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PROMOTING EFFECTIVE ETHICAL INFRASTRUCTURE IN LARGE LAW FIRMS: A CALL FOR RESEARCH AND REPORTING

Elizabeth Chambliss and David B. Wilkins***

I. INTRODUCTION

> Law firm policies and procedures are still private to a large extent and thus discussion of them is akin to exploring folklore.[1]

United States lawyers increasingly practice in large, structurally complex organizations.[2] This is particularly true in the corporate client sector, with the growth and globalization of law firms and emergence of new organizational forms, such as multinational and multidisciplinary partnerships.[3] However, it also is increasingly true in the individual

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1. Stephen R. Volk et al., *Law Firm Policies and Procedures in an Era of Increasing Responsibilities: Analysis of a Survey of Law Firms*, 48 BUS. LAW. 1567, 1568 (1993).

2. The percentage of private practitioners working in law firms with fifty or more lawyers increased from 7.3% in 1980 to 18% in 1998. *See* BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S 13-14 (1985) (providing the 1980 figure); ANDREW L. KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY ch. 13 (4th ed. forthcoming 2002) (providing the 1998 figure).

3. In 1960, the thirty-eight largest U.S. law firms ranged from 50 to 100 lawyers. *See, e.g.*, MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 22 (1991). In 2000, the fifty largest U.S. firms ranged from 531 to 2771 lawyers, and the 250 largest all had more than 150 lawyers. *See* Law.com, The NLJ 250, *at* http://www.law.com/special/professionals/nlj250/nlj250_2000_fin.html (last visited Feb. 10, 2002). Most of the largest U.S. law firms have offices in more than one country. *See The Global 50 Survey*, AM. LAW., Nov. 2000, at 86, *passim*.

client sector, with the emergence of the franchise form,[4] the growth of prepaid legal service networks,[5] and the move toward multidisciplinary practice by social service providers.[6]

The growth of law firms and the emergence of new organizational forms have strained the profession's individualistic approach to lawyer regulation. Because lawyers increasingly practice in large organizations, professional regulation increasingly depends on the development of "ethical infrastructure"[7] within firms; that is, on *organizational* policies, procedures and incentives for promoting compliance with ethical rules.

To avoid conflicts of interest, for instance, some large, multi-office law firms have instituted centralized screening procedures, backed (more or less) by administrative incentives, i.e., you cannot get a billing number until you get a conflicts clearance.[8] Some firms also have special supervisory procedures for issuing audit and opinion letters and for the management of client funds.[9] Further, anecdotal evidence suggests that large law firms increasingly rely on in-house ethics advisors, firm general counsel, and other internal specialists to manage the firm's compliance with ethics and malpractice regulation.[10]

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4. *See* JERRY VAN HOY, FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES 2-5 (1997) (discussing the rise of the franchise form and its effect on the delivery of legal services).

5. The number of Americans covered by some type of prepaid legal plan has grown from an estimated 13 million in 1987 to 152 million in 2000. *See* Alec M. Schwartz, *A Lawyer's Guide to Prepaid Legal Services*, LEGAL ECON., July/Aug. 1989, at 43, 43 (providing the 1987 figure); National Resource Center for Consumers of Legal Services, 2000 Legal Services Plan Census, *at* http://www.nrccls.org/Publications/Legal_Census/20001.html (last visited Feb. 10, 2002) (providing the 2000 figure). For a discussion of the effects of this increase on the size and management of law firms, see Carroll Seron, *Managing Entrepreneurial Legal Services: The Transformation of Small-Firm Practice*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 63, 63-92 (Robert L. Nelson et al. eds., 1992).

6. *See generally* Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices For People*, 7 CLINICAL L. REV. 227 (2000) (tracing the emergence and organizational structure of multidisciplinary practices serving low and moderate income people).

7. We borrow this term from Professor Ted Schneyer. *See* Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. TEX. L. REV. 245, 246 (1998).

8. *See* Krysten Crawford, *A Marriage of Convenience*, AM. LAW., Nov. 2001, at 110, 113, 140 (describing the conflicts checking system at Clifford Chance Rogers & Wells Pünder). The point about administrative incentives comes from our own research.

9. *See* Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 285-86 (1997) [hereinafter Fortney, *Law Firm Partners*] (reporting the results of a survey of 191 law firms); Volk et al., *supra* note 1, at 1571-74 (reporting the results of a survey of twenty-six law firms).

10. *See* David Hricik, *Uncertainty, Confusion, and Despair: Ethics and Large-Firm Practice in Texas*, 16 REV. LITIG. 705, 706 (1997) ("Most large law firms have their own in-house ethics gurus, people who are expected to set policy and provide ethics advice on internal matters, malpractice claims, and similar issues."); Jonathan M. Epstein, Note, *The In-House Ethics Advisor:*

Despite the increasing importance of such ethical infrastructure, we know very little about firms' current practices, or how to motivate improvement where necessary. The empirical literature consists of a handful of small and/or regional surveys[11] and a case study of in-house ethics advising in one Oregon firm.[12] Though these studies provide important data about some forms of ethical infrastructure, many basic questions remain.[13]

Further, legal ethics scholarship has been slow to incorporate research from other organizational contexts. Most law review articles calling for improved supervision within law firms begin with a few egregious examples of supervisory failure, and conclude by calling for direct regulation of law firms by state disciplinary authorities.[14] Bar regulators, too, have focused primarily on the desirability of direct regulation under Model Rule 5.1(a).[15] Yet research on the regulation of

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Practical Benefits for the Modern Law Firm, 7 GEO. J. LEGAL ETHICS 1011, 1028-29 (1994); Peter R. Jarvis, *Ethics Advisors Watch Over Firms*, NAT'L L.J., July 13, 1992, at 15; Daniel B. Kennedy, *New Trend is General Counsel in Firms*, A.B.A. J., Jan. 1995, at 29, 29; Gary Taylor, *Counsel to Firms Goes In-House: Legal Costs Are Leading Firms, Like Their Clients, to Look Inside for Advice*, NAT'L L.J., July 18, 1994, at A1.

11. *See generally* Fortney, *Law Firm Partners*, *supra* note 9 (reviewing a survey of peer review procedures in 191 Texas law firms); Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239 (2000) [hereinafter Fortney, *Soul for Sale*] (discussing a survey of billing practices of 487 associates working in Texas law firms); Lee A. Pizzimenti, *Screen Verité: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?*, 52 U. MIAMI L. REV. 305 (1997) (reporting findings of survey of conflicts screening procedures in thirty-one law firms); Volk et al., *supra* note 1 (providing results of a survey of various policies and procedures in twenty-six law firms).

12. *See generally* Peter R. Jarvis & Mark J. Fucile, *Inside an In-House Legal Ethics Practice*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 103 (2000) (describing their own in-house ethics practice).

13. Fortunately, additional research is on the way. Susan P. Shapiro, a Senior Research Fellow at the American Bar Foundation ("ABF"), is about to publish a groundbreaking study about how lawyers identify and manage conflicts of interest on a day-to-day basis. *See generally* SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICTS OF INTEREST IN LEGAL PRACTICE (forthcoming 2002). Her forthcoming study, based on interviews with lawyers in a random sample of 128 Illinois law firms, will be a major contribution to the empirical literature in this area. Shapiro discusses a sampling of cases from her study (involving particularly difficult conflicts) in a recent symposium article. *See generally* Susan P. Shapiro, *Everests of the Mundane: Conflicts of Interest in Real-World Legal Practice*, 69 FORDHAM L. REV. 1139 (2000).

