Ethical Horizons: Navigating the Complexities of Team-Based Legal Representation in Large Corporate Firms

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The legal profession requires the best of its members, asking them to act in ways that respect and prioritize the needs of clients, so long as those needs are ethical and legal. However, when an attorney works within a large law firm, they are faced with not only requirements from their clients, but also from their peers, supervisors, and client representatives. This Note focuses on (1) the origins and history of the large law firm structure that is so common today, (2) the ethics of practicing law in large law firms and how it impacts the individual, and (3) how to overcome ethical pitfalls common within the organizational structure. It concludes with a review of the literature that is most likely to find solutions to resolve these ethical dilemmas.

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INTRODUCTION

Lawyer teams in large, corporate firms create environments that make ethical decision-making more difficult. Since corporate law firms were first created in the nineteenth century, gradual changes in attorney practice methods have occurred with increased acceleration throughout the nineteenth and twentieth centuries alongside the introduction of new technologies, such as the telephone, personal computer, and the internet. It is likely that with the introduction of artificial intelligence and similar new inventions, such as robo-lawyers and online drafting software, the changes will only accelerate in the coming years. As these changes occur, the world through which lawyers navigate becomes increasingly complex, as lawyers in large firms find themselves with multiple stakeholders pulling the attorney in different directions. The tensions for large firm attorneys today are not only business- or client-centric; rather, these tensions come from every aspect of the attorney's life, including the social, relational, moral, and ethical. Attorneys must be aware of ethical implications at every turn and the consequences for failure to comply can be drastic.

One of the major areas of ethical tension lies in the way in which attorneys in corporate firms participate in team-based legal practice. Lawyers on teams not only answer to each other, but they also answer to supervisors, clients, and human resource departments. This web of tensions creates polycentric pressure on individual attorneys. However, to understand the full measure of this pressure, it is vital to understand the history of the corporate law firm, how the practice of law within the corporate law firm has changed, how ethical considerations have changed alongside changes in the corporate firm, the impact of teams on an individual attorney's autonomy, and the ethical rules already in place to guide an attorney through the maze of the corporate firm. Finally, I discuss a few minor proposals to ameliorate ethical challenges for attorneys, largely drawing from preexisting scholarship on ethical infrastructures within corporate law firms.

I. A BRIEF HISTORY OF THE CORPORATE LAW FIRM

The history of corporate law extends back to the creation of the English East India Company in 1600 and the Dutch East India Company in 1602.[1] Large, corporate law firms, however, did not become prevalent until the mid- to late-1800s.[2] To fully understand attorneys' methods of practice in large corporate firms today, it is worthwhile to examine the roots of the large, corporate firm.

A. The Emergence of a Pro-Business Elite

Changes in contract theory in the mid-nineteenth century provided the environment where corporate law firms could flourish. Up to the nineteenth century, it was a long-held belief that contractual obligation was justified due to the "inherent justice or fairness of an exchange."[3] That is, the ability to bind oneself through contract was only enforceable because of a natural law that allowed one to exchange something for another. However, nineteenth-century American jurists rejected this view for the current view—that contractual obligation is not justified through a natural form of justice, but rather through the "convergence of the wills of the contracting parties" or a "meeting of the minds."[4] This was known as the will theory of contracts, and it was introduced to prevent subjectivism in contract making and to provide objective uniformity and predictability.[5] This change transformed American law by paving the way for the expansion of the market economy, the commercialization of law, and the establishment of a "procommercial legal elite . . . [aligned] . . . with aggressive business interests."[6] It was in this environment that the first corporate law firms were created.

1. *Dutch East India Company*, BRITANNICA, https://www.britannica.com/topic/Dutch-East-India-Company [perma.cc/QS72-KUK5] (last visited Apr. 18, 2024).

2. *See generally* Thomas Paul Pinansky, *The Emergence of Law Firms in the American Legal Profession*, 9 U. ARK. LITTLE ROCK L. REV. 593 (1987).

3. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 160 (1977).

4. *Id.*

5. HORWITZ, *supra* note 3, at 35.

6. *Id.* at 211.

B. The Formation and Evolution of the Corporate Law Firm

The first corporate law firms looked much different than those today. Many of the now-global elite law firms began in New York City with relatively humble beginnings.[7] Throughout this section, I will address the changes in corporate firms from a historical perspective, which will show how firms not only became larger but also how they drifted away from the standard-bearers of professionalism to a more commercialized body akin to profit-driven corporations.

1. Origin

The origins of the modern-day corporate law firm take us back to the nineteenth century. While some corporate law firms were founded in the early 1800s,[8] it was not until the mid-1800s that the practice of law in New York City began to accelerate, as more young attorneys flooded the city in the post-Civil War era.[9] During this time, law firms were relatively small, sometimes starting with just two partners from well-to-do families.[10] Firms existed with more partners, but even firms with just five partners were considered large.[11] Prior to the end of the Civil War, most attorneys did not work in firms, but instead practiced as solo practitioners or shared an office with one other attorney solely to reduce office costs, not to share clients.[12] It was the growth of commercial businesses and corporations that prompted a more coordinated effort amongst attorneys within these newer, larger firms.[13]

Alongside this growth, the Bar of New York faced increased public scrutiny due to attorneys' involvement in what was called "corporate warfare."[14] Despite corporate warfare being a driving reason behind the scrutiny of the Bar, many attorneys did not blame corporate capitalism, but instead blamed New York's 1846 state constitution, which erased the distinctions between attorneys, solicitors, and counselors and created more simple licensing procedures.[15] The attorneys in question thought this was a "progressive debasement of the Bar & Bench."[16] In response to this, Samuel Tilden and William Evarts believed that new and demanding admission standards should be introduced, including the requirement

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7. *See Chapter 1: Foundation*, WHITE & CASE, https://history.whitecase.com/chapter-1-foundation [perma.cc/5PYX-SPHW] (last visited Apr. 16, 2024).

8. *Our Story*, CRAVATH, https://www.cravath.com/our-story/index.html#:~:text=Our%20story%20began%20on%20the,Street%20in%20New%20York%20City [perma.cc/M8VB-L8QJ] (last visited Apr. 15, 2024).

9. EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898 967 (1999).

10. WHITE & CASE, *supra* note 7.

11. BURROWS & WALLACE, *supra* note 9, at 1047.

12. MITT REGAN & LISA H. ROHRER, BIGLAW: MONEY AND MEANING IN THE MODERN LAW FIRM 17 (2021).

13. *Id.* at 17–18.

14. BURROWS & WALLACE, *supra* note 9, at 967. Examples of "corporate warfare" included Daniel Drew, James Fisk, and Jay Gould's hiring tens of attorneys to water down Erie Railroad stocks to sabotage Cornelius Vanderbilt during the Erie War. *See* CLIFFORD BROWDER, THE MONEY GAME IN OLD NEW YORK: DANIEL DREW AND HIS TIMES (1986). Furthermore, the judicial bench was also tarnished by unscrupulous behavior of attorneys, including James T. Brady who accused one "Judge Bernard of corruption, to his face in open court." BURROWS & WALLACE, *supra* note 9, at 967.

15. BURROWS & WALLACE, *supra* note 9, at 967.

16. *Id.* at 968.

that attorneys pay admission fees, which would only allow admittance to the "worthy," not the "uncouth."[17] By introducing higher standards, they hoped to "make the law a 'noble profession,'" and not just a trade.[18] Thanks to their efforts, the "Association of the Bar of the City of New York" (Association) was created in 1870.[19] Even a year post-creation, the Association had only admitted 450 out of 4,000 New York attorneys to its ranks.[20] This self-regulatory scheme was later adopted throughout the country, and formed the model that would also lead to the creation of the American Bar Association (ABA).[21] While membership in the Association was for already-licensed attorneys in New York City—that is, it did not prevent individuals from gaining admission to practice within New York State—the self-regulatory scheme the Association adopted is nonetheless relevant particularly because of its influence in the creation of the ABA and, therefore, how lawyers self-regulate their profession today.

During the mid- to late-1800s, a fair number of large, corporate law firms were formed, including Davis Polk & Wardwell in 1849 (first known as Bangs and Stetson);[22] Milbank, Tweed, Hadley & McCloy in 1866 (first known as Anderson, Adams, and Young); and Sullivan & Cromwell in 1879.[23] Other currently-large firms were created shortly after, including White & Case in 1901.[24] Typically, the clients of these firms were railroad, banking, and industrial companies, and attorneys spent their time "defending railroads in court, serving as board directors, working as lobbyists . . . , representing speculators and empire builders, managing real estate interests, advising social and cultural organizations, and handling trust, estates, and . . . the complicated affairs of the new nationally oriented corporations."[25] However, many attorneys refused trial work and focused instead on building corporate interests.[26] Critics of the increased focus on corporate work lamented the commercialization of the legal profession and the decrease in professional values, arguing that financial interests "corralled" the legal profession to a profit-driven business.[27]

From the mid-1800s to the 1940s, the system in which firms operated drastically changed. Walter S. Carter's firm, Chamberlain, Carter, and Hornblower, developed a system in which it would hire young associates straight from elite law schools.[28] The firm would pay, train, and, when the time came, promote these associates to partner.[29] Paul D. Cravath, who was employed at the firm, liked the approach so much that he later applied it "so extensively at his own firm that it

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *See id.*
22. *Davis Polk & Wardwell LLP*, VAULT, https://legacy.vault.com/company-profiles/law/davis-polk-wardwell#:~:text=Davis%20Polk%20was%20founded%20by,firms%20in%20the%20United%20States [perma.cc/N543-THMH] (last visited Apr. 15, 2024).
23. BURROWS & WALLACE, *supra* note 9, at 1047.
24. *White & Case in History*, WHITE & CASE, https://history.whitecase.com/timeline-white—case-in-history [perma.cc/LX2Z-HSGP] (last visited Apr. 15, 2024).
25. BURROWS & WALLACE, *supra* note 9, at 967, 1047.
26. *Id.* at 1047.
27. REGAN & ROHRER, *supra* note 12, at 18–19.
28. BURROWS & WALLACE, *supra* note 9, at 1047.
29. *Id.*

became known as the 'Cravath system.'"[30] This model differed from the previous model, in which law firm partners hired unpaid law clerks as apprentices, with later opportunities to become partners themselves.[31] This change in law firm management paved the way for the "Golden Age" of the large corporate firm.

