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Visions of the Eternal Law Firm: The Future of Law Firm Screens

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VISIONS OF THE ETERNAL LAW FIRM: THE FUTURE OF LAW FIRM SCREENS

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I. THEMES

I have adapted the title for my thoughts from an unlikely source. In 1932, the French composer Olivier Messiaen created "Apparition de l'Eglise eternelle" (Vision of the Eternal Church) for pipe organ. The piece begins tentatively, quietly announcing its theme using only a small part of the instrument's potential. It carefully adds other voices, relentlessly building to full organ in both volume and timbre. Unified by the keyboard, many voices speak as a mystical whole, announcing the future fulfillment of human potential.

Messiaen's musical vision offers several themes for our reflection. The first, and perhaps the most easily imagined, I will call "market crescendo." Encouraged by external market forces and its own internal structure, the small law firm grows bigger and the large law firm expands to megaproportions. We are now witnessing the result of such a market-inspired crescendo. Like Messiaen's vision, market crescendo is "very simple, almost brutal at its climax. Established slowly, it will take a long time to disappear."[1] Similarly, I believe that the current market crescendo will eventually climax (if it

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1. OLIVIER MESSIAEN, MESSIAEN ON MESSIAEN: THE COMPOSER WRITES ABOUT HIS WORKS 4 (Irene Feddern trans., 1986).

hasn't already). Law firms have grown and may continue growing, especially if they can establish safeguards to manage conflicts of interest.

Messiaen's music next suggests two possible outcomes for future law firms. First, the market crescendo may be followed by a "regulatory cacophony" designed to control the harmful effects of conflicts of interest. The regulatory safeguards currently most touted by the bar, so-called "Chinese Walls," may then proliferate as they have in other businesses such as investment banking. As this occurs, lawyers will need to reevaluate the additional costs of doing business in large firms in a heavily regulated environment.

Messiaen's vision does not end with its climactic crescendo, however. Rather, "a decrescendo equally progressive"[2] follows, lasting until the end of the piece. Similarly, a clash between market crescendo and regulatory cacophony may be followed by regulatory complexity as well as by a reconsideration of law firm structure and size. I will call this theme "ethical reprise." If courts or law firms decide that screens inadequately respond to professional obligations, the future shape of law practice may resemble Messiaen's progressive decrescendo.

II. MARKET CRESCENDO

There can be no doubt that law firms have grown in size and complexity during the past century. Although commentators differ in explaining exactly why this has occurred, at least two major factors have played a part. First, external market forces that affect all businesses have also encouraged law firm growth. Second, the internal structures of some law firms have added pressure toward expansion as well.

A. External Market Forces

Perhaps the most significant external forces are the national and international economies. Both have grown dramatically in size and complexity since World War II.[3] Law firms offering services in a dynamic economy often face opportunities for increased revenues that they can exploit only by adding additional lawyers to serve new demand.

The volume of legal services has tripled since 1970.[4] At the same time, another factor, the increasing complexity of legal regulation, has added to the

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2. *Id.*

3. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 38, 115 (1991).

4. *Id.* at 112 (citing Richard Sander & Douglas Williams, *Why Are There So Many Lawyers?: Perspectives on a Turbulent Market*, 14 L. & SOC. INQUIRY 431, 435 (1989)).

demand for corporate legal services. Business in general has developed international complexity in a domestic legal system replete with new environmental, economic, and workplace regulation.[5]

The increasingly complex web of legal regulation that surrounds modern business may also have accelerated the proliferation of in-house counsel, who perform routine tasks and counseling functions formerly farmed to outside firms. In-house lawyers today shop for value and quality in outside counsel, often shifting only complex and specialized work to outside firms.[6]

Exponential growth in the legal-services market over the past twenty-five years parallels exponential growth in the number of lawyers. The number of students graduated by the nation's law schools has tripled since 1960,[7] making available a large number of new lawyers willing to market their services in an increasingly complex world. A disproportionate number of these lawyers have been swallowed up by growing law firms serving corporate clients.[8]

As lawyers have grown in number, their organizations, whether law firms or government offices, have followed suit. The identity of clients has also been transformed from individuals or small groups to large entities. Indeed, most large-firm clients today are corporations, partnerships, private associations, or government agencies. Over time, these groups, like their lawyers, merge, diversify, and grow. All of these trends result in an increasingly fluid legal-services market.

Large-firm lawyers today must come to grips not only with exponential increases in firm size but with the increasingly competitive world of providing corporate legal services. These structural pressures push lawyers toward finding more work to replace that lost to in-house lawyers or competitive outsiders.

Recent evidence suggests that the market crescendo may have peaked. In the last year, forty-eight percent of the 250 largest law firms have lost, rather than gained, lawyers.[9] Overall, however, the number of law firms with more than 100 lawyers continues to grow—up from 79 in the year 1978[10] to over

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5. *See id.* at 115.

6. *See id.* at 49-50, 113-14; Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 382 (1985).

7. GALANTER & PALAY, *supra* note 3, at 110 (1991).

8. *Id.* at 40, 110-11.

9. Thom Weidlich, *The Legal Field Sees a Glimmer of Recovery*, NAT'L L.J., Sept. 27, 1993, at S2. In the previous year, 64% of the largest law firms lost attorneys. Kenneth Rutman & Carol M. Neal, *The 15th Survey Boasts a Leaner, Meaner Field*, NAT'L L.J., Sept. 28, 1992, at S2, S3.

10. *See The NLJ 250: A Special 5-Year Report on the Dramatic Growth of the Nation's Largest Law Firms*, NAT'L L.J., Sept. 19, 1983, special insert, at 1, 1.