14. *See generally* Fortney, *Soul for Sale*, *supra* note 11; Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999); Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Lawyers' Supervisory Duties*, 70 NOTRE DAME L. REV. 259 (1994); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991).

15. Model Rule 5.1(a) requires law firm partners to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct." MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2001). Recently,

organizations in other contexts suggests that the effectiveness of external regulation depends significantly on the scope and effectiveness of compliance procedures within firms.[16] Thus, the firm remains the central arena—and agent—of regulation.

This Article proposes a research agenda for the study of ethical infrastructure in large law firms. This exercise has a dual purpose. First, we recently began a research project addressing some of the questions that we outline below, and we are eager for critical feedback from practitioners, regulators and scholars. Second, we hope to encourage others to engage in similar research. We believe that systematic research and reporting could contribute significantly to the development of effective ethical infrastructure by increasing the visibility of law firm policies and procedures and by promoting "best practices" within firms.

Our proposed research agenda is organized around three central questions. The first is a basic descriptive question: What are firms doing? What types of ethical infrastructure have law firms created? And how much variation exists among firms? Law firms generally can be described as tending toward progressively formal management and internal specialization as firms move from smaller and collegial to larger, more bureaucratic forms.[17] Yet many lawyers are resistant to the rationalization of law firm management, because it interferes with personal authority relations and constrains individual lawyers'

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two states, New York and New Jersey, amended their state versions of this rule to apply to law firms as entities, in addition to individual partners. *See* N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-102A (1999); N.J. CT. R. ANN. R. 1:20-15(j) (1999). The ABA Ethics 2000 Commission also considered, but ultimately rejected, entity regulation under Rule 5.1(a). *See* Ctr. for Prof'l Responsibility, ABA, Comm'n on Evaluation of the Rules of Prof'l Conduct, Changes from the November 2000 Report to the May 2001 Report, *at* http://www.abanet.org/cpr/e2k-chan_jun.html (last visited Mar. 14, 2002) (explaining the rationale behind rejecting entity regulation).

16. *See, e.g.*, IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 25-35, 106-19 (1992) (noting the limits of punitive approaches to organizational regulation and the comparative advantages of "enforced self-regulation"); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1542-47 (1992) [hereinafter Edelman, *Legal Ambiguity*] (examining employers' responses to the Civil Rights Act of 1964); John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 AM. SOC. REV. 794, 795-96 (1996) (examining the role of employers in defining strategies for compliance with equal employment law); *see also* Lauren B. Edelman & Marc C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 505-06 (1997) [hereinafter Edelman & Suchman, *Legal Environments*] (reviewing research on the role of organizations in constructing the meaning of regulatory compliance); Mark Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 903-04 (1996) (book review) [hereinafter Suchman & Edelman, *Legal Rational Myths*].

17. *See* GALANTER & PALAY, *supra* note 3, at 48-49; ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 147-50 (1988).

autonomy.[18] To what extent has the rationalization of law firm management extended to the creation of specialized structures for self-regulation? What types of ethical and regulatory issues are most likely to be handled by formal policies and procedures?

The second question concerns the incentives for firms to create ethical infrastructure. What types of firms are most likely to create internal ethics controls? How important are organizational imperatives, such as size? What is the role of professional discipline and other forms of direct regulation? What is the role of private compliance specialists, such as insurers and in-house ethics advisors? What is the role of clients? In our own research, we are interested particularly in the role of in-house compliance specialists, such as ethics advisors and firm general counsel. We view firms' increasing reliance on in-house specialists as a particularly important development because research shows that such specialists may play a critical role in defining the operational standards for "compliance."[19]

Finally, the $64,000 question: How effective are formal policies and procedures in promoting ethical conduct within firms? How do formal policies and procedures relate to informal incentives and practices; that is, to the ethical culture of the firm? And what are the standards for measuring "effectiveness?" This most important question is also the most difficult to research—especially for researchers outside the firm. Concerns about confidentiality and potential liability make law firm managers extremely skittish about providing the kind of access that would make an external assessment possible. Here, then, we argue for shifting the primary research responsibility to firms, and suggest some means for encouraging self-study.

Part II of the Article reviews the findings from existing research on law firm ethical infrastructure. Part III explains our research agenda and our working hypotheses. We conclude by proposing some strategies for additional research and reporting in this increasingly important area.

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18. *See* NELSON, *supra* note 17, at 86-124, 231-90 (discussing the tension between organizational imperatives and professional ideology); Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 714-15 (1997) (reporting that partners in some large law firms routinely bypass formal assignment systems).

19. *See* Edelman & Suchman, *Legal Environments*, *supra* note 16, at 498-501 (reviewing research on the role of lawyers and other internal specialists in shaping organizations' responses to regulation); Elizabeth Chambliss & Lauren B. Edelman, *Sociological Perspectives on Equal Employment Law*, *in* LAW'S DISCIPLINARY ENCOUNTERS: READINGS IN LAW AND SOCIAL SCIENCE (Victoria Saker Woeste et al. eds., forthcoming n.d.—under review at Univ. of Chi. Press) (manuscript on file with Authors) (reviewing the role of internal specialists in the implementation of equal employment law).

II. REVIEW OF EXISTING RESEARCH

By far the most systematic research on law firm ethical infrastructure to date are two surveys conducted in Texas by Professor Susan Saab Fortney.[20] The first survey, conducted in 1995, focused on peer review within firms; that is, "'the process in which law firm partners or principals monitor and evaluate the job performance of their colleagues.'"[21] The survey inquired about a number of specific peer review procedures as well as about respondents' attitudes toward peer review generally.[22] The survey was sent to the managing partners of all Texas law firms with ten or more lawyers ($n = 311$), and yielded 191 responses for a response rate of 61.4%.[23]

The second survey, conducted in 1999, focused on law firm billing practices and the effects of billable hour requirements on associate satisfaction.[24] The survey also included general questions about the ethical infrastructure of the firm.[25] The survey was sent to a random sample of 883 Texas associates who practice in firms with at least ten lawyers and are subject to billable hour requirements.[26] Over half of the associates returned the survey ($n = 487$) for a response rate of 55.2%.[27]

In addition to Professor Fortney's work, there are two other, smaller surveys that provide some interesting data. One is a 1992 survey conducted by three partners at Shearman & Sterling that asked about law firm policies and procedures in twelve specific areas: firm and personal investments; directorships and trusteeships; new clients; opinion and audit letters; client funds; new lawyers; ancillary services; speaking, writing, and expert testimony; outside employment; supervision, training and evaluation of associates; claims and publicity; and computer and office systems.[28] The survey was sent to senior partners at fifty law firms and twenty-six responded.[29] The authors provide no information about the size or location of firms or the original sampling criteria.

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20. *See* Fortney, *Law Firm Partners*, *supra* note 9; Fortney, *Soul for Sale*, *supra* note 11.

21. Fortney, *Law Firm Partners*, *supra* note 9, at 280. The term "'colleagues' refers to other partners or principals." *Id.* at 280 n.52.

22. *See id.* app. at 313-16.

23. *See id.* at 275-77.

24. *See* Fortney, *Soul for Sale*, *supra* note 11, at 243.

25. *See id.* at 253-57.

26. *See id.* at 243-44, 243 n.18.