2. "Golden Age"

The large corporate law firm experienced a so-called "Golden Age" of practice in the 1950s and 1960s.[32] During this time period, an attorney who began at a large, corporate firm could expect a variety of benefits, including: mentorship from partners, the high chance of becoming a partner at the firm, an above-average income, and the opportunity to retire from the same firm in which they began work.[33] Large law firms experienced a great deal of autonomy, wielding control over their own work and maintaining independence from their clients.[34] This was partly due to large law firms' lack of reliance on one client, as well as an unspoken understanding that clients would be loyal to "their" firm.[35] Furthermore, the structure of big law firms was more akin to an apprenticeship, with the composition of partners to associates typically being a 1:1 or a 2:1 relationship, allowing the partners to spend more time mentoring and developing their associates.[36] However, this possibility was partly a consequence of the law firms' relative monopoly over their given markets.[37] Law firms typically operated in a single office, were identified by that city, and were well known in their respective localities.[38]

In 1955, the average size of a large, corporate firm was forty attorneys, though in a survey of thirty-five firms, the number of attorneys ranged anywhere from seven to eighty-four lawyers.[39] By 1965, the average of those same firms was 62.6 attorneys, with a range from 13 to 112 lawyers.[40] These firms experienced considerable growth, and the thirty-five firms that were still considered among the top fifty in 1985 saw an annual growth rate of 5.3%.[41] During this time period, managing partners of elite firms would attend a luncheon each year to determine the salaries for new associates for the upcoming year.[42] The large firm environment

30. *Id.* It is unclear to what extent the system should be attributed to Chamberlain, Carter, and Hornblower or to Cravath. *See The System's History*, CRAVATH, https://www.cravath.com/the-cravath-system/the-system-s-history.html [perma.cc/KQ6X-KBR3] (last visited Apr. 15, 2024). Regardless of attribution, the import of this transition is nonetheless significant.

31. BURROWS & WALLACE, *supra* note 9, at 1047.

32. *See* Marc Galanter & Thomas Palay, *The Transformation of the Big Law Firm*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 31–62 (R. Nelson, D. Trubek & R. Solomon eds., 1992); THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 12–15, 73 (2010).

33. MORGAN, *supra* note 32, at 13.

34. Galanter & Palay, *supra* note 32, at 44.

35. *Id.* at 42–45.

36. *Id.* at 43–44.

37. *Id.* at 45.

38. *See id.* at 38, 46.

39. *Id.* at 38.

40. *Id.*

41. *Id.*

42. *Id.* at 39. For New York firms, the starting salary in 1953 was $4,000 (the equivalent of $46,967.22 in January 2024). The salary increased to $7,500 by 1963 (the equivalent of $77,055.59 in January 2024). *Id.*; *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, https://data.bls.gov/cgi

at the time is best summarized by the case of a firm that refused to manage and reward associates according to their time billed, fearing that this would lead to increased competition among the associates and decrease the tight-knit culture of the firm.[43]

As discussed in the previous section, lawyers created bar associations to control the influx of lawyers into the profession.[44] During the "Golden Age," the self-regulatory powers of attorneys were at an all-time high.[45] However, it was during this "Golden Age" of lawyering that the self-regulatory scheme was weakened by the United States Supreme Court through a number of cases.[46] Through the "Golden Age" of the 1950s-1960s, and into the 1970s, the self-regulatory powers of the legal profession waned and the ABA enacted a new Model Code for lawyers.[47] The "good-old days" were over.

3. Modern Era

After the "Golden Age," the legal profession experienced a decline in professionalism in combination with the rise of commercialization.[48] From the 1970s to the present, the large, corporate law firm experienced exponential growth as large law firms merged with their smaller counterparts,[49] creating large mega-firms with over one thousand attorneys per firm.[50] Along with this period of growth came increased competition between law firms.[51] Where firms used to have long-lasting relationships with clients, they now are no longer able to consider clients as firm-specific capital, and partners must instead spend much of their time obtaining new clients and ensuring profitability.[52] Part of this relationship problem is the ease in which the partners of today's law firms are able to leave a partnership, take their clients with them, and join a different firm.[53]

-bin/cpicalc.pl [perma.cc/9BRQ-9ZEU] (last visited Apr. 16, 2024) (calculating the buying power in 2024 by entering in the dollar amounts and appropriate dates and pressing the "Calculate" button).

43. REGAN & ROHRER, *supra* note 12, at 21. It is worthy to note that the firm in question at first began using billing metrics to evaluate associates, but it was only after outcry by the associates that changes were made, and only for ten years at that. *Id.*

44. *See supra* Part I.B.1.

45. *See* MORGAN, *supra* note 32, at 73.

46. *E.g.*, Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957) (prohibiting bar examiners from denying bar admission strictly on the basis of membership in the communist party); Bhd. of R.R. Trainmen v. Va. ex rel. Va. State Bar, 377 U.S. 1 (1964) (striking down a state's prohibition against unions' referral of members to lawyers); Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) (finding that a minimum fee schedule endorsed by the Virginia State Bar violated antitrust laws).

47. *See* MORGAN, *supra* note 32, at 76–79.

48. *See* REGAN & ROHRER, *supra* note 12, at 31–32 (discussing increased commercialization and the need for a distinct separation of law firms from the market as a "prerequisite for professionalism"). Here, "professionalism" should be understood as seeing the law as a "craft and calling," not as an extension of business trends or needs. For further reading, see Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283 (1998).

49. *See* David Thomas, *US Law Firm Mergers Ticked Up Last Year as More Deals Loom for 2024*, REUTERS (Jan. 2, 2024, 11:26 AM), https://www.reuters.com/legal/transactional/us-law-firm-mergers-ticked-up-last-year-more-deals-loom-2024-2024-01-02/ [perma.cc/3J8Z-NGEP].

50. *See Law Firms*, LAW.COM, https://www.law.com/law-firms/ [perma.cc/AJ7S-TFW9] (last visited Apr. 15, 2024).

51. *See* Milton C. Regan, Jr., *Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 197, 198 (2000).

52. REGAN & ROHRER, *supra* note 12, at 17.

53. *Id.* at 28.

The change in relationship dynamics between partners and clients indicates clients' growing bargaining power.[54] Clients now exert greater control over the provision of services, including cost.[55] Because of this, partners today must increase their entrepreneurial efforts to attract and retain clients. However, this creates a tension between the successful partners and their firm, as the perpetual threat of a partner leaving for a different firm encourages the partner's firm to try to institutionalize those clients.[56] Clients typically hire firms because of personal relationships with attorneys at that firm and will even choose to follow an attorney to different firms to maintain that relationship.[57] Despite this, clients understand that they are in fact receiving the majority of their required services from the firm, not the individual attorneys.[58] Even in the modern era, relationships are vital for obtaining clients, but business skills are increasingly important for retaining them.[59] In the following Section, I will show how one particular firm's business changed throughout the years and into the modern era.

4. White & Case (Study)

White & Case is a large firm that was founded in New York City in the late nineteenth century.[60] Through a brief recounting of its history, the reader will gain a greater understanding of the evolution of large firm practice.

In 1897, at the home of Dumont Clarke, a well-known banker in New York City and president of the American Exchange National Bank, George Case met DuPratt White, a close friend of the Clarke family.[61] Case also met Mary Clarke, Dumont Clarke's daughter, whom George married in 1898.[62] At Mary's suggestion, White, at 31, and Case, at 28, founded a law firm on May 1, 1901 at 31 Nassau Street, just a few blocks away from the New York Stock Exchange.[63] They were not established lawyers at the time, but they were ambitious and had good connections.[64] No partnership agreement was created for the first fourteen years of the firm, as they had great trust in each other.[65] However, in 1915, they drafted a partnership agreement as they had already accepted three other lawyers as partners.[66] As discussed in Part I.B.1 above, White & Case was not the first Wall Street firm focused on commercial clients, nor was it the first to eschew litigation-centric practices; instead, White & Case focused much of their early work on

54. *Id.* at 52.

55. *Id.*

56. *Id.* at 94–95. Institutionalization of clients simply refers to helping the client feel a closeness to the firm generally rather than to a specific partner. *Id.*

57. *See id.* at 44; John C. Coates, Michele DeStefano, Ashish Nanda & David B. Wilkins, *Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market*, 36 LAW & SOC. INQUIRY 999, 1015 (2011).

58. *See* Coates et al., *supra* note 57.

59. *See id.* at 1029–30.

60. *Chapter 1: Foundation*, WHITE & CASE, https://history.whitecase.com/chapter-1-foundation [perma.cc/9RLX-DGFJ] (last visited Dec. 4, 2024).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

banking through a client and ally, Harry Davison, who would later become the managing head of J.P. Morgan.[67]

The partnership grew quickly, and by 1918 it had nine partners and sixteen associates.[68] Ten years later, it had fifteen partners and forty-five associates.[69] Each of these associates became partner within six to nine years after their first day at the firm.[70] Throughout the Great Depression, the firm continued to hire new associates, at a rate of six per year.[71]

An outlier in its efforts to spread globally, White & Case was one of the first U.S. law firms to open an office outside of the United States.[72] Specifically, White & Case opened an office in Paris, France in 1926.[73] From the end of World War II until 1952, the firm opened and operated a London office.[74] In 1967, it opened an office in Brussels, followed by a reopening of the London office in 1971.[75] As the firm grew, American attorneys working in foreign offices often worked with attorneys at other firms who entered the deals as co-counsel.[76] In 1978, the firm opened an office in Hong Kong, in part due to its representation of the Indonesian government.[77] In its representation of the Indonesian government, White & Case was tasked with rescheduling their debt.[78] This was largely a team-based effort, involving multiple partners, including a team lead by Jim Hurlock, the future chairman of the firm.[79] These types of larger, more sophisticated matters required team-based efforts and shows how the team-based lawyer model developed alongside the international growth of large, corporate firms.