250 today.[11]

B. Internal Structural Responses

Palay and Galanter point out that the incentive structure of large law firms promotes a "tournament of lawyers" hungry for partnership.[12] Each new partner necessitates additional associates to serve the clients generated by the partner's "shareable human capital," or ability to delegate some aspects of the client's legal work to others. Assuming a constant associate-to-partner ratio, each new partner adds exponentially to the size of a firm.[13] This account of law firm growth depends, however, on two assumptions: (1) that each partner possesses "surplus shareable human capital," and (2) that the firm fixes and does not decrease the percentage of associates who eventually win the tournament and become partners.[14]

Palay and Galanter describe the human capital of some partners as "highly idiosyncratic,"[15] which limits their ability to lend work to associates. Similarly, firms whose partners possess "just enough reputation, client relationships, skills, and experience to support themselves"[16] will have little need for associates at all. Firms with partners that can share surplus human capital will also remain stable in size if they rarely promote associates. But as these employees develop their own skills, they have little incentive to stay with the firm absent the partnership option, and the likelihood of their departure increases.[17]

The internal-governance structure of a law firm thus depends on the individual skills of its partners and the extent to which they can create incentives for promotion. External market forces offer a firm the opportunity for growth; a firm's internal structure reflects its ability and willingness to respond.

C. Consequences

Increased size brings opportunities for increased wealth, but it also multiplies the potential for problems. Beyond the economic realities of finding and keeping business, lawyers increasingly are confronting ethical dilemmas generated by law firm growth. As a firm expands and the number of its

11. *See* Weidlich, *supra* note 9, at S5-S26.
12. *See* GALANTER & PALAY, *supra* note 3, at 100-02.
13. *See id.* at 103.
14. *See id.* at 107.
15. *Id.* at 109.
16. *Id.*
17. *Id.*

clients and matters increases, the potential that a client may have an interest adverse to another current or former client grows as well.[18]

A firm confronting a conflict of interest faces two distinct ethical problems. First, it must be alert to and remedy loyalty conflicts caused by simultaneous representation of two or more clients with adverse interests. Because all firm lawyers share an equal fiduciary duty to all clients, any client who does not consent to a loyalty conflict of interest can limit the law firm's ability to represent others.[19] If the number of clients increases as a law firm expands, the potential for conflicts between simultaneously represented clients also increases.

Absent client consent, the firm may solve a loyalty conflict only by ceasing its representation of all conflicting clients.[20] To encourage clients to consent to a loyalty conflict, a firm may promise a screen barring the attorneys who represent the conflicting clients from communicating with one another. In nonlitigation matters, potentially adverse clients who are willing to assume a large degree of responsibility for the representation and to actively manage the conflict may consent to common representation.[21] Absent this circumstance, screens are not adequate safeguards in conflicts between current clients.[22]

A firm cannot solve a concurrent-client conflict by choosing one client and ceasing representation of the other. When a firm ceases representation of all but one conflicting client, it then faces a second ethical problem. Lawyers and firms owe clients a duty of confidentiality as well as a duty of loyalty. This duty to respect confidences, like the loyalty obligation, is borne by the entire firm. Unlike the loyalty duty, however, the duty of confidentiality continues indefinitely beyond the end of the representation of the client.[23] A firm that ceases representation of a client thus remains obligated not to use against that client any confidences gained during the course of the representation. Since a disclosure by any former client to one lawyer in the firm could have been shared with other lawyers, the entire firm faces the almost insurmountable dilemma of proving that it has not used, and cannot use, the confidences of a former client against that client if the firm seeks to represent

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18. Lloyd N. Cutler, *The Role of the Private Law Firm*, 33 BUS. LAW. 1549, 1549 (1978); William H. Rehnquist, The Legal Profession Today, Address at the Commemoration of the Indiana University School of Law Library Building, *in* 62 IND. L.J. 151, 155 (1987).

19. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.10 (1993); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1983).

20. *See, e.g.*, Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976).

21. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1993).

22. *See* International Business Machines Corp. v. Levin, 579 F.2d 271, 280 (3d Cir. 1978); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 232-33 (2d Cir.), *aff'g in part and rev'g in part* 435 F. Supp. 84 (S.D.N.Y. 1977).

23. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.7.2, at 298 (Student ed. 1986).

an adversary in the same, or in a substantially related,[24] matter. This analysis also would apply if representation of the first client ceased before the second client approached the law firm.

Conflicts of this sort between former and current clients arise when either a client[25] or lawyer[26] changes law firms. A lawyer joining a new firm can taint the new firm by bringing information about former clients from her past practices. Both lawyer and client moves are more likely to create conflicts in small towns or in specialized practices, such as patent law, for which the availablity of lawyers may be limited.

Although conflicts generated by former-client representation occur in all sizes of firms, the vast majority of reported cases involve firms of fifty or more lawyers.[27] Two factors may account for this.

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24. *See generally id.* §§ 7.4.2-.3, at 364-71 (discussing the substantial-relationship test under MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 before its 1987 and 1989 amendments).

25. *See, e.g.*, Havoco of America, Ltd. v. Hilco, Inc., No. 81-C-419, 1988 U.S. Dist. LEXIS 3928, 1988 WL 40871 (N.D. Ill. Apr. 26, 1988).

26. *See* Graham *ex rel.* Graham v. Wyeth Labs., 906 F.2d 1419 (10th Cir. 1990), *on remand to* 760 F. Supp. 1451 (D. Kan. 1991); Atasi Corp. v. Seagate Technology, 847 F.2d 826 (Fed. Cir. 1988); Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975), *aff'g* 370 F. Supp. 581 (E.D.N.Y. 1973); Geisler *ex rel.* Geisler v. Wyeth Labs., 716 F. Supp. 520 (D. Kan. 1989), *remanded*, 934 F.2d 326 (10th Cir.) (table decision; opinion available in WESTLAW at 1990 WL 299410), *on remand at* 760 F. Supp. 1451 (D. Kan. 1990); Parker v. Volkswagenwerk Aktiengesellschaft, 781 P.2d 1099 (Kan. 1989).

