management
quite so completely as the threat of individual criminal sanctions. My conviction
in this regard appears to be widely shared. For example, in the wake of the recent
corporate accounting scandals, the congressional response has been to focus, in
major part, on increasing the criminal sentencing exposure of individual
wrongdoers. As Senator Leahy recently stated in a press conference on corporate
responsibility:

We should tighten reporting requirements and do what we can to shame the
corporate wrongdoers. But if these insiders think that after robbing their
investors, bankrupting their firms and stranding their employees they still will
be able to grab their money and walk away, it will take the prospect of hard time
in prison to get their attention. . . . The message to the bad apples must be clear:
If you defraud your investors, your employees and the public, you will not be
able to run away with your loot and leave your company behind in shambles.
You’ve got some hard time ahead of you, in jail.

The costs to a corporation of a criminal conviction can be very weighty and
certainly management will try to avoid them. But the fall-out of a corporate

92. See Creamer Testimony, supra note 29, at 3-4 ("[A] mere ‘hope’ that the proposed change will strengthen
individual lawyers’ sense of responsibility for ethics rules compliance is a weak basis for such a potentially
far-reaching change in responsibility for ethics compliance. The touchstone for legal ethics compliance in every
U.S. jurisdiction has always been individual lawyer responsibility for conduct, both the lawyer’s own conduct
and the conduct of others the lawyer supervises or controls. This Commission should do nothing that has even
the possibility of vitiating or weakening this obligation of individual responsibility.")
93. See supra note 14.
94. Statement of Patrick Leahy, Chairman, Senate Judiciary Committee, Press Conference on Corporate
conviction is, when all is said and done, a threat to the bottom line (even if a substantial one), while the cost to individuals (whether measured in loss of liberty, economic costs, or "stigma" effect) is felt to be much more devastating. Accordingly, the best result, at least in view of those arguably at risk in management, is for the responsibility for any affirmative duty, and sanctions for the violation of that duty, to be placed first and foremost upon the corporation.

A liability rule that puts individual lawyers at risk for quasi-criminal sanctions, then, will be much more effective in promoting individual attention to ethical duties than a rule that focuses on firm penalties. To be sure, one could argue that the proposed expansion of liability provides for both firm and individual penalties, and thus that it should not create a disincentive for individual compliance. This position is a little difficult to sustain, however, given that one of the principal arguments for an expansion of liability to firms is the difficulty of enforcing the relevant rules against individuals practicing in large firms and the lack of enforcement against such individuals to date. Individual sanctions continue to be an option, and one that will likely be pursued in cases involving solo practitioners and lawyers working in small firms. But the very rationale of the firm liability rule will tell large-firm practitioners that enforcement authorities are basically throwing in the towel as far as individual cases against large-firm lawyers are concerned. Further, lawyers may well read this change to represent a further conclusion by ethical authorities that these duties can best be met by firm management, rather than by lawyers acting as individuals. Recall that these are duties not to refrain from wrongdoing, but rather to invest time and energy in building an ethical superstructure and ensuring adequate supervision. To the extent that their time is a scarce and valuable resource, non-management firm lawyers are unlikely to invest it in trying as individuals to create a firm-wide ethical infrastructure that comports with Rules 5.1(a) and 5.3(a). They will leave the job to firm management, content that liability for breaches of these rules will likely rest on the firm rather than on them as individuals. In sum, as opponents of firm disciplinary liability argued to the Ethics 2000 Commission:

> Although the arguments in favor of law firm discipline appear compelling, it is likely to have an opposite effect from that intended by its proponents. In my experience, the most effective means of controlling the behavior of ethically challenged lawyers is the credible threat of the loss or suspension of their license to practice law. Any shift from the individual responsibility of lawyers to the collective responsibility of the firm will diminish the effectiveness of that deterrent. In fact, for the target population of this intended rule, the change in emphasis is likely to be welcomed. It will be viewed by many lawyers as shifting the risk of unethical behavior from a threat to their livelihood to a cost

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95. See infra notes 349-51 and accompanying text.
of doing business. For that reason, it is likely to lead to more, rather than less, unethical behavior by lawyers and law firms.  

2. DOES FIRM LIABILITY CREATE ORGANIZATIONAL INCENTIVES TO SANCTION THROUGH INTERNAL FIRM DISCIPLINE?

Some scholars justify corporate liability as an indirect means of sanctioning the wrong-doing agents within the corporation. One contention is that it is difficult and costly for enforcement personnel to pursue individual agents directly, and that corporations are better positioned to sanction the wrongdoing agents either by disciplining them or by seeking indemnification from them. If only individual penalties are available, the theory goes, entities will sacrifice a middle-management scapegoat and easily replace him, expressing shock at his misconduct while pocketing the profits of his wrongdoing. Entity penalties, then, are necessary to ensure that the entity has an incentive to make clear to its agents before the fact that misconduct will be discovered and consistently punished internally, even if it is unlikely to eventuate in criminal sanction.

Applying this theory to the instant context, internal firm discipline may well be preferred to professional discipline if the goal is to hold lawyers accountable. Internal discipline may be more easily accomplished in light of the firm’s greater access to witnesses and documents, and more cost effective in light of the lesser procedural protections that may obtain. Internal disciplinary efforts can also foster a firm culture of ethical compliance, thereby preventing future misconduct. However, the second major accountability concern expressed by Fisse and Braithwaite is that:

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96. Comments of Robert A. Creamer Concerning Draft Model Rules 5.1 and 5.3, ABA Comm’n on Evaluation of the Rules of Prof’l Conduct at 2 (July 6, 2000), available at http://www.abanet.org/cpr/creamer10.html (visited May 2, 2002) [hereinafter Creamer Comments]; see also Creamer Testimony, supra note 29, at 3-4; ABA Ethics 2000 Comm’n Rule 5.1 Comments received in Response to Final Draft for Review by the Comm’n in Charleston, March 16-17, 2001 at 1 [hereinafter Final Draft Comments] (quoting the comments of the National Organization of Bar Counsel (NOBC) in opposition to firm liability amendment to state, inter alia, that “[e]xpanding use of this sanction has the potential to lead to the prospect of firms or lawyers internalizing the cost of breaking the rules as a cost of doing business, or of offering firm-paid fines to avoid individual discipline.”).


98. See id.; Arlen & Kraakman, supra note 65, at 692 (“[E]ntity liability can reduce enforcement costs by inducing firms to sanction wrongdoers in those circumstances where firm-level sanctions are cheaper (or more accurate) than government-imposed sanctions and have the equivalent deterrent effect”); Coffee, “No Soul to Damn,” supra note 86, at 407-08.


100. See, e.g., Schneyer, Professional Discipline, supra note 5, at 28-29 & n.166; Hazard, supra note 38, at 13.

101. Cf. Wilkins, Afterword, supra note 15, at 486-87 (noting that “recent examinations of the practices of various subgroups within the profession underscore the extent to which the institutions in which lawyers live and work structure their understanding of and allegiance to legal norms”).
where corporations are sanctioned for offences, in theory they are supposed to react by using their internal disciplinary systems to sheet home individual accountability, but the law now makes little or no attempt to ensure that such a reaction occurs. The impact of enforcement can easily stop with a corporate pay-out of a fine or monetary penalty, not because of any socially justified departure from the traditional value of individual accountability, but rather because that is the cheapest or most self-protective course for a corporate defendant to adopt.\textsuperscript{102}

Is it any more likely that law firms will discipline those who participated in wrongdoing? Here, as in the corporate criminal context, “a disciplinary program may be disruptive, embarrassing for those exercising managerial control, encouraging for whistle-blowers, or hazardous in the event of civil litigation against the company or its officers.”\textsuperscript{103} Firms may determine that discipline is necessary to restore internal morale and reestablish trust with clients and the larger legal community. Just as often, however, firms may rationalize, as do corporations now, that “the problem has been sufficiently investigated and resolved by public enforcement action.”\textsuperscript{104}

In conclusion, then, it is not at all clear that firm liability will either discourage

\begin{itemize}
  \item \textsuperscript{102} Fisse & Braithwaite, supra note 83, at 2.
  \item \textsuperscript{103} Id. at 9. It appears that, at least in the not-so-distant-past, corporate internal discipline was a non-starter. See id.; Coffee, “No Soul to Damn,” supra note 86, at 408 (“There are . . . reasons to question the adequacy of penalties focused exclusively on the firm: evidence of internal discipline within large corporations is conspicuously absent at senior corporate levels. . . .”); id. at 408 n.69 (noting case studies that suggest that “the corporation becomes sufficiently embarrassed to fire the convicted senior executive only when he is imprisoned (and rarely even then)”). At least on the federal level, this may be changing as prosecutors are increasingly insisting, as a precondition to giving corporations credit for “cooperation” and thus perhaps a declination of prosecution, that corporations sanction errant agents. See, e.g., DOJ Charging Guidelines, supra note 75, at VI (stating that “while cases will differ depending on the circumstances, a corporation’s promise of support to culpable employees and agents, either through the advancing of attorney’s fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government’s investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation’s cooperation”); id. at VIII (“In evaluating a corporation’s response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed.”). It is unclear to me whether disciplinary authorities can structure this same charging incentive; thus, any improvement in corporate internal discipline since the inception of the charging guidelines does not necessarily control in the disciplinary context.
  \item \textsuperscript{104} Fisse & Braithwaite, supra note 83, at 9. The answer to this particular accountability concern may be the disciplinary use of firm “probation,” a condition of which could be internal discipline. Some disciplinary authorities use probation as a tool but they apparently do so “only in the simplest situations—usually by ordering a disorganized sole practitioner who has neglected his clients to follow certain office procedures as a condition of keeping his license,” Schneyer, S&L Crisis, supra note 4, at 650, or where necessary to facilitate a lawyer’s rehabilitation. See supra note 62, for an example of rehabilitation through substance abuse treatment; see, e.g., In re Kersey, 520 A.2d 321 (D.C. 1987). Probation, as the corporate sentencing example shows, can be expensive and intrusive. See, e.g., Schneyer, S&L Crisis, supra note 4, at 650 & n.47; Schneyer, Professional Discipline, supra note 5, at 22, 36-37. For these reasons, as well as a potential lack of expertise in mandating firm procedures and questions regarding disciplinary authorities’ jurisdiction to oversee firms on probation or enforce the conditions of probation, it seems unlikely that this remedy will be effective in this context. See Schneyer, S&L Crisis, supra note 4, at 650.
\end{itemize}
individual lawyers’ line-skating or promote internal disciplinary efforts. Absent that kind of nexus to the aims of disciplinary action, evidentiary or instrumental considerations alone do not provide a convincing basis for firm liability.105

C. THE ENTITY IS THE CULPRIT

The above-described evidentiary assertion that it is difficult to isolate and sanction an individual culprit may be correct, but “its truth may lie less in the ability of the ‘true’ culprit to hide his identity than in the absence of any such ‘true’ offender in the broad range of cases.”106 As proponents of corporate criminal liability argue, the relevant point is that:

Because of the diffusion of responsibility in organizations and the ways in which the individual decisions are channelled by corporate rules, policies and structures, there may in fact be no individual or group of individuals that is “justly to blame” for the crime. Individuals in corporations frequently operate in a kind of “twilight zone” of autonomy; they may simply exert insufficient choice or control to be suitable recipients of blame.107

In the disciplinary context, those who argue for firm liability posit that there similarly will be cases where the firm, not the individual, is ultimately the erring actor. Focusing the sanction in the enterprise “has appeal when . . . society wishes to denounce the conduct and rehabilitate the actor, but the source of the wrongdoing seems to lie in bureaucratic shortcomings—flaws in the organization’s formal and informal authority structure, or in its information pathways—rather than in the deliberate act of any particular employee.”108

105. Some law and economic scholars would argue that the difficulties enforcement authorities face in sanctioning individuals and the fact that some individual agents may be “judgment proof” creates a “need” for corporate criminal and civil liability. See, e.g., Arlen & Kraakman, supra note 65, at 692. In Professors Arlen and Kraakman’s view, the goals of corporate civil and criminal liability are to “induce firms to select efficient levels of productive activity (the activity level goal) and to implement enforcement measures that can minimize the joint costs of misconduct and enforcement (enforcement goal).” Id. Again, in the criminal and quasi-criminal context, my own view is that economic efficiency is not a justifying aim of entity liability except to the extent that that efficiency furthers the goals of sanctioning, in this context deterrence, incapacitation, or rehabilitation. I believe that Professors Arlen and Kraakman and I would agree that these instrumental or evidentiary enforcement “needs” may be relevant to what I analyze as “catalyzing deterrence” goals, discussed within. See id. at 692-93; infra text accompanying notes 165-70.


108. Schneyer, Professional Discipline, supra note 5, at 25 (quoting Stone, supra note 72, at 31). As the New York Bar’s Committee on Professional Responsibility concluded:

A law firm’s organization and operating procedure may be what is at fault—not the individual lawyers. This is particularly likely to be the case with conflict of interest problems, billing procedures and handling of client funds. A firm’s policies with respect to leverage through partner/associate ratios and caseload management may also encourage mishandling of cases. If the problem is the firm, and not any individual attorney, then it is the firm which should be disciplined.

1. CAN AN ENTITY BE THE CULPRIT?

Some take issue with the basic premise of this rationale: they question whether an impersonal legal entity has "the capacity to have an intention and to choose" that is the precondition to blameworthiness and whether the "stigma" of criminal condemnation means anything when an impersonal entity is its target.

It is true that a firm, like a corporation, has "no soul to be damned, and no body to be kicked." While as a philosophical matter it is difficult to see how this invisible being can manifest a will to do wrong, many scholars convincingly argue that entity intentionality is expressed through standard operating instructions, decision rules, hierarchical structures, encouraged patterns of behavior, and systems of control because these policies and practices "are intended to replace agents' decisional autonomy with an organizational decision-making process." Organizational theory affirms that "[t]he behavior of individuals in corporations is not merely the product of individual choice; it is stimulated and shaped by goals, rules, policies, and procedures that are features of the corporation as an entity." Research into the origins of white-collar crime demonstrates that "at least some criminal behavior usefully may be viewed not as personal deviance, but rather as a predictable product of the individual's membership in or contact with certain organizational systems, typically industries or professions." As one researcher found, organizational cultures can constitute such a strong force as to overwhelm the significance of individual will: "In [the corporate setting,] each man's own wants, ideas—even his perceptions and emotions—are swayed and directed by an institutional structure so pervasive that it might be construed as having a set of goals and constraints (if not a mind and purpose)

109. Owen M. Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 22-23 (1979); see also Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1229, 1241 (1979) [hereinafter Developments] (noting that mens rea "has no meaning when applied to a corporate defendant, since an organization possesses no mental state").


113. Fisse, supra note 65, at 1148 n.19; see also Fisse & Braithwaite, supra note 83, at 133 ("Corporate responsibility may be based on corporate intentionality, in the sense of corporate policy, or corporate negligence, in the sense of an inexcusable failure to meet the standard of conduct expected of a corporation in the position of the defendant."); Peter French, Collective and Corporate Responsibility 164-72 (1984); see generally William S. Laufer & Alan Strudler, Corporate Intentionality, Desert, and Variants of Vicarious Liability, 37 Am. Crim. L. Rev. 1285 (2000).

114. Moore, supra note 107, at 767.

115. Id. at 753.

116. Martin Needleman & Carolyn Needleman, Organizational Crime: Two Models of Criminogenesis, 20 Soc. Q. 517, 517 (1979); see also Moore, supra note 107, at 754 & n.58.
of its own.” The literature, then, confirms what practical experience might suggest:

(1) each corporation is distinctive and draws its uniqueness from a complex combination of formal and informal factors; (2) the formal and informal structure of a corporation can promote, or discourage, violations of the law; and (3) this structure is identifiable, observable, and malleable.

This thesis finds some support in the literature surrounding firm life:

In his pioneering study of the New York bar, Jerome Carlin demonstrated that a given lawyer’s understanding of the normative content of ethical rules will be strongly influenced by the “ethical climate” of the institutions in which the lawyer works. More recent examinations of the practices of various subgroups within the profession underscore the extent to which the institutions in which lawyers live and work structure their understanding of and allegiance to legal norms.

The above discussion may suggest that there are two potentially overlapping but analytically distinct ways in which an entity may be deemed “responsible” in

117. CHRISTOPHER D. STONE, WHERE THE LAW ENDS 7 (1975).
118. Bucy, supra note 65, at 1127; see also Moore, supra note 107, at 755 (“There appear to be ‘good’ and ‘bad’ corporations, law-abiding corporations and recidivists, and there is a remarkable consensus as to which corporations are which.”); Diane Vaughan, Toward Understanding Unlawful Organizational Behavior, 80 MICH. L. REV. 1377, 1378, 1396-97 (1982). Marshall Clinard surveyed middle managers from a variety of companies, asking why some corporations are more ethical than others. He summarized their responses as follows:

[M]ost of the executives believed that unethical corporate behavior can usually be traced to internal rather than external forces. Internally, individual ethics, personal ambition, and poor supervision by top management play major roles. The ethical history or tradition of a corporation is also important, particularly the characteristics of the founder and his influence on family participation and subsequent top management. Finally, unethical behavior is likely to result if the corporate way of life results in a tendency to push too aggressively for profits. Factors external to the corporation, such as corporate financial problems, unfair practices of competitors, or the type of industry, though mentioned by some, were not major explanations for the underlying factors that lead to some corporations being unethical and others ethical.

119. Wilkins, Afterword, supra note 15, at 486-87 (citing JEROME E. CARLIN, LAWYERS’ ETHICS: A SURVEY OF THE NEW YORK CITY BAR 166-67 (1966)); see also Levin, supra note 37, at 55 n.227 (noting that “there is evidence that the ethical climate in law offices can affect lawyers negatively and can give support for ethical violations”). Author Lincoln Caplan notes that “[i]t is now generally agreed by observers of the legal profession that the main influences on lawyers when they make [a reconciliation between the lawyer’s duty to serve his client and his obligation to serve the public] are what they learn from lawyers they practice with, in the same office or in similar circumstances, and the expectations they glean from the legal culture, expressed most obviously in talk among lawyers, in the legal press, and in directives from the bar about the duties of the profession.” LINCOLN CAPLAN, SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE 125 (1993). Caplan’s self-described “anthropology” of the culture of a large firm (Skadden, Arps, Slate, Meagher & Flom) is well worth the read. See id. at 161; see generally ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988) (another major sociological contribution to the study of firm cultures).
a causal sense for its agents’ ethical misconduct. First, a firm may fail to put in
place organizational policies or practices sufficient to prevent certain types of
professional misconduct. An example of these bureaucratic defaults would be a
failure to invest in effective conflicts-checking software such that a firm
constantly finds itself with conflicts problems that, strictly speaking, may be no
individual lawyer’s fault. The fault ultimately lies in poor management (which
may itself be more unthinking than unethical). Many of these management
failures are likely to harm primarily clients, in that they will be the ones whose
interests are directly prejudiced if conflicts are not identified, or if the controls
and auditing for client trust funds are insufficient, or if no “tickle” system is in
place for filing deadlines. Second, a firm may possess a bad “culture” or “ethos,”
which may in some cases explain the above management deficiencies but which
may also create different and varied problems for both clients and third parties.
An example of a bad firm “ethos” would be a firm in which billable hours are
prized above all else, so that all the lawyers within it are (implicitly if not
explicitly) encouraged to over-bill. Another firm “ethos” that a colleague
identified as troubling would be one in which sheer aggressiveness is empha-
sized, with the end result being a firm full of pit bulls who have little
compunction about lying to adversaries, courts, or regulators to secure the
clients’ aims.

I believe that many firms do have “cultures,” both good and bad. Further, as the
ensuing discussion will make clear, the threat of malpractice liability and market
forces together create a large incentive for firms to put into place policies and
practices to take care of bureaucratic deficiencies that may alienate clients.
Indeed, the following analysis will show that, to the extent that there is an
enforcement gap with respect to ethical misconduct in large firms, it likely lies in
the enforcement of rules that are intended to prevent harm to third parties, such as
adversaries, the courts, and regulators. The larger problem, then, is probably not
defective management policies, but rather market-fueled firm cultures that
promote wrongdoing that burdens third parties. Finally, some recent literature
suggests that companies that undertake programs designed to promote not only
legal compliance but also an ethical “culture” are more likely to have successful
programs than those that do not.121

Although the problem presented by renegade firm “cultures” may be greater,

120. For example, “a senior partner [of Skadden, Arps, Slate, Meagher & Flom] listed aggressiveness as a
cardinal virtue at the firm.” CAPLAN, supra note 119, at 148; see also id. at 147-48 (describing a Skadden
partner’s contribution on a debate about lawyer civility as stating that, at Skadden Arps, “[w]e pride ourselves
on being assholes” and recounting a firm-wide conference at which the predominate view expressed from above
was “[i]f I catch any of you being nice to an opponent . . .”).

121. See, e.g., Lynn Sharp Paine, Managing for Organizational Integrity, HARV. BUS. REV. 106, 109, 114
(March-April 1994); Linda Klebe Trevino, et al., Managing Ethics and Legal Compliance: What Works and
What Hurts, 41 CALIF. MANAGEMENT REVIEW 131, 149 (Winter 1999); see also Donald C. Langevoort, The
and an ethical superstructure that addresses questions of "culture" may be optimal, the "culture" question is one that may be difficult to address effectively from an enforcement point of view. Separating a "good" from a "bad" firm culture will be much more subjective than separating those firms whose conflicts-checking procedures are remiss from those who have exemplary management controls.\textsuperscript{122} Taking the last example posed above, what one individual might object to as an outlaw firm "culture," others (including, no doubt, those within it) may view as entirely appropriate; they would argue that sheer aggressiveness does not necessarily translate into lying and often instead is reflected in zealous representation that serves both client and societal interests.\textsuperscript{123} From an evidentiary perspective, how would one prove that a 500-person law firm (which, presumably, would not commit its exhortations to misconduct to paper), as an entity, promotes wrongdoing?\textsuperscript{124} Would this require proof of multiple violations by the lawyer or the firm and, if so, how would those violations be discovered if no complaints were lodged? If not, what evidence would prove that a single act of misconduct should be primarily attributed to the firm culture, as opposed to the character of the lawyer in question? This last question suggests that issues of causation would be as daunting as evidentiary difficulties. When would a firm culture that requires from its lawyers long hours

\textsuperscript{122} See, e.g., Langevoort, supra note 121, at 112-14; Zacharias, supra note 21, at 252-53 ("The ability to establish code violations and uphold convictions depends on the presence of a rule with sufficient scope to cover the offending conduct, but which defines the elements of the offense in a way susceptible of proof. The more objective the elements and the easier it is for enforcers to find evidence (e.g., witnesses), the more likely it is that enforcers will seek and be able to maintain a conviction. The enforceability of professional regulations, therefore, should vary directly—though perhaps not proportionally—with the specificity of the regulations.").