27. *See id.* at 243-44.

28. *See* Volk et al., *supra* note 1, at 1568-81.

29. *See id.* at 1569.

The second is a 1997 survey by Professor Lee A. Pizzimenti about the use of conflicts screens within firms.[30] The survey was sent to managing partners in a nonrandom sample of 156 law firms located in Michigan, Illinois, Pennsylvania, and Oregon (the four states that allow screening when lawyers move between private firms).[31] All firms in the original sample had at least fifty lawyers.[32] Unfortunately, only twenty percent of those surveyed responded,[33] perhaps in part because the survey was twenty-five pages long.[34] Professor Pizzimenti provides no information about the characteristics of respondents versus nonrespondents.

A. *Descriptive Findings: What Are Firms Doing?*

The surveys provide relatively detailed findings about the existence of specific forms of ethical infrastructure. For instance, the surveys agree that almost all law firms have a formal procedure for identifying conflicts of interest,[35] and seventy-five percent of firm managers in the peer review survey report that they periodically monitor partners' compliance with conflicts procedures.[36] Most firms also have formal policies or procedures regarding directorships,[37] trusteeships,[38] and audit opinion letters.[39] Firms appear to be less likely to have formal procedures to monitor business transactions with clients. Only half of the firms in the peer review survey report that they monitor partner investments in business ventures with clients,[40] and only five firms in the Shearman &

30. *See* Pizzimenti, *supra* note 11, at 320-33.

31. *See id.* at 321.

32. *See id.*

33. *See id.*

34. *See id.* at 321 n.68.

35. *See id.* at 322 (reporting that all firms surveyed consult a client index before opening a new matter, and that most also circulate an office memorandum); Volk et al., *supra* note 1, at 1580 (reporting that all twenty-six firms surveyed had a computerized conflicts checking system).

36. *See* Fortney, *Law Firm Partners*, *supra* note 9, at 285.

37. *See id.* at 282-83 (reporting that sixty-percent of firms monitor or prohibit principals from serving as directors of for-profit entities); Volk et al., *supra* note 1, at 1570 (reporting that twenty-five of twenty-six firms require approval before lawyers may serve as directors for for-profit entities, and one firm prohibits it altogether).

38. *See* Fortney, *Law Firm Partners*, *supra* note 9, at 283 (reporting that fifty-four percent of firms monitor or prohibit principals from serving as trustees); Volk et al., *supra* note 1, at 1570 (reporting that seventeen of twenty-six firms require approval before lawyers may serve as trustees).

39. *See* Fortney, *Law Firm Partners*, *supra* note 9, at 287 (reporting that seventy-six percent of firms require partner approval of audit opinion letters); Volk et al., *supra* note 1, at 1574 (reporting that twenty-five of twenty-six firms require partner approval of audit opinion letters, and sixteen require centralized filing of all audit response letters).

40. *See* Fortney, *Law Firm Partners*, *supra* note 9, at 284.

Sterling survey report that they require prior approval of stock trades.[41] Most firms also lack formal procedures for monitoring the withdrawal of client funds. Only thirty-five percent of firms in the peer review survey[42] and ten firms in the Shearman & Sterling survey[43] require a second partner's signature for the withdrawal of client funds.

The surveys are somewhat less informative regarding more general purpose ethical infrastructure, in part because they ask different questions and with varying specificity. For instance, the surveys report that most firms have a policy or system for addressing ethical questions, but it is unclear from the survey questions precisely what systems firms have in place. In the peer review survey, Professor Fortney asked; "[d]oes your firm have a principal or committee designated to [h]andle ethics or malpractice problems?"[44] and seventy-three percent of firms reported that they do.[45] The Shearman & Sterling survey asked; "[d]oes your firm have a policy and system for dealing with ethical concerns of lawyers?" and twenty-five of twenty-six firms reported that they do.[46] Professor Pizzimenti asked whether there "[i]s . . . a committee within the firm to identify, discuss and resolve [ethical or professional] issues?" and, if so, "at what intervals it meets."[47] 70.4% of firms reported that they have an ethics committee[48] but most meet only on an ad hoc basis.[49] Although the survey includes other interesting questions about the composition and jurisdiction of ethics committees, and the authority of the designated ethics partner, if any,[50] Professor Pizzimenti does not report the results of those questions.

Not surprisingly, the most detailed findings relate to the specific issues that the surveys address; that is, peer review, billing and conflicts screening. On the whole, the findings are troubling, in that most firms appear to lack formal procedures for self-regulation in these areas. As to peer review, for example, only half of the firms surveyed reported

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41. *See* Volk et al., *supra* note 1, at 1569.

42. *See* Fortney, *Law Firm Partners*, *supra* note 9, at 284.

43. *See* Volk et al., *supra* note 1, at 1575.

44. Fortney, *Law Firm Partners*, *supra* note 9, app. at 314.

45. *See id.* at 289.

46. Volk et al., *supra* note 1, at 1578.

47. Pizzimenti, *supra* note 11, at 353.

48. *See id.* at 322. It is unclear what number of firms this percentage represents, because Professor Pizzimenti does not report raw numerical data. This is problematic given the small number of respondents. Professor Pizzimenti reports that only twenty percent of 156 firms responded, which translates to thirty-one firms. *See id.* at 321. However, there is no number divided by thirty-one that equals 70.4%. *See id.* at 322. This problem persists throughout the article.

49. *See id.* at 322.

50. *See id.* at 353.

engaging in any form of peer review, and those predominantly on an informal basis.[51] Most firms do not monitor partners' compliance with internal procedures other than conflicts and billing procedures;[52] and only ten percent of firms have formal procedures for reviewing partners' work (other than a review conducted in connection with compensation decisions).[53]

Likewise, as to billing, only 40% of associates surveyed reported that their firms have formal billing guidelines other than those imposed by clients,[54] and 66% reported that, during the previous year, their supervisor had never questioned their billings.[55] Fully 26% of associates said that they received no instruction on billing when they joined the firm, and 35% reported that they received less than one hour of instruction.[56] Almost half of those surveyed agreed with the statement that "[b]illing pressure causes ethical and competent attorneys to leave private law practice."[57]

Finally, as to conflicts of interest and the use of conflicts screens, Professor Pizzimenti finds that many law firms "do not solicit all the information they need to protect themselves" from conflicts;[58] and that, upon discovering a conflict after a lawyer joins the firm, sixty-five percent of firms would proceed with a screen without seeking former clients' permission.[59] Professor Pizzimenti concludes that while "a large majority of responding firms take conflicts seriously," they are hampered by "flawed conflicts detection" and "flawed systems for maintaining screens."[60]

Overall, then, the surveys suggest that ethical infrastructure is underdeveloped in most law firms. Though many firms have policies and procedures to deal with specific ethical issues, many others lack such procedures; and even firms that have formal procedures have few mechanisms for monitoring compliance. Further, even in the area most likely to be governed by formal procedures—that is, conflicts—existing procedures appear to be flawed.

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51. *See* Fortney, *Law Firm Partners*, *supra* note 9, at 289.
52. *See id.* at 284-85.
53. *See id.* at 290.
54. *See* Fortney, *Soul for Sale*, *supra* note 11, at 253.
55. *See id.* at 256.
56. *See id.* at 254.
57. *Id.* at 279.
58. *See* Pizzimenti, *supra* note 11, at 324.
59. *See id.* at 326-67.
60. *Id.* at 333.