In fact, Jim Hurlock's elevation to chairman of the firm, in addition to the firm's resolution of a dispute with the Securities and Exchange Commission and the growth of a new generation of future-facing partners, aided White & Case in becoming a global firm.[80] The new generation of partners pushed for a more open management style and for a leaner management committee that led to quicker decision-making.[81] In this environment, White & Case became the global firm it is today, with attorneys working across various teams to ensure clients' needs are always met.[82]

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67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Chapter 3: Corporate Clients*, WHITE & CASE, https://history.whitecase.com/chapter-3-corporate-clients [perma.cc/X3GN-4VA2] (last visited Apr. 16, 2024).
72. *Chapter 5: New Horizons*, WHITE & CASE, https://history.whitecase.com/chapter-5-new-horizons [perma.cc/V62Y-H58F] (last visited Apr. 16, 2024).
73. *Id.* The Paris office eventually closed in 1941 due to the effects of World War II. The office would not reopen until 1960. *Id.*
74. *Id.*
75. *Id.*
76. *See id.*
77. *Chapter 6: Sovereign Practice*, WHITE & CASE, https://history.whitecase.com/chapter-6-sovereign-practice [perma.cc/S7SD-544A] (last visited Apr. 16, 2024).
78. *Id.*
79. *Id.*
80. *Chapter 7: Transition*, WHITE & CASE, https://history.whitecase.com/chapter-7-transition [perma.cc/QW9X-4Y4P] (last visited Apr. 16, 2024).
81. *Id.*
82. *See White & Case LLP – The Inside View*, CHAMBERS, https://www.chambers-associate.com/white-case/true-picture/3672/1 [perma.cc/M84K-ZQEH] (last visited Apr. 18, 2024).

C. Teamwork Within Corporate Law Firms

As evident from the brief histories of large, corporate firms and White & Case, attorney methods of practice changed as the firms, corporate clients, and deals grew in size and magnitude. Throughout this growth, collaboration of lawyers in teams became commonplace, to the point that many in practice today believe that law should be considered a "team sport."[83] However, even those who believe that the law should be practiced in teams, also recognize the realities of the structure of law, including ethical standards and norms that seem to focus on solo work and do not adequately account for team dynamics.[84] Even if lawyers do much of their work individually at their own desk, there is no denying the increased need for lawyers to work in what have been called "task-sharing teams."[85] Ironically, the way that law firms promote their associates today seems to indicate the attorney's autonomy, masking the idea that while attorneys work in large firms, their work is not done individually, but in small teams that constantly communicate and work together to produce client deliverables.[86]

One reason that large, corporate firms require the use of teams is because of client demands. Thomas D. Morgan, a professor at The George Washington University Law School, has highlighted how today's lawyers are increasingly handling "project" work.[87] He posits that while clients could reach out to various smaller firms for the completion of such projects, the reality is that solo practitioners and smaller firms would likely be overwhelmed by the scope of corporate client demands, and larger firms can dole out pieces of that project—or share the task—with their colleagues within the firm.[88] The sheer size of large, corporate firms provides them with the benefit of organizing work so that it can be worked on at all hours of the day, sometimes within the United States and sometimes outside of its borders.[89] The global nature of firms today makes this possible and provides clients with high demands a reason to pay the exorbitant prices that these firms charge.[90] Despite the need for large lawyer teams, clients also favor the modern era ability to shop around at different law firms, or to use multiple law firms for different types of transactions or legal needs.[91] This seems to indicate

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83. Mark A. Cohen, *Law Is A Team Sport In The Digital Age*, FORBES (May 18, 2021, 8:16 AM), https://www.forbes.com/sites/markcohen1/2021/05/18/law-is-a-team-sport-in-the-digital-age/?sh=1de42730131e [perma.cc/7PZJ-CXVA].

84. *See id.*

85. Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 MINN. L. REV. 697, 699 (1988).

86. *See, e.g.*, *People*, CRAVATH, https://www.cravath.com/people/index.html [perma.cc/FF37-9SW3] (last visited Apr. 18, 2024); *Lawyers*, SULLIVAN CROMWELL, https://www.sullcrom.com/LawyerListing [perma.cc/48MA-WMJT] (last visited Apr. 18, 2024). Other examples exist, but in both of these law firms' websites, each attorney is listed with a short, personal bio that emphasizes their practice area and expertise, matters they have worked on, and awards they have received, making no mention of the teams that shared the task. *See also* Twitchell, *supra* note 85, at 708.

87. MORGAN, *supra* note 32, at 142.

88. *Id.*

89. *Id.* at 142–43.

90. *Id.*; Dan Roe, *Top Big Law Partners Are Earning More Than $2,400 Per Hour, as Rates Continue to Climb*, THE AMERICAN LAWYER (Jan. 10, 2024, 5:00 AM), https://www.law.com/americanlawyer/2024/01/10/top-restructuring-partners-are-earning-more-than-2400-per-hour-as-rates-continue-to-climb/ [perma.cc/V3ZP-2WCV].

91. MORGAN, *supra* note 32, at 143.

that while organizational clients value lawyer teams, lawyer teams and their firms must increasingly rely on marketing and other entrepreneurial efforts to maintain their business.[92]

So, what does teamwork look like for lawyers anyway? While a lawyer's work is often individual in nature (i.e., drafting memos, researching the law, redlining contracts, etc.), today's lawyers often work within their practice group and collaborate with lawyers of varying levels of responsibility, including junior associates, mid-level associates, senior associates, and partners. In fact, Mitt Regan, a professor at Georgetown Law, delineated the tasks typically involved in handling client matters depending on the attorney's experience level.[93] While attorney teams can vary, Regan emphasizes the hierarchical organization of the team, with a client relationship partner at the top, working along with other supervising and junior partners to assign the work to senior, mid-level, and junior associates.[94] Task-sharing in such teams helps to create economic efficiencies, but may create additional stress due to the requirement of processing the required information, dividing the work among the team's attorneys, and ensuring that the attorneys are at capacity.[95] However, it is the very splitting of the work into pieces for different attorneys to handle that creates increased pressure on the attorneys, especially in response to the hierarchical division of labor.[96]

II. ETHICAL ISSUES OF TEAMWORK IN THE LEGAL PROFESSION

Ethical challenges arise in all areas of legal practice. It is the nature of client-based work: Goals do not always purely align, and attorneys often have to juggle what the client wants, what the attorney wants, what the law permits, and what is right. It is not a simple task. However, place an attorney in a team, with a client made of legal fiction, and the troubles become more convoluted. Ethical implications arise because of the nature of this increasingly complex environment. Throughout this section, I will discuss the ethical implications arising in teamwork settings. I use the term "ethics" broadly, intending it not only to refer to the legal profession's ethical rules, which lawyers must obey, but also to refer to the discipline of ethics, or the study of what is good and bad and the duties and obligations arising therefrom.[97] I will first address the traditional model of legal ethics and the assumptions on which it is based. After discussing these ethical assumptions—and why they are incorrect—I will then discuss three main areas in which lawyer teams are implicated by ethical challenges: (1) the reduction of personal accountability, (2) the challenges of supervisory relationships and their impact on attorney psychology, and (3) the psychosociological implications of teamwork.

92. *Id.* at 146; REGAN & ROHRER, *supra* note 12, at 54–55.

93. Mitt Regan, *Working in a Law Firm: What You Need to Know* 19–20, https://www.law.georgetown.edu/wp-content/uploads/2020/11/Law-Firm-Economics-PPT-Nov-2020.pdf [perma.cc/RLG6-RVHF].

94. *Id.*

95. Twitchell, *supra* note 85, at 714–15.

96. *Id.* at 715.

97. *See Ethics*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/ethics [perma.cc/L8JD-VPV8].

A. The Assumptions of the Traditional Model of Legal Ethics

In a detailed analysis of ethical implications within the legal profession, David B. Wilkins asserts that the traditional model of legal ethics is based on assumptions about the role of lawyers and the nature of the client.[98] The assumptions about the lawyer are (1) individualism, (2) universalism, and (3) professionalism.[99] The assumptions about the client are (1) autonomy, (2) vulnerability, and (3) legalism.[100] The reason these assumptions are important to understand for the purposes of this Note is because in both the assumptions about the attorney and about the client, the responsibility of lawyer teams and of institutions, specifically corporate law firms, are not addressed, even though the falsity of the assumptions seems to indicate a need for something beyond mere individual responsibility. I will first address the assumptions about the lawyer's role, followed by the assumptions about the nature of the client.

1. Assumptions About the Lawyer

a. Individualism

"Individualism" is the assumption that almost all lawyers are solo practitioners, and that even when lawyers work within an organization, such as a firm or within a legal unit of a company, the lawyers are still individuals, "free from external review or supervision."[101] This view is reflected in the Model Rules of Professional Conduct (Model Rules), which are almost entirely focused on the individual attorney. This assumption fails to address lawyers that work in teams, especially as associates in large corporate firms, who are not independent from supervision.[102] Attorneys are frequently provided with performance reviews from their supervising attorneys, which have real consequences, including the possibility of layoffs.[103] Attorneys do not work in a vacuum,[104] and the majority of attorneys know this.[105]

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98. David B. Wilkins, *Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics*, *in* EVERYDAY PRACTICES AND TROUBLE CASES 68, 70–74 (Sarat et al. eds., 1998).

99. *Id.* at 71–72.

100. *Id.* at 72–74.

101. *Id.* at 71.

102. *See* Peter G. Glenn, *The Shared Responsibility for Effective Supervisory Relationships in Law Practice*, 47 J. LEGAL PROF. 123, 133–37 (2023).

103. *See* Justin Henry, *Associates' Performance Reviews Are Influenced by Market Conditions*, THE AMERICAN LAWYER (Nov. 3, 2022, 3:39 PM), https://www.law.com/americanlawyer/2022/11/03/associates-performance-reviews-are-influenced-by-market-conditions/ [perma.cc/VT26-XFUG]; Patrick Smith, *Goodwin, Citing Performance Reviews, Parts with Number of Associates*, THE AMERICAN LAWYER (Feb. 1, 2024, 4:46 PM), https://www.law.com/americanlawyer/2024/02/01/goodwin-citing-performance-reviews-parts-with-number-of-associates/ [perma.cc/58UQ-79XX].

104. Law firms have highlighted the need for attorneys to work in teams in light of the current highly competitive market. *See The Importance of Teamwork in a Modern Law Firm in 2022*, BRESSMAN LAW (Jan. 19, 2022), https://www.bressmanlaw.com/blog/importance-of-teamwork-in-modern-law-firm/ [perma.cc/DWC6-9BTM].