\textsuperscript{123} For example, as Lincoln Caplan described the culture at Skadden, Arps, Slate, Meagher & Flom, "[t]here was no conflict between the firm's sense of integrity and its aggressiveness, in the judgment of Skadden lawyers. The rules of conduct were designed to restrain lawyers, like a leash. But the firm style was to test their limits." Caplan, supra note 119, at 148. In the view of Skadden lawyers, the culture of "hardball" was described as "effective advocacy," not ethical line-skating. Id.

\textsuperscript{124} Professor Bucy has proposed a standard of corporate liability which assumes that each corporate entity "has a distinct and identifiable personality or 'ethos'" and the government may convict a corporation under this standard "only if it proves that the corporate ethos encouraged agents of the corporation to commit the criminal act." Bucy, supra note 65, at 1099. Professor Bucy argues that one of the advantages of this approach would be that "it is practical, workable, and provable, from concrete information already available in grand jury investigations of corporate crime." Id. at 1101. Thus, she states:

To ascertain the ethos of a corporation, and to determine if this ethos encouraged the criminal conduct at issue, the factfinder should examine: the corporate hierarchy, the corporate goals and policies, the corporation's historical treatment of prior offenses, the corporation's efforts to educate and monitor employees' compliance with the law, and the corporation's compensation scheme, especially its policy on indemnification of corporate employees. These facts are typically, or easily, examined in any criminal investigation of corporate misdeeds and are subject to proof in a courtroom.

\textit{Id.} My own view is that this could in fact be a lengthy, difficult factfinding process in a large entity, and that even if it is not too great a burden for prosecutors, grand juries, and petit juries, it would be too much to expect of disciplinary authorities who are already hard pressed in dealing with a large caseload and would not have the powers of the grand jury and immunity to force cooperation in this wide-ranging inquiry.
and hard-hitting advocacy be deemed to have crossed the line from a culture shared by many large firms into a culture that "causes" over-billing or deceptions to the court? Even under a respondeat superior standard of liability, which is said to obviate such evidentiary and causation problems, resource-strapped enforcement officials will have to make an initial discretionary decision as to which firms to investigate or prosecute and which firms to leave alone. Decisions regarding the normative nature of the firm "culture" presumably would have to be made at that point (on a much briefer record), if not later. Were enforcement authorities or others to attempt to isolate "culture" benchmarks to guide the primary conduct of firms or the discretion of enforcement authorities, those responsible may have difficulty articulating what criteria would be relevant to an ethical firm "culture" and how such "cultures" would be measured or evaluated.

With apologies to my readers, I raise these questions but will not attempt to resolve them. I am presently serving on the U.S. Sentencing Commission's Ad Hoc Advisory Committee on the Organizational Guidelines and the Committee may consider whether the Organizational Guidelines, which control the sentencing of organizations in federal criminal prosecutions, should address corporation culture and/or encourage organizations to foster ethics or integrity programs. In the interests of keeping an open mind on these subjects, then, I will focus the following analysis on the first, bureaucratic, model of firm "responsibility" for misconduct. The following discussion does include references to firm "culture" because firm disciplinary liability is intended to influence that culture, both in constructing management safeguards and beyond; what will not be further explored are the administrative or enforcement issues that a discrete focus on firm "culture" may present.

2. How Can One Identify When the Entity, As Opposed to the Individuals Within It, Should Be Identified As the Culprit?

Accepting, then, that legal entities can be responsible for wrongdoing, the next question must be how one can identify when the entity, as opposed to (or in addition to) individuals within it, should be identified as the "culprit." In framing a response to this question, two additional objections to the imposition of corporate criminal liability should be considered.

125. See Schneyer, Four Systems, supra note 5, at 276 ("Disciplinary authorities should have the power to hold a firm vicariously accountable when its individual lawyers commit professional misconduct, so that agencies can proceed against the firm when they suspect that internal controls were inadequate, but without the burden of proving the point or establishing a close causal connection between inadequate controls and the underlying violation.").

126. See generally Federal Sentencing Guidelines Manual ch. 8 (2001); see also id. at § 8A1.1, Application Note 1 ("Organization" means "a person other than an individual" and includes "corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations").
First, some argue that vicarious criminal liability is unfair because its penalties unjustly fall "on the innocent rather than the guilty—that is, the penalty is borne by stockholders and others having an interest in the corporation rather than by the guilty individual." This "flow-through" fairness argument has a second, utilitarian or consequentialist strand which contends that if the "stigma" criminal law uses to achieve its ends is applied to tar "innocent" shareholders and other corporate constituencies who did not participate in or knowingly condone the misconduct, it will create a perception that the law is unjust and thus ultimately undermine compliance with that law. Additionally, the stigma, if overused, will lose its unique force and effect. In Herbert Packer’s words, “[t]he more indiscriminate we are in treating conduct as criminal, the less stigma resides in the mere fact that a man has been convicted of something called a crime.”

Do these same concerns apply in the disciplinary context? As an initial matter, one could argue that there is a much closer identification between partners and their firm such that any "flow-through" effect could be deemed just deserts: given that partners in theory have much greater leverage to shape firm culture and prophylactic firm policies than shareholders have in corporations, partners are not the “innocents” that shareholders are when someone within the firm commits an ethical violation within the scope of her employment and with the intention to benefit, at least in part, the firm. The question, then, is whether partners actually have sufficient control in the management of the firm that whenever misconduct occurs within the firm, they should be deemed responsible—that is, not “innocent”.

127. Coffee, Corporate Criminal Responsibility, supra note 71, at 257; see also Coffee, “No Soul to Damn,” supra note 86, at 401-05 (discussing “overspill” externality problem of deterrence, under which penalties fall heavily on innocent or less-culpable parties).

128. See F. Allen, Regulation by Indictment: The Criminal Law as an Instrument of Economic Control at 14 (1978) (McNally Memorial Lecture at the University of Michigan Graduate School of Business Administration), quoted in Fisse, supra note 65, at 1174:

The law must in general be compatible with what men and women perceive as sensible and just, and hence capable of attracting the spontaneous and uncoerced compliance of the great majority of persons to whom it applies. A system of law that widely disregards the moral sense of the community may be able to function with reasonable effectiveness for a time, but such a system ‘lives on capital.’ The long-term effect is to demoralize the administration of justice and to weaken the community’s attachment to law.

129. See, e.g., PACKER, supra note 111, at 68-69, 273; Bucy, supra note 65, at 1099-1100 (“To the extent that historical and current standards of corporate criminal liability allow criminal convictions without proof of the corporation’s intent, they encourage the blurring of criminal and civil responsibility. This blurring dilutes the impact of a criminal conviction, and, ultimately, erodes the power of the criminal law.”)

130. PACKER, supra note 111, at 273.

131. See Schneyer, Professional Discipline, supra note 5, at 26 (arguing that “the case for organizational sanctions such as fines, restitution, or adverse publicity is strongest when ownership and management are somewhat distinct, yet not so sharply separated as to leave owners powerless to shape entity practices. The modern law firm is just such an organization; firms have increasingly specialized management, but all owner-partners are directly involved in the firm’s operations.”).
Although partners may wield this type of control in theory, it seems to me questionable as a practical matter, at least in the types of large firms that Professor Schneyer and others are concerned with policing. Those who have studied organizational change in large law firms project that the increasing bureaucratization of law firm practice is "inevitable":

The transformation in size and complexity of the organization itself and the development of intense competition between firms in the market for corporate legal services has challenged the organizational arrangements by which firms were traditionally governed. Direct, ad hoc control of day-to-day operations by a few leading partners has been replaced by management structures that include long-range planning groups, professional administrators, and the division of managerial functions among department heads.

Moreover, "[t]he structural changes that mark the bureaucratization of firms—specialization, departmentalization, and increasing stratification in the earnings and authority of partners—run counter to traditional conceptions of the professional partnership in which all partners are in some sense peers, 'a company of equals.'”

Thus, although "[t]he fundamental principle of the partnership as a legal form is that all partners share in profits and governance," for law partnerships, this seldom means "equal participation." It is debatable, then, whether each partner truly has sufficient influence on partnership policies or culture to be deemed culpable for a failure to use that influence to prevent any and all ethical violations by firm personnel. In the present environment, many partners may actually have no more power over firm policies or culture than that attributable to a large institutional shareholder in a corporation or a senior employee. Recent legislation creating limited liability

132. See Nelson, supra note 119, at 274; see also Schneyer, Professional Discipline, supra note 5, at 5 ("As law firms have grown, firm governance has become more complex. . . . [M]ost firms now recognize the limits of individual partner control in the face of extensive personal liability for firm malpractice and have adopted a variety of bureaucratic controls to limit their exposure: policy manuals, formal rules, committees, specialized departments, and centralized management. This trend toward law firm bureaucracy is expected to accelerate."); Wilkins, Making Context Count, supra note 15, at 1204-05 ("Firms grew dramatically in size and geographic scope. Associate-to-partner ratios mushroomed and firms hired scores of paraprofessionals. Many firms shifted from a "general service" model of representation to a "specialty" model, with a corresponding increase in departments and an early emphasis on specialization. The governance structure of most large firms became increasingly centralized and bureaucratic.").


134. Id. at 4.

135. Id. at 8.

136. Some courts appear to recognize this reality. For example, in United States Equal Employment Opportunity Commission v. Sidley & Austin, 2002 WL 206485, 88 Fair Empl. Prac. Cas. (BNA) 64 (N.D. Ill. Feb. 11, 2002), Sidley & Austin argued that the EEOC did not have jurisdiction to issue an administrative subpoena duces tecum to investigate under the Age Discrimination in Employment Act of 1974 ("ADEA") its new firm retirement plan for firm partners. A partnership is an employer under the ADEA but the law does not reach the relationship between existing partners of a partnership. Id. at 1,3. Sidley & Austin argued that it had demonstrated that its members were "true partners" because they all contribute to capital, share in the profits,
partnerships, through which law firms may limit the personal liability of individual partners for certain types of wrongdoing perpetrated by their partners while still enjoying the tax benefits of the partnership form, seems to have been influenced by a legislative recognition that it is difficult for lawyers to monitor effectively the conduct of their colleagues in large firms.\textsuperscript{137} Certainly the dearth of enforcement of Rules 5.1(a) and 5.3(a) as presently constituted seems to suggest that bar authorities (at least under Professor Schneyer’s theory) share this belief. Anecdotal experience may further support this inference. Certainly, one would not be inclined to “blame” the shareholders of Enron for management’s conduct; indeed they are widely viewed as victims. Interestingly, however, when the criminal indictment of a professional partnership—Arthur Andersen—was announced, a great deal of criticism was directed toward the “unfair” result that a criminal sanction would have on “innocent” partners and other employees.\textsuperscript{138} Such criticism seemed to reflect a popular recognition that in large, complex firms, it is not realistic to hold each partner responsible for every act of misconduct by firm agents.

\begin{footnotesize}
\begin{enumerate}
\item For example, Lou Dobbs of CNN wrote in the \textit{Wall Street Journal}:
\begin{quote}
Just as the Pentagon calls innocent people injured in battle “collateral damage,” the Justice Department has its own terminology for innocents damaged by its actions—“collateral consequences.” You’ll likely be hearing much about these consequences in days ahead, because there will be a lot of those resulting from the indictment of Andersen as a firm. Specifically, a substantial number of Andersen’s employees will lose their jobs and benefits: 7,000 current employees, and many retirees . . . These people had nothing to do with Enron. They didn’t shred documents, and knew zip about it. They’re honest, hard working people who shouldn’t fear our Department of Justice. They’re people the Department should be protecting, not persecuting . . .
\end{quote}

There are more collateral consequences. Because Andersen has lost more than 100 clients in the past few weeks, it can no longer pay as much to settle Enron shareholder lawsuits. People inside the firm tell me any settlement amount will now be $400 million to $500 million less than before the indictment. In other words, the indictment of Andersen has doubly victimized Enron shareholders. These are shareholders for whom Justice, and the Securities and Exchange Commission should be trying to recover as much lost money as possible. Every day that passes means less money for Enron shareholders. And two former SEC chairman agree: David Ruder and Richard Breeden both tell me this indictment is simply wrong.

\end{enumerate}
\end{footnotesize}
Assuming, then, that "flow-through" fairness concerns are implicated in this context because there will be situations in which there are "innocent" partners—that is, partners who do not have the power to affect firm culture or policies to prevent all ethical violations by firm personnel—the question becomes just what force these concerns have. In the criminal context, the rejoinder to objections founded on the unfair "flow-through" effect of criminal penalties are many. "Innocents" to some degree suffer whenever criminal penalties are imposed, whether it is the families of individual defendants or the shareholders, bondholders, employees, or customers of corporations. Criminal penalties prevent the unjust enrichment of shareholders and other corporate constituencies. Any sanctions imposed in excess of the criminal profits obtained are spread among so many shareholders as to be negligible. Shareholders have acceded to a distributional scheme in which profits and losses from corporate activities are distributed not according to "just deserts" but rather according to position in the company or type of investment. Finally, the stigma of criminal conviction does not "flow through" to shareholders.

How do these arguments play out in the disciplinary context? First, although there are always collateral costs to any punitive proceeding, basic principles of justice would seem to require that unwarranted and unproductive pain should be avoided if possible. In the disciplinary context, the general concern is the appropriateness of expressive or incapacitative penalties. Outside of misappropriation cases, there appears to be less attention paid to disgorgement of whatever unjust enrichment might exist. The disciplinary context also would appear to be different than the corporate crime context because partners purportedly do rely on a just deserts (however measured) distributional scheme, and the "flow-through" effect is not rendered de minimus through distribution of the sanction. Indeed, some of its effects will likely be quite personal and direct.

Generally there will be far fewer partners in a firm than shareholders in a public company, and the partners' investment in the partnership (both economic and intangible) will be far greater than the average shareholder's stake in the public company in which he holds stock. Although a fine is not now generally authorized in disciplinary proceedings, Professor Schneyer and others have advocated adding that weapon to disciplinary authorities' arsenal of sanctions. A fine would not be remedial, and it would, in many cases, have a much greater impact on "innocent" partners than a corporate fine has on "innocent" shareholders. Although a cynic might argue that sanctions imposed for excessive zeal on clients' behalf may attract clients (or at least a type of client I'm not sure that one would wish to attract), my own instinct is that, in general, the collateral economic

139. See Coffee, Corporate Criminal Responsibility, supra note 71, at 257-58.
140. Fisse, supra note 65, at 1175.
141. Schneyer, Professional Discipline, supra note 5, at 31-33; see also Levin, supra note 37 at 77-80; Bene, supra note 37, passim.
fallout of a well publicized sanction in terms of loss of business or impairment of practice may be great on a per-partner basis. The stigmatizing effect on the law firm may also be substantial, whether measured in terms of client defections, difficulties in personnel retention or recruiting, or status in the legal community. These effects would necessarily impact all the partners. Indeed, these consequences are likely to penalize far more “innocent” partners than “guilty” ones. Finally, partners are more closely identified in the legal community with their partnerships than run-of-the-mill shareholders are with the entities in which they hold shares. To some extent, then, the stigma of the violation may well impact individual “innocent” partners directly. The individual innocent partners may also be subject to the same collateral consequences—such as obligations to report the firm sanction to courts and other bar authorities—as the responsible parties within the firm.

To meet these concerns, a rule of parsimony would seem appropriate. In other words, in order to minimize unfair “flow-through” effects and thus to preserve the perceived fairness of the rule and the deterrent value of the sanction, firm liability should only be imposed when it is clear that the firm is actually the culprit—that is,

142. See Schneyer, Professional Discipline, supra note 5, at 35. For example, when explaining the potential value of “shaming” penalties in the disciplinary context, Professor Schneyer notes:

[Law firms would presumably be quite sensitive to the threat of public censure. In making extensive use of public relations, today’s law firms display no less an interest than corporations in maintaining and enhancing their reputations. Law firms also rely more heavily than sole practitioners on the “brand” loyalty of repeat clients who may be scared away by adverse publicity. In addition, “shaming” sanctions are most effective when imposed on offenders who belong to a reasonably well-defined ethical community. More so than the business world, the legal profession arguably is such a community, as evidenced by its specialized ethics codes.

Id.] 143. Employees of the Attorneys’ Liability Assurance Society, Inc. (“ALAS”), which provides malpractice liability insurance for many large law firms, testified before the ABA Ethics 2000 Commission. (Although one might assume that ALAS had a financial stake in this fight, I am assured that such is not the case and that most malpractice liability policies read that disciplinary and ethical violations and expenses are not covered (unless a subsequent civil suit arises from it)). In the course of so doing, they posed a host of practical difficulties that might arise from the proposal for firm liability, some of which concerned these collateral consequences:

If the Commission’s current recommendations on law firm discipline are adopted, a host of new lawyer disciplinary issues will arise. What must lawyers in disciplined firms disclose when applying for pro hac vice admission in other jurisdictions, or in seeking admission to the bar in other states? Must they disclose that they have been the subject of disciplinary action? Must they disclose that their firm has? If a firm with offices in many states is disciplined, must it report this to lawyer disciplinary authorities in other states? Does a lateral lawyer joining a disciplined firm share in the taint of the firm’s sanction? Must a lateral partner contribute to paying any monetary fine imposed on the firm? What about lawyers who leave a disciplined firm, must they continue to report that they were sanctioned, or that their former firm was sanctioned while they were part of it?

Creamer Testimony, supra note 29, at 4; see also Final Draft Comments, supra note 96, at 1 (quoting the NOBC's comments in opposition to firm liability amendment to state, inter alia, that “ironically, law firm discipline has the potential to let culpable lawyers off the hook while at the same time stigmatizing innocent ones with a criminal history.”); id. at 1 (noting additional practical questions raised by Sarah McShea, Revisiting Law Firm Discipline—Does It Really Work?, N.Y. PROF’L RESPONSIBILITY REPORT, Feb. 2001).
that the firm’s culture, policies or procedures caused, encouraged, or condoned the misconduct at issue.

If the fairness and ultimate utility of firm liability turns on the precision with which the firm is identified as the culpable party, a respondeat superior standard of liability with no due diligence defense— that is, a standard of liability that does not permit consideration of a firm’s reasonable efforts to create an ethical infrastructure—is not the answer. Such a standard would ensure that firm sanctions would be unfairly over-inclusive in at least three respects.

First, a respondeat superior standard will be unfairly overbroad if applied to the ethics code as a whole rather than to those kinds of violations that firms actually have some hope of policing and controlling. There are types of ethical violations as to which it is possible to construct an effective “ethical infrastructure” to head off problems. Among the logical components of such an infrastructure are rules concerning maintenance of client funds, standards regarding required record-keeping, and policies and practices designed to prevent conflicts of interest. There would also appear to be violations, however, that firm policies and procedures—no matter how well-intentioned—are unlikely to prevent. An overbroad liability standard may not only be perceived as unfair,
thus impairing compliance, but it may also have a significant and adverse effect on the fairness of the legal system as a whole by encouraging lawyers to engage in defensive lawyering. An overbroad standard is particularly troubling in this context, where "zealous" advocacy is prized and ethical judgments may be difficult, fact-specific, and designedly discretionary.

Second, a more general and important "fairness" concern is that the respondeat superior standard permits—without any examination of the firm's policies or culture—the wrongdoing and intent of individual firm agents to be imputed to the firm. It does not distinguish between wrongdoing encouraged, condoned, or tolerated by the firm culture or policies and wrongdoing that is principally attributable to a rogue agent whose misconduct could not reasonably have been prevented by the firm. Thus, respondeat superior principles will enable firms to be sanctioned even where the firm is not the "culprit"—that is, when firm policies and culture did not contribute to, and could not reasonably have prevented, the ethical violation. A firm that has the most law-abiding of cultures and has, at no small expense, instituted state-of-the-art bureaucratic controls may nonetheless be lumped together as an ethical miscreant with a firm whose culture is a petri dish for misconduct and whose management is in complete disarray. Quite simply, there is a fundamental disconnect between this standard of liability, which imposes indiscriminate vicarious liability on the entity, and this rationale for entity liability, which posits that liability should not be vicarious and is justified only when the entity is actually the wrong-doing party.

Third and relatedly, because the respondeat superior standard does not discriminate among firms based on firm, as opposed to individual, responsibility, it violates a "leading precept" of justice, that is, treating like entities alike and different entities differently. "It is a poor legal system indeed which is unable to differentiate between the law breaker and the innocent victim of circumstances so that it must punish both alike." Not only would this rule overaggregate firms, it would also create a divide between enforcement as to firms and enforcement as to other entities in which lawyers can be found. Despite the fact that the obligations of Model Rules 5.1(a) and 5.3(a) apply to individual lawyers

Responsibility should be applicable to law firms, including the rule governing the responsibilities of a supervising lawyer (DR 1-104), and the rules relating to the use of client funds and the avoidance of conflicts of interest (DR 5-105 and DR 9-102). See New York Bar Report, supra note 17, at 637-42.


150. See, e.g., Moore, supra note 107, at 759.

151. H.L.A. HART, THE CONCEPT OF LAW 155 (1961); see also Bucy, supra note 65, at 1100 ("From Bentham on, scholars and practitioners have recognized that a fundamental requirement for any criminal justice system is that the system treat like actors alike and different actors differently.").

152. Mueller, supra note 67, at 45.
who do not practice in firms,\textsuperscript{153} it is difficult to see how disciplinary authorities will have the jurisdiction to sanction a corporation or a governmental agency for misconduct by their legal staffs.

