ARTICLE: PROFESSIONAL DISCIPLINE FOR LAW FIRMS?

NOTHING

Reporter: 77 Cornell L. Rev. 1

Length: 23301 words

Author: Ted Schneyer
*

LexisNexis Summary

In 1989 a partner at Baker & McKenzie made improper racist and sexist remarks while interviewing a University of Chicago Law School student for a job with the firm. One wonders, therefore, how any particular partner could have been singled out as an appropriate disciplinary target. The post-1970 development of probation as a sanction illustrates the shift toward a disciplinary philosophy compatible with firm-wide discipline. Just as legislatures, prosecutors, and juries are reluctant to sanction individual corporate agents for such offenses, disciplinary authorities may resist proceeding against law firm partners. Fines have traditionally not been authorized as a disciplinary sanction for lawyers. This seems a very flimsy reason for rejecting fines as a disciplinary sanction. Disciplinary agencies already use probation to sanction individual lawyers. Moreover, a system of law firm discipline could piggyback on the existing disciplinary system and would not require a new judicial bureaucracy. Consequently, the civil sanction and professional discipline systems sometimes overlap, and disciplinary authorities often defer to the trial courts in policing this specialized field. Even so, the organized bar has never accepted the SEC's disciplinary authority, arguing that state supreme courts, not federal agencies, should regulate the practice of law. In *In re Keating, Muething & Klekamp*, the SEC instituted disciplinary proceedings against a law firm whose chief client had extensively violated the securities laws.

Text

[*1] INTRODUCTION

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

1. In 1989 a partner at Baker & McKenzie made improper racist and sexist remarks while interviewing a University of Chicago Law School student for a job with the firm. [1] Shortly after the incident was reported to the firm, the interviewer opted for early retirement. But matters did not end there. Instead of treating the incident as the isolated wrongdoing of a "bad apple," the school insisted that the firm submit a written description of the measures it was taking to prevent similar incidents before the school would allow the

---

*

Professor of Law, University of Arizona College of Law; A.B. 1965, Johns Hopkins University; LL.B. 1968, Harvard Law School; J.S.M. 1971, Stanford Law School.

Earlier versions of this article were presented at the Annual Meeting of the Law & Society Association in June 1990 and at a Faculty Workshop at the University of Texas Law School in November 1990. The author is indebted to his colleague Michael Block, formerly of the United States Sentencing Commission, for discussions on the analogy between professional discipline for law firms and criminal liability for organizations. Thanks also to Professors Roger Cramton, Geoffrey Hazard, Vic Kramer, Toni Massaro, Carrie Menkel-Meadow, Deborah Rhode, Ron Rotunda and Charles Wolfram for helpful comments, and Tom Hartzell, a student at the University of Arizona College of Law, for valuable research assistance. Research for this article was funded by grants from the University of Arizona Foundation and the University of Arizona College of Law.

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

firm to recruit on campus again. The firm complied with this demand. [2] Thus, by imposing an informal sanction on the firm, the school promoted appropriate professional behavior by the firm's lawyers. [3]

2. A company represented by Fried, Frank, Harris, Shriver & Jacobson sued the federal government to obtain documents under the Freedom of Information Act. [4] The company's name was to be kept confidential under a protective order. In 1989, Fried, Frank **[*2]** inadvertently filed in court an unredacted document that divulged the client's name. [5] The person or persons in the firm who allowed the document to be submitted were not identified. [6] The mistake involved not only a breach of confidentiality but a possible violation of the ethical requirement that lawyers take reasonable care to prevent their employees or associates from revealing client confidences. [7]

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

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

---

2 *Id.*

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

4 *Anonymous No More: Fried, Frank's Slip-Up Unveils "John Doe Corp.,"* LEGAL TIMES, May 22, 1989, at 6 (discussing a suit under the Freedom of Information Act, 5 U.S.C. § 552 (1988)).