105. *See* Mark A. Cohen, *Law Is A Team Sport In The Digital Age*, FORBES (May 18, 2021, 8:16 AM), https://www.forbes.com/sites/markcohen1/2021/05/18/law-is-a-team-sport-in-the-digital-age/ [perma.cc/NTS4-BXT8].

b. Universalism

"Universalism" is the assumption that lawyers are interchangeable. The traditional model does little to distinguish between roles of lawyers, such as whether they perform transactional or litigation-based work.[106] However, Wilkins also notes the failure of the traditional model to account for gender, race, class, and other personal characteristics that make that attorney who they are.[107] In today's environment, where lawyer teams are heavily used, the need to account for gender, racial, and class diversity is important. While increased diversity in groups can lead to increased tensions, discomfort, and perceived conflict, diversity in groups also increases creativity and innovation, as well as improves financial success because it causes one's self-reflection of their own biases and assumptions while encouraging them to consider alternatives more fervently.[108] This is vitally important for corporate law firm attorneys to consider, especially in light of more recent surveys that indicate diversity in those firms is not reflective of society as a whole[109] (though this seems to be an issue for the legal profession generally).[110] Corporate law firm teams that lack diversity are more likely to succumb to groupthink than those that do not,[111] especially if the culture of the firm does not encourage ethical compliance or inclusion.[112] Therefore, this becomes an ethical issue because conformity can lead to stagnant thinking, or can lead to ethical lapses due to overlooking issues that may be obvious to members of different genders, racial groups, or socioeconomic classes.[113]

c. Professionalism

"Professionalism" is the assumption that those who practice law have skills and beliefs that set them apart from people who choose different occupations.[114] The idea here is that attorneys seek the public good, and their own personal gain is

106. Wilkins, *supra* note 98, at 71–72.

107. *Id.* at 72.

108. Katherine W. Phillips, *How Diversity Makes Us Smarter*, GREATER GOOD MAGAZINE (Sept. 18, 2017), https://greatergood.berkeley.edu/article/item/how_diversity_makes_us_smarter [perma.cc/YED2-UBDJ]; Marybeth Gasman, *Why We Need More African American Lawyers*, FORBES (Mar. 16, 2023, 1:57 PM), https://www.forbes.com/sites/marybethgasman/2023/03/16/why-we-need-more-african-american-lawyers/ [perma.cc/RS2N-ER4T].

109. *See* AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 1, 111 (2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf [perma.cc/KY3D-RQH9].

110. *Id.* at 34.

111. *See infra* Part II.B.3; Deborah Gilshan, *The Ethics of Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 3, 2021), https://corpgov.law.harvard.edu/2021/02/03/the-ethics-of-diversity/ [perma.cc/LVD8-J63U].

112. *See Can You Be Ethical if You're Not Inclusive?*, INST. OF BUS. ETHICS (Jan. 11, 2024), https://www.ibe.org.uk/resource/can-you-be-ethical-if-you-re-not-inclusive.html [perma.cc/YDE4-5X8S] (explaining how an organization's culture must be inclusive for diversity to fully mitigate bad decisions); *Corporate Culture*, ETHICAL SYSTEMS, https://www.ethicalsystems.org/corporate-culture [perma.cc/4ET4-SR9T]; *see also* William E. Mumley, *Organizational Culture and Ethical Decision-Making During Major Crises*, 12 J. VALUES-BASED LEADERSHIP, July 2019, at 85–86 (highlighting how organizational culture influences individual behavior).

113. *See* Gilshan, *supra* note 111 (discussing diversity's mitigation of groupthink); *Can You Be Ethical if You're Not Inclusive?*, INST. OF BUS. ETHICS (Jan. 11, 2024), https://www.ibe.org.uk/resource/can-you-be-ethical-if-you-re-not-inclusive.html [perma.cc/HZ3B-AJ35].

114. Wilkins, *supra* note 94, at 72.

a consequence of that goal.[115] However, critics have indicated that this argument is little more than an apologist's guise for self-interest.[116] This seems to be supported by attorneys' continued motivation to seek client goals in spite of the public interest.[117]

2. Assumptions About the Client

a. Autonomy

"Autonomy" is the assumption that clients are always autonomous individuals, meaning the client is a person, not an organization.[118] If the client is an organization, this assumption is to treat the organization, full of groups of individuals with differing preferences and goals, as a single entity, which reinforces the idea that the client is a single client.[119] In reality, when an organization is a client, there are typically multiple people within the organization who direct the work assigned to corporate law firms, and these individuals may have ideas or goals that conflict with each other.[120] The ABA Model Rule 1.13(a) takes a realistic approach in the matter, stating that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[121] However, even Rule 1.13 fails to address the full complexity of the situation, as many corporations or organizational clients may have or be subsidiaries to other entities. Lon Fuller, a prominent legal philosopher, discussed the complexities of polycentric tensions that arise during adjudication—though its application to organizational clients is poignant:

> We may visualize [a situation where the form of one object redefines the parties affected] by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered"—each crossing of strands is a distinct center for distributing tensions.[122]

An organizational client is like the center of a spiderweb. Each strand emanating from the center outwards is a stakeholder that bears some form of influence over the organization. There are subsidiaries, parent companies, directors, officers, and shareholders, each with their own ideas of successful management of the organization, and each with different goals. The removal or replacement of a director or officer affects the tensions of the other strands, changing the pattern of the web as a whole. The motivations change with each change in personnel. What complicates the issue further is that different corporate officers or directors for the

115. *Id.*
116. *Id.* at 82–83.
117. *Id.* at 83.
118. *Id.* at 73.
119. *Id.*
120. *Id.* at 83–84.
121. MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2024).
122. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978).

same organization may reach out to different attorneys on the same team within the same law firm. What we have today are client groups being represented by lawyer groups.[123] Therefore, despite the ABA's attempt at simplifying the rules surrounding organizational clients, the Model Rules fail to grasp the full complexity of the tensions inherent in that form of representation.

b. Vulnerability

"Vulnerability" is the assumption that clients require lawyers because the clients have no understanding of the law and are unable to determine their needs in light of current law.[124] Wilkins identifies three types of assumed client vulnerability: to the state (due to the law itself), the client themselves (due to their inability to assess their legal needs), and the attorney (whose services the client requires and does not understand).[125] Again, this assumption is divorced from reality in that the majority of corporate law firm clients are corporate organizations with sophisticated directors and officers who understand the legal environment that impacts their business, leading them to have increased bargaining power over the law firm and its teams of attorneys.[126] At least one scholar has noted the ethical danger of failing to recognize changes in client power.[127] Because large law firms are dependent on their clients' repeat business, the increase in client power, together with a more competitive legal market, creates a problem where partners responsible for the relationship must deliver or be replaced. The client is no longer as vulnerable as once assumed.

c. Legalism

"Legalism" is the assumption that clients want to maximize their interests to the full extent of the law.[128] Sophisticated clients of large law firms are often repeat players who use litigation not only to resolve immediate legal disputes, but also as a broader tool to obtain advantages in the business or political world.[129] Strict legal victories in court are not the only outcome that clients desire; instead, they may be more interested in swaying public opinion or influencing government officials.[130] Are the client's motivations shared with the large firm partner responsible for the client relationship? Does the partner share the client's motivations with the associates on his or her team? If not, there are ethical issues at play because associates may be working on outcomes that are not strictly legal in nature, but that may contradict their own moral compasses.

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123. John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825, 825 (1991–1992).

124. Wilkins, *supra* note 98, at 73.

125. *Id.*

126. *See* REGAN & ROHRER, *supra* note 12, at 52–53 (discussing how client bargaining power over law firms has increased since the 2008–09 recession, in part because of the increase of in-house counsel in corporate organizations, thus reducing any form of asymmetry in legal experience between client and attorney).

127. Wilkins, *supra* note 98, 85–86.

128. *Id.* at 73–74.

129. *Id.* at 86.

130. *Id.*

3. Why These Assumptions Matter

The three assumptions about the typical lawyer and client are essential to understanding why lawyer teams have specific ethical implications. The assumptions built into the model rules about the nature of the average attorney make ethical violations more likely because the model rules assume that attorneys are independent, have complete control over their work, and do not face significant pressure from institutions or supervisors, while, in fact, the opposite is true.[131]

Further, the lack of ethics rules that are specific to the realities of the attorney-client relationship of corporations and corporate law firms creates a gap that needs to be filled. If attorneys are working in teams for clients represented by a team of individuals, this needs to be reflected in the Model Rules.[132] The lack of ethics rules that govern the modern-day attorney-client relationship for corporate law firms makes the practice of law more ethically dangerous.

B. Ethical Challenges of Teamwork

As discussed in the prior section, assumptions regarding the current ethical environment in the legal profession mean that ethical rules do not fully address the reality of today's typical attorney. Working in a group setting has its own unique challenges. This section will focus on three broad issues that arise due to the attorney-team environment in corporate law firms. First, I will discuss the reduction of individual accountability that arises in group settings. Second, I will discuss the pressures arising from the hierarchy of attorney teams in law firms. Finally, I will address the psychosociological effects of groups that increase the likelihood of ethical violations at corporate law firms.

1. Reduction of Individual Accountability

In corporate law firms, there are typically large numbers of attorneys who are all working on a single matter. Who, then, is representing the client? Is it the attorney handling tax matters in New York City, or is it the attorney handling the drafting of a partnership agreement in Los Angeles? Is the attorney who communicates with the client the sole representative? Or is representation split evenly among every attorney working on the matter? It is easy to see that individual accountability for a given matter in a complex corporate case becomes nuanced, and it leaves one wondering if the Model Rules are sufficient to manage the attorney-client relationship in the context of corporate law.