It may be worth noting in conclusion that this type of over breadth creates collateral costs as well as threatening unfairness and the compliance disincentives that flow therefrom. These costs will be discussed at greater length when our discussion moves from “fairness” concerns to the deterrence equation, but it is worth mentioning one significant cost at this point. Disciplinary enforcement officials will bear the burden of investigation, litigation, and (likely) defense on appeal of any sanctions sought to be imposed.\textsuperscript{154} If a large law firm is the target, disciplinary officials can be sure that it will be a hard-fought contest, burdening not only their staff but also witnesses and others caught up in the process.\textsuperscript{155} Because disciplinary authorities are already operating under tight budgetary constraints, whatever is achieved through overbroad firm prosecutions will come at the expense of the timely pursuit of other worthy cases.\textsuperscript{156}

If respondeat superior is not the appropriate standard by which to isolate firm “culprits,” what is? This issue is frequently encountered in the corporate crime literature; indeed, the question whether “it [is] possible to attribute fault to a corporation on a genuinely corporate yet workable basis” has been labeled “the blackest hole in the theory of corporate criminal law.”\textsuperscript{157} It has provoked an interesting literature in which scholars have attempted to isolate those situations in which the corporation, as opposed to individuals within it, should be deemed responsible.\textsuperscript{158} The answer to this query depends in part on what we are seeking

\begin{itemize}
\item \textsuperscript{153} See supra note 23.
\item \textsuperscript{154} See Wilkins, Who Should Regulate, supra note 15, at 829 (“Because the proceedings take place after the fact, disciplinary officials must bear all of the costs of investigation, prosecution, and adjudication. Moreover, some of these agencies are chronically underfunded. As a result, many disciplinary cases take years to resolve, further adding to both participant and administrative costs.”).
\item \textsuperscript{155} See, e.g., Miller, supra note 88, at 311 n.225 (quoting letter from Geoffrey C. Hazard, Jr. to Ted Schneyer in which Professor Hazard asserts that law firms will aggressively defend against disciplinary charges); Supreme Court of N.J., Office of Attorney Ethics, 2001 State of the Attorney Discipline System Report at 3 [hereinafter 2001 New Jersey Report] (noting that usually disciplinary cases are “contested at all stages, including investigation, hearing, appellate review, and at the final Supreme Court level”).
\item \textsuperscript{156} See Schneyer, Four Systems, supra note 5, at 253-54 (“[T]he fact that the disciplinary system lacks [the power to sanction law firms] is not necessarily a bad thing. Disciplinary agencies are already hard pressed to carry out their core mission of protecting unsophisticated clients from misconduct by the sole practitioners who usually represent them. When it comes to disciplinary reform, authorizing the agencies to proceed against law firms may not be a sound priority.”).
\item \textsuperscript{157} Fisse, supra note 65, at 1183.
\item \textsuperscript{158} Various commentators have suggested “corporate character theories” of criminal liability, each of which contains slightly different features. See, e.g., Fisse & Braithwaite, supra note 83, at 48 (proposing concept of “reactive fault” defined as “unreasonable corporate failure to devise and undertake satisfactory preventative or corrective measures in response to the commission of the actus reus of an offence by personnel acting on behalf of the organization”); Bucy, supra note 65, at 1121 (corporations should be liable when their “ethos” (culture or “characteristic spirit”) “encourages criminal conduct by agents of the corporation”); Moore,
to achieve in structuring the liability system because even accepting that a firm can be an ethical "culprit" in that its policies or culture encouraged the misconduct at issue, we still need a principled rationale for sanctioning the firm as opposed to the individuals within it.

The underlying premise of some of the theories concerning the optimal ways to identify corporate "culprits" seems to be that corporations can be responsible for criminal misconduct in moral terms as well as in practical effect. According to some corporate crime scholars, then, the object of identifying the corporate "culprit" and imposing a criminal stigma on that "culprit" is, at least in part, to exact retribution. However, retribution—imposing “just desserts” on the errant lawyer or firm—is the only aim of criminal punishment that is not claimed by disciplinary enforcement. In fact, as noted, there appears to be a consensus in the literature on the purposes of ethical codes that such codes are not designed to separate the moral from the immoral. Imposing “just desserts” on a firm for its moral shortcomings, then, is simply not part of the disciplinary picture and cannot serve as a basis for firm disciplinary liability. Proponents of both corporate criminal liability and firm disciplinary sanctions argue that the rationale for punishing entities in addition to individuals is supplied by the deterrence literature. If persuaded that deterrence goals do warrant firm

supra note 107, at 768-70 & n.124; Developments, supra note 109, at 1241-58 (identifying three different theories of corporate blameworthiness and proposing a standard of liability under which a corporation would be liable under respondeat superior principles but the corporation could rebut the presumption of liability created by respondeat superior by proving that it, as an organization, exercised due diligence to prevent the crime). It appears, however, that most corporate character theorists would find the corporation at fault in three sets of circumstances: (1) when the corporation has adopted (formally or informally) a policy that is illegal and an agent of the corporation carries out the policy or where it was reasonably foreseeable that a corporate policy or practice (legal or illegal) would lead to commission of a crime; (2) when “an illegal act is committed, authorized, ordered or endorsed by a high managerial official in the corporation”; or (3) if the corporation implicitly ratifies or endorses its agent’s illegal act, which can be shown either by evidence that in this instance the corporation failed to correct a violation once it is discovered or by demonstrating that the organization has a history of similar violations by its agents. Moore, supra note 107, at 768-69.

159. Fisse & Braithwaite, supra note 83, at 25 (asserting that “[w]hen people blame corporations, they are not merely channelling aggression against the ox that gored. Nor are they pointing the finger at individuals behind the corporate mantle. They are condemning the fact that the organisation either implemented a policy of noncompliance or failed to exercise its collective capacity to avoid the offence for which blame attaches.”); Fisse, supra note 65, at 1169-70 (arguing that retributionist “justice as fairness” ideals can be said to require that all entities compete on equal terms and that erring entities be forced to divest themselves of any undue profit or advantage accrued through wrongdoing); Laufer & Strudler, supra note 113, passim; Moore, supra note 107, at 755 (“The idea of corporate culpability is not merely a product of organizational theory and research on corporate crime; it is part of ordinary moral discourse.”); Developments, supra note 109, at 1241 (noting that “while the primary aim of corporate criminal sanctions is deterrence, there may be some retributive limitations on the pursuit of this goal, and courts as well as legislatures will likely continue to require some blameworthiness on the part of the defendant in the vast majority of cases”).

160. The argument that entity liability is warranted on retributionist grounds is the minority view. Most scholars and others argue that the only legitimate aim of corporate criminal liability is deterrence. See, e.g., Khanna, supra note 65, at 1494 & nn. 91-93 (collecting authorities); Pitt & Groskaufmanis, supra note 69, at 1573 (“[T]he most commonly accepted basis for corporate criminal liability is the need to deter misconduct. A
liability, we can return to the question of how we can best isolate and sanction firm “culprits” so as to promote those goals.

D. CATALYZING DETERRENCE

In traditional terms, deterrence theory presupposes that the credible threat of sanctions will discourage rational actors from engaging in illegal or unethical conduct (“negative deterrence”). This negative deterrent calculus is said to be a function of the likelihood that the sanction will be imposed and the costs associated with the sanction:

Economists generally agree that an actor who contemplates committing a crime will be deterred only if the “expected punishment cost” of a proscribed action exceeds the expected gain. This concept of the expected punishment cost involves more than simply the amount of the penalty. Rather, the expected penalty must be discounted by the likelihood of apprehension and conviction in order to yield the expected punishment cost.161

When deterrence is designed to affect the conduct of entities, however, this formula must take into account the fact that deterrence in this context must have a catalyzing as well as inhibiting function (“catalyzing deterrence”). As Brent Fisse explains in the corporate crime context:

[O]rganizational offenders cannot exert self-control merely by individual self-denial. Self-denial on the offenders’ parts must be embodied in corporate policy and backed by appropriate disciplinary measures and organizational procedures. Accordingly, under a scheme of corporate deterrence, punishment or a threat of punishment requires corporations to do more than merely exercise inhibition and self-restraint; they are expected to institute effective crime prevention policies, disciplinary controls and changes in standard operating procedures.162

Indeed, the sweep of this catalyzing theory potentially includes incapacitative goals which, although central to disciplinary enforcement, may be difficult to fit into a firm liability theory because it is questionable whether firms as a whole can or should be disbarred or suspended from law practice.163 As Brent Fisse argues,
"[p]olicy revision, internal disciplinary control, and procedural action—the forms of rehabilitation and incapacitation that are most practical and useful in preventing corporate crime—are subgoals of [catalyzing] deterrence."164

The catalyzing theory of deterrence is the predominant rationale relied upon for firm liability and is the rationale that holds most promise.165 That is, the ultimate purpose of firm disciplinary sanctioning is to galvanize firms to put in place policies, and to reform firm cultures, such that future harms to clients or third parties will be avoided. Consistent with our firm as "culprit" model,166 the theory is that law firms' policies and culture create an "ethical infrastructure"167 and that this infrastructure has "at least as much to do with causing and avoiding unjustified harm as do the individual values and practice skills of their lawyers."168 As explored above, individual liability for failures to put in place an effective ethical infrastructure is judged to be very difficult as a practical matter.169 More important for present purposes, Professor Schneyer argues that individual liability alone does not create institutional incentives to change the firm's ethical infrastructure, relying on the corporate crime literature:

If the state sanctions only the corporate agent who commits a crime that is intended or likely to benefit the company, then the owners will often have no incentive to prevent, detect, or remedy such crimes, at least when the perpetrator has no indemnification right by which to pass her penalty on to the company. The owners, on this theory, will be both unjustly enriched by corporate crimes and uninterested in their prevention. On the other hand, imposing fines or other sanctions on the corporation will adversely affect corporate profits and give owners an incentive to monitor for wrongdoing.170

The power of this rationale for firm disciplinary liability turns on a number of inquiries. First, we must explore whether firm liability actually will create incentives for change not prompted by individual liability. Second, if such

Creamer Testimony, supra note 29, at 4 (noting that because law firms are not admitted to law practice they cannot be disbarred or suspended).

164. Fisse, supra note 65, at 1159 (footnote omitted).

165. See, e.g., Schneyer, Professional Discipline, supra note 5, at 14 ("The chief reason to allow disciplinary authorities to proceed directly against firms is prophylaxis—the promotion of firm practices that prevent wrongdoing by individual lawyers."); New York Bar Report, supra note 17, at 629-32.

166. See supra notes 109-60 and accompanying text.

167. Schneyer, Professional Discipline, supra note 5, at 10.

168. Id.

169. The difficulties of relying solely upon individual prosecution in the corporate crime context are said to be "enforcement overload; opacity of internal lines of corporate accountability; expendability of individuals within organisations; corporate separation of those responsible for the commission of past offences from those responsible for the prevention of future offences; and corporate safe-harbouring of individual suspects." Fisse & Braithwaite, supra note 83, at 37 (footnote omitted). Other considerations also include the "vigour and resources with which prosecutions of corporate officers are typically defended." Id. at 37 n.96.

potential exists, we should determine what standard of liability ought to be employed so as fairly and effectively to maximize institutional compliance incentives. Then, consideration should be given to the extent of the problem sought to be addressed and the efficacy of alternative enforcement systems. Finally, and to come full circle, the ultimate question to be resolved is whether whatever institutional incentives may be created are too costly given the real concern that a shift to firm liability will dilute individual lawyers' felt responsibility for the creation of a firm ethical infrastructure.

1. CAN FIRM DISCIPLINARY LIABILITY GALVANIZE INSTITUTIONAL COMPLIANCE?

As an initial matter, it is worth noting that the corporate crime literature does not wholeheartedly embrace Professor Schneyer's economic rationale for supplementing individual liability with corporate criminal liability.\(^{171}\) "[T]here are probably as many theories or sub-theories of corporate regulation as there are lawyer-economists."\(^{172}\) Accordingly, "[t]here is a spectacular diversity of opinion" in the law and economics literature about the optimal allocation of responsibility among corporations and individuals, leading some experts to conclude that existing "law and economics commentaries . . . do not provide persuasive solutions to the fundamental issues of allocation of responsibility" for wrongdoing in the corporate context.\(^{173}\)

Some of the literature specifically examining organizational change in large law firms suggests that such change is the result of complex forces, many of which are as yet incompletely understood.\(^{174}\) For example, as Robert L. Nelson argues, "[d]espite mounting pressures for the development of rational managerial structures, power in the [large] law firm remains inextricably tied to 'control of clients.'"\(^{175}\) For that reason, "the organizational rationalization of the firm will be controlled by the partners with power."\(^{176}\) This dynamic may suggest that partners with power by virtue of an important client relationship may be loath to

\(^{171}\) See, e.g., Fischel & Sykes, supra note 65, at 319 (concluding that corporate criminal liability is unnecessary to serve deterrent goals where appropriate civil remedies are available); Khanna, supra note 65, at 1495-96 (arguing that in all but the rare case, modified corporate civil liability will best serve deterrent purposes).

\(^{172}\) FISSE & BRAITHWAITE, supra note 83, at 59-60.

\(^{173}\) Id. at 89. Similarly, organizational theory appears to provide no definitive answers.

\(^{174}\) See, e.g., NELSON, supra note 119.

\(^{175}\) Id. at 5.

\(^{176}\) Id.
institute controls that will inhibit their ability to please their client at the expense of third parties. The “partners with power” may estimate that their pro rata share of any disciplinary sanction will be negligible in comparison to the power and money that accrues to them by virtue of their ability to retain and satisfy their clients through overzealous behavior. I frankly do not know how this would actually play out, but this literature suggests that it may be foolhardy to conclude that introducing firm liability for disciplinary violations will necessarily result in the effective implementation of an ethical infrastructure.

Indeed, Robert Nelson’s work suggests that, rather than relying on firm liability, we ought to consider a system in which the “partner with power” (that is, the partner credited with bringing in a client or a piece of business) should be accountable as an individual if she fails to supervise ethical compliance in relation to the work done on behalf of the client. I understand that the SEC imposes liability on individuals who fail in their supervisory responsibility in the conduct of a regulated business. I am not aware of any empirical validation of its approach, but anecdotal reports indicate that it is effective. It may be, then, that the focus should shift from firm liability to reinterpretation of the ethical standards for supervisory responsibility and reinvigoration of those standards’ enforcement.

To return to our subject—the question of firm liability—whatever law and economics theory or firm sociology might suggest in the abstract, the existing realities of disciplinary enforcement present a large stumbling block to the effective achievement of catalyzing deterrence. To evaluate whether extending disciplinary liability to firms will catalyze institutional change, one must understand the context in which the disciplinary system operates, as well as the role played by other systems through which the laws and norms governing lawyers are enforced. 177 After exploring these subjects, I will apply the deterrence formula to the existing enforcement context. Because the outcome of that analysis is quite discouraging, I will then explore the question whether adding firm disciplinary liability may itself change the outcome of the deterrence formula, principally by changing the rate of detection or sanctioning of firm misconduct.

a. The Context in Which the Disciplinary System Operates, and the Role of Other Enforcement Systems

There are a number of sources of the “law” governing lawyering. 178 The “law” with which this article is primarily concerned are the legal ethics rules. Lawyers are also subject to laws that apply to other ordinary citizens in the jurisdiction in which the lawyers practice—including common law, statutes, and regulations

178. See 1 HAZARD & HODES, supra note 3, § 1.3, at 1-5 to 1-6.
concerning administrative, civil, and criminal obligations and prohibitions. A variety of systems enforce these laws, often operating independently from each other. These systems differ in significant respects, including the nature of the complainants, the procedures, decision standards and sanctions or remedies available, and, ultimately, their effectiveness in responding to varied types of misconduct.

I have found very helpful Professor David Wilkins’ comparative institutional analysis of the various lawyer enforcement systems. In addition to disciplinary enforcement, he identifies two systems that are relevant to our analysis. The first, “liability controls,” are controls exerted by the various statutory and common law causes of action (the principal among these being malpractice) under which lawyers may be sued by their clients and others. Liability controls may be the most effective for our purposes because “arguably no regulatory system does more to promote the ethical infrastructure of law firms than civil liability,” specifically, malpractice actions. Conventional malpractice liability cases rarely turn on a firm’s failure to put in place effective control systems, but the threat of firm liability for individual acts of wrongdoing is said to create firm incentives to put such systems in place.

The second, “institutional controls,” are controls exerted by state officials, including judges and regulatory agency personnel, over the lawyers who practice before them. The most obvious examples of judicial institutional controls are federal judges’ power under Federal Rule of Civil Procedure 11 to sanction lawyers who file frivolous pleadings or motions and judges’ power to disqualify lawyers (or their firms) from engaging in a representation where conflicts of interest exist or are threatened. Federal regulators, such as the Securities and Exchange Commission (“SEC”) or the Office of Thrift Supervision (“OTS”), exercise institutional controls through their power to sanction lawyers for improperly advising clients who have duties under those agencies’ regulatory regimes.

Both liability controls and institutional controls offer something, at least in

179. Professor Wilkins has acknowledged that the enforcement systems he studied were “defined at a high level of abstraction using formalist criteria.” Wilkins, Afterword, supra note 15, at 477 (footnote omitted). No doubt more context would aid in this inquiry, but even a simplified framework sufficiently illustrates certain basic truths fundamental to our analysis.

Professor Wilkins analyzes these control systems according to two criteria—“the ability of an enforcement system to produce substantial compliance at acceptable costs” (“compliance arguments”) and “the relationship between a particular sanctioning system and the status of lawyers as independent professionals” (“independence arguments”). Wilkins, Who Should Regulate, supra note 15, at 809. Although very important to Professor Wilkins’ principal inquiry into who should regulate lawyers, the independence arguments are less central to this article, which is primarily interested in evaluating compliance effects.

181. Schneyer, Four Systems, supra note 5, at 270.
182. See id. at 272.
certain circumstances, that disciplinary controls currently do not: the opportunity for firm liability.\textsuperscript{184} Further, "[e]ach of the principals of a law firm organized as a general partnership without limited liability is liable jointly and severally with the firm" for at least certain liability and institutional control sanctions.\textsuperscript{185}

To return to the control system that is our greatest concern—disciplinary enforcement—it is important to understand the context in which that system operates in order to assess whether firm disciplinary liability is capable of "catalyzing deterrence." A first critical contextual fact is lawyers' dual role. Lawyers are, of course, expected to be zealous advocates—keeping clients informed, safeguarding client secrets, and charging reasonable fees, for example. At the same time, lawyers serve as officers of the court—with duties to avoid assisting clients in fraudulent conduct, asserting frivolous claims or defenses, unreasonably delaying a litigation, and the like.\textsuperscript{186} Recognition of this dual role permits one to differentiate between two types of professional misconduct for purposes of analyzing the efficacy of various enforcement mechanisms. "Agency problems" are those situations in which a client is the person primarily hurt by the lawyer's misconduct.\textsuperscript{187} "Common examples include overbilling, allowing the statute of limitations to run, and representing conflicting interests in the same or substantially similar cases."\textsuperscript{188} "Externality problems" concern situations in which lawyers, often with their clients, together "impose unjustified harms on third parties or on the legal framework."\textsuperscript{189} "Common examples include cases in which a lawyer files frivolous pleadings during the course of litigation, knowingly allows her client to present perjured testimony, or assists the client in preparing a false or misleading proxy statement."\textsuperscript{190}

Lawyers' dual role is also relevant to our analysis because the incentives of participants in any disciplinary proceeding often depend upon whether the infraction at issue implicates an agency problem or an externality problem.\textsuperscript{191} A client, for example, will want disciplinary authorities to address agency problems, that is, to enforce the rules that ensure zealous representation. Rational clients rarely, if ever, will complain about externality problems, that is, ethical violations that assist the client's cause at the expense of the judicial system.\textsuperscript{192}

The second important contextual circumstance that must be considered is the

\textsuperscript{184} See, e.g., \textsc{Restatement (Third) of the Law Governing Lawyers} § 58(1) (2000) ("A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority.").

\textsuperscript{185} Id. § 58(2).

\textsuperscript{186} Wilkins, \textit{Who Should Regulate}, supra note 15, at 815.

\textsuperscript{187} Id. at 819-20.

\textsuperscript{188} Id. at 820.

\textsuperscript{189} Id.

\textsuperscript{190} Id.


\textsuperscript{192} See id. at 815-16.
fact that variations in client experience, sophistication, and opportunities for control in hiring and monitoring lawyers will greatly impact one's evaluation of the efficacy of disciplinary enforcement in addressing certain types of problems. In particular, there is a large asymmetry in both information and power between corporate clients and individual clients. Corporations generally have the sophistication, the means, and the incentive to know what services they need, and the knowledge to monitor and evaluate the quality, quantity, and cost of services rendered, thus avoiding many agency problems.\textsuperscript{193} No monitoring is perfect, of course, and clients will not detect all agency abuses by their firms.\textsuperscript{194} Many large-firm clients also possess, however, a powerful prophylaxis to agency problems in their ability in an increasingly competitive legal market to take their business elsewhere if dissatisfied.\textsuperscript{195} For example, the types of ethical violations about which individual clients most often complain—neglect and misappropriation of client property—\textsuperscript{196} are less likely to be a problem in large firms than in small firms or the practices of sole practitioners because corporate clients have the power and incentive to demand that systems be put in place to prevent such problems.\textsuperscript{197}

Agency problems undoubtedly continue to exist, in part because the structure of large-firm practice, while making many agency problems less likely, may aggravate the possibility for others.\textsuperscript{198} However, even if agency problems do arise between a corporate client and its lawyers, “[t]he disciplinary system, with its emphasis on ex post review and punitive sanctions, [is] not an effective means of accomplishing the objectives of corporate clients.”\textsuperscript{199} Corporate clients are rarely interested in investing in a disciplinary process that may result in sanctions but is unlikely to compensate them for any economic loss attributable to the

\textsuperscript{193}See id. at 817 (“As ‘repeat players,’ these sophisticated consumers [corporations] usually have a considerable baseline of experience from which to formulate the goals of the representation and to evaluate lawyer performance. In addition, corporations have comparatively more resources to devote to the task of understanding and evaluating lawyer conduct.”) (footnote omitted).

