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# WORKING WITHOUT A NET: THE SOCIOLOGY OF LEGAL ETHICS IN CORPORATE LITIGATION\*

Mark C. Suchman

“Advice for passing the Multistate Professional Responsibility Exam: Always choose the second-most ethical option.”

—Anonymous

The preceding epigram captures several important aspects of professional ethics: most obviously, it highlights the difference between professional ethics and lay standards of propriety. More subtly, it also suggests that the two, although distinct, are not unrelated. Professional ethics are, at least to some extent, grounded in “real” ethics; however, professional ethics must explicitly incorporate the existence of various competing moral obligations, in a way that purely aspirational principles usually do not. Professional ethics must allow enough room for real life, and as a result, usually offer only a symbolic display of vacant platitudes or a minimalist “floor” between the merely sleazy and the undeniably corrupt. Either way, however, an ethical profession requires more than just professional ethics. It requires a sense of right and wrong—estimable and reprehensible practice—that rises above the letter of the rules. And it also requires a set of social structures for creating, preserving, and transmitting this understanding in the face of real-world challenges.

This paper reports the results of an unusual exploratory investigation into the normative beliefs and structural mechanisms that sustain (and at times impede) the ethical practices of a core segment of the American legal elite—the growing community of litigators working in large urban law firms, primarily in the service of prominent corporate defendants.<sup>1</sup> In 1995, in response to a number of highly publicized

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1. Traditionally, litigators in “white-shoe” corporate law firms have stood at the pinnacle of the legal profession’s status hierarchy, barely a half-step behind the federal judiciary and well above both in-house corporate attorneys and practitioners specializing in the representation of private individuals. Although there is reason to believe that this situation may be changing somewhat, to date the realignment appears to have affected the degree of separation between various groups more than it has affected their relative rank. *See, e.g.*, John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* 322 (1982) (hypothesizing that the legal profession is divided into two very separate hemispheres: corporate lawyers and those serving individuals); Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 *Stan. L. Rev.* 277, 277 (1985) (arguing that general corporate counsel has moved close to the top of the corporate hierarchy); Eve Spangler & Peter Lehman, *Lawyering as Work*, in *Professionals as Workers* 63, 75 (C. Derber ed., 1982) (“[W]ithin the legal community, the most prestigious lawyers are those who

cases of misconduct by such large-firm litigators, the American Bar Association's Section on Litigation convened a task force of socio-legal scholars to examine the nature of "ethics beyond the rules" in this portion of the profession. Unlike many officially-sanctioned ethical inquiries, the project began with the premise that professional standards were at least as vulnerable to distortion by supposedly un-reproachable elites as by more marginal practitioners. Without prejudging the issue, the project team oriented its investigations around the assumption that if the ethics of American litigators were indeed eroding,<sup>2</sup> important aspects of that erosion might be driven by changing practices at the "top" of the professional pyramid, rather than by failed social control at the bottom. Thus, the *Ethics: Beyond the Rules* project represented an exploratory expedition into the moral universe of what is arguably the most prestigious and well-heeled component of the contemporary American bar. Through a series of focus groups, open-ended conversations, and semi-structured interviews, we sought to learn whether large-firm litigators possess a sense of right and wrong that transcends the formal rules of professional conduct, and, if so, to determine: (a) what that moral sense might look like; (b) whether it is adequately supported in the social structures of the profession; and (c) how favorable is the prognosis for its survival.

The following pages outline several tentative conclusions from this endeavor. In particular, I argue that the lawyers we observed possess a fairly well-developed ethical sense, but that this outlook does not map easily onto lay conceptions of ethics-as-morals. In part, this disjunction reflects the crosscutting obligations that the profession places on its practitioners. Equally important, however, the disconnect also reflects the growing inadequacy of the profession's mechanisms for resolving ethical ambiguities and for transmitting moral standards that rise above the baseline rules.

Given the exploratory objectives of the *Ethics: Beyond the Rules* project, the research team chose to employ several interrelated qualitative techniques. All of these techniques involved extended discussions with individuals who were active, in one capacity or another, in

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work for the large law firms that tend to the legal needs of the largest industrial and banking corporations.").

2. As the term "erosion" suggests, it is difficult to discuss professional ethics without using language fraught with evaluative connotations. Although most people would accept the abstract assertion that ethical professions are preferable to unethical ones, recent theoretical and empirical work suggests that real-world professions often propound rules of conduct that are neither in the public interest nor even in the interest of the profession as a whole. The "erosion" of such rules may be no more lamentable than the erosion of a social caste system or an economic monopoly. Thus, while the following discussion will eschew the linguistic contortions that would be necessary to capture the full ambiguity of "professional ethics," readers should remain alert to the possibility that not all ethical constraints are good, and not all ethical weakenings are bad.

the world of corporate litigation; however, the various components of the investigation differed in their precise focus and, to some extent, in their empirical rigor. In essence, the research was conducted in three stages: (1) a preliminary project-framing stage; (2) a core focus-group stage; and (3) a follow-up validation stage. This section briefly summarizes the methodology of each.

### *Preliminary Framing*

The project-framing stage was both the briefest and the least rigorous of the three. It involved several hours of open-ended group discussion on the topic of large-firm litigation ethics, conducted at the 1995 annual meeting of the American Bar Association's Litigation Section. The seventeen participants in this discussion were essentially self-selected, consisting primarily of senior partners (roughly evenly split between men and women) in large urban law firms from around the country. By virtue of their presence at the Litigation Section meeting, all of these attorneys evidenced an atypically high level of professional commitment, and by virtue of their participation in the "Beyond Ethics" session, they also evidenced an atypically high level of concern about ethical issues. Thus, although their comments foreshadowed several interesting and persistent themes of the project, the participants in this preliminary conversation were deemed to be too unrepresentative to provide a reliable picture of real-world conditions. Consequently, the results from this session have been largely omitted from the analysis presented below. Nonetheless, these early conversations did help to alert the research team to important methodological and substantive issues, and in this sense they constituted a useful, albeit informal, pretest of the research design.

### *Large-Firm Litigator Focus Groups*

The core of the empirical research was considerably more systematic, although still largely exploratory in character. Over the course of two weekends (four full days) in autumn 1995, the research team conducted semi-structured group discussions with litigators from large law firms in two major urban areas, one on the East Coast and the other in the Midwest. The subjects in this phase consisted of ten partners (six men and four women) and nine associates (six men and three women), drawn from five of the leading law firms in each city.<sup>3</sup> Par-

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3. All of the firms in our sample follow the conventional practice of hiring young attorneys as "associates," a probationary status that these recruits hold for anywhere from five to eight years before being reviewed for partnership. In most large firms, promotion to partnership is rare, with as little as 10% of each entering cohort eventually "making partner." Much of this winnowing occurs through attrition, however, and the odds for senior associates are somewhat better than the overall promotion rate might suggest. In addition, in recent years many large firms have begun to offer permanent non-partnership appointments, blurring the "up-or-out" character of the

ticipants were randomly selected from lists of litigators who had practiced at the same firm for a minimum of three years.<sup>4</sup> Biographical information indicated that these informants spanned a wide range of ages and family circumstances, and their comments during the sessions displayed a substantial diversity of opinion. Thus, although the sample may not have been statistically representative, the selection procedure appears to have captured a wide range of experiences and viewpoints, minimizing potential biases and omissions.

The two weekends, scheduled about one month apart, were divided into separate day-long sessions with partners and associates, respectively. On the first weekend, Saturday was devoted to the group of associates (from both cities, combined), and Sunday was devoted to the partners; on the second weekend, the order was reversed. Thus, in total, this phase of the research provided roughly 160 participant-hours of contact time (ten participants \* eight hours/session \* two sessions) with each group of attorneys.<sup>5</sup>

During this time, the research team employed a variety of discussion-oriented research techniques. As an initial stimulus, early sessions introduced the *Fisons* case, a real-life example of litigation gone awry.<sup>6</sup> Subsequent sessions brought in additional cases and hypotheticals, but the large bulk of each weekend was devoted to open-ended group discussions of respondents' own experiences with ethical issues and litigation decisions. At the end of the first weekend, the research team conducted one-on-one interviews with all participants to explore the extent to which participants' earlier comments might have been artifacts of the group-discussion format. For similar reasons, during the second weekend, participants were given short, anonymous "writing assignments" in which they were asked both to describe the ethics regime in their firm and to suggest directions for improvement. In

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promotion-to-partner decision. Meanwhile, at the partner level, many firms have introduced gradations among levels of partnership. Although these regimes vary from firm to firm, most are designed to give attorneys an increasing ownership stake as their careers advance and/or as their client-books grow. See generally Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* 120 (1991) [hereinafter Galanter & Palay, *Tournament of Lawyers*] (concluding that the organization of large firms will become more diverse in the near future); 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, 806 (1990) [hereinafter Galanter & Palay, *Why the Big Get Bigger*] (concluding that greater experimentation and diversity in the organization of large law firms will be common in the future).

4. Due to the small size of the sample, the random selection procedure was relaxed in a few cases to ensure an adequate gender balance in each group.

5. This calculation is, of course, somewhat optimistic, because only one participant could speak at a time. Nonetheless, even by a more conservative accounting, the sessions provided ample opportunity for all participants to state their views, often at substantial length.

6. See Report, *Ethics: Beyond the Rules*, 67 Fordham L. Rev. 691 app. at 885-87 (1998).

addition, for a portion of the second weekend, participants were separated into smaller subgroups, in order to facilitate more intensive discussion. All of these sessions were taped and transcribed, and each member of the research team kept copious field notes.

### *External Views*

The third phase of the project was devoted, in essence, to cross-validation.<sup>7</sup> Although the participants in the 1995 sessions were drawn entirely from the ranks of large-firm litigators, many of the “villains” in their accounts came from other segments of the bar—most notably judges, plaintiffs’ attorneys, and corporate in-house counsel. Consequently, the research team decided to explore how these three “external” groups viewed the same underlying phenomena.<sup>8</sup>

To this end, in autumn 1996, the research team spent two additional weekends conducting group discussions with judges, plaintiffs’ attorneys, and in-house corporate counsel in the same two cities where the team had conducted the large-firm litigator sessions. In all, these discussions involved ten judges, sixteen plaintiffs’ attorneys, and sixteen in-house counsel. The judges represented a variety of civil courts, divided roughly evenly between the state and federal benches. The plaintiffs’ attorneys were non-randomly selected from the upper echelons of the plaintiffs’ bar, so as to provide a group of litigators whose specialties—securities, antitrust, employment, product liability, medical malpractice, and the like—would routinely place them in opposition to attorneys from large corporate law firms.<sup>9</sup> In-house counsel were drawn from a list of local corporations with substantial legal departments; for each contacted corporation, the general counsel (or the senior litigation counsel, where applicable) was invited to partici-

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7. This endeavor began, informally, at the 1996 ABA meeting in Orlando, Florida, where the research team presented its preliminary results. Following the presentation, the team employed interactive audience-polling technology to solicit feedback from the roughly 75 attorneys (from various segments of the bar) who were in attendance.