B. Incentives for Firms to Create Ethical Infrastructure

None of the surveys asked directly why firms adopted specific procedures or about the timing of adoption. Instead, the authors appear to assume that firms are motivated primarily by the content of formal rules and the fear of liability—despite their own findings that firms' procedures, in most respects, are inadequate from this standpoint. Thus, the existing literature provides no data about the relative importance of direct regulation or other incentives for firms to create ethical infrastructure.

Professor Fortney finds that firm size is an important variable, however, which suggests that the development of ethical infrastructure stems in part from organizational imperatives.[61] In the peer review survey, for example, Professor Fortney finds that firms with at least fifty lawyers are more likely than smaller firms to designate a partner or committee to handle ethics and malpractice matters;[62] and more likely to designate a partner or committee to handle risk management and quality assurance.[63] Larger firms are also more likely to rely on formal procedures for reviewing partners' work.[64] Professor Fortney concludes that "the larger the firm, the more likely it is to be more bureaucratic, imposing more controls on the conduct of principals."[65]

Similarly, in the billing survey, associates in firms with more than 100 lawyers are more likely than associates in smaller firms to report that their firm has general purpose ethical infrastructure, such as a designated ethics partner, an ethics committee, scheduled ethics training, and a written policy encouraging the reporting of misconduct.[66] For instance, 56% of associates working in 100-plus-lawyer firms report that their firm has designated ethics counsel, compared to 35% of associates from firms with 25-100 lawyers.[67] Professor Fortney does not report the total number of firms represented in the sample, and some firms may be represented by more than one associate. Nevertheless, the findings are instructive, and consistent with the findings from the peer review survey.

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61. *See* Fortney, *Law Firm Partners*, *supra* note 9, at 289.

62. *See id.* at 289 & n.107 (reporting that all firms with at least fifty lawyers have an ethics partner or committee, compared to 87% of firms with twenty-six to fifty lawyers, and 60% of firms with twenty-five or fewer lawyers).

63. *See id.* at 289 n.107. (reporting that 86% of firms with at least fifty lawyers have a risk management partner or committee, compared to 70% of firms with twenty-six to fifty lawyers, and 52% of firms with twenty-five or fewer lawyers).

64. *See id.* at 290 & n.113.

65. *Id.* at 291.

66. *See* Fortney, *Soul for Sale*, *supra* note 11, at 255.

67. *See id.*

The peer review survey also supports the notion that lawyers tend to resist formal management because they view it as impinging on their individual autonomy and personal relationships with clients. Professor Fortney finds that concerns about autonomy are the main obstacle to peer review.[68] Many lawyers also cite specialization as an obstacle to peer review.[69] Close to half of respondents believe that partners can only be effectively monitored by partners in the same area of practice; and twenty-one percent of respondents strongly agreed with the statement that "'[u]nlike accounting or medicine, lawyering skills cannot be easily evaluated or monitored.'"[70]

Professor Fortney concludes that firms with a team culture are more likely to implement peer review than firms that function "as a confederation of individual practitioners."[71] Citing management consulting literature, she emphasizes the economic benefits of a team approach, and urges firm leaders to take proactive steps to shape a positive culture in the firm.[72] She notes, however, that taking proactive steps means, primarily, changing firm *structures*—such as monitoring and compensation structures—which points to the difficulties of specifying the relationship between "culture" and "structure."[73] We return to this issue in Part III.[74]

C. *Measuring the Effectiveness of Ethical Infrastructure*

All four surveys criticize the relative lack of ethical infrastructure within firms, but Professor Pizzimenti's is the only study that evaluates the effectiveness of existing infrastructure.[75] Indeed, the main purpose of Professor Pizzimenti's survey is to compare the rules governing conflicts screens with the actual practice as reported by respondents.[76] As noted, Professor Pizzimenti concludes that current practices, both formal and informal, are flawed. Moreover, given the low response rate to the survey, one might suspect that current practices are even more flawed than the findings suggest. Presumably, firms with the worst practices are the least likely to respond to surveys about their internal practices. This

68. *See* Fortney, *Law Firm Partners*, *supra* note 9, at 292-94.
69. *See id.* at 294-95.
70. *Id.* at 295.
71. *Id.* at 275, 309.
72. *See id.* at 309-10.
73. *Id.* at 311.
74. *See infra* Part III.B.3.
75. *See generally* Pizzimenti, *supra* note 11 (reporting and evaluating firms' responses to questionnaires written in an attempt to determine "how well screens work in practice").
76. *See id.* at 306.

points to a limitation of survey research for assessing the effectiveness of ethical infrastructure.[77]

One solution may be to survey associates rather than (or in addition to) partners. In Professor Fortney's peer review survey, for instance, 73% of managing partners reported that their firm has a principal or committee to handle ethics and malpractice problems.[78] In the survey of billing practices, however, which drew from the same population of Texas law firms, only 54% of associates reported that their firm has a "system or policy for dealing with ethical concerns of attorneys."[79] Twenty-two percent of associates said that their firm had no such system, and 24% did not know.[80] Obviously, associates' awareness of a system is a prerequisite for its effectiveness. Associates' awareness of ethical infrastructure, therefore, may be a useful measure for survey research.

D. *Summary*

The four surveys reviewed above provide an important starting point for research on law firm ethical infrastructure. Not only do they map the existence of specific structural controls within firms, they also raise fundamental questions about the effectiveness of existing controls, and suggest some means for investigating this issue. Nevertheless, they are only a start. Two of the surveys rely on small, nonrandom samples of firms; and the other two, while more systematic, only cover firms in one state.[81] Thus, we still lack basic data about what firms around the country are doing and, more importantly, about what motivates firms to create internal controls. Our project is designed to help fill this gap.

III. OUR RESEARCH AGENDA AND WORKING HYPOTHESES

Our project focuses on the process by which particular types of ethical infrastructure become established within law firms. Informed by

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77. Researchers may fare somewhat better with in-person interviews, to the extent that lawyers and firms (and funders) are willing. Susan Shapiro's forthcoming study is based on personal interviews with the lawyers most directly responsible for handling conflicts of interest, and promises a "wealth of information" on "how firms seek to avoid conflicts, how they identify potential or actual conflicts, evaluate them, [and] resolve them." Shapiro, *supra* note 13, at 1141-42.

78. *See* Fortney, *Law Firm Partners*, *supra* note 9, at 289.

79. Fortney, *Soul for Sale*, *supra* note 11, at 254.

80. *See id.*

81. *See supra* notes 20-34 and accompanying text.

"institutional" theories of organizations,[82] we view this process as driven primarily by private, professional, and cultural incentives rather than by regulatory incentives.[83] This is not to suggest that direct regulation is not important, or that the threat of liability does not provide important momentum for organizational change; but rather that the scope and pace of change is not directly liability driven.[84]

Instead, institutional research shows that organizations take their structural cues primarily from each other.[85] Thus, organizations may create internal compliance structures even in the absence of potential liability, because other organizations have them and it seems like the right thing to do.[86] Likewise, organizations may do nothing, despite exposure to liability, because both regulatory enforcement and institutional accountability are weak.[87] Finally, even when the creation of internal compliance structures is motivated primarily by a perceived threat of liability, organizations collectively play a central role in defining the scope and effectiveness of such structures.[88]

Thus, while legal ethics scholars and bar regulators tend to focus on the content of formal rules and the scope of potential liability, institutional theory calls attention to the regulatory *process*.[89] The

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82. *See generally* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977); Suchman & Edelman, *Legal Rational Myths*, *supra* note 16 (explaining institutional and "new institutional" theories of organizations).