\textsuperscript{194}See id. at 826 n.107.

\textsuperscript{195}See Schneyer, S&L Crisis, supra note 4, at 641-42 (“[C]ommentators theorize that corporate lawyers are rarely disciplinary targets because business clients are sophisticated enough to monitor their clients and powerful enough to take their business elsewhere if they are dissatisfied.”) (footnote omitted); Schneyer, Professional Discipline, supra note 5, at 8.

\textsuperscript{196}See, e.g., 2001 NEW JERSEY REPORT, supra note 155, at 90. Although the overwhelming majority of inquiries to bar authorities are not docketed as complaints (because, for example, they deal with fee disputes or with concern matters not deemed to be within disciplinary authorities’ jurisdictions), 34.4% of the grievances accepted concerned the handling of money (e.g., misappropriation of funds, failure to account for funds, failure to pay promptly monies, failure to adequately explain disbursements), 18.4% concerned neglect, 9.0% concerned misrepresentation or fraud, 8% concerned lack of communication, and 4.3% concerned conflicts of interest. Id.

\textsuperscript{197}See Schneyer, Professional Discipline, supra note 5, at 7 n.45 & 8; see also Wilkins, Who Should Regulate, supra note 15, at 832.

\textsuperscript{198}See Wilkins, Who Should Regulate, supra note 15, at 827.

\textsuperscript{199}See id. at 828 (footnote omitted).
ethical violation. If harmed by lawyer misconduct, these corporate clients generally seek remedies through informal means or institutional and liability controls.\textsuperscript{200}

For example, I would assume that, with market pressures to obtain and keep business, the size and branching of many large firms, the trend toward increased specialization, and the increasing mobility of lawyers, the type of agency problem most likely to linger in the large firm context is the potential for firm representation of clients with conflicting, or potentially conflicting, interests.\textsuperscript{201} Conflicts are also a type of agency problem that may be difficult or time-consuming for clients to monitor.\textsuperscript{202} "Yet, when this agency problem became apparent to corporate clients in the mid-seventies, they did not invoke the protection of the disciplinary system."\textsuperscript{203} Rather, many companies sought, through an institutional control—disqualification motions—to prevent their firms from representing conflicting interests. "This strategy proved successful, as corporate firms instituted procedures for preventing these problems from occurring in the first place."\textsuperscript{204}

Alternatively, corporate clients may seek recourse to liability controls for agency problems. In 1995, for example, a corporate client was awarded compensatory damages \textit{and} $3,000,000 in punitive damages in suit against its former law firm where the firm partner committed malpractice by virtue of an undisclosed conflict of interest.\textsuperscript{205} Relatively few malpractice actions are filed by corporate clients, likely because "the fact that these clients can credibly threaten malpractice suits undoubtedly provides a further incentive for corporate lawyers to prevent agency problems and helps these clients reach favorable settlements when a dispute occurs."\textsuperscript{206}

\begin{itemize}
\item \textsuperscript{200} From the perspective of the injured client, the most obvious difference between liability controls and the disciplinary system is that only the former allows for a monetary recovery in excess of whatever fee the client has paid to her lawyer. The chance to recover full compensatory (and perhaps even punitive) damages is obviously a substantial incentive to file suit. \textit{Id.} at 830 (footnote omitted); \textit{see also} Ronald D. Rotunda, \textit{The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel}, 1988 U. ILL. L. REV. 977, 977-78 (1988) (describing malpractice settlements made by large law firms to resolve claims by clients and others).
\item \textsuperscript{201} \textit{See, e.g.}, Wilkins, \textit{Who Should Regulate}, supra note 15, at 827-28; \textit{see also} Pitt & Groskaufmanis, \textit{supra} note 69, at 1626 \& n.401 (linking the rising number of conflicts cases to the growth of firms and the increasing mobility of lawyers).
\item \textsuperscript{202} \textit{See} Wilkins, \textit{Who Should Regulate}, supra note 15, at 827 ("At any given time, a large corporation often will have several law firms working on dozens of separate matters. Keeping track of their own work, let alone what other work these firms may be doing, is an extremely time consuming and difficult task.") (emphasis in original).
\item \textsuperscript{203} \textit{Id.} at 828.
\item \textsuperscript{204} \textit{Id.}
\item \textsuperscript{205} \textit{See} Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn, 907 P.2d 506 (Ariz. 1995).
\item \textsuperscript{206} Wilkins, \textit{Who Should Regulate}, supra note 15, at 832-33. ("[I]f a problem does arise, corporate lawyers have both the incentive and the ability to settle disputes before formal charges are filed. Liability controls
By contrast, because many individuals are "one-shot" participants in the legal market, they are much more likely to suffer from the three major information asymmetries that foster agency problems:

[T]hey do not know what services they need, they do not have access to information that would allow them to predict the quality of services that a particular lawyer is likely to render, and they do not have a sufficient baseline from which to evaluate the quality of the services performed.\(^207\)

Not only do many individual clients lack the sophistication, knowledge, or means to monitor or prevent agency problems, they also have less power when such problems are identified, in part because they \textit{are} often one-shot participants who cannot necessarily promise future business.\(^208\) Individual clients, of course, can seek to use other controls—principally liability controls—that address lawyer misconduct. Indeed, it is predominantly individuals who bring malpractice suits.\(^209\) Reference to the (to me) shocking total dollar recoveries in malpractice suits demonstrates that this is a low-visibility, but apparently oft-invoked, remedy: "[e]ach year legal malpractice costs insurers nationwide more than $4 billion—more than medical malpractice, almost as much as what plaintiffs collect annually after ‘exorbitant’ jury awards, and many times more than the annual amount of rarely collected jury punitive damage awards."\(^210\)

Although certainly a potential remedy for the type of agency problems from which individuals commonly suffer, malpractice actions are subject to limitations as a control device.\(^211\) Some individual clients do not realize that they are the victims of malpractice.\(^212\) Most important, malpractice suits are not effective where the misconduct at issue does not result in provable damages that outweigh the transaction costs involved in the malpractice litigation.\(^213\) Professional discipline therefore allow sophisticated corporate clients to tighten their hold over lawyer conduct without filing a claim."

\(^{207}\) Id. at 829.

\(^{208}\) See \textit{id.} at 827 n.109 ("Unlike attorneys who work primarily for individuals, corporate lawyers are paid quite handsomely for keeping up with both clients and their cases. Moreover, the likelihood that a satisfied client will bring the lawyer more business gives corporate lawyers a powerful incentive to go the extra mile that is not present in many individual contexts.").

\(^{209}\) See \textit{id.} at 832 n.134 ("The vast majority of malpractice claims are filed against solo practitioners or lawyers in very small firms. . . . [T]he lawyers in large firms, the ones most likely to be representing large corporations, are almost never sued for malpractice.").


\(^{211}\) See Schneyer, \textit{Four Systems, supra} note 5, at 275; see also Wilkins, \textit{Who Should Regulate, supra} note 15, at 830-35.

\(^{212}\) Wilkins, \textit{Who Should Regulate, supra} note 15, at 830.

\(^{213}\) \textit{Id.} at 848; see also McKay Report, \textit{supra} note 40, at 11, stating:

In most jurisdictions, the only option for aggrieved clients other than the disciplinary system or the client protection fund is a malpractice suit. . . . The problem is not the willingness of lawyers to handle
discipline, then, would seem to be better than liability controls as a means of addressing individuals' "low-level agency problems."  

This is, of course, precisely the content of the overwhelming number of disciplinary complaints. Yet most of these complaints also reflect the three major information deficiencies to which individual clients are subject. They are often dismissed because, even if the client has a legitimate complaint against the lawyer, the complaint is not one that is addressed by the ethical rules. There is, then, in Professor Wilkins' terms, an agency problem paradox that pervades disciplinary enforcement:

Those clients most likely to use the process to combat agency problems [that is, individuals] are the least likely to do so effectively. Corporate clients that have the ability to monitor and evaluate lawyer conduct also have powerful embedded controls at their disposal that render the [disciplinary] system largely unnecessary.  

It is important to stress one facet of the above discussion: the large law firms whose conduct is sought to be regulated through vicarious disciplinary liability are more likely to create externality problems than agency problems. Because of corporate clients' advantages in monitoring and controlling their lawyers' conduct, they are able to "control effectively most agency problems without substantial regulatory intervention, and to influence their lawyers to adopt a client-centered understanding of professional independence." Moreover, these sophisticated clients have "the power both to press their lawyers to act in ways that jeopardize systemic norms and the rights of third parties, and to protect themselves against any loss of zealous advocacy or individual autonomy that might otherwise follow from an increase in external regulation." It is a good

malpractice cases but that the time and expense of a civil suit make only large claims economically feasible. Even when the claim is for a large sum, full civil proceedings are a slow and expensive method of resolving the dispute. Also, many types of lawyer misconduct that are legitimate grounds for client dissatisfaction and dispute may not constitute malpractice.

215. See, e.g., id. at 829; supra note 41 and accompanying text.
217. Id. at 829; see also id. at 824.
218. Id. at 879.
219. Id. at 872; see also NELSON, supra note 119, stating:

[L]awyers in large firms adhere to an ideology of autonomy, both in their perceptions of the role of legal institutions in society and the role of lawyers vis-a-vis clients, but that ideology has little bearing on their practice. In the realm of practice these lawyers enthusiastically attempt to maximize the interests of clients and rarely experience serious disagreements with clients over the broader implications of a proposed course of action.

Id. at 232; id. at 5-6 ("[T]he is highly unlikely . . . that lawyers in large law firms will act as an independent voice that checks the self-interest of clients. It is far more likely that the large law firm will be the enthusiastic voice for the interests of clients.").
bet that the increasingly competitive market for legal business means that externality problems are likely to increase further, and that law firms (often at the behest of their liability insurers as well as clients) will continue to put in place policies and procedures to guard against the agency problems that have the effect of alienating clients or subjecting the firms to liability or institutional controls.\footnote{220}

The importance of the type of misconduct most likely to be of concern in large firms is revealed by the third important contextual circumstance of disciplinary enforcement: "[the disciplinary system] simply does not address externality problems."\footnote{221} There are a number of reasons underlying this reality. First, disciplinary controls are almost entirely reactive. They are initiated when witnesses to, or victims of, the alleged misconduct file complaints. To be sure, almost all jurisdictions have rules that would permit disciplinary authorities to investigate even in absence of a complaint,\footnote{222} and at least some have programs through which lawyer trust accounts are randomly audited.\footnote{223} And some authorities monitor newspapers, court orders, and other publicly available sources for disciplinary infractions and initiate proceedings on that basis, although the extent to which such active monitoring takes place varies widely.\footnote{224} Yet the overwhelming majority of proceedings continue to be founded upon complaints rather than proactive investigations.\footnote{225} This reactive quality is said to flow from: disciplinary authorities’ separation from the venues in which lawyers actually work; the resource constraints under which disciplinary agencies operate; the fact that most ethics rules are not prophylactic in nature and thus are generally invoked only when the harmful conduct prohibited actually occurs; and questions about the “propriety of disciplinary counsel engaging in activities that might involve undercover operations with the potential for entrapment, violations of the attorney-client privilege, and other negative consequences."\footnote{226}

Further, an overwhelming majority of disciplinary complaints are filed by clients. Despite many attorneys’ ethical obligations to report the serious

\footnotesize{\footnote{220. See, e.g., Wilkins, Making Context Count, supra note 15, at 1205-07, 1213 (documenting increasing competition among firms and projecting that such competitive pressures will give rise to increasing likelihood of externality problems).}

\footnote{221. Wilkins, Who Should Regulate, supra note 15, at 829; see also id. at 847-48.}

\footnote{222. See McKay Report, supra note 40, at 74.}

\footnote{223. In New Jersey, for example, disciplinary authorities have a Random Audit Program (“RAP”) to check private firm compliance with trust account responsibilities. 2001 NEW JERSEY REPORT, supra note 155, David E. Johnson, Jr., Director, Letter of May 28, 2002 to Hon. Chief Justice and Associate Justices of the Supreme Court at 1. In twenty years, RAP has audited 7,254 firms. Id. Nearly 99% of all audits were closed administratively; in 1.3% of cases (93 over 20 years) serious violations resulted in discipline. Id.; see also McKay Report, supra note 40, at 56 (recommending random audit of trust accounts).

\footnote{224. See, e.g., McKay Report, supra note 40, at 75; see also Schneyer, Professional Discipline, supra note 5, at 7; Schneyer, S&L Crisis, supra note 4, at 643-44; Steele & Nimmer, supra note 39, at 922; Wilkins, Who Should Regulate, supra note 15, at 822.}

\footnote{225. See supra note 39.}

\footnote{226. McKay Report, supra note 40, at 75; see also Schneyer, Professional Discipline, supra note 5, at 7; Schneyer, S&L Crisis, supra note 4, at 643-44; Steele & Nimmer, supra note 39, at 922; Wilkins, Who Should Regulate, supra note 15, at 822.}
misconduct of fellow lawyers, judges and lawyers—those who may have the best positioning and the greatest incentive to report externality problems—constitute a distinct minority of complainants. As noted above, clients have

227. See supra note 82. As Professor Hazard has explained, this ethical duty is somewhat controversial, and is only nominally enforced:

[L]awyers see each other at work on a daily basis, and are often in the best position to identify violations. Accordingly, the legal profession has traditionally . . . imposed on its own members an independent duty to report violations by others. Over the years, the duty to report professional misconduct has become an important aspect of the bar's self-governance and hence of the law of lawyering.

Forceful arguments may be made against the imposition of an enforceable duty, however. Our society, unlike some others, does not impose a general duty to report crime, even serious crime. Moreover, an enforced "informer" rule could weaken the profession rather than strengthen it, by breeding mutual suspicion. It has also been argued that an unqualified informer rule will not be obeyed, and that such disobedience will breed contempt for the law and beget cynicism about professional misconduct generally.

8 HAZARD & HODES, supra note 3, § 64.2, at 64-5; see also Gerald Lynch, The Lawyer as Informer, 1986 DUKE L.J. 491 (questioning reporting rule); see generally Rotunda, supra note 200. The mandatory reporting rule in the Code of Professional Responsibility, DR 1-103(A), was not universally adopted by the states and, "[e]ven where the requirement remained nominally in force, enforcement was virtually nonexistent." 8 HAZARD & HODES, supra note 3, § 64.2, at 64-5. Model Rules Rule 8.3(a) "accepts the reality that an all-embracing mandatory reporting rule would be subject to massive civil disobedience that would in turn make it difficult to prosecute even clear and egregious cases." Id. § 64.2, at 64-6. In a compromise formulation, then, Rule 8.3(a) imposes a duty to report only in cases "raising a 'substantial question' about another lawyer's very fitness to practice law." Id. Rule 8.3(a) rarely leads to attorney discipline in absence of other violations. See Douglas Richmond, The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation, 12 GEO. J. LEGAL ETHICS 175 (1999); Rotunda, supra note 200, at 982 (with the exception of the case of In re Himmel, 533 N.E.2d 790 (III. 1988), "it is virtually unheard of to find a case where a lawyer is disciplined merely for refusing to report another lawyer. . . . In those cases where the lawyer was disciplined for failing to report another lawyer, the failure to report was merely one of several disciplinary violations, with the bar authorities or the court throwing in the failure to report as one violation among many.").

228. See STANDARDS FOR IMPOSING LAWYER SANCTIONS preface at 2. The Preface to the latest iteration of the Standards for Imposing Lawyer Sanctions notes:

In discussing sanctions for lawyer misconduct, this report assumes that all instances of unethical conduct will be brought to the attention of the disciplinary system. Experience indicates that such is not the case. In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee) was charged with the responsibility for evaluating the effectiveness of disciplinary enforcement systems. The Clark Committee concluded that one of the most significant problems in lawyer discipline was the reluctance of lawyers and judges to report misconduct. The same problem exists today.

Id.; see also McKay Report, supra note 40, at 44 (noting that despite ethical obligations to report misconduct, "the National Organization of Bar Counsel informed the Commission that judges and lawyers comprise a very small percentage of all complainants"); id. at 95 (noting that although the Clark Report identified as a problem the reluctance on the part of lawyers and judges to report instances of professional misconduct in 1970, "[r]eporting by lawyers and judges of misconduct is still rare, and, in many instances, is motivated more by a desire to disqualify opposing counsel or gain advantage in a legal matter"); Levin, supra note 37, at 7 n.29 (noting that "lawyers and judges are unwilling to report the misconduct of other lawyers. . ."); Steele & Nimmer, supra note 39, at 968-74; Wilkins, Who Should Regulate, supra note 15, at 822, 823 & n.92 ("Although judges and lawyers are strongly urged to report misconduct, these knowledgeable parties rarely file complaints."); infra notes 257-61 and accompanying text (discussing reasons for failures to report).
"little incentive to report strategic behavior taken on their behalf." Whether an individual or a corporation, a client is unlikely to report the client's lawyer for engaging in misconduct that is designed to inure to the client's advantage to the detriment of third parties or the legal system. The vast majority of disciplinary proceedings, then, concern agency problems. Accordingly, "[d]isciplinary controls are unlikely to deter externality problems by either individual or corporate lawyers."  

b. Application of Deterrence Formula in the Existing Disciplinary Context

Assuming that the traditional deterrence model works, the above may indicate that there are significant obstacles to its practical achievement in the disciplinary context. First, the probability of sanction is very low. Before a sanction can be imposed, disciplinary authorities obviously need to be made aware of the ethical infraction. Yet the reporting system for lawyer misconduct appears to be very poor. Individual client reporting of agency problems is spotty for a variety of reasons, including an inability to monitor or identify attorney misconduct, a lack of awareness of the disciplinary system, and a
perception that disciplinary authorities are likely to be more sympathetic to lawyers than to disgruntled clients.  

More important for present purposes, large-firm clients generally have the incentive and means to monitor and prevent their firms from subjecting them to agency problems. These clients rarely pursue disciplinary sanctions against their large-firm lawyers either because they are not harmed by the firm or, where they are harmed, because they have formal and informal alternative enforcement systems through which they can secure the kind of satisfaction (largely economic) that disciplinary enforcement does not provide. The above discussion demonstrated that the type of harm most likely to flow from large-firm practice, externality problems, is also the type least likely to be addressed by disciplinary enforcement. Corporate clients certainly have no incentive to report the misconduct of their lawyers that serves their interests at the expense of third parties, such as opposing parties, courts, or regulators. And relatively few complaints are lodged by those best situated to expose externality problems—other lawyers or judges. As a consequence of these circumstances, the large firm lawyers who are the primary target of Professor Schneyer’s proposed remedy are rarely the subject of disciplinary complaints flowing from harm inflicted on clients, third parties, or the legal system; such complaints are disproportionately lodged against solo practitioners and small firm lawyers and concern low-level agency problems.

Even where complaints are filed, the probability of sanctions being imposed is low. In 1996, for example, only about five percent of disciplinary complaints eventuated in sanctions. The most common type of disciplinary complaints,
those concerning "delay, neglect, inaction, and costs, account for only a minority of the serious disciplinary sanctions imposed, whether public reprimands or more serious sanctions." It appears to require egregious misconduct to secure any real sanction. Indeed, suspensions and disbarments seem to be primarily reserved for those whose conduct has resulted, or could result, in criminal convictions or recidivists who have extensive disciplinary records. Large-firm lawyers, already disproportionately underrepresented with respect to complaints, are rarely actually subjected to discipline.

Some commentators also contend that sanctioning decisions are difficult to predict and often are not publicized, thus further undermining both specific and general deterrence. For example, Professor Leslie Levin argued in a 1998 article that state disciplinary authorities use "vague, often unarticulated," and non-public sanctioning standards, tend to impose "light and inconsistent" sanctions,

concerning alleged lawyer misconduct. The actual number of complaints was undoubtedly higher. Only about five percent of all complaints resulted in any sanctions against lawyers.”}; Steele & Nimmer, supra note 39, at 1005 (explaining that “[i]n all jurisdictions, only a small fraction of complaints result in prosecution. Most are disposed of administratively without extensive investigation. Of these, the majority are dismissed outright.”).

239. Steele & Nimmer, supra note 39, at 996; see also 2001 NEW JERSEY REPORT, supra note 155, at 90; supra notes 39-45 and accompanying text.

240. See, e.g., Levin, supra note 37, at 9 (arguing that “sanctions imposed on lawyers are often light and inconsistent”); Steele & Nimmer, supra note 39, at 999 (stating that “disciplinary agencies do not prosecute and impose sanctions on an attorney unless the case against him meets an extremely high threshold of lawyer deviance. In cases where this high threshold is not met, agency response is fragmentary or nonexistent.”).

241. See, e.g., 2001 NEW JERSEY REPORT, supra note 155, at 10 (isolating the predominant reasons for attorney discipline, which include a number of types of misconduct that might subject a lawyer to criminal sanction: knowing misappropriation of client funds (12.7% of cases disciplined); fraud or misrepresentation (6.7%); and "criminal offenses" (6.1%)); Steele & Nimmer, supra note 39, at 993; see also id. at 993-96. This reliance on criminal cases reflects the fact that disciplinary authorities often rely on the investigative work of others assertedly because, inter alia, of disciplinary authorities’ concern about lawyers’ public image, their dependence on other sources for information about lawyers’ conduct, and their lack of investigative resources. Id. at 994-95.


Disciplinary agencies tend to concentrate their prosecutorial resources on a relatively narrow segment of lawyers—those previously complained about, disciplined, or criminally convicted. The rationale implied is that “anyone can make a mistake.” Therefore, relatively few cases involving a single complaint unconfirmed by other complaints, prior disciplinary sanctions, or a criminal conviction are sufficiently strong to overcome the presumption of professional innocence.

Id. at 998; see also, e.g., 2001 NEW JERSEY REPORT, supra note 155, at 11-20 (outlining the substantial problem constituted by habitual offenders and noting that they “cause the attorney disciplinary system to expend a disproportionate amount of disciplinary resources and time” and present a “danger to the public and the Bar”).