5 *Id.*

6 *Id.*

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

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

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

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

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

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

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

Law practice in the United States is regulated in many ways, but most comprehensively through a specialized system that metes out professional discipline to those who violate the rules of legal ethics. [16] Under this system a bar committee or state supreme court agency investigates complaints about the conduct of lawyers licensed in its jurisdiction. If the agency determines that a lawyer may have breached the legal ethics code, it may pursue the case in an administrative hearing or, ultimately, before the state supreme court. [17] If the lawyer is found guilty of code violations, the agency or court may impose the following sanctions: Private reprimand, public censure, probation, payment of restitution and costs, suspension from practice, or disbarment. [18] Disciplinary targets are often afforded procedural protections reminiscent of the criminal process: a right to counsel; [19] a right to reputation-protecting secrecy in preliminary investigations; [20] and a requirement that wrongdoing be [*4] shown by clear and convincing evidence or even proof beyond a reasonable doubt, rather than by a mere preponderance of the evidence. [21]

Disciplinary agencies have always taken individual lawyers as their targets. They have never proceeded against law firms either directly, for breaching ethics rules addressed to them, or vicariously, for the wrongdoing of firm lawyers in the course of their work. [22] The traditional focus on individuals has probably resulted from the system's jurisdictional tie to licensing, which the state requires only for individuals,

---

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

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

14 National Student Mktg., 457 F. Supp. at 716-17.

15 O'Brien, *supra* note 13, at 64.

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

17 *Id.* at 99-117.

18 *Id.* at 117-41.

19 *Id.* at 100.

20 *Id.* at 107.

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

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

and from the system's development at a time when solo practice was the norm. [23]

Legal practice, however, has changed. While as late as 1951, sixty percent of the bar practiced alone, [24] two -thirds now work in law firms and other organizations; in addition, more lawyers in private practice now work in firms than as sole practitioners. [25] Law firms themselves have also changed. As a result of internal growth and mergers, the top 100 law firms now account for nearly twenty percent of all legal fees. [26] While only thirty-eight American law firms had more than fifty lawyers in the late 1950s, by 1986 over 500 firms did so and over 250 had more than 100 lawyers. [27] As of 1984, 95 of the 100 largest firms had at least one branch office. [28] Branching has made intrafirm coordination both more difficult and more important. [29] Firms have also become highly leveraged -- that is, the ratio of relatively inexperienced associates to partners has risen as [*5] high as four-to-one. [30] The proportionally larger number of inexperienced lawyers within firms has heightened the need for supervision. [31]

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

---

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

24 AMERICAN BAR FOUNDATION, THE 1971 LAWYER STATISTICAL REPORT 10 (1972).

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

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

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

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

29 *See, e.g.,*Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.) (separate branches in a large firm simultaneously represented conflicting interests), *cert. denied,*439 U.S. 955 (1978).

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

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

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

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

34

As law firms grow, the potential harm they can inflict on clients, [*6] third parties, and the legal process grows as well. [35] At the same time, the law firm, at least the larger firm, is ripening into an institution that presents new opportunities for bureaucratically controlling the technical and ethical quality of law practice. Indeed, the large firm may now be ready to perform the control or monitoring function for its lawyers "that the hospital [or HMO] performs for the medical profession." [36]

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

Proceedings against lawyers in large or even medium-sized firms are very rare. In 1981-82, for example, more than eighty percent of the lawyers disciplined in California, Illinois, and the District of Columbia were sole practitioners, and none practiced in a firm with over seven lawyers. [39] Yet, judging from the frequency with which larger firms and their lawyers are the targets of civil suits, motions to disqualify, and sanctions under the rules of civil procedure, [*7] [40] disciplinable offenses occur with some regularity in those firms. [41] Some observers attribute the paucity of disciplinary actions against larger-firm lawyers to an informal immunity from disciplinary scrutiny that those lawyers, as the most prestigious segment of the bar, supposedly enjoy. [42] Others point out that the types of misconduct that most often generate griev-

lawyer he could not be disciplined by the bar. Moreover, it is hard to see how the disciplinary authorities could rationally single out certain lawyers in the firm to hold responsible for the accountant's failures. Thus, any significant movement toward nonlawyer partners will strengthen the need for a system of professional discipline for firms as such.

34 NELSON, *supra* note 28, at 225.

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

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

37 MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 comment P2 (1989). *See* Geoffrey C. Hazard, Jr., *Firm Culture Sets the Tone on Behavior,* NAT'L. L.J., Feb. 20, 1989, at 15.

38 MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1989).

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

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

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

42 ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 3 (Final Draft 1970) [hereinafter cited as CLARK REPORT, after Justice Tom