83. *See* Elizabeth Chambliss, *MDPs: Toward an Institutional Strategy for Entity Regulation*, 4 LEGAL ETHICS 45, 56-64 (U.K.) (2002) (criticizing the command-and-control approach to law firm discipline and calling instead for more attention to institutional incentives for self-regulation).

84. *See* Suchman & Edelman, *Legal Rational Myths*, *supra* note 16, at 923 & n.65 (finding "considerable empirical support" for the notion that "compliant behavior is motivated more by cultural norms and accounts than by the imminent threat of legal sanctions").

85. *See* Pamela S. Tolbert & Lynne G. Zucker, *Institutional Sources of Change in the Formal Structure of Organizations: The Diffusion of Civil Service Reform 1888-1935*, 30 ADMIN. SCI. Q. 22, 35 (1983); *see also* Edelman & Suchman, *Legal Environments*, *supra* note 16, at 498 (reviewing research on the process of structural diffusion).

86. *See* Edelman, *Legal Ambiguity*, *supra* note 16, at 1554-69 (examining the adoption of equal employment policies, procedures, and offices in 346 organizations); Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1422-37 (1990) [hereinafter Edelman, *Expansion of Due Process*] (examining the adoption of due process protections in fifty-two organizations); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 412-19 (1999) [hereinafter Edelman et al., *Endogeneity of Legal Regulation*] (examining employers' adoption of nonunion grievance procedures).

87. One might argue that this explains the lack of ethical infrastructure in some law firms.

88. *See supra* note 16 and accompanying text.

89. *See* Edelman & Suchman, *Legal Environments*, *supra* note 16, at 502.

introduction of new regulation is just the first stage of this process. As Professors Lauren B. Edelman and Mark C. Suchman write:

> If all legal doctrine were substantive and unequivocal and if all legal implementation were coercive and undeviating, then one could imagine a simple feedback loop, in which organizations would adjust their behaviors exclusively in response to existing laws.... In the [institutional] account, however, the plot-line is much messier than this. Because the ambiguity of law-on-the-books is not an occasional aberration but rather a political fact of life, the practical meaning of any given law-in-action can only emerge through a highly interactive process.... involv[ing] not only the official agents of the legal system (regulators, judges, litigators, and the like), but also the members of the focal organizational field (including individual firms, professional groups, trade associations, media observers, and legal advisors). Eventually these efforts may gradually produce a working agreement on what the law "is" and what it "requires," and that agreement may become reified and institutionalized in formal structures... nonetheless, to say that the legal rules "cause" the organization practices... is, at best, a gross simplification.[90]

The first stage of our project focuses on firms' creation of explicitly "ethical" infrastructure, such as ethics committees and in-house ethics advisors; and the extent to which firm managers actively support the use of such infrastructure. From an institutional perspective, "ethics" structures are especially important because they serve as a visible signal of the firm's attention to high ethical standards. Further, ethics advisors, as designated experts within the firm, are in a unique position to shape the development of firm policies and procedures and to promote a positive ethical culture in the firm. Our research to date consists of a series of focus groups and informal interviews with law firm managers, ethics advisors, firm general counsel, insurers, and regulators. Many of the questions and working hypotheses that we discuss in this section are informed by this exploratory research.

We also are interested in firms' creation of special purpose infrastructure, including such structures as pro bono committees, diversity committees, and sexual harassment committees, in addition to the structures already discussed, such as those dealing with conflicts and billing. As we explain below, the timing of firms' creation of special purpose infrastructure may provide important evidence about firms' incentives to create formal structural controls.

90. *Id.* at 501-02 (citation omitted).

We assume that firm size is an important determinant of whether firms create ethical infrastructure; however, we are more interested in other sources of variation among firms. We, therefore, have limited our research agenda to "large" (100-plus-lawyer) firms. Our research to date suggests that the creation and use of ethical infrastructure varies significantly even among large firms.

A. *Descriptive Questions*

The first goal of our project is to provide a "thick description" of explicitly ethical infrastructure; that is, not just whether or not firms have it, but also the scope of its jurisdiction, the frequency of its use, and the formal and informal authority of the lawyers who manage it.[91] Consider ethics committees, for example. Based on the surveys reviewed above, we assume that most large law firms have an "ethics" or "professional responsibility" committee.[92] We suspect, however, that not all ethics committees are created equal. The power of a committee depends on its jurisdiction over core organizational functions, and on the status of the people who serve on the committee. We plan to investigate these questions directly through in-depth interviews with law firm managers and partners who serve on ethics committees. What is the jurisdiction of the committee? Does it meet regularly or on an ad hoc basis? How often does it meet? Who serves on the committee? Are they elected or appointed? How often does membership on the committee rotate among firm members? Is significant committee service compensated by the firm?

We suspect that firms will invest more resources in committees with economic jurisdictions than committees with aspirational jurisdictions. For instance, we suspect that ethics committees that focus primarily on conflicts of interest will be staffed by senior and/or managing partners with specialized expertise, and will meet routinely and often, because conflicts committees have jurisdiction over who gets to keep what business. On the other hand, we suspect that ethics committees that do not have jurisdiction over conflicts will meet less often, and will be more likely to be staffed by rotation. These hypotheses are consistent with the findings from previous research.[93] We also

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91. This term is borrowed from cultural anthropology. *See* CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, *in* THE INTERPRETATION OF CULTURES 3, 3-30 (1973).

92. *See supra* notes 44-50 and accompanying text.

93. *See* Fortney, *Law Firm Partners*, *supra* note 9, at 284 (finding that "firms are more likely to monitor compliance with office procedures relating to firm finances than procedures relating to

suspect that, in some firms, the jurisdiction of the "ethics" committee has changed over time, from a committee that focused primarily on conflicts to a committee with a broader mandate. Thus, we are interested in the age of ethics and conflicts committees, and, in firms that have both, the relationship between them.

We also are interested in distinguishing between ethics *committees* and ethics *specialists*. As noted above, we view firms' increasing reliance on in-house ethics advisors as a potentially important development, given the role of internal specialists in other regulatory contexts. Our initial research suggests, however, that like ethics committees, the role of in-house ethics advisors varies significantly from firm to firm. In some firms, the ethics advisor's role is limited to managing conflicts: a typical example would be a male senior partner with significant litigation experience who is in charge of telling other partners "no" when a potential conflict prevents representation. In one multinational law firm that we know of, this is a formalized, full-time job and the partner performing it has no outside clients. More typically, it seems, this job is structured as a part-time committee duty for a respected practicing partner.

Other firms have ethics advisors whose jobs are broader than clearing conflicts and extend to a wide range of substantive and procedural issues within the firm. For instance, some ethics advisors provide individual counseling on professional disciplinary matters; help the firm develop standardized procedures for raising and addressing ethical questions; help the firm develop standardized forms, such as fee contracts and conflict waivers; provide training seminars on ethical issues that arise within the firm's practice; and develop intranet and internet resources, such as a list of "frequently asked questions" with links to formal ethics opinions.[94] If the firm has no labor law or human resources department, ethics advisors also may handle tricky personnel and human resource matters. In some firms, this job is structured as a full-time job: the partner who holds it has no outside clients and is compensated according to a different formula (and presumably at a lower rate) than partners with outside billings. In other firms, the ethics advisor bills the firm for in-house practice, but also maintains an outside practice focusing on malpractice and disciplinary matters.