243. See, e.g., Schneyer, Professional Discipline, supra note 5, at 6 (“Proceedings against lawyers in large or even medium-sized firms are very rare.”); Schneyer, S&L Crisis, supra note 4, at 641 (same); Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 641 n.168 (noting result of survey of 125 disciplinary actions from three jurisdictions in which 81% of lawyers sanctioned were solo practitioners and none were members of firms larger than seven lawyers); Wilkins, Who Should Regulate, supra note 15, at 828 n.116 (“The number of elite lawyers from major corporate firms who have ever been disciplined is exceedingly small.”).
favor non-public penalties, and fail to publicize what "public" sanctions are imposed.\textsuperscript{244}

The low likelihood of disciplinary sanction, particularly for the type of externality problems that appear to be endemic to large-firm practice, is important because this variable is much more central to a prospective wrongdoer's calculation of the "expected punishment cost" than the amount of the penalty. "The consensus of criminologists is that the likelihood of apprehension is far more important than the severity of punishment."\textsuperscript{245} As Professor Daniel Nagin informed a symposium hosted by the U.S. Sentencing Commission in 2000, research into tax compliance indicated that "compliance is nearly perfect when detection risk is very certain, and compliance is nearly zero when the detection risk is negligible."\textsuperscript{246}

Finally, two additional factors deserve mention. First, in determining the "expected punishment cost," one must consider that, in this context, "catalyzing," not just "negative," deterrence is necessary. Thus, the rational firm would discount any prospective fine by both the low likelihood of sanction and the affirmative expense the firm would incur in changing policies and practices to institute and maintain an ethical infrastructure.

Second, the resultant "expected punishment cost" must then be compared to the expected gain from misbehavior, and given the market forces at play, such an expected gain may be significant. The expected gain from misconduct presumably is the market advantage large-firm lawyers may secure by virtue of their willingness to engage in overzealous conduct that benefits their clients at the expense of third parties. Given the particularly low rate detection and sanctioning of large-firm lawyers for externality problems, the costs of instituting and maintaining an effective ethical infrastructure to prevent such problems, and the potentially significant market up-side of overzealous behavior, it would seem that the "expected punishment cost" is going to be significantly lower than the potential gain from the misconduct unless a truly onerous penalty is authorized. Because the likelihood of apprehension is more important to potential wrongdoers than the size of the sanction, criminologists believe that "draconian penalties are unlikely to be an effective substitute for a more-difficult-to-achieve alternative of effective detection and prosecution."\textsuperscript{247} The firm's disciplinary sanction, then, is going to have to be a truly whopping one to make the "catalyzing deterrence" formula work.

\textsuperscript{244} See Levin, supra note 37, at 5-6, 9, 46-49, 71-77.


\textsuperscript{246} Id.

\textsuperscript{247} Id.
I, and others, believe that disciplinary authorities will not be given the power to disbar or suspend a firm from practice.\textsuperscript{248} Perhaps adding fines to disciplinary authorities' arsenal provides a means of making violations sufficiently costly so as to offset the low probability of enforcement. As noted above, the amount of the fine must be augmented to account for "catalyzing" costs and the market costs that flow from refusals to go beyond the bounds of zealousness on a client's behalf. The very draconian fines that would be required, however, raise a number of problems—not the least of which are their potential disproportionality (given the offense conduct) and random quality (given the low level of, and inconsistency in, reporting and sanctioning). The size of the fines that would likely be necessary also may cross the legal line into "punishment," requiring processes akin to those used in criminal cases for their imposition and the costs that would flow from those processes.\textsuperscript{249}

Use of a respondeat superior standard will create serious fairness issues in light of the fact these huge sanctions will be visited on "good" as well as "bad" firms and may have unfair flow-through effects. Professor Schneyer's response to the potential over breadth of the respondeat superior standard is, in part, to suggest that firms' good faith compliance efforts be recognized at the sanctions stage, when a "modest" penalty can be assessed.\textsuperscript{250} While this proposal may make the standard more fair, it will also make it far less effective from a deterrence point of view.\textsuperscript{251} The extreme fines necessary may also be more than firms can reasonably pay (changing firms' deterrent costs/benefit analysis at the outset) and may in fact "extort" "innocent" firms to settle. As Professor Coffee summarized the problem in the corporate crime context:

We face an apparent paradox: the low rates of apprehension and the potentially high rewards that characterize much of corporate criminal behavior make severe penalties necessary, but the overspill problem makes such penalties seemingly unfair, the deterrence trap [under which the ability to deter entity misconduct may be confounded by the inability to set an adequate punishment cost that does not exceed the entity's resources] makes their availability questionable, and the extortion problem makes their effect undesirable. . . . One conclusion seems inescapable: the cash fine system chiefly functions in the case of corporations as a kind of public morality tax, but not as a deterrent threat.\textsuperscript{252}

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\textsuperscript{248} See supra note 163.

\textsuperscript{249} See STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 2.8 cmt. ("Fines are not an appropriate sanction"); id. at Standard 6.14 cmt. ("Fines are punitive and criminal in nature and should be avoided. The use of fines in discipline or disability matters might be deemed to imply that the proceedings are criminal and require proof beyond a reasonable doubt, trial by jury, and other standards of criminal due process."); supra note 46 (discussing the Supreme Court's test for what constitutes criminal "punishment" for constitutional purposes).

\textsuperscript{250} Schneyer, Four Systems, supra note 5, at 276-77; see also Schneyer, Professional Discipline, supra note 5, at 30.

\textsuperscript{251} See, e.g., Miller, supra note 88, at 311-12 n.225.

\textsuperscript{252} Coffee, "No Soul to Damn," supra note 86, at 407.
Mine is a simplistic deterrence analysis, and those with greater economic expertise would no doubt argue that other factors should be considered in resolving this issue. The variable not thus far considered that I believe could potentially make the most difference in this analysis is the prospect that firm liability itself may change the likelihood both that wrongdoing will be reported and that such reports will eventuate in meaningful sanctions.

c. The Likelihood that Firm Liability Will Change the Deterrence Equation

The above discussion demonstrated that those sought to be regulated through respondeat superior liability—large law firms—predominantly serve sophisticated clients—corporations—who are generally able to avoid most agency problems. Where agency problems persist—for example, where the structure of the large firm practice and market forces combine to encourage conflicts problems—corporate clients simply do not report them. Rather, they secure the remedy that matters most to them—disqualification of the firm and/or economic redress—through informal means or through liability and institutional controls. Externality problems rarely come to the attention of disciplinary authorities, much less eventuate in sanctions. The size of the sanction necessary to outweigh the extremely low likelihood of detection and sanctioning (as well as the expense of a compliance structure and the costs of refraining from client-serving overzealousness) will be so large as to be barred by considerations of fairness, proportionality, and practicality. Given this context, which appears to have been remarkably stable over time, will the imposition of firm liability either change the context that yields this conclusion, or the conclusion itself? I doubt it.

The potential for firm liability obviously will not alter the dual role of lawyers. Nor is it likely to remedy the fundamental informational or power asymmetries between individual and corporate clients. The problems faced by individual clients are not, strictly speaking, relevant to this analysis because firm liability is supposed to be necessary to fill an enforcement gap relating to large firms that typically do not serve individuals. That said, if firm liability had the collateral advantage of addressing the problems that individuals face, that would certainly be a benefit worth considering. It is difficult to see, however, why firm liability would lead to more informed, sophisticated, or powerful individual clients (unless enforcement agencies use the firms as cash cows with which to fund programs aimed at individual clients). Those measures most likely to affect the

253. Among the other variables that may be relevant are: behavioral perspectives which suggest that there is a divide between the interests of the typical middle management offender and the firm such that it may be “extraordinarily difficult to prevent corporate misconduct by punishing only the firm,” see id. at 393; the possibility that sanctioning authorities will consider “externality costs” such as spill-over effects of organizational sanctions on innocent parties and thus impose lenient sentences, id. at 405-07; and the possibility that lawyers are more deterrable as a group than the average criminal, see Levin, supra note 37, at 69 n.308; Bene, supra note 37, at 924-25; see also Arlen & Kraakman, supra note 65, passim.
disparity between “have” and “have not” clients are ones that will increase individuals’ ability to monitor and control lawyer conduct by enhancing the ability of sophisticated intermediaries (such as public interest organizations, community groups, pro bono bar activists, and some prepaid legal service plans) to help individuals obtain qualified, low cost, effective legal representation. As Professor Wilkins argues, the answer to remedying this disparity is not to give corporations more power to control their lawyers in addition to the significant power they already wield by reason of their superior resources and experience. Yet if law firm disciplinary liability does anything, it adds an arrow to the quiver of corporate, not individual, clients.

Will corporate clients be galvanized to use this arrow? What of externality problems—would firm liability alter corporate client disincentives to report such problems? It seems unlikely that changing this liability rule would fundamentally alter clients’ self-interest, that is, change clients’ incentives to report lawyers’ misconduct that benefits them at the expense of their opponents or the legal system. Unless firm liability changes the incentives of third parties—such as lawyers, judges, and regulators—to complain to disciplinary authorities about externality problems, firm liability will not alter the fact that disciplinary complaints center primarily on agency but not externality problems.

The dynamics that render lawyers and judges reluctant to make complaints about externality problems are unlikely to be affected by firm liability. Lawyers apparently do not often report other lawyers’ misconduct for a variety of reasons, including the fact that such “snitching” is said to cut against the societal grain, such complaints generally carry no reward, and reporting other lawyers may in fact subject the complaining lawyer to retaliation. Lawyers are more likely to use informal means to address any problems encountered, such as reporting

255. Id. at 881.
256. The threat of firm liability may also give more leverage to individual clients who have agency problems with the small firms that generally service individuals. I am not convinced that arming individual clients with the threat of firm liability would actually enhance their power vis-a-vis their firm. As is explained infra, I believe that the threat of individual sanctions is a greater deterrent and that that threat is more credible in the small firm context. See infra notes 349-51 and accompanying text.
257. See McKay Report, supra note 40, at 44.
258. See Boohatch v. Butler & Binion, 977 S.W.2d 543, 546 (Tex. 1998) (holding that a partner in a law firm could be expelled from partnership for accusing, in good faith, another partner of overbilling without subjecting partnership to tort damages for breach of fiduciary duty); Wilkins, Who Should Regulate, supra note 15, at 822-23 & n.88. As Professor Wolfram has explained:

[T]he general absence of professional peer complaints should not automatically be attributed solely to sullen indifference, craven cowardliness, or clubbish protectionism among lawyers. Filing a disciplinary complaint can incur substantial personal risk for a lawyer if the subject of the complaint is a lawyer in a position of power in the profession or in the legal system.

CHARLES WOLFRAM, MODERN LEGAL ETHICS § 12.10.1 (1986); see also Douglas Richmond, Associates as Snitches and Rats, 43 WAYNE L. REV. 1819 (1997) (suggesting that associates in law firms are particularly reluctant to report for fear of retaliation or ostracism).
litigation-related misconduct to a judge, ceasing to make referrals or to cooperate with the lawyer or his firm, or letting others in the relevant legal community know about the lawyer's misconduct. Judges' disinclination to report misconduct is attributed to their reluctance to interfere in the attorney-client relationship and their preference for the tools they have to control their courtroom, including Rule 11 or contempt sanctions and the possibility of publicly castigating the lawyer on the record or in published opinions. It would seem that regulators, too, would prefer to use their own systems of enforcement rather than relying on a disciplinary system that the agency does not control. An agency would logically prefer to devote its resources to interpreting and applying the ethical rules as it deems best and employing the remedies it finds effective rather than pursuing collateral disciplinary sanctions that are not part of the regulatory responsibility or mandate. The availability of disciplinary sanctions against law firms would not seem to alter any of these third parties' incentives.

Could firm liability increase corporate clients' incentives to report whatever agency problems they have with their law firms and thereby galvanize law firms to institute responsive "ethical infrastructures"? In particular, to the extent that large firm practice and market forces mean that more firms will ignore conflicts problems, will firm liability move corporate clients to pursue disciplinary, as opposed to institutional or liability, controls? The fact that firms may be subjected to disciplinary liability is unlikely to change their clients' incentives to pursue disciplinary sanctions for the simple reason that no pot of damages gold lies at the end of the disciplinary rainbow. "Even if the state supreme courts regarded fines as an appropriate disciplinary sanction, as most now do not, disciplinary fines would presumably be modest and not go to the aggrieved party." Disciplinary proceedings are often drawn out, highly litigated affairs, and the large law firms who are the subject of concern here will certainly have an incentive to fight vigorously the assessment of professional penalties. It is

259. See, e.g., 8 HAZARD & HODES, supra note 3, § 64.5, at 64-10. Professor Hazard notes that;

In practice, of course, lawyers actually do report litigation misconduct more frequently to the court than to the disciplinary authorities. This may be due in part to the fact that such misconduct is not often thought to rise to the level of the seriousness required to trigger the operation of Rule 8.3. But it may also be because lawyers generally believe that informing the tribunal is the more effective course of conduct.

This approach seems sound. In litigation-related matters, the court is not only the best forum for resolving what actually happened and fashioning a sanction to fit the situation, but also has its own incentives to do so.

Id.

260. See Wilkins, Who Should Regulate, supra note 15, at 823 & n.89.

261. See id. at 823 & nn. 90 & 91; see also STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 1.1 cmt. ("Frequently, judges take the position that there is no [need to report lawyers' misconduct] and that errant behavior of lawyers can be remedied solely by use of contempt proceedings and other alternative means.").

262. Schneyer, S&L Crisis, supra note 4, at 645.

263. Id. at 645 (footnote omitted).
doubtful whether corporate clients will undertake even whatever costs are entailed in being a complainant for the simple pleasure of punishing an errant lawyer or for the altruistic satisfaction of promoting the construction of an ethical infrastructure to prevent harm to future clients. Unless the corporate client was truly a victim of substantial firm misconduct, in which case it would likely sue, it will be disinclined to burn its bridges with the firm for this dubious satisfaction.

Indeed, if punishing their lawyers is the goal, sophisticated clients often may have the option of referring the matter for the ultimate stigmatizing sanction: criminal prosecution. A number of federal criminal prohibitions, most notably the mail and wire fraud statutes, can be enlisted to cover quite an expanse of lawyer misconduct. For example, in United States v. Bronston, the Second Circuit upheld the criminal conviction of a large-firm lawyer founded on the lawyer’s “fraudulent” nondisclosure of a conflict of interest even though there was no proof that “the defendant took advantage of or used his fiduciary relationship with firm clients to do them harm,” for example by wrongfully using or disclosing one firm client’s confidential information for the benefit of the other. Also, in United States v. O’Hagan, the Supreme Court upheld a large-firm lawyer’s criminal convictions under the federal securities, mail fraud, and money laundering statutes upon proof that the lawyer “defrauded his law firm and its client, [Grand Metropolitan PLC], by using for his own [securities] trading purposes material, nonpublic information regarding Grand Met’s planned tender offer” for the Pillsbury Company.

In short, firm liability is unlikely to make changes in the dynamics of disciplinary enforcement to increase the extent to which complaints against large firms are made, particularly complaints concerning the most likely source of ethical abuses in such firms—externality problems. Agency problems are less frequent in large firms because of the imbedded controls exercised by corporate clients, and those clients who do suffer such problems are unlikely to abandon the control systems they now employ, and apparently find more responsive to their needs, at the prospect of firm disciplinary liability.

This discussion suggests that the threat of disciplinary liability is unlikely to

264. See, e.g., id. at 645-46 (explaining that government agencies’ compensation goals explained in part their “enthusiasm for lawsuits and enforcement actions” instead of disciplinary proceedings against lawyers).
266. 658 F.2d 920 (2d Cir. 1981). This case was decided before the Supreme Court held, in McNally v. United States, 483 U.S. 350 (1987), that the mail and wire fraud statutes did not encompass schemes to defraud others of non-property rights, such as a victim’s asserted right to the “honest services” of another (e.g., their lawyer). However, Congress overruled McNally in passing 18 U.S.C. § 1346, which permits mail, wire, and bank fraud prosecutions based on a defendant’s fraudulent deprivation of another’s right to “honest services.” Most circuits that have considered the question have held that § 1346 “restored the ‘vitality’ of . . . pre-McNally cases.” United States v. Blumeyer, 114 F.3d 758, 765 (8th Cir. 1997); see O’SULLIVAN, supra note 7, at 358-60.
267. 658 F.2d at 931; see also O’SULLIVAN, supra note 7, at 343-44.
269. Id. at 648.
change the status quo unless there is a fundamental change in third-party reporting incentives or the reactive nature of disciplinary proceedings. Adoption of firm liability may well increase the visibility of disciplinary enforcement, thus altering complaint rates. Third parties as well as corporate clients could be urged more vigorously to report misconduct to disciplinary authorities. Disciplinary authorities could devote additional attention and resources to monitoring sources, such as newspaper reports and court orders, for externality problems that may be subject to disciplinary sanction. They could also begin to proactively monitor and audit firm bureaucratic controls, meaning that enforcement would not be dependent on the willingness of corporate clients to report. A combination of increased third-party reporting, monitoring of outside sources, and proactive enforcement would mean that problems could be identified before misconduct occurs and that misconduct stemming from deficient ethical infrastructures can be caught that might otherwise fall through the cracks.\(^\text{270}\)

How likely are these changes? Those more expert than I express serious doubts.\(^\text{271}\) Efforts to encourage third-party reporting have been tried, and apparently have largely failed.\(^\text{272}\) Budgetary constraints on disciplinary enforcement are a serious and continuing problem; such financial limitations will probably continue to limit the extent to which proactive enforcement is an option.\(^\text{273}\) Finally, the regulatory incentives surrounding the disciplinary control system will largely determine whether fundamental changes are possible. As Professor Wilkins argues:

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\text{[S]o long as the bar continues to exert substantial influence over the disciplinary system, it is unlikely that this form of control will ever value externality problems as highly as agency problems. The image of the lawyer as the client's champion stands at the heart of the bar's view of the world. This image has had a lasting effect on the development of the current disciplinary system. ... Although it might be possible to break the grip of this path of the}
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\(^{270}\) See, e.g., Schneyer, Four Systems, supra note 5, at 277 ("[I]f it seems important to empower disciplinary agencies to proceed proactively against law firms with obviously deficient internal controls—i.e., before the deficiencies result in individual misconduct—then vicarious liability will not suffice. Ethics codes will have to be amended, as they recently were in New York, to impose supervisory duties on law firms themselves to maintain reasonable internal controls.").

\(^{271}\) See Wilkins, Afterword, supra note 15, at 478-79 (noting that "there is no inherent reason why disciplinary agencies could not become more proactive or that greater efforts could not be made to encourage knowledgeable parties to report misconduct to those bodies. Nevertheless, attempts to achieve both of these goals have been largely unsuccessful.").

\(^{272}\) Id. at 478; see also McKay Report, supra note 40, at 95 (noting that in 1970, the Clark Report recommended greater emphasis on the duty to report in law school and the imposition of sanctions for failure on the part of lawyers and judges to report misconduct but concluding that "[r]eporting by lawyers and judges of misconduct is still rare"; further noting some success in programs aimed at judges, but concluding that "clearly, more needs to be done on the local, state, and national levels to encourage judges and lawyers to report professional misconduct to disciplinary agencies.").

\(^{273}\) See Wilkins, Afterword, supra note 15, at 478.
past, doing so will inevitably involve efficiency costs [because liability and institutional controls have a comparative advantage over disciplinary controls in dealing with externality problems].

IV. ASSUMING CATALYZING DETERRENCE WOULD WORK, WHAT STANDARD OF LIABILITY WILL FAIRLY AND EFFECTIVELY MAXIMIZE INSTITUTIONAL INCENTIVES?

The above discussion suggests that, under traditional deterrence principles and given the existing disciplinary enforcement dynamic, adding the prospect of firm liability to supplement individual liability is unlikely to catalyze firms to build an effective infrastructure because the probability of sanctions is low and a fine sufficient to offset that probability is unlikely to be authorized or imposed. The types of misconduct most likely to flow from large firm practice–externality problems–are not generally reported to, much less sanctioned by, disciplinary authorities. Even where corporate clients identify agency problems with their firms, such as conflicts of interest, they use other formal and informal means of securing redress and rarely resort to disciplinary controls. Firm liability will not change these realities. It therefore will not increase the likelihood that large firm lawyers will be subjected to disciplinary complaints or sanctions, and ultimately will not affect the dismal prospects for catalyzing deterrence.

It is important to recognize that this picture, while bleak, is not the entire picture. The dynamic described obviously speaks to the general run of cases, and we must recognize that there will be exceptions to these generalizations. Some large-firm lawyers are the subject of disciplinary action, and externality problems are sometimes addressed in disciplinary proceedings. Further, although unlikely, the circumstances extant in disciplinary enforcement may change.

Additionally, it has been suggested to me that given the resource constraints that disciplinary enforcement officials presently face, making the case that catalyzing deterrence will not work in this context is a bit like shooting fish in a barrel–with a cannon. Accordingly, I would like in the following section to imagine an enforcement system that is not driven in large part by resource constraints. If disciplinary authorities had, for example, the resources available to the SEC enforcement division, one could perhaps assume that catalyzing deterrence would be possible. The principal question then would be what standard of liability would most fairly and effectively promote deterrence goals. The virtue of this approach is that it seems a more constructive (or at least optimistic) one and it allows us potentially to extend the relevance of our

274. Id. at 478-79; see also STANDARDS FOR IMPOSING LAWYER SANCTIONS at 5 (modeling four questions for a court imposing discipline to ask, the first of which is "[w]hich ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)," and noting that "[i]n determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients") (emphasis in original).
discussion of disciplinary standards to other contexts (such as institutional enforcement).

The heart of the existing debate over the appropriate standards of liability is whether catalyzing deterrence would be better served by (1) Professor Schneyer's respondeat superior standard, which does not recognize a "due diligence" defense but may permit credit for reasonable efforts to create an ethical infrastructure at the sanctioning stage, or (2) a standard akin to Rule 5.1(a), which authorizes sanctions only for an "unreasonable" failure to build an adequate ethical infrastructure.

