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The Ethical Dilemmas of Lawyers on Teams

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The Ethical Dilemmas of Lawyers on Teams*

Mary Twitchell**

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INTRODUCTION

How do you get along at the office? Do you trust each other? Or does each have a separate safe for his money?

—Groucho Marx to several lawyers¹

The very concept of a *team* of lawyers, whether colleagues or adversaries, evokes suspicion in the popular mind. If a group of lions is a pride, so the joke goes, a group of lawyers is a conspiracy. Yet lawyer teams—associated trial counsel, partnerships, corporate legal teams, legal service groups—have always been with us. These groups share not only safes but often a degree of trust and skillful team coordination that suggests the fear underlying the popular myth is not that lawyers cannot work together, but that they are too powerful when they do.

We have begun to pay serious attention to certain types of lawyer teams, studying the impact of organizational structure and bar stratification on the delivery of legal services.² Yet we

1. M. GREEN, *THE OTHER GOVERNMENT* 6-7 (1975) (quoting Groucho Marx).

2. See, e.g., G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978); Laumann & Heinz, *The Organization of Lawyers' Work: Size, Intensity, and Co-Practice in the Fields of Law*, 1979 AM. B. FOUND. RES. J. 217 (discussing implications of specialization and co-practice in various fields of law); Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*,

continue to ignore the smallest organizational building block in the lawyer's professional repertoire—the task-sharing team.³

According to organizational theory, the most important exercise of organizational power lies in designing and implementing the frameworks in which decisions are made.⁴ Although the legal profession has become increasingly conscious of the way that it exercises power through the design of the larger decision-making constructs, such as law firms, bar associations, corporate legal departments, and government agencies,⁵ it has paid scant attention to the smaller frameworks that lawyers, often unwittingly, fashion for day-by-day decisions—task-sharing teams.⁶

1981 AM. B. FOUND. RES. J. 97 (discussing organizational structure of large law firms and their impact on legal system); Slovak, *Giving and Getting Respect: Prestige and Stratification in a Legal Elite*, 1980 AM. B. FOUND. RES. J. 31 (examining social impact of stratification of firm partners and house counsel).

3. See *infra* note 6. Most formal and informal lawyer associations are variations built on two organizational building blocks, task sharing and partnership. The task-sharing team, as this Article defines it, works on a particular assignment for a specified client or client group. The team can be small (two lawyers) and short-lived (a discrete job assignment). In a partnership lawyers share resources, risks, and benefits but not necessarily work. Although a partnership can also be composed of relatively few individuals, it presupposes duration over time.

4. Ranson, Hinings & Royston, *The Structuring of Organizational Structures*, 25 ADMIN. SCI. Q. 1, 7-9 (1980).

5. See, e.g., sources cited *supra* note 2, *infra* note 24.

6. See E. SPANGLER, LAWYERS FOR HIRE 197 (1986) (lawyers pay little attention to organization of their work); Gilboy & Schmidt, *Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants*, 70 J. CRIM. L. & CRIMINOLOGY 1, 3 (1979) (little research on problems created by criminal lawyers who represent clients sequentially); Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 530 (historically, fact that attorneys practice within large organizations has been ignored).

There are several reasons for this lack of attention. Most important, perhaps, is the premise underlying the theory of professional organizations that professionals generally work alone in whatever structure they may occupy. See sources cited *infra* note 7. While this theory concedes the significant impact of institutional and management constraints on professional work product, the technical aspects of the lawyering craft are thought to be accomplished in relative solitude. For this reason few organizational studies focus on the dynamics of task-sharing teams composed of workers in the same profession. See generally COLLEAGUES IN ORGANIZATION (R. Blankenship ed. 1977) (analyzing teams working in same profession); E. FREIDSON, PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE (1970) (same).

Additionally, theories regarding professionalization seem to assume that teamwork increases individual competence and ethicality and that teamwork, therefore, is a relatively benign phenomenon. See, e.g., Bucher & Stelling, *Characteristics of Professional Organizations*, in COLLEAGUES IN ORGANIZA-

Until recently sociologists and legal scholars accepted the conventional wisdom that lawyers practice in groups but not in teams, because of the unique nature of the lawyer-client relationship and the high degree of professional judgment and autonomy required.⁷ Although this tenet remains substantially true for the majority of practitioners, many lawyers practicing in the largest and most powerful American firms now work in task-sharing teams.⁸ The 1987 Iran-Contra hearings brought into sharper focus the legal, ethical, and moral dilemmas faced by members of a high-pressure team. From the congressional hearings emerged the disturbing message that we must confront the way that small groups in adversarial situations work

TION 127-29 (R. Blankenship ed. 1977). The sole empirical study of the relationship between ethicality and types of lawyer teamwork generally supports this premise. See generally J. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 58 (1966) (lawyers who face most difficult ethical decisions work alone or in small groups).

Finally, practicing lawyers do not appear to regard the structuring of responsibility and authority in task-sharing teams as particularly problematic. Attention to this issue appears confined to possible violations of ethical codes or positive law. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C)(3) (1980) (lawyer may withdraw when unable to work with co-counsel); *id.* EC 5-12 (counsel unable to agree on matter vital to client's representation should submit disagreement jointly to client for resolution). Even here, the profession's scrutiny has not been intense. For example, in the last 70 years the American Bar Association (ABA) has been consulted only once regarding the appropriate resolution of a direct conflict of judgment arising between lawyers working together as a team. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1203 (1972) (when junior attorney and senior attorney disagree over whether some fact must be called to attention of tribunal, junior attorney must withdraw from case); *cf.* ABA Comm. on Professional Ethics, Formal Op. 324, at 6 (1970) (Code "militate[s] against any interference with the lawyer-client relationship by the directors of a legal aid society after a case has been assigned to a staff attorney"); ABA Comm. on Professional Ethics, Informal Op. 1074 (1969) (military defense counsel not justified in obeying order from superior not to investigate issue in case if he feels it necessary to client's defense; instead, junior counsel must seek withdrawal of order or ask that it be rescinded by higher authority).

7. Q. JOHNSTONE & D. HOPSON, *LAWYERS AND THEIR WORK* 118 (1967) ("Legal work is largely the product of individual rather than group effort."); see also Nelson, *supra* note 2, at 127 (departmentalization and specialization affect scope of individual practice but not production process itself); Zirkle, *Dynamics of Group Behavior in the Practice of Law*, 11 *LAW OFF. ECON. & MGMT.* 493, 496 (1971) (most firms are federations of proprietors); *infra* note 17 and accompanying text (most lawyers will work alone). But see E. SPANGLER, *supra* note 6, at 66 (much of actual labor of law firm accomplished through teamwork system).

8. See Schwartz, *The Reorganization of the Legal Profession*, 58 *TEX. L. REV.* 1269, 1283-84 (1980); see also Basten, *Control and the Lawyer-Client Relationship*, 6 *J. LEG. PROF.* 7, 8 (1981) (structure of profession changing as increasing number of lawyers work as employees).

and how they can err.⁹ It seems worthwhile therefore to look beyond the conventional wisdom about autonomy to find out how such task-sharing patterns affect the way that lawyers work.

This task grows more urgent as courts grapple with increasingly complex questions concerning the division of authority and responsibility for specific client services among lawyers. These questions come embedded in issues of case management, competence, collective and supervisory responsibility, tort and malpractice liability, ethical responsibility, fee arrangements, and conflicts of interest.¹⁰

This Article shows that task sharing among lawyers is not only increasingly common but increasingly important; what was once done with little conscious planning is becoming a common mode of operation, perhaps the standard building block in the larger organizational constructs within which lawyers operate. Task sharing, particularly in larger groups, raises a range of technical and ethical problems for the individual practitioner and for the profession as a whole that we can no longer accommodate. Instead, we must analyze the process of teamwork, the reasons behind it, its impact on the central lawyering task, and the way that team lawyers approach problems raised by constant jurisdictional overlaps and conflicts in decision making, information transmission, and client relations.

9. HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN & SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 285-324 (1987) [hereinafter IRAN-CONTRA REPORT] (discussing group concealment of information in Iran-Contra affair); see also *Eight Important Days in November: Unraveling of the Iran-Contra Affair*, N.Y. Times, July 5, 1987, § 1, at 10, col. 1 (discussing defense counsel's and Lieutenant Colonel Oliver North's implicit approval of North's secretary smuggling documents out of White House).

10. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 217 (2d Cir. 1987) (fee arrangements for plaintiffs' ad hoc "firm"), *cert. denied*, 108 S. Ct. 695 (1988); *Hunt v. Tomlinson*, 799 F.2d 712, 713-14 (11th Cir. 1986) (per curiam) (malpractice liability when two lawyers involved in case); *Lyle v. Charlie Brown Flying Club, Inc.*, 112 F.R.D. 392, 399-400 (N.D. Ga. 1986) (duty of team members to investigate facts), *rev'd mem.*, 822 F.2d 64 (11th Cir. 1987); *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 70-76 (E.D. Pa. 1983) (lawyers' struggle for control of class action), *aff'd in part, rev'd in part*, 751 F.2d 562 (3d Cir. 1984); *J.M. Clemminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 347-48 (D. Conn. 1981) (collective and individual responsibility for acts of others on team); *Control Data Corp. v. International Business Machs. Corp.*, 1973-1 Trade Cas. (CCH) ¶ 74,363, at 93,685-86 (D. Minn. 1973) (lawyers' destruction of documents).

The first part of the Article looks at the nature of the lawyering task itself. It identifies three forms of ambiguity that enrich and complicate the lawyer's work—task ambiguity, role ambiguity, and norm ambiguity—and explores the ways in which lawyer teamwork alters these ambiguities. Part II examines the behavior of lawyers in four task-sharing litigation teams characteristic of team types found in current private legal practice. These case studies demonstrate the specific problems faced by lawyers who must work together, including the practical difficulties of dividing authority and transmitting critical information among themselves. The studies also expose the more subtle ethical problems that underlie teamwork, including problems of conflict avoidance and resolution, pressures to conform to team norms, and the temptation to "lose" information injurious to team goals.

Part III examines possible regulatory responses to these problems. It suggests that because lawyers rarely discuss the phenomenon of teamwork with each other, and never with outsiders, they have developed little practical insight into the workings of lawyer teams and little positive law to regulate such teams. Part III predicts that as teamwork problems come increasingly to the attention of the public and the judiciary, managerial judging will provide an effective short-term check on some of the excesses created by lawyer teamwork. The Article concludes, however, that ad hoc judicial regulation is not a long-term solution; practicing lawyers, legal scholars, and social scientists must focus on the unarticulated problems faced by lawyers working together so that regulation is based on a deeper understanding of the complex dynamics of lawyer teamwork.

I. LAWYERS AS TEAM WORKERS

A. TWO MODELS OF LAWYERING

The framework for our understanding of lawyers comes from many sources: personal experience, media reports, sociological studies, literature, anecdotes, and urban legends.¹¹ From this barrage of information we choose the material that

11. See, e.g., J. BRUMVALD, *THE VANISHING HITCHHIKER: AMERICAN URBAN LEGENDS AND THEIR MEANINGS* (1981) (introducing concept of urban legends); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 64 (1983) (asserting that concept of "litigation explosion" is product of folklore).

forms our image of lawyers. Although our vision of lawyers has changed greatly over the past half century, perhaps the most significant change concerns our sense of the lawyer as an autonomous actor.

1. Model One: The Lawyer as Autonomous Professional

For generations we based our image of the lawyer on a professional model. Central to this model is the notion of autonomy. Professionals can apply complex skills to social problems only if they have discretion to select the manner in which their services are rendered.¹² In return they owe a duty to society to exert a high degree of self-control, based on their individual commitment to professional norms and values.¹³

The complexity of professional work has led some organizational theorists to conclude that professionals are shielded from internal, as well as external, control.¹⁴ Although professionals are better able than outsiders to judge each other's work, the degree of discretion involved in day-to-day tasks makes it difficult for them to divide a task or to monitor each other effectively.¹⁵

On first glance lawyers fit well into this model. Like other professionals they apply complex intellectual and social skills

12. D. RUESCHEMEYER, *LAWYERS AND THEIR SOCIETY* 13 (1973). Rueschemeyer points out, however, that the model ignores governmental and legal forms of control. *Id.* at 14; see also W. MOORE, *THE PROFESSIONS: ROLE AND RULES* 6 (1970) (professional uses own judgment in exercise of exceptional knowledge); Kritzer, *The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study*, 1984 AM. B. FOUND. RES. J. 409, 413 ("At the heart of the idea of autonomy is the image of the actor who is an *independent* player in the relationship.") (emphasis in original); Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 590 (1985) (conventional definition of professionalism presupposes substantial degree of public commitment and private autonomy); cf. Landon, *Lawyers and Localities: The Interaction of Community Context and Professionalism*, 1982 AM. B. FOUND. RES. J. 459, 468-72 (size of lawyer's community affects nature of autonomy); Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 506 & n.16 (1985) (professional autonomy is an "ambiguous concept that has been defined in numerous, inconsistent ways").

13. D. RUESCHEMEYER, *supra* note 12, at 13.

14. See M. LARSON, *THE RISE OF PROFESSIONALISM: SOCIAL ANALYSIS* 190 (1977) (reluctance of professionals to sanction their colleagues); D. RUESCHEMEYER, *supra* note 12, at 24 (internal stratification of bar and specialization limit the "self-control which the profession is supposed to exercise according to the model of professional autonomy"). See generally E. FREIDSON, *supra* note 6, at 146, 154 (exploring reasons doctors do not engage in collegial control).

15. See E. FREIDSON, *supra* note 6, at 122-29, 154.

to resolve legal problems. Although they serve clients, their independent duty as officers of the court gives them a degree of freedom from client control.¹⁶ Dealing with fluid and ambiguous matters, they have difficulty dividing their work or monitoring each other on a daily basis. Viewed from this professional perspective, lawyers appear destined to work alone.¹⁷

The lawyer's professional code of ethics reinforces this autonomous image. As late as 1969, the Code of Professional Responsibility treated the lawyer as an individual operating in a world of clients, courts, and society.¹⁸ Although the Code addressed some of the pressures faced by the profession, it ignored those generated by the economics and organization of a lawyer's work.¹⁹

Even in 1969 this professional model did not reflect reality.²⁰ In the late nineteenth and early twentieth century, law-

16. See *infra* note 46 and accompanying text; see also D. RUESCHEMEYER, *supra* note 12, at 23-25 (discussing factors that limit lawyer's independence from client).

17. Half of all recent entrants to the bar try solo practice at some point in their careers. E. SPANGLER, *supra* note 6, at 211 (citing B. CURRAN, *Lawyer Demographics*, in THE LAWYERS ALMANAC 1982-1983, at 82 (1983)). Even when not in solo practice, much of their work is done alone. See Q. JOHNSTONE & D. HOPSON, *supra* note 7, at 118 (even in large private law firms, partner likely to supervise only a secretary and a few associates).

18. See C. WOLFRAM, MODERN LEGAL ETHICS 878 (1986) (Code projects image of lawyer as sole practitioner).

19. The 1969 Code of Professional Responsibility makes passing references both to firm practice, see, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-2 (1980) (lawyer may disclose affairs of clients to firm partners or associates), and to temporary associations, see, e.g., *id.* EC 2-22 (without consent of client, lawyer should not associate in particular matter another lawyer outside firm); *id.* EC 4-2 (lawyer should not seek counsel from another lawyer if it might reveal client confidences). The 1969 Code essentially ignores, however, lawyers who work together in corporate or government offices. See C. WOLFRAM, *supra* note 18, at 878. Professor Charles Wolfram notes that the Code "does not recognize . . . that the division of function and responsibility within a firm can create both different and greater problems of professional responsibility than those that confront a solo practitioner." *Id.* The Model Rules of Professional Conduct, adopted by the ABA in 1983, attempt to correct this deficiency by addressing the question of hierarchical authority within a law firm. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1987) (responsibilities of partner or supervisory attorney); *id.* 5.2 (responsibilities of subordinate attorney); *id.* 5.3 (responsibilities for nonlawyer assistants); see also *infra* note 255.

Although the Model Rules were amended in 1987, they continue to be known as the 1983 Model Rules. Citations in this Article to the current Model Rules use the date of amendment.

20. See C. WOLFRAM, *supra* note 18, at 878.

yers had begun to shed some of the hypothetical autonomy of the profession for more cooperative work arrangements.²¹ As institutional clients grew larger and their legal needs more complex, their lawyers began to work within the larger institutional structures to provide more extensive services to their clients and more economic stability for themselves.²² Because the professional model failed to account for these changes, an alternative picture of lawyers began to emerge.²³

2. Model Two: The Lawyer as Organizational Professional

The vision of the lawyer has changed primarily in the last twenty years as lawyers, legal scholars, and social scientists have recognized the significant influence that clients and lawyer groups have on the work practices of individual lawyers.²⁴ Such studies, focusing primarily on larger structures within

21. *Id.* at 877-78.

22. *Id.* (larger firms began to develop in late 19th century to help clients handle complex litigation and growing government regulation). Two-thirds of the bar now work within organizations of some sort, Rhode, *supra* note 12, at 590, usually for entities whose structure mirrors that of their clients. *Id.* at 631.

23. See Rhode, *supra* note 12, at 589-93 (exploring conflict between ideology of lawyer as autonomous public servant and bureaucratic realities of contemporary practice); see also Nelson, *supra* note 12, at 543 (changing organization of legal work in corporate sector requires divergence from traditional ideology of professional autonomy).

24. For two relatively early empirical studies of lawyers working in groups, see J. CARLIN, *supra* note 6 (examining social conditions and ethics of Members of New York City Bar); E. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* (1964) (sociological study of Wall Street firm). See generally Q. JOHNSTONE & D. HOPSON, *supra* note 7 (study of legal profession in United States and England). By the 1970s studies of the sociology of the bar had become a growth industry. See, e.g., D. RUESCHEMEYER, *supra* note 12 (comparing legal profession in Germany and United States); Galanter, *Mega-Law and Mega-Lawyer in the Contemporary United States*, in *THE SOCIOLOGY OF THE PROFESSIONS* 152 (R. Dingwall & P. Lewis eds. 1983) (analyzing distinctive style of law practice associated with, but not restricted to, large law firms); Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111 (1978) (analyzing social structure of legal profession in Chicago); Kritzer, *supra* note 12 (setting forth three-dimensional framework for interpreting lawyer-client relationships: professional, business, and social); Landon, *Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice*, 1985 AM. B. FOUND. RES. J. 81 (examining impact of small town practice on practitioners' exercise of zealous advocacy); Laumann & Heinz, *supra* note 2 (discussing implications of specialization and co-practice in various fields of law); Nelson, *supra* note 12 (asserting that large law firm lawyers' ideology of autonomy has little bearing on their practice); *Symposium on the Corporate Law Firm*, 37 STAN. L. REV. 271 (1984) (examining trends in organization of corporate firm practice).

which lawyers work,²⁵ have demonstrated that economic context can radically affect the ideal of professional autonomy.²⁶

We now recognize that the pressures on sole practitioners serving their own client base significantly differ from those faced by lawyers working for a firm, a corporation, or a government agency.²⁷ We have also recognized the stratification of the American bar into at least two groups, one consisting of lawyers who work alone or in small groups with limited resources to serve individual persons,²⁸ and a more powerful group of lawyers who work within corporations or "megafirms" to serve institutional clients.²⁹ The image of the lawyer as an

25. See, e.g., Galanter, *supra* note 24.

26. See, e.g., C. WOLFRAM, *supra* note 18, at 878 (lawyers who serve single large client face more pressure to defer to lawyer linking firm and client); Heinz & Laumann, *supra* note 24, at 1113 (legal profession "shaped and structured by its clients"); Kritzer, *supra* note 12, at 410 (research shows corporate sector of profession is, if anything, "more dependent on and constrained by clients than are lower-status lawyers who represent personal clients"); Nelson, *supra* note 12, at 543 (changing organization of work in corporate sector increases divergence between ideology of professional autonomy and actual practice); Rhode, *supra* note 12, at 590, 594 (autonomous paradigm bears little resemblance to daily practice; lawyers working within organizations are subject to norms peculiar to each setting).

27. See sources cited *supra* note 26; see also E. SPANGLER, *supra* note 6, at 176 (trend toward replacement of varied clientele by single powerful employer); Rhode, *supra* note 12, at 627 (pressures to suspend normative judgment may intensify when attorney's status and income are closely tied to representation of single patron or to success in particular proceeding).

28. See sources cited *infra* note 29. Lawyers sometimes serve individual clients through larger groups, such as legal aid offices, clinics, and prepaid legal plans. See, e.g., E. SPANGLER, *supra* note 6, at 144-74 (discussing work of Legal Services lawyers); Cahn & Schneider, *The Next Best Thing: Transferred Clients in a Legal Clinic*, 36 CATH. U.L. REV. 367 (1987) (discussing impact of transferred cases on student practice in legal clinic).

29. See, e.g., J. CARLIN, *supra* note 6, at 23-25 (almost all large-firm lawyers in New York City serve major corporations); D. RUESCHEMEYER, *supra* note 12, at 24 (division of bar into different client milieux); E. SPANGLER, *supra* note 6 (lawyers working in firms, government agencies, or legal service corporations operate under strikingly different working conditions from those of corporate counsel); Galanter, *supra* note 24 (comparing practices serving institutional clients with practices serving individual clients); Kritzer, *supra* note 12 (distinguishing corporate services and personal services lawyers); Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968) (ethical canons appropriate for large firms make practices of individual lawyers appear unethical). One study identifies four separate types of legal practice: corporate litigators, corporate office work, individual and small business litigators, and individual and small business office work. Laumann & Heinz, *supra* note 2, at 246. They point out that less than one-sixth of the lawyers in their study do substantial work for both individual and corporate clients:

Unlike the task specialization that Durkheim associates with mutual

independent public servant aiding a wide range of people has changed to the image of a lawyer as entrepreneur, profit-maximizer, and handmaiden of powerful institutional interests.³⁰

Not only do we see lawyers as less autonomous and more bureaucratically arranged than the professional model suggests, but we use organizational rhetoric to describe their mission. Professors Edward Dauer and Arthur Leff, perhaps overstating their case, have nevertheless captured the bureaucratic aspects of lawyering:

Most lawyers are free-lance bureaucrats, not tied to any major establishment bureaucracy, who can be hired to use, typically in a bureaucratic setting, bureaucratic skills—delay, threat, wheedling, needling, aggression, manipulation, paper passing, complexity, negotiation, selective surrender, almost-genuine passion—on behalf of someone unable or unwilling to do all that for himself.³¹

Several changes have grown out of our recognition that lawyers' skills straddle two organizational camps, professionalism and bureaucracy.³² The first is conceptual: we are building a richer and more subtle lawyering model that takes context into account.³³ Using this model, we better appreciate the pres-

interdependence, this sort of division of labor may assign many lawyers to separate microenvironments that are so exclusively devoted to the service of particular clienteles that they have little interest in or dependence on lawyers who serve other sorts of clients.

Id. at 243-44 (citing E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 62 *passim* (G. Simpson trans. 1964)).

30. See Johnson, *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567, 575 (1980-1981) (arguing that lawyer's primary goal is to maximize personal profits); Laumann & Heinz, *supra* note 2, at 238 (profession's overall preoccupation lies with "business transactions, transfers of wealth, and the defense of property rights. A mere 18 percent of the total legal effort [of the Chicago practitioners studied] is directed to fields concerned with the alleviation of personal problems . . .").

31. Dauer & Leff, *The Lawyer as Friend (Correspondence)*, 86 YALE L.J. 573, 581 (1977); see also Rhode, *supra* note 12, at 598 ("Many of the nation's most eminent law firms are noted for their skill in genteel procrastination.").

32. See, e.g., M. LARSON, *supra* note 14, at 191 (suggesting much that is characteristic of "professionalization" is consistent with bureaucratization). See generally Hall, *Professionalization and Bureaucratization*, 33 AM. SOC. REV. 92 (1968) (discussing impact of bureaucratization on professionals and effect of introducing professionals into bureaucracy); Plumlee, *Lawyers as Bureaucrats: The Impact of Legal Training in the Higher Civil Service*, 41 PUB. ADMIN. REV. 220 (1981) (discussing limited effect that legally trained civil servants have on federal bureaucracy); Slovak, *The Ethics of Corporate Lawyers: A Sociological Approach*, 1981 AM. B. FOUND. RES. J. 753, 758 (examining conflicts faced by professionals working within bureaucratic structure).

33. Cf. J. CARLIN, *supra* note 6, at 58 (impact of type of practice on ethical decisions facing lawyers); Rhode, *supra* note 12, at 591 (bar's concerns for individual dignity and trust not implicated in same way in all legal practice).

tures that lawyers face as they negotiate the conflicting roles and duties created by their position within our social institutions.³⁴ The second change is normative: we are learning to recognize that ethical norms and legal standards must be fitted to meet the conditions under which lawyers work.³⁵

Despite this gradual emergence of the model of the lawyer as institutional professional, we still cling to the notion that lawyers accomplish their day-to-day activities alone. Although surrounded by contradictory evidence, from the law school graduates who fill the ranks of law firm associates to the hordes of lawyers on the Bhopal streets,³⁶ we have not built a picture of the smaller work-sharing team into the institutional-professional model. Instead we subscribe to the model of lawyer individuality at the lowest level, ignoring the fact that many lawyers do much, or even all, of their work in groups.

This addition to the model is crucial. Just as a large organizational structure affects how a lawyer's work is accomplished, work on smaller task-sharing teams necessarily affects a lawyer's productivity and ethical behavior. Yet virtually no one has acknowledged the pragmatic and ethical dimension of such teamwork, the choices and the stresses faced when lawyers share their work.

Focusing on task-sharing teams provides a novel perspective on the problems faced by an institutional lawyer. Such teams often cut across the institutional structures that are traditionally examined in a study of lawyer organizations. Task-sharing teams can be creatures of a firm or ad hoc creations put

34. Cf. Rhode, *supra* note 12, at 591 (study of legal ethics requires exploration of ideological and organizational context of legal practice).

35. Cf. Rotunda, *Law, Lawyers and Managers*, in *THE ETHICS OF CORPORATE CONDUCT* (C. Walton ed. 1977) (examining unique ethical problems facing corporate counsel); Patterson, *The Limits of the Lawyer's Discretion and the Law of Legal Ethics: National Student Marketing Revisited*, 1979 DUKE L.J. 1251, 1263 (ethical rules fail to recognize that different clients have different legal rights). See generally G. HAZARD, *supra* note 2 (examining ethical dilemmas of corporate and government attorneys and impact of working in teams on resolution of ethical problems); Greenebaum, *Attorneys' Problems in Making Ethical Decisions*, 52 IND. L.J. 627 (1977) (advocating analysis of attorney's ethical behavior as result of interaction between attorneys, clients, and groups to which they belong); Rhode, *supra* note 12 (study of ethical dimensions of contemporary legal practice requires exploration of its ideological and organizational context); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 12 (1975-1976) (arguing peculiar situation of criminal defense lawyer justifies behavior not appropriate for other types of lawyers).

36. See *Teams of Lawyers Pouring Into India*, Chicago Daily L. Bull., Dec. 12, 1984, at 1, col. 5.

together temporarily by individual lawyers.³⁷ Whether sole practitioners or employees of a large organization, lawyers often do their lawyering in task-sharing teams. Although some stresses are the product of the particular team, others appear universal to lawyers who must work together. To understand these pressures, we must first isolate and identify the stresses of a practitioner working alone. The next section examines the litigator's task in more detail.

B. THE LAWYER'S TASK

Perhaps the most salient characteristic of a lawyer's task is its ambiguity. Lawyers use a complex body of technical knowledge and skills to exercise judgment for clients regarding the interpretation and application of human norms and values by institutions. This interpretation rests on ambiguities about central values and has a fluid and uncertain outcome. If the task involves litigation, it is also intense and adversarial, often with an all-or-nothing outcome. To work effectively, then, lawyers must make continuous, multiple judgments about highly ambiguous situations.³⁸ These ambiguities fall into three classes: task ambiguity, role ambiguity, and norm ambiguity. Although overlapping, each category calls for a different type of judgment and exerts a different strain on the lawyer.

1. Task Ambiguity

Although all professionals rely upon complex systems of knowledge, the type of knowledge that lawyers use is unique:

The body of knowledge lawyers have a special competence in is not—as in the case of medicine, physics, or engineering—concerned with laws and regularities independent of human actions or intentions. Rather than natural laws, its subject matter are social norms and rules for their application—norms and rules subject to deliberate change as well as to interpretation and estimates of the likelihood that they will be enforced. . . .

. . . Furthermore, much of counsel's valued skills is not at all based on his technical knowledge or is only tenuously linked to it. . . . Organizational "know-how," economic experience, wisdom about personal relations, connection, and "inside" knowledge are often as important for the lawyer's work as knowledge of the law.³⁹

37. See *infra* notes 68-96, 120-72 and accompanying text.

38. Cf. Nagel, *Lawyer Decisionmaking and Threshold Analysis*, 36 U. MIAMI L. REV. 615 (1982) (applying threshold analysis to situations lacking accurate cost-benefit information).

39. D. RUESCHEMEYER, *supra* note 12, at 23. Contrasting the kind of knowledge used by doctors and lawyers, Eve Spangler wrote: "[S]cientific

The contextual nature of legal work provides one key to the ambiguity associated with this unique body of knowledge. As one lawyer in Professor Eve Spangler's study pointed out:

One of the biggest things that law schools have [to do] is disabuse many students [of] the notion that words are like numbers. We have a lot of trouble with engineers in law school, people whose way of expressing themselves and whose mode of thought is in terms of mathematical equations. "Five is five." You get another word, they don't see that it can change meaning in context so that in one sentence it means almost the opposite of what it means in another sentence. . . . Even if you had the words that purported to answer [a particular question] you'd have disagreements about what the words mean in that particular context.⁴⁰

In litigation the ability to grasp the essentials of a situation and anticipate the relevant future possibilities encompasses a series of complex case management decisions vitally tied to language and context.⁴¹ Lawyers must decide which facts to gather, retain, and use, and, equally important, which facts to ignore.⁴² They must assess the significance of legal precedents for a particular case and choose the best presentation of legal and factual arguments to key decision makers. Perhaps most important, they must decide what the case is worth in order to allocate available resources.

Few of these decisions are clear cut. Just as important as a lawyer's decision about one of these matters is his decision about the amount of time to invest in any particular issue. One of the most uncertain aspects of litigation is the relative value of a particular strategic action.⁴³ Much of a litigator's work will not affect the suit's outcome, but he is never sure which detail

knowledge is objective, replicable, intrinsically suprahistorical and supracultural, while legal knowledge has none of these once-and-for-all qualities. Rather, it is cultural knowledge: informed estimates about which arguments will be persuasive in [a] specific jurisdiction under particular circumstances." E. SPANGLER, *supra* note 6, at 184-85 (footnote omitted).

40. E. SPANGLER, *supra* note 6, at 185-86.

41. The lawyer's goal is productivity: "Modern lawyers often pride themselves on their general ability to grasp the essentials of a situation and to anticipate the relevant future possibilities, and another typical claim is that they can 'get things done'—discreetly or deftly, as the case requires." *Id.*

42. Cf. Hazard & Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, in *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* 109 (1983) (most of what lawyer does is preparing for eventualities that never happen).

43. Cf. Hazard & Rice, *supra* note 42, at 84 (good planning anticipates flexibility and requires capacity for feeling one's way); Oakes, *A Theoretical Framework for Lawyering Behavior and Techniques of Legal Diagnosis*, 14 *PAC. L.J.* 243, 256-57 (1983) (applying medical concept of triage to lawyer's case evaluation decisions).

will turn out to be crucial. This all-or-nothing aspect of litigation puts great pressure on a lawyer trying to serve a client competently and efficiently.⁴⁴

2. Role Ambiguity

One of the most important decisions for a lawyer is how to order his various roles. A lawyer has a professional duty to the client,⁴⁵ to the court,⁴⁶ and to society.⁴⁷ A lawyer may also be constrained by self-interest and obligations to family, employer, partners, and other social or work groups.⁴⁸ Each role contains internal ambiguities. For instance, the lawyer's duty to the client may be problematic when the client's short-term goals, such as winning "at any cost," conflict with other long-term client goals, such as economic survival.⁴⁹ In addition, the obligations of one role often conflict with the obligations of a

44. See Gould, "Burnout": *Law and Disorder*, Nat'l L.J., Apr. 30, 1984, at 13, col. 1, 17, col. 4, 19, col. 1, reprinted in S. GILLERS & N. DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 643, 646 (1985) (inability to control ultimate outcome lowers lawyer autonomy and raises stress).

45. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 comment (1987) (attorney must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").

46. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1980) (lawyer must reveal client's fraud to tribunal if client refuses and information not privileged); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) (1987) (lawyer shall not knowingly make false statements to tribunal); *Control Data Corp. v. Washington Metro. Area Transit Auth.*, 87 F.R.D. 377, 379 (D.D.C. 1980) (counsel must observe duty as officer of court to secure just, speedy, and inexpensive judicial determinations).

47. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1980) (lawyer shall not "knowingly make a false statement of law or fact"); *id.* EC 7-1 (duty of lawyer to client and to legal system is to represent client zealously within bounds of law); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(a) (1987) (lawyer shall not misstate material fact or law to third person); *id.* Rule 8.4(c) (lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). Some commentators have deplored the fact that these codes of professional responsibility put too little emphasis on the lawyer's duty to the court and to society. See Fay, *Officers of the Court*, FLA. B.J., Dec. 1986, at 9, 10-11 (historical concept of lawyer's duty as "officer of the court" hardly visible in 1969 Model Code or in 1983 Model Rules); Rhode, *supra* note 12, at 595-605 (profession has failed to resolve the contradiction between fidelity to client and to legal system as whole).

48. See, e.g., G. HAZARD, *supra* note 2, at 8-9 (identifying many "others," besides client and court, to whom lawyer may owe duty); W. WEYRAUCH, *THE PERSONALITY OF LAWYERS* 141 (1964) (lawyers' behavior controlled not just by canons of professional ethics, but by informal social taboos); Kritzer, *supra* note 12, at 410 (what is in lawyer's economic self-interest may not be in client's interest).

49. See generally Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C.L. REV. 316 (1987) (when

competing role.⁵⁰ The most familiar and formidable example of these conflicts is that between the lawyer's duty to the client and to the court.⁵¹ A lawyer must cope with role ambiguity on two levels: determining how much time and energy are needed to clarify goals and options, and deciding how to accommodate, or choose among, competing duties. Given the difficulty of both tasks, it is not surprising that many lawyers ignore the role ambiguity that permeates their work.⁵²

3. Norm Ambiguity

To some extent ethical rules and legal norms circumscribe a lawyer's choices about case management and role conflict. On closer inspection, however, many norms that appear to guide a lawyer's choices are themselves ambiguous,⁵³ adding further stress to the lawyering task.⁵⁴ For example, our society has

confronted by competing goals, client, not lawyer, should decide what is in client's best interest).

50. See Cox, *The Lawyer's Public Responsibilities*, 4 HUM. RTS. 1 (1974) (examining conflicts faced by lawyer in public office); Gould, *supra* note 44, at 19, col. 1, reprinted in S. GILLERS & N. DORSEN, *supra* note 44, at 647 (discussing contribution of role ambiguity to lawyer burnout).

51. See, e.g., S. GILLERS & N. DORSEN, *supra* note 44, at 372 (discussing conflict between duty to client and duty to avoid fraud on court); Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 122-28 (1985) (discussing conflicting obligations of attorney convinced that client intends to commit perjury); see also *In re A*, 276 Or. 225, 239-40, 554 P.2d 479, 487 (1976) (lawyer who made good-faith attempt to resolve immediate conflict between duty to protect lawyer-client confidentiality and duty to prevent fraud on court not subject to discipline).

52. See, e.g., Hazard, *Quis Custodiet Ipsos Custodes?* (Book Review), 95 YALE L.J. 1523, 1529 (1986) ("The defense lawyer's avoidance of knowledge that incriminates his client provides an escape from the contradiction between the cognitive and normative reality of personal knowledge, and the cognitive and normative tableaux that the law uses as the basis for adjudication."); Wasserstrom, *supra* note 35, at 5 (lawyer's role as client advocate allows attorneys to separate themselves from wider moral implications of their actions). Professional responsibility casebooks generally ignore these conflicts as well. See Chemerinsky, *Pedagogy Without Purpose: An Essay on Professional Responsibility Courses and Casebooks*, 1985 AM. B. FOUND. RES. J. 189, 191.

53. Rhode, *supra* note 12, at 628 ("While the pressures for normative compromise vary across practice settings, the data . . . suggest that litigation can generate unusual levels of moral smog.").

54. Cf. Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639, 659 ("The Code of Professional Responsibility can best be understood as an uneasy truce among a number of competing and even inconsistent values The Code cannot provide clear answers to difficult questions precisely because it always points in multiple directions."); Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 67-68 (1980) (lawyer's judgment in achieving coherence among conflicting values is skill which must be

provided notoriously inadequate guidelines as to the extent of negative information that lawyers must reveal to opponents or the court about their clients. The ethical norms⁵⁵ and legal rules⁵⁶ that control these issues are vague or contradictory, revealing society's ambivalence about the conflict between advocacy and truth seeking.⁵⁷ Although we recognize the existence

learned and practiced in moral as well as legal tasks); Rhode, *supra* note 12, at 618 ("For lawyers in practice, the appeal of agnosticism often increases. Pure victims and villains are hard to come by; factual uncertainties, extenuating circumstances, and normative dissonance confound all but the rarest cases."). On the other hand, some lawyers fear that a clearer but more rigorous code of ethics would create even more serious stresses. See sources cited in Rhode, *supra* note 12, at 647 n.178.

55. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1987) (disclosure permitted only to prevent client from criminal act likely to result in substantial bodily harm); *id.* Rule 3.3(a) (disclosure of client perjury or other wrongdoing before tribunal required); C. WOLFRAM, *supra* note 18, at 668-71 (1969 Code ignores "collision course" created by confidentiality and disclosure requirements; Model Rules also sharply inconsistent); Nelson, *supra* note 12, at 541 ("whistle-blowing" proposal allowing lawyer to prevent client from inflicting bodily harm to another was most hotly contested issue in ABA House of Delegates consideration of proposed Model Rules of Professional Conduct); Rhode, *supra* note 12, at 614 (disclosure standards have been "riddled with exceptions and indeterminacies"); Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455, 467-70, 473-74 (1984) (disclosure standards of Model Code, ABA ethics committee opinions, and Model Rules unclear); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 811, 837 n.105 (1977) (formal regulations of legal profession "speak in barely detectable whispers about perjury" and opinion of ABA ethics committee regarding client perjury provide "an array of inconsistent options"). Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1980) (if lawyer knows client has perpetrated fraud on tribunal, lawyer shall call upon client to rectify it and reveal fraud to tribunal if client refuses) with *id.* DR 4-101 (1980) (lawyer shall not knowingly reveal confidence or secret of client); compare *id.* DR 4-101(A) (principle of confidentiality) with *id.* DR 4-101(C) (principle of disclosure).

56. See, e.g., MacCarthy & Mejia, *The Perjurious Client Question: Putting Criminal Defense Lawyers Between a Rock and a Hard Place*, 75 J. CRIM. L. & CRIMINOLOGY 1197 (1984) (discussing attorney's conflicting obligations to clients and to court); Rieger, *supra* note 51 (discussing conflicting obligations of attorney convinced client about to commit perjury); Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979) (noting sharply divergent views among prominent civil procedure scholars, as well as among practitioners, about level of disclosure legally required in response to discovery request).

57. Cf. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 279 (1979) (discussing conflict between duty to client and duty to seek truth); Rhode, *supra* note 12, at 615 (some qualified responsibility to third parties might improve system); Shapiro, *supra* note 56, at 1071, 1088-90 (discussing ambiguous nature of work product rule); *Trustee's Criticism of Lawyers in O.P.M. Imbroglia*, Legal Times, May 2, 1983, at 20 (decrying ABA's

of such ambiguities,⁵⁸ we have not fully explored the impact of normative uncertainty on litigators.⁵⁹

C. GROUP DYNAMICS AND THE LAWYERING TASK

Task sharing among lawyers relieves the stress of certain types of ambiguity but heightens others. Working together creates economic efficiencies. Lawyers can specialize, channel clients among themselves, and undertake tasks too large for a single lawyer. Specialization permits the lawyer to focus on a narrow area of law, thus limiting the lawyer's exposure to novel issues and increasing expertise.⁶⁰ Channeling clients among several lawyers reduces lawyers' gatekeeping expenses and increases the amount of time devoted to delivery of services.⁶¹ Grouping provides lawyers with a vehicle in which to improve their information gathering and analytical skills, exercise informed decision making,⁶² and meet the stringent time re-

vote not to permit fuller disclosure of client's illegal activities as "outrageous and irresponsible").

58. See Lefstein, *Incriminating Physical Evidence, the Defense Attorney's Dilemma, and the Need for Rules*, 64 N.C.L. REV. 897 (1986); Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543; Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979); Kaufman, Book Review, 94 HARV. L. REV. 1504 (1981) (reviewing A. GOLDMAN, *THE MORAL FOUNDATION OF PROFESSIONAL ETHICS* (1980)).

59. For sensitive treatments of the question, see Brazil, *The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice*, 3 J. LEG. PROF. 107 (1978); Hazard, *supra* note 52; see also Gould, *supra* note 44, at 13, col. 1, reprinted in S. GILLERS & N. DORSEN, *supra* note 44, at 643 (raising issue of lawyer burnout); Rhode, *supra* note 12, at 629 (conflicts produce "cognitive dissonance" that usually results in behavior favoring clients).

60. As in all professions, the growing technical complexity of law lends itself to collaboration among specialists who work together to serve a particular client. See Q. JOHNSTONE & D. HOPSON, *supra* note 7, at 154-55; E. SMIGEL, *supra* note 24, at 149-54.

61. See generally McChesney, *Team Production, Monitoring, and Profit Sharing in Law Firms: An Alternative Hypothesis*, 11 J. LEGAL STUD. 379, 388-90 (1982) (promoting recognition in profit sharing of decreased client production costs through team delivery of legal services).

62. See, e.g., P. DRUCKER, *MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES* 472 (1973) (effective decision grows out of clash of divergent opinions); Stasser & Titus, *Pooling of Unshared Information in Group Decision Making: Biased Information Sample During Discussion*, 48 J. PERSONALITY & SOC. PSYCHOLOGY 1467 (1985) (discussion can help decision-making group when members have incomplete or biased information); cf. Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, in *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS*, *supra* note 42, at 37 (discussing advantages of decision making by team of special masters).

quirements of their work,⁶³ thus improving the outcome for clients with complex legal problems.

Despite these advantages, group work also adds another layer to the complex stresses faced by lawyers. Whenever lawyers work in a group, they must process information and divide responsibility in a manner that permits members to work to capacity. This division of labor presents difficult problems for any task-sharing group, whether comprised of soldiers, social service workers, or corporate officials.⁶⁴ The high level of ambiguity in the lawyer's job, however, may magnify the problem. Complex decisions about task management, roles, and norms, usually made by a single professional, must now be made by a number of people, working within a model based on professional autonomy yet committed to a group goal.

The problems of lawyer teams fall into three general areas: division of responsibility, information transmission, and conflict avoidance. How do lawyers divide decision-making authority among themselves when each part of the task is related to other parts and each lawyer bears responsibility for both his work and the work of others? If every decision about task, role, and norm depends on the interpretation of language and social context, how much of the context and their own interpretation of that context will lawyers transmit to other team members? Equally problematic are questions of boundary drawing and dispute resolution: how do lawyers manage the conflicts that inevitably arise from different interpretations of their work, the roles that they play, and the norms that guide them? After examining these three dimensions of team lawyering, we must ask the difficult underlying normative ques-

63. For an example of common, although disturbing, use of lawyer teamwork to relieve the time constraints of litigation practice, see Maddi, *Improving Trial Advocacy: The Views of Trial Attorneys*, 1981 AM. B. FOUND. RES. J. 1049 (discussing practice of firm assignment of pretrial motion hearings to firm's junior members, rotation of files among lawyers on basis of convenience, availability, and necessity, and forwarding of cases to trial lawyers just prior to, or on day of, trials).

64. See generally CRITICAL STUDIES IN ORGANIZATION AND BUREAUCRACY (F. Fischer & C. Sirianni eds. 1984) (presenting competing theories of organizational and bureaucratic structure); D. FUNK, GROUP DYNAMIC LAW (1982) (analyzing relationship between organization's rules and its group dynamics); J. HAGE, THEORIES OF ORGANIZATIONS: FORM, PROCESSES, AND TRANSFORMATION (1980) (discussing relationship between organizational form and power, change, personnel, and society); Vaughan, *Toward Understanding Unlawful Organizational Behavior*, 80 MICH. L. REV. 1377, 1394 (1982) (group organization and specialization diffuses knowledge and responsibility, increasing opportunity for unlawful activity).

tion: do current forms of lawyer teams represent a healthy accommodation of the conflicts between professional autonomy and group process?

The next part of the Article looks at the processes adopted by four litigation teams. Moving from a small ad hoc team to teams of broader scope, intensity, and complexity,⁶⁵ it examines the behavior of lawyer teams similar to those in current legal practice. All are litigation teams, partly because they are the most common and visible, but also because litigation teams span the great divide that separates corporate lawyers from those who primarily represent individuals.⁶⁶ Two teams are hypothetical; the descriptions of the other two teams are amalgamations based on published reports of real lawyer teams. Although each team differs, certain shared tensions concerning information management, conflict resolution, and the division of authority confirm that all task-sharing lawyer teams confront common stresses that must be recognized and addressed.

II. FOUR LAWYER TEAMS

A. SMALL AD HOC TEAM

1. Illustration

Lawyer A, a partner in a small personal injury firm, is handling a claim arising out of an automobile accident. She negotiates a settlement with the alleged tortfeasor but thinks that her client has a malpractice claim against the physician who treated her client after the accident. She refers the client to Lawyer B, a lawyer practicing in the city where the physician lives, to whom Lawyer A has occasionally referred cases for a percentage of the fee. Over the next few years, A occasionally talks with the client and writes B to check on the suit's progress.

Lawyer B, a member of a two-partner firm, has a busy commercial practice and modestly successful trial practice that often sends her out of town. After meeting the client, she assigns the file to an associate recently graduated from law

65. This view of teams is necessarily limited because it only focuses on private-sector lawyers working by themselves or within firms. Although many of the problems encountered by these lawyers are duplicated within the litigation teams that work within such institutions as government agencies, corporations, or legal service offices, the study does not examine the processes unique to those groups. See generally E. SPANGLER, *supra* note 6 (examining work patterns of lawyers in variety of institutional settings); Gilboy & Schmidt, *supra* note 6 (criminal lawyers); Maddi, *supra* note 63 (trial lawyers).

66. See *supra* note 29.

school. Over a period of two years, under B's general supervision, the associate conducts limited discovery, focusing on the physician's negligence during the client's initial examination after the accident. B prosecutes the claim before a state mediation panel that finds the physician "not negligent" based on the testimony of the defendant's expert witness. B explains to the client that the panel's finding may reduce her success at trial, but that she still has a good chance of recovery before a jury. The client advances part of her settlement money to cover trial preparation expenses.

B files suit. As time for trial nears, she contacts Lawyer C, a successful trial attorney with whom she has worked before. B has five personal injury cases nearing trial that she asks C to handle. She takes five files to C's office in a large cardboard box, and after a brief conversation, C agrees to "look the files over." No discussion as to the division of responsibility and authority ever takes place.

C examines the files, meets once with the client, instructs her law clerk to research the law and ask plaintiff's expert witness certain questions about the witness's testimony at the mediation panel. After this, C writes a brief progress report to B. She also prepares a Notice of Appearance but does not file it, for reasons she cannot later recall. According to the law clerk's report, the plaintiff's expert witness testimony will be equivocal at best. This uncertainty leads C to suggest to the client that the case be abandoned before further expenses are incurred. While the client is considering C's recommendation, the defendant files a motion for involuntary dismissal on the ground that the suit has been inactive for twelve months.⁶⁷ Suit is dismissed with prejudice. A flurry of letters passes between A, B, and C in which past events are reconstructed and recorded and recriminations are exchanged.

Client sues B and C for malpractice. C's attorney, a seasoned malpractice defense lawyer, concludes after some investigation that the client had a valid malpractice claim against the physician for improper follow-up treatment. Although B's associate addressed this theory briefly during discovery, none of the lawyers pursued the issue. The malpractice suit is settled.

67. See, e.g., FLA. R. CIV. P. 1.420(e) (providing for involuntary dismissal of action when no record activity has occurred for one year).

2. Discussion: Small Ad Hoc Team

The trial association team is at once the simplest and most complex lawyer team. Limited in duration and scope, it is nonetheless a difficult vehicle for coordinating tasks because it exists outside a larger organizational framework.

Lawyers serving individuals commonly pass responsibility for a particular piece of litigation among several practitioners. Lawyers do not limit this practice to plaintiffs' personal injury cases. England institutionalized associational teamwork in its solicitor-barrister dichotomy,⁶⁸ and cross-institutional teams frequently handle criminal defense and corporate litigation in America.⁶⁹ Such teamwork increases lawyer productivity by permitting generalist lawyers serving a large client base to draw on the expertise of litigation specialists or local counsel without losing their clients entirely.⁷⁰

By definition, the ad hoc associative team is not permanent, but a collaboration of limited focus and moderate duration. Lawyers work cooperatively for a particular client with a particular claim. Because of this impermanence, lawyers must establish new rules for teamwork with each case.⁷¹

Lawyer teamwork requires careful division of authority and information management. Because the progress of a case is cumulative, it is never clear whose steps will ultimately prove most significant to the case's outcome. Therefore, each knows

68. See Q. JOHNSTONE & D. HOPSON, *supra* note 7, at 357-98.

69. See, e.g., Aibel, *Successful Teaming of Inside and Outside Counsel to Serve the Corporate Client*, 38 BUS. LAW. 1587 (1983) (discussing requisites of successful teaming of inhouse and outside corporate counsel); Gilboy & Schmidt, *supra* note 6, at 4-6 (defendants are represented by different lawyers at pretrial and trial stages in 60% of felony cases reaching trial courts in Chicago; 45% of criminal defendants represented by private lawyers are represented sequentially); Mounts, *supra* note 6 (public defender programs); Nelson, *supra* note 2, at 130 (use of inside and outside counsel). Serial lawyering can also occur in clinical and legal services settings. See E. SPANGLER, *supra* note 6, at 154-66; Cahn & Schneider, *supra* note 28.

70. See C. WOLFRAM, *supra* note 18, at 877 (describing pressures on solo practitioners: "With only the time, experience, learning, ability, and clientele of one lawyer to go around, [they often] . . . perform too little research, and sometimes lose or upset clients because of inability to perform specialized or multilawyer tasks."); Gilboy & Schmidt, *supra* note 6, at 9 (some lawyers limit themselves to one stage of litigation for economic reasons: large case volume, no trials, and defendants less apt to run out of money).

71. See Gilboy & Schmidt, *supra* note 6, at 13 (sequential representation works better inside lawyer organization because second lawyer can judge work of prior lawyer, ask for information, and sanction bad work by letting her dissatisfaction filter through to supervisor).

her responsibilities, has the information necessary to make case management decisions, appreciates the significance of her acts to the outcome, and transmits relevant gathered information to other lawyers who need it. To remain efficient, however, the group process must not call for extensive lawyer-lawyer contact.

If competent delivery of service is a primary goal,⁷² we might expect team members to attempt to clarify each member's area of responsibility and to develop some mechanism for exchanging information about the substantive and procedural aspects of the case. Social scientists recognize such opportunities for discussion and information exchange as a major component of good decision making.⁷³ They advise lawyers to plan carefully and coordinate when working together.⁷⁴

Yet such discussions are more often the exception than the rule. The lawyers on this ad hoc team spent almost no time discussing case management and avoided almost all contact during the life of the case. They adopted a form of "stage" or "serial" representation:⁷⁵ the lawyer holding the file had the case, while the other lawyers dropped into the background. Each lawyer handled the case for a limited period. When she perceived that she could no longer handle it competently and economically, the lawyer passed the case on, expanding the team and reducing her expected recovery. During the period that each lawyer handled the case, she essentially acted as a sole practitioner. Because the lawyers did not discuss the case among themselves, they lost the benefits of shared thinking or each other's experience. Although all shared legal and ethical responsibility to the client,⁷⁶ they left unsettled almost all questions of authority, responsibility, and coordination.

The lawyers' failure to coordinate authority and information sharing contributed directly to the suit's dismissal. Had these lawyers fully discussed the case at some point, they might

72. See Garth, *supra* note 54.

73. See I. JANIS & L. MANN, DECISION MAKING 11 (1977); sources cited *supra* note 62.

74. See Aibel, *supra* note 69, at 1590, 1597 ("full and frank discussion" needed for successful teaming of inside and outside counsel; they must meet regularly and clarify scope of work, division of labor, ultimate responsibility, and costs); see also American Booksellers Ass'n v. Hudnut, 650 F. Supp. 324, 329 (S.D. Ind. 1986) (recognizing that when lawyers work together, "time well spent in conference can prevent the unnecessary duplication of effort sometimes caused by poor communication").

75. See Mounts, *supra* note 6, at 484.

76. See *infra* note 84.

have developed a clearer view of its strengths and weaknesses, including the overlooked theory of negligent follow-up care. Furthermore, they might have avoided the procedural dismissal caused by each lawyer's assumption that someone else was responsible for the suit's procedural viability.⁷⁷

Several factors contribute to this lack of coordination. Perhaps the most important factor is the difficulty of coordinating information flow and planning when work is fragmented, particularly across organizational boundaries. In cases involving substantial sums, such as corporate litigation handled jointly by inhouse and outside counsel, lawyers may invest the time needed to clarify the division of authority and to devise means to transmit information, even though the task is extraordinarily difficult.⁷⁸ But ad hoc teams frequently share marginal cases, such as this one, brought for relatively powerless clients.⁷⁹ Lawyers often take such cases on a contingency basis, carrying a number of them at once.⁸⁰ Lawyers working together on such cases may find team coordination too difficult,

77. Still, this criticism may be Monday-morning quarterbacking. Although the outcome of the suit ultimately turned on the lack of file activity and the issue of the proper medical follow-up, see *supra* note 67 and accompanying text, these problems are obvious only in hindsight. At the time the lawyers probably could not have separated these issues from many others that seemed equally or even more compelling. It might have taken a significant investment of time and energy for them to cover the bases necessary to identify these two issues and to see that they were properly addressed.

78. See J. STEWART, *THE PARTNERS* (1983) (examples of inside and outside counsel cooperation); Aibel, *supra* note 69, at 1597. Because corporations have begun to keep more of their business inhouse, or distribute it among firms, outside counsel for major corporations have begun to find themselves in short-range, one-shot relationships with their clients. Nelson, *supra* note 2, at 130-33; see also Chayes & Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 294 (1985) (outside counsel tend to be more hired guns, less members of ongoing relationship, as their functions are internalized); Freund, *Comment on "Corporate Counsel and the Elite Law Firm,"* 37 STAN. L. REV. 301, 303 (1985) (commenting on benefits of retaining outside counsel); Lochner, *Comment on "Corporate Counsel and the Elite Law Firm,"* 37 STAN. L. REV. 305, 308-09 (1985) (discussing relationship between inside and outside counsel).

79. See J. CARLIN, *supra* note 6, at 66-73. See generally Shuchman, *supra* note 29, at 245-46 (Canons of Ethics better suited to large firms than small firms).

80. Professor John Coffee has pointed out that it is not uncommon for a plaintiff's lawyer to carry a large portfolio, invest little in each case, and attempt to settle as many cases as possible. See Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, LAW & CONTEMP. PROBS., Summer 1985, at 5, 22-23; see also *infra* note 157 (plaintiffs' lawyers tend to work within smaller, less stable organizations). The advantage of this approach to the client is that someone is willing to take the case at all; how-

frustrating, and time-consuming to invest the time and money needed to fine-tune their collaborative efforts.⁸¹ Adoption of the simplest method possible—serial representation with little or no communication—saves valuable time, making it economically feasible to accept such cases at all.⁸²

Yet these lawyers could not disentangle themselves entirely after they passed on the case. Lawyer A, as the intake or client's lawyer, talked to the client and communicated occasionally with B and C, the process lawyers. A client-process division is fairly common in association relationships.⁸³ Yet Lawyer A did not turn the case over entirely, primarily because she wanted to participate enough to justify her fee⁸⁴ and retain

ever, the cost may be steep because case management may well be minimal, even if only one lawyer handles the case from start to finish.

81. See J. CARLIN, *supra* note 6, at 66-72 (describing lawyer treatment of lower-status clients); Gilboy & Schmidt, *supra* note 6, at 15 (even when lawyers have opportunity to cooperate, first lawyer may have little information to transfer if he spent little time on case or recalls little about it).

82. But see Kritzer, Felstiner, Sarat & Trubek, *The Impact of Fee Arrangements on Lawyer Effort*, 19 LAW & SOC'Y REV. 251, 267 (1985) (empirical data suggest hourly-fee lawyers put more time into cases than contingent-fee lawyers only if case worth less than \$30,000).

83. See, e.g., *Itel Containers Int'l Corp. v. Puerto Rico Marine Mgmt.*, 108 F.R.D. 96 (D.N.J. 1985) (local and general counsel); *Bodily v. Intermountain Health Care Corp.*, 649 F. Supp. 468 (D. Utah 1986) (same); *Pollack v. Lytle*, 120 Cal. App. 3d 931, 175 Cal. Rptr. 81 (1981) (pretrial and trial counsel); *Ortiz v. Barrett*, 222 Va. 118, 278 S.E.2d 833 (1981) (three lawyers working on case successively); see also *Lochner*, *supra* note 78, at 309-11 (one of most important roles for inside counsel is transmitting information about client's values and style to outside counsel, who lacks ongoing relationship with client needed for such knowledge).

84. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107 (1979) (attorney cannot divide fee with nonmember of firm unless such division made pursuant to client consent and based upon services performed and responsibility assumed); see also *Altschul v. Sayble*, 83 Cal. App. 3d 152, 161-63, 147 Cal. Rptr. 716, 719-21 (1978) (fee-splitting contract unenforceable as contrary to public policy); *In re Kaye*, 24 A.D. 345, 348-49, 266 N.Y.S.2d 69, 72 (App. Div. 1966) (referring negligence cases and retaining percentage of contingent fee without regard to work performed held misconduct), *appeal denied*, 17 N.Y.2d 422, 216 N.E.2d 32, 268 N.Y.S.2d 1028 (1966), *vacated and remanded on other grounds*, 386 U.S. 17 (1967). Ethics committees and individual practitioners have hotly debated the ethicality of receiving referral fees when day-to-day task responsibility is not shared. See McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45, 70 n.132 (1985) ("The bar has never adequately explored the value of referral fees to both sellers and consumers. . . . [R]eferrals are merely a way of accomplishing between lawyers in different firms exactly what happens every day between lawyers in the same firm."); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 793 (1977).

her client.⁸⁵ Thus her position remained ambiguous: to the client she appeared to participate in the suit, and she was legally and ethically responsible for the outcome,⁸⁶ but she did not actually contribute to its prosecution.

Lawyers B and C divided the work through a serial split between pretrial and trial stages,⁸⁷ symbolically achieved with the file's delivery to C. Although fairly clear in the abstract, the lines of division between B and C are also ambiguous. Their behavior reflected this fuzziness: by delivering the file, B symbolically turned the sword over to C. But the delegation was not clear because the file was one of a batch, C promised only to "look it over," and B remained attorney of record.⁸⁸ Because of this ambiguity, neither lawyer took full responsibility for overseeing the suit.

At best, the lawyers' teamwork was marginal. Although sharing case responsibility, they did not work collaboratively; the very purpose of associating counsel was to move the case into other hands. They invested little time on the case after the transfer and would have had difficulty monitoring each others' decisions because of distance anyway. Because lawyers A, B, and C could not collaborate economically, they formed a super-

85. This is probably a minor concern when, as here, the client will probably have little repeat work. See generally Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97, 100-01 (1974).

86. Although her exact degree of responsibility is not clear, see *infra* notes 257-65 and accompanying text, courts are increasingly holding referring attorneys responsible for the acts of associated counsel. See, e.g., *Tormo v. Yormack*, 398 F. Supp. 1159, 1169-70 (D.N.J. 1975) (attorney who transfers client's case to another counsel is under duty to exercise due care to ensure retained counsel is competent and trustworthy).

87. See generally Gilboy & Schmidt, *supra* note 6 (sequential representation common in criminal practice); Mounts, *supra* note 6 (same regarding public defender programs). Professor Judith Resnik sees the Federal Rules as fostering this split in civil cases. See Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 522 (1986) (1983 Rules created opportunities for a "new set of lawyers, 'litigators,' who did their work (motions, deposition, and interrogatory practice) during the pretrial process and who were to be distinguished from 'trial lawyers,' who actually conducted trials.").

88. Status as attorney of record is often considered crucial by courts in determining the extent of an associated lawyer's responsibility. See *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 348 n.5 (D. Conn. 1981) ("[T]he buck stops with the attorney's appearance as counsel of record." (citing *Maryland Metals v. Harbaugh*, 33 Md. App. 570, 576, 365 A.2d 600, 603 (Ct. Spec. App. 1976))). But see *Ortiz v. Barrett*, 222 Va. 118, 127-28, 278 S.E.2d 833, 838 (1981) (appearance as counsel of record does not make associated counsel liable for another attorney's malpractice when associated counsel's services were clearly intended by both attorneys to be of limited scope).

ficial relationship in which they distanced themselves from each other and from their case responsibilities.

B and C also added another team layer by assigning important case preparation duties to employees. Although lawyers frequently delegate pretrial preparation to associates and clerks, they usually limit the responsibility to routine assignments to keep information-gathering and decision-making responsibility in the hands of those who appreciate the significance of such responsibility. Because this case was marginal, however, these lawyers could not delegate so carefully and could not supervise so closely their subordinates' work. Thus each relinquished a crucial aspect of the case—the discussions with the expert witness—to inexperienced lawyers. Delegation of authority increased the risk that B and C would lose critical information, as they in fact did.

Serial division and task assignment to poorly supervised subordinates have important ethical implications because they increase the risk of poor case management. Critics have pointed out the dangers of serial or stage litigation in public defender work.⁸⁹ Lawyers handling only part of a case, the critics argue, tend to have limited perspective.⁹⁰ Without responsibility for the entire case, they may fail to relate to the client or to focus on the case as a whole and may lose information and make decisions that endanger the subsequent prosecution of the case.⁹¹ As the hypothetical suggests, similar problems can occur in any case handled through serial representation, particularly if the lawyers consider the case marginal.⁹²

89. Gilboy & Schmidt, *supra* note 6; Mounts, *supra* note 6; *see also* Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (although specialization in stages may promote efficiency and provide expert service, it also raises "risks of a loss of the close confidential relationship between litigant and counsel and the subordination of an individual client's interest to the larger interests of the organization"). *But see* Morris v. Slappy, 461 U.S. 1, 13-14 (1983) (sixth amendment does not guarantee "meaningful relationship" between client and counsel).

90. *See, e.g.*, Gilboy & Schmidt, *supra* note 6, at 24-25 (sequential representation often adversely affects case preparation because information is lost or distorted).

91. *Id.* at 1-3; Mounts, *supra* note 6, at 485.

92. *See* E. SPANGLER, *supra* note 6, at 129 (lawyers' work does not lend itself to standardization and division of labor because one person must know entire case). Commentators have also noted that the efficiencies to be achieved by dividing work among more experienced attorneys and their associates may be lost if lawyers lack resources to provide sufficient supervision. *Cf.* Maddi, *supra* note 63, at 1053 (meaningful supervision of trial work unlikely in cases of small firm or sole practitioner).

This point is vividly illustrated in the way that this lawyer team handled the substantive side of the client's case. Lawyer A did not assume any responsibility for the substantive case; she talked with the client but failed to pass on what she learned to B. Lawyers B and C delegated the preliminary investigation and evaluation to inexperienced employees who did not recognize the significance of the client's follow-up treatment and thus did not pursue it with the plaintiff's expert witness. Although B and C might have made the same error, closer examination could have brought this line of investigation to their attention. B simply did not bother, perhaps because she did not worry about how to prove the case at trial.⁹³ C, perhaps assuming that all medical theories had been explored and viewing the case as a "loser" because of the unfavorable mediation outcome, put less effort into gathering and analyzing facts than she might have if she had handled the pretrial stages of the suit.

Diffusion of authority among several lawyers is the gravest drawback of team lawyering. If a single lawyer handles a case and gives it only marginal attention, she cannot blind herself entirely to the ethical implications of her actions. At some level she recognizes that she alone is responsible for this client and this case. Multiple lawyers, on the other hand, may find it easier to deny personal responsibility for a lowered standard of care by justifying their part in handling (or mishandling) the case as the best that could be done given their limited role. Thus, the client-process, pretrial-trial, and attorney-associate divisions sometimes distance lawyers from their client and their craft.

93. Although she needed to present the case to the mediation panel, she may have done so with minimal preparation. Plaintiffs' lawyers sometimes regard mediation as a technical hurdle, erected by defendants, on the way to the jury. Hence they frequently will not even offer testimony. See *Herrera v. Doctor's Hosp.*, 360 So. 2d 1092, 1097 (Fla. Dist. Ct. App. 1978) (state may require mediation as prerequisite to filing medical malpractice suit, but cannot force plaintiff to present evidence at hearing if plaintiff feels that it would be wasteful because she plans to file civil suit regardless of outcome); see also Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1316-17 (1978) (lawyers' decisions regarding discovery are based on prior determination whether case is likely to settle; if settlement thought likely, lawyers will not engage in full discovery that will expose weaknesses of their case); Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 113, 122 (1983) (because plaintiffs get higher return from strategy oriented toward settlement than one geared to formal adjudication, bargaining is most cost-effective activity for plaintiff).

3. Summary: Small Ad Hoc Team

One gets the impression from this example that the client was lost in the pile of lawyers working on her case. Over a three-year period, four different lawyers represented her serially and concurrently; none assumed complete control over the case's progress. Although it might appear to stretch reality to call the interactions of these lawyers teamwork, they shared responsibility for their client's malpractice claim. Until immediately before dismissal, each suggested that the case was worth the time and money expended, perhaps because no one wanted to tell the client otherwise. Yet because of each supervising attorney's marginal effort, the client's suit was substantively and procedurally mishandled. No single decision was particularly extraordinary, and yet one doubts that these four lawyers would have acted in the same fashion if they had devised a management plan early in the suit. Serious slippage occurred both within the individual firms and the interorganizational division of responsibility.

Most ad hoc litigation teams successfully and efficiently represent clients. Similarly, this client could have had the same negative experience if only one lawyer or firm had handled her suit.⁹⁴ Still, it seems clear that this division of responsibility can weaken the rendition of legal services if not carefully monitored by every participating lawyer. What remains unclear is how such monitoring can be effectively and efficiently achieved in cross-organizational teamwork.

Ethical dilemmas faced by these lawyers are, to a large extent, the product of economic forces. To survive financially, lawyers must carry a large number of cases and divide their major resource—time—among the cases as best they can.⁹⁵ They delegate responsibility to inexperienced assistants, divide the case serially with other lawyers, and ignore the type of communication and supervision necessary to assure good case

94. Indeed, the fact that several lawyers were involved in mishandling the case probably helped the client discover the poor service.

95. See, e.g., E. SPANGLER, *supra* note 6, at 200 ("Often it seems that neither [the sole practitioner] nor his client can afford to have him do a really good job."); Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 711 (1986) (sole practitioner "can deliberately bring a large number of actions and devote relatively little time or energy to any single case"); Garth, *supra* note 54, at 662 (Code permits lawyers to be somewhat less thorough when dealing with small claim).

management.⁹⁶ The question of how our system should respond to such teamwork problems must wait until more complex litigation teams are examined.

B. SMALL PARTNERSHIP TEAM

1. Illustration

Client Hospital regularly sends its medical malpractice defense work to lawyers FF and DD, who have been partners for twenty years in a ten-partner, small town firm. Psychological opposites, FF is a careful, deliberate, precise master of detail, while DD is impulsive, argumentative, and impatient with detail but quick to grasp main ideas. Despite their differences, FF and DD together handle the firm's large professional malpractice suits. Despite DD's love for argument, his dislike for precision and his inability to perceive nuances of character make him a poor litigator. FF, punctilious in every detail, therefore performs the trial work while DD handles motion practice and appellate work.

Maintaining contacts with the client insurance companies, FF makes an initial file review of all new cases, contacts parties if necessary, and enlists help from his associate, A, for detailed document study. If he feels that they should direct motions to the complaint, he discusses the motions briefly with DD who, without reviewing the file, passes it on to Associate A for drafting. Associate A addresses his questions to FF, not DD, before drafting the motions, which DD then edits and ultimately argues. Over the course of the litigation, A works closely with FF on pretrial discovery and with DD on drafting motions and appellate briefs. Occasionally DD files motions that strike FF as unnecessary, contentious, and hypertechnical, but FF never questions DD's decision to file such motions.

Indeed, the partners work primarily without discussion. Although they address critical developments that arise, such discussions are always low-key and brief. The associate is never included in these meetings but learns of case management decisions through file notes, correspondence, or discussion with an individual partner. When DD gives A instructions that potentially conflict with positions FF has taken, A will approach FF,

96. See Garth, *supra* note 54, at 670-71 (ordinary client unable to bargain for particular level of service because client lacks information and bargaining power); Kritzer, *supra* note 12, at 413-14 (individual clients have relatively little leverage because payment is often controlled by others).

who usually defers to DD's changes, if possible, without comment or criticism.

Respected in the legal community, the partners adhere to high standards of ethical behavior. They occasionally discuss ethical dilemmas faced by other lawyers but appear to face no unresolved ethical dilemmas themselves.⁹⁷ The associate understands that he too must adhere to the highest standards of ethical behavior.⁹⁸

While investigating a hospital malpractice suit, A begins to suspect that the client's laboratory technicians have erroneously misidentified the hospital technician who ran a test that is the subject of the suit. If A is right, the hospital may lose the case because the suspected technician is poorly trained and susceptible to using inadequate procedures. A must choose between calling the employees' attention to their mistake by questioning them further, voicing his concerns to FF, or saying nothing. He decides to question the employees and learns, much to everyone's dismay, that the less skilled employee gave the test. After establishing that the employee used improper standards, FF advises the hospital to settle the suit and assures A that he acted correctly. A, however, is less convinced.

2. Discussion: Small Partnership Team

Every team consists of individuals with their own decision-making styles, and this team is no exception. Certain crucial characteristics of this team's operation are unique, yet the team's structure provides a pattern that may be generalized to other firm teams as well.

This team differs from the ad hoc team in that it is a long-term team within an institutional structure. This long-term group superstructure has an important impact on the way that these partners approach a particular case. Lawyers who work together can offer clients a broader range of services and larger staff, making their firm more attractive to clients with greater

97. Their only obvious ethical concern is that they not take on cases that involve a conflict of interest. See G. HAZARD, *supra* note 2, at 83 ("Involvement in a really serious conflict of interest is feared by a large law firm more than anything except encountering personal dishonesty in its membership.").

98. Commentators suggest that the need for an unsullied ethical reputation increases with the permanency, and perhaps with the size, of the lawyer group. See M. GREEN, *supra* note 1, at 39-40; G. HAZARD, *supra* note 2, at 82; Nelson, *supra* note 2, at 124.

economic resources and more substantial legal work.⁹⁹ Thus in-house teams can strike a different balance of efficiency on an individual case, investing more energy and resources than a plaintiff's ad hoc team might.¹⁰⁰ Paradoxically, grouping also strengthens professional identity, increasing individual lawyers' resistance to client pressure. Thus, firm practice both increases the potential for pressure from strong clients and the capacity to resist it.¹⁰¹

Like a long-lasting marriage, this team has evolved over a twenty-year period. Starting with the raw materials of each other's personal style and preconceptions, both partners have come to know each other well in a variety of circumstances.¹⁰² Although initial collaborations were informal and unsystematic, the partners gradually developed a system whereby activities could be coordinated with as little friction as possible. They have come to resemble each other in certain shared values and approaches and, more importantly, to understand thoroughly each other's language and limits despite dramatically different personal styles. They can infer behavior patterns from words or gestures and have learned to compromise when they know that they will never agree.¹⁰³

99. The court in *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978), noted:

If [the firm's] size and multi-city status had any effect, it was in the direction of encouraging the oil companies to divulge confidential information. Whereas they might show reluctance to entrust their substantial assets and future fortunes to a sole practitioner or small law firm, [the firm's] substance and reputation would tend to comfort any apprehensions and open the lines of communication.

Id. at 1321; *see also* Laumann & Heinz, *supra* note 2, at 233-34 (large firm may offer broader range of expertise to handle corporate client's diverse needs).

100. Class action suits may produce the same kind of incentive for an ad hoc plaintiffs' lawyer team to invest massive amounts of time and energy. *See infra* notes 120-72 and accompanying text.

101. *See* J. CARLIN, *supra* note 6, at 58 (examining relationship between size of lawyer firm, type of client base, and rate of ethical violations); K. STRONG & A. CLARK, *LAW OFFICE MANAGEMENT* 35 (1974) (sole practitioners more pressured by client's needs than partners); Schwartz, *supra* note 8, at 1284-86 (large firms promote ethical conformity yet face strong client pressures).

102. *See* Nimetz, *Questions Regarding Growth, Participation & Public Relations in Law Firms*, 29 REC. A.B. CITY N.Y. 451, 451 (1974) (partners in small firms have close relationships with each other and with associates; this is less true with large law firms).

103. *Cf.* W. GORDON & R. HOWE, *TEAM DYNAMICS IN DEVELOPING ORGANIZATIONS* 123 (1977) (business managers who spend time together make better decisions than those who do not, because their strong bonds permit them to tolerate more divergence of opinion).

Because they work in close proximity, the partners can make more subtle divisions of labor than can ad hoc associates. They retain concurrent access to the files and divide responsibility in terms of skills and taste. Organizational teamwork, however, also requires more subtle balancing to ensure that the lawyers work together effectively over the long run. This balance produces ethical problems that generally differ from those of the small ad hoc team. The danger is not that the lawyers will ignore their client, but that closeness and mutual dependence among team lawyers, and between lawyer and client, will lead team members to forget the competing demands of their independent duty as officers of the court.¹⁰⁴ The risk arises out of the very closeness that makes such teamwork successful.

a. *Conflict Management: The Partners*

Economics and geography prevented members of the ad hoc referral team from looking over each other's shoulders. They were forced to rely on each other's work product completely. On the other hand, these partners work closely together and have the resources needed carefully to plan and discuss the case. Yet very little discussion actually took place, and what did occur was casual, elliptical, and never included all three lawyers.

Two factors explain this silence. The first is efficiency: too much information flow interferes with effective team operation. Despite the ambiguity of litigation management and the need for contextual information, lawyers need not know everything about the case; their clients will not pay for such redundancy.¹⁰⁵ Thus these lawyers, like those on the ad hoc team, must delegate responsibility, trusting that each will make appropriate decisions and pass on any necessary information. Learning exactly what information should be given to another lawyer, and what is unnecessary, is one of the more challenging aspects of teamwork. The ability to determine when one law-

104. See D. RUESCHEMEYER, *supra* note 12, at 23-24 (stratification of bar and emphasis on client loyalty weaken commitment to broader values of profession).

105. Some clients are willing to pay. See J. STEWART, *supra* note 78, at 66 (client instructing firm to "leave no stone unturned" no matter what the cost). More often, clients want to control costs, but because of the complex nature of the lawyering task, they have difficulty knowing whether the lawyers' work is necessary or not. Cf. Johnson, *supra* note 30, at 579 (complexity of litigation and numerous strategic decisions involved makes monitoring of lawyers' work time consuming and expensive).

yer should inform another of a development is a skill composed of intuition and experience.¹⁰⁶

To some extent these lawyers' preference for silence may be as much the result of stress avoidance as efficiency. Infrequent communication is often the most effective means for managing conflict. Because FF and DD have different personal styles, they sometimes interpret norms and view case strategy differently. Being more adversarial, DD is more enthusiastic about using all litigation tools available. FF, being less combative and more fact- and goal-oriented, likes to dig out facts to reach the heart of the matter. He always aims for trial.

Their styles both complement each other and pose a risk of conflict. Because the ambiguous legal and ethical norms support both lawyers' predilections, the lawyers have no external means for resolving differences. At best such conflicts will slow them down; at worst they will cause psychological stress, harm their relationship with the client, or interfere with effective case management.¹⁰⁷ Over the years, therefore, these partners have developed methods to control conflicts.

Fundamental, of course, is their mutual knowledge and trust.¹⁰⁸ They use task division to separate their jurisdictions and rarely interfere with each other's decisions, even if they disagree.¹⁰⁹ Years of learning what each will and will not do enables them to turn over authority to their partner without great risk. Their jurisdictional boundaries do not overlap in terms of client, witness, or court contact, and communication is limited to brief, unscheduled, face-to-face contacts.¹¹⁰

106. See E. SMIGEL, *supra* note 24, at 260-61 (partners want associate who can "correctly interpret the not so easily recognizable informal rules. . . . As one young lawyer put it: 'Personal success, or lack of it, depends upon your judgment in keeping a partner up to date on things he is interested in—and to get off his back.'") (emphasis in original).

107. Cf. Buckley, *Making It in Big-Time Bridge*, N.Y. Times, July 26, 1987, § 6 (Magazine), at 22, 23 (world championship bridge player, Robert Hamman, discussing his partner: "We think totally differently about almost everything. That includes bridge, so we hardly ever discuss it, and we never practice. We just show up to play.").

108. Cf. Greenbaum, *The Small Group Under the Gun: Uses of Small Groups in Battle Conditions*, 15 J. APPLIED BEHAV. SCI. 392, 395 (1979) (soldiers who fought best were those who maintained strong, supportive ties with others in groups).

109. Cf. P. DRUCKER, *supra* note 62, at 547 (members of management team should not even have opinions in areas not their primary responsibility, and team members should never fight in public).

110. Cf. *id.* at 548 (because human dynamics are so complex, meetings are very poor tools for getting work done); R. HALL, ORGANIZATIONS: STRUCTURE

Use of the same associate to coordinate information flow also contributes to the smooth working of the team. Although associates often work for only one team partner or several partners on different projects, some, like Associate A, serve as information bridges. The partners coordinate strategy in face-to-face meetings and the associate serves as a check in the system to pick up unnoticed slippage. Although lengthy discussions between partners on the case's progress would be inefficient, it is relatively inexpensive to use an associate to handle the job. Perhaps more important, using the associate as a go-between allows the partners to avoid intrusive conflicts.

When each partner has his own associate, this collaborative system breaks down. Each associate has a primary relationship with one lawyer and unconsciously adopts that lawyer's style of addressing problems. When forced to collaborate in, say, preparing a brief, each associate adopts his superior's position, mirroring the partners' differences. Lacking discretion to resolve or avoid such conflicts, their group work may fail. When only one associate serves as coordinator, such second-level conflicts cannot occur.¹¹¹

Given the associate's unusual team position, it is not surprising that he is excluded from the partners' strategy meetings. Although he performs a vital bridging function as information manager, the partners perceive him as a detail coordinator. Because the associate is not as experienced in the team's ambiguous operating language, he slows the process down by requesting more information than the partners exchange to reach a decision. Moreover, A's presence would unmask the partners' game and his role in it. Although his active participation in strategy meetings might shed new light on unsolved problems, this team follows the pattern of other long-running teams that limit communication with outsiders who might increase group pressures.¹¹²

AND PROCESS 169 (2d ed. 1977) (desire of professionals to deal directly with fellow professionals is "exact opposite of organizationally-desired impersonality"); Daft & Macintosh, *A Tentative Exploration into the Amount and Equivocality of Information Processing in Organizational Work Units*, 26 ADMIN. SCI. Q. 207, 219 (1981) ("[W]hen tasks are not analyzable, coding schemes to transmit data and information are hard to develop and use. Communication is thus less frequent when activities are intangible and ambiguous.").

111. See J. O'SHAUGHNESSY, PATTERNS OF BUSINESS ORGANIZATION 33 (1976) (discussing additional complexity created by increasing number of subordinates).

112. See generally Katz, *The Effects of Group Longevity on Project Communication and Performance*, 27 ADMIN. SCI. Q. 8 (1982) (empirical study of

Divided labor and controlled communication enable the partners to avoid most day-to-day stresses of group work. They will, however, have less discussion about case management and the conflicting roles and norms encountered than we might expect from two people who work closely on the same project. In their desire to minimize stress, the partners may choose to ignore signs of unethical or questionable behavior in their colleague unless they believe it will come under public scrutiny. For example, FF rarely questions DD's decisions to file motions on fairly flimsy grounds, even though FF would not file such motions himself, because raising these issues with another partner results in too much stress. Unless he believes that DD's actions will cause public embarrassment, FF looks the other way.¹¹³ Diffusion of responsibility, then, cuts both ways: it compels partners to care about the clearly unethical behavior of their teammates if it reflects badly on the firm's reputation but allows them to sanction behavior that violates their own personal norms.

b. *Conflict Management: The Associate's Dilemma*

The lawyer-associate relationship is one of the most basic teamwork units found in law. It is perhaps the simplest unit, because it is based on familiar employer-employee hierarchical structure. Compared to partnership and ad hoc teams, lawyer-associate teams maintain clear lines of daily decision-making authority but the teamwork relationship makes it more difficult to discern the legal and ethical contours of the associate's duty to the client and the court.¹¹⁴ Labor is generally di-

research teams has shown that the longer research teams worked together, the more isolated they became from information sources that might upset stability of team).

113. See *infra* note 269 and accompanying text.

114. See Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259 (1985) (associates owe duty to partners and firm, as well as to clients, legal profession, and society, and duties can conflict); see also *In re Knight*, 129 Vt. 428, 281 A.2d 46 (Vt. 1971) (associate under domination of practitioner should have withdrawn when practitioner sought unethical behavior); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1203 (1972) (junior attorney should withdraw from case pending before tribunal when he forms firm conviction that disclosure of certain information is necessary to prevent fraud on tribunal and supervising attorney disagrees); MODEL CODE OF PROFESSIONAL RESPONSIBILITY 2-110(C)(3) (1980) (lawyer may withdraw from matter not pending before tribunal when inability to work with co-counsel indicates withdrawal will best serve client); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1987) (subordinate lawyer acting at direction of another lawyer responsible for known, clear-cut violations of Rules but not for

vided on a ministerial-discretionary model.

The associate has his own set of conflicts relating to his expected behavior and the information he gathers. Although all lawyers face these stresses, they are more pronounced among associates because of their inexperience and newness to the profession and to the team. Associates do not yet know themselves as lawyers and hence have no clear sense of what their own value choices will be when confronted by conflict. Working with these partners serves as an important professional training ground for A. The partners serve as models in skills training and in resolution of the complex role demands of a lawyer.¹¹⁵ By observing how these lawyers respond to specific situational demands, A learns how to preserve his sense of honesty and ethicality while presenting the client's case in the best light. Although no member of the team ever openly discusses specific ethical questions raised in a case,¹¹⁶ A has gradually learned to act with more subtlety in areas permitting discretion.

Because the partners themselves resolve these complex questions in a highly ambiguous manner, it is unsurprising that they convey this information to A through collaboration rather than discussion. The partners explicitly affirm the profession's written rules but can only communicate the rules' complex application through example. For instance, in answering interrogatories, the associate has learned to control the amount of information gathered or revealed, thereby internalizing his respected superiors' method of resolving the tensions created by their competing duties to the court and the client. Because he identifies strongly with FF's approach to lawyering, FF's ethical choices profoundly affect him. In fact, although he does not feel that DD crosses the line into unethical behavior, he feels uncomfortable with DD's pretrial tactics, which sometimes raise what A considers to be spurious arguments.

carrying out supervisory lawyer's "reasonable resolution of an arguable question of professional duty").

115. See generally E. SMIGEL, *supra* note 24, at 147 (through interaction with partners, associates learn "both the law and how to get along").

116. For one of the rare discussions of the ability of lawyers to address difficult ethical questions with their peers, see Hazard, *Comment on "The Special Responsibility of Lawyers in the Executive Branch,"* 55 CHI. B. REC. 4, 13, 17-18 (1973) (asserting desirability of discussion of conjoint responsibility "even if embarrassing and difficult because it is self-revealing"). The author states that "[i]n my experience it's extremely difficult to get attorneys to discuss such issues, except on a one-to-one basis. Make the forum any bigger than one-to-one and it all becomes a lot of baloney." *Id.* at 18.

The problem that A encounters in gathering information from the laboratory technicians illustrates the team's subtle influence on his behavior. Although vaguely aware of the ethical dimensions inherent in the question of what to ask the hospital employees, A feels that he must consider what DD and FF would do because he relies on their example and does not want to let his employers down.¹¹⁷

Ironically, A cannot ask what he truly wants to know—what FF would like him to do. He knows that FF would tell him to find out who conducted the test, but he is unsure whether FF would tell him to do so because it is the ethical thing to do, because FF wants full disclosure of all the facts, or because he has put FF on the spot. Once A and FF openly acknowledge the possibility that facts may be hidden, A believes FF would have difficulty turning away from further investigation.¹¹⁸ A realizes that suppressing his suspicions might help the team.¹¹⁹ Although he does not bury the information, he feels that he has let the team down and is uncertain that he did the right thing.

3. Summary: Small Partnership Team

Like the ad hoc team, this is a small team with a simple structure. Because the lawyers work closely together, they develop a more subtle division of authority and a more effective method of transmitting information than the ad hoc team. Equally important, their client is willing to pay for close collaboration, an advantage unavailable to the ad hoc team.

Despite this closeness, the lawyers operate with as little overlap as possible. Working within a tight group, the lawyers must find ways to avoid the conflicts arising from looking over one another's shoulders. Significantly, their major buttress against such stress is silence—quenching voices within themselves and discouraging transmission of negative information from others. Having worked together for a long time, these lawyers feel that they can comfortably predict how each other

117. Cf. Rhode, *supra* note 12, at 635-36 (organizational settings encourage team players, and in certain practice contexts incentives can be particularly acute).

118. See *infra* note 269 and accompanying text.

119. Cf. Hazard, *supra* note 52, at 1527, 1532 (lawyers rarely acknowledge that they may not want to gather all relevant information concerning client's matter; when two lawyers are involved, discrepancy between adversarial and truth-seeking roles may be reduced when first lawyer to deal with client manipulates client's information before case is sent to specialist).

will handle most situations that arise. Although the team members and client may view this as a good balance between autonomy and collaboration, the legal profession must question whether this balance should be left undisturbed.

C. LARGE AD HOC TEAM

1. Illustration

A Vietnam veteran has asked G to represent him concerning injuries caused by exposure to Agent Orange during his service in the Vietnam war.¹²⁰ The client wants medical assistance and also hopes to inform other veterans about the dangers of Agent Orange. G files suit on his client's behalf against several manufacturers of Agent Orange. Believing that a larger suit would be more effective, however, G and a Vietnam veterans' organization enlist the aid of Y, a lawyer with experience in toxic tort litigation. Y agrees to turn the case into a billion dollar class action suit on behalf of veterans exposed to Agent Orange¹²¹ and convinces several other personal injury lawyers to help him finance and prosecute the suit.¹²² Because other lawyers are filing similar cases across the country, Y's lawyer group is initially concerned that they may lose control of the class action.¹²³ Members of the group fly around the country encouraging veterans to hire local counsel who will work with the team by filing class actions locally.¹²⁴

The lawyers meet on several occasions to discuss management of the lawsuit. They form a consortium of twelve lawyers,¹²⁵ make some initial funding arrangements,¹²⁶ agree to a

120. This description is drawn from Professor Peter Schuck's detailed study of the Agent Orange product liability case. See P. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986) [hereinafter P. SCHUCK, *AGENT ORANGE ON TRIAL*]; see also *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985) (attorney's fee award), *rev'd*, 818 F.2d 216 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (approving settlement); Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986) [hereinafter Schuck, *The Role of Judges*].

121. P. SCHUCK, *AGENT ORANGE ON TRIAL*, *supra* note 120, at 45. The initial strategy included a comprehensive campaign involving a national class action, legislative lobbying, and media saturation. Y was "legal field commander" of the operation. *Id.* at 44.

122. *Id.* at 44-47.

123. *Id.* at 51.

124. *Id.* at 47. All parties joined the request that the Agent Orange actions be consolidated into one case in New York. *Id.* at 48-49.

125. *Id.* at 51.

126. *Id.* at 52. Each lawyer agreed to advance an initial \$2000 and addi-

fee-sharing formula, and divide responsibility for research, document preparation, and discovery. They fail, however, to answer many financial and case management questions.¹²⁷

Economic concerns hound the consortium. The lawyers cannot fund the massive discovery and pretrial preparation without more capital. Furthermore, no team member has experience managing complex litigation of this size.¹²⁸ The legal and factual issues are extremely complex, the issue of causation in particular will be extremely difficult to prove, and defendants have several immunity defenses.¹²⁹ Not surprisingly, given the case's complexity, team members disagree sharply about various case management questions, including the best financing methods and best case strategies. Y wants to undertake a complex epidemiological study to establish causation, but his partners refuse to advance funds.¹³⁰ When Y threatens to inform the judge of the team's disagreements as a way to force cohesion and maintain control,¹³¹ the lawyers attempt to temper their disputes, but bitterness grows.¹³²

The strongest resentment is directed at Y, who is seen as running the team without regard for the others' views.¹³³ According to his partners, Y has singlehandedly taken over the complex issue of causation,¹³⁴ refuses to communicate with them about his strategy¹³⁵ and will not produce his data, even when needed for settlement negotiations.¹³⁶ Other team lawyers claim that Y will not go over the case with them step by

tional amounts needed to reimburse expenses that the firm deemed necessary. *Id.*

127. They did not agree on the scope of the team's work, such as whether individual causation and damage questions would be handled by local counsel or by the consortium; nor did they agree on the extent to which expenses would be reimbursed. P. SCHUCK, *AGENT ORANGE ON TRIAL*, *supra* note 120, at 52-53.

128. *Id.* at 52, 95.

129. *Id.* at 52-55.

130. *Id.* at 52-53.

131. *Id.* at 53-54.

132. *Id.* at 64, 73-74.

133. *Id.* at 53, 63, 73, 84, 104-05. In 1981 some consortium members hired a management consultant to examine case financing and administration. *Id.* at 73. The consultant found the consortium's plans for financing the suit nonexistent and described the case as an "accident waiting to happen." *Id.* He identified Y's poor management as the biggest problem faced by the consortium. *Id.*

134. *Id.* at 103.

135. *Id.* at 105.

136. *Id.* at 88-89. Some consortium members claim that Y was separately negotiating with one defendant. *Id.* at 90.

step.¹³⁷ Y rejoins that they have refused to invest the time necessary to learn about causation from him.¹³⁸ Y's approach is so proprietary that, on the eve of trial, Y refuses to tell other team members the names of the expert witnesses supporting plaintiff's causation theory.¹³⁹

Challenged by other lawyer groups¹⁴⁰ and increasingly unable to manage the suit without more funding and expertise,¹⁴¹ team members vote to remove Y as their spokesperson and to recruit new investors.¹⁴² Although many of the original team members continue to participate in the suit, the new investors take increasing control over the case, restructuring¹⁴³ the fee-sharing arrangement to raise the percentage of profits available to the new investors and to lower it for those already involved in the suit.¹⁴⁴ The arrangement also gives new investors approximately the same recovery whether suit settles or goes to trial, thereby increasing the investors' incentive to settle the case.

At first, settlement negotiations fail, but on the eve of trial the federal trial judge informs both sides to "bring their toothbrushes" to the courthouse for settlement negotiations.¹⁴⁵ After two days of negotiations, a settlement agreement is forged.¹⁴⁶ Some members of the class are pleased with the \$180 million settlement fund. Many others believe that the fund is too small and feel deprived of their day in court. When the court considers the lawyers' fee petitions, it awards the plaintiffs' lawyers five percent of the settlement amount.¹⁴⁷ The renegotiated fee-sharing agreement, however, is struck down on appeal.¹⁴⁸

137. P. SCHUCK, AGENT ORANGE ON TRIAL, *supra* note 120, at 105.

138. *Id.*

139. *Id.* at 104.

140. *Id.* at 84-85.

141. *Id.* at 83-84.

142. *Id.* at 94-95, 105-06.

143. *Id.* at 108-09, 120-21.

144. *Id.*; see also *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 217-20 (2d Cir. 1987) (describing fee arrangements).

145. P. SCHUCK, AGENT ORANGE ON TRIAL, *supra* note 120, at 150.

146. *Id.* at 164-66.

147. *Id.* at 200.

148. Several lawyers challenged the agreement on the ground that it violated DR 5-103 which prohibits attorneys from acquiring a proprietary interest in an action in which they are involved and DR 2-107, which prohibits division of a fee with an attorney who is not a member of the same firm unless such division is made pursuant to client consent and is based upon services performed and responsibility assumed. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103 (1980); *id.* DR 2-107. The trial judge disagreed, reasoning that because the litigation required the Plaintiff's Management Committee to per-

2. Discussion: Large Ad Hoc Team

The first two litigation teams handled cases that, like most American cases, involved relatively simple issues and low-to-moderate stakes.¹⁴⁹ The Agent Orange team and the firm team depicted in the next hypothetical illustrate the other end of the spectrum: the teamwork that occurs in the sprawling, complex cases now dominating the litigation landscape in a manner out of proportion to their incidence.¹⁵⁰

The large lawyer teams that handle complex litigation differ in several ways from smaller teams. A large team demands an express organizational structure: implicit division of control in small teams must be made overt with a large team. Large teams of lawyers are needed not only to specialize, but also to provide the "surge capacity" necessary to handle extended, complicated litigation.¹⁵¹ Unlike small-team lawyers, many lawyers *must* work on the same tasks at the same time, from discovery, through negotiations, to trial. Such same-task work requires more cooperation and creates a more difficult division of responsibility than teamwork on cases requiring less manpower.

Information control and coordination are major problems for large teams. The various mechanisms for control and coordination available to the small team—few members, daily contacts, past experience, division by task or by stage—are by

form like an "ad hoc law firm," it could split fees among its members. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1452, 1458 (E.D.N.Y. 1985). On appeal the Second Circuit reversed on the ground that the agreement did not protect class interests. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d at 224 (fee arrangement provided managing attorneys with incentive to accept settlement offer not in best interests of clients).

149. *See* Galanter, *supra* note 11, at 61, 64 ("litigation explosion" is concept invented by elites with limited view of legal system and propagated in elite law reviews); Trubek, Sarat, Felstiner, Kritzer & Grossman, *supra* note 93, at 82-84 (in typical case amount at stake is \$10,000 or less and case is procedurally simple).

150. *See* Galanter, *supra* note 11, at 46 (as law becomes more complex, it can be deployed only by actors who can play on the requisite scale); Resnik, *supra* note 87, at 511 (as statistical rarities, "Big Case" and structural reform lawsuit are nevertheless in our imagination because we are drawn to "vivid" information).

151. *See* Chayes & Chayes, *supra* note 78, at 295. Marc Galanter has assessed the strengths and weaknesses of such "megalawyer" teams. He argues that working in larger groups amplifies the power of competent players, allowing them to pursue long-range litigation strategy in a way that individuals cannot, coordinating their efforts on several fronts, selecting their targets and forums, and managing the sequence, scope, and pace of litigation. Galanter, *supra* note 24, at 172-73.

definition unavailable as the case grows larger. As more people make decisions, no one mind can collect, retain, or coordinate the complex interactions taking place. More complex frameworks are needed to maximize coordination of team efforts.¹⁵²

Most complex lawyer teams solve the problem by imposing an internal hierarchical structure on the team and by emphasizing organizational identity. Because huge amounts of material must be gathered and digested, teamwork is mandatory. Conceding this reality, the lawyers on this team adopted the hierarchical structure of a business by designating leaders, establishing management committees and subcommittees, and assigning members to various specialized tasks.¹⁵³ Furthermore, the group tried to develop a coherent public identity, publically referring to itself as "Y and Associates." Even the trial judge recognized the plaintiff's lawyers as an ad hoc law firm.¹⁵⁴

The size of the suit and lack of resources to prosecute it, however, made it almost impossible to develop a cohesive team. Because the possibility of recovery was highly contingent, the lawyers had difficulty mounting the litigation without an adequate infusion of their own capital. Thus business decisions became central to the institution of the case, and team control went to some extent to lawyers willing and able to pay for it.¹⁵⁵ Although economics are always implicit in a lawyer's decisions, class actions make this dimension breathtakingly overt.¹⁵⁶

Economic problems also prevented the lawyers from developing a fully staffed, fully experienced team. Continually wor-

152. For discussions of the complexity of information processing in large organizations, see J. GALBRAITH, *DESIGNING COMPLEX ORGANIZATIONS* (1973); Ungson, Braunstein & Hall, *Managerial Information Processing: A Research Review*, 26 ADMIN. SCI. Q. 116 (1981).

153. If they do not set up such a committee, the judge will do it for them. See MANUAL FOR COMPLEX LITIGATION, SECOND § 20.22 (1985) (lawyers may coordinate their own activities, but court should institute procedures necessary for efficiency and economy, including selection of attorney spokespersons); see also Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 314 n.32 (1986) (appointment of lead counsel or steering committee in complex case may reduce client's litigation costs but not necessarily those of individual litigator).

154. See *supra* note 148.

155. See P. SCHUCK, *AGENT ORANGE ON TRIAL* *supra* note 120, at 124 (1986) (by end of case, authority for settlement and for spending was in hands of financiers who had not lived with case and did not really know it).

156. See generally Coffee, *supra* note 95 at 677-90 (examining effect of economic incentives on litigation decisions).

ried about funding, the lawyers could not lavish the kind of time and resources on the suit that lawyers with a more economically secure defendant class could afford.¹⁵⁷ Nor could they reduce costs by minimizing attention to the case, as did the smaller ad hoc team. Their stakes in the case were sufficiently high and the suit sufficiently complex to require vigorous participation. Furthermore, uncertainty as to the suit's length or the kind of resources ultimately required forced the team to grow incrementally, like the small ad hoc team. Thus its structure was very unstable.¹⁵⁸

Client control was as weak here as it was in the case of the small ad hoc team. Although the scale of the class action suit was larger and the team represented many plaintiffs rather than an individual, the clients remained weak economic players with little control over their lawyers.¹⁵⁹ Because the class lawyers looked to each other for funding and decision making, they could not conceive of the case as belonging to the *class*. Thus many of the lawyers focused on early settlement even though class members might have been more interested in the public forum that a trial provided.¹⁶⁰

157. This team is no exception to Professor John Coffee's thesis that economic forces generally compel the plaintiff's lawyers to work in small, unstable structures. See *id.* at 706-12; Coffee, *supra* note 80, at 17-69. Although 250 United States firms had more than 80 lawyers, the largest firm regularly representing plaintiffs in class action and derivative suits had 37 lawyers. *Id.* at 20. Plaintiffs' firms have organization and monitoring problems because their projects are long term, it is hard to know who is shirking, and the tendency for plaintiffs' lawyers to depend on their individual reputation as litigators prevents the development of strong "institutional cement." *Id.* at 21-22.

158. Schuck, *The Role of Judges*, *supra* note 120, at 347 (lawyers on plaintiff's management committee at time of settlement were distant from veterans and had different personalities, ideologies, and incentives from lawyers on early team).

159. These clients have no more economic resources to support lawyer activity than the clients in the first illustration. They are not repeat players. See *supra* note 85; see also Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 229-36 (1983) (analyzing consequences following from "the necessarily weak control that the client can exercise over the attorney in complex class and derivative actions") [hereinafter Coffee, *Private Attorney General*]; Coffee, *supra* note 95, at 677-78 (in class actions and shareholder derivative suits client has only nominal stake in outcome); Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 318 (1985) (class representatives lack power to control attorneys).

160. See *supra* notes 120-21 and accompanying text; see also P. SCHUCK, *AGENT ORANGE ON TRIAL*, *supra* note 120, at 50 (1986) (many veterans complained that lawyers focused solely on suit instead of veterans' overall strategy).

The lawyers' awareness of the contingency of recovery may also have interfered with group solidarity. Organizational studies have indicated that groups under stress become very cohesive if anticipating success but may fall apart quickly if they perceive themselves as failing.¹⁶¹ Thus, the more uncertain the lawyers are of the case's progress, the less likely they can avoid overt conflict and develop a coherent approach to case management.

Motivational differences also interfered with team cohesiveness. Although all of the lawyers wanted economic recovery for the class, and hence themselves, they had a variety of conflicting secondary goals. Some wanted the professional renown of managing a successful trial; others sought to publicize the problems of Agent Orange through a trial; still others wanted only a quick settlement.¹⁶² In fact, Y claimed that his partners did not want the causation study because it might show substantial injuries to veterans and interfere with settlement.¹⁶³ If true, it is evidence of information "burial" similar to that faced by the associate in the hospital malpractice suit.¹⁶⁴ This time, however, the litigators buried the information not to protect the client's welfare, but to protect the litigator's economic interest.

Although similar conflicts exist on every lawyer team, a large team without a permanent group structure to give it shared long-range goals may find it difficult to minimize these differences. Legal commentators have recognized the stresses that cripple class actions when class members disagree among themselves and with their lawyers,¹⁶⁵ but they have paid little attention to the way that the lawyers who serve them reconcile their own conflicting goals.¹⁶⁶

161. Van de Vliert, *Escalative Intervention in Small-Group Conflicts*, 21 J. APPLIED BEHAV. SCI. 19, 22 (1985) (group expecting to win intergroup conflict will become more cohesive, while cohesion will disintegrate if group expects to lose).

162. To Yannacone, the case was as much a vehicle for political organization, veteran consciousness-raising, and public education as it was a self-contained judicial proceeding; in contrast, many of the others saw the case as a professional and financial venture, a calculated investment in the prospect of a large settlement and award of counsel fees.

P. SCHUCK, AGENT ORANGE ON TRIAL, *supra* note 120, at 73.

163. *Id.* at 53.

164. See *supra* notes 117-19 and accompanying text.

165. See Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U.L. REV. 492 (1982); Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

166. See Comment, *The Use of Subclasses in Class Action Suits Under Title*

Lawyer Y's management style created an additional source of stress for the team. He was not, in the eyes of the lawyers, a good "team player." They perceived him as unwilling to cooperate, to share information, or to modify his own goals to achieve team harmony. Many of Y's positions later proved to be correct,¹⁶⁷ but he failed to make his ideas operational for the team.

Judicial control over class representatives may, as a last factor, have affected team success. Because courts monitor class representation and retain the power to remove some or all of the lawyers on the class team,¹⁶⁸ these lawyers had less incentive to maintain their group identity when things began going badly.

Although all of these problems—organizational instability, uncertainty about suit management or future prospects, goal and personality conflicts—exist in the smaller groups, they caused greater conflicts in this team than in the two smaller teams. Unlike the smaller ad hoc team, these lawyers could not avoid conflicts by working serially because their task required active collaboration.

Such collaboration was difficult. Although dependent on the work of their peers, team lawyers could not easily monitor each other. Unlike the partnership team, these lawyers had no shared experiences to help them understand each other, predict behavior, and avoid stresses. They had no ongoing group structure and no tacit arrangements, like that of an associate and partner, to provide informal monitoring.¹⁶⁹ If one lawyer, like

VII, 9 INDUS. REL. L.J. 116, 145 (1987) (recognizing potential conflicts between subclasses in class actions and recommending that judges encourage cooperation and information sharing among counsel for various subclasses); see also *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 70-76 (E.D. Pa. 1983) (describing infighting among counsel for class), *aff'd in part, rev'd in part*, 751 F.2d 562 (3d Cir. 1984); *In re Continental Ill. Sec. Litig.*, 572 F. Supp. 931, 933-35 (N.D. Ill. 1983) (setting forth guidelines governing awardance of fees in class action in attempt to prevent "chaos" among plaintiffs' counsel and to "avoid duplication and unnecessary expense").

167. For example, Y correctly perceived that causation was crucial. See P. SCHUCK, AGENT ORANGE ON TRIAL, *supra* note 120, at 113.

168. *Id.* at 84-85.

169. Professor Schuck has described this problem as encountered in the Agent Orange litigation:

[T]he members of the PMC [plaintiff's management committee] had never worked together before. As personal injury specialists, their customary work style involved one senior partner on a case surrounded by a few young associates. "The PMC consisted of egocentric, aggressive kingpins who were essentially strangers to one another," one close observer commented. "They had not developed a

Y,¹⁷⁰ failed to cooperate, teamwork ground to a halt.

Although this class action involved a marginal case, even lawyer teams working with very solid cases encounter serious internal stresses. Lawyers may engage in an equally disruptive struggle for case control, not out of uncertainty as to case management, but to increase their share of the recovery.¹⁷¹

3. Summary: Large Ad Hoc Team

In one sense the teamwork problems and consequent ethical dilemmas of the small ad hoc team are magnified on this large team. Because the lawyers' potential recovery is both high and dependent on the outcome of a very marginal suit, case management decision making is extremely stressful. Crucial decisions are driven by economics.¹⁷² Lawyers cannot prosecute this suit if they do not form a group that can both underwrite and manage the case. Because they provide all of the resources for this joint venture and take all of the risks, however, they may fight bitterly among themselves to control the suit, creating problems for their client, their opponents, and the court. We must once again ask, as with the small ad hoc and partnership teams, whether the teamwork that evolved naturally is the most desirable form for managing such suits.

D. LARGE INHOUSE TEAM

1. Illustration

An old client of ZB, a Wall Street law firm, asks it to defend two major antitrust suits.¹⁷³ The client's inhouse counsel

rapport through years of partnership, and it was often hard for them to get along."

Id. at 123.

170. See *supra* notes 133-39 and accompanying text.

171. An example of this is the bitter infighting of the *Fine Paper* antitrust case, in which lawyers engaged in fierce competition to control the makeup of the plaintiff's management team and in outrageously duplicative behavior. *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 70-76 (E.D. Pa. 1983); see also Coffee, *Private Attorney General*, *supra* note 159, at 238 & n.91 (plaintiffs' teams "often run along the line of a WPA work-relief project").

172. Coffee, *Private Attorney General*, *supra* note 159, at 262 (problem is not a few bad apples but "structural dilemma involving a skewed incentive structure"); see *supra* note 157.

173. This team description is based on published reports of the handling of the *Berkey v. Kodak* case appearing in Kiechel, *The Strange Case of Kodak's Lawyers*, *FORTUNE*, May 8, 1978, at 188, and J. STEWART, *supra* note 78, at 327-65; see also *Berkey Photo v. Eastman Kodak Co.*, 457 F. Supp. 404 (S.D.N.Y. 1978), *aff'd in part, rev'd in part*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Brazil, *supra* note 93, at 1326-27 (discussing *Berkey* case); Kid-

and ZB plan strategy jointly, including a decision to hire a nationally recognized economist as an expert witness. Desiring the most thorough representation possible,¹⁷⁴ inhouse counsel asks that an aggressive partner head up the case.¹⁷⁵ Agreeing, the firm establishes a team of six partners led by the head of the litigation department. The team leader then organizes the team hierarchically by assigning senior partners, junior partners, and associates to manage three key areas: motion practice, economic theories, and legal theories.¹⁷⁶

Communications and cooperation between client and lawyers are good. Because ZB realizes at the time of discovery that no currently available partner could handle the trial, it seeks counsel outside the firm, offering a partnership to W in exchange for his agreement to direct the case.¹⁷⁷ Although nationally known, W has never before handled a complex antitrust case.¹⁷⁸

W changes the suit's administrative structure, taking over principal responsibility from other partners in several areas and assigning them to more limited roles.¹⁷⁹ During the course of the litigation, several partners complain to the head of the litigation department that W does not delegate enough responsibility to them or trust their work.¹⁸⁰

der, *Wall Street and the Powerhouse Firms: Stewart's Partners*, 1983 AM. B. FOUND. RES. J. 938, 941 (same); Wessel, *Institutional Responsibility: Professionalism and Ethics*, 60 NEB. L. REV. 504, 506-09 (1981) (same); *Former Attorney for Eastman Kodak Sentenced to Prison*, Wall St. J., Oct. 18, 1978, at 18, col. 3 (same). The illustration presented in this Article, however, is not intended to reflect historical fact (we may never know what actually happened), but to present a hypothetical worst case scenario of the type of events that may have occurred within the firm and have occurred in other firms handling similarly complex cases. See, e.g., *Law Firm Faulted by Appeals Court*, N.Y. Times, June 28, 1987, at A27, col. 1 (reporting judge's criticism of elite New York firm for unethical conduct, including deceit in obtaining documents); Brill, *Death of a Career*, Am. Law., Dec. 1986, at 1, col. 1 (describing firm associate who violated securities laws by giving insider information about client's business to outsider); Galante, *Rogers & Wells Will Pay \$40 M*, Nat'l L.J., Mar. 3, 1986, at 3, col. 1, 50, col. 1 (same); Pollock, *Rogers & Wells and the J. David Fiasco*, Am. Law., July-Aug. 1985, at 24, col. 1 (describing firm's failure to recognize and prevent client's illegal conduct); *Trustee's Criticism of Lawyers in O.P.M. Imbroglia*, Legal Times, May 2, 1983, at 20, col. 1 (client's fraud could not have occurred without assistance of lawyers).

174. See J. STEWART, *supra* note 78, at 334.

175. See *id.* at 330-32.

176. See *id.* at 335.

177. *Id.* at 333.

178. *Id.* at 334.

179. *Id.* at 335.

180. "An associate who worked closely with [W] during this period de-

Prior to trial a magistrate orders W to produce all reports written by defendant's expert about the litigation, including interim reports.¹⁸¹ Although W transmits this order to Stevens, the ZB partner responsible for this phase of discovery, Stevens decides that a damaging 1974 letter from the expert does not come within the scope of the request.¹⁸² Even after receiving a second discovery request from plaintiff, Stevens does not reveal the document's existence, telling plaintiff's lawyers that he will get back to them.¹⁸³ The opposition makes no further document requests, and Stevens takes no further action.¹⁸⁴ W is left unaware of Stevens' failure to turn over the letter.¹⁸⁵

During the expert's deposition, Stevens tells opposing counsel that documents previously mailed to him by the expert¹⁸⁶ have been destroyed.¹⁸⁷ An associate, knowing the documents' true location,¹⁸⁸ reminds Stevens in a whisper that the documents have not been destroyed,¹⁸⁹ but Stevens ignores him and subsequently files an affidavit affirming the documents' destruction.¹⁹⁰ The associate does not discuss these events with any other partner but moves the documents to a locked closet and advises Stevens of what he has done. The two never discuss the incident again.¹⁹¹ Stevens later reports to W that he destroyed some documents sought by the other side. Although such destruction would be highly unusual during the course of litigation, W does not probe into the matter.¹⁹²

Preparing the expert the night before he is to testify at trial,¹⁹³ Miller, another partner on the team who has worked on a different aspect of the case, recalls the expert's earlier, equivocal letter that Stevens has hidden. Miller reminds the expert of the letter and its contents. The expert then tells a ZB

scribes him as 'a very good lawyer who could do the work of three. But give him thirty lawyers—and still he only produces the work of three. He didn't trust, didn't rely on us. It made me furious.'" *Id.* at 338.

181. *Id.* at 340; see Kiechel, *supra* note 173, at 190.

182. See J. STEWART, *supra* note 78, at 340-41; Kiechel, *supra* note 173, at 190.

183. Kiechel, *supra* note 173, at 188, 190.

184. *Id.*

185. See *id.*

186. J. STEWART, *supra* note 78, at 341.

187. *Id.* at 356.

188. *Id.* at 341.

189. *Id.*; Kiechel, *supra* note 173, at 190.

190. See J. STEWART, *supra* note 78, at 344.

191. See *id.* at 356.

192. *Id.* at 342-43.

193. See *id.* at 345.

associate of the letter's existence. Although charged with reviewing the expert's testimony with him, she did not previously know about the letter.¹⁹⁴ She takes the information to W, who decides that ZB does not have an obligation to produce the letter.¹⁹⁵ Because the expert is now aware of the letter, however, information of its existence comes out on cross-examination with disastrous results to the client.¹⁹⁶ The jury is convinced that the client is hiding key evidence, and the trial judge is shocked that the ZB team failed to disclose the letter.¹⁹⁷

After this debacle Stevens confesses to W that he lied to the court about the suitcase of documents. He admits that the documents were not destroyed as he had said. Without consulting other firm members, W makes a full disclosure to opposing counsel and the court.¹⁹⁸ A jury verdict is returned in favor of the plaintiff. Stevens is expelled from the partnership, and F's career with the firm is also cut short.¹⁹⁹

2. Discussion: Large Inhouse Team

a. *Structure*

This team stands in sharp contrast to the previous class action team in its ability to capitalize on a hierarchical structure and group identity to provide the cohesion necessary to handle complex litigation. Yet significantly, the carefully crafted team structure cannot forestall serious breakdowns.

Because the client and its lawyers have greater resources, large firm teams can develop complex, differentiated management structures.²⁰⁰ Coordination is conducted at the top, with lawyer teams working on various issues. At each succeeding lower rung of the hierarchy, work becomes more routine and task-specific, so that most associates see only a small piece of the puzzle.²⁰¹ Communications move up and down the chain through informal encounters and written documents. The team

194. See J. STEWART, *supra* note 78, at 346.

195. See *id.* at 346-47.

196. *Id.* at 347.

197. See *id.*

198. See *id.* at 349-51.

199. *Id.* at 357, 363; see also *Former Attorney for Eastman Kodak Sentenced to Prison*, *supra* note 173, at 18, col. 3 (partner sentenced to one month in prison for lying and withholding documents).

200. See Chayes & Chayes, *supra* note 78, at 295 (bulk of outside corporation work is litigation handled by elite law firms).

201. See E. SMIGEL, *supra* note 24, at 148. Some firms have a rule limiting teams to four lawyers to avoid this fragmentation. M. GREEN, *supra* note 1, at 40-41.

coordinates detailed information through a centralized computer storage system. Informal cross-team exchanges also occur as lawyers talk, often at meals, with their colleagues on other issue teams.²⁰²

Yet task ambiguity still prevents large law teams from obtaining the clear-cut structure and lines of authority of a bureaucratic organization.²⁰³ To prevent information overload, lower level professionals must reduce the amount of information reported to superiors. Yet most legal decisions are themselves based on an ambiguity that requires relaying complex messages. The problem grows exponentially with team size. Because task ambiguity makes it difficult to codify this information,²⁰⁴ a communications system for transmitting case data in a complex team is probably less effective than the creation of an experienced team whose members share the same values, know each other well, and trust one another to make similar decisions under the same set of circumstances. To achieve this, the complex litigation team must mesh hierarchical control with group identity so that every team member can draw on the same type of group understanding that members of small

202. See generally J. STEWART, *supra* note 78 (describing litigation management in some of the nation's largest law firms). Stewart's description of the organization of IBM's litigation team gives insight into team structure. See *id.* at 53-113. Generally litigation teams in large law firms consist of a senior partner, one or more junior partners, and several associates. When a litigation project is big, teams are divided into subteams, each working on a separate issue. See *id.* at 90. The associates generally work alone, reporting to their supervising partners. See *id.* Some associates work for several partners on different projects. Their work involves a certain amount of discretion. Most deal with the documentary evidence in the case, preparing material for use by partners examining witnesses at trial or deciding what to include in findings of facts to be presented to the judge. See *id.* at 83, 90, 96. Associates are sometimes free to contact employees of the client corporation if they need additional factual information. See *id.* at 74.

Team members learn about the rest of the case by reading documents and trial briefs and often by talking with other firm members of equal status. Such conversations frequently occur at meals and at weekly lunches where lawyers deliver progress reports and participate in a sport together to build team spirit. See *id.* at 74. The firm uses a sophisticated computer system to centralize information processing. Despite the voluminous documentary evidence in the case and a trial transcript of one hundred thousand pages, supervising partners are generally able to remain familiar with the relevant aspects of the case. See *id.* at 75; interview with Linda Smitty, Yale Law School (Apr. 11, 1982).

203. See Nelson, *supra* note 2, at 118.

204. Cf. Middleton, *Getting Support*, Nat'l L.J., June 4, 1984, at 1, col. 3, 26, col. 4 (use of paralegals to do routine document work worries trial lawyers who fear it distances them too much from materials they need to be familiar with).

partnership teams use to coordinate their efforts.²⁰⁵

Sociologists and other observers have examined the complex methods by which large law firms achieve cooperation on an organizational level, but they have generally ignored its relationship to specific work groups.²⁰⁶ Although inhouse counsel and government agencies may accommodate professionalism and bureaucratization differently,²⁰⁷ large law firms derive much of their strength from socialization.

If strong firm and professional identity are crucial to the large law firm's effectiveness, internal task sharing engenders and demands such heightened identity. Long-term training and observation of associates before selection for partnership is key to the socialization of the lawyers in a large law firm.²⁰⁸ As in small firm teams, associates learn complex responses to ambiguous tasks and strengthen their allegiance to supervising attorneys through work sharing.²⁰⁹ They perceive themselves and their supervisors as part of a larger group effort, which heightens their identity with the firm and their sense of distance from the client.

Although both large and small teams stress competent delivery of service as their highest goal, this value is embodied differently in large firm teams. Standardized norms of competence (and other behavior) are more important in a team with a large or extremely fluid membership than on the small team in which members who know each other well accommodate individual idiosyncracies. Similar backgrounds and training, and the development of unspoken social norms within the firm, increase the group's effectiveness in dealing with task ambiguities.²¹⁰

205. See E. SMIGEL, *supra* note 24, at 249-91; see also Morrison, *Making Partner: Tradition in Flux*, Nat'l L.J., Apr. 12, 1982, at 1, col. 3, 29, col. 1 (associate describing partnership choices reports that "[t]he most important thing is to be just like them").

206. See authorities cited *supra* notes 2 and 24; see also M. LIPSKEY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980) (analyzing place of individuals, including lawyers, within organizational structure of public service agencies).

207. See E. SPANGLER, *supra* note 6, at 70-174 (examining work of corporate staff counsel, civil service attorneys, and legal service advocates).

208. See E. SMIGEL, *supra* note 24, at 80.

209. See *id.* at 299. Smigel quotes one associate as saying that "[m]y first responsibility is to the partner and then to the client." *Id.*

210. As one observer noted, "Covington & Burling is a culture as well as a law firm, as much a community of tribal customs, hierarchical relationships and extended loyalties as the Trobriand Islanders [or] the Tasadays . . ." M. GREEN, *supra* note 1, at 31.

b. *Breakdowns*

As in any complex human organization, however, breakdowns concerning information control and prescribed team behavior occur in large lawyer teams.²¹¹ Just as lawyers' tasks and the information they process are frequently ambiguous, the impact of a breakdown is also ambiguous. Unlike other professions, ambiguity within a lawyer team, litigation or otherwise,²¹² can sometimes benefit rather than hurt the client. This tension results from the lawyer's dual role as client advocate and officer of the court. Because certain kinds of information or adherence to prescribed ethical norms can hurt the client's immediate interests, lawyers sometimes adopt methods, consciously or unconsciously, to screen out information before it reaches them or to rationalize the choices they make in their client's interests.²¹³

211. Just as important as the breakdowns that occur when the team functions poorly are the ethical problems created by the team when it works well. Scholars have devoted a great deal of attention to the social problems created by the powerful smoothly running megateam. The very structure of the team creates ethical problems, because the team has resources capable of overwhelming both the opposition and the court system. See *Control Data Corp. v. Washington Metro. Area Transp. Auth.*, 87 F.R.D. 377, 379 (D.D.C. 1980) (expressing dismay at "extraordinary commitment of the resources of the parties, the talents of counsel, and the time of the Court to what is ultimately only a dispute about money"); see also Chayes & Chayes, *supra* note 78, at 296-97 (large-firm litigants have devoted energy and intelligence of elite lawyers to increasing size, complexity, duration, and cost of lawsuit instead of working on new ventures and ongoing corporate planning and decision making); Levy, *Discovery—Use and Abuse, Myth and Reality*, 17 FORUM 465, 470 (1981) (large-firm discovery lawyer who only sees small part of case frequently commits overdiscovery because he lacks direction, is not sure how trial lawyer will try case, and does not want to be criticized); Resnik, *supra* note 87, at 524 (because judges depend more on attorneys to simplify and clarify issues, the problem of attorney misbehavior grows as cases become more complex).

212. For an example of a breakdown in a nonlitigation area, see *In re Keating, Muething & Klekamp, Exchange Act Release No. 15,982*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,124, at 81,988-89 (July 2, 1979) (securities reporting); see also Pollock, *supra* note 173, at 24, col. 1 (describing firm's failure to recognize and stop client's illegal Ponzi scheme); Lempert, *O.P.M. Lawyers: Could, Should They Have Known?*, Legal Times, Jan. 3, 1983, at 1, col. 3 (describing attorneys' service of client for three months after discovering client's serious financial wrongdoing); Lempert, *O.P.M. Tale Raises Troublesome Ethics Questions*, Legal Times, Jan. 3, 1983, at 28, col. 1 (same).

213. See Schanberg, *Westway Deceit (2)*, N.Y. Times, June 29, 1982, at A23, col. 1 (information detrimental to client's interests deliberately withheld from federal tribunal); see also *In re North Am. Acceptance Corp.*, 513 F. Supp. 608, 614-15 (N.D. Ga. 1981) (plaintiff alleged law firm aided and abetted defendants in violating federal securities laws); *SEC v. National Student Mktg.*, 457 F. Supp. 682, 687 (D.D.C. 1978) (SEC alleged attorney aided client in violating

As the example illustrates, teamwork complicates this conflict. In handling discovery Stevens made several decisions concerning the opposition's requests for the expert's documents. First, relying on linguistic ambiguity, he decided that the 1974 letter did not meet the definition of the material requested,²¹⁴ and when that ambiguity was cleared up upon the second request, he performed his own ambiguous act—he stalled. In effect, Stevens created “lost” information that was known only to a few team members and was protected from exposure to opposing counsel and the rest of the lawyer team by his inactivity. Because the expert had also forgotten the letter's contents and had subsequently developed more favorable views toward the client's position,²¹⁵ the letter might have remained “lost” with no ill effects to the client for the remainder of the trial. The team operations had, at least temporarily, created a situation in which defendant's chief litigator and chief expert witness could candidly say in court that no prior negative reports existed. If the action was discovered, the entire firm and its client would suffer, but if not, diffused responsibility created a screen protecting the upper-level public actors from the impact of their subordinate's decision.²¹⁶

federal securities laws); *cf.* Rhode, *supra* note 12, at 598-99 (adversarial framework has often generated ethos in which truth becomes more obstacle than objective); Hazard, *supra* note 52, at 1523 (concealing and distorting facts so client avoids just deserts under the law is “an aspect of law practice that every lawyer knows about, but many may fear to question”). In a national survey of 1500 large-firm litigators, half of those responding believed that unfair and inadequate disclosure of material information prior to trial was a “regular or frequent” problem. Rhode, *supra* note 12, at 598-99 (citing S. Pepke, Standards of Legal Negotiations, Interim Report and Preliminary Findings (1983) (unpublished manuscript)); *see also* C. WOLFRAM, *supra* note 18, at 639-40 (American lawyers regard evidence known to them as “private and proprietary” that must be revealed only if other side makes “specific triggering request”); Brazil, *supra* note 93, at 1311-12 (because disclosing relevant but damaging information exposes lawyer to malpractice, discipline, and marketplace sanctions, no economic or competitive incentives exist to pursue truth); Chemerinsky, *Protecting Lawyers from Their Professions: Redefining the Lawyer's Role*, 5 J. LEGAL PROF. 31, 40-41 (1980) (noting traditional view that lawyer's duty to client requires guarding of some information and presentation of evidence in most favorable light); Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 823 (1985) (discussing incentives to distort evidence in our lawyer-dominated system).

214. *Cf.* Brazil, *supra* note 93, at 1324 (discussing silent assertion of privilege).

215. *Cf.* Langbein, *supra* note 213, at 835 (subtle pressure on experts to “join the team”).

216. *See* Vaughan, *supra* note 64, at 1394 (as structures grow larger and more specialization occurs, opportunity for illegal behavior increases because

Although usually not resulting in such obviously negative results, the phenomenon of "losing" information occurs whenever lawyer teams operate.²¹⁷ It is reflected in thousands of judgment calls by which the picture of the client's legal affairs constantly changes.²¹⁸ The phenomenon was present in the partnership example in which the associate deliberated over whether to ask his client's employee a question that could damage the client's entire case.²¹⁹ Likewise, it was present more recently in the Iran-Contra hearings,²²⁰ when members of President Reagan's staff described their mission as one of creating "plausible deniability" for the President.²²¹ These teams, lawyer and nonlawyer alike, share one trait: because they see themselves as fighting in an adversarial world, they regard keeping dangerous information from the enemy to be of pri-

superiors lose control over subordinates and organizational behavior becomes more obscure). Professor Rhode has noted that "[a]ttorneys working on fragmented aspects of a substantial matter may feel little accountability for its ultimate consequences. In hierarchical organizations the sources of rationalization multiply; lack of experience, certitude, or formal responsibility supply ready grounds for suspending judgment." Rhode, *supra* note 12, at 637.

217. Information loss can be the result of physical destruction of relevant documents. See, e.g., *Control Data Corp. v. International Business Mach. Corp.*, 1973-1 Trade Cas. (CCH) ¶ 74,363, at 93,685-86 (D. Minn. 1973) (as part of settlement agreement, plaintiff destroyed computerized index to discovery materials that would have been useful to other plaintiffs); see also Renfrew, *supra* note 57, at 279 (difficult to detect attorney's deliberate withholding of information); Granelli, *Gibson Dunn Fined in Document Destruction*, Nat'l L.J., May 10, 1982, at 2, col. 3 (two firms and client fined \$375,000 for willful destruction of documents relating to pending antitrust suit).

218. See Langbein, *supra* note 213, at 845 (adversary domination of fact-gathering privatizes decisions about how deep to dig); Renfrew, *supra* note 57, at 265 (fabrication and suppression of material facts common although lawyers and judges do not want to admit it); Hazard, *supra* note 52, at 1523-24 (events in which facts concealed or distorted "are largely verbal—things said and pointedly left unsaid; for the work of the lawyer consists essentially of fashioning words and phrases").

219. See *supra* notes 117-19 and accompanying text.

220. See IRAN-CONTRA REPORT, *supra* note 9, at 285-326 (discussing concealment of information by Reagan administration officials involved in Iran-Contra affair); TAKING THE STAND: THE TESTIMONY OF LIEUTENANT COLONEL OLIVER L. NORTH (1987) [hereinafter TAKING THE STAND].

221. Compare the remarks of Representative Michael Dewine to Secretary of State George P. Schultz during the Iran-Contra Hearings: "[I]n my opinion, you let Admiral Poindexter cut you out. . . . You stated, and it's uncontroverted, . . . you did not want to know the operational details. In my opinion, you purposely cut yourself off from the facts." N.Y. Times, July 25, 1987, at A7, cols. 5-6; see *infra* notes 245, 266 and accompanying text; see also Weyrauch, *Gestapo Informants: Facts and Theory of Undercover Operations*, 24 COLUM. J. TRANSNAT'L L. 553, 569 & n.39 (1986) (discussing concept of plausible deniability).

mary value. They have built a private morality of secrecy that contradicts their public posture as truth-seekers.²²²

As the example illustrates, both superiors and subordinates in a hierarchically organized team face problems. When team size makes it impossible to achieve control through informal means, superiors must find the proper mix between delegating responsibility and assuming control over subordinates, and between information flow and information reduction. They face novel ethical pressures in reaching "information optimality": control over the way that questions and answers are framed to elicit the optimal amount of information from clients and to yield the optimal amount to their adversary and the court.²²³ Because work must be divided among lawyers, they must rely on their subordinates and their peers to exercise these judgments without completely knowing what information lies beyond the unasked question. Yet to discuss these judgments or techniques openly is to put the group's fragile claim of ethical probity at risk and to create a sense of group complicity that many lawyers wish to avoid.²²⁴

Subordinates on large teams also face competing pressures. Professor Erwin Smigel notes that the ability to interpret and codify these difficult, unstated rules is the most highly valued quality an associate can possess.²²⁵ Subordinates must exercise professional discretion in decision making without bothering their superiors. At the same time they must transmit all important information and take no action that will endanger the outcome of the case. Team subordinates may also face pressure from their superiors to resolve discretionary decisions in prede-

222. See E. SPANGLER, *supra* note 6, at 125 (lawyers sometimes define winning as keeping damaging information undiscovered); Brazil, *supra* note 93, at 1311-12 (legal community defines success as degree to which client is placed in better position than that warranted by facts); cf. W. REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 15-36 (1979) (any social process includes myth system of rights and wrongs and operational code telling operators when and how wrongs may be done).

223. See Hazard & Rice, *supra* note 42, at 109 (incentives in massive case for litigators to use their superior information to subvert judge); Langbein, *supra* note 213, at 833 (rare case in which either side wants anyone to give the whole truth).

224. Even recording a judgment in memorandum form can prove devastating. See Galante, *supra* note 173, at 3, col. 1, 50, col. 1 (document discovery in case against firm accused of failing to recognize and stop client's fraud revealed series of admissions, including note written by one lawyer to himself saying "Ponzi scheme. Love to have the business, but want to sleep at night.").

225. E. SMIGEL, *supra* note 24, at 260-61.

terminated ways.²²⁶ Finally, subordinates may feel strong conflicting ethical pressures from above. Their superiors may send double signals, mandating adherence to strict professional norms while assigning tasks requiring norm-breaking behavior for success.

In his study of lawyers' ethics, Professor Jerome Carlin suggested that ethical pressure on subordinates frequently occurs in hierarchically structured firms.²²⁷ Those tasks requiring questionable behavior for success are delegated to subordinates in the hierarchy.²²⁸ As a member's status improves, he is less pressured to take unethical actions. Carlin suggested that lawyer teams using a peer structure, rather than a hierarchical structure, handle ethical problems differently. Because peers cannot delegate distasteful jobs to subordinates, they control group behavior through open discussions of ethics to clarify group opinion on norm-breaking behavior.²²⁹ Such peer groups will adopt an ethical "climate" that deeply affects the individual lawyer's behavior, as we saw in the small partnership team.²³⁰ On the other hand, Carlin found that in hierarchical firms, in which more time is spent actually collaborating than in peer firms, the firm climate is less indicative of members' ethical attitudes than is their hierarchical position, because that position controls their actions.

Carlin also suggests, however, that promotion in the hierar-

226. This is also true of government agency lawyers. The greatest threats to their independent judgment may come not from the outside, but from their own superiors. *Proceedings of the Forty-First Annual Judicial Conference for the District of Columbia Circuit*, 89 F.R.D. 169, 255-57 (1980) (remarks of Joan Bernstein, General Counsel of the Department of Health and Human Services).

227. J. CARLIN, *supra* note 6, at 96-117.

228. *Id.* at 117.

229. *Id.* at 108-09.

230. Carlin's observation of the impact of peer-group discussion is borne out by recent sociological research, which has identified a "group polarization" phenomenon. See generally I. JANIS, *GROUPTHINK* (2d ed. rev. 1983) (demonstrating that small groups working in high stress situations often exhibit symptoms of "groupthink," maintaining illusion of invulnerability and unanimity, suppressing personal doubts, and developing "mindguards" to prevent dissident views). According to Irving Janis, "[O]ne of the most incomprehensible characteristics of a cohesive group that is sharing stereotypes and manifesting other symptoms of groupthink is the tenacity with which the members adhere to erroneous assumptions despite the mounting evidence to challenge them." *Id.* at 60-61; see also Myers & Lamm, *The Polarizing Effect of Group Discussion*, in *CURRENT TRENDS IN PSYCHOLOGY* 346 (I. Janis ed. 1977) (group discussion enhances initially dominant point of view); authorities cited *infra* note 272.

chy is both the cause and result of ethical behavior. If lawyers cannot communicate easily, they have no control over their colleagues' work, even when sharing responsibility for the same tasks. Partners, therefore, select as partners only those whose judgment they trust. In this light the bizarre aspect of this case is not that Stevens failed to disclose that the documents existed or that he lied, but that these behaviors had not been detected or socialized away long ago.²³¹

Carlin's study explains the "clean hands" position of supervising lawyers but does not consider the problems of a subordinate lawyer who, like A, is confronted by a superior's rule-breaking behavior. Although confronted with a clear case of unethical behavior, A apparently did not discuss it with other members of the firm, the bar, or the client. The associate faced ethical and pragmatic conflicts: his immediate self-interest lay in preserving Stevens's ethical reputation and his own, because partnership promotion probably depended on Stevens's sponsorship.²³² Although it must have seemed clear to A that his duty required him to alert someone in the firm to the lie,²³³ he may also have felt that, on another level, his duty required him to ignore his supervisor's lie because this would relieve others in the firm of ethical responsibility and would be less injurious to the client's interests if never discovered.²³⁴ Thus the

231. Perhaps the newness of the team leader, W, contributed to the difficulty that the team had in operating smoothly. See E. SPANGLER, *supra* note 6, at 43 (describing problems new lawyers face when joining teams).

232. See C. WOLFRAM, *supra* note 18, at 888 (partnership election can stimulate competition in way that blunts ethical instincts).

233. In fact, the associate would likely be required to report his superior's lie under either the Model Code or the Model Rules. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1980) (lawyer having unprivileged knowledge of violation or circumvention of any Disciplinary Rule shall report such knowledge to tribunal or other authority); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1987) (lawyer with knowledge that another lawyer has violated rule of professional conduct that raises substantial question as to lawyer's honesty, must inform appropriate professional authority); see also C. WOLFRAM, *supra* note 18, at 667 (lawyer should talk with advisor before deciding whether to "blow whistle" on client); Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491 (exploring obligation placed on lawyers to inform against other lawyers and suggesting that reasons for society's general ambivalence toward informing deserve more serious consideration by authors of ethical codes); *supra* note 114 and accompanying text (discussing ethical obligations of associate acting at direction of another). *But cf.* Levy, *The Judge's Role in the Enforcement of Ethics—Fear and Learning in the Profession*, 22 SANTA CLARA L. REV. 95, 105 (1982) (no lawyer ever disciplined for violating rule requiring reporting of ethical violations).

234. See C. WOLFRAM, *supra* note 18, at 881 (relationship with senior part-

associate's choice—ethical behavior versus silent collusion—may not have been an exercise in self-interest or blind loyalty, but a painfully “responsible” decision to participate personally in unethical behavior to protect the interests of the teams to whom he owed his loyalty—the litigation team, the firm team, and the client.²³⁵ He risked discovery and destruction of his own career, but he may have made the choice with fuller awareness of its implications and less cynicism than might first appear.²³⁶

Ironically, Stevens himself confessed the lie about the undestroyed documents to W.²³⁷ The partnership immediately expelled Stevens, unable to support further damage to their reputation—a capital asset—by permitting him to stay.²³⁸ The firm was compelled to adhere to the official code at this point. A's involvement in the scandal also apparently cut short his future with the firm. Although individual firm members may have sympathized with A's plight, his allegiance to Stevens, rather than to the firm and to the court, could not be condoned once it was made public.

ners and work environment “leaves associate with very little ethical room to maneuver”).

235. See *infra* notes 249-50 and accompanying text. For an extreme expression of the “team member” ethic, see TAKING THE STAND, *supra* note 220.

236. Cf. *Engineer is Leaving Utah Rocket Plant*, N.Y. Times, Oct. 30, 1986, at 21, col. 1 (reporting claim of engineer who testified to Congress that he was punished for opposing launching of space shuttle Challenger).

237. It is also ironic that in the real *Berkey* case, the lawyer actually caught in this information gap was John Doar, who acted as Chief Counsel for the House Judiciary Committee on the Impeachment of Richard Nixon. In that position Doar devised a plan to prevent leakage of information by his legal staff by creating a rigidly hierarchical model of lawyer teamwork. B. WOODWARD & C. BERNSTEIN, *THE FINAL DAYS* 113-14 (1976). Each lawyer worked on a very small part of the case; only a few top staff lawyers had a total view of the picture. *Id.* Doar's bureaucratic emphasis was sufficiently strong that he required his staff lawyers to wrap up all loose work each night. The greatest tribute to a man, he told a staffer one day, would be that if he died, someone could come into his office the next day and pick up where he left off. *Id.*

238. See Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 126-27 (1983) (lawyer must preserve professional reputation to effectively serve client's need for legitimation); Larson, *On the Nostalgic View of Lawyers' Role: Comment on Kagan and Rosen's "On the Social Significance of Large Law Firm Practice,"* 37 *STAN. L. REV.* 445, 456 (1985) (one main service large firm sells is legitimation, and unassailable firm reputation is necessary prerequisite to this service); Rhode, *supra* note 12, at 627 (“[R]eputation for integrity remains a profitable commodity in many circles.”).

3. Summary: Large Firm Team

The large law firm team parallels both the ad hoc and small partnership teams. Like the ad hoc team, this group possesses a fluid membership and diffuses responsibility among a series of peer-peer and superior-subordinate relationships. Although jurisdictional boundaries between peers appear clearly drawn, with partners assuming responsibility for different trial stages and issues, responsibilities often overlapped; Stevens, Miller, and two associates all dealt with the expert just before trial but failed to coordinate their efforts, with costly results.

The large firm team also shares many of the partnership team's characteristics: the group shares proximity, duration, identity, and collective responsibility for powerful clients, giving them a strong incentive to invest considerable resources in their cases and to cultivate an ethical reputation. In most cases these qualities ensure that the large law firm delivers competent, ethical services to its clients. The ZB example illustrates, however, how size alone can create offsetting complexities for which the large task-sharing team must be prepared. To avoid these problems, the team must encourage information processing and professional responsibility despite team pressures to collaborate or ignore unethical behavior. Still, the competing pressures to work efficiently as a team and win in litigation make some information gaps advantageous to the client and the team.

III. REGULATING LAWYER TEAMS

A. THE TENSIONS OF TEAMWORK

Shifting notions of justice and the exercise of legal judgment concerning human behavior, social norms, and political institutions create ambiguity in the lawyering task. This ambiguity exists not just at the level of application but is inherent in the structure of law and of the lawyer's craft. Every lawyer must by definition accommodate competing roles as advocate, court officer, and autonomous professional.²³⁹

This Article illustrates these emerging tensions, some novel to teamwork and some characteristic of the lawyering process but exacerbated by team effort. Most obvious is the conflict between the efficiencies of task division and the cumu-

239. See G. HAZARD, *supra* note 2, at 5; Chemerinsky, *supra* note 213, at 39-43; Greenebaum, *supra* note 35, at 627; Wasserstrom, *supra* note 35, at 3.

lative nature of legal decision making which depends on the individual's finely honed sense of all that has transpired. The problem reflects the broader conflict between the professional's need for autonomy and authority to make decisions and the professional's obligation to share collective responsibility with other team members. He must be concerned about their actions, perceptions, and ethical choices, yet he cannot intrude on their decision making without intensifying work stress and undercutting the efficiencies that teamwork is designed to provide.

Information processing presents a more subtle problem, because eliciting information from a client or revealing it to others can interfere with a case's successful outcome. The individual lawyer, deciding which questions to ask or how to frame a response, is not forced to consciously consider the overall balance being struck. When decision-making authority is vested in a team, however, each team lawyer must strike a new and different balance with each such decision. Most lawyers are understandably reluctant to discuss openly the advantages of "lost" information or their techniques for regulating information flow. Yet some sense of how this is to be done, and of the acceptable limits of such behavior is crucial for successful team operation. Without observing one another making decisions over a long period of time, then, team lawyers do not establish a unified approach to information management. Absent such shared experience, team members may be reluctant to discuss difficult situations with each other. Instead, they must decide individually, sometimes with limited information, when and how far to press their client.²⁴⁰

Teamwork also heightens the conflict between a lawyer's duty to an individual client and to the team, particularly in litigation in which adversarial pressures increase the members' needs for mutual trust and support.²⁴¹ As team members, lawyers must allocate their time among cases differently than they would as sole practitioners. The result may be a more efficient, competent representation, or, as in the small ad hoc team, abdication of responsibility to other lawyers.

As the lawyer's task grows more complicated and reasons for teamwork more compelling, the tensions that arise within

240. See Hazard, *supra* note 116 at 13, 17-18 (conjoint responsibility must be discussed despite reluctance of agency and firm lawyers to confront issue).

241. Cf. Greenbaum, *supra* note 108, at 395 (best soldiers those who maintained strong, supportive ties with others in group).

lawyer teams command our increased attention. We have paid little attention to how professionals resolve the tensions of working together on unstructured tasks.²⁴² As the illustrations suggest, conversations concerning communication and responsibility rarely occur, at least in small teams, because the problems themselves present too many technical or ethical ambiguities for the group to directly resolve.²⁴³

To this extent the theory that lawyers do not really work together is borne out in fact. Team members spend as little time as possible actually delineating their respective duties or communicating about their part of the team product. This observation parallels the findings of organizational theorists who point out that when tasks are ill-structured and ambiguous, team communications are also limited and fuzzy.²⁴⁴ Rather

242. Because a central precept of professionalism is autonomy in decision making, bridging the work gap between team members is problematic for all professionals. Students of the medical professions have discovered that physicians practicing on teams rarely attempt to challenge or control each others' behavior directly, even if they sharply disagree with the professional's decisions. Instead they create jurisdictional boundaries, by specialization, patient relationship, or rank, and generally avoid entering another physician's sphere of authority. When they can avoid conflict by separating themselves temporally or spatially from other physicians treating the same patient, the stresses of these jurisdictional apportionments are minimized. If they must work at the same time with the same patient and bear joint responsibility for the result, as they must on hospital surgical teams, stresses are intensified and often unbearable. See C. BOSK, FORGIVE AND REMEMBER: MANAGING MEDICAL FAILURE (1979); E. FREIDSON, *supra* note 6; M. MILLMAN, THE UNKINDEST CUT: LIFE IN THE BACKROOMS OF MEDICINE (1978); Coser, *Authority and Decision-Making in Hospitals: A Comparative Analysis*, 23 AM. SOC. REV. 56 (1958); Freedman, *A Prolegomenon to the Allocation of Responsibility in Hierarchical Organizations: The Hospital Context*, 4 LEGAL MED. Q. 35 (1980).

243. Their silence may also come from a more fundamental social reluctance to articulate the normative codes that guide small group behavior. See Weyrauch, *The "Basic Law" or "Constitution" of a Small Group*, 27 J. SOC. ISSUES 49, 53, 59 (1971) (one fundamental norm of small group is that rules are not to be articulated; if rule is articulated, either deliberately or accidentally, it will be discarded).

244. Task ambiguity is identified as a characteristic of work that cannot be easily rationalized or broken down into a series of routine steps because of uncertainty about cause-effect relationships. See Daft & Macintosh, *supra* note 110, at 208-09; Ungson, Braunstein & Hall, *supra* note 152, at 122-24. The complexity of the work lies not in its variety or technical difficulty, which may also be present, but in its "unanalyzability." Daft & Macintosh, *supra* note 110, at 208-09. When task ambiguity is present, the organization must diffuse discretion to its members who are specially trained to perform the task. Decentralization, destandardization, and professionalization are key characteristics of organizations performing ambiguous tasks. See Schoonhoven, *Problems with Contingency Theory: Testing Assumptions Hidden Within the Language of Contingency "Theory"*, 26 ADMIN. SCI. Q. 349, 356, 370 (1981). Task perform-

than directly address group processes, lawyers develop equally vague divisions of labor, relying on similar training and experiences to build a rapport in which more sophisticated, clearer lines of authority can evolve. Obviously only long-range teams can reach such evolution; a new ad hoc team can only muddle through.

Like the task itself, the impact of teamwork on the legal profession is ambiguous. On the one hand, teamwork increases the chance that clients, particularly corporate entities, will obtain competent and efficient services. It also increases each lawyer's resources and enables lawyers to deal with more complex issues. Because of the ambiguities of the lawyering task, teamwork provides a crucial training ground for new lawyers. Finally, teamwork intensifies lawyers' identity with their professional group by exposing them to professional standards and offering insulation from intense client pressures.

On the other hand, teamwork has disadvantages. It results in diffusion of information and responsibility that can affect both the management of individual cases and the individual lawyer's sense of autonomy and responsibility for the team's results.

B. THE REGULATORY RESPONSE

The proper regulatory response to the problems of lawyer

ance becomes the personal responsibility of each member because efficiency requires that uncertainty be resolved when it arises. See J. O'SHAUGHNESSY, *supra* note 111, at 58.

Recent studies show that when task ambiguity exists, very little communication occurs in unscheduled, face-to-face encounters and when communication does occur, it is in language that is general, ambiguous, and highly symbolic. Daft & Macintosh, *supra* note 110, at 219-22. Daft and Macintosh explain that:

[I]f a work environment is fuzzy, muddled, and indescribable, then an accurate representation of that system is also fuzzy, muddled and indescribable. Messages that are ambiguous and have multiple interpretations thus provide information that is consistent with the construction of an internal representation that captures the messy, multiple causation aspects of the system.

Id. at 212.

The authors offer two complementary explanations for low communications: when tasks are not analyzable, coding schemes to transmit data and information are hard to develop and use because they would not be congruous with the work activities. Further, because the broad symbolic language used conveys richer content to participants experienced in dealing with those symbols, fewer communications are needed. *Id.* at 219. These highly charged but fuzzy messages, like constitutional directives, are used by co-workers trained in their interpretation to derive rules of decision under varying circumstances.

teams remains in question. To what extent do team dynamics need correction and team pressures need counterbalance? We must ask whether the lines of legal and ethical responsibility among team lawyers are drawn with sufficient clarity and whether they are consistent with the level of moral responsibility that lawyers actually feel. We must also ask whether greater communication and information sharing among team lawyers should be encouraged.

1. Clarifying Lines of Responsibility

[I]f this whole thing came down to creating political controversy or embarrassment . . . I would be the person who would be dismissed or reassigned or fired or blamed or fingered or whatever I was willing to serve in that capacity. All of that assumed that this was not going to be a matter of criminal behavior That is one of the essences of plausible deniability.

—Col. Oliver North, *Iran-Contra Hearings*²⁴⁵

A sole practitioner has legal and ethical responsibility to the client, the court, the profession, and society. Beyond these external strictures lies the lawyer's own sense of personal or moral responsibility.²⁴⁶ These ambiguous and sometimes discordant responsibilities often cause conflict. Working with other lawyers adds to the equation by introducing two new layers of legal responsibility. The team lawyer becomes legally and ethically responsible to third parties for teammates' work and to the team lawyers themselves. Thus individual responsibility in an organizational setting may be very different from the responsibility assumed by a sole practitioner.²⁴⁷ Although we know that teamwork engenders strong loyalties among team members,²⁴⁸ we are only vaguely aware of the legal, ethical, and moral contours of that additional responsibility or its effect on the lawyer's sense of obligation to the client and society.

a. Lawyers' Responsibility for Their Own Acts

Although lawyers are clearly responsible for their own acts, teamwork adds subtle shades of meaning to the obligation. Distanced from the effect of their behavior on clients or other parties, team lawyers may not feel the full implication of their actions. In this sense teamwork deprives a lawyer of a sense of

245. N.Y. Times, July 10, 1987, at A8, col. 1.

246. See *supra* note 48 and accompanying text.

247. Mounts, *supra* note 6, at 507-09.

248. See *supra* note 235 and accompanying text.

autonomy and responsibility at the most fundamental level: "What is everyone's responsibility is, in fact, no one's responsibility."²⁴⁹

Team norms contribute to this sense of nonresponsibility. As the illustrations have shown, lawyers learn how to deal with ambiguous norms on a day-to-day basis and to assimilate group norms as they work together. Every team lawyer is forced at some point to choose between actions that the lawyer considers proper and a path more protective of the team.²⁵⁰ More alarming than a conflict between team loyalty and lawyer autonomy is the total lack of struggle between these choices demonstrated by many lawyers, so completely have they subjugated their sense of moral responsibility to team norms.²⁵¹

Working in a subordinate position further dilutes a team lawyer's sense of responsibility. As autonomous professionals, lawyers may exercise their own judgment, but as employees, their options are limited.²⁵² If instructed to engage in clearly illegal or unethical behavior, subordinates must refuse,²⁵³ if ordered to do something legally or ethically ambiguous, they face a greater dilemma.²⁵⁴ While wanting to make independent decisions, supervised lawyers cannot ignore that their superior has interpreted the situation differently. Thus regulators must clarify the limits of the subordinate's legal and ethical responsibility.²⁵⁵ Equally important, they must consider the social bond

249. Mounts, *supra* note 6, at 514; *see also* Vaughan, *supra* note 64, at 1391 (organizational processes "create an internal moral and intellectual world in which the individual identifies with the organization and the organization's goals").

250. Rhode, *supra* note 12, at 635-36 (organizational settings encourage team players).

251. *See id.* at 635-38.

252. *See generally* Gross, *supra* note 114, at 260-61 (associate generally subject to partner's control); Mounts, *supra* note 6, at 530 (subordinate's responsibility ignored historically because no simple solutions to problem); Levinson, *Ethics Inside the Law Firm* (Book Review), 36 VAND. L. REV. 847, 847 (1983) (firm and associate must recognize they owe each other fiduciary duty).

253. *See supra* note 114; *see also* ABA Comm. on Professional Ethics, Informal Op. 1074 (1969) (military defense counsel not justified in obeying order from superior not to investigate issue if counsel deems it necessary to adequate defense); G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 459-60 (Supp. 1986) (Model Rule 5.2(a) cautionary).

254. Commentators have pointed to the pressures that lawyers put in such positions may feel. *See* C. WOLFRAM, *supra* note 18, at 881-83; Gross, *supra* note 114, at 297-309; Mounts, *supra* note 6, at 475.

255. The section of the Model Rules defining the relative responsibilities of firm lawyers is described by Professors Geoffrey Hazard and William Hodes as

that exists between lawyers on teams—the pull of “team spirit”—and how the existence of that unarticulated norm modifies the lawyer’s perception of responsibility toward those not on the team.²⁵⁶

b. *Vicarious Responsibility*

Lawyers’ legal and ethical responsibility for the acts of teammates is less certain than lawyers’ responsibility for their own acts. Although traditional tort and agency law principles define some areas of responsibility, such as a lawyer’s liability to a client for partner or employee malpractice,²⁵⁷ many areas are left in doubt, including criminal and civil liability and ethical responsibility for the acts of teammates.

Judges have rarely defined the contours of such responsibility, in part because the question is simply too difficult, given the ambiguities in lawyer teamwork. Furthermore, few judges are willing to embarrass lawyers publicly by criticizing the work of individual members of the team.²⁵⁸ At the same time,

“a major innovation.” G. HAZARD & W. HODES, *supra* note 253, at 451; MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.1 to 5.3 (1987). Model Rule 5.2(b) provides that a subordinate lawyer does not violate the rules of professional conduct when acting in accordance with a supervisor’s “reasonable resolution of an arguable question of professional duty.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(b) (1987). Although the Rule is to be praised for addressing the issue at all, it does not solve all problems. In the first place, the model may be flawed because it does not recognize that in many bureaucratic situations the subordinate lawyer may have a much better feel for the circumstances surrounding a decision than the supervising attorney. *See* Mounts, *supra* note 6, at 530-33; Levinson, *supra* note 252, at 858. Giving final say in an ambiguous situation to the supervisor may, therefore, create more problems for clients and lawyers than it resolves.

Second, because many disagreements will fall into the “reasonably arguable” area, the Rule may discourage associates from confronting their own responsibility for their acts or discourage them from challenging the instructions of their supervisors. This is particularly so because the associates’ careers depend on the employer’s good will. *See* Gross, *supra* note 114, at 298-99 (associate may be afraid to disagree even with clearly unethical order if unprotected from discharge). It also leaves subordinates forced to act in ways they may consider unethical. We need to consider whether the rule is sufficient as it stands, *see* C. WOLFRAM, *supra* note 18, at 883 (Model Rules assume, but do not require, that discussions will occur, leading to better decisions), or whether other avenues should be explored for encouraging subordinates to raise their ethical concerns within the group and whether such techniques might do more to improve the ethical climate of lawyer teams.

256. *See supra* notes 104-19, 232-36 and accompanying text.

257. *See* C. WOLFRAM, *supra* note 18, at 882-83.

258. *See* Hot Locks, Inc. v. Ooh La La, Inc., 107 F.R.D. 751, 752 (S.D.N.Y. 1985) (sanctions hurt lawyer’s self-esteem and undermine atmosphere of friendly cooperation needed for civil litigation); Chrein, *The Actual Operation*

lawyers rarely press judges to question their relative responsibility as team members unless disciplinary action is involved or the financial stakes are high.²⁵⁹

The issue of vicarious and collective responsibility, however, has become increasingly important²⁶⁰ because of the increase in suits seeking sanctions for violations of the Federal Rules of Civil Procedure,²⁶¹ actions against lawyers for security law violations,²⁶² and suits seeking attorney's fees.²⁶³ In all three situations, judges and other regulators must explore the roles played by various lawyers in case management and the

of Amended Rule 11, 54 *FORDHAM L. REV.* 13, 16 (1985) (judge does not want to unduly embarrass counsel).

259. See Galante, *supra* note 173, at 3, col. 1 (firm accused of failing to recognize and stop client's fraud settles case, foreclosing judicial determinations of relative responsibilities of participating attorneys); Pollock, *supra* note 173, at 24, col. 1 (high stakes); *Trustee's Criticism of Lawyers in O.P.M. Imbroglia*, *supra* note 173, at 20, col. 1 (disciplinary action); *cf. In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 70-76 (E.D. Pa. 1983) (judge must analyze relative responsibilities of lawyers in determining attorneys fee award in class-action suit), *aff'd in part, rev'd in part*, 751 F.2d 562 (3d Cir. 1984).

260. See cases cited *infra* notes 261-63. Compare *Pollack v. Lytle*, 120 Cal. App. 3d 931, 948, 175 Cal. Rptr. 81, 91 (1981) (Johnson, J., dissenting) (by holding that attorney associated to try case acted as agent of and owed duty to original counsel, majority imposes untenable position of divided loyalties on associated counsel) with *Ortiz v. Barrette*, 222 Va. 118, 131, 133, 278 S.E.2d 833, 840-41 (1981) (Thompson, J., dissenting) (majority's refusal to hold associated counsel jointly responsible for legal malpractice ignores independent action taken by each counsel which creates responsibility and duty to client). See generally Feinberg, *Collective Responsibility*, in *RESPONSIBILITY* 107-19 (1975) (discussing distinction between "bound" and "free" agents).

261. See, e.g., *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1131 (5th Cir. 1987) (Rule 11 sanction for filing frivolous claim properly imposed on attorney who signed pleadings but not against second attorney who did not sign pleadings); *Calloway v. Marvel Entertainment Group*, 650 F. Supp. 684, 687 (S.D.N.Y. 1986) (Rule 11 sanctions imposed on both individual attorney and firm on whose behalf attorney signed documents); *Itel Containers Int'l Corp. v. Puerto Rico Marine Mgmt.*, 108 F.R.D. 96, 102-05 (D.N.J. 1985) (Rule 11 sanctions imposed on general counsel as well as on local counsel that signed pleadings).

262. See, e.g., *In re Keating, Muething & Klekamp*, Exchange Act Release No. 15,982, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,124, at 81,988 (1979) (failure to file disclosure documents traced to "a division of authority among partners in the firm concerning client matters which significantly impaired communications within the firm"); *cf. Trustee's Criticism of Lawyers in O.P.M. Imbroglia*, *supra* note 173, at 20, col. 1 (bankruptcy trustee's discussion of responsibility of four sets of lawyers serving corporation convicted of defrauding lenders).

263. See, e.g., *Donovan v. CSEA Local Union 1000*, 784 F.2d 98, 106 (2d Cir.), *cert. denied*, 107 S. Ct. 74 (1986); *American Booksellers Ass'n v. Hudnut*, 650 F. Supp. 324, 326 (S.D. Ind. 1986); *Dotson v. City of Indianola*, 639 F. Supp. 1056, 1057 (N.D. Miss. 1986).

legal and ethical shortcomings in their individual performances.²⁶⁴ If we are to build a common law of lawyer team responsibility, lawyers and judges must overcome their reluctance and pay more attention to the complex issues raised by lawyer teams. Although the Model Rules establish some guidelines for lawyers working with teams,²⁶⁵ if our discussion is to provide guidance for who must make these critical decisions, we must look not only to the positive law, but also to the psychological dynamics that underlie all teamwork.

2. Increasing Team Communication and Coordination

I made a very deliberate decision not to ask the President so that I could insulate him from the decision and provide some future deniability for the President if it ever leaked out.

—Adm. John M. Poindexter,
*Iran-Contra Hearings*²⁶⁶

Lawyer teams limit nonvital communications for reasons of efficiency, stress avoidance, and "information optimality."²⁶⁷ Although team lawyers perceive limited communication as desirable, we must ask whether greater communication, coordination, and information sharing should be encouraged.

Several benefits might accrue from increased communication. Team members could coordinate their efforts to improve strategic planning. Some lawyers who do not know each other well avoid extended communication because they are concerned about wasting time, exposing conflicts, and causing unnecessary stress.²⁶⁸ Yet, because they avoid working together, they do not carefully map out strategy. Thus, encouragement of overt collaboration can serve such a team's long-term interest.

Increased communication among team lawyers may also foster ethical behavior by producing lawyers who are better

264. See, e.g., *Trustee's Criticism of Lawyers in O.P.M. Imbroglia*, *supra* note 173, at 20, col. 1 (providing detailed analysis of attorney responsibility).

265. Rule 5.1(a) requires that all firm partners make "reasonable efforts" to enact measures to ensure firm compliance with the rules of professional conduct. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(a) (1987). Rule 5.1(b) requires that a supervisory attorney make such efforts for his subordinates. *Id.* Rule 5.1(b). Rule 5.1(c) further makes a lawyer responsible for another lawyer's ethical violation if the lawyer ordered the conduct, ratified conduct that he specifically knew of, or failed to take reasonable remedial action to avoid or mitigate harm resulting from the known misconduct of a partner or subordinate. *Id.* Rule 5.1(c).

266. N.Y. Times, July 16, 1987, at A12, col. 5.

267. See *supra* notes 223-24 and accompanying text.

268. See *supra* notes 78-82 and accompanying text.

aware of the impact of their actions.²⁶⁹ As the hypotheticals illustrate, team lawyers may willingly act or encourage others to act in ways that they normally would not condone in open discussion. Improved communication would be particularly effective in hierarchically arranged teams in which superiors could no longer separate themselves from subordinates' questionable behavior that they previously left uncontrolled or tacitly sanctioned.²⁷⁰ Open discussion within teams would also give lawyers an opportunity to address difficult issues without betraying client confidences. Indeed, only within a team could lawyers explore the implications of their actions without violating the attorney-client privilege.

Greater communication also serves the truth-seeking function of the adversary system. Lawyers who must explain the context of their decisions must obtain more information from colleagues and transmit it to other team members and opponents.²⁷¹ Those who share more facts with each other cannot bury information or rationalize their behavior as easily as those who communicate little.

Yet greater communication and coordination has serious disadvantages. One drawback is inefficiency. Lawyers are reluctant to expend their most valuable resource—their time—on information exchanges that carry no immediate economic benefit. Communication also increases stress. Forced discussion of case management questions, particularly issues of role or norm ambiguity, exposes lawyers to potentially unresolvable daily conflicts.

Furthermore, raising the level of discussions may not in fact promote more capable or ethical decision making. Some organizational studies have indicated that small group discussion can lead to less rational and responsible decisions than those reached by individuals working alone.²⁷² Although care-

269. Cf. Rhode, *supra* note 12, at 648 (“[A] more ethically rigorous code might perform a salutary function by sensitizing professionals to the full normative dimensions of their choices.”).

270. Cf. Vaughn, *supra* note 64, at 1387-91 (discussing how such group organization diffuses knowledge and responsibility, increasing opportunity for unlawful behavior).

271. Cf. *Hawkins v. Fulton County*, 96 F.R.D. 416, 418 (N.D. Ga. 1982) (plaintiff's discovery attempts frustrated when each of two lawyers identified as representing defendant denied responsibility and told plaintiff that the other was in charge of the case).

272. See, e.g., I. JANIS, *supra* note 230, at 60-61 (discussing adherence of members of small group working in high-stress situation to erroneous assumptions); Myers & Lamm, *supra* note 230, at 346 (group discussion enhances ini-

ful structuring of discussion dynamics can minimize this "groupthink" phenomenon,²⁷³ these studies prevent us from comfortably asserting that group discussion always leads to more productive and ethical case management.

Regulators then should identify specific areas in which greater team communication would result in more responsible lawyering and create incentives for discussion in those areas.²⁷⁴ One such area involves serially or collaboratively managed cases for clients with few economic resources. Regulation would assure that a case received attention from an experienced and informed lawyer who bore responsibility for management decisions.²⁷⁵ This need for regulatory oversight is particularly acute with class action lawyer teams.²⁷⁶

A second area of concern is the ethical climate within some teams that fosters suppression of information, failure to ask critical questions, and misinterpretation of answers, thereby creating an information gap. Although these problems can occur on any team, they clearly plague closely-knit, high stress litigation teams in which group loyalty has become a significant value and superiors overtly or implicitly pressure lawyers to conform to group norms.

Two strategies are available to increase intrateam communication that leads to careful case management for marginal cases and class actions and responsible production of information that might otherwise be buried: we must use the judicial system to exert pressure on litigators, and we must foster more open discussion among all lawyers about the complex realities of teamwork.

tially dominant point of view); Hoffman, *Applying Experimental Research on Group Problem Solving to Organizations*, 15 *J. APPLIED BEHAV. SCI.* 375, 375 (1979) (reviewing research indicating groups do not necessarily produce best decision of which its members are capable); Stasser & Titus, *supra* note 62, at 1476 (groups do not always pool necessary information because their discussion is dominated by information that members already hold in common and by information that supports their own preferences); Tjosvold & Field, *Effects of Social Context on Consensus and Majority Vote Decision Making*, 26 *ACAD. MGMT. J.* 500, 505 (1983) (research shows groups are less successful problem solvers for judgmental tasks than for "right answer" tasks).

273. See I. JANIS, *supra* note 230, at 260-76.

274. Cf. Resnik, *supra* note 87, at 547 (recognizing need to consider context in determining which subsets of cases require special kinds of rules).

275. Cf. Gilboy & Schmidt, *supra* note 6, at 25 (discussing sequential representation and noting "the absence of a centralized authority to coordinate the work of the various lawyers").

276. See Coffee, *supra* note 80, at 50-52, 62; Note, *supra* note 159, at 314-19.

a. *Pressure on Lawyer Teams: Sanctions and the Managerial Judge*

Although not originally intended to improve team lawyering,²⁷⁷ the current thrust toward earlier and more vigorous judicial involvement may result in greater coordination and discussion within lawyer teams. Using a variety of tools, including wide-ranging sanction powers, "managerial judges" are compelling lawyers to prepare their cases earlier and more carefully.²⁷⁸ The federal courts rely on Rules 11, 16, and 26(g) of the Federal Rules of Civil Procedure to implement this scheme. Rule 11 requires lawyers to certify that they have inquired into the legal and factual sufficiency of every paper filed.²⁷⁹ Rule 26(g), counterpart to Rule 11, requires the signer to certify that similar grounds exist for discovery papers.²⁸⁰

277. *But see* Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L. J., Nov. 28, 1983, at 24, col. 1 (noting that Advisory Committee had been concerned that supervising lawyers in large firms were not reading documents prepared by subordinates before filing).

278. *See* Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1832 (1986); Elliott, *supra* note 153, at 310-14; Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 771 (1981); Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 399-402 (1982); Schuck, *The Role of Judges*, *supra* note 120, at 349-58.

279. Rule 11 provides:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motions, or other paper; that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FED. R. CIV. P. 11. For discussion of the rationale for and implementation of Rule 11, see Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976); Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987); Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300 (1986); Comment, *Sanctions Unwarranted by Existing Law*, 52 BROOKLYN L. REV. 609 (1986).

280. FED. R. CIV. P. 26(g). For general discussion of discovery rules and sanctions for discovery abuse, see Sherman & Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245 (1982); Levy, *supra* note 211; Refrew, *supra* note 57; *Sanctioning Attorneys for Discovery Abuse—The Recent Amendments to the Federal Rules of Civil Procedure: Views from*

Rule 16 establishes complex scheduling and planning requirements²⁸¹ and provides sanctions for attorneys who disobey scheduling or pretrial orders.²⁸²

Designed to control what was perceived to be a flood of frivolous or oppressive litigation,²⁸³ these changes may also affect the operation of lawyer teams. A judge who participates vigorously in case development can force lawyers to coordinate activities and exchange a greater amount of positive and negative information. Rules 11 and 26(g), requiring a lawyer to inquire into the factual and legal bases for a claim before signing a pleading or discovery paper, place responsibility on the individual lawyer. Aware that they are subject to sanctions if their investigatory methods are found incomplete, lawyers signing papers have the incentive to consider carefully the difficult issues of task, role, and norm ambiguity that they might otherwise have ignored.²⁸⁴ In the large firm case, for example, if Rule 26(g) had been in effect and vigorously enforced, Stevens might have discussed the negative expert opinion letter with his colleagues or superior. The discussion would have turned on how an outsider would view the situation.²⁸⁵ Thus, manage-

the Bench and Bar, 57 ST. JOHN'S L. REV. 671 (1983); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978); Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982).

281. FED. R. CIV. P. 16(a)-(e); see also Pieras, *Judicial Economy and Efficiency Through the Initial Scheduling Conference: The Method*, 35 CATH. U.L. REV. 943, 945-54 (1986) (discussing initial planning conferences pursuant to Rule 16).

282. FED. R. CIV. P. 16(f); see also Sherman & Kinnard, *supra* note 280, at 281 (discussing proposed amendment adding subsection (f)).

283. See sources cited *supra* notes 279-80; see also Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997 (1983); Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 264-65 (1985); Underwood, *Curbing Litigation Abuses: Judicial Control of Adversary Ethics—The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure*, 56 ST. JOHN'S L. REV. 625 (1982); Wade, *Frivolous Litigation*, 14 HOFSTRA L. REV. 433 (1986).

284. Cf. *Itel Containers Int'l Corp. v. Puerto Rico Marine Mgmt.*, 108 F.R.D. 96, 100-102 (D.N.J. 1985) (lawyers created rationalization helping them agree proposed answer to interrogatory was complete although each realized it omitted critical information). One commentator contends that attorneys' "tendency to exaggerate both the strengths of their own case and the weaknesses of their adversaries' case" is a feature of the trial mentality and that the trial judge helps to counterbalance this tendency by providing lawyers with an informed outsider's view. Schuck, *The Role of Judges*, *supra* note 120, at 356.

285. Of course, the penalty that the team suffered was in reality even heavier than a discovery sanction would have been. The point, however, is that now

rial judging can promote information sharing between lawyers, discourage groupthink, and make it more difficult for a lawyer to ignore unfavorable information.²⁸⁶

Aggressive judicial management can also reduce the incentive for waste, conflict, and incompetent representation that often mar marginal case or class action teamwork.²⁸⁷ Ideally, consistent application of these rules will force lawyers who work on a contingency fee basis to focus on issue development and trial preparation earlier in the case. Lawyers cannot leave work entirely to inexperienced associates or to trial counsel in the hope that the case will settle before they need to produce their proof.

Although pressure from managerial judges may encourage lawyers to engage in earlier investigation and information sharing to avoid sanctions, it may also have the opposite effect in some cases. Because the pressure to invest more time and energy in the case also means more expenditures, it can reduce the economic incentive to take marginal cases at all.²⁸⁸ Thus the Rules may ultimately operate to prevent cases involving difficult proof problems from reaching the courts regardless of their merit.²⁸⁹

all lawyers face the risk of discovery sanctions, not just the few involved in the unusual cases in which serious misbehavior happens to come to the attention of the court.

286. The rules are particularly effective in forcing careful attention to adversarial arguments because this judicial scrutiny will often come at the end of the suit. Whether a lawyer has won or lost a case, whether a particular piece of information was instrumental or not, the lawyer's decisions about how to handle any detail of the case pertinent to the particular document may be open for subsequent examination. *Cf.* Alschuler, *supra* note 278, at 1835 (litigation in America is undermanaged, not overmanaged, and greater judicial familiarity with facts of case is needed, including judicial involvement in evidence-gathering); Schuck, *The Role of Judges*, *supra* note 120, at 359 ("Judicial involvement in settlement may tend to 'perfect' the lawyer-centered bargaining process . . . by introducing a third party who can correct for certain 'market failures.'").

287. *Cf.* Elliott, *supra* note 153, at 331 (by imposing compensating costs on lawyers, "managerial judges might, in theory, correct for problems in the structure of incentives between lawyers and clients that cause lawyers to over-prepare (or under-prepare) to the detriment of their clients").

288. Pressure for earlier investigation and information sharing may also discourage lawyers from engaging in discovery in the cases they do take. *See* Resnik, *supra* note 87, at 547 (local rules requiring lawyers to document efforts to confer with opposing counsel may so increase costs of discovery that parties dealing with small matters may stop seeking discovery altogether).

289. The best remedy for this problem, as some judges have suggested, is to differentiate between types of cases, giving lawyers who handle socially useful public law cases, or perhaps even private cases brought on behalf of individual

Of equal significance, judges in several recent class action cases have suggested that team lawyers spent *too much* time communicating and sharing information. For example, in *In re Continental Illinois Securities Litigation*,²⁹⁰ Judge John Grady blamed the team structure for problems in plaintiff class action suits:

Generally, attorneys should work independently, without the incessant "conferring" that so often forms a major part of the fee petition in all but the tiniest cases. Counsel who are not able to work independently should not seek to represent the class.²⁹¹

Up to now judges have discouraged "overlawyering" only in situations in which lawyers appeared to be generating unreasonably large fees.²⁹² Nevertheless, the tension between these competing judicial concerns—that lawyers spend more time investigating and conferring with each other and that they avoid raising fees through needless consultation—indicates that regulators must give the problem more attention.

Commentators have noted that managerial judges play a

clients, more leeway when facts are difficult to obtain. See *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986) (because citizens will not have information about official action without discovery, using sanctions to bar suits against government entities will effectively immunize such defendants from suit), *cert. denied sub nom. Suffolk County v. Graseck*, 107 S. Ct. 1373 (1987); *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558 (E.D.N.Y.) (cases brought against government officials and government agencies should not be discouraged), *modified*, 821 F.2d 121 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 269 (1987). But see *Dore v. Schultz*, 582 F. Supp. 154, 158 (S.D.N.Y. 1984) (firm application of procedural rules needed when high officials sued because "insubstantial lawsuits against high public officials 'undermine the effectiveness of [g]overnment' " (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 n.35 (1982))).

290. 572 F. Supp. 931 (N.D. Ill. 1983).

291. *Id.* at 933; *accord*, *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 73 & n.4 (E.D. Pa. 1983) (taking special note of one litigator's objection to committee structure of numerous plaintiff's attorneys: "Mediocrity needs group shelter, but as a perceptive commentator observed 'no park contains a shrub erected to honor the accomplishments of a committee.'"), *aff'd in part, rev'd in part*, 751 F.2d 562 (3d Cir. 1984).

292. Scholars who work closely with the litigation system have also begun to suggest that limits on information gathering and sharing by lawyers may be appropriate or useful when they promote efficiency and encourage settlement. Cf. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 399-400 (1986) (magistrate questioning need for exhaustive data for settlement purposes notes experienced counsel seem able to value individual claims for settlement purposes "with only modest amounts of information about the plaintiff"); Elliott, *supra* note 153, at 321 (we must confront fact we cannot afford to decide every case "based on the fullest possible information," and only real choice is what techniques we will use to narrow issues); Schuck, *The Role of Judges*, *supra* note 120, at 351-53 (discussing how trial judge in Agent Orange case used lawyers' lack of information about certain aspects of case to encourage settlement).

radical new role in the administration of justice as they set new, and sometimes unreviewable, standards for litigation management.²⁹³ What has remained unnoticed is the equally radical role that managerial judges will play in professional regulation as a result of this reform. Because the standard for "reasonable inquiry" in Rules 11 and 26(g) is not self-defining, federal judges must draw on their own experience or upon expert witnesses to determine what lawyers should have learned or done before taking critical legal steps. Because judges have rarely been called on to decide how teamwork affects the standard for "reasonable inquiry," existing case law provides little guidance for lawyers who wonder to what extent they may rely on the information transmitted by another team lawyer.²⁹⁴ As sanctions cases continue to flood the federal courts, however, judges will become far more involved with the inner workings of lawyer teams, and in the process they will assume a significant new role in the regulation of the legal profession.

Practicing lawyers and scholars, as well as judges, must consider what constitutes "reasonable inquiry." Obviously in answering the question, they must clarify the fundamental goal: Is a *reasonable* lawyer worried primarily about the welfare of the client? the lawyer's own economic situation? the search for truth? Should a different standard apply to different lawyers? different clients? different cases? As the hypotheticals show, the type of inquiry to be made will be profoundly different, depending on the goals the lawyer serves.²⁹⁵

293. See generally Elliott, *supra* note 153, at 308 (managerial judging began as means to create incentives to narrow issue for trial but now used to induce settlements); Resnik, *supra* note 87, at 539 (members of bar advocating procedural reform today "don't seem to like procedural formality, the centrality of lawyers, or adjudication very much at all").

294. Also unresolved is whether lawyers who do not sign court papers can expect to be subject to sanctions under Rules 11 and 25 if they permit other lawyers to sign papers that they know are unjustified. Compare *Calloway v. Marvel Entertainment Group*, 650 F. Supp. 684, 687 (S.D.N.Y. 1986) (imposing Rule 11 sanctions on both individual attorney and partnership on whose behalf attorney signed papers) and *Itel Containers Int'l Corp. v. Puerto Rico Marine Mgmt.*, 108 F.R.D. 96 (D.N.J. 1985) (imposing liability on general counsel even though only local counsel signed pleadings) with *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987) (only signer of pleadings is liable).

295. Another regulatory change would improve lawyer communication and responsibility: the requirement that lawyers cannot split a fee unless they share responsibility for a case should be eliminated. Although on the surface such shared responsibility would seem to promote lawyer participation and good case management, the sham participation that it fosters may do more harm than good because it creates a client-process division that may prevent critical information from reaching the team member who should have it. Be-

b. *Increased Public Discussion*

Although judicial case management may counterbalance, to some extent, the problems created by lawyer teamwork, far more critical is the need to have practitioners, legal scholars, and social scientists explore the complex dynamics of lawyer teams. The legal profession must discuss the phenomenon of lawyer teamwork in law schools, bar groups, and the press. Because so much of a lawyer's work depends upon its context, lawyers can only come to grips with team pressures if they study the situations that they actually encounter and attempt to understand the complex psychological dynamics involved in such situations. Law school ethics courses should include critical analysis of team dynamics. Likewise, practitioners must talk more openly about their own experiences.²⁹⁶

Professor Deborah Rhode has argued for the creation of more channels of normative dialogue among lawyers, so that lawyers can freely confront ethical issues without fear of professional risk.²⁹⁷ Establishing such channels of communication would help counteract the silence of lawyer teams. Discussion may both help lawyers accept the reality of their role as organizational professionals and counterbalance the pressures of team affiliation.²⁹⁸ Although managerial judges may alleviate imme-

cause many commentators already recognize that the "shared responsibility" rule is more honored in the breach than in the observance, *see* sources cited *supra* note 84, it is time to accept openly a referral fee rule.

296. Lawyers must also draw on the growing body of social science research and organizational theory to help them understand what they are experiencing. Social scientists have long recognized some of the characteristics that we have identified in these lawyer teams: the tendency to draw fuzzy organizational lines and to communicate in ambiguous ways when the group's core task involves high task ambiguity; the tendency of groups to bury information; and the groupthink phenomenon. *See* sources cited *supra* notes 64, 110, 230, and 244.

297. Professor Rhode states:

Individuals must have ongoing occasions to confront ethical issues, to test their perceptions openly, and to raise concerns about client or collegial practices without professional risk. For that purpose, far more is needed than bar association advisory opinions or law firm conflict-of-interest committees. Rather, the profession must fashion structures within and across employing institutions that can encourage collective support and a sense of responsibility for normative concerns.

Rhode, *supra* note 12, at 646-47.

298. *Id.* at 646, 651 ("There may be no uncontroversial answers, but there are better and worse ways of thinking about the questions. . . . Practitioners must begin to perceive ethical dilemmas not as aberrant, episodic events, but rather as the inevitable consequences of bureaucratic pressures, adversarial frameworks, and social inequalities.").

diate team pressures, lawyers must develop for themselves the inner resources necessary to cope with the stressful, complex, and demanding role of a team member.

CONCLUSION

As the lawyer's task grows more complicated and the reasons for teamwork more compelling, the tensions that arise when lawyers cooperate command our attention. The case studies in this Article explore these emerging tensions, some novel to teamwork and some characteristic of all lawyering but exacerbated by team effort. Most problematic is the conflict between the efficiencies of division of labor and the cumulative nature of lawyer decision making. Team lawyers are responsible for, and must be aware of, their teammates' actions, yet they cannot intrude on their teammates' decision making without intensifying work stresses and undercutting the efficiencies that teamwork is designed to provide.

Teamwork also subtly affects the manner in which the individual lawyer gathers information from the outside world and transmits it to team members. Although we have begun to recognize the incentives in our system to "lose" unfavorable information, we have not yet examined the effect of this phenomenon on team lawyers. Teamwork adds an additional role to the lawyer's duties, which may encourage ethical lawyering, but may also create a barrier between the lawyer and the world.

The legal community has paid surprisingly little attention to how lawyers resolve these tensions. As the case studies illustrate, lawyers silently cope with teamwork problems. They rarely acknowledge the problems or discuss them with colleagues and never bring the problems to outsiders for examination. Nevertheless, the problems have become too visible and too disruptive to stay hidden.

"Managerial judging" provides one method for counterbalancing the pressures of lawyer teamwork. In a sense managerial judging creates a new team composed of lawyers and judges who together develop the case as efficiently as possible without denying justice to the parties. Despite this new role, ad hoc judicial control cannot substitute for input from the legal community. If the strengths and weaknesses of lawyer teams are to be understood fully, scholars and practitioners must engage in full and frank discussion about their experiences with task-sharing teams.