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client representation matters"); Pizzimenti, *supra* note 11, at 322 (finding that most ethics committees meet on an ad hoc, rather than regular, basis).

94. *See* Jarvis & Fucile, *supra* note 12, at 104-08 (describing their in-house ethics practice at Stoel Rives LLP, a 300-plus-lawyer firm based in Portland, Oregon).

Finally, some firms have more than one partner who specializes in what we are broadly defining as "in-house ethics advising." For instance, one firm that we know of has three different specialists: a general counsel, who focuses on conflicts; a full-time ethics advisor, whose job is broader; and a practicing partner who serves as the liaison to the firm's malpractice insurer. In another firm, the general counsel focuses on claims and loss prevention and the ethics committee focuses on conflicts.

We are especially interested in the prevalence of full-time ethics advisors and part-time ethics advisors who are compensated for this function. We suspect that whether or not ethics advisors are compensated may affect both the scope and quality of in-house ethics advising. For instance, ethics advisors who are compensated for this function may be more likely than uncompensated committee members to take a proactive role in developing firm-wide ethics controls. Thus, firms with compensated ethics advisors may tend to have more ethical infrastructure than firms without compensated ethics advisors.

On the other hand, the mere creation of a specialized, compensated position does not guarantee the ethics advisor's authority within the firm. For instance, full-time ethics advisors without outside billings may not command the respect of their partners, especially if they were never practicing partners in the firm. Thus, we suspect that the professional status of those charged with ethics advising—including their tenure at the firm and the degree to which they enjoy visible support from top management—also may be a key determinant of the ethics advisor's role. We plan to begin to test these hypotheses through in-depth interviews with a small sample of in-house ethics advisors.

In addition to asking about the age and jurisdiction of explicitly ethical infrastructure, we plan to interview law firm managers about the overall management structure of the firm, including the age and jurisdiction of special purpose infrastructure. We also plan to ask law firm managers why they adopted specific ethical infrastructure, in hopes of gaining some understanding of firms' incentives to create formal structural controls.

B. Incentive Questions

The second goal of our project is to begin to address the question of why firms create ethical infrastructure. According to institutional research on the regulatory process, organizations' creation of internal compliance structures occurs in three roughly chronological stages:

(1) the introduction of new regulation; (2) the testing of structural responses to regulation by first-mover organizations; and (3) a process of "institutional isomorphism"[95] whereby other organizations in the regulatory community copy successful (legitimated) structures at an increasing rate.[96]

Informed by this model, our inquiry is organized around the following questions. First, who are the first movers? What types of firms have taken the lead in creating ethical infrastructure? Secondly, what are the mechanisms of structural diffusion among firms? That is, how do firms get information about what other firms are doing?

1. Who are the First Movers?

Institutional research suggests that first movers tend to be those organizations subject to the most regulatory scrutiny: for instance, large organizations, public organizations, and private organizations with administrative linkages to the federal government.[97] This research suggests that ethical infrastructure will emerge first in response to regulatory exposure: for instance, in firms that have suffered regulatory sanctions; firms that represent regulated clients; and firms with a significant litigation practice (because of the potential for judicial sanctions).

So far, however, institutional research has focused exclusively on public and business organizations, rather than professional organizations such as law firms. Most lawyers we speak to explain law firm structure and culture in terms of individual leadership; that is, as a reflection of the professional values of senior and managing partners. This explanation is consistent with previous research showing the importance of professional ideology in the development of management structures within law firms.[98] Thus, it may be that law firms respond to different incentives than public and business organizations.

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95. In biology, "isomorphic" organisms differ in ancestry but have similar form. *See* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1014 (2d ed. 1987). "'[I]nstitutional isomorphism'" refers to the process by which "organizations facing the same cultural rules and understandings become ... increasingly similar to one another." Edelman & Suchman, *Legal Environments*, *supra* note 16, at 496.

96. *See* Chambliss, *supra* note 83, at 56-59 (explaining the institutional model of the regulatory process).

97. *See, e.g.*, Edelman, *Expansion of Due Process*, *supra* note 86, at 1422-37; Edelman, *Legal Ambiguity*, *supra* note 16, at 1554-69.

98. *See, e.g.*, ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? 79, 205-06, 218 (Ind. Univ. Press 1973) (1969) (suggesting that law firms are structured by the professional values of firm members); William G. Ouchi, *Markets, Bureaucracies and Clans*, 25 ADMIN. SCI. Q. 129 *passim* (1980). *But see* NELSON, *supra* note 17, at

One way to test the importance of regulatory incentives is to investigate the timing of firms' creation of special purpose infrastructure. To the extent that regulatory incentives are important in determining who are the first movers, we would expect that the purpose and/or jurisdiction of the infrastructure would reflect the regulatory incentive. For instance, firms that have been sanctioned for filing a frivolous motion should be among the first firms to require two signatures on all filings. Likewise, firms that practice securities law should be among the first firms to create opinion letter committees. Finally, firms with a substantial litigation practice should be among the first firms to create formal procedures for identifying conflicts of interest.[99]

Another way to investigate firms' sensitivity to regulatory incentives is to track firms' response to widely-publicized enforcement actions against law firms. For instance, we suspect that the sexual harassment suit against Chicago-based firm Baker & McKenzie, which resulted in a multi-million dollar punitive damages award,[100] prompted some firms (but not others) to establish sexual harassment committees. Examining whether—and when—firms created sexual harassment committees, therefore, may help to identify characteristics that affect firms' response to regulatory incentives.

We are less confident about how to measure the role of regulatory incentives in firms' creation of general purpose infrastructure, such as ethics committees and in-house ethics advisors. Currently, there is no regulation requiring firms to have an ethics committee or an in-house ethics advisor—except, arguably, partners' supervisory duties under Model Rule 5.1(a).[101] Further, although New York and New Jersey recently have imposed supervisory duties on law firms as entities,[102] most lawyers and regulators to whom we have spoken do not expect much enforcement against large firms. Experience teaches that

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205-28 (arguing that firm elites define "professionalism" to justify whatever structures the firm has in place).

99. *See, e.g.*, David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 828 (1992) (noting that judicial disqualification for conflicts of interest played an important role in promoting the development of effective conflict-avoidance systems within firms).

100. *See* Richard C. Reuben, *Award a Lesson for Firms: Baker & McKenzie Ex-Partner to Pay $7.1 Million*, A.B.A. J., Nov. 1994, at 19, 19.

101. *See* Epstein, *supra* note 10, at 1018 (stating that "though Model Rule 5.1(a) cannot be said to prescribe that every law firm establish an ethics committee, the drafters . . . clearly considered an ethics committee to be a significant measure in meeting the generalized duty prescribed by the Rule").