In examining this question, we must incorporate into this analysis our earlier conclusion that a rule of parsimony is appropriate. To minimize unfair "flow-through" effects and thus to preserve the perceived fairness of the rule, firm liability should only be imposed where it is clear that the firm is actually the culprit, that is, that the firm's culture, policies, or practices caused, encouraged, or condoned the misconduct at issue.\textsuperscript{275} We determined using the rule of parsimony that if the fairness of firm liability turns on the precision with which the firm is identified as the culpable party, a respondeat superior standard of liability with no due diligence defense will not serve us well.\textsuperscript{276}

This "fairness" argument had a utilitarian component as well. Because the respondeat superior liability allows "innocents" to be sanctioned, that standard will give rise to a perception that the rule is unjust and thus will ultimately undermine respect for, and compliance with, the rule.\textsuperscript{277} Further, if the "stigma" associated with bar sanctions is overused, in the sense of being unfairly visited upon "innocent" firm members, the deterrent power of that stigma will be eroded.\textsuperscript{278}

In light of these conclusions, it is fair to begin with a presumption that respondeat superior is not the standard that will fairly and effectively further catalyzing deterrence goals. The relationship between disciplinary sanctions and the likelihood that those sanctions will further deterrent ends is an empirical one: "it is a question of fact whether punishment does lead to such results."\textsuperscript{279} Unless a compelling empirical case can be made that deterrence requires a respondeat superior standard, then, the above concerns should control. Reference to recent experience with the Federal Sentencing Guidelines for Organizations, as well as the corporate crime literature, provides no such definitive proof; indeed, these sources may actually argue for a "reasonableness" standard. Further, administrative and enforcement considerations, on balance, counsel against a respondeat superior standard and in favor of a "reasonableness" standard augmented by bar-defined benchmarks for an ethical infrastructure.

\textsuperscript{275} See supra text accompanying notes 127-44.
\textsuperscript{276} See supra text accompanying notes 144-56.
\textsuperscript{277} See supra text accompanying note 128.
\textsuperscript{278} See supra text accompanying notes 129-30.
\textsuperscript{279} See Developments, supra note 109, at 1231.
A. CREATING COMPLIANCE-FRIENDLY INCENTIVES

Those who favor a strict respondeat superior standard presumably would point to the apparent success that the U.S. Sentencing Guidelines for Organizations have had, directly or indirectly, in encouraging organizations to adopt compliance programs. As some commentators have noted, “[w]ithout question, the Guidelines’ greatest practical effect thus far is to raise the business community’s awareness of the need for effective compliance programs.” Such programs are not (generally) legally mandated, they continue to be legally irrelevant to the application of respondeat superior liability, and they are only relevant under the Guidelines to provide a reduction in criminal fines. Despite the limited nature of the “credit” given for a compliance program, some have gone so far as to contend that “[f]or a general counsel to ignore [implementation of a compliance program under] these Guidelines is professional malpractice.”

The Guidelines’ compliance program credit does not alter the vicarious liability standard to provide a due diligence defense and only gives corporations sentencing credit, yet it is said to have provoked a compliance boom. This might suggest that corporations have done the math and found that effective compliance programs are cost-effective despite the fact that the implementation of a compliance program will not necessarily foreclose liability and carries with it its own, potentially significant, costs.

Of the 1,089 cases sentenced under the Organizational Guidelines between 1991 and 1999, however, only three organizational defendants qualified for the effective compliance program sentencing credit. Some might argue either that these expensive programs are not proving cost-effective or that the objective
here—galvanizing corporations to put in place effective programs designed to prevent criminal conduct—is not being served by this institutional incentive.285 The Sentencing Commission believes that these inferences are incorrect286 and quite appropriately points out that the Organizational Guidelines have had an influence far beyond criminal sentencing.287

For example, the Department of Justice, apparently at least in part in reaction to the Organizational Guidelines, has articulated a policy under which an effective compliance program may help to persuade the Department to decline a criminal prosecution of an organization.288 The Organizational Guidelines have also had a significant effect on corporate law. In In re Caremark International Inc. Derivative Action,289 the Delaware Chancery Court credited the Organizational Guidelines for creating “powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to make prompt, voluntary remedial efforts.”290 The Caremark court then recognized a corporate director’s duty to see that adequate information and reporting systems are put in place within the corporation.291 Finally, the Sentencing Commission notes that the Organizational Guidelines have influenced the policies of various federal regulatory agencies that now consider whether an organization has an effective compliance program in deciding, for example, whether to pursue enforcement actions or impose significant penalties such as debarment from government contracting.292

In part because of these further developments, the Commission believes that

285. See id. at 149.
286. See id. As John Steer, a Member and Vice-Chair of the U.S. Sentencing Commission explained:

The overwhelming majority of organizations ultimately criminally convicted and sentenced in federal courts are small, closely-held companies. These small businesses are less likely to have become aware of the sentencing guidelines, or to have acted on any awareness they may have gained, by allocating resources to develop a sufficient compliance program. Moreover, because such organizational offenders often, by their nature, involve high level management participation in the offense, they are precluded under the terms of the guidelines from receiving sentencing credit for any compliance program that may have been developed.

Id.


288. See DOJ Charging Guidelines, supra note 75, at IV.
289. 698 A.2d 959 (Del. Ch. 1996).
290. Id. at 969.
291. See id. at 970.

the Guidelines have had an important impact on companies whose programs' "effectiveness" will never be tested at sentencing. For example, the Commission notes that studies credit the Organizational Guidelines with "helping to create an entirely new job description: the Ethics and Compliance Officer." Surveys further demonstrate that the Guidelines are having "a lot of influence" on many organizations' "commitment to ethics as manifested through the adoption of a compliance program." According to the Sentencing Commission, then, the Organizational Guidelines have been successful in that they "not only provide incentives for substantial changes in organizational behavior, but also further some of the main goals of the Sentencing Reform Act: the prevention and deterrence of criminal conduct."

One could argue that the Organizational Guidelines have not directly affected compliance incentives and that there are a variety of factors that have contributed to the booming market in corporate compliance programs. One factor in the decision to institute such programs is a desire to "communicate[e] an intent to stay well within the law. To the extent that a corporate code actually sets the tone from the top, adoption of a code is an important way to evidence that intent." It is hoped that a clear statement of law-abiding intent may change the conduct of agents who either purposefully or unintentionally would otherwise have fallen afoul of relevant legal or ethical norms; a compliance program may, then, actually prevent harms that could subject an entity to serious civil or criminal liability. The possible adverse consequences of wrongdoing that may galvanize a corporation to put in place prophylaxes include the threat of civil liability (through shareholder derivative, qui tam, or other litigation), fear of suspension or debarment from government contracting, and the prospect of disqualification from doing business in a regulated industry. All of these may, at least in dollar terms, provide more of a compliance incentive than the statistically remote threat of criminal charges or sanctions. It is certainly arguable that the Organizational Guidelines, rather than directly creating an incentive to put in place compliance programs, have affected the compliance market most through their effect on the Department of Justice’s charging policy, corporate law, and other agencies’

293. Murphy, supra note 287, at 710.
294. Id.; see also Steer, supra note 284, at 149 (noting that lack of empirical data means that it is not presently possible "to assess directly the success, or lack thereof, of the organizational guidelines in altering the rates at which organizations commit crimes," but noting studies that show companies are enhancing or instituting compliance programs in response to Organizational Guidelines’ incentives).
295. Murphy, supra note 287, at 699 (emphasis added).
296. Indeed, some date the initial catalyst for corporate compliance programs to prosecutions and scandals dating back to 1960. See Pitt & Groskaufmanis, supra note 69, at 1578-98. As of 1990, the year before the Organizational Guidelines became effective, Harvey Pitt and Karl Groskaufmanis wrote that "corporate codes [of conduct] have become standard corporate fare" and that "surveys found that over ninety percent of the respondents had adopted a written code of conduct." Id. at 1602.
297. Id. at 1634.
298. See id. at 1635.
enforcement policies. Unfortunately, it is not yet possible empirically to validate the Sentencing Commission's suggestion that it has had an indirect and a direct effect on the primary conduct of organizations. A 1999 study concluded that the data "are too few and ambiguous to draw even tentative conclusions" regarding changes effected by the Organizational Guidelines on the incidence of compliance programs in the post-guidelines world.299

In sum, it is difficult to gauge the persuasive power of the Organizational Guidelines analogy without further information because the proximity of the nexus between the sentencing incentives offered by the Guidelines and the impulse to implement compliance programs is as yet unknown. It is my own belief, concededly unsupported by evidence, that the Department of Justice's charging guidelines provide a much greater incentive than do the Organizational Guidelines simply because companies, in my experience, would much rather secure a declination of prosecution rather than sentencing credit. If I am correct, compliance incentives may be greater if credit was given for reasonable compliance efforts at the liability, rather than sanctioning, stage.

The literature concerning how the law should structure the liability of corporations for the crimes of their agents provides no more definitive guidance than does the Organizational Guidelines experience.300 That literature is still developing, and there appears to be little consensus among scholars on the actual incentives and costs created by the existing respondeat superior rule, which does not admit of a "due diligence" defense and in fact provides that liability may


300. See, e.g., Arlen & Kraakman, supra note 65, at 687 (arguing for a "composite regime" of corporate liability which would impose "high penalties subject to mitigation for firms that engage in compliance activities" but concluding that the existing composite liability regime embodied in the Organizational Guidelines is flawed); Arlen, supra note 97, at 833 (arguing that strict corporate liability may deter corporate monitoring by making criminal exposure more likely, so that its imposition may increase the likelihood of crime); H. Lowell Brown, Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents, 41 LOY. L. REV. 279, 313-15, 321-22 (1995) (arguing that "due diligence" defense should relate to liability); Coffee, "No Soul toDamn," supra note 86, at 401-02, 446 (arguing that consideration of "due diligence" defense only at sentencing serves the interests of general deterrence and victim compensation and gives the court a wider, more accurate, range of vision); Kevin B. Huff, The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach, 96 COLUM. L. REV. 1252 (1996) (proposing modification of current vicarious liability standards to accommodate compliance programs as relevant evidence); William S. Laufer, Corporate Liability, Risk Shifting, and the Paradox of Compliance, 52 VAND. L. REV. 1343 (1999) (arguing that because of the recent emergence of the good citizen corporate movement, in which compliance programs can be considered to mitigate corporate criminal blameworthiness so that prosecutors seek convictions of subordinate agents and deal with the corporations through non-criminal enforcement systems, corporations purchase only the amount of compliance necessary to transfer risk from the corporation to the individual agent and concluding that "[g]iven equivocal evidence of compliance effectiveness, the rise of the good corporate citizenship movement risks undermining the objectives and spirit of the corporate criminal law"); Developments, supra note 109, at 1241-58 (arguing for a "due diligence" affirmative defense to organizational liability under a respondeat superior standard).
attach despite corporate policies forbidding the conduct giving rise to liability.\textsuperscript{301}

Those who argue that there should be a "due diligence" defense to corporate criminal liability often contend that, although the Organizational Guidelines may deem a company less culpable because it has put in place an effective program to prevent and detect violations of law, that endorsement of the company culture is too little, too late. At sentencing, irreparable and perhaps (in view of the existence of an effective compliance program) unfair, damage to the corporation has already been done by the liability assessment in the form of onerous criminal restitution and fine obligations and significant collateral consequences such as: suspension and debarment from government contracting, disqualification from doing business in regulated industries, the potential for large civil liability awards founded on collateral estoppel principles in shareholder derivative, \textit{qui tam}, and other third-party litigation, public stigma, and lower employee morale and consequent defections in talent.\textsuperscript{302}

Unfortunate incentives are said to be created when such severe consequences are visited on the corporation despite its best efforts to comply with the law. As one in-house counsel for a large corporation explained:

\begin{quote}
    The fundamental flaw in limiting the benefit of a company's compliance efforts to mitigation of punishment is that the message sent to corporate management is that no matter what the corporation does to prevent criminality in the work force and regardless of the resources that are directed to compliance efforts, the corporation cannot avoid vicarious liability. In such circumstances, even the most conscientious and well intentioned executives must carefully consider whether increasingly scarce resources should be channeled into a compliance program.\textsuperscript{303}
\end{quote}

Ethical infrastructures—effective or not—cost money to institute and maintain.\textsuperscript{304} Decisions concerning the value of compliance program will be influenced by such costs.\textsuperscript{305} Imposing what is essentially a strict liability regime may

\textsuperscript{301} See O'SULLIVAN, supra note 7, at 117 (discussing federal respondeat superior standard).
\textsuperscript{302} See Brown, supra note 300, at 321-22.
\textsuperscript{303} Id. at 324 (footnotes omitted); see also Miller, supra note 88, at 311-12 n.225 ("A rule of 'strict disciplinary liability' for supervision of work-related activities (i.e., no due diligence or 'reasonableness' defense but only mild sanctions for violations) might insufficiently motivate firms to implement supervisory policy when they know that, despite all reasonable efforts, a sanction is forthcoming if an attorney commits a work-related ethical infraction."); PENALTIES FOR WHITE COLLAR CRIME: ARE WE REALLY GETTING TOUGH ON CRIME?: HEARING BEFORE THE SENATE COMM. ON THE JUDICIARY, 107TH CONG. (JULY 10, 2002), available at http://www.judiciary.senate.gov/print_testimony.cfm?id=310&wit_id=431 (visited July 19, 2002) (testimony of George J. Terwilliger III) ("I really do not believe that either new crimes or increased penalties will solve our problems. In fact, in the real world, excessive exposure to draconian sanctions in economic crime cases has the potential to discourage meaningful corporate critical self-examination, as well as disclosure, cooperation and guilty pleas by individuals and companies.").
\textsuperscript{304} Cf. Langevoort, supra note 121, at 93-94 (discussing direct costs of corporate compliance programs).
\textsuperscript{305} See, e.g., Pitt & Groskaufmanis, supra note 69, at 1634 ("Adopting corporate codes (and the compliance programs that ineluctably accompany them) is costly.")
threaten overdeterrence in that a firm may put in place a web of regulations so numerous that many could only be observed in the breach if law firm personnel wish to continue practicing law.\textsuperscript{306} If policies are followed to the letter, the costs may be prohibitive and may create further flow-through victims: clients.

Recent scholarship also suggests that effective "monitoring is a far more difficult and costly practice" than is commonly recognized.\textsuperscript{307} Professor Donald Langevoort has identified two common errors made in evaluating compliance programs. "First, evaluators are likely to overestimate the extent to which a firm can rely on line supervisor monitoring to detect possible illegality. While such supervision will catch some misconduct, a host of forces thwart its effectiveness overall. Here, the bias is toward tolerating sub-optimal monitoring."\textsuperscript{308} Among the factors that create this common error are: the fact that "non-complying agents are only sometimes deliberately opportunistic" and often are able to rationalize their actions as appropriate business behavior; imperfect information available to supervisors; difficulties of determining at the hiring stage which agents would achieve a firm's compliance goals; the conflict some supervisors may experience when their compensation is based on the economic, not the compliance, performance of subordinates; the cognitive tendencies of supervisors that bias them against prompt recognition of compliance risks; and the fact that supervisors (like most people) substantially overrate their abilities to "spot cheaters."\textsuperscript{309}

"Perhaps because direct supervision can break down in predictable circumstances, firms with serious compliance programs introduce third-party monitoring as well."\textsuperscript{310} There are however, direct and indirect costs involved in employing a professional compliance staff, which leads us to the second error that Professor Langevoort identifies. "[T]here is also a likelihood of underestimating the costs associated with the most obvious cure for line supervisor bias: third-party compliance audits. This likely error biases the legal response towards

\textsuperscript{306} See, e.g., Vaughan, supra note 118, at 1398 ("A proliferation of guidelines related to a particular industry, task, or exchange may defy mastery, or result in some regulations being selectively ignored. Large numbers of laws and rules, moreover, create monitoring difficulties, which reduce the risk of detection and sanctioning.").

\textsuperscript{307} Langevoort, supra note 121, at 81.

\textsuperscript{308} Id. at 74. The law firms with which I am familiar do not have in place hierarchal structures where attorneys' work product is subject to review and supervision by attorney "managers" whose sole responsibility it is to observe and monitor the performance of the supervised attorneys. "Supervision" is usually accomplished on an ad hoc basis by the attorneys with ultimate responsibility for a certain client or matter, and the degree of supervision accorded depends on the type of matter involved, the experience and ability of the attorney generating the work product, and the style of the responsible attorney. In this sense, then, law practice differs from many corporate settings, where there often will be a more much explicit hierarchy, professional managers or supervisors, and at least some understanding of supervisory standards. If my experience accurately reflects the true state of supervision in large-firm law practice, it may be that the effectiveness of direct supervision will be lower in law firms than in corporations.

\textsuperscript{309} Id. at 83-90.

\textsuperscript{310} Id. at 82.
insisting on too much auditing, forcing unnecessary costly compliance initiatives." Among the indirect costs associated with such third-party auditing that are not commonly recognized are: the message of distrust sent by aggressive third-party compliance audits "has the potential to displace actions that are motivated by loyalty or reciprocity, leading to a loss of productivity"; the risk that "by using penalties as the primary enforcement mechanism, agents will actually be less likely to comply with the law than in the absence of such penalties"; and the fear that once a compliance office is created, it will "overstate the law's demands" because it will tend to "construe ambiguous information in a self-serving way that maximizes its influence and, hence, claim to additional resources." The errors identified by Professor Langevoort suggest that, in many instances, compliance programs may be less effective and more costly than is generally supposed, or at least that the structuring (and evaluation) of an effective compliance program is a much more complex undertaking than many realize.

Finally, although compliance programs appear to be all the rage these days, they do not come without potentially serious collateral costs that may further weight the cost/benefit calculus toward a "we'll take our chances," rather than a compliance-friendly strategy. For example, to have a truly "effective" program that will appeal to prosecutors or sentencing authorities, businesses may have to change lucrative business practices or policies, fire or discipline valued employees, or terminate longstanding business relationships. A strict compliance standard may be used by civil litigants or prosecutors as the yardstick against which future employee conduct should be measured (to the entity's detriment). Perhaps most important, a compliance program may "collect and ultimately provide access to negative information that prosecutors, plaintiffs'
lawyers, competitors, and the media may use against [the business].”

Professor Jennifer Arlen has argued that introducing consideration of these kinds of “enforcement costs,” which she defines as corporate expenditures on detecting and investigating crimes committed by corporate employees, into the deterrence equation may require a conclusion that “increased corporate liability does not necessarily reduce corporate crime and, indeed, may result in increased crime.” She contends that:

[The existing legal regime] of strict vicarious liability presents corporations contemplating enforcement expenditures with conflicting, potentially perverse, incentives. On the one hand, increased enforcement expenditures reduce the number of agents who commit crimes by increasing the probability of detection and thus each agent’s expected cost of crime. On the other hand, these expenditures also increase the probability that the government will detect those crimes that are committed, thereby increasing the corporation’s expected criminal liability for those crimes. If the expected cost to the corporation of the resulting increase in its expected criminal liability exceeds the expected benefit to the corporation of the reduction in the number of crimes, a corporation subject to strict vicarious liability will not respond by increasing its enforcement expenditures because additional enforcement would only increase the firm’s expected criminal liability. In fact, in some circumstances a corporation subject to vicarious liability may spend less on enforcement than it would absent vicarious liability.

This perverse incentive may be more pronounced when law firm compliance programs are at issue because there will be (at least in theory) a greater likelihood that whatever misconduct is identified through increased enforcement expenditures will lead to sanctions. Lawyers in firms operate under an obligation to report any serious ethical misconduct they discover, whereas corporate actors, in absence of a specific statutory or regulatory reporting requirement, operate under no general legal obligation to report misconduct or crimes they discover through operation of their compliance program.

Prevailing standards of corporate liability make it difficult for counsel to identify whether any legal benefit will result from a code’s adoption. Added to this difficulty is the possibility that, in some cases, a corporate code might prove counterproductive. The code could find its way into evidence on behalf of the adopting company’s adversary in a legal proceeding, or it may establish expectations beyond those the adopting company is capable of effecting. Given these pragmatic difficulties, the response to a suggestion that a company adopt a corporate code may well be, “Why bother?”

Id. at 1634.

319. Arlen, supra note 97, at 835-36 (emphasis added); see also Vaughan, supra note 118, at 1396-1401.
320. Arlen, supra note 97, at 836 (footnotes omitted).
321. See supra notes 82 & 227.
322. The criminal provision used to address failures to report criminal activity on the federal level—misprision of a felony, see 18 U.S.C. § 4 (1994)—requires proof of more than a simple failure to volunteer
It is, at bottom, difficult to predict with any certainty whether a respondeat superior standard without a due diligence defense will create the appropriate incentives, will be ineffectual, or will in fact create perverse incentives. Again, this question is essentially an empirical one and in light of the inconclusiveness of our answer (and the possibility that a respondeat superior standard may actually be counterproductive), it seems to me that the burden of proof (created by the fairness and consequentialist arguments against respondeat superior liability, discussed above) has not been met.

B. ADMINISTRABILITY OF LIABILITY STANDARD

Those arguing for a respondeat superior standard without a due diligence defense frequently rely on the objection that "by recognizing the defense, one raises the possibility of feigned compliance and thus encourages cosmetic attempts at monitoring."323 Another way to express this concern is that the existence of a due diligence defense may dampen incentives to invest in compliance because rational companies would invest "just enough to establish the defense but not enough to prevent those crimes profitable to the corporation."324 The counter to this objection is that judges and juries presumably are capable of separating those corporations with "paper" policies from corporations who have made "reasonable efforts" in good faith to create a compliance culture.325

In the disciplinary enforcement area, those who promote a respondeat superior standard and frown upon the Rules' "reasonableness" standard worry about enforcement authorities' ability to handle this challenge. The first suggestion, that

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relevant information. To prove misprision, the Government must demonstrate that "(1) the principal committed and completed the felony alleged . . . ; (2) the defendant had full knowledge of that fact; (3) the defendant failed to notify the authorities; and (4) the defendant took an affirmative step to conceal the crime." United States v. Ciambrone, 750 F.2d 1416, 1417 (9th Cir. 1985). " 'Mere silence, without some affirmative act, is insufficient evidence' of the crime of misprision of felony. Thus, a person who witnesses a crime does not violate 18 U.S.C. § 4 if he simply remains silent." Id. at 1418 (citation omitted); see also United States v. Adams, 961 F.2d 505, 508-09 (5th Cir. 1992) ("[U]nder the misprision statute, the defendant must commit an affirmative act to prevent discovery of the earlier felony. '[M]ere failure to make known does not suffice.' ") (alteration and emphasis in original) (quoting United States v. Warters, 885 F.2d 1266, 1275 (5th Cir.1989)).