27. Examples of such cases are Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988), *remanding* Manning v. Fort Deposit Bank, 619 F. Supp. 1327 (W.D. Tenn. 1985); Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983); LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *aff'g in part and rev'g in part* Westinghouse Elec. Corp. v. Rio Algom Ltd., 448 F. Supp. 1284 (N.D. Ill.), *cert. denied*, 439 U.S. 955 (1978); SLC Ltd. V v. Bradford Group West, Inc., 147 B.R. 586 (D. Utah 1992), *aff'd in part and rev'd in part*, 999 F.2d 464 (10th Cir. 1993); Margiotta v. McLaren (*In re* McLaren), 115 B.R. 922 (Bankr. N.D. Ohio 1990); Bridge Prods., Inc. v. Quantum Chem. Corp., 58 U.S.L.W. 2733 (N.D. Ill. Apr. 30, 1990); *In re* Davenport Communications Ltd. Partnership, 109 B.R. 362 (Bankr. S.D. Iowa 1990); Employers Ins. of Wausau v. Albert D. Seeno Constr. Co., 692 F. Supp. 1150 (N.D. Cal. 1988); *Havoco of America, Ltd.*, 1988 U.S. Dist. LEXIS at 3928, 1988 WL at 40871; General Elec. Co. v. Industra Prods., Inc., 683 F. Supp. 1254 (N.D. Ind. 1988); Huntington v. Great Western Resources, Inc., 655 F. Supp. 565 (S.D.N.Y. 1987); Zimmerman v. Duggan, 81 B.R. 296 (E.D. Pa. 1987); Schechter v. Drobny (*In re* Columbia Realty Assocs., Ltd.), 71 B.R. 804 (Bankr. N.D. Ill. 1987); Haagen-Dazs Co. v. Perche No! Gelato, Inc., 639 F. Supp. 282 (N.D. Cal. 1986); Hallmark Cards, Inc. v. Hallmark Dodge, Inc., 616 F. Supp. 516 (W.D. Mo. 1985); United States Football League v. National Football League, 605 F. Supp. 1448 (S.D.N.Y. 1985); Guthrie Aircraft, Inc. v. Genesee County, 597 F. Supp. 1097 (W.D.N.Y. 1984); INA Underwriters Ins. Co. v. Nalibotsky, 594 F. Supp. 1199 (E.D. Pa. 1984); Williams v. Trans World Airlines, Inc., 588 F. Supp. 1037 (W.D. Mo. 1984); Hughes v. Paine, Webber, Jackson & Curtis, Inc., 565 F. Supp. 663 (N.D. Ill. 1983); Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz, 573 A.2d 1001 (Pa. 1990).

First, some large firms became large by merger or by lateral hiring. Either event causes immediate conflicts issues.[28] Assuming that loyalty conflicts can be obviated by ceasing representation of one of the current clients, the new firm must then turn to the fiduciary problem of confidentiality. New associates and partners bring with them the confidences of former clients, some of whom may now be involved as adversaries against one of the new firm's current clients.

Initially, the laterally hired or merged lawyers do not have any association with their new firm, which is required to provide the opportunity for sharing former-client secrets. Large-firm lawyers therefore argue that ethical problems caused by duties of former-client confidentiality can be addressed with walls that screen tainted lawyers from participation in adverse matters in the new firm.[29]

Former clients who accept this argument can consent to the firm's continuing representation of a current adversary.[30] The former client who does not consent can move for a court order to disqualify the firm from its current representation. Courts considering such motions apply what is known as the "substantial relationship" test.[31] Designed to protect former clients from having to disclose the very confidences they currently seek to protect through disqualification, the substantial-relationship test asks whether the past representation is substantially related, legally or factually, to the current client's need for legal services. If it is, a presumption arises that the attorney obtained the former client's confidences and can use them against the former client.[32] A lawyer can rebut the presumption only if the lawyer can "clearly and persuasively show that he was not privy to the confidences and secrets of the client."[33] A few courts, however, sometimes deny motions to disqualify

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28. *Compare* Cox v. American Cast Iron Pipe Co., 847 F.2d 725 (11th Cir. 1988) (law firms merged) *with In re* McLaren, 115 B.R. at 922 (attorney laterally hired). *See generally* Lauren Ravkind, Note, *Imputed Disqualification?: Law Firm Mergers and the Need for Change*, 8 REV. LITIG. 93 (1988) (analyzing conflict-of-interest issues caused by law firm mergers).

29. *See Silver Chrysler Plymouth, Inc.*, 518 F.2d at 751; Kearns v. Chrysler Corp., 771 F. Supp. 190 (E.D. Mich. 1991); Rockwell Graphics Sys., Inc. v. DEV Indus., Inc., No. 84-C-6746, 1991 U.S. Dist. LEXIS 9002, 1991 WL 127592 (N.D. Ill. June 24, 1991); *In re* Chicago South Shore & South Bend R.R., 101 B.R. 10 (Bankr. N.D. Ill. 1989); State *ex rel.* Freezer Servs., Inc. v. Mullen, 458 N.W.2d 245 (Neb. 1990); Rowley v. Waterfront Airways, Inc., 493 N.Y.S.2d 828 (App. Div. 1985).