102. *See* sources cited *supra* note 15.

disciplinary proceedings against lawyers who work in large law firms are relatively rare.[103]

Some commentators explain firms' increasing reliance on in-house ethics advisors as a response to the growth of malpractice litigation and the increasing complexity of legal ethics as a substantive area of law.[104] Presumably, however, these developments affect all law firms to some extent; thus, they do not suggest a hypothesis about which firms will be first to respond. One possibility is that the location of the firm is important. It is noteworthy, for instance, that Peter Jarvis, an in-house ethics advisor since the mid-1980s and co-author of the case study on ethics advising,[105] practices in Oregon, the only state with mandatory malpractice insurance.[106]

Another possibility is that the identity of the firm's insurer matters. For instance, a number of ethics advisors to whom we have spoken practice in firms insured by the Attorneys' Liability Assurance Society ("ALAS"). ALAS, which is owned by its members, has been especially proactive in providing loss prevention counseling to insureds; and ALAS requires its insureds to designate a liaison within the firm.[107] In a number of firms that we know of, the ALAS liaison is also the in-house ethics advisor. Thus, it may be that firms insured by ALAS have been among the first firms to designate in-house ethics advisors.

Institutional theory would suggest that law firms create explicitly "ethical" infrastructure in part to signal their high ethical standards to key constituents, such as clients and potential firm members.[108] In their description of their own in-house ethics practice, for instance, Peter Jarvis and Mark Fucile note that firm members use the presence of in-house ethics advisors as a selling point when recruiting law students.[109] As they state: "A firm that expressly devotes personnel to ethics issues is

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103. *See* Schneyer, *supra* note 14, at 6; *see also* Schneyer, *supra* note 7, at 247-54 (discussing the insignificance of professional discipline for the development of ethical infrastructure within law firms); Wilkins, *supra* note 99, at 822-35, 869-72 (explaining why so few disciplinary actions are brought against lawyers who work in large law firms).

104. *See* Epstein, *supra* note 10, at 1018, 1028-29; Jarvis, *supra* note 10, at 15.

105. *See* sources cited *supra* note 12.

106. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1662 n.28 (1994). Oregon adopted mandatory insurance in 1978. *See* OR. REV. STAT. § 9.080(2) (1999); Resolution Adopted by the Oregon State Bar at its November 1977 Bar Convention (effective July 1, 1978).

107. *See* George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 340 (1997).

108. *See* Edelman et al., *Endogeneity of Legal Regulation*, *supra* note 86, at 416-18; Edelman, *Legal Ambiguity*, *supra* note 16, at 1542-45.

109. *See* Jarvis & Fucile, *supra* note 12, at 112.

telling its lawyers that it cares about those issues and their resolution."[110] Again, however, the question remains as to which firms are *first* to create in-house ethics advisors. In other words, which firms are most sensitive to "institutional" incentives?

At this stage, we can only speculate about the role of regulatory and institutional incentives in firms' creation of ethical infrastructure, and the sources of variation among firms. We plan to investigate these questions further as our research progresses.

2. Mechanisms of Structural Diffusion

We are likewise speculative about the mechanisms of structural diffusion among firms. We suspect that in-house ethics advisors may play an important role, especially insofar as they participate in specialist networks outside of the firm. Institutional research consistently finds that the presence of lawyers and other compliance specialists within business organizations is a significant determinant of whether—and when—the organization adopts internal regulatory controls.[111] Internal specialists act as conduits for regulatory information, and thus tend to increase the organization's responsiveness to regulation generally.[112] Further, internal specialists tend to network through associations and conferences, professional journals, and electronic list-serves, hastening the spread of information and the diffusion of new structural forms.[113] We suspect, therefore, that the emergence of networks among in-house ethics advisors may be an important mechanism of structural diffusion among firms.

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110. *Id.*

111. *See* Frank Dobbin et al., *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 AM. J. SOC. 396, 404 (1993) (finding that "[p]ersonnel professionals played a central role" in the formalization of internal labor markets as a response to equal employment law); Edelman, *Legal Ambiguity*, *supra* note 16, at 1565 (finding that organizations with personnel departments created equal employment opportunity policies at "almost twice the rate of other organizations"); Sutton & Dobbin, *supra* note 16, at 807-08 (finding that personnel officers and labor lawyers were central to the institutionalization of grievance procedures in private firms); Edelman & Suchman, *Legal Environments*, *supra* note 16, at 498-501 (reviewing research on the role of professionals in shaping organizations' responses to regulation).

112. *See* DiMaggio & Powell, *supra* note 82, at 152-54; Edelman & Suchman, *Legal Environments*, *supra* note 16, at 499; Sutton & Dobbin, *supra* note 16, at 800-01.

113. *See* Edelman, *Expansion of Due Process*, *supra* note 86, at 1434-35; John R. Sutton et al., *The Legalization of the Workplace*, 99 AM. J. SOC. 944, 966 (1994) (finding that "organizations that are structurally linked to the wider national environment through . . . []personnel officers and labor attorneys[]" are significantly more likely than other organizations to create nonunion grievance procedures).

Recent legal ethics scholarship suggests that malpractice insurers also may be important.[114] Like ethics advisors, malpractice insurers are in a position to provide expertise about sources of potential liability and mechanisms for promoting compliance. Malpractice insurers may promote the diffusion of ethical infrastructure in a number of ways: through the creation of policy provisions and exclusions; through the provision of risk management services; and, increasingly, through direct audits of law firm management practices.[115] ALAS, for instance, has an annual conference in which it reviews recent malpractice verdicts and disseminates "best practice" information to member firms.[116] Thus, we suspect that firms with proactive insurers may have more extensive ethical infrastructure than firms without proactive insurers. Further, we suspect that firms with the same insurer will tend to have similar ethical infrastructure. Again, we plan to investigate these issues in the second stage of our research.

3. The Effectiveness Question

Obviously a central question that demands systematic research is what difference it makes whether firms create formal ethical infrastructure. To what extent do formal policies and procedures actually shape lawyers' conduct within the firm? Are they simply window dressing to stave off outside regulation? Are they even potentially harmful, in that they provide an excuse for individual lawyers to duck tough ethical decisions?

Many lawyers to whom we have spoken in developing our research agenda have told us that what really matters is the culture of the firm; and that formal policies and procedures are largely irrelevant to lawyers' conduct. The argument, essentially, is that good lawyers will be ethical regardless of the presence (or absence) of formal infrastructure; and that bad lawyers, likewise, will find a way to circumvent whatever formal structures are in place.

This argument, however, is not inconsistent with our "institutional" approach. The central premise of institutional theory is that organizations are motivated primarily by cultural norms and

114. *See* Cohen, *supra* note 107, at 339-41; Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1996) (examining whether or not malpractice insurance carriers possess the capability to informally regulate those that they insure).

115. *See* Davis, *supra* note 114, at 211-22.

116. *See* Cohen, *supra* note 107, at 340; Rita Henley Jensen, *Malpractice Rates May Level Off*, NAT'L L.J., July 19, 1993, at 1.

expectations rather than by material or technical concerns.[117] Indeed, institutional theory arose as a response to neoclassical theories of organizations, which portray organizations as driven primarily by rational calculations of economic efficiency.[118] Institutional theory does not suggest that organizations are *not* rational, but rather that economic rationality is shaped by institutional norms.[119]

Thus, institutional research on organizations' responses to regulation, which focuses on the creation and diffusion of formal compliance structures within firms, does not assume that such structures necessarily are effective in securing compliance; or that the adoption of formal structures is the end of the story. Instead, institutional theory views the creation of internal compliance structures as *culturally* symbolic.[120] In other words, institutional theory views formal structure as part of the culture of the firm. As Jarvis's and Fucile's observation about the recruiting value of in-house ethics advisors suggests, firms that adopt formal ethics structures are signaling to lawyers (and, institutional theory would add, to regulators) that the firm takes ethical issues seriously.[121]

This point has several important implications for inquiries about "effectiveness." First, from an institutional standpoint, even purely symbolic structures are in some sense "effective," in that they—by definition—alter the culture of the firm. Thus, institutional theory draws a distinction between a firm with no formal policy, and one in which the formal policy is inconsistent with actual conduct.