323. Coffee, Corporate Criminal Responsibility, supra note 71, at 262; see also Pitt & Groskaufmanis, supra note 69, at 1560 (noting that "'[c]ommentators have continued to express great skepticism about the impact of' corporate codes of conduct and that '[c]ommentators often dismiss voluntary compliance programs as self-serving publicity ploys'").

324. Coffee, Corporate Criminal Responsibility, supra note 71, at 262. This seems to assume that the rational corporation without this defense would invest in crime prevention "by any means" to avoid strict liability. This assumption does not comport with the above discussion, which illustrates that the corporate compliance pocket is not in fact bottomless. See infra notes 301-20 and accompanying text.

325. See, e.g., Brown, supra note 300, at 313-15 ("The concern that a corporation's compliance program is a mere sham intended only to shield the corporation from liability would seem to be assuaged if the court inquired into the corporation's diligence in enforcing its policies and instructions as a preliminary to allowing the defense to go forward.").
If discipline could only be imposed upon a showing that a law firm’s internal controls were deficient, proceedings against law firms might too often turn into protracted and inconclusive inquiries into questions of law firm governance, is unpersuasive. Even under a respondeat superior standard, law firms are likely to fight disciplinary liability long and hard. Further, as Arthur Andersen’s criminal experience may demonstrate, firms can impose upon disciplinary authorities significant litigation-related costs and delays even when liability is evaluated under a respondeat superior standard.

More troubling is the competency question: whether disciplinary authorities have the expertise to evaluate the reasonableness of a law firm’s prophylactic systems. Determination of what firm policies and procedures should be in place to prevent ethical violations will require familiarity with “best practices” of firm management in different types of firms with different types of practices. There is no assurance that bar authorities would “have a deeper understanding than law firm partners of when internal controls are adequate.” Indeed, Professor Langevoort’s work suggests that we should be very cautious in assuming that the “administrative or judicial system has the capacity to determine what constitutes a good [compliance] system with some degree of accuracy and precision.”

Professor Langevoort states that he assumes that “the natural tendency of the judge will be to react to the breakdown [of a compliance system evidenced by the uncovering of serious illegality] by insisting that the firm should have done more high heat monitoring, especially by persons other than line supervisors—the main source of hidden costs that I’ve identified.” Thus, outcomes will be biased in favor of “over-penalization,” and hence overdeterrence.

326. Schneyer, Four Systems, supra note 5, at 276; see also Schneyer, Professional Discipline, supra note 5, at 30.
327. Schneyer, Four Systems, supra note 5, at 276 (“It is not] clear that the [disciplinary] agencies would develop enough expertise in matters of law firm infrastructure to use their new powers wisely. It is one thing to require a neglectful solo practitioner to improve his office management procedures; it is quite another to try to re-engineer the internal controls of a complex organization.”); see also id. at 253-54; Schneyer, Professional Discipline, supra note 5, at 30.
328. Langevoort, supra note 121, at 113.
329. Id.
330. Id. at 113. Professor Langevoort cautions that there are serious difficulties with investing administrative or judicial actors with the responsibility of determining whether a given compliance program is reasonable, but he agrees with other commentators that “some affirmative incentive for good monitoring beyond that provided by vicarious liability must be part of any systematic effort to deter corporate wrongdoing.” Id. at 114. While he acknowledges that there is “no easy answer” to this problem, he makes two suggestions. “First, the indeterminancy of adequate monitoring systems within any given firm suggests to me that in the interest of both consistency and the avoidance of undue cost, the legal standard underlying any affirmative monitoring requirement presumptively be set at a moderate height. . . . My candidate would be industry best practices.” Id. at 114-15. One could argue that the suggestion made herein—that the reasonableness standard be augmented by bar-defined guidelines (which may well turn on law management “best practices”)—accords with this suggestion. Second, Professor Langevoort argues that added emphasis should be given to proceeding against supervisory personnel for their negligence in meeting their supervisory responsibilities. Id. at 116. Again, my thesis is consistent with this conclusion in that I would hope to see additional emphasis on individual sanctions
While it may be true that disciplinary authorities will share judges’ difficulty in evaluating the most efficient or effective compliance system, that does not necessarily require the imposition of a respondeat superior regime, at least in the disciplinary context. The problem with the suggestion that respondeat superior obviates these judgment problems is demonstrated by the suggested alternative to proceeding under a “reasonable efforts” standard or recognizing a due diligence defense to vicarious liability: disciplinary authorities should exercise their discretion to sanction the entity only when it is truly the culprit, pursuing the culpable individuals in all other cases. Given that the overwhelming majority of disciplinary complaints are dismissed prior to investigation, disciplinary authorities obviously exercise a great deal of discretion in deciding which complaints to investigate, let alone to pursue to sanction. In light of the budgetary constraints they face, it is inevitable that—despite a standard of liability that, like respondeat superior, seems to require no exercise of judgment—bar authorities will be making a determination of the “reasonableness” of firm compliance efforts at the intake if not the liability stage. It is difficult to understand why disciplinary authorities’ expertise is insufficient to judge a firm’s due diligence when adjudicating liability but is sufficient when determining whether a case ought to go forward in the first instance. A determination made at the charging stage will be just as subjective and potentially unreliable, and just as fraught with the potential for uneven and even arbitrary results. Indeed, determinations made at the charging phase may be even more troubling. In most states, dismissed complaints are treated as confidential so these declinations will be insulated from review and cannot be subjected to public critique for either their wisdom or their compatibility with other cases.

331. See Schneyer, Four Systems, supra note 5, at 277; Schneyer, Professional Discipline, supra note 5, at 30.

332. This conclusion should not be read to imply that disciplinary enforcement officials cannot be trusted to responsibly exercise discretion under a respondeat superior standard while criminal prosecutors can. As noted above, criminal prosecutors were not invested with this discretion after reasoned consideration of alternative ways of catalyzing corporate compliance efforts; rather, as corporate criminal liability “just grew,” so too did its necessary corollary, prosecutorial discretion in the administration of this penalty. See supra note 67 and accompanying text. To the extent that one can distinguish between the disciplinary and the criminal system in terms of the potentially problematic nature of prosecutorial discretion, those distinctions lie not in the qualifications of the “prosecutors” but rather in the characteristics of the codes they enforce. Many of the ethical standards setting forth the substantive rules of conduct are vague, often by design. See, e.g., Levin, supra note 37, at 7 n.29 (noting that state disciplinary systems deal with only a fraction of lawyer misconduct for a variety of reasons, including the fact that “codes of conduct governing lawyers tend to be vague and general, making it difficult to determine what conduct is unacceptable in certain practice settings”); Schneyer, S&L Crisis, supra note 4, at 668; see generally Zacharias, supra note 21, at 224. By contrast (at least in theory) criminal statutes are supposed to provide clear notice of that which will render individuals liable. The ethics rules certainly provide no guidance on what types of policies or practices might be deemed necessary or effective to create a culture in which ethical violations are prevented, or at least promptly detected and remedied. Compounding this problem is the fact that there are no guidelines in the rules or otherwise to structure disciplinary authorities’
C. REASONABLENESS STANDARD AUGMENTED BY BAR-DEFINED BENCHMARKS

The answer to concerns about the competency of bar authorities to differentiate between conscientious firms and "culprit" firms is not to put in place what is ultimately a deceptive automatic liability standard with critical "reasonableness" judgments left to the intake stage. Rather, it is to provide guidelines for bar authorities’ decision-making, whether in "prosecutorial charging guidelines" that govern the processing of complaints at the intake stage or in the ethics rules or their commentary. Presumably, the agreement on a list of criteria or benchmarks by which the "reasonableness" of firms' efforts should be decided would make more objective, uniform, and reliable sanctioning decisions. It would also have a number of other important advantages.

First, providing concrete benchmarks to guide firms' efforts may well be more effective in galvanizing compliance efforts. To the extent the Organizational Guidelines provide an analogy, it is worth noting that the Guidelines do not simply say that organizations must make "reasonable" efforts and leave it up to them to determine, at their risk, what that means. Rather, the Organizational Guidelines define seven criteria that the Sentencing Commission determined were necessary to an effective compliance program.333 Recognizing that what constitutes an effective program to prevent and detect violations will differ depending on factors such as the size of the organization, the nature of its
determination of when the firm, and not the individuals within it, is the true culprit. This, again, differentiates disciplinary enforcement from (at least) federal corporate criminal enforcement in that the U.S. Department of Justice has a policy outlining the factors that it will consider in assessing an entity's culpability for charging purposes. See DOJ Charging Guidelines, supra note 75.

333. See FEDERAL SENTENCING GUIDELINES MANUAL at § 8A1.2, Application Note 3(k). The criteria are: (1) "The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct"; (2) "Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures"; (3) "The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities"; (4) "The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, i.e., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required"; (5) "The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution"; (6) "The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific"; and (7) "After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses--including any necessary modifications to its program to prevent and detect violations of law." Id.
business, and its prior compliance history, the Commission defined these criteria at a sufficient level of generality so as to make it possible for companies and industries to tailor programs responsive to their needs. The Organizational Guidelines example, then, demonstrates that there can be a happy medium between strict respondeat superior liability and an amorphous "reasonableness" standard. To the extent that the Organizational Guidelines are believed to be persuasive authority for the proposition that incentives trained at organizations can galvanize deterrence, one might also conclude that the Organizational Guidelines' flexible definition approach was a part and parcel of their success.

Second, a reliance on an affirmative "reasonable" efforts liability rule augmented by flexible criteria to test that reasonableness would have enforcement advantages. To be sure, those favoring respondeat superior liability believe that that standard will aid enforcement; indeed, the suggestion seems to be that only such a simple and straightforward standard will catalyze bar authorities' enforcement efforts. Respondeat superior liability, fairly or unfairly, eliminates the need to articulate standards of reasonable supervision or to establish any causal nexus between violations and a firm's alleged supervisory default. This could be said to increase the probability of sanctioning because disciplinary authorities appear loath to sanction lawyers based on novel interpretations of the ethics rules and stick for a number of reasons to "garden variety" cases. Unless a clear and unequivocal standard, such as respondeat superior, is imposed, one might argue, disciplinary authorities will be very reluctant to sanction firms based on an amorphous "reasonable" supervision standard.

The premise of much of this argument—that disciplinary authorities will happily apply a standard of liability that requires no interpretation or judgment in its application—is questionable. Indeed, enforcement of a vicarious liability standard is unlikely to be any more vigorous than a "reasonableness" standard, at least if one accepts the argument that bar authorities are reluctant to "scapegoat" individual actors for the default of all. For example, if one small "team" at a large firm crosses an ethical line despite the firm's demonstrably good faith efforts to ensure ethical compliance, will disciplinary authorities be any more likely to visit the consequences of vicarious firm liability on hundreds of "innocent" lawyers?

334. See id. at § 8A1.2, Application Note 3(k)(i)-(iii).
335. See supra note 125.
336. See, e.g., Schneyer, S&L Crisis, supra note 4, at 664. These reasons include the facts that fair notice is a great concern in these quasi-criminal proceedings and that disciplinary agencies do not use their scarce resources to develop the meanings of vague duties through common law adjudication. Id.; see also Levin, supra note 37, at 7 n.29 (noting that state disciplinary systems deal with only a fraction of lawyer misconduct for a variety of reasons, including the fact that "[s]tate disciplinary agencies shy away from pursuing cases in which the rules are unclear, due in part to concerns about giving fair notice to lawyers who are subjected to the disciplinary process"); Wilkins, Who Should Regulate, supra note 15, at 821 & n.85 (assuming that "enforcement officials will generally only impose sanctions when a lawyer has clearly violated a relatively unambiguous professional norm").
than to individually sanction those "innocents"? My instinct is that bar authorities will be disinclined to "tag" an entire firm for disciplinary sanction—with any consequences such sanctions may have in terms of monetary burdens, client or personnel defections, reputational damage and the like—where most of the persons who will bear those consequences are truly innocent of wrongdoing. Further, to the extent that enforcement authorities are averse to articulating standards of decision or sanctioning lawyers based on amorphous standards, the use of benchmarks ought to address both concerns.\(^3\) Firms also would have notice of their obligations, which would likely contribute to a perception that the rules, and enforcement of those rules, are fair.\(^3\) \(^7\) Finally, advance specification of what firms should be doing would also mean less need for litigation over "reasonable efforts" standard of Rule 5.1(a), thus preserving resources for more deserving cases.\(^3\) \(^9\)

One could argue that by articulating standards, one encourages technical compliance; that is, one simply gives firms the bones upon which to construct "cosmetic attempts at monitoring." But this concern would seem to be outweighed by the advantages of prospective identification of the necessary components of an ethical infrastructure—especially if one assumes that most lawyers wish to comply with ethical norms. Affirmative duties can, at least in theory, be enforced through proactive enforcement before the misconduct occurs and someone is harmed. Perhaps more important, the ultimate aim of the ethical rules is to provide guidance for attorneys' primary conduct, not necessarily to provide a penal code in the event of their violation. As the Committee on Professional Responsibility of The Bar of the City of New York expressed it:

[T]he Disciplinary Rules are about more than practical enforceability. We firmly believe that the vast majority of lawyers seek to comply with disciplinary rules because they are in the Code of Professional Responsibility, and independent of the actual threat of discipline. Indeed, this notion is at the heart of a system of self-regulation. We believe that the vast majority of lawyers want to act ethically. The function of the Code of Professional Responsibility is to help them do so. In our view, the instructive function served by the Disciplinary Rules is more important to the profession than is the fact that the Rules are used as a basis for discipline. As we have stated, the function of the proposed amendments is to help law firms avoid civil or other liability by requiring them to improve firm-wide practices and procedures.\(^3\) \(^4\)

\(^3\)37. Professor Zacharias has cautioned against the trend toward specificity in the drafting of ethics rules. With respect to certain types of rules, he argues, specificity dampens lawyers' ability and incentive to engage in the kind of ethical introspection that the ethical code should incite. See, e.g., Zacharias, supra note 21, at 236-39. The type of rules we are dealing with here, however, seem to be ones as to which Professor Zacharias would agree that specificity is helpful. See id. at 283-84.

\(^3\)38. Schneyer, Professional Discipline, supra note 5, at 27.

\(^3\)39. Id.

\(^3\)40. New York Bar Report, supra note 17, at 643 (emphasis in original).
Giving attorneys some affirmative guidance as to how best to approach implementing an effective ethical infrastructure before ethical violations occur, then, both has the potential to prevent harm and furthers a cardinal purpose of the ethical code.

The real question is not whether a “reasonableness” standard augmented by benchmarks is the answer, but rather who should isolate the relevant benchmarks: those responsible for formulating the ethics rules and their commentary, or those responsible for enforcing the rules.

The strongest argument in favor of letting enforcement authorities set the benchmarks through “prosecutorial guidelines” is that, to the extent that they are themselves removed from the domination of the bar, they are free of the inherent conflict of interest presented by the bar setting the standards for its own conduct. One could reasonably argue that the bar will set standards for ethical infrastructures that are far too lenient. I suppose that the fact that the standards will be available for public consumption might assist in sparking lawyers’ public spiritedness in drafting the benchmarks, but some contend that this spark has not been terribly evident in self-regulating decisions to date. A more compelling reason that bar officials may be counted upon to act in ways that may not always serve their immediate self-interest is the consequence of their failure to do so. The bar should recognize the alternative if it fails to produce effective benchmarks that will accurately allow the identification of “culprit” firms: renewed and increased pressure for a respondeat superior standard that puts “good” and “bad” firms at risk for disciplinary sanctions. I believe for this reason that it is reasonable, and fair, to assume that bar officials will make a good faith effort to craft effective benchmarks for an ethical infrastructure.

The affirmative advantages of allowing bar officials, rather than enforcement officials, to determine the relevant benchmarks are many. Again, assuming bar officials’ good faith, one could argue that the process of defining such standards,

341. See, e.g., Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, 59 TEX. L. REV. 639, 653 (1981) (the answer to the title question is “to contribute to market control”); Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 HARV. L. REV. 703, 706 (1977) (arguing that the ethics rules put the interests of the individual attorney first and should be reformed to put the interests of the public and the client first); Deborah Rhode, Why the ABA Bothers: A Functional Prospective on Professional Codes, 59 TEX. L. REV. 689, 692 (1981) (arguing that Model Code and Model Rules “consistently resolved conflicts between professional and societal objectives in favor of those doing the resolving”). But see Ted Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 LAW & SOC. INQUIRY 677, 737 (1989) [hereinafter Schneyer, Professionalism] (concluding that “if one looks closely enough at the process in which the Model Rules were developed, no grand theory, critical or functionalist, comes close to accounting for it”).

342. See supra note 341.

343. Cf. Pitt & Groskaufmanis, supra note 69, at 1561 (assuming that “self-regulation is preferable to government regulation, provided that self-regulation is subject to appropriate oversight and is pursued diligently,” because “government regulation is excessively disruptive to corporate enterprise”).
in and of itself, has a value in promoting ethical practice.\footnote{See, e.g., Schneyer, Professionalism, supra note 341, at 734 (noting that he believes that the “ethical debate that goes hand-in-hand with producing a good professional code” is a “good in itself”); Wilkins, Who Should Regulate, supra note 15, at 863 (“By collectively engaging in the process of enacting and enforcing rules of professional conduct, lawyers develop and reinforce the disposition for moral decisionmaking.”).} Presumably, the American Bar Association would take the lead in isolating the benchmarks that would apply, and those most expert in creating compliance policies and procedures could be called upon to participate. Such persons would have the opportunity and incentive to discuss what works and what does not in creating an ethical infrastructure for different types of firms and practices. The benchmarks would also provide guidance for smaller firms that do not have the resources to devote to conducting such an examination for themselves. In short, the bar potentially has the resources and the expertise to create much more effective and comprehensive benchmarks than do either bar officials or individual lawyers and firms.

The authoritative nature of the benchmarks should go a long way toward resolving any disinclination enforcement authorities have to pursue firms for their deficient ethical infrastructures. Enforcement officials may justifiably rely on the expertise of the bar and feel confident that the process of drafting the benchmarks, and the notice provided by the benchmarks, removes any equitable impediments to prosecution. Enforcement authorities may also be reluctant to demand that firms put in place specified policies and practices because of the authorities' belief that such demands constitute an undue invasion of firms' autonomy. Bar-defined standards would alleviate any autonomy concerns that the promulgation of standards by disciplinary authorities, whether through adjudication under the “reasonableness” standard or through articulation of “prosecutorial guidelines,” might create.

Finally, the bar is also capable of proposing a set of uniform standards, whether reflected in the Model Rules themselves or, more likely, in the commentary to the rules. The individual states would have to consider whether to adopt, amend, or reject those standards, but at least there would be a much enhanced potential for uniform benchmarks. Particularly where the focus of this exercise is regulating the conduct of large firms, many of which include lawyers licensed in different jurisdictions, the potential for greater uniformity in benchmarks is an important advantage. Finally, to the extent that the goal here is to affect the primary conduct of lawyers rather than to create a penal code, the result of this process would have to be more coherent, public, and readily accessible than the result of each state enforcement agency's formulation of “prosecutorial charging guidelines.”

In conclusion, as I have already made clear, I hold out little hope that catalyzing deterrence may be achieved given the present realities of disciplinary enforcement under any standard of firm liability. In an effort to be constructive—and to potentially expand the applicability of this standards assessment beyond
the sphere of disciplinary enforcement to the realm of institutional enforcement—I have assumed for present purposes that disciplinary enforcement has sufficient resources to make catalyzing deterrence possible. The above discussion of the standard of liability that would make most sense (given that assumption) suggests that a "reasonableness standard" augmented by bar-defined benchmarks for an effective ethical infrastructure would allow bar authorities to more fairly, reliably, uniformly, and objectively isolate firm "culprits" deserving of sanction than a respondeat superior standard. Further, such a concrete, bar-generated approach may more effectively galvanize firms to invest in an effective ethical infrastructure before clients or third parties are harmed by lawyer misconduct. Finally, freed from the fear of imposing liability under amorphous standards, concerns about their competency to adjudicate infrastructure issues, or a distaste for impinging on law firms' management autonomy, bar authorities are likely to more actively pursue firms who fail to live up to benchmarks defined as reasonable by the bar.

V. THE MAGNITUDE OF THE MISCONDUCT AT ISSUE AND THE VIABILITY OF ALTERNATIVE ENFORCEMENT SYSTEMS

The above demonstrates that if one accepts the critical (and, I believe, counter-factual) premise that firm disciplinary sanctions will catalyze firms to overhaul their ethical infrastructures, a "reasonableness standard" augmented by bar-defined benchmarks will best serve fairly and effectively to create the appropriate incentive. We have now come full circle because the question remains whether firm liability is sufficiently valuable to risk the real possibility that this liability change will undermine individuals' felt responsibility for the creation of a firm-wide ethical infrastructure. Before conducting a final balancing, it may be productive to inquire whether individual ethics violations in large law firms are so rampant and so under-enforced that whatever message firm liability will send to individual lawyers will be worth whatever incremental gains are made in internal monitoring. It may also be helpful to examine the extent to which alternative enforcement systems—institutional and liability controls—are adequate to address the threat identified.

In arguing that firm liability is necessary, Professor Schneyer pointed to fundamental changes in the legal market and in particular the new challenges presented by ever-larger law firms: the organization of legal practice has fundamentally shifted from predominantly solo practice to predominantly firm practice; on average, firms have become larger and many have branched out geographically. In those firms that have branched out, coordination within the firm is both more challenging and more important, and firms are hiring a proportionately larger number of young associates per partner, increasing a need
Professor Schneyer argued that the downside of increased size is that, as firms grow, “the potential harm they can inflict on clients, third parties, and the legal process grows as well.” Finally, Professor Schneyer noted that disciplinary proceedings largely concern complaints filed against solo practitioners and small firms and that lawyers in large firms are rarely targeted. He then drew the critical conclusion that, “judging from the frequency with which larger firms and their lawyers are the targets of civil suits, motions to disqualify, and sanctions under the rules of civil procedure, disciplinable offenses occur with some regularity in those firms,” but are not effectively addressed absent firm disciplinary liability. Closer examination of the likely magnitude of this problem suggests that it may not be sufficiently pressing to warrant a significant change in liability rules, or that the relative extent of the problem is difficult to gauge and is in any case unlikely to be effectively addressed through the disciplinary enforcement system, with or without firm liability.