The Model Rules do attempt to ensure attorneys feel individually accountable for the ethical implications of their work, such as through the implementation of Model Rule 5.2(a) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person").[133] This rule is intended to prevent a subordinate lawyer from blaming a supervising attorney; but it could also be applied to any lawyer within a team acting at the request of a colleague or peer, simply because the colleague has different information because they are working on a different part of the client matter. However, the

131. *See* MODEL RULES OF PRO. CONDUCT rr. 1.13, 5.1, 5.2 (AM. BAR ASS'N 2024).
132. *See infra* Part II.B.1.
133. MODEL RULES OF PRO. CONDUCT r. 5.2 (AM. BAR ASS'N 2024).

reduction in individual accountability does not only come from a specific gap in the ethics rules. It also comes from the nature of the work at large, corporate firms. Attorneys work in teams and use other attorneys throughout the firm to aid in a matter. However, if one of the attorneys on the team makes a mistake that violates ethical rules, precedent exists indicating that there is a non-zero chance that no attorney on the team would be subject to disciplinary action.[134]

Individual accountability for each attorney helping with the matter is important, and members of a team should each individually bear the responsibility of honesty and integrity in helping their client achieve their goals. When institutional clients require law firms' aid, they typically look to individual attorneys with whom they have a relationship.[135] The attorney in charge of the relationship then takes advantage of firm resources to meet the client's needs. This includes leveraging associates from various practice groups, offices, and experience levels. Because of this reality, and despite clients hiring attorneys based on longstanding relationships,[136] it is difficult to say that a corporation is in fact hiring a single attorney. Instead, even though the relationship is managed by a single attorney at the firm, clients are essentially hiring the law firm to handle the matter, to allow the attorneys within the firm to complete the task, no matter how many attorneys must touch it to complete it. To argue that the institutional clients are unaware of the resources available to firms, and which they expect the firm attorney to leverage, is no longer viable given modern-day client sophistication.[137] Therefore, what is lacking in the current corporate legal scheme is not so much individual accountability, as the Model Rules define the expectations for individual attorneys, but it is the lack of institutional accountability. This point is even more salient when considering the fact that ethical rules are not only to protect clients, but also third parties and the general public.[138] Perhaps it is time for an additional Model Rule that places ethical responsibility and accountability upon the law firm, in addition to those placed on the attorney. When organizational clients hire an attorney, who then uses the resources of the firm through a team-based model, individual accountability is good, but it does not fully address the problem.

2. Supervisory Relationships

The Model Rules currently account for issues regarding supervisory and subordinate relationships among lawyers.[139] Despite the requirements that supervisors perform reasonable actions to ensure subordinates' compliance with the

134. *See* Ted Schneyer, *Professional Discipline for Law Firms*, 77 CORNELL L. REV. 1, 1–2 (1991–1992).

135. *See* Mark Herrmann, *Inside Straight: Hiring Law Firms or Lawyers?*, ABOVE THE LAW (Apr. 21, 2011, 11:18 AM) https://abovethelaw.com/2011/04/inside-straight-hiring-law-firms-or-lawyers [perma.cc/F4ZZ-EDDZ]; Frank Michael D'Amore, *Do Clients Hire Based on the Lawyers or Law Firms?*, THE LEGAL INTELLIGENCER (June 16, 2014, 12:00 AM), https://www.law.com/thelegalintelligencer/almID/1202659359519/ [perma.cc/78JX-QVLK].

136. John C. Coates, Michele DeStefano, Ashish Nanda & David B. Wilkins, *Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market*, 36 LAW & SOC. INQUIRY 999, 1015 (2011).

137. *Id.* at 1028–29.

138. *See, e.g.*, MODEL RULES OF PRO. CONDUCT rr. 4.1–4.4 (AM. BAR ASS'N 2024).

139. *See* MODEL RULES OF PRO. CONDUCT rr. 5.1, 5.2 (AM. BAR ASS'N 2024).

Model Rules[140] and that attorneys be held individually accountable for violations of the Model Rules, even if under direction from another,[141] the Model Rules do not consider the social pressure that arises from bad management in a highly hierarchical environment. In team environments, lawyers often feel the intense pressure to make the right decisions for their own individual workload, and may feel hesitant to discuss difficult situations with their team, especially a superior.[142] Various attorneys have shared nightmare scenarios in which they feel hesitant to discuss issues with the partner in charge of the matter on which they are staffed because of the potential verbal abuse.[143]

Even in situations void of toxicity or verbal abuse, the context surrounding attorney decision-making is relevant. Attorneys are not unintelligent people who cannot understand the consequences of violating the ethical rules. However, intelligence is not a bulwark of unethical obedience, and scholars have pointed to certain contextual factors as indicative of the likelihood to obey unethical orders. In 1974, Stanley Milgram performed a study to answer the question of when people will ignore their consciences to obey unethical orders from authority figures.[144] In that study were three roles: the experimenter, the teacher, and the learner.[145] The experimenter and the learner were the administers of the experiment.[146] The test subject was the teacher, who was instructed to apply shocks to the learner (who was not actually shocked, but acted as if they were) at the request of the experimenter when the learner incorrectly answered a question.[147] The experimenter requested the teacher to gradually increase the power of the shocks as the learner continued to answer incorrectly.[148] Milgram found that 65% of the teacher subjects continued to apply the shocks up until the max voltage at the request of the experimenter, despite the learner's repeated requests to quit the experiment, screams of pain, and eventual silence (indicating unconsciousness).[149] The study was replicated and results were similar among different genders, socioeconomic strata, and countries of origin.[150]

Andrew M. Perlman, a scholar of legal ethics and professional responsibility, concluded that the Milgram study, as well as the Asch and Sherif studies discussed in Part II.B.3 *infra*, all indicate the important role of context in wrongful obedience

140. MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 2024).
141. MODEL RULES OF PRO. CONDUCT r. 5.2 (AM. BAR ASS'N 2024).
142. Twitchell, *supra* note 85, at 759.
143. Andrea M. Alonso & Kevin G. Faley, *The Law Firm Culture of Abuse*, 84 A.B.A. J. 116 (1998); Kathryn Rubino, *The Screaming in Law Firms Needs to End*, ABOVE THE LAW (May 31, 2018, 6:32 PM), https://abovethelaw.com/2018/05/the-screaming-in-law-firms-needs-to-end/ [perma.cc/LY9Y-X7CH].
144. *See* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 1–3 (1974).
145. *See id.* at 3–5.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 60.
150. *Id.* at 5, 62–63, 170–71.

and conformity.[151] Perlman identified various contextual factors from the Milgram study that increased wrongful obedience, including:

> (1) the existence of a plausible legitimate reason for the wrongful conduct . . . ; (2) the use of positive language to describe the negative behavior . . . ; (3) the presentation of rules that, on their face, seem benign . . . ; (4) the creation of some kind of verbal or contractual obligation to help . . . ; (5) the assignment of specific roles . . . ; (6) the physical separation of the person carrying out the orders and the victim . . . ; (7) the close proximity of the person issuing the orders and the person following them . . . ; (8) the blurring of responsibility or the assignment of responsibility to someone else . . . ; (9) the incremental nature of the experiment . . . ; (10) the social prestige of the setting . . . ; and (11) the elimination of dissent.[152]

In large corporate firm teams, each of these factors may appear in practice, making wrongful obedience more likely.[153] For example, factors one and two are easily met by a partner assigning work to a junior associate with a clarification that it is for the client's benefit. Factors four and five could be easily met in a team environment where a partner assigns multiple associates specific parts (roles) of a project and they each agree to complete the work in front of the whole team. If the work is ethical, this is a nonissue. But if the assigned work violates ethical rules, then wrongful obedience is more likely to occur. As a last example, factors eight and eleven would easily be met in a teamwork environment. If a group of attorneys is working on a single project, in the junior members' eyes the responsibility for that project may seem to fall on the most senior attorney present who is leading the team, whereas the more senior attorneys could view the more junior members as responsible because they actually complete the work. Such blurring of responsibility is enough to induce wrongful obedience by junior associates. However, if you add in senior attorneys' refusal to hear dissent from junior members, the likelihood of wrongful obedience would potentially increase as there would be no way for a junior attorney to voice doubts about the project.

Additional context that greatly impacts the likelihood of unethical or wrongful subordinate obedience is the attorney's level of experience. Attorneys fresh out of law school may exhibit a greater mastery of attorney ethical obligations, but they are ignorant of the application of these obligations.[154] New attorneys may look to other attorneys on how to act, rather than to the Model Rules; or, they may fall prey to "pluralistic ignorance," which is when the attorney comes to the conclusion that nothing is the matter because senior attorneys appear unbothered.[155] New attorneys also experience increased pressure from senior attorneys because they receive work assignments and evaluations from senior attorneys in the firm, not from their

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151. *See generally* Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451 (2007) (explaining how social psychology may help explain why lawyers with good intentions may fail to act ethically).

152. *Id.* at 462–63.

153. *See id.* at 463–69 (providing specific examples from attorney practice).

154. Catherine Gage O'Grady, *Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Professional Perspective*, 15 NEV. L.J. 671, 680 (2015).

155. *See id.* at 681–82; *see also* Donald C. Langevoort, *Where Were the Lawyers?: A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 105–06 (1993).

clients.[156] Accordingly, their success at the firm is highly dependent on their superiors.[157] These ideas may cause a new attorney to feel more like a common everyday employee, not an autonomous attorney.[158] New associates experience a higher level of vulnerability, and therefore increased pressure to wrongfully obey. However, it is unlikely that new attorneys have intent to wrongfully obey; rather, it is the contextual pressure that causes them to make ethical lapses, often small at first, but gradually getting more and more serious as they become more comfortable with the ethical environments in which they work.[159]

Despite these contextual pressures, assigning partners may mitigate the ethical risks inherent in supervisory and subordinate relationships through their communications with associates. While not a complete shield against ethical violations, partners' awareness that their descriptions of assignments to associates are prime opportunities for miscommunication can reduce ethical violations.[160] In large part, this is because the partner not only has years of experience, but also a firm grasp on the client's request, whereas the associate may be new, nervous, or aware of the power imbalance between her and the partner.[161] The partner can reduce misunderstandings by providing the associate with the "big picture" of the assignment at hand, including the task, the necessary work product, the resources available to the associate, the deadlines involved, budget restrictions, and the context of the client's representation.[162] This is vital for situations in which the associate will be working in a team, as the process increases the associate's engagement and connection to the project, as well as autonomy overall.[163] This is one area where law firms could provide guidance to partners to ensure proper communication and leadership skills are used.

In an ideal world, contextual factors, such as toxic culture, verbal abuse, Perlman's factors, level of experience, "pluralistic ignorance," or partners' inadequate leadership skills would not increase the likelihood of an associate's wrongful obedience. But in a world where context can significantly alter the likelihood of a person's choice,[164] it is no surprise that when placed in hierarchical and high-stress environments, people make mistakes and fail to speak-up about supervisors' unethical practices because of their own perceived lack of responsibility.[165] Therefore, despite attorneys' assumed autonomy in large firms,[166]

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156. O'Grady, *supra* note 154, at 680.