30. *See* Celanese Corp. v. Leesona Corp. (*In re* Yarn Processing Patent Validity Litig.), 530 F.2d 83, 89 (5th Cir. 1976); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b)-(c) (1993).

31. The substantial-relationship test was first articulated in T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953). A modern version may be found in MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 & cmt. (1993).

32. *See, e.g.*, English Feedlot, Inc. v. Norden Labs., Inc., 833 F. Supp. 1498, 1506 (D. Colo. 1993).

33. *See, e.g.*, LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 257 (7th Cir. 1983).

firms even when the matters are substantially related and the lawyer has been privy to client confidences, ruling that a screen, or Chinese Wall, also rebuts a presumption that any former-client confidences obtained by a lawyer have been, or will be, shared with her new firm.[34]

Litigation about former-client conflicts arises primarily in the context of large firms for a second reason. Courts have almost never allowed screens in small (less than ten lawyers)[35] or mid-size (ten to twenty lawyers)[36] firms. Nearly all screens seriously considered by courts involved law firms with more than fifty lawyers. Because of this, small firms are probably less likely to argue for the use of screens.

Large law firms therefore face a dual reality. On one hand, increased size brings with it greater potential for current- and former-client conflict. Laterally hired or merged lawyers increase both risks. On the other hand, screening has emerged in a handful of cases as a remedy to former-client conflicts that occur in large law firms. Large firms therefore have a basis for believing that that former-client conflicts can be managed irrespective of the former client's consent.[37]

D. Screens in Perspective

Screens of various sorts have been used in a number of industries for at

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34. *See* Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222, 224 & n.1 (6th Cir. 1988), *remanding* Manning v. Fort Deposit Bank, 619 F. Supp. 1327 (W.D. Tenn. 1985); Nemours Found. v. Gilbane, 632 F. Supp. 418, 428 (D. Del. 1986); *accord* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 204 (Tent. Draft No. 4, 1991).

35. Research reveals only two cases allowing screens in firms of less than 10 lawyers. The first, United States *ex rel.* Lord Elec. Co. v. Titan Pacific Constr. Corp., 637 F. Supp. 1556 (W.D. Wash. 1986), has been criticized. *See* Elan Transdermal Ltd. v. Cygnus Therapeutic Sys., 809 F. Supp. 1383, 1392 (N.D. Cal. 1992). The second is Geisler *ex rel.* Geisler v. Wyeth Labs., 716 F. Supp. 520 (D. Kan. 1989), *remanded*, 934 F.2d 326 (10th Cir.) (table decision; opinion available in WESTLAW at 1990 WL 299410), *on remand at* 760 F. Supp. 1451 (D. Kan. 1990).

36. Only two reported cases allowed screens in firms of 10 to 20 lawyers. In the first, Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564 (Fed. Cir. 1984), the court was persuaded as much by the former lawyer's peripheral representation as by his new firm's subsequent screen. *See id.* at 1577-81. The other, Nemours Found. v. Gilbane, 632 F. Supp. 418 (D. Del. 1986), upheld a screen in a 16-lawyer firm. At least one commentator has argued, however, that the *Nemours Foundation* result could more easily be justified on the basis of the peripheral-representation rule as well. *See* Thomas D. Morgan, *Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem*, 10 U. ARK. LITTLE ROCK L.J. 37, 53 (1987-88).

37. *See generally* M. Peter Moser, *Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm*, 3 GEO. J. LEGAL ETHICS 399 (1990) (supporting the increased use of Chinese Walls to allow representation over the objections of former clients); Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677 (1980).

least three decades to segregate functions of an institution and thereby limit the liability exposure of the whole. In particular, securities firms and banks have responded to conflicts of interest created by the possession of confidential information with screens designed to prevent part of an institution's operations from tainting another department's function.

Initially designed as a defense against insider-trading liability, Chinese Walls first were used successfully by securities brokers to argue that trades were not based on the communication of information between the investment banking, research, and sales divisions of their firms.[38] These walls, sometimes more accurately referred to as "bamboo curtains,"[39] bar investment-banking analysts from giving brokers both obviously improper information, such as facts learned in investigating financial deals, and less obviously improper information, such as whether a researcher or analyst is even working on a particular report for a particular client.[40]

What was designed twenty-five years ago as a defense against civil liability has now become a complex operational necessity in securities firms. In 1990 the Securities and Exchange Commission implemented new standards requiring all brokerages to establish written policies to prevent insider trading.[41] In 1991 the General Accounting Office reviewed the screens required by these procedures at eighteen large brokerages and found them "satisfactory."[42] Less than a year later, however, Shearson Lehman Brothers agreed to a $500,000 fine for failing to supervise its Chinese Wall procedures. Shearson had allowed research rating changes to be communicated to supervisors of trading desks around one-half hour before general dissemination throughout the firm. Some of the firm's traders apparently saw nothing wrong using such an early warning to liquidate positions.[43]

The significant difficulties encountered by securities firms in maintaining screens are further exacerbated by the use of electronic records of share transactions. Establishing a bamboo screen that should prevent oral or written communications between divisions of a firm is one thing, but creating a "wire fence" in computer systems may prove more difficult.[44]

38. *See* James R. Doty & David N. Powers, *Chinese Walls: The Transformation of a Good Business Practice*, 26 AM. CRIM. L. REV. 155, 155-56 (1988).

39. *See, e.g.*, Susan Antilla, *Stock Picks Plagued by Leaks*, N.Y. TIMES, Jan. 22, 1993, at D1, D14.

40. *See id.*

41. Jayne Levin, *GAO Says Brokerage Firms' Chinese Walls 'Satisfactory'*, INVESTMENT DEALERS' DIGEST, Sept. 23, 1991, at 10.

42. *Id.*

43. *See* Christina Toh-Pantin, *U.S. Brokers' Surveillance System Seen Breachable*, Reuters Fin. Rep., June 24, 1992, *available in* LEXIS, Bankng library, Reufin file.

44. *See Practioners [sic] Concerned About Taurus; System May Create Compliance Problems*, THOMSON'S FIN. COMPLIANCE WATCH, May 17, 1991, *available in* LEXIS, Bankng library,

Commercial banks are also becoming more frequent users of screens, establishing them to separate commercial divisions from trust department operations.[45] For example, playing financial advisor to a debtor allows the bank as creditor to be one of the first aware of a potential bankruptcy. Separating the functions of financial advisor and credit officer with a screen appears to offer promise, though some observers express doubt about "how impermeable the wall is in most cases."[46]

In addition, banks now manage investment companies while continuing their traditional lending role. Nonpublic financial information possessed by a loan department could easily, if communicated, shape a trust department's advice to its customers. Consequently, the Federal Reserve Board, the OCC, and the SEC require that the functions be screened from one another.[47] European countries are now coming to recognize the necessity of Chinese Walls in financial institutions as well.[48]

More recently, screening procedures have been adopted to avoid conflicts of interest for bankruptcy creditors' committees.[49] In bankruptcy reorganization proceedings, large institutional creditors often seek to serve on creditors' committees, whose function is to restructure the debtor's obligations. A conflict develops when the debtor is a publicly traded company and the institutional creditor is also an investment manager for a wide variety of client accounts, all of which will want to remain free to trade the debtor's securities. In order to avoid prohibitions against all trades of a debtor's securities while serving on a creditor's committee, institutional advisors set up screens as "appropriate information blocking device[s]"[50] designed to prevent traders from receiving any information from co-employees working with the creditors' committee. This device of course also necessitates that a person not manage any investments while serving on a creditors' committee.

Most recently, government contractors are learning that screens may prevent an "organizational conflict of interest" within the meaning of the Federal Acquisition Regulations system and the procurement integrity provisions of the Office of Federal Procurement Policy Act as well as specific agency rules.[51] These rules prohibit private contractors from entering into

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45. *See* Edmon W. Blount, *Retooling Systems for Reforms Past and Future*, A.B.A. BANKING J., March 1991, at 68, 73.

46. Andrew W. Singer, *Morgan Helps Push Client Into Bankruptcy*, U.S. BANKER, July, 1992, at 14.

47. *See* Blount, *supra* note 45, at 68.

48. *See Chinese Walls for Banks*, FIN. REG. REP., Nov. 18, 1991.

49. *See generally* Robert C. Pozen & Judy K. Mencher, *Chinese Walls for Creditors' Committees*, 48 BUS. LAW. 747 (1993).

50. *In re* Federated Dep't Stores, Inc., No. 1-90-00130, 1991 Bankr. LEXIS 288, at *2, 1991 WL 79143, at *1 (Bankr. S.D. Ohio Mar. 7, 1991), *quoted in id.* at 748.

51. *See* Thomas J. Madden & James F. Worrall, *Identifying and Avoiding Organizational*

management services contracts with government agencies if they currently, or will in the future, seek other business from the same agency.[52]

All of these examples—securities firms, commercial banks, creditor's committees, and government contractors—share common features. First, the confidential information in these circumstances is generally obtained in the course of an arms-length transaction—such as preparing a prospectus or negotiating a loan agreement, a loan workout, or the terms of a contract—where the disclosures are necessary to negotiate or carry out the transaction. Second, because conflict-of-interest problems are inherent in the nature of the businesses themselves,[53] securities-brokerage, banking, creditors' committee, and government-contractor walls are permanent, screening entire departments or divisions from one another.

Despite these similarities, screening barriers in these situations have been known by a number of different names, including "Chinese Wall," "bamboo curtain," "wire fence", "screen," and "fire wall." Each of these appellations evokes a slightly different image: an ancient wall, once impenetrable but now crumbling; a moving curtain that allows partial but limited view; a metal fence that blocks large objects but is easily penetrated by smaller things; an opaque or transparent, stationary or moveable item; or a thick barrier impervious even to fire. These shades of meaning suggest similar gradations of function, many of which may allow information to flow through cracks in the barriers.

If similar structures are to succeed in law firms, they must control the source of conflict by successfully blocking the flow of *all* confidential information. In my view, the best image to convey this idea is "fire wall" because it promises impermeability and strength. Fire walls also can be opened when they are no longer needed. With these ideas in mind, I will sketch the future of large firms with such fire walls in place.

III. REGULATORY CACOPHONY

Permanent fire walls in the situations mentioned in the preceding section are usually required by extensive government regulation, which has led to the fullest development of fire wall standards to date. Combining the prescriptions of these regulations with the requirements of the handful of cases that allow fire walls in law firms affords an opportunity to speculate about the future shape of large firms, whose growth could be encouraged further if fire walls were deemed adequate to prevent leaks of confidential information.

Conflicts of Interest, 58 Fed. Cont. Rep. (BNA) No. 23, at D-26 (Dec. 21, 1992), *available in* LEXIS, BNA library, Fdcont file.

52. *See id.*

53. *See generally* Alison G. Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738 (1978) (theorizing that conflicts of interest inevitably result from specialized exchange).

A. Internal Structure

The structure of large firms must be geared toward the discovery of conflicts of interest, which must be detected before prophylactic measures can be taken. Two sources of information are important: new clients and former clients. First, each proposed new client for a firm should be identified adequately by all known names, past and present. This is especially important for clients that are entities that may have merged or otherwise changed structure over time. Next, the identities of all potential opposing parties must be established. Once properly identified, both the prospective client and the potential opposing parties should be checked against both current and past client lists of the firm. Any matches deserve further scrutiny.[54]

If there is any likelihood that advocacy on behalf of a current client could disadvantage a potential new client, the firm must seek the consent of both to the dual representation. If either refuses consent, the firm must decline the new matter. Proceeding without consent risks sanctions ranging from disqualification motions[55] to disciplinary action[56] to tort liability.[57]

Another problem occurs if the firm rejects its current client in favor of a potential opponent. Assuming that the current client permits the firm to withdraw, the firm ceases representation and leaves behind its general duty of loyalty. The firm retains its confidentiality duty, however, and therefore must continue to guarantee into the indefinite future that it will not use any confidences of the prior client against that client. For this reason, all proposed new clients must be checked against former as well as current clients of the firm. The firm cannot represent an opponent of a former client without the former client's consent so long as the two matters are substantially related.[58]

The former client may consent either to the use of its confidences in a current matter or to safeguards such as fire walls to prevent disclosure. Absent the consent of both the former client and the proposed new client,

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54. *See* Lloyd N. Cutler, Supplemental Remarks to *The Role of the Private Law Firm* at the Airlie House Conference on the Ethical Responsibilities of Corporate Lawyers (June 11, 1977), *in* 33 BUS. LAW. 1559, 1560-61 (1978); WOLFRAM, *supra* note 23, § 7.3.4, at 356-57. As a matter progresses, the law firm must be free to reassess the potential for additional opposing parties. Prior or current representation of a potential opposing party creates additional conflict for the firm that owes fiduciary duties to both clients but fears a motion to disqualify if a currently or formerly represented party is joined. *See* Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988), *remanding* Manning v. Fort Deposit Bank, 619 F. Supp. 1327 (W.D. Tenn. 1985); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir.), *aff'g in part and rev'g in part* 435 F. Supp 225 (S.D.N.Y. 1977).

55. *But see* Nathan M. Crystal, *Disqualification of Counsel for Unrelated Matter Conflicts of Interest*, 4 GEO. J. LEGAL ETHICS 273 (1990) (arguing against the routine disqualification of lawyers for unrelated-matter conflicts of interest).

56. *See infra* note 87 and accompanying text.

57. *See infra* text accompanying notes 82-85.

58. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1993).

however, the firm faces the same sanctions as it would in a conflict between current clients: disqualification motions, disciplinary action, and tort liability.

The detection of conflicts required when new clients seek representation by the firm is also required on another occasion. Any change in lawyer personnel, whether by hire, merger, spinoff, or dissolution, requires adjustments to the current- and former-client lists. Lawyers hired from other firms should bring with them complete lists of former clients, including those represented by other lawyers at their old firms. The firm should follow the same procedures in hiring nonlawyer personnel, including law clerks, paralegals, and secretaries and investigators who have previously worked for lawyers.[59]

Once detected, potential conflicts need further examination by a team of lawyers well versed in the nuances of relevant legal regulation concerning former-client conflicts. The team should examine at least three issues in every instance.[60]

First, the reviewers should establish the exact scope of the prior representation. Most courts, but not all,[61] have adopted the peripheral-representation rule, which allows a lawyer to rebut the presumption of receipt of confidential information by showing that the lawyer in fact had no access to confidences during the prior representation.[62] Such an argument is plausible when the lawyer had no contact with the former client other than vicariously through her firm.[63] The argument is also plausible when the lawyer actually worked on a former-client matter, but in a limited way, such as performing legal research without access to a client's file.[64]

Second, if the prior representation was more than peripheral, the

59. For cases where secretaries or office managers subjected an attorney or firm to review for disqualification, see Kapco Mfg. Co. v. C & O Enters., Inc., 637 F. Supp. 1231 (N.D. Ill. 1985); Herron v. Jones, 637 S.W.2d 569 (Ark. 1982); Esquire Care, Inc. v. Maguire, 532 So.2d 740 (Fla. Dist. Ct. App. 1988); Lackow v. Walter E. Heller & Co. Southeast, Inc., 466 So. 2d 1120 (Fla. Dist. Ct. App. 1985); King v. King, App. No. 89-46-II, 1989 Tenn. App. LEXIS 675, 1989 WL 122981 (Tenn. Ct. App. Oct. 18, 1989).

For cases where paralegals brought scrutiny upon an attorney or firm regarding a motion to disqualify, see Rivera v. Chicago Pneumatic Tool Co., No. 51-63-64, 1991 Conn. Super. LEXIS 1832, 1991 WL 151892 (Conn. Super. Ct. Aug. 5, 1991); *In re* Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 607 A.2d 962 (N.J. 1992); Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc., 514 N.Y.S.2d 440 (App. Div. 1987).

60. The firm should retain the former-client lists for conflict-of-interest checks as new clients seek representation.

61. *See, e.g.*, State *ex rel.* FirsTier Bank, N.A. v. Buckley, 503 N.W.2d 838, 844 (Neb. 1993).

62. *See, e.g.*, W.L. Gore & Assocs., Inc. v. International Med. Prosthetics Research Assocs., Inc., 745 F.2d 1463, 1467 & n.3 (Fed. Cir. 1984).

63. *See, e.g.*, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 756-57 (2d Cir. 1975), *aff'g* 370 F. Supp. 581 (E.D.N.Y. 1973).

64. *See id.*

reviewers should compare the factual and legal nature of the prior representation to that of the current matter. The former client's confidences are at risk only in substantially related[65] matters. Because dozens of cases have discussed the scope of "substantial relationship," a firm with a potential conflict must very carefully conduct a jurisdiction-specific legal and factual review.[65]

Third, if the prior representation was more than peripheral and the matters appear substantially related, the reviewing attorneys must consider the possibility of former-client consent and the conditions of that consent. Fire walls designed to prevent disclosure of former-client confidences may prove acceptable to either the former client or a court. Because the entire firm's loyalty is no longer an issue, the screen can be limited to those lawyers who had access to the former client's confidences. If promptly erected and adequately maintained, fire walls in the case of former-client confidences prevent professional sanctions if the former client knowingly consents to the details of the screen. Former clients and firms are therefore free to bargain for a fire wall as a condition of consent to the adverse representation.[67]

In no reported case has a court refused to allow a screen to which the former client has consented. The majority of lawyers, who practice in anti-screen jurisdictions, therefore need to understand the function of screens in order to bargain for and establish adequate consensual screens. Those lawyers in more liberal jurisdictions that allow screens without client consent need to understand the judicial requirements imposed on such screens. Thus, every lawyer needs to understand how to establish, maintain, and monitor a fire wall.

The viability of a fire wall depends on the nature of the past representation and the manner in which the wall is established and monitored. One of the most important factors is law firm structure. In general, larger size and greater departmentalization offer the best physical environment in which to erect a fire wall. Large departmentalized firms are much better able to physically isolate a specialized lawyer in a separate department or floor.[68] Smaller firm lawyers, on the other hand, often assume a number of roles and interact more informally in their firms.[69] And since successful fire walls

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65. See *supra* text accompanying notes 31-33.

66. *See* WOLFRAM, *supra* note 23, § 7.4.3, at 370-71.

67. *See, e.g.*, Celanese Corp. v. Leesona Corp. (*In re* Yarn Processing Patent Validity Litig.), 530 F.2d 83 (5th Cir. 1976). Occasionally, courts will imply consent if the motion to disqualify is made long after the underlying facts became apparent. *See* Cox v. American Cast Iron Pipe Co., 847 F.2d 725 (11th Cir. 1988). *But see* Baird v. Hilton Hotel Corp., 771 F. Supp. 24, 28 (E.D.N.Y. 1991) (holding that laches is generally not a defense to a disqualification motion).

68. *See, e.g.*, INA Underwriters Ins. Co. v. Rubin, 635 F. Supp. 1, 5 (E.D. Pa. 1983).

69. *See* Cheng v. GAF Corp., 631 F.2d 1052, 1058 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903, *dismissed*, 659 F.2d 1058 (2d Cir. 1981) (table decision); Yaretsky v.

presume the ability to preclude persons from sharing information, it is impossible to accept the idea that one person "can erect a Chinese Wall down the middle of his forehead."[70]

There are several requirements for a viable fire wall. First, for a fire wall to work, all attorneys and support staff in the firm must be initially informed of its existence.[71] Next, the wall must include physical separation of files,[72] allowing access to screened cases on a need-to-know basis only. Special attention to secret codes in computer databases is necessary. Further, the screened lawyer must not share in the fees from the matter.[73] Finally, the firm should physically separate screened lawyers from the rest of the firm, whether within a practice area or in separate practice areas.[74]

Once an adequate screen is established, it will need to be monitored until it is disassembled. A screen could be disassembled if the former client consents or if the firm can establish that the prior representation was either peripheral or not substantially related to the current representation.[75] In all other cases, the firm must monitor its screens for as long as the adverse representation continues, often years. Adequate monitoring includes continual reminders such as signs or tags on paper and computer files as well as on the office doors or walls of screened lawyers. To guard against inadvertent leaks

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Blum, 525 F. Supp. 24, 30 (S.D.N.Y. 1981).

70. *Insider Trading Problems May Arise for Institutional Investors, Smythe Cautions*, 24 Sec. Reg. & L. Rep. (BNA) No. 34, at 1295 (Aug. 21, 1992). The apt quote is from Marianne Smythe, the director of the SEC's Division of Investment Management.

71. *See* Rockwell Graphics Sys., Inc. v. DEV Indus., Inc., No. 84-C-6746, 1991 U.S. Dist. LEXIS 9002, at *15, 1991 WL 127592, at *5 (N.D. Ill. June 24, 1991); *In re* Chicago South Shore & South Bend R.R., 101 B.R. 10, 14-15 (Bankr. N.D. Ill. 1989); Bauunternehmung v. United States, 8 Cl. Ct. 793, 795 (Cl. Ct. 1985).

72. *See* United States v. Goot, 894 F.2d 231, 235-36 (7th Cir.), *cert. denied*, 498 U.S. 811 (1990); Cox v. American Cast Iron Pipe Co., 847 F.2d 725, 732 (11th Cir. 1988); Kearns v. Chrysler Corp., 771 F. Supp. 190 (E.D. Mich. 1991); *Rockwell Graphics Sys., Inc.*, 1991 U.S. Dist. LEXIS 9002, at *15, 1991 WL 127592, at *5; *In re Chicago South Shore & South Bend R.R.*, 101 B.R. at 15; Nemours Found. v. Gilbane, 632 F. Supp. 418, 429 (D. Del. 1986); Rowley v. Waterfront Airways, 493 N.Y.S.2d 828 (App. Div. 1985).

73. *See Cox*, 847 F.2d at 727; Dugar v. Board of Educ., No. 92-C-1621, 1992 U.S. Dist. LEXIS 8650, at *19, 1992 WL 142302, at *7 (N.D. Ill. June 18, 1992).