First, the practice trends relied upon to demonstrate the potential scope of the problem of under-enforcement appear to be reversing themselves. The trend in the last five years appears to be away from firm or large-firm practice. Further, while the proportion of solo practitioners increased by 5% between 1991 and 1995, this increase was “primarily attributable to growth in the number of small firms.”

While firms of ten or fewer lawyers increased by 5% over the period, the total number of firms larger than ten declined by 2%. As a result, the share of the law firm universe occupied by small firms [defined as firms containing ten or fewer lawyers] rose from 87% in 1991 to 89% in 1995.
as of 1995, sole practitioners increased to 35% of the lawyer population. Of the 39% of lawyers working in firms, exceedingly few of them worked in large firms. Thus, 89% of firms contain ten or fewer lawyers; indeed, just 1.6% of firms as of 1995 had 51 or more lawyers. These numbers are significant because imposing individual liability for a firm’s failure to build an effective ethical infrastructure is much easier, and some would contend fairer, in a small firm. Such firms are unlikely to provide what culpable individuals exist with bureaucratic camouflage. Further, where one partner in a three-person firm steals clients blind or rarely appears at work, it would be fairer to sanction his partners for a failure to detect and stop misconduct that they should and could have uncovered and that in some cases benefited them very directly. It is also in a small firm practice that firm liability is unlikely to create incentives that individual liability would not.

It is not surprising, then, that one point repeatedly made in comments in opposition to the Ethics 2000 Commission’s proposed amendments to authorize firm disciplinary liability under Rules 5.1(a) and 5.3(a) was that disciplinary authorities were not having any difficulty identifying individuals as to whom liability was appropriate for supervisory failures. Further, opponents of firm liability pointed to the fact that although New York and New Jersey have created affirmative obligations on firms to create ethical infrastructures, there have been exceedingly few cases prosecuted under those rules. Such a dearth of enforcement may stem from a lack of complaints, insufficient resources available

Thus, 75.5% of firms contain five or fewer lawyers; 13.4% consist of 6-10 lawyers; 6.4% consist of 11-20 lawyers; 3.2% consist of 21-50 lawyers; 9% consist of 51-100 lawyers; and .7% consist of 101 or more lawyers. Id. at 26. "The change between 1991 and 1995 may reflect the end of the trend characterizing the 1980s in which firms of ten or fewer shrank from 93% of all firms in 1980 to 91% in 1985, to 89% in 1988, and to 87% in 1991." Id. at 16.

350. See, e.g., Creamer Testimony, supra note 29, at 2 (The Ethics 2000 Commission reporter’s explanation for the proposed change to the Model Rules authorizing firm liability under Rules 5.1(a) and 5.3(a) “cites no instance in which a state disciplinary authority was unable to deal effectively [with] legal ethics violations because of inability to prosecute a law firm. Nor, to our knowledge, were any such instances brought to the Commission’s attention by state disciplinary authorities.”).

351. See, e.g., In re Rovner, Allen, Seiken & Rovner, 754 A.2d 554 (N.J. 2000); In re Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein, 715 A.2d 216 (N.J. 1998); In re Jacoby & Meyers, 687 A.2d 1007 (N.J. 1997); see also Creamer Testimony, supra note 29, at 3. As ALAS employees argued to the ABA’s Ethics 2000 Commission:

Based on our informal contacts with experts on lawyer discipline and disciplinary authorities [in New York and New Jersey], we have learned that these New York and New Jersey rules have been used very infrequently. According to lawyers familiar with lawyer discipline in New York, since 1996, when the New York Code was amended to impose Model Rule 5.1(a) and 5.3(a) type obligations on law firms, three of four Appellate Divisions of the New York Supreme Court (which administer the lawyer disciplinary system) have not even issued implementing regulations for these new rules. In the First Appellate Division, where regulations have been promulgated, only two “private admonitions” have been issued to small New York firms for minor professional misconduct.

In New Jersey, which has had versions of Rules 5.1(a) and 5.3(a) that apply to law firms since 1984, we have found only three reported cases in 17 years in which law firms have been disciplined. Although New Jersey has gone further than New York in publicly, as opposed to privately,
proactively to investigate failures to comply with the rules, or disciplinary authorities’ disinclination to enforce vague standards or impose unfair flow-through effects on innocent partners. It also, however, may reflect the lack of a problem.

One should ask here whether authorization of firm liability has changed firm behaviors, even if there is little enforcement effort. That is, have firms in New York and New Jersey made efforts to address deficiencies in their “ethical infrastructures” that firms in other jurisdictions have not been moved to make? Unfortunately, there is no empirical evidence of which I am aware that answers this question.

It may be worth noting in addition that those responsible for ethics enforcement also have not been campaigning for firm liability. In fact, the professional organization of lawyer disciplinary officials, the National Organization of Bar Counsel (“NOBC”), opposed the ABA Ethics 2000 Commission’s proposed amendments to Rules 5.1(a) and 5.3(a).\(^3\) In sum, some argue that:

If there is a widespread perception among lawyer disciplinary authorities that many important legal ethics rules were going unenforced because no individual partner could be disciplined, surely more U.S. jurisdictions would have acted to address the problem. The fact that only two jurisdictions have done so—and that even in those jurisdictions only five law firms have been publicly or privately reprimanded—is the strongest possible evidence that the ... proposal is “a solution in search of a problem.”\(^3\)

What of the 1.6% of lawyers working in large firms? One could argue that, even if their numbers are relatively few, they “command an increasingly disproportionate share of the gross receipts for legal services.”\(^3\) With the economic power that they, and their clients, wield, they may actually be able to inflict disproportionate harm on the legal system. One could further plausibly posit that these lawyers are responsible for a great many ethical problems that ought to be addressed even if their numbers are not great in absolute terms.

Although it is safe to assume that lawyers in large firms transgress ethical limitations, there is no dependable evidence as to the extent of this problem.

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\(^3\) reprimanding these firms, the facts of the cases make clear that individual lawyers could have been identified and sanctioned in each case.

\(\text{Id.}\) In 2001, the New Jersey disciplinary authorities reported that “two of the most significant matters [resolved that year] involved lawyers who were disciplined [under Rule 5.3(a)] for failure to properly supervise their practices and personnel. 2001 NEW JERSEY REPORT, supra note 155, at 4. Both cases involved sanctions imposed on what appeared to be solo practitioners who failed to supervise staff who then stole clients’ funds. \(\text{Id.}\) at 5-7.

\(^3\) See Creamer Testimony, supra note 29, at 2; see also Creamer Comment, supra note 96, at 2; Final Draft Comments, supra note 96, at 1 (quoting the NOBC’s comments in opposition to firm liability amendment).

\(^3\) Creamer Testimony, supra note 29, at 3.

\(^3\) NELSON, supra note 119, at 37.
Professor Schneyer is forced by the dearth of reliable empirical data to rely only on anecdotal support for his conclusion. Those who argue that the concept of firm liability is a solution in search of a problem might point to the fact that large law firm lawyers are rarely the target of disciplinary enforcement as evidence that large firm lawyers may be more scrupulous than their colleagues in other parts of the bar. A number of reasons have been posited for this phenomenon, but none would suggest that this hypothesis is true.

Some suggest that the overwhelming number of cases brought against solo practitioners and small-firm lawyers stems from disciplinary authorities' bias in favor of the large-firm practitioner, and thus reveals an enforcement vacuum that needs to be filled. This may have been a supportable inference as an historical matter, but the available evidence today does not support a conclusion that solo and small firm practitioners are unfairly targeted by disciplinary authorities.

Given that solo practitioners and small firm lawyers continue to constitute the overwhelming majority of lawyers in the United States, it is not exceptional that they are the predominant target of disciplinary proceedings. Further, individual clients who feel aggrieved by their lawyer's performance, i.e., those who lodge the overwhelming majority of disciplinary complaints, are more likely to be complaining about the misconduct of the solo practitioners and small firms who typically serve them. Other reasons posited for the predominance of solo practitioners in disciplinary actions are that “lawyers in solo practice encounter economic pressures that may make them more likely to engage in misconduct,” they “are more likely to have troubled clients who present ethical problems,” they “may not have the staff and office controls that enable other lawyers to avoid the most common disciplinary complaints,” they have the “fewest resources to fight prosecutions,” and their cases “do not present the difficulties of proof that arise

355. See, e.g., Levin, supra note 37, at 6-7 (“It is difficult to obtain a clear picture of the consistency, efficacy or fairness of [lawyer disciplinary] sanctions. Inadequate record-keeping by many jurisdictions, differing reporting methods, uninformative published opinions, private discipline, limited empirical research, and the failure to report much lawyer misconduct makes accurate evaluation difficult.”).
356. See, e.g., Schneyer, Professional Discipline, supra note 5, at 7 nn. 40 & 41; see also Schneyer, S&L Crisis, supra note 4, at 641 & n.6.
357. See supra notes 237, 243.
358. See, e.g., Schneyer, Professional Discipline, supra note 5, at 7.
359. See, e.g., Id. at 7 & n.42 (“Some observers attribute the paucity of disciplinary actions against large-firm lawyers to an informal immunity from disciplinary scrutiny that those lawyers, as the most prestigious segment of the bar, supposedly enjoy.”).
360. See, e.g., Wilkins, Who Should Regulate, supra note 15, at 828 n.116 (noting that “[t]here is plenty of evidence that disciplinary officials may have discriminated against certain non-elite lawyers in the past. However, the growing independence of disciplinary counsel and the current heterogeneity of the bar cast doubt on the continuing validity [of a] conspiracy theory.”).
361. See, e.g., Schneyer, Professional Discipline, supra note 5, at 7 n.47 (“The proportion of law firm income from individual rather than organizational clients varies sharply and inversely with the firm size.”); Wilkins, Who Should Regulate, supra note 15, at 817, 832 n.134.
when prosecuting large firm lawyers." In sum, the evidence suggests that a complex of factors contribute to the disciplinary complaint demographic and that bias certainly is not a predominant cause of the dearth of sanctions against large-firm lawyers. Indeed, a 2001 study of California disciplinary proceedings commissioned by the California legislature and performed by an independent consulting firm concluded that sole practitioners and small firm attorneys, as compared with attorneys practicing in large firms, are not disproportionately investigated, prosecuted or disciplined by the California Bar.

The most likely explanation for the failure of large-firm lawyers to be targeted in disciplinary actions is not such lawyers' greater virtue or enforcement bias, but rather the dynamic discussed at length above. There is an enduring profile of the types of cases in which disciplinary enforcement is most effective, or at least most frequently invoked by those harmed by lawyer misconduct. Because the kinds of misconduct most likely to be encouraged by large-firm practice are unlikely to be reported to disciplinary authorities (with or without firm liability), or are dealt with, if at all, through other enforcement mechanisms, it is not surprising that few large firm lawyers are subjected to disciplinary complaints.

The above-described dynamic may account for the dearth of disciplinary proceedings, but can we conclude from that fact that there is no enforcement gap with respect to the misconduct of large-firm lawyers? That is, can we assume that whatever problems exist are adequately dealt with through liability and institutional controls and that those systems create adequate institutional incentives to put in place ethical infrastructures? There is no empirical evidence to support a conclusion either way. Reference to some of the deficiencies of these control mechanisms suggests that an enforcement gap does exist, especially with respect to externality problems, but the magnitude of that gap is difficult to estimate.

Professor Wilkins has demonstrated that externality problems, such as abuses that harm the clients' opponent, the legal system, or the functioning of regulatory agencies, are better dealt with through liability and institutional controls. Both

362. Levin, supra note 37, at 62 n.275; see also 2001 CALIFORNIA REPORT, supra note 237, at 1 (concluding that there is no enforcement bias against solo practitioners and small firms and suggesting that the dynamics of those types of practices may account for the greater incidence of certain types of complaints).

363. See 2001 CALIFORNIA REPORT, supra note 237, at 1. The study concluded that: "[t]he numbers and percentages of disciplinary prosecutions are commensurate with the numbers and percentages of investigations opened against solo practitioners and small firm practitioners, as compared to large firm attorneys"; "[i]t is the number of complaints filed against solo practitioners and small firm practitioners that is disproportionate to the general attorney population in the three sizes of law firms"; and that "there is no institutional bias against solo practitioners and small firm attorneys." Id.

364. See, e.g., Wilkins, Who Should Regulate, supra note 15, at 828 n.116 ("Because corporate clients have so little incentive to report their lawyers, it is not surprising that these lawyers are rarely the subject to professional discipline.").

of these controls are applied to law firms, in addition to individual lawyers, and have apparently been effective in prompting firms to invest in at least some types of responsive controls. For example, courts can sanction lawyers and law firms for externality problems, such as the filing of frivolous pleadings or motions, under Rule 11. Regulatory agencies can also exert institutional controls on firms. In some cases, firms and regulators have entered into consent decrees, a common feature of which is a firm commitment to improve internal controls to prevent externality problems. Further, as noted above, institutional and liability controls are also available in many cases should large-firm clients find themselves with agency problems, such as conflicts, with their lawyers.

Yet both institutional and liability controls have their deficiencies as control devices, particularly with respect to the externality problems we have identified as our principal concern. For example, many lawyers operating in large firms are not litigators or lawyers who appear frequently before administrative agencies. Thus, these controls have little utility when such lawyers stray. Rule 11, like other institutional controls, may be used for strategic advantage, most effectively by institutional defendants to sanction individual plaintiffs. Accordingly, "institutional controls such as rule 11 seem likely to overdeter individual externality problems while simultaneously underdetering corporate externality problems." Perhaps more important are the limitations of liability controls in offering redress to third parties. Robert O'Malley of the Attorneys' Liability Assurance Society, Inc. ("ALAS"), which provides malpractice liability insurance for many large law firms, noted in 1989 that "[a] majority of the most severe claims are not coming from the clients themselves, but from various third parties (investors, 

366. See, e.g., Schneyer, Four Systems, supra note 5, at 255, 260, 264; see also supra note 366.
367. See, e.g., Schneyer, S&L Crisis, supra note 4, at 648 ("Malpractice suits and administrative enforcement actions ... carry potential liability for every partner, liability which [in some cases] is unlikely to be covered fully by malpractice insurance. These devices, unlike discipline, give each law-firm principal, even a far-flung partner with no [agency clients], an incentive to consider changes in firm policy which might prevent harm in the future.") (footnote omitted); Wilkins, Who Should Regulate, supra note 15, at 832 ("Anecdotal evidence suggests that the threat of malpractice liability has caused corporate lawyers to institute a number of preventative measures, such as circulating master calendars, keeping better track of their time, and implementing continuing legal education courses.").
368. Such problems are generally not susceptible to liability controls because parties generally have no enforceable duty of care to the opposing party. See Schneyer, Four Systems, supra note 5, at 258. Courts are said to be the preferred avenue for addressing such concerns for a number of reasons: judges are more expert in assessing pleadings and motions, they have a strong incentive to protect the quality of justice administered in their courts, and they have the power to dispose of the issue more quickly and without initiating a separate proceeding. Id. at 256; see also supra notes 359-61.
369. See Schneyer, Four Systems, supra note 5, at 264.
370. See supra notes 201-06 and accompanying text.
371. See, e.g., Schneyer, Four Systems, supra note 5, at 270; Schneyer, Professional Discipline, supra note 5, at 41.
373. Id. at 843.
lenders, purchasers, stockholders, regulatory agencies such as FDIC and FSLIC, etc.). Insurers, in recognition of this potentially severe threat of liability for externality problems, brought "their knowledge and power to bear on the behavior of the law firms that they insure." Yet while such third party suits against firms appear to be on the increase, there are significant barriers to recovery. Most notably, malpractice suits generally require that the claimant establish a duty and prove that "privity" exists. "Traditionally, a lawyer was liable in tort only to his clients, and a third party had no right of action even if it was clear that the lawyer's services were intended to protect or to benefit the third party." The "citadel" of privity is no longer absolute, but "[t]he privity requirement is still significant in much modern litigation." In sum, liability controls, which many commentators agree have been very significant in galvanizing firms to create controls that will obviate agency problems, are not necessarily as effective in providing remedies for third-party harms. It is difficult to know, then, to what extent liability controls create similar incentives for large firms to put in place controls that may prevent or deter externality problems.

VI. CONCLUSION

Where are we? Firm disciplinary liability ultimately must be justified by a belief that firm disciplinary sanctions will move firms, in ways that individual liability will not, to create ethical infrastructures capable of preventing lawyer misconduct. The existing dynamics of disciplinary enforcement would strongly suggest, however, that firm liability will not catalyze deterrence. There is a very low likelihood that the type of externality problems to which market forces impel large firms will be detected or sanctioned. The size of the penalty necessary to overcome this low sanction rate, as well as the costs of instituting an ethical infrastructure and refraining from client-serving but objectionable behaviors, is so prohibitively high as to be impossible as a practical matter. The extent of misconduct occurring within large law firms that is not being effectively sanctioned (through disciplinary enforcement or other alternative mechanisms) is unknown. It appears likely, however, that some externality problems created by such firms are not being deterred or sanctioned through the disciplinary system, and perhaps not through any alternative system. The imposition of firm liability

375. Id. at 364.
376. See Wilkins, Who Should Regulate, supra note 15, at 833-34.
377. 1 HAZARD & HODES, supra note 3, § 4.6, at 4-15.
378. Id.
379. Id.; see also Schneyer, Four Systems, supra note 5, at 275 (stating that much "professional misconduct—e.g., filing a frivolous claim—is not civilly actionable because its victims are not clients and not in 'privity' with the firm.").
will not change the disciplinary dynamic, however, to make it more likely that such externality problems will be brought to the attention of bar authorities, much less sanctioned by them. And to the extent that agency problems, such as conflicts, are at issue, firm disciplinary liability is unlikely to change the reporting incentives of large firm clients. Because such liability will not make them whole, corporate clients will continue to employ the informal, institutional, and liability controls that they apparently find more responsive to their needs than disciplinary controls.

Given that changing liability rules to encompass firm disciplinary liability is unlikely to be effective in catalyzing deterrence, it would not seem to yield any systemic benefit. Indeed, it will carry with it potentially significant costs. To the extent that firm liability is imposed only infrequently and almost randomly given the inconsistency of reporting, that liability is likely to create a sense that enforcement is essentially arbitrary and unfair. Far from furthering catalyzing deterrence, then, this perception may undermine both compliance and the utility of the disciplinary stigma. Changing the liability rules certainly poses a real threat of undermining individual lawyers’ perceived need to participate actively in the creation of a firm ethical infrastructure. Finally, encouraging disciplinary authorities to pursue firm liability also seems to me to constitute a less than optimal allocation of resources given disciplinary enforcement authorities’ budgetary constraints and the many other cases worthy of their time and attention. In particular, I confess that in reading up for this article, I was shocked by the amount of neglect, incompetence, and dishonesty to which individual clients are often subjected. Given that disciplinary enforcement is the best—and often the only—avenue of recourse open to individual clients for “low-level” (but, to them, important) agency problems, and the very low likelihood that firm liability will achieve much if anything in the way of “catalyzing deterrence,” it seems to me clear that any spare disciplinary enforcement resources should be directed to cases involving the victimization of individuals by their lawyers.

Given the above, my own judgment is that, on the information now available, firm liability simply does not make sense. What is troubling about this conclusion is the fact that there may well be an enforcement gap with respect to the very type of misconduct that large firm practice is most likely to generate—externality problems. I join Professor Schneyer and others in their frustration in this respect. It is very unsatisfying that disciplinary, liability, and institutional controls all are to some degree lacking when externality problems are at issue. One might argue, then, why not take Professor Schneyer up on his suggestion, at least to the extent of authorizing firm disciplinary liability for “unreasonable” failures to meet bar-defined standards for an ethical infrastructure? Even if firm disciplinary liability is unlikely to be used frequently or even effectively to galvanize law firms to institute ethical infrastructures, why not allow disciplinary authorities this option, thereby creating a deterrent threat that could fill any enforcement gap in extraordinary cases? If fines are likely to be modest and we adopt a
"reasonableness" standard augmented by bar-defined benchmarks to obviate fairness problems and spur both compliance and enforcement, what would be the downside?

I ultimately (and reluctantly) believe that this threat will not have any deterrent effect and that an ineffective threat of firm disciplinary sanctions is not worth its potential cost. A combination of liability controls and market forces—the threat of malpractice liability or the loss of clients—has given firms ample incentives to put in place systems that will prevent and detect many types of agency problems and to remedy informally agency problems that do occur. It is difficult to know with any certainty how this would play out, but my own guess would be that firms, which likely have a better sense of the above-described dynamic than anyone, will conclude that the likelihood of disciplinary sanctions being imposed for externality problems are exceedingly low and the fines (if authorized) will likely be modest. To the extent, then, that market forces are pressing large-firm lawyers to engage in conduct that produces externality problems, this pallid threat of firm disciplinary liability is unlikely to outweigh the press of those forces.

Further, the creation of an essentially unenforceable threat may well do more harm than good. This change in liability rules sends a message that creation of an ethical superstructure and ensuring adequate supervision are firm responsibilities, not personal ones, and that any deficiencies in meeting these duties will be treated as a cost of business rather than an invitation for individual censure. The cost of this ineffectual "threat," then, may be the creation of individual compliance disincentives. Finally, to the extent that complaints are made against large firms alleging misconduct, experience in the corporate crime area indicates that there is a real possibility that this liability rule may invite resource-strapped disciplinary authorities to take the easy path of sanctioning the firm, rather than investing the time and resources to sanction individual lawyers, thus reinforcing the unfortunate message that individuals are not responsible for firm-wide ethical culture, policies, and practices.