8. Throughout this paper, I adopt the convention of referring to the various groups of informants in the study as “large-firm partners,” “large-firm associates,” “judges,” “plaintiffs’ attorneys” and “in-house counsel,” respectively. Since the focus of the paper is on large-firm litigators, however, this category serves as the “default” that is implied by references simply to “informants” or “participants.” It is also worth noting that “large-firm litigators” tend to serve primarily as defense counsel for large corporate clients, while “plaintiffs’ attorneys” tend to represent individuals, small businesses, and class-action litigants in suits against such corporations. Although there are certainly times when corporations appear in court as plaintiffs and times when individuals appear as defendants, such configurations are exceptional for the segments of the bar that we are studying here.

9. As a side effect, this frame produced a sample that was somewhat more senior and more successful than the plaintiffs’ bar as a whole.

pate.<sup>10</sup> Once again, the sample of participants in all three groups was far from random; nonetheless, it encompassed a wide variety of experience and opinion. Although some portions of the bar clearly were missing (especially less elite plaintiffs' attorneys), those that were included sufficed to provide a vigorous empirical "interrogation" of the preliminary findings from the large-firm portion of the project.

The format of this third phase was similar to the earlier round, except that each of the new sessions involved only local participants, and hence all participants attended only one weekend, not two. On both weekends, Friday afternoon was devoted to judges, Saturday to plaintiffs' attorneys, and Sunday to in-house counsel. This resulted in roughly forty person-hours of conversation with judges, 130 with plaintiffs' attorneys, and 130 with in-house counsel. Once again, the sessions began with the *Fisons* case and then proceeded to more direct discussions of participants' own experiences. Again, all sessions were tape recorded, and team members kept extensive field notes. Due to technical difficulties, however, only one of the two weekends was transcribed in full.

#### A TYPOLOGY OF OBLIGATIONS

One message that came through quite clearly over the course of the research project was that the language of normative obligation can be quite slippery. Thus, as a starting point, it may be useful to briefly outline what "litigation ethics" might mean in the abstract—and what this term meant, in practice, to our litigator-informants. Rather than being subject to a single set of obligations imposing a consistent normative orientation, the attorneys in this study seemed to be operating in a world where obligations were differentiated along at least two dimensions: (a) the logic of the constraint, and (b) the beneficiary of the constraint.

##### *Logic of Constraint*

I will use the term "logic of constraint" to refer to the conceptual distinction between three possible bases of action: the "moral," the "ethical," and the "pragmatic." For non-lawyer members of the research team, one of the project's earliest revelations was the finding that these terms carried significantly different connotations for our informants than for the general public. Although the differences might at first appear to be simply terminological, they reveal a great deal about how large-firm attorneys experience the normative dimensions of litigation practice.

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10. In one of the two cities, several corporations declined to take part in the study; however, there was no discernable pattern to these refusals, and no evident bias in the resulting sample of informants.

In the lay person's view, ethics and morals are virtually synonymous, and both are quite distinct from pragmatism. Morality and ethics constrain behavior through the actor's ingrained sense of right and wrong, even if such conscientiousness carries personal costs. Pragmatism, in contrast, serves the actor's self-interest, even if such instrumentalism contradicts social duties. Of course, in a smoothly functioning social system, reputational effects and third-party sanctions often align morality/ethics with pragmatism by imposing costs that make asocial self-interest less rewarding than compliance with social norms. Nonetheless, the motivations are still distinct, as illustrated by the hypothetical question: "What do you do when nobody's looking?"<sup>11</sup>

For large-firm litigators, the conceptual map seems to be somewhat different. Both associates and partners repeatedly distinguished between ethics (meaning the letter and, to a limited extent, the spirit of the professional rules) and morals (meaning substantive issues of right and wrong). More importantly, these attorneys displayed a penchant for blurring the lines between morality and pragmatism—and for reading the rules narrowly, in ways that made ethics at best a secondary concern. As one member of the research team remarked, the dominant orientation seemed to be one of "ethical pragmatism": an outlook that compartmentalized any nonpragmatic aspects of morality, and that marginalized ethics as a floor or a lower limit on acceptable practice.<sup>12</sup> A large-firm associate captured this sense of the distance between "ethics" and "right and wrong" by noting that "[m]ost of the issues that we're talking about here aren't issues of ultimate justice or even specific justice. They are questions of following the rules so that cases will come out, and the right information will be presented, and ultimately, justice will be served."<sup>13</sup>

In this view, ethical rules provide a loose *framework* for pragmatism, rather than a tight *constraint* on pragmatism. This orientation could be heard, for example, in our informants' frequent reliance on reputation-protection as an explanation for "beyond the rules" decision-making, as well as in their recurring emphasis on judges (and, to a lesser extent, insurers) as sanctioning agents whose attentions could save the profession from itself. As suggested above, both reputational effects and external sanctioning agents allow social systems to align

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11. This question is quite relevant in the present context, because (as detailed below) most large-firm litigators conduct a substantial portion of their practices in situations where "nobody's looking."

12. See Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 *Fordham L. Rev.* 739, 743-46 (1998).

13. Quotations of statements by study participants are taken from the author's notes or from the transcripts of the study's structured group discussions. The transcripts, which are confidential to protect the identities of study participants, are on file with Professor Robert Nelson of the American Bar Foundation. For a brief description of the study see *supra* pp. 838-42.



morality and pragmatism, and our informants seemed distinctly ill at ease with the prospect of justifying litigation decisions in purely moral terms, without reference to these aligning mechanisms.<sup>14</sup> Indeed, at times, attorneys' invocations of ethical pragmatism seemed almost mythological in character:

You're expected to do the right thing, the favored thing, the ethical thing. It makes sense for a lot of reasons. I think sharp practices never work in the end. They always get you in trouble or get your client in trouble, causing malpractice suits and things like that.

Thus, although informants repeatedly decried the laxity of real-world reputational mechanisms and sanctioning agents, the logic of ethical pragmatism represented a basic taken-for-granted assumption underlying these attorneys' interpretations of most potential "problem situations." On the one hand, informants often *assumed* that bad conduct would carry a long-term penalty (via loss of reputation, wasted effort, etc.), even when they could not identify a specific mechanism that would impose such a penalty. On the other hand, informants also often *assumed* that the "real" meaning of ethical rules was consistent with pragmatic concerns, even when the letter of the rules was not. (This, for example, was clearly the dominant understanding of the facially restrictive rules governing deposition defense.) Unfortunately, in a world where ethical surveillance and reputation are in fact quite weak, experience is more likely to contradict the first assumption than the second. And each time marginal conduct pays off, the second assumption—that the rules should be read to permit pragmatically effective strategies—will operate to ratchet down the level of ethical constraint.

Before proceeding, it is perhaps worth noting that our informants' logics of constraint varied somewhat by social location. Among large-firm litigators, associates readily acknowledged the moral dimensions of their work, but often collapsed these into pragmatic concerns. Thus, for example, they frequently discussed morality in terms of how an action would appear in a newspaper or to a judge or jury. These imaginary external audiences seemed to provide a "reality check," or, in the words of one associate, an "objective moral standard." The "newspaper test" operates much like Mead's "generalized other"—

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14. Given the methodological limitations of the present investigation, one cannot entirely discount the possibility that the ethical pragmatism that we saw in large-firm litigators was as much a rhetorical habit as a fundamental mindset. To the extent that clients seek legal advice instrumentally, an attorney's ability to rationalize ethical behavior in instrumental terms may provide his or her only leverage against client demands for less punctilious conduct. Over time, such pragmatic arguments may replace more lofty moral reasoning in the lawyer's rhetorical armamentarium—even if the underlying moral motivation remains. While few of our informants directly addressed this possibility, both large-firm litigators and in-house counsel concurred that corporate clients increasingly ask outside lawyers only for technical and tactical services, not for moral advice.

providing a social looking-glass that allows one not only to see and judge oneself (moral) but also to predict how one will be seen and judged by others (pragmatic).<sup>15</sup> Large-firm partners, on the other hand, tended to deny the moral dimensions of their work entirely, and to reduce most issues to either ethical rules or pragmatic strategies.<sup>16</sup> In a one-on-one interview, one partner had trouble conjuring up even a hypothetical situation that would pose a moral dilemma unforeseen by the rules (presumably bearing in mind the catch-all rule, "of when in doubt, serve your client"). Another partner asserted that, in litigation, "the area of morals is a murky place to be, and you don't want to go there."<sup>17</sup>

Other informant groups varied more widely. Judges were quite willing to invoke moral standards and were generally rather skeptical of the claim that the litigation system effectively aligns ethics and pragmatism, as well as the claim that ethical rules should be interpreted in light of pragmatic expedience. Plaintiffs' attorneys, for their part, readily invoked moral logic, but it was generally a macro-morality of "doing justice"—even if this required bending the rules. In this sense, these informants were equally pragmatic as the large-firm defense attorneys, but they were less concerned about the profession's ethics than about its ideals. Finally, in-house counsel exhibited only passing concern for legal norms of any kind and focused, instead, on the often challenging task of reconciling managerial ideals, such as efficiency, profitability, confidentiality, and hierarchical authority, with the vagaries of a court system that operates on starkly different principles. Thus, although they were often more willing than outside counsel to link ethics and morality, in-house counsel rarely framed this linkage as a question of their professional obligations *as lawyers*.

In short, our results suggest that the dominant logic of constraint among large-firm litigators is one of "ethical pragmatism," in which true ethical violations are assumed (despite any contrary evidence) to

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15. See George Herbert Mead, *Mind, Self and Society: From the Standpoint of a Social Behaviorist* 154 (Charles W. Morris ed., 1974).

16. It is worth noting that, to some degree, the observed difference between partners and associates may have been artifactual. The divergence seemed much narrower on the second weekend than on the first, perhaps because the partners had by then recognized our lay conventions and grudgingly adopted them. Even so, however, partners seemed far more comfortable talking about "civility" than about "morality," a point to which I will return below.

17. Comparing the lay view, the associates' view, and the partners' view, one could posit that the position of morality in decision-making "migrates" over the course of the lawyer's career. When lay people enter law school, morals and ethics are synonymous, and both are distinct from pragmatism. By the end of law school, ethicality has come to be seen as a professional construct, separate from "natural" morality; however, both ethicality and morality also remain differentiated from self-interest. As an associate, ethicality continues to be seen as a distinct constraint imposed by the profession, but the two "naturally occurring" constraints—morals and pragmatism—begin to blend. Finally, as a partner, morals vanish from consideration, leaving only ethics and pragmatism (with the former in a distinctly subordinate role).

have adverse pragmatic implications, and in which inconvenient ethical strictures are assumed (despite any contrary doctrine) to have pragmatically manageable real meanings. This logic differs significantly from the "ethical moralism" of judges, the "idealistic pragmatism" of plaintiffs' attorneys, and the "managerial morality" of in-house counsel. Moreover, it also differs from lay conceptions of ethics and morals as deeply-internalized, self-effacing value commitments. Nonetheless, as a taken-for-granted cognitive assumption, the logic of ethical pragmatism allows large-firm litigators to reconcile—both rhetorically and behaviorally—the ethical demands of their profession with the pragmatic demands of their result-oriented clients.<sup>18</sup> To a large extent, all other findings of the present investigation must be understood in terms of their interaction with this distinctive mind set.

### *Beneficiary of Constraint*

Constraints on legal practice—regardless of whether they are moral, ethical, or pragmatic—can also be divided on the basis of their ostensible beneficiaries. These beneficiaries fall into three broad classes: (a) fellow members of the legal profession; (b) specific non-professionals with whom lawyers interact directly; and (c) society as a whole. Each of these classes can then be further subdivided: duties to fellow professionals include duties to opposing counsel, duties to co-workers, and duties to the profession as a whole; duties to non-professionals include duties to one's client and duties to third-party bystanders, such as expert witnesses; and duties to society include duties to the integrity and smooth functioning of the legal system and duties to the general welfare.

The large-firm litigators in this study spent the bulk of their time talking about duties to other professionals, and, in particular, to opposing counsel. At times, discussions also touched on duties to clients and duties to the legal system. Duties to third-party non-professionals and duties to the general welfare, however, received virtually no attention from these informants. Interestingly, while focus groups composed of judges shared this intra-professional emphasis, groups of plaintiffs' attorneys and groups of in-house counsel appeared signifi-

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18. It is perhaps worth noting that the ethical pragmatism of large-firm litigators is, in some ways, the flipside of what Luban and others describe as the "role morality" of the legal profession: the belief that morally dubious adversarial advocacy can be justified by its contribution to a larger system of morally worthy legal institutions. See Richard Wasserstrom, *Roles and Morality*, in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 25, 36 (David Luban ed., 1983). Just as ethical pragmatism spares attorneys from confronting contradictions between professionalism and expedience in individual instances, "role morality" spares them from confronting contradictions between professionalism and justice in the aggregate. Taken together, the two outlooks construct an almost-anything-goes regime, in which litigators see themselves as serving their clients, their profession, and their society by acting as zealous gladiators, in a game whose rules are intended to be read permissively.

cantly more willing than their large-firm colleagues to discuss ethical obligations to third-party bystanders and to the larger society.<sup>19</sup> This pattern accords with Abbott's model of professional purity, in which the status-honor of professional elites is seen as resting on their ability to distance themselves from contamination by extra-professional disorder.<sup>20</sup> Although our informants might have talked very differently in more naturalistic settings, in these homogeneous focus groups, being a member of the legal elite apparently correlated with a tendency to address ethical issues in primarily intra-professional terms.

#### CONTENT OF ETHICS IN DISCOVERY PRACTICE

Over the course of the study, our large-firm informants provided several insights into the substantive content of their tacit ethical rules. Significantly, however, such substantive statements were far less common than a "cookbook" image of ethics might predict. Almost always, the first assertion about the content of "ethics beyond the rules" was "it depends"—often followed by a very tentative and unsatisfying list of conditions upon which it depended. Nonetheless, several areas of substantive consensus (or at least focused disagreement) emerged, especially during the later sessions. Rather than attempting to provide an exhaustive catalog of these, however, the present discussion will simply highlight an interesting and unanticipated relationship between the content of attorneys' tacit rules and the cross-cutting typologies of obligations outlined above.

#### *Morality as Civility in Intra-professional Relations*

As mentioned previously, large-firm litigators' focus-group comments centered predominantly on intra-professional obligations. Informants generally couched these discussions in the language of ethical pragmatism; however, by the second weekend, many attorneys began to introduce some (modest) normative considerations as well. Significantly, though, even when the conversations carried moralistic overtones, the groups showed little interest in (or concern about) morality with a capital "M." Rather, large-firm litigators tended to frame the moral challenges of intra-professional relations as questions of "civility"—a normative standard, to be sure, but one suggesting that the primary consequence of violation would be pragmatic inconvenience and tit-for-tat retribution, not systemic corruption and depravity.

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19. Of course, unsurprisingly, plaintiffs' attorneys and in-house counsel attended to different components of these beneficiary groups, with plaintiffs' attorneys expressing concern about the role of defense attorneys in silencing powerless victims and endangering the public, while in-house counsel expressed concern about the role of plaintiffs' attorneys in harassing innocent managers and burdening the economy.

20. See Andrew Abbott, *Status and Status Strain in the Professions*, 86 *Am. J. Soc.* 819, 830 (1981).

Nonetheless, civility hardly seemed to be a trivial matter for these attorneys. Among large-firm partners and associates alike, achieving and preserving civil intra-professional relations represented a persistent topic of discussion, both regarding adversarial encounters with opposing counsel and regarding collegial/supervisory encounters within the firm. In particular, these attorneys repeatedly identified incivility as a central characteristic of the profession's purported villains (small firms, lateral hires, mid-level partners, etc.). As one associate stated, "Those people . . . are typically quite hardworking, but they do tend to be people who . . . are more uncivil than they ought to be." Indeed, judging from the response that the issue elicited, one could justifiably conclude that incivility would rank at or near the top of our large-firm informants' complaints about the current state of litigation practice. For example, when asked for anonymous proposals to elevate their firms' professional practices, subjects contributed such items as "[y]ou must first identify . . . the problems and the impediments to achieving the goal of what litigation ought to be. One of the worst problems is incivility. . . . We need to act reasonably, independent of what the rules allow us to do."

Further, "[to] promote my own aspirations for professional standards: First, I would like to see written standards of practice regarding civility. Lawyers should be encouraged in writing to be courteous and respectful of other attorneys, parties and witnesses." Thus, among large-firm litigators, "ethics beyond the rules" seems, to a large extent, to mean simply maintaining civil relations with professional colleagues, rather than denigrating, brow-beating, undercutting, or ignoring them.<sup>21</sup>

### *Morality Versus Pragmatism in Client Relations*

The focus groups also provided some insight into the content of large-firm litigators' normative standards in the area of client relations—although, here, no single standard garnered universal support. On the whole, informants portrayed their clients as being amoral, short-sighted and excessively aggressive. Moreover, most attorneys felt themselves to be under fairly close scrutiny (or even suspicion) from clients who simultaneously expected no-holds-barred litigation and no-frills billing. One participant in an early session captured this outlook as follows:

Our clients are sending out mixed messages: "We want loyalty from you . . . but we are not going to reward your loyalty. You can work

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21. It is perhaps worth noting that judges, plaintiffs' attorneys, and in-house counsel did not share this overriding concern with intra-professional civility. While occasionally decrying litigation's roughest edges, these groups seemed at least as concerned about the ability of large-firm litigators to turn the process into a hypercivilized game of manners, at the expense of more substantive ideals such as truth, justice, and efficiency.

very hard, but every time we have a new matter, we're going to put it out to bid." And then, finally, the other mixed message: "We want you to be economical—we don't want you to have associates on every case, every phone, every conference—but we want a Cadillac defense."

While this image of the activist client was almost universal among large-firm litigators, reactions to the situation subdivided into two classes. One camp essentially capitulated to the constraint, adopting a passive position as an agent of the client's will—and passing moral responsibility along to the client-as-principal. This *agentic* stance is well captured by one such litigator's comment that "if executives tell the in-house counsel that there's nothing morally wrong, you can't go against that." Other informants, however, saw the attorney as having a more active *fiduciary* role, and asserted that they would make at least a cursory effort at moral suasion if they felt that their client was in the wrong. Nonetheless, members of this group also acknowledged that such counseling was exceptionally difficult to implement in practice. The best chance, several suggested, was to couch moral concerns in pragmatic terms; however, even this approach was deemed to be risky, because it would leave the outside counsel in an awkward position if the in-house counsel were to argue for a more aggressive posture. Perhaps not surprisingly, several of the attorneys retreated to the safe ground of ethical pragmatism, suggesting that a "CYA [cover-your-ass] letter" might suffice to discharge the attorney's advisory obligations.

Predictably, in-house counsel painted quite a different picture of the attorney-client dynamic, portraying themselves as champions of reason vis-à-vis outside attorneys (whose incomes, they argued, depend on protracted litigation). Moreover, in-house counsel were quite muted in their criticisms of corporate executives, depicting managerial litigiousness as being, at most, a rare aberration. On the whole, the amoral, short-sighted, hyperaggressive client was virtually absent from this alternative account. Such differences in perception between in-house and outside counsel will be addressed at greater length below. With regard to the ethics of lawyer-client relations, however, the primary impact was to make in-house counsel vocal partisans of the litigator-as-agent model. Whereas even the most agentically-oriented large-firm litigators voiced this position in tones of resignation, most inside counsel affirmatively embraced the placement of moral decision-making squarely within the corporation—preferably in an interaction between themselves and their executive superiors. In this view, in-house attorneys have ample moral sensitivity to produce ethical litigation strategies, and executives have ample rationality to recognize when aggression would be pragmatically unwise. Although outside lawyers may occasionally be useful as sounding boards, in general, they only cloud the moral and managerial issues with their own pecu-

niary interests in generating billable hours. Therefore, the most ethical stance for outside counsel would be one of agentic deference—with the locus of fiduciary counseling moving entirely in-house.

Since the tension between agentic and fiduciary roles is one of the most celebrated and longstanding issues in legal ethics,<sup>22</sup> the divergence between outside and inside counsel represents a significant, albeit under-acknowledged, schism in the profession's internal moral climate. Not only do inside counsel question the proposition that outside attorneys should have significant counseling obligations, but they also appear to question the larger ideology that links professional autonomy with moral objectivity. From the in-house counsel's perspective, outside attorneys' non-agentic ethical concerns are, at best, redundant with the in-house counsel's own moral stewardship—and, at worst, subversive of the very principle of client control. Since outside lawyers do not need to worry about corporate clients' ethics, doing so amounts to either an unethical waste of resources or an unethical attempt at manipulation. Needless to say, even when they advocate an agentic posture, large-firm litigators see the issue quite differently.

Without further research, it is hard to know whether this schism between inside and outside counsel is a longstanding condition, or whether instead the in-house bar has only recently begun to question the assumption that independence yields superior moral judgment.<sup>23</sup> In any case, though, as in-house legal departments grow and become increasingly powerful, their distinctive ideological claims become an important part of the moral universe of corporate litigation—for corporate clients and for large-firm litigators alike.

### *Ethical Pragmatism in Systemic Relations*

The final level of normative obligation—duty to the larger social system—surfaced primarily in informants' comments on the linkage between discovery practice and the courts. Although judges repeatedly emphasized that discovery is *supposed* to serve a systemic objective of truth-seeking, to a striking extent, litigators (and judges as well) described actual discovery practice in the language of adversarial gamesmanship, as a highly stylized competition in which each side could be counted upon to employ a fairly predictable repertoire of maneuvers. In this game, deception and diversion are both normal

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22. See, e.g., Wasserstrom, *supra* note 18, at 35 (examining how the different roles lawyers play affect their moral decisions).

23. Robert Rosen reports substantial deference by corporate in-house counsel to the moral judgments of outside attorneys. See Robert E. Rosen, *Lawyers in Corporate Decision Making* (1984) (unpublished Ph.D. dissertation, University of California (Berkeley)) (on file with the *Fordham Law Review*). Assuming that this orientation was widespread at the time, the much less deferential attitudes revealed in the present study may, indeed, be a relatively recent development.

and normative. Thus, for most large-firm litigators, the ethics of the lawyer-court relationship revolve not around the morality of the game itself—or even around the morality of winning a case on strategy rather than on the merits—but rather around the legitimacy or illegitimacy of particular *tactics* within the game's official and unofficial rules.

Here, informants seemed to operate within a fairly well-defined hierarchy of obligation, ranging from the genuinely moral to the narrowly ethical to the purely pragmatic. In defending depositions, for example, instructing one's witness to lie was almost universally condemned as a serious moral lapse—a “cardinal sin,” as one informant put it.<sup>24</sup> Instructing one's witness not to answer was also seen as morally improper (and at least one defense firm had an explicit policy against it), but here the impropriety rose only to the level of a “venial sin” or a “rules violation.” Making speaking objections and/or conferring with the witness during questioning was recognized as a violation of court rules (and, hence, as arguably “unethical”), but the relevant rules were generally seen as artificial constraints, to be construed as narrowly as pragmatically possible. Finally, conferring with one's witness during rest breaks was seen as an affirmative moral obligation—even in jurisdictions where the courts had promulgated rules formally prohibiting it.

Judging from the emphasis of our informants' comments, the bulk of deposition defense falls into the middle ground of speaking objections, conferences during questioning, and strategic requests for “rest

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24. Although attorneys clearly felt that suborning perjury was beyond the ethical and moral pale (and pragmatically self-defeating, as well), many went quite far in briefing witnesses on the case, before hearing their proposed testimony. As one large-firm partner remarked, without apparent irony, “You are aware of the psychological impact, but that's not the purpose, because you do it for everybody.”

While it is tempting to see this as either incredible naiveté or cynical formalism, other comments suggest a more complex interpretation. In many ways, litigation practice involves constructing a consistent and plausible narrative that serves as a simulacrum for an inherently unknowable “truth.” See Jean Baudrillard, *Simulacra and Simulation 1* (Shelia Faria Glaser trans., 1994). This “Story of the Case” emerges only gradually, but by the time depositions have begun, “The Story” has taken on a reality that is prior to and independent of any particular testimony. Spontaneity—whether honest or dishonest, helpful or harmful—is therefore dangerous, because statements that are disconnected from “The Story” threaten the attorney's cognitive control. Telling “The Story” to a witness before hearing his or her testimony isn't suborning perjury, because “The Story” is the attorney's best approximation of Truth. Anything consistent with “The Story” is, at worst, honest “spin,” and anything inconsistent is, at best, confused recollection. Encouraging the former and discouraging the latter serves, rather than violates, the attorney's duty as an officer of the court.

While this mindset may seem implausible to a layperson, it helps to explain how attorneys can justify “aggressive” witness preparation. It also sheds a somewhat more favorable light on efforts to intervene in a deposition after the witness has offered testimony contradicting “The Story.” As one associate noted, the attorney's interruption may be motivated less by a desire to obscure a potentially damaging revelation than by a desire to clarify a potentially misleading inconsistency.



breaks.” In these maneuvers, ethical pragmatism translates into a “gaming” of the formal rules.<sup>25</sup> As one partner put it (with perceptible pride), “It’s interesting what you can do under the guise of clarification.” At several points, attorneys even suggested that the sin of instructing a witness not to answer a legitimate question may be morally justifiable in extreme circumstances—much as the sin of pass interference in a football game may be justifiable when it prevents an otherwise sure touchdown. The logic seems to be that if a rule violation does not contradict the basic premise of the game, then it should be seen as an integral part of the game, an option to be employed instrumentally when the balance of strategic payoffs and sanction threats make it pragmatically worthwhile.<sup>26</sup>

### *The Sound of Silence*

Before proceeding, it is perhaps worth noting that the ethical/moral/pragmatic comments summarized above leave several potential obligations unaddressed. Thus, for example, our informants exhibited little sense of moral duty to the well-being of the larger legal system. Perhaps because they saw themselves as subordinate to the courts, the informants seemed to perceive little chance that their pragmatic gaming would undercut the administration of justice (at least as long as they avoided full-blown deception or extreme obstructionism). To the extent that these attorneys accepted moral responsibility for discovery practices, it was primarily responsibility for acting civilly toward their opposing counterpart and for giving good counsel to their lay client. The court, like a parent, was seen as providing moral constraint, but not as needing moral protection. This parental imagery was echoed in judges’ comments as well. While some informants expressed concern that attorney behavior might subvert the pursuit of justice in particu-

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25. Significantly, some of these activities simultaneously drew approval (or at least acceptance) as litigation tactics and opprobrium as intra-professional incivility. Ethical deposition defense, it seems, involves skirting the constraints of the larger legal system with enough finesse that one does not step on opposing counsel’s toes in the process.

26. Although the sessions with plaintiffs’ attorneys, judges, and in-house counsel did not dwell at length on the topic of deposition practice, nothing emerged from these groups that significantly contradicted the account provided by the large-firm litigators. Plaintiffs’ attorneys simultaneously decried some defense tactics (such as excessively incessant objections) and introduced some dubious tactics of their own (such as imposing inconvenient deposition schedules in order to break down executives’ elitist sense of invulnerability); however, their understanding of the tacit “rules of the game” seemed roughly congruent with that of the defense attorneys. Judges, for their part, vociferously denounced the prevalence of gamesmanship on both sides; however, they generally depicted this gamesmanship as a failure of institutional enforcement mechanisms, rather than as an ethical lapse on the part of the attorneys. In fact, judges’ complaints about the difficulty of sanctioning run-of-the-mill game-playing attest to the existence of consensually-defined tacit rules that make such adversarial maneuvers informally (if not formally) legitimate.

lar cases, few expressed concern that it would corrupt the justice system as a whole.

Equally significant, informants had little to say about obligations to the well-being of the legal profession (in contrast to specific colleagues and adversaries); obligations to the well-being of third-party witnesses and other non-professional bystanders (in contrast to clients); and obligations to the well-being of the larger society (in contrast to the justice system, alone).<sup>27</sup> The fact that these beneficiaries are not particularly salient in litigators' moral reasoning may help to explain the suspicion and hostility that the legal profession often encounters in its interactions with the general public.

### SOCIAL STRUCTURE AT THREE LEVELS

In addition to describing the normative rules governing particular aspects of practice, informants spent a substantial amount of time discussing the factors supporting or undercutting "good behavior" in the profession. For convenience, we can divide these into three levels of analysis: individual-level factors, firm-level factors, and system-level factors.

#### *Individual-level Factors*

Just as respondents were quick to say that most ethical decisions rested on situational judgments ("it depends"), they were equally quick to point out that the outcome of such decisions rested on individual personality. In particular, the "asshole attorney" repeatedly emerged as a taken-for-granted personality type, with the primary social-structural question being simply whether such miscreants clustered in specific social locations. Rather than seeing social structure as a cause of ethically problematic behavior, informants tended to attribute causation to pre-existing character flaws and tended to see social structure merely as a contingency that might or might not allow such traits to come to the fore. In the words of a large-firm associate, ethical failings reflect the fact that:

You have jerks . . . who are occasionally rewarded for aggression. . . . You get some really aggressive, smart people who are tremendously egotistical, and who have a lot to prove, and who have client relationships to foster, and who want to be great guys—and they will play to the edge, and sometimes they go over it.

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27. None of the focus groups dwelled on these topics at great length. Nonetheless, compared to large-firm litigators, judges and plaintiffs' attorneys seemed somewhat more concerned about the image of the legal profession and about the needs of society, at least rhetorically if not in their daily practices. In-house counsel, for their part, seemed somewhat more willing to discuss the treatment of third-party bystanders, especially if this category is seen as including corporate personnel who are not the direct targets of a complaint.

Nonetheless, while ethical lapses may, in fact, stem from individual-level personality, the evidence from the focus groups also suggests some grounds for caution. Among other things, the “personalities” of several informants actually seemed to move back and forth along the aggressiveness continuum over the course of the two weekends. As one large-firm partner put it, “Nice guys can be shifty.” Thus, for example, one associate, commenting on the first weekend that she routinely opens discovery by volunteering to waive interrogatories and forswear hard-ball tactics, indicated on the second weekend that she has no qualms about diverting a deposition with unwarranted objections—“if they fall for it, do it.” Facially inconsistent practices like these suggest that “asshole” behavior may be as much a product of the situation as of the person.

In this regard, one persistent theme that emerged in large-firm litigators’ discussions of deposition defense was a sense that “walking the line” was the morally preferred position for the responsible attorney. When these informants told deposition war stories, an ability to push the ethical envelope represented a source of substantial professional pride, rather than an embarrassing confession of susceptibility to temptation. Their comments indicated no ethical “safe zone” lying well within the limits of the rules: cautious punctiliousness was at least as ethically troubling as venturesome zeal.

Arguably, the origins of this orientation lie in the adversarial ethos that most large-firm litigators repeatedly espoused: just as the Hippocratic Oath directs physicians to “first, do no harm,” the unspoken norms of the legal profession instruct the litigator to “first, zealously serve your client.” While it is tempting to treat this doctrine as being at best an all-purpose fallback, and at worst a disingenuous excuse for abdicating moral responsibility, our informants seemed to experience it as being much more substantive and compulsory than this. Zealous advocacy was, to them, an affirmative moral obligation, even when it came into conflict with other ethical rules. As one large-firm partner observed with regard to defending depositions, “An attorney isn’t expected to stay away from these lines and leave the witness out there alone . . . . You don’t feel you’re doing your job without speaking objections.”

So the litigator is like a tightrope walker, trying to tread the line between a moral obligation to play by the rules and an equally moral obligation to protect the client. To use the language of the previous section: extra-professional advocacy obligations to the client, intra-professional comity obligations to opposing counsel, and systemic investigatory obligations to the court all interact to create a set of cross-cutting constraints. Deviation from the line *in either direction* is an ethical failure, and a cause for embarrassment. Indeed, one of the most senior partners actually blushed beet-red when recounting how youthful arrogance had led him to “step over the line” once, more

than *three decades* ago. Moreover, the formal sanctioning regime actively reinforces this sense that the good attorney walks the ethical borderline. The legal system imposes monetary punishments not only for excessive aggressiveness, but also (under the guise of malpractice) for excessive caution.

Ironically, these crosscutting structural forces may actually increase the sense that ethicality is an individual personality trait. Unable to rest squarely inside the ethical boundary, the litigator must perch on a very fine perimeter and grapple with "surprise" pressures from multiple directions (including from all the large-firm litigator's "usual suspects": uncivil plaintiffs' attorneys; amoral, fair-weather clients; hyperaggressive mid-level partners; under-socialized lateral hires; petty, intrusive in-house counsels; and lazy, remote judges). Success in holding this perch may depend as much on "personal" characteristics like balance, judgment, agility, and composure as "contextual" characteristics like the severity of the punishment for slipping off.

Clearly, this analysis portrays litigators' individual-level behaviors in a relatively sympathetic light, and one could certainly formulate a more critical alternative account. Nonetheless, there is sound empirical and theoretical reason to believe that most people try to do what they believe is morally right, most of the time.<sup>28</sup> Given this, one should hardly be surprised when actors describe their ethical lapses as having been forced upon them by a catch-22 of competing constraints or by a conspiracy of diabolical outside forces. Of course, one should also not be surprised when those "outside forces" describe their own behavior as having been equally forced upon *them*. And, indeed, this is largely what we found in our conversations with large-firm litigators' favorite villains—a point to which I will return below.

### *The Changing Macro-Structure of Legal Practice*

To the extent that the self-exculpatory beliefs of large-firm litigators, plaintiffs' attorneys, in-house counsel, and judges are *all* "true," understanding ethical breakdowns may require a shift of focus to a more macroscopic level of analysis. To understand such macrostructural influences on litigation practice, it is important to recognize that the legal profession has undergone two distinct but interrelated transitions in recent years. The first is "marketization"; the second, "bureaucratization."

Marketization refers to an increasing exposure of elite law firms to competitive pressures.<sup>29</sup> Although the precise causes of this transition

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28. See James G. March, *Decision Making Perspective: Decisions in Organizations and Theories of Choice*, in *Perspectives on Organization Design and Behavior* 205, 205-37 (Adrew H. Van de Ven & William F. Joyce eds., 1981).

29. Prior research suggests that less-elite lawyers have long experienced more intense economic competition than currently confronts even the most marketized portions of the bar's upper strata. See, e.g., Jerome E. Carlin, *Lawyers on Their Own: A*

remain debatable, several historical developments have almost certainly played a part. Since the 1970s, courts have struck down restrictions on professional advertising,<sup>30</sup> a new breed of legal journalism has begun to report on law firm management and earnings,<sup>31</sup> and legal labor markets have fluctuated significantly, producing periods of both over- and under-supply.<sup>32</sup> Perhaps most importantly, many corporate clients have responded to rising legal costs by augmenting their in-house counsel's offices, making these companies into unprecedentedly informed consumers of professional services.<sup>33</sup> One in-house counsel described the new regime as follows:

When I got into our company, nobody reviewed the legal bills; they just got paid. Since we were paying millions and millions of dollars every year, I didn't like that idea. . . . Lawyers need to face the fact that today with more than 850,000 lawyers in this country there are an enormous number of top-quality litigators who love doing trial work, and who will do it for relatively low cost. I've told partners very directly that one of our objectives is to lower your annual income.

Another in-house attorney's comments illuminate the resulting increase in "comparison shopping":

I don't want to pay \$500 an hour for [legal] services, and there are a lot of high-quality lawyers around. I had one case on the East Coast where I decided to have the bulk of the work done in Texas, because the law firm I was using there charged half the hourly rate, just straight across the board. And the partners were excellent, the associates were top-notch. If I have general legal research questions, frequently I call Houston now. I don't go to Philadelphia, Wilmington, or New York.

In addition to breaking down ongoing "retainer" relationships between law firms and their clients, this commodification of legal services has also influenced the relationships among outside attorneys themselves. With clients increasingly "hiring lawyers, not firms," inter-firm career mobility has risen, and lateral recruitment has become a familiar feature of the professional landscape.<sup>34</sup> Thus, firms are now

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Study of Individual Practitioners in Chicago 115-16 (1962) (concluding that over 40% of low-level practitioners and less than 20% of upper-level lawyers experienced competition).

30. See Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, in *Lawyers' Ideals/Lawyers' Practices* 1, 12 (R. Nelson et al. eds., 1992).

31. *Id.* at 9-10.

32. Richard H. Sander & Douglas Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 *L. & Soc. Inquiry* 431, 464-67, 471-73 (1989).

33. See, e.g., Chayes & Chayes, *supra* note 1, at 281 (proposing that "corporations are . . . in a far better position to accomplish business goals in a legally optimized manner with effective inside counsel than without").

34. Since law firms often recruit mid-career partners as "rainmakers," cultural synecdoche appears to have made lateral hiring into an almost mythical symbol for the

competing with one another for the transitory loyalties of partners, as well as of clients. Moreover, there are few signs that the marketization trend will stop here. As an in-house counsel observed:

It's not going to get any easier. The competition isn't between Law Firm A and Law Firm B. One of my missions in life is to try never to use the lead firm's paralegals any more. My number two goal is to subcontract out my legal research, and to get to a point where we're going to hire temporary lawyers to do routine tasks. [Large firms are] going to face a major unbundling of their marketable services. They think we shouldn't be doing that. I guess I can understand their complaint, but that's what's going on.

Alongside this marketization of professional practice, elite lawyers are also experiencing a significant bureaucratization of their professional workplaces. As documented, the size of the nation's leading law firms has grown dramatically in recent decades.<sup>35</sup> With very few exceptions, elite outside counsel (including virtually all of our informants) now work in "partnerships" of literally hundreds of attorneys, often spread among offices in several states or even countries. Moreover, although the upper echelons of the legal profession are still disproportionately white and male, they have become significantly more heterogeneous than they once were.<sup>36</sup> As law firms grow and diversify, informal social structures and face-to-face contacts no longer suffice to bind these organizations together, and a new regime of formal hierarchy, record-keeping, and evaluation has slowly begun to emerge. At the same time, outside of elite firms, attorneys are increasingly practicing in other highly bureaucratized settings as well, including business corporations, government agencies, mass-market legal service chains, and rationalized court systems.<sup>37</sup>

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marketization process as a whole. Certainly, in our informants' comments, laterals received a degree of blame for the ethical state of the profession that was far out of proportion to their likely influence. Interestingly, in an interim presentation to the American Bar Association's annual meeting, the research team polled the audience and found a virtually even split on the question of whether lateral hires exert a negative impact on large-firm ethics. Responses, however, correlated closely to whether respondents had, themselves, made a lateral career move—with over 80% of the non-movers adopting a critical stance.

35. See Galanter & Palay, *Tournament of Lawyers*, *supra* note 3, at 46; Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, in *The Sociology of the Professions: Lawyers, Doctors and Others* 152, 153-55 (Robert Dingwall & Philip Lewis eds., 1983); Galanter & Palay, *Why the Big Get Bigger*, *supra* note 3, at 749.

36. Cf. Heinz & Laumann, *supra* note 1, at 10-11 (noting the increasing number of women and minorities among young Chicago Lawyers); Erwin O. Smigel, *The Wall Street Lawyer* 44-47 (1964) (highlighting the traditional barriers in Wall Street firms for women and minorities).

37. See generally Wolf Heydebrand & Carroll Seron, *Rationalizing Justice: The Political Economy of Federal District Courts* 134-44 (1990) (stating that the increasing bureaucratization of the federal justice system has resulted in a technocratic administration of justice); Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* 2-5 (1997) (discussing the rise of mass market law firms and

Thus, at a macroscopic level, the modern legal profession is experiencing an unprecedented degree of both commodification and supervisory control. Not surprisingly, the repercussions of these changes echoed through our informants' comments, sometimes with positive overtones, but usually with regret. In the absence of further research, it is, of course, impossible to determine whether the commentary that we heard was either an accurate description of empirical conditions or a hyperbolic evocation of intra-professional mythology. In either case, though, the image of a profession increasingly subordinated to both markets and hierarchies clearly constituted a central component of our informants' world views.<sup>38</sup> In explaining the ethical state of the profession, these macro-structural images manifested themselves at two levels of analysis: the individual law firm and the legal system as a whole.

#### *Firm-level Factors*

All of the focus-group discussions among large-firm litigators devoted a substantial amount of attention to ways in which law firm structure might promote or undermine ethical litigation practices. The observations elicited by these conversations were rich and diverse. To provide a framework for interpreting this material, the present section subdivides informants' comments into: (a) observations about material controls within the firm; (b) observations about cultural controls within the firm; and (c) observations about changes in these control mechanisms in light of larger transformations in the social organization of the profession.

Broadly speaking, organizations (including law firms) possess two main means of control over their members: material incentives and cultural beliefs. Participants in the large-firm focus groups spent quite a bit of time discussing material factors; however, a dispassionate analysis would almost certainly conclude that the formal material controls on ethicality in these firms are remarkably weak. Although these are some of the most structurally-elaborated firms in the country, they

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its effect on the delivery of legal services); Chayes & Chayes, *supra* note 1, at 277-78 (noting the increasing importance of in-house counsel and its effect on law firms); Spangler & Lehman, *supra* note 1, at 63-99 (discussing the work and practice structures of the American legal profession).

38. Readers familiar with organizational economics may note an apparent contradiction in the claim that the "governance" of legal transactions has become, simultaneously, both more market-like and more hierarchical. See, e.g., Oliver E. Williamson, *The Economic Institutions of Capitalism* 73-74 (1985) (noting that market governance controls most nonspecific transactions types). This situation is only contradictory, however, if one subscribes to a rigid view of the markets-versus-hierarchies opposition as an all-encompassing partition of the universe of governance structures. In fact, what has happened in the practice of law is that loose "professional" governance, based on reputational networks and internalized norms, has begun to give way to more formal capitalistic regimes: markets for some types of transactions, and administrative bureaucracies for others.

conduct very little routine ethical evaluation, and they possess few mechanisms for incorporating ethical information (were it available) into the allocation of material rewards. Most of the firms' sanctioning regimes are premised on "exceptional case response," and yet the structures for identifying and reporting response-worthy cases are either nonexistent or marginalized. As several informants noted, judges rarely impose sanctions for discovery abuse, and in the absence of such external alerts, most sharp practices remain virtually invisible to the firm as a whole. In theory, firms might compensate for judicial passivity through active internal monitoring; however, there was little evidence of this, even among those firms that professed strong ethical sensibilities. One associate's comments captured the irony of the situation:

I've worked at two firms, and I think that in both firms, certainly, you would be encouraged to bring anything that you felt was a clear problem to the right place—although, quite frankly, I couldn't tell you what the right place was, in either one of those firms, because they didn't designate anyone in particular, to my knowledge.

Moreover, even if occasional ethical failures do come to light, few firms offer clear micro-to-macro feedback loops for examining the overall pattern of problem-cases and for formulating general policy responses.

At best, the material control structures in these firms provide symbolic enactments of the abstract cultural principle that "ethicality matters to people like us," but it seems unlikely that any of these attorneys could fear serious material repercussions for anything but the most egregious of ethical failures.<sup>39</sup> In the language of organizational theory, the formal structures in our informants' firms seem better designed for ceremonial conformity<sup>40</sup> than for organizational learning;<sup>41</sup> "[a]ppropriate" controls exist in the abstract, but in reality they turn out to be almost entirely decoupled from daily practice. Instead, firms operate on the basis of a "logic of confidence":<sup>42</sup> the firm's ethical health is "confirmed" by the absence of negative feedback from control structures that have been allowed to atrophy precisely because of a belief that the firm is too ethically healthy to really need them.

Significantly, the weakness of formal material controls may partly reflect these firms' allegiance to a particular ideology of autonomous professionalism. For many informants, professional collegiality

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39. It is even clearer that none of our attorneys saw anything to be *gained* in their firm's compensation and promotion process from exceptionally *high* ethical conduct.

40. See John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 *Am. J. Soc.* 340, 340-41 (1977).

41. See Barbara Levitt & James G. March, *Organization Learning*, 14 *Ann. Rev. Soc.* 319, 319-340 (1988).

42. Meyer & Rowan, *supra* note 40, at 357-58.



seemed incompatible with close supervisory control of day-to-day activities. Although associates often expressed a desire for more ethical guidance (see below), they also prided themselves on having earned enough trust to manage matters on their own. Partners, for their part, expressed quite a bit of ambivalence about whether formal ethical control was the firm's responsibility at all. As one partner put it, "How would you do it? Deposition police? These are senior guys working on their own matters." Another added, "Applying standards of decency is hard when you are dealing with adults and fellow partners."

The absence of systematic ethical control is further supported by other aspects of professional ideology which play up the case-by-case nature of practice and which take a skeptical view of scientific rationalization.<sup>43</sup> A large-firm associate's comments suggest that ethical enforcement is hardly the only area in which law firms fail to recognize linkages between individual instances: "It's amazing how inefficient large law firms are. I had a client say, 'Boy, I just paid such and such, X amount of time, to research this very thing.' We duplicate research and reinvent the wheel—even for the same client." In this sense, the weakness of ethical feedback loops is simply another manifestation of the individualized, disaggregated, unrationalized, anecdotal character of legal practice in general.

Of course, this does not mean that large law firms are entirely devoid of effective evaluation-and-reward structures. Indeed, while large-firm attorneys may reject ethical evaluation as being unprofessional and demeaning, other types of evaluation are quite commonplace. Unfortunately, many of these incentive systems seem to be actively working *against* peak ethicality. When large firm informants were asked to propose firm-level changes that would promote ethical practice, many of their suggestions involved abolishing counterproductive structures, not enhancing beneficial ones. Among the culprits: billing pressures (including the use of billable hours as an all-purpose performance measure), competitive compensation, emphasis on rainmaking, and the favorable treatment of aggressiveness in evaluation. As one associate suggested—to make a more ethical law firm, simply "don't promote jerks."

The general sense seemed to be that, despite official policy statements, most firms were designed to reward behavior that was at best unrelated to ethicality, and at worst destructive of it. In the words of one senior associate: "Being perceived as being aggressive in defending the client's interest will get me ahead in the law firm, get me on the cases that I want to be on and in the position that I want to be in." Another associate elaborated:

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43. Cf. Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993) (describing the crisis that modern lawyers face as the "lawyer-statesman" ideal declines).

I have the perception that if one is reasonable and perhaps even likable and cordial to an adversary (as I'd like to think I am), that this is perceived as a weakness by some mid-level partners. They don't understand why you give [opposing counsel] pleasantries during depositions—"Why don't we threaten them with sanctions!?" You're viewed as being somehow soft or something. I feel that my style, which I like to think is a little more reasonable and pragmatic, is looked at as being weak or less-than-aggressive.

Although few attorneys saw their firms as being well-constructed for enforcing ethicality through material incentives, many professed much more faith in the adequacy of the second major control mechanism, firm culture. Organizational sociologists have identified three major sources of organizational culture—selection, socialization, and interaction—and to some extent, informants reported that their firms employ all three.<sup>44</sup> It is not clear, however, whether any of these mechanisms are sufficiently well-developed to produce truly effective cultural control.<sup>45</sup>

Large-firm selection procedures focus primarily on recruiting "people like us." New associates are drawn from the "better" law schools, and they pass through a winnowing process of interviews, summer programs, performance reviews and, eventually, promotion to partner. The role of ethicality in this winnowing, however, remains unclear. Since law firms have few opportunities to observe new attorneys' litigation ethics in action, and since lateral hires are chosen primarily for their rainmaking potential, it seems likely that the moral components of selection focus almost entirely on intra-professional conviviality within the firm. Thus, the selection regime increases the likelihood that a firm's attorneys will share a common set of manners and common standards of civility, but it may not ensure that they will be particularly ethical in their litigation practices.

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44. See generally *Organizational Culture* (Peter J. Frost et al. eds., 1985) (discussing the development of the study of organizational culture); *Reframing Organizational Culture* (Peter J. Frost et al. eds., 1991) (same); Harrison M. Trice & Janice M. Breyer, *The Cultures of Work Organizations* (1993) (discussing the cultural processes of modern work organization).

45. This point was not lost on our informants. Although firm culture was frequently cited as the ultimate guarantor of ethicality, its nature (and even its existence) remained a matter of some ambivalence. On the one hand, most large-firm informants professed faith in *their* firm's culture, and most judges, plaintiffs' attorneys, and in-house counsel claimed to be able to draw meaningful distinctions among these firms. On the other hand, few informants could articulate the details of their own firm's culture, and several suggested that growth and diversification rendered firm culture largely a thing of the past. Among the skeptics, opinions varied regarding where behavioral norms were now institutionalized—at the level of individual personalities, at the level of intra-firm practice groups, at the level of city-wide legal communities, or at the level of practice specialties within the larger bar. Equally important, even the informants who argued for the existence of firm culture split over the adequacy of such culture in producing ethical behavior.

Perhaps more important than selection is socialization. Certainly, this aspect of culture-building generated substantial discussion in the litigator focus groups. In general, although formal training programs received frequent mention, attorneys cited informal day-to-day contacts between associates and partners as providing the primary socialization forum in most firms. The following associate's-eye view was typical:

You walk down the halls to the partner or to an associate who's a little more senior than yourself and you say, "Geez, I've got these interrogatories; have you ever done anything like this before?" "Oh yeah, I've got something from a case called blankety blank. Why don't you go look in that file?" Then you go through a drafting process where you actually haggle over the language, and in that process, you learn what sorts of things you're supposed to be doing—"how we do it here"—and also you've looked at what other people have written. And that's how the knowledge of the lawyer trickles down.

Significantly, however, associates were much less satisfied with the current training regime than were partners. When asked to list important or distinctive things that their firms did to promote ethics, over half the partners identified either formal or informal socialization mechanisms, and only one partner saw a need to increase such efforts. Presented with this sanguine assessment, associates expressed substantial dismay; on their own list of policy changes, improving socialization played a much more central role. In particular, associates voiced concern about the fact that most training activities were concentrated in the very early stages of their careers, before they had enough relevant experience to raise hard questions (and before they had bad habits to correct). They also complained that formal ethical training tended to neglect day-to-day issues, and that it provided insufficient guidance in dealing with the sharp practices of opponents. This criticism seemed most prevalent in connection with courses provided by professional bodies outside the firm. A relatively senior associate captured the tenor of many of these concerns:

When I was new, we had many more in-house seminars on ethical dilemmas and what you should do about them. Now that we have [an externally-imposed Continuing Legal Education requirement], as the time goes by, we don't have those in-house seminars anymore. That is a little bit of a problem, because it is very hard, in my opinion, to find ABA ethics classes that actually speak to somebody who faces the dilemmas that I face. For example, I am a mid-level associate. I have just started now dealing with expert witnesses . . . . It would be really useful for me if somebody were to give a seminar on the ethical dilemmas that I might face and how to deal with those, but the ABA and the [State Bar Association] don't seem to have that, and it's something my firm is not providing.

It is also worth noting that, while large-firm associates felt that informal role-modeling was generally more effective than formal instruction, they did not necessarily feel that the most commonly modeled behaviors were particularly conducive to ethical practice. Said one, in regard to the *Fisons* vignette:

You're taught these things when you walk into the firm. You're taught to be aggressive and to not just hand things over. The attitude is almost that they have to rip it out of your hands, otherwise we're going to build up all sorts of road blocks. . . . At my firm, from the time I was a baby associate in my first couple of weeks, I've had a number of partners who've said, "This document . . . — it's absolutely nothing. It's the employment application or something! . . . This document was not specifically called for, so we're not going to produce it." Certainly, the aggressive attitude was communicated in those kinds of situations.

Added another: "I think that you learn by osmosis. The first time I had to draft a response to interrogatories, I went and looked at other people's responses, and I found out that there was a sort of canned, standard response—which was to object to everything in sight."

Despite these complaints about weaknesses in socialization, however, informants' greatest concerns seemed to center on the third leg of the cultural triad: interaction. In most social settings, culture is elaborated through informal dialogue and reinforced by formal ceremony. The large modern law firm, however, faces obstacles in both regards. In their comments, most large-firm attorneys depicted themselves as working alone—or, at best, as participating in a department or practice group that comprised only a small subset of the firm as a whole. Asked how they would reform their firms to improve ethical standards, many proposed gathering firm members together, in one way or another, to share experiences and compare practices. Associates, in particular, conveyed a profound sense of isolation and a genuine craving for supportive direction. Although they frequently talked about clearing discovery tactics with supervising partners, their reform proposals revealed a pervasive desire for more vibrant ethical dialogue in the firm as a whole. Prominent among these recommendations were changes in informal interaction, such as: "Talk about ethics at section meetings," "make more effort to communicate norms," "create a culture where there's comfort with raising ethical issues," and "treat associates as lawyers, not as hired help." As one associate put it, "Our suggestions are a cry for guidance."

Moreover, in many large firms, the existing repertory of cultural ceremonies—like the repertory of material incentives—occasionally works against the development of ethical culture. Thus, for example, several comments hinted that the daily rituals of tracking workloads serve to symbolically exclude ethical discussion from the firm's core activities. When firms make billable hours a key evaluation device (as

our informants' firms clearly have), billing procedures become not just a way of allocating material incentives, but also a way of indicating which aspects of professional life "count." This, presumably, was the motivation behind one associate's suggestion that firms should create a billing number for "time spent in ethical give and take," and, in a different way, it may have also influenced another associate's suggestion that ethical feedback be separated from the evaluation process, where it currently gets drowned out by productivity concerns. In short, in a setting where the Ethics Committee is known as the "No Business Committee," the routine ceremonies of business production can inadvertently convey the symbolic message that ethical consultation is just one step above napping at one's desk.

Before leaving the law-firm level of analysis, it is perhaps worth noting that most informants perceived the firm-level situation to be worsening, rather than improving. As described above, recent years have seen a significant reorganization of legal practice, and large-firm informants expressed dismay at the impact that this transition has had on the ability of their firms to serve as ethical control structures. The most frequently-mentioned threat was an increasingly cost-conscious, decreasingly loyal clientele, which will no longer subsidize apprenticeship, socialization, or indulge ethical back-talk. The growth of in-house counsel offices ostensibly exacerbates this trend, by creating, in essence, a legally-trained yes-staff that undercuts outside counsel's moral authority and constrains outside counsel's operational autonomy. Firms, for their part, capitulate to this new regime by basing promotion and recruitment on rainmaking ability, rather than on affinity with the firm's ethical culture. Informants harshly criticized lateral hires in this regard; although it was unclear whether the critique was that: (a) the type of person who would seek lateral mobility is, by nature, asocial, mercenary, and hyper-aggressive, or (b) laterals are no less thoroughly socialized than other attorneys, but because they have received their socialization elsewhere, their arrival inevitably "frays" the hiring firm's cultural coherence.

Large-firm informants also expressed misgivings about the increasing bureaucratization of their law firms. Several informants, for example, indicated that a firm's larger size brings a greater reliance on formal versus informal control, and on material versus cultural control. They also indicated that size heightens the risk of isolation on the part of individual attorneys, practice groups, or departments, and, when coupled with geographical dispersion, it increases the potential for cultural heterogeneity. As one associate observed:

I've worked with two firms, and in the less hierarchical—the much smaller—firm, there was a much more open flow of information. You feel more free and capable of speaking your mind, and you're less intimidated about speaking to someone who is the head of your

department or the head of your firm. In a larger firm, which is more hierarchical by nature, there are more barriers.

Admittedly, growth also often increases financial stability, and several informants suggested that this can have a positive impact on ethicality. "Those who can afford ethics do it," said one large firm partner. However, much of this gain can be absorbed by higher compensation expectations and by the growing firm's insatiable hunger for new business.<sup>46</sup>

Interestingly, organizational sociology suggests a counter-story regarding bureaucratization. In the classic rendition, bureaucracies serve to impose hierarchical control on their lower echelons<sup>47</sup> and to buffer their technical cores from environmental pressures.<sup>48</sup> Arguably, both of these impulses have the potential to improve ethical behavior, particularly when hierarchical supervisors are themselves well-socialized professionals and environmental pressures primarily come from unsocialized lay clients. In addition, because of their greater visibility, large bureaucracies presumably have a greater stake in maintaining their sociopolitical legitimacy, thereby making them more subject to reputational controls. None of these optimistic arguments, however, surfaced in the comments of our lawyer informants. It is hard to know whether this was due to practitioners' inability to disentangle the effects of marketization and bureaucratization, the theory's insensitivity to unique features of the present situation,<sup>49</sup> or the bureaucratization of large law firms. It is clear, though, that at the present juncture, few of our large-firm informants see either marketization or bureaucratization as representing a positive development for professional ethics.

On the whole, then, the picture that emerges at the law firm level is one in which the nature of the practice has shifted dramatically, but the ethical controls on practice have remained almost unchanged.

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46. Given our informants' misgivings about growth, it is interesting to note that they were virtually unanimous in their endorsement of the claim that large firms are more ethical (or at least more "civil") than small ones. In part, this may reflect a conflation of size and financial security. But to a large extent, it probably reflects the fact that when ethicality is reduced to a question of manners, it becomes quite easy for large-firm attorneys to mistake their colleagues' socio-cultural similarity for moral propriety. Viewing these firms from an outside perspective, plaintiffs' attorneys saw them as "internally cannibalistic"—albeit in a polite, high-society way.

47. See Max Weber, *Bureaucracy*, in *From Max Weber: Essays in Sociology* 196-244 (H. H. Gerth & C. Wright Mills eds., 1946).

48. See James D. Thompson, *Organizations in Action* 19-23 (1967).

49. Bureaucracy, for example, tends to foster an impersonal environment and compartmentalization, which may carry particularly adverse consequences for the largely tacit ethics of elite law firms. In addition, if the decision makers at the head of a bureaucratic firm are themselves less concerned about ethical issues than about profitability, hierarchical control structures and environmental buffers will merely amplify this tendency. Finally, reputation and visibility can cut both ways, especially if firms come to believe that a "tough guy" image attracts clients and intimidates opponents.

Firms still rely on informal contact, professional collegiality, and cultural homogeneity to maintain high ethical standards; however, the reality that they embody is one of isolation, hierarchical differentiation, cultural fragmentation, and increasingly cut-throat market competition.

### *System-level Factors*

Given that informants were ostensibly discussing professional ethics, rather than individual or firm ethics, it is interesting to note how little direct attention they devoted to the role of the profession and other system-level factors in constructing and supporting standards of good practice. Nonetheless, the fact that both individual-level and firm-level phenomena reside within a larger institutional framework formed a running subtext to many of the discussions.

At the most basic level, one striking feature of our attorneys' comments was the extent to which they analyzed ethical dilemmas as issues of intra-professional miscommunication. Repeatedly, discovery was framed as a semiotic ritual—an exchange of “significant gestures,” in Mead’s terminology<sup>50</sup>—between two members of a single “discourse community.”<sup>51</sup> The measure of ethical conduct seemed to be “did the attorney send an honest signal,” not “did the attorney produce the relevant material.” As a result, certain practices (such as “opening the warehouse” in response to a demand for document production, or making a speaking objection in response to a deposition question, or subtly reframing a discovery request in the process of supplying an evasive answer) were considered more acceptable if they were used as signs to opposing counsel than if they were used as impediments to the release of legitimately requested information. In the words of one large-firm associate:

It’s probably okay if you put your spin [on a discovery request] into writing and make it obvious to the requestor that you’re putting in the spin and saying it outright. The problem is when people sort of privately, passively put these spins on the request and don’t state that and don’t make it explicit in their answer.

Relatedly, many informants (including some plaintiffs’ attorneys) interpreted the *Fisons* scenario not as an ethical lapse on the part of the defense firm, but rather as a communication breakdown between opposing attorneys—and, hence, as the product of unprofessional conduct on both sides. A large-firm associate’s comments were typical: “the lack of a reaction by the plaintiffs’ attorneys to these responses borders on negligence. To just take these responses, and not to see where they are going with this—I mean, there are a lot of red

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50. See Mead, *supra* note 15, at 75-82.

51. See James P. Zappen, *The Discourse Community in Scientific and Technical Communication: Institutional and Social Views*, 19 J. Technical Writing 1, 1 (1989).

flags that need responses.” This did not seem to be merely a case of blaming the victim. Rather, such reactions reflected a pervasive sense that fluency in the symbolic vocabulary of the profession ranked at or near the top of every litigator’s list of moral obligations. As another associate put it: “That may be the difference between whether a lay person could do it or only someone who is part of the club—because lay people wouldn’t necessarily know that these are red flags.”

The existence of system-level ethical understandings emerged in other contexts, as well. Although they came from two different cities and several different firms, large-firm litigators showed a substantial amount of consensus on, for example, the hierarchy of sins in deposition defense. And even where they displayed disagreement, the debate was often limited to two distinct positions, with one in the clear majority. Most large-firm attorneys favored literal rather than liberal interpretation of discovery requests; most favored briefing potential witnesses on the “story of the case” rather than passively accepting their unbriefed testimony; most favored aggressive rather than restrained deposition defense; and most preferred to act as an agent of their client’s will, rather than adopting an assertive fiduciary stance. For all the talk of ethics being a matter of individual personality, the views that our focus groups presented were remarkably uniform.

Given informants’ apparent tendency to see litigation behavior as a conversation of significant gestures and to embrace a system-level consensus on most ethical issues, it would hardly be surprising to find that, over time, the normal tends to become the normative in litigation practice. With a common gestural vocabulary and broad agreement on central ethical standards, few informants seemed to feel that anything was seriously amiss in their practices, even in those areas (such as deposition defense) where technical rule violations abound. If conveying clear messages is the highest ethical obligation, then universal adoption of a particular gesture makes that gesture appropriate by *definition*. In this sense, litigation ethics do not exist in the abstract, but rather are constantly being constructed from litigators’ day-to-day routines. Standards of conduct come from neither individual attorneys nor from individual firms, but rather from the larger system of the profession as a whole.

In addition to providing the content of litigation ethics, the larger social system also provides many of the mechanisms for their enforcement. Several crucial sources of material and cultural controls reside largely outside the boundaries of any individual law firm. On the material side, the most obvious such mechanism is professional reputation, which emerges primarily from firms’ ongoing interactions with *one another*. Because an image of ethicality can facilitate everything from discovery efforts to settlement negotiations, reputational concerns (both personal and organizational) play a central role in the logic of ethical pragmatism. Professional reputation, however, is not



the only systemic source of material incentives. Other devices for aligning morality and self-interest emerge from ongoing interactions with *external monitors*, such as malpractice insurers and the judiciary. These monitors can increase the cost of sharp practices not only directly (by raising premiums or imposing fines), but also indirectly (by encouraging the adoption of internal control mechanisms). Even when these monitors operate by motivating firm-level reforms, however, it is important to recognize that the resulting changes are products of the external environment as much as of the firm itself.<sup>52</sup>

Similarly, a great deal of what appears to be firm-level culture may, in fact, come from outside. As mentioned above, attorneys often turn to external mirrors (both real and hypothetical) for insights into their own identities. These mirrors include newspapers, juries, judges, and other firms. Said one large-firm associate:

When I draft answers to discovery requests, I assume that at some point they're going to be blown up on a piece of poster board and shown to a jury, and I don't want to be embarrassed by it. And if you sort of view every discovery request that way, you'll find that you'll answer in a much more reasonable fashion.

Relatedly, a large-firm partner echoed a recurrent theme when he noted, "I know very little about my partners, except what I hear from other firms." Thus, the "looking-glass self"<sup>53</sup> large-firm culture is largely a construct of the intra-professional environment.

Moreover, recent changes in the structure of practice may actually be increasing the extent to which "firm culture" is, in reality, exogenous. Most obviously, laterals bring their socialization with them, rather than receiving it within the firm. But in an era when associates often work in isolation, even "home-grown" attorneys may, in effect, be raised by wolves. More than one informant commented that he or she had learned important deposition skills primarily by observing opposing counsel. The same, presumably, could be said about the looking-glass effects described in the previous paragraph: as growth and bureaucratization dilute the culture-building force of intrafirm interaction, intra-professional reflections become an increasingly important source of self-identity.

Before concluding this discussion of systemic factors, it is important to note that most large-firm informants (and many plaintiffs' attorneys and judges, as well) saw trends at the system level as being no more conducive to ethical practice than trends at the firm and individual

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52. Cf. Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 *Am. Soc. Rev.* 147, 148 (1983) (stating that organizations in the same field are prompted by external forces to become more similar to one another); W. Richard Scott, *The Adolescence of Institutional Theory*, 32 *Admin. Sci. Q.* 493, 494 (1987) (averring that organizations tend to incorporate relevant environmental aspects into their structure).

53. Charles Horton Cooley, *Human Nature and the Social Order* 196-97 (1922).

levels. On the material side of the ledger, the relevance of individual reputation diminishes as the profession becomes more national in scope; and the weight of organizational reputation diminishes as law firms become more fluid and internally heterogeneous. External sanctioning agents rarely possess the aptitude or inclination to step into the breach. While malpractice insurers may demand changes in law firm structure, they rarely do so with much understanding of the subtleties of real-world litigation. Even judicial controls are not without problems. Although many informants urged greater judicial oversight of discovery, these calls rang somewhat hollow when viewed in conjunction with informants' tendency to deride current judicial interventions as ignorant, grandiose, naive, biased, and simplistic. Each side of the litigation bar—both defendant and plaintiff—saw the judiciary as applying an unjustified double standard in favor of the other, and few informants seemed to have much tolerance for judges scrutinizing internal firm practices.

On the cultural side, the prognosis was, if anything, even worse. As mentioned above, informants generally saw profession-level ethics training as the least satisfying of their various socialization opportunities. Informants viewed the externalization of culture through lateral hiring as not merely unhelpful but as actively pilloried as a basic cause of ethical decay. Finally, although some informants welcomed the feedback that they received from their contacts with opposing counsel, most found these interactions to be culturally coarsening, and none saw them as an adequate substitute for apprenticeship training or other intrafirm interactions. If nothing else, the very adversarial character of the litigation system makes opposing counsel an unreliable source for behavioral guidance.

In short, most of our informants saw the dominant systemic trends in the legal profession as weakening, not strengthening, ethical control. Large-firm practice has become substantially more market-driven in recent years—and markets, as social structures built around “exit” rather than “loyalty and voice,”<sup>54</sup> tend to erode community, weaken culture, and discourage moral discourse. Litigation poses a prisoner's dilemma, in which ethical practice is largely sustained by each side's faith in the reputation (and the reputation-based interests) of the other. As one associate put it:

If I'm thinking of the other person as a bastard or a son-of-a-bitch or “the enemy,” that makes me inclined to be very defensive and to take aggressive positions so that I will have negotiating power. But

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54. The reference here is to Albert Hirschman's classic study of organizational learning, in which he distinguishes two characteristic feedback mechanisms—one in which disgruntled parties simply terminate their relationship with the organization (“exit”), and another in which they stay despite dissatisfaction (“loyalty”) and actively work for improvement (“voice”). See Albert Hirschman, *Exit, Voice, and Loyalty* 21-43, 76-105 (1970).

if I trust the other people and trust that they will play fair with us if we play fair with them, then we won't have to go quite as far.

Under a loyalty/voice regime, the long-term reputational interests of attorneys, firms, and clients are similar, since together they are all repeat-players. When each of these groups embraces the logic of exit, however, the system begins to unravel. No one has much incentive to invest in goodwill, since everyone can plausibly deny responsibility for prior ethical lapses by blaming some long-gone co-conspirator—saying, in effect, “I didn't want to do it, but I couldn't restrain my asshole partner/associate/client.” As an in-house counsel bluntly stated, “I don't care about [preserving] the law firm's reputation. I care about the cost-effective handling of that particular case.” In this brave new world, ethics become situational because instances become decoupled from identities. Such decoupling would be troubling in any social system, but it is particularly corrosive in a profession where governance rests almost entirely on culture and reputation.<sup>55</sup>

#### A MATTER OF PERSPECTIVE

Before concluding, it is necessary to manage the divergent images of litigation that emerged from discussions with large-firm litigators, in-house counsel, plaintiffs' attorneys, and judges, respectively. Although the research project focused primarily on the ethical world of the large-firm litigator, that world is necessarily composed, in part, of the views of each of the other groups represented in the study. Moreover, as in the time-honored metaphor of the blind men and the elephant, what these groups saw when they observed the profession depended largely on where they stood. For readers with a postmodern bent, this situation allows an encounter with the multivocality of lived experience; for the more positivistically inclined, it represents an opportunity to triangulate on empirical reality from differing perspectives. Each group offered a distinctive world view, complete with its own set of ideals, its own definition of the problem, its own self-justifications, and its own demonology. The resulting hologram is surprisingly coherent, despite its occasional equivocation.

From the perspective of large-firm litigators, the guiding ideal of legal professionalism resides in the image of a ritualized adversary

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55. A provocative illustration of this decoupling can be found in the unwillingness of cost-conscious clients to subsidize apprenticeship socialization. Both partners and associates alike bemoaned this state of affairs; yet (as in-house counsel pointed out) no one suggested that the cost of such socialization should be absorbed by the firm. In the “good old days,” both clients and law firms had an interest in apprenticeship, since both benefitted from the reputation and competence of the firm's attorneys. Under the new regime of mobile clients, mobile partners, and mobile associates, it is not clear that anyone continues to have such an interest. One partner observed ruefully that “clients used to invest in mentoring for young associates; but today, because they aren't committed to the firm, they don't want to invest in that anymore.” Ironically, it appears that many large-firm partners could say the same about themselves.

contest—a stylized confrontation in which lawyers serve as zealous champions for good and bad causes alike, without ever becoming so close to the principles that they lose sight of the nobility of a game well-played. As one associate put it, “We are based on an adversarial system. The assumption is that all the lawyers are reasonably competent, and that you’re all out there as agents or knights for your clients, and you’re going to joust it out.” In this conceptualization, the primary challenge to the profession lies in preserving the ritual integrity of the adversary encounter. If problems arise in this regard, they are most likely attributable either to the failure of over-zealous combatants to acknowledge each other’s dignity, or to the failure of meddling clients to allow their champions sufficient room to maneuver and sufficient liberty to fight with honor. Confronted with instances of ethically dubious obstructionism, large-firm informants tended to rationalize the behavior by arguing that it is not the defendant’s job to do the plaintiff’s work. As long as a litigation tactic leaves one’s opponent a recourse within the arena, it is, by assumption, legitimate. Thus, in discovery, large-firm informants generally saw nothing wrong with an evasive response that “tees up” the issue for a motion to compel. The ball, although hidden, remains in the field of play, and both the spirit of the game and the honor of the players remain intact.

To in-house counsel, the paramount ideal of the profession is not adversarialism, but efficiency. This is true in both the local and the global sense. The good lawyer provides a cost-effective vehicle for his or her client’s specific interests, and in doing so, he or she also facilitates the efficient functioning of the economy as a whole. The challenge facing the profession, therefore, is to provide a maximum amount of dispute resolution at a minimum cost. Obstacles to achieving this objective arise from two sources: agency problems in the control of rent-seeking legal representatives, and moral hazards in the resolution of unwarranted legal harassment. The former peril forces corporations to overcome inefficient transaction costs in order to settle legitimate claims for their “fair value,” while the latter forces corporations to engage in protracted court battles in order to deter “strike suits” based on frivolous complaints and junk science. In this milieu, the primary rationalization for stretching ethical boundaries is to spare corporate executives from wasteful legal distractions—in the form of either busybody moralists or of pillaging marauders. In the in-house counsel’s ideal world, litigation would simply be commerce by other means; if getting to this end requires modifying a few feudal vestiges, that can hardly be a bad thing.

From the perspective of plaintiffs’ attorneys, neither the honor of the game nor the efficiency of the economy lie at the heart of the legal ideal. Rather, the morality of the justice system rests squarely on its ability to provide justice. The obstacles to achieving this worthy goal stem primarily from delay and deception by corporate wrongdoers

and from the innate elitism of those wrongdoers' various co-conspirators, representatives, and lackeys. In attacking such obstacles, plaintiffs' attorneys rationalize litigation tactics that their opponents might call uncivil and harassing by arguing that these behaviors are the only ways to sweat out the smoking gun from a corporation intent on concealing it or to break down the wall of upper-crust arrogance that keeps the captains of industry from acknowledging industry's victims.

Finally, whereas plaintiffs embrace *justice*, the judiciary embraces *truth*. While judicial informants were somewhat sympathetic to the virtues of conducting a fair fight, of settling cases before trial, and of promoting equity, their *raison d'être* clearly resides in their ability to facilitate the revelation of fact and the debunking of fiction. From this truth seeking perspective, the problem with litigation lies in the tendency of defendants to withhold information<sup>56</sup> and, more importantly, in the tendency of both sides to pursue their objectives through counterproductive game-playing. If judges fail to fulfill their ethical obligations—such as the duty to impose sanctions for discovery abuse—they tend to justify these actions (or inactions) as efforts to short-circuit the litigation game. As one judicial informant commented:

“Our response is to stop playing the game. If we impose sanctions, then we have litigation within litigation. And how have we advanced the case? If we award sanctions, we are saying, ‘Keep this game going.’”

These alternative perspectives produce a complex demonology, in which everyone blames everyone else for the profession's failings. Judges, plaintiffs' attorneys, and in-house counsel all blame large-firm litigators for showboating to impress clients, for churning cases to generate billable hours, and for reveling excessively in word games and other aspects of litigation-as-sport. Even large-firm litigators themselves lodge many of these complaints against their “devils within”—lateral hires and mid-level partners. Large-firm litigators, plaintiffs' attorneys, and in-house counsel also blame judges for being too reluctant to sanction misconduct. Judges, for their part, largely accept this critique but generally pass the buck to their own internal enemy: appellate courts that routinely reverse discovery sanctions on appeal. Large-firm litigators and in-house counsel further place a large share of the blame for discovery abuse on plaintiffs' counsel, who are seen as launching boilerplate strike suits against deep-pocket corporations and engaging in uncivil harassment merely to raise the settlement value. While judicial informants were notably silent on this complaint, the present sample of relatively well-heeled plaintiffs' attorneys responded by deflecting such criticisms downward toward the “incom-

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56. In this sense, the judicial ethic implies a slight pro-plaintiff bias during discovery, since the release of irrelevant information poses less of a threat to truth seeking than does the concealment of relevant information.

petent” practitioners at the lower reaches of their bar. Finally, large-firm litigators, judges, and plaintiffs’ attorneys all attacked in-house counsel and/or their executive superiors for being either irrationally aggressive, unethically withholding, or both. Interestingly, in-house counsel were the only set of informants who did *not* attempt to deflect blame onto an “internal other” (in this case, the logical candidate would have been non-legal executives). Instead, they vociferously denied the charge of irrational aggressiveness—which they redirected toward outside counsel—and they partially justified withholding, on the grounds that a more forthcoming stance would simply encourage unethical plaintiffs to go on “fishing trips.”

As a final point, it is worth noting that large-firm litigators and in-house counsel also directed several unique criticisms toward one another—criticisms that were not voiced by either judges or plaintiffs’ attorneys. Outside counsel described their in-house counterparts as too controlling and demanding, frequently complaining that, in effect, clients were squeezing ethics out of the practice of law in their efforts to eliminate every expense that could not be linked to an immediate financial return. In-house counsel, in return, described outside attorneys as greedy, gutless, and old-fashioned—unwilling to bear the cost of preserving the ethics that they profess to love, unwilling to pursue difficult fights without overwhelming firepower, and unwilling to come to terms with the fact that the modern economy has no place for bastions of manorial privilege. Illuminated by this opposition among allies, the ethical dilemmas of the profession leapt into stark relief.

#### CONCLUSION

The dominant theme emerging from this exploratory investigation is that litigation ethics are alive, but perhaps not well. Although large-firm litigators appear to define “ethics” narrowly as the letter of professional rules, most of our informants were able to move “beyond the rules” when pressed. And while their mapping of this murkier terrain was not exactly what a lay person might expect (or approve), these lawyers were hardly amoral. At the same time, however, most seemed to sense that they were working in an increasingly amoral—or multi-moral—system. Culprits abounded, from judges, to plaintiffs’ attorneys, to in-house counsel, to lateral hires, and to mid-level partners. But, at some level, all of these villains seemed to be merely scapegoats for a broader structural shift in the nature of large-firm practice. This transformation has introduced the profession to all of the performance pressures and profit opportunities of a market-oriented business, while adding little to the profession’s historical complement of diffuse cultural and reputational restraints.

At the same time, it may be wise not to make too much of the complaints of a few idiosyncratic segments of the larger bar. Even within these relatively selective focus groups, only large-firm litigators and

judges seemed genuinely convinced that the bar faces significant threats to its integrity—and, given their comments, it seems clear that neither of these groups would have unanimously labeled the situation as dire. Further, to the extent that informants did see genuine challenges to the profession's well-being, the situation might plausibly be characterized as a "crisis of discomfited elites." The groups that complained the most vociferously (large-firm litigators and judges) were those at the pinnacle of the old order, while the rising factions (plaintiffs' attorneys and in-house counsel) were far more sanguine. Indeed, one way to read the transition in practice is to see it as a shifting of the lay/professional interface into the corporation, and away from the law firm/client relationship. Since professionals experience their greatest power and autonomy in their interactions with laity, it is hardly surprising that outside counsel feel commodified by the change, and in-house counsel feel invigorated. While genuine ethical questions remain unanswered, it is unclear whether the situation represents anything more lofty than an intra-professional power struggle.

All of these characterizations are, of course, preliminary at best. Although our informants were helpful above and beyond the call of duty, there are certain questions that ten days of discussion simply cannot resolve. Our conversations failed, for example, to settle such issues as: whether clients favor litigators with records for aggressiveness, whether clients exacerbate or moderate aggressiveness in ongoing litigation; whether outside counsel "churn" cases to generate billable hours; and whether they or their in-house counterparts are generally in charge of the conduct of litigation. Other unresolved issues include the prevalence and impact of large-firm cultures, the differences between routine cases and "bet-your-company" litigation, and the extent of baseless strike suits. All of these topics are amenable to empirical investigation; however, most would require hypothesis-testing designs that would be far different from the open-ended, exploratory model employed here.

In the end, then, we are left with a better sense of the contours of the elite litigator's ethical world, and with an appreciation of the ways in which that world may be tectonically transformed by changes in the social organization of practice. Although it is still too early to determine whether the twin pressures of marketization and bureaucratization will topple the legal profession's delicate ethical balance, we can at least begin to understand the trepidation of large-firm attorneys, who must stand perched at mid-wire while the thunderheads roll in.