157. *Id.*

158. *Id.* at 683; *see also* text accompanying notes 94–98.

159. *See* O'Grady, *supra* note 154, at 675, 678–79; Perlman, *supra* note 151, at 467 (quoting David Luban's commentary on the Milgram experiment); David J. Luban, *The Ethics of Wrongful Obedience*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 103 (Deborah L. Rhode ed., 2000) (explaining how people become ethically numb through gradual and subtle ethical lapses).

160. Peter G. Glenn, *The Shared Responsibility for Effective Supervisory Relationships in Law Practice*, 47 J. LEGAL PROF. 123, 154 (2023).

161. *Id.*

162. *Id.* at 155–56 (citing Liz Ryan Cole & Leah Wortham, *Learning from Supervision*, LEARNING FROM PRACTICE, A TEXT FOR EXPERIENTIAL LEGAL EDUCATION 36–41 (Leah Wortham et al. eds., 3d ed. 2016)).

163. *Id.* at 159.

164. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: THE FINAL EDITION 3–5 (2021).

165. Twitchell, *supra* note 85, at 761.

166. *See supra* Part II.A.

lawyers who work in hierarchical teams are more likely to be overly subservient to supervisors if those supervisors create a culture that punishes openness.[167] Therefore, since law firms create the context in which associates are pressured to violate ethical rules through the structuring of hierarchical, team-based practice, it stands to reason that law firms should also bear a non-zero amount of responsibility for those ethical violations.

3. Psychosociological Considerations

In addition to the ethical issues arising directly from the current Model Rules as described above, there are additional considerations that are completely absent from the Model Rules that affect how an attorney acts within team environments. These considerations arise from human psychological and sociological errors and fallacies that appear during teamwork in general, but which may be exacerbated in the adversarial and partisan nature of law firm practice, as well as from the institutional organization of large law firms.

a. Groupthink

Groupthink is defined as "a pattern of thought characterized by self-deception, forced manufacture of consent, and conformity to group values and ethics."[168] However, Irving Janis, a Yale University psychologist who coined the term, described groupthink as "a deterioration of mental efficiency, reality testing, and moral judgment that results from in-group pressures."[169] Prior to the coinage of the term "groupthink," Solomon Asch found that conformity within groups increases with each additional person until around seven people, after which no significant increase in conformity occurs.[170] Further, Muzafer Sherif found that conformity within groups increases with ambiguity, an observation that is particularly relevant to many legal environments where black and white answers are few and far between.[171] Sherif's research seems to support Janis's findings on groupthink, which asserted that people who consistently work in teams together develop "informal norms to preserve friendly intragroup relations."[172] Janis found that there were eight general symptoms of groupthink that fell under three main types, or categories:[173]

Type I: Overestimations of the group—its power and morality

(1) An illusion of invulnerability, shared by most or all the members, which creates excessive optimism and encourages taking extreme risks.

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167. *See generally* Luban, *supra* note 159.

168. *Groupthink*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/groupthink [perma.cc/S2VT-Z6ED] (last visited April 16, 2025).

169. IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 9 (2nd ed. 1982).

170. Perlman, *supra* note 151, at 453–55.

171. *Id.* at 455–56.

172. JANIS, *supra* note 169, at 7.

173. *Id.* at 174.

(2) An unquestioned belief in the group's inherent morality, inclining the members to ignore the ethical or moral consequences of their decisions.

Type II: Closed-mindedness

(3) Collective efforts to rationalize in order to discount warnings or other information that might lead the members to reconsider their assumptions before they recommit themselves to their past policy decisions.

(4) Stereotyped views of enemy leaders as too evil to warrant genuine attempts to negotiate, or as too weak and stupid to counter whatever risky attempts are made to defeat their purposes.

Type III: Pressures toward uniformity

(5) Self-censorship of deviations from the apparent group consensus, reflecting each member's inclination to minimize to himself the importance of his doubts and counterarguments.

(6) A shared illusion of unanimity concerning judgments conforming to the majority view (partly resulting from self-censorship of deviations, augmented by the false assumption that silence means consent).

(7) Direct pressure on any member who expresses strong arguments against any of the group's stereotypes, illusions, or commitments, making clear that this type of dissent is contrary to what is expected of all loyal members.

(8) The emergence of self-appointed mindguards—members who protect the group from adverse information that might shatter their shared complacency about the effectiveness and morality of their decisions.[174]

Clearly, a single lawyer team within a large, corporate firm would likely not be subject to all eight of these symptoms at any given time. However, anyone that has been involved in a group that works together repeatedly for long periods of time would likely find at least a few of these symptoms to be familiar. These symptoms are especially exacerbated when the attorney's client is in a favorable position, as it prevents the attorney from seeing the possibility of defeat. Many of these symptoms, especially those of closed-mindedness and pressure towards uniformity (Types II and III) are more likely to occur in environments where the leader of the group facilitates a culture where mistakes, discussion of weakness, and other topics around vulnerability are discouraged.[175]

So, why discuss groupthink at all in an article about lawyer ethics? Because despite attempts at creating ethical environments, the Model Rules do not account for the social pressures that arise in practice and groupthink creates a dangerous ethical environment. Take, for example, an individual driving down a freeway in a

174. *Id.* at 174–75.

175. BRENÉ BROWN, DARING GREATLY: HOW THE COURAGE TO BE VULNERABLE TRANSFORMS THE WAY WE LIVE, LOVE, PARENT, AND LEAD 194–200 (2012).

car. They are alone, yet surrounded by other drivers. If the driver only relies on the actions of the others around them to motivate their decision-making, they increase their likelihood of a car crash or some other hazard. Their lack of attention to traffic signals, warning signs, and other notices prevents them from making advance decisions to avoid the hazards. Their lack of attention then influences the other drivers around them if they slam on their brakes last minute, swerve, or even crash into others. Similarly, individuals in lawyer teams that are not conscious of groupthink, who only pay attention to the others in their team and base their reactions and decisions in response to their actions, increase the likelihood of collision with ethical hazards. Awareness of the possibility of ethical violations reduces the risk of the occurrence of violations.[176] However, if one does recognize symptoms of groupthink, what can be done?

Other researchers, including Cass Sunstein and Reid Hastie, provide us with solutions. In their research, Sunstein and Hastie have found that when individuals within groups make mistakes, groups suffering from groupthink tend not to correct the mistakes, but instead *amplify* those mistakes.[177] For corporate law firms, where teamwork is spread out geographically and where a single firm has its own culture that can affect the viewpoints of individuals, simple miscommunications can be compounded into large mistakes. Granted, these may not be mistakes in ethics, but the very fact that attorneys must rely on each other, supervise each other, and deal with clients from various viewpoints indicates a need to reduce groupthink so that teams are better able to make ethical decisions. Sunstein and Hastie recommend eight approaches to reduce groupthink in teams: (1) inquisitive and self-silencing leaders,[178] (2) "priming" critical thinking,[179] (3) rewarding group success,[180] (4) role

176. *See* THALER & SUNSTEIN, *supra* note 164, at 30–31.

177. CASS R. SUNSTEIN & REID HASTIE, WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER 2 (2015).

178. People with higher social status, including leaders, are more likely to freely share their opinions and less likely to silence themselves, partly because they are more likely to think that their information is worth sharing. To prevent groupthink, leaders can learn to listen, purposely inform their subordinates of their willingness to hear unique viewpoints and opinions, and refrain from stating firm views early on in deliberations. *Id.* at 105–07.

179. Priming critical thinking refers to the triggering of a specific notion to influence people's behaviors. In groups, leaders are the typical candidates who have the power to prime their subordinates' behavior. To prevent groupthink, leaders can prime the group to favor information disclosure and to be open to disagreeable views. Contrarily, priming groups to prioritize "getting along" over "critical thinking" increase groupthink and prevent good outcomes. *Id.* at 107–09.

180. Rewarding people for the group's success prevents groupthink by incentivizing individuals to share what they know, rather than toe the party line. When individuals seek their own success above the group's success, group errors become more prevalent. Methods to promote group success include social norms, as well as material rewards. *Id.* at 109–11.

assignment,[181] (5) perspective changing,[182] (6) devil's advocates,[183] (7) red teams,[184] and (8) the Delphi method.[185] Each of these approaches are meant to prevent groupthink by increasing information sharing, mitigating self-silencing, and promoting critical thinking. While team decision-making is certainly an area where groupthink may arise, Sunstein and Hastie's solutions seem to hint that the main driving factor behind groupthink is the culture of the group. If leaders of groups foster a culture where dissent and discussion are prized instead of demonized, individual team members are much more likely to pinpoint and raise even the smallest of ethical issues, thus mitigating the ethical risks inherent in team-based work.

b. Unconscious Biases, Moral Reasoning & Partisanship

While groupthink occurs because of group dynamics and their impact on the individual within a team, there are also unconscious cognitive processes that create heuristics and biases within law practice that impact the individual, which then impacts their teams.[186] Andrew Perlman has posited that the attorney's role as partisan distorts their perceptions of reality and reduces the attorney's ability to objectively reason.[187] In *A Behavioral Theory of Legal Ethics*, Perlman refers to Daniel Kahneman's *Thinking, Fast and Slow*, in which Kahneman discusses System 1 and System 2 thinking. System 1 thinking "operates automatically and quickly, with little or no effort and no sense of voluntary control."[188] System 2 thinking, on the other hand, "allocates attention to the effortful mental activities that demand it . . . . The

181. When individuals in groups know that the other members have relevant information to contribute, or if they know the other group members are experts in their area, people are more likely to speak up and listen to each other, leading to better decisions. When people in a group know the other members have a specific role and a reason to be included, avoidance of groupthink is easily attainable. *Id.* at 111–13.

182. Changing one's perspective, or roleplaying, allows an individual in a group to think more clearly. If a group is in the middle of a downward trend in productivity, or if it is failing to meet goals, thinking about what a new leader would do in their situation could be enough to counteract the groupthink that led them to the current situation. In other words, placing oneself in another's shoes could be enough to think outside the group norms and counteract groupthink. *Id.* at 114–15.