74. *See* United States *ex rel.* Lord Elec. Co. v. Titan Pacific Constr. Corp., 637 F. Supp. 1556, 1566 (W.D. Wash. 1986) (screened attorney was only "of counsel"); Jenson v. Touche Ross & Co., 335 N.W.2d 720, 732 (Minn. 1983) (screened attorney was only "of counsel"); Doty & Powers, *supra* note 38, at 178.

75. *See* Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1577-79 (Fed. Cir. 1984); Gas-A-Tron v. Union Oil Co., 534 F.2d 1322, 1325 (9th Cir. 1976) (per curiam), *rev'g* Nos. 73-191-TUC-WCF & 73-212-TUC-JAW, 1974 WL 919 (D. Ariz. Aug. 28, 1974) (also available in LEXIS, Genfed library, Dist file), *cert. denied sub nom.* Shell Oil Co. v. Gas-A-Tron, 429 U.S. 861 (1976); American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1129-30 (5th Cir. 1971); Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp., 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

of information, informal firm meetings on screened cases may need to be abandoned in favor of formal meetings with attendance noted.

Another way to monitor fire walls is suggested by securities firms, which keep records of all meetings and phone calls between screened brokers and employees working on the screened matters. This will remind both groups that, even if contact is appropriate for other purposes, complete records must be kept to document the date, duration, and content of each contact.[76]

Equally important, but easily overlooked, are informal contacts between lawyers over lunch, at parties, or in elevators, corridors, or rest rooms in the firm. The inadvertent remark when a lawyer's guard is down may pass significant information rather innocently.[77] Requiring screened firm members to account for the date, time, and place of each such contact may be necessary to establish adequate monitoring.

Because these procedures are cumbersome and might not prevent intentional[78] or inadvertent leaks, law firms may also be required to audit their own compliance on a periodic basis.[79] This task will require the establishment of a firm-wide compliance department, perhaps an ethics committee or branch of a management committee.[80] Adequate control may require a firm to hire full-time compliance personnel.

The compliance department should periodically review both the physical structure of the screens and the records of contact with screened lawyers to assure that no leaks have occurred. The firm should establish policies and procedures that encourage disclosure of leaks and give the department authority to discipline those who fail to comply with screening mechanisms. Finally, the department should provide continuing professional education that informs firm members of policies regarding conflicts checks and establishing and maintaining screens.[81] The firm should give special attention to new employees and those in sensitive areas, and it should require all lawyers to attend training sessions that update and reinforce applicable law and firm policy.

A legal environment that accepts the use of fire walls does not necessarily guarantee their *risk-free* adoption and use. Once allowed, screens proliferate.

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76. Doty & Powers, *supra* note 38, at 178.

77. Lawrence J. Fox, *The Ethics of Conflicts: Are There Any?*, AM. LAW., Mar. 1993, Special Corporate Counsel Section, at 41, 48.

78. *See* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *aff'g in part and rev'g in part* Westinghouse Elec. Corp. v. Rio Algom Ltd., 448 F. Supp. 1284 (N.D. Ill.), *cert denied*, 439 U.S. 955 (1978); *In re* Highway Truck Drivers & Helpers Local Union #107, 86 B.R. 404 (Bankr. E.D. Pa. 1988).

79. *See* Doty & Powers, *supra* note 38, at 178-79.

80. *See* Robert E. O'Malley, *Preventing Legal Malpractice in Large Law Firms*, 20 U. TOL. L. REV. 325, 361-63 (1989).

81. *See* Doty & Powers, *supra* note 38, at 179.

With even a few lateral hires, a firm of 100 lawyers could easily generate dozens, or even hundreds, of screens. Unless screened lawyers somehow avoid all communication with the rest of the firm, the danger of inadvertent disclosure of confidential information is ever present.

B. External Enforcement

Screening has developed into a complex science in other contexts in which the failure to screen can result in civil or criminal sanctions. Law firms, on the other hand, have been relatively free of such sanctions, concerning themselves instead with the dilemmas created by disqualification motions. Law firms should realize, however, that both tort liability and disciplinary sanctions also lurk as potential pitfalls for the unprepared law firm.

Former clients who establish that a fire wall is not viable—or worse, has leaked—can maintain tort suits based on breach of fiduciary duty for any damages caused by the misuse of confidences.[82] If the matter is before a court, the former client also can successfully seek the disqualification of the firm from its representation of the opposing client.[83] Former clients whose confidences are at risk, even in nonlitigated matters, may seek injunctive relief to prevent the firm from representing a client with adverse interests.[84] If the firm is disqualified, the current client must seek new counsel. Absent prior consent to this risk, that client may also seek damages for breach of fiduciary duty. Typical damages are partial or total recovery of fees paid.[85]

In deciding disqualification matters, courts rely on various rules of professional ethics.[86] Violation of these standards additionally creates the potential for disciplinary sanctions which can range from private censure to disbarment.[87] And some governmental agencies have attempted to regulate the behavior of attorneys who practice before them as well.[88]

The most effective sanction, however, is no doubt the criminal penalty. Although no criminal penalties currently exist to punish leaks in law firm fire

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82. *See* Maritrans GP Inc. v. Pepper, Hamilton & Sheetz, 602 A.2d 1277 (Pa. 1992), *rev'g* 572 A.2d 737 (Pa. Super. Ct. 1990).

83. *See* T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953).

84. *See Maritrans GP Inc.*, 602 A.2d at 1286-88.

85. *See* Silbiger v. Prudence Bonds Corp., 180 F.2d 917, 920 (2d Cir.), *cert. denied*, 340 U.S. 813, *and cert. denied*, 340 U.S. 831 (1950); Dewey v. R.J. Reynolds Tobacco Co., 536 A.2d 243, 252 (N.J. 1988).

86. *See* WOLFRAM, *supra* note 23, § 7.1.7, at 328-29