Second, institutional research suggests that even purely symbolic structures, over time, may take on a substantive bite. Formal policies provide ammunition for reform-minded individuals, as well as for those who would invoke them, to advance their own economic and/or professional interests (such as in-house compliance specialists).[122] In Professor Fortney's study of billing practices, for instance, seventy-one

117. *See* Edelman & Suchman, *Legal Environments*, *supra* note 16, at 484-506 (contrasting "material" and "cultural" theories of organizations).

118. *See generally* W. RICHARD SCOTT, ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS 76-101 (1998) (reviewing theoretical approaches to the study of organizations).

119. *See* DiMaggio & Powell, *supra* note 82, at 153-54.

120. *See* Edelman, *Legal Ambiguity*, *supra* note 16, at 1542-47; Meyer & Rowan, *supra* note 82, at 346-52.

121. *See* Jarvis & Fucile, *supra* note 12, at 112.

122. *See, e.g.*, Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 LAW & POL'Y 73, 75 (1991) (arguing that, once implemented, symbolic structures "tend to develop a life of their own," in part through mobilization by politically motivated specialists); *see also* Edelman & Suchman, *Legal Environments*, *supra* note 16, at 505.

percent of respondents agreed that "'[c]lear billing guidelines would help attorneys who want to practice ethically.'"[123]

Finally, consistent with its emphasis on cultural norms and expectations, institutional theory assumes that, in general, firm managers seek compliance with regulation.[124] Thus, while some approaches to organizational regulation—such as, for instance, the command-and-control approach associated with professional discipline—tend to portray the targets of regulation as resistant to regulatory demands, institutional theory focuses on the process of organizational *compliance*.[125] Institutional theory assumes that firms that create formal compliance structures probably intend to promote compliance (though the meaning of "compliance" may be contested).

Of course, none of this answers the empirical question about the effects of ethical infrastructure on lawyers' day-to-day conduct. We submit, however, that this is in fact an *empirical* question, and not one to be assumed away by pitting "structure" against "culture" as if they were unrelated. On the contrary, a substantial body of research on organizations finds that organizational structure and culture are dynamically related.[126] From this perspective, tracking the creation and diffusion of ethical infrastructure is an essential component of any inquiry into law firms' ethical culture.

This being said, how can we measure the effects of formal ethical infrastructure on lawyers' day-to-day conduct? We already have suggested one possible measure: that is, associates' awareness of ethical infrastructure and their propensity to use it. Thus, one strategy is to ask lawyers, and particularly associates, directly about the effectiveness of ethical infrastructure in their firm. Associates, however, are unlikely to have access to the most interesting data, and, as noted above, most partners will be reluctant to discuss specific ethical problems—especially those involving the failure of formal ethical infrastructure. Indeed, we have yet to hear one story from a partner about a significant ethical lapse that occurred within that partner's firm. There are limits, therefore, on outsiders' ability to assess the effectiveness of ethical infrastructure.

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123. Fortney, *Soul for Sale*, *supra* note 11, at 253-54.

124. *See* Edelman, *Legal Ambiguity*, *supra* note 16, at 1544.

125. *See* Chambliss & Edelman, *supra* note 19, manuscript at 2 (contrasting legal/coercive versus sociological/institutional models of the regulatory process).

126. *See, e.g.*, Edelman, *Legal Ambiguity*, *supra* note 16, at 1542; Suchman & Edelman, *Legal Rational Myths*, *supra* note 16, at 909-13.

Insiders certainly can do so, however. That is, firms themselves can engage in self-study to evaluate the effectiveness of their own infrastructure. For instance, Jarvis and Fucile note that an important part of their role as in-house ethics advisors is to alert firm managers to potential ethical problems and help them design a response.[127] Presumably, evaluating the effectiveness of internal procedures also is a central part of general counsels' jobs. While we recognize that promoting self-study in this context somewhat begs the question, in that self-study is itself a form of ethical infrastructure, the only alternative would seem to be to abandon the inquiry altogether. Given the profession's duty of self-regulation—not to mention recent events involving malfeasance by professional firms—we do not view this as a defensible alternative. Thus, we argue for shifting the burden of researching effectiveness to firms. At the very least, we view the burden of defending the *absence* of ethical infrastructure as falling squarely on firms.

Bar associations can encourage self-study by law firms in a number of ways. First, the bar can encourage law firms to designate in-house ethics advisors. Ethics advisors have a professional incentive to promote high ethical standards and to maximize the importance of ethics regulation as an area of law.[128] Thus, ethics advisors are likely to promote the development of ethical infrastructure within firms and to monitor the effectiveness of internal policies and procedures.[129]

The bar should also encourage journalists and professional research organizations to include questions about firms' ethical infrastructure in their surveys. For instance, the *National Law Journal*'s annual survey of the largest U.S. law firms could include a question about whether the firm has an in-house ethics advisor and/or a system for insuring ethical conduct within the firm. The National Association for Law Placement ("NALP"), likewise, publishes an annual directory of legal employers for use by law school placement offices that already includes a number of questions about firms' ethical infrastructure, such as the firm's pro bono policy and whether the firm has a diversity committee.[130] The NALP survey could be expanded to include additional questions, such as

127. *See* Jarvis & Fucile, *supra* note 12, at 106-07.

128. *See* Epstein, *supra* note 10, at 1028-29, 1041-42.

129. *See* Chambliss, *supra* note 83, at 60-63 (arguing that the American Bar Association should promote the authority and professional organization of in-house ethics advisors, and explaining the potential benefits of this strategy).

130. *See, e.g.*, NAT'L ASS'N FOR LAW PLACEMENT, NALP DIRECTORY OF LEGAL EMPLOYERS (2001 ed.).

whether the firm has a formal system addressing associates' ethical questions.

Most ambitiously, the bar could require firms to report on their ethical infrastructure and publish the aggregated results. Professor Irwin Miller argues for such a requirement under Model Rule 5.1(a).[131] Or the bar could simply encourage voluntary reporting, and publish a list of firms that participate.

Finally, the bar should support academic research on law firms' ethical infrastructure. In her survey of peer review procedures, for instance, Professor Fortney credits her high response rate in part to the fact that the survey was partially funded by the Texas Bar Foundation, which Texas lawyers view "as a prestigious group that funds worthy projects."[132] We submit that in the inevitable rethinking of professional self-regulation in the post-Enron era, such funds are well spent.

IV. CONCLUSION

We believe that the design and implementation of effective ethical infrastructure is critical to the future integrity of private law practice. The growth and globalization of law firms and the emergence of new organizational forms, such as multidisciplinary partnerships, have radically altered the conditions of practice and professional self-regulation. Regulators, in the United States and elsewhere, currently are grappling with a variety of proposals to insure the effectiveness of professional regulation in a global, multidisciplinary market. Although these efforts are at an exploratory stage, the one thing regulators agree upon is the need to move beyond the individualistic paradigm that currently dominates professional regulation and to focus on the development of self-regulatory structures within firms.

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131. *See* Miller, *supra* note 14, at 319-20.

132. Fortney, *Law Firm Partners*, *supra* note 9, at 277.