183. As previously indicated, self-silencing or ignorance of roles can lead to groupthink. Devil's advocacy creates an environment where one is assigned to take a contrary position. This helps counteract any cultures where speaking against consensus or the dominant position. However, devil's advocacy is often discounted by other group members if they have knowledge that the person taking on the role is insincere or merely going through the motions. Devil's advocacy is effective only when the dissenter genuinely believes what they are saying, and the others in the group are aware of that belief. *Id.* at 115–18.

184. Similar to devil's advocacy, "red teams" are groups appointed to either "play an adversary role" enlisted to defeat the opposing team in a simulation or "to construct the strongest case against a proposal[]." Since teams are involved, costs are likely to play an important factor in determining the possibility of red teams. *Id.* at 118–19.

185. The Delphi Method is akin to a secret ballot system which employs a social averaging process. Essentially, it begins with an anonymous vote of each individual's opinions, followed by a discussion of the votes, followed by a second anonymous vote. This method mitigates social pressures and increases information sharing by preventing self-silencing. The "estimate-talk-estimate" process increases a group's success. *Id.* at 120–23.

186. *See* Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639, 1656 (2015).

187. *Id.* at 1647.

188. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20 (2011).

operations of System 2 are often associated with the subjective experience of agency, choice, and concentration."[189] System 1 thinking is typically the area associated with heuristics, or mental shortcuts.[190] It is a highly efficient and useful method of thinking.[191] However, it is also the source of biases that, if unchecked, can lead attorneys to improperly reason and make poor decisions.[192] Perlman, expounds on Kahneman's assertions, discussing how unconscious biases and heuristics lead to "mistakes of judgment."[193] These biases lead us to act inconsistently with the idea that humans are rational actors.[194] In fact, Jonathan Haidt, a professor of business ethics and moral psychology, has indicated that intuitive reasoning (part of Kahneman's System 1) and judgment occur prior to logical reasoning.[195] These unconscious biases and heuristics are exacerbated in partisan situations, which includes all lawyers in large law firms—a side effect of law firms being engaged in a client-service model.[196] Lawyer teams are involved in partisan efforts. Whether in a litigation or transactional group, the end goal is to "maximize the likelihood that the client's objective will be attained."[197] Because of this aspect of their role, they are likely to be subject to unconscious distortions of judgment and reasoning.[198] Part of the reason this is particularly worrisome for attorneys is because they (1) are required to take partisan positions for their clients and (2) they view themselves as objective.[199] At least one scholar has indicated that

189. *Id.* at 21.
190. *Id.* at 105.
191. *Id.*
192. *Id.*
193. Perlman, *supra* note 186, at 1649.
194. *Id.* at 1650–51.
195. *See* JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 54–55 (2012); *see also* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001); Jonathan Haidt, *The Emotional Dog Gets Mistaken for a Possum*, 8 REV. GEN. PSYCHOL. 283 (2004); Jonathan Haidt & Fredrik Bjorklund, *Social Intuitionists Answer Six Questions about Moral Psychology*, 3 MORAL PSYCHOLOGY (Walter Sinnott-Armstrong ed., forthcoming) (Feb. 5, 2006 manuscript on file with author); Jonathan Haidt & Craig Joseph, Intuitive Ethics: How Innately Prepared Intuitions Generate Culturally Variable Virtues, DAEDALUS, Fall 2004, at 55. Other scholars agree. *See, e.g.*, Ann E. Tensbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223 (2004); Milton C. Regan Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941 (2007).
196. Perlman, *supra* note 186, at 1655 (discussing how partisanship can distort "professionals' perceptions and judgments"). The idea that attorneys' partisanship may increase ethical violations, including wrongful obedience, has been explored by other scholars as well. *See* Cassandra Burke Robertson, *Judgment Identity and Independence*, 42 CONN. L. REV. 1, 6–12 (2009) (explaining how partisanship impacts lawyers' view of reality and, therefore, their ability to accurately judge a situation); Leigh Thompson, *"They Saw a Negotiation": Partisanship and Involvement*, 68 J. PERSONALITY & SOC. PSYCHOL. 839, 840–41 (1995) (explaining how individuals with partisan perspectives see information hostile to their point of view as biased or unreliable); Langevoort, *supra* note 155, at 101–05 (describing how egocentric (i.e., partisan) viewpoints leads to biased decision making).
197. David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004 (1990).
198. Perlman, *supra* note 186, at 1656.
199. *Id.*

attorneys' high evaluation of their own ethicality and objectivity actually hinders their ability to be objective or to correctly analyze information.[200]

Despite these biases, there are methods to prevent biased decision-making. For example, Perlman discusses the idea of a law firm creating processes mandating its own attorneys to perform periodic audits of lawyer teams.[201] The lawyer-auditor could discuss with that team any ethical issues that arose in that team's representation of a client.[202] This auditor could also provide an outside perspective that the members of the team could implement to avoid groupthink.[203] Perlman discusses this concept with the assumption that the law firm would be disciplined by "public reprimands or monetary sanctions."[204] However, if the lawyer-auditors came from within the firm, there would be an incentive not to disclose any negative results from that internal audit. Perhaps a more reasonable or sound approach would be to implement something akin to the accounting field. For many large corporations and businesses, internal audits are performed by outside auditors from accounting firms.[205] To implement the same practice for law firms, there would need to be an external lawyer-auditor that would enter the firm and perform the audit. This would prevent any incentives for the firm to hide their results. However, law firm discipline is a solution for many of the ethical gaps discusses in this Note and will be addressed in Part III.

Finally, a key method to prevent unconscious biases can be as simple as creating infrastructure within a firm that, like an aviator's checklist prior to flight, encourages the attorney teams to consider opposing points of view to induce objectivity. It is easy to not view things from an opposing viewpoint when attorneys are encouraged to empathize with their client, but empathy is the key to overcoming such a shortfall by also empathizing with the opposing side.[206] Attorneys must maintain a level of empathy for all parties involved to avoid the pressures of uniformity.

c. Ethical Infrastructure

In *Professional Discipline for Law Firms*, Ted Schneyer coined the term "ethical infrastructure" to refer to a "law firm's organization, policies, and operating procedures."[207] Schneyer proposed that due to the complex nature of law firm infrastructure, the firms have "at least as much to do with causing and avoiding unjustified harm as do the individual values and practical skills of their lawyers."[208] The difficulty in assigning responsibility in such cases is because the "locus of

200. *See* Jonathon R. B. Halbesleben, M. Ronald Buckley & Nicole D. Sauer, *The Role of Pluralistic Ignorance in Perceptions of Unethical Behavior: An Investigation of Attorneys' and Students' Perceptions of Ethical Behavior*, 14 ETHICS & BEHAV. 17, 25 (2004).

201. Perlman, *supra* note 186, at 1665.

202. *Id.*

203. *Id.* at 1665–66.

204. *Id.* at 1665.

205. *Audit*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/accounting/audit/ [perma.cc/42DC-SBN9] (last visited Dec. 4, 2024).

206. *See* Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1, 17–18 (2008).

207. Schneyer, *supra* note 134, at 10.

208. *Id.*

individual responsibility seems . . . unclear."[209] When groups of individuals are involved in making decisions, it is difficult to assign responsibility to only one of them.[210] For example, Kirkland & Ellis represented two conflicting clients because the individuals responsible for the clients were in separate branches and the firm did not have an "adequate mechanism for identifying conflicts."[211] When groups of lawyers are working simultaneously in various geographic locations, the lack of ethical infrastructure has a direct effect on the firm's ability to adequately protect against ethical mistakes. Ethical infrastructure is therefore incredibly important in preventing ethical lapses at large firms.

This seems to be supported by literature surrounding how human beings' choices can be influenced by their environments. For example, in their 2021 book *Nudge: The Final Edition*, Richard Thaler and Cass Sunstein discussed how small changes to environment can change what individuals do.[212] Thaler and Sunstein discuss how "nudges," or anything within "choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives," are powerful options to influence behavior.[213] A simple example of a nudge includes grocery stores' placement of healthy food at eye level so people are more likely to purchase it, as opposed to outright banning junk food.[214] While focused more on consumer choices, the lesson still applies to law firms. By redesigning choice architecture in the ethical setting, law firms can alter attorney behavior to become more ethical.[215] For example, taking the Kirkland & Ellis example from above, many law firms today are using legal software to identify conflicts at increasingly fast speeds, making the conflict-check process easy for attorneys.[216] If a task is more complex to perform or if a decision is more difficult to make, then choice architecture has a much higher level of influence on those choices.[217] Where there are more complex tasks or difficult decisions and no choice architecture, people make efforts to strategically simplify, which may include eliminating behavioral options, which could lead to ethical shortcuts in corporate firm team settings.[218] Due to large law firms' complex infrastructure, constructing choice architecture to make choices easier for individuals, such as through the simplification of conflicts checks, is key to preventing ethical violations.[219] For example, in preventing the over-billing of a single client, law firms could make use of software that prompts attorneys with reminders to track their time so that the attorneys do not over-record their hours, similar to how Gmail has instituted software nudges to remind users to respond to emails to which they have not

209. *Id.*
210. *Id.* at 10–11.
211. *Id.* at 2, 10.
212. *See* THALER & SUNSTEIN, *supra* note 164, at 8.
213. *Id.*
214. *Id.*
215. *See id.* at 121.
216. *The New Era of Conflict Checks for Law Firms*, LEXOLOGY, https://www.lexology.com/library/detail.aspx?g=f0328de2-13dc-4f25-8659-98fc5cbd18cf [perma.cc/Q92X-3JVA] (last visited Apr. 30, 2024).
217. THALER & SUNSTEIN, *supra* note 164, at 122.
218. *See id.*
219. *See id.*

responded.[220] Certainly, one could argue that introducing nudges like this is paternalistic,[221] but, as Schneyer points out, increasing the ethical infrastructure of a law firm could improve attorney lives and attract new clients.[222]

A real-life example of building up ethical infrastructures within law firms includes the regulation of incorporated legal practices (ILPs) in Australia.[223] ILPs are publicly-traded law firms and they first began operating in 2007.[224] ILPs are regulated by the Legal Protection Act (LPA), which requires the ILPs to implement and maintain "appropriate management systems (AMS).[225] The LPA does not provide a definition of AMS, however, the Office of Legal Services Commissioner (OLSC) issued guidance about ten specific areas which a firm's AMS should monitor, including topics such as communications, conflicts, and negligence.[226] The OLSC also worked with ILPs in completing self-assessments to evaluate the ILP's policies and management systems.[227] Since the self-assessment forms helped educate the ILPs on where they could improve, the process became known as "education toward compliance."[228] Incorporating language from Thaler and Sunstein, Susan Fortney found that the self-assessment process nudged ILPs to continuously revise and reform their processes to improve upon the ethical infrastructures.[229] This is what Schneyer calls a "proactive, management-based regulation" (PMBR).[230] However, Schneyer also discusses how it is not only "management-based," but it is "firm-based" as well because it requires firms to "designate one or more lawyer-managers to take . . . responsibility for their firm's 'ethical infrastructure.'"[231] PMBRs would also require "proactive collaboration" between firms and regulators.[232] Since Australia's successful implementation of PMBR programs in connection with ILPs, two states, Colorado and Illinois, have implemented PMBR programs. Colorado's was implemented in 2015 as a voluntary measure, whereas Illinois implemented a mandatory system in 2017.[233] In 2019, the ABA's House of Delegates adopted a resolution urging all state supreme courts to "study and adopt" PMBR programs.[234] In that resolution, the ABA discussed how

220. *Gmail Will Now Remind You to Respond*, GOOGLE WORKSPACE UPDATES, https://gsuiteupdates.googleblog.com/2018/05/gmail-remind-respond.html [perma.cc/9U7X-8ELT] (last visited Apr. 30, 2024).

221. *See* Glen Whitman, *The Rise of the New Paternalism*, CATO UNBOUND, https://www.cato-unbound.org/2010/04/05/glen-whitman/rise-new-paternalism [perma.cc/4UDK-7VKA] (last visited Apr. 30, 2024).

222. *See* Schneyer, *supra* note 134, at 12–13.

223. Susan Saab Fortney, *Keeping Lawyers' Houses Clean: Global Innovations to Advance Public Protection and the Integrity of the Legal Profession*, 33 GEO. J. LEGAL ETHICS 891, 895–96 (2020).

224. *Id.* at 895.

225. *Id.* at 896.

226. *Id.* n. 28.

227. *Id.* at 897.

228. *Id.*

229. *Id.* at 898.

230. Ted Schneyer, *On Further Reflection: How Professional Self-Regulation Should Promote Compliance with Broad Ethical Duties of Law Firms Management*, 53 ARIZ. L. REV. 577, 584 (2011).

231. *Id.* at 584–85.

232. *Id.* at 586.

233. Fortney, *supra* note 223, at 905–07.

234. *2019 ABA Resolution 107*, AM. BAR ASS'N, available at https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/107-annual-2019.pdf [perma.cc/HA2B-D8EQ] (last visited Apr. 30, 2024).

the current schema for regulating attorney ethics is complaint-driven, rather than preventative, and that preventing problems is superior to post-violation discipline.[235] The ABA also indicated that PMBR programs help further ABA Model Regulatory Objectives, including, but not limited to, "protecting the public" and "providing transparency about the nature and scope of legal services to be provided."[236] While the current regulatory environment in most United States jurisdictions do not mandate PMBR programs, it is nonetheless hopeful that this resolution by the ABA will encourage state bar associations to implement them in the future. This will help to create strong ethical infrastructures that prevent lawyer teams from engaging in unethical behavior, whether unintentionally or not.

III. EDUCATION TOWARDS COMPLIANCE: PMBR PROGRAMS AS A SOLUTION TO THE ETHICAL RISKS OF LAWYER TEAMS

Since the reality of legal practice in large firms today revolves around a group of attorneys aiding an organizational entity with a group of representatives, only requiring individual responsibility and accountability is insufficient in mitigating ethical lapses; more is required. Team dynamics inherently and subconsciously minimize individual responsibility.[237] Further, as described above, law firms have such complex infrastructures that are often difficult for any individual attorney to navigate. To prevent ethical lapses or violations, law firms may implement PMBR programs through the construction of "ethical infrastructures," as proposed by Ted Schneyer, or choice architectures that disincentivize poor ethical decision-making, as proposed by Thaler and Sunstein.[238] Since firms have the power to reduce ethical violations through relatively low-cost efforts (e.g., by requiring attorney self-assessments), they should bear some of the responsibility for failing to institute such measures.

In the same article in which Schneyer discussed implementing "ethical infrastructures," he also proposes disciplining law firms for ethical violations.[239] Schneyer proposes that law firm responsibility for unethical behavior could be imposed through a change in Model Rule 5.1(a).[240] Currently, Rule 5.1(a) maintains individual responsibility, as it places the managerial and ethical responsibility upon attorneys with managerial roles as a method to prevent ethical lapses of individual subordinate attorneys.[241] However, Schneyer posits that amending Rule 5.1(a) to include institutional responsibility would provide incentives to create ethical infrastructures by imposing penalties for firms' failure to do so.[242]

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235. *Id.* at 2–3.

236. *Id.* at 12.

237. *See supra* Part II.B.1.

238. *See infra* text accompanying notes 206–28.

239. *See generally* Schneyer, *supra* note 134, at 13–23 (discussing the how law firms have become appropriate disciplinary targets, and the reasons why it would be prudent to implement disciplinary measures, including prophylaxis, previous model codes or rules that addressed law firm responsibility for ethical violations, and current model rules that address responsibility in the law firm governance context while not firmly implicating law firm responsibility).

240. *Id.* at 17–20.

241. *See* MODEL RULES OF PRO. CONDUCT 5.1(a) (AM. BAR ASS'N 2024).

242. *See* Schneyer, *supra* note 134, at 17–20.

In 2003, Elizabeth Chambliss and David Wilkins raised two main problems with the 5.1(a) framework for firm discipline.[243] First, it focuses on individual conduct.[244] While it bestows partners and managerial attorneys with responsibility to ensure ethical compliance, it does so in a way that is focused on ensuring that individuals are ethically compliant.[245] Therefore, the current rules are focused individually on either managerial attorneys or on subordinate attorneys. The responsibility does not fall to the firm as an organization at all. Second, Rule 5.1(a) creates a collective responsibility among partners, making them all "equally responsible for the development and monitoring of structural controls in the firm."[246] Schneyer proposes to make the firm as an organization responsible and liable for sanctions, with the hoped-for effect being deterrence against ethical violations.[247] However, Chambliss and Wilkins address criticisms of this proposal, specifically that requiring the whole firm to be liable reduces individual accountability.[248] In other words, "[w]hen everyone is responsible, no one is responsible."[249] Chambliss and Wilkins don't stop there; in fact, their new framework is notably similar to, though perhaps not as extensive as, the PMBR programs implemented in 2007 in Australia and recommended by Schneyer in 2011[250] and the ABA in 2019.[251] Chambliss and Wilkins' solution was to require firms to recruit "in-house compliance specialists," which would solve the individual responsibility problem while also allowing "managerial freedom" within firms.[252] Multiple firms have already created this function and their in-house compliance specialists are already significantly involved in ensuring that quality ethics controls exist within the firm.[253]

I agree with Chambliss and Wilkins that basing a disciplinary framework off of Model Rule 5.1(a) would be insufficient. Schneyer later agreed with Chambliss and Wilkins in large part because of the unenforceability of law firm discipline under Model Rule 5.1(a).[254] The ethical infrastructures that Schneyer originally found to be insufficient in law firms in 1991 he later found to be virtually ubiquitous in 2011.[255] To prevent attorney misconduct, the current literature all points to PMBR programs as the most effective method, in large part because of its ability to improve relations between regulators and the regulated.[256] Additionally, the ABA points to

243. Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 336–41 (2003).

244. *Id.* at 336–39.

245. *Id.* at 336–37.

246. *Id.* at 339.

247. *Id.*; Schneyer, *supra* note 134, at 11.

248. Chambliss & Wilkins, *supra* note 243, at 339–40.

249. Symposium, *How Should We Regulate Large Law Firms? Is a Law Firm Disciplinary Rule the Answer?*, 16 GEO. J. LEGAL ETHICS 203, 211 (2002).

250. Schneyer, *supra* note 230, at 584.

251. AM. BAR ASS'N, *supra* note 234.

252. Chambliss & Wilkins, *supra* note 243, at 345–46.

253. *Id.* at 346–47.

254. *See generally*, Schneyer, *supra* note 230, at 592–602 (discussing how disciplinary actions for law firm discipline are rare because the Model Rules are too diffuse to be practical, reasonableness standards discourage disciplinary enforcement because they are vague and uncertain, the investigations for complaints of violations of 5.1(a) are too time-intensive).

255. *Id.* at 619 (citing Douglas R. Richmond, Law Firm Partners as Their Brothers' Keepers, 96 KY. L.J. 231, 262–63 (2007–2008)).

256. *See* AM. BAR ASS'N, *supra* note 234, at 5.

PMBR programs' ability to bring noncompliant attorneys and firms into compliance without the invocation of disciplinary proceedings.[257] PMBR programs provide additional benefits specifically related to lawyer teams in large, corporate firms. Specifically, they help to implement management policies and procedures that aid in improving work-team cultures and habits that increase ethical behavior.[258] This is particularly important in light of the psychosociological findings from Asch, Sherif, Janis, Sunstein, Hastie, Perlman, and Thaler.[259] By creating ethical infrastructures through PMBR programs that specifically address human biases and heuristics, as well as organizational environments, lawyer teams in large, corporate firms are much more likely to increase ethical compliance through educational systems rather than disciplinary.[260]

CONCLUSION

I began this Note with a discussion of the history of the large corporate law firm. As the large corporate firm became more prominent, changes in the way lawyers practiced created new tensions for the attorneys working in those firms. Additionally, I have addressed teamwork in the legal profession, the ethical implications arising from that teamwork, and some possible solutions to ensure attorneys avoid pitfalls associated with working in teams in a corporate environment. While the ethics of institutional accountability have been widely debated over the past three decades, it seems that the most promising solution is to implement regulatory schemes that facilitate an "education towards compliance," such as through PMBR programs. With the increased emphasis on ethics in large, corporate firms, increased oversight of lawyer teams will help to prevent unnecessary ethical lapses and violations, thereby creating a more ethical environment.

257. *Id.*
258. Schneyer, *supra* note 230, at 621.
259. *See* Part II.B *infra*.
260. *See* Fortney, *supra* note 223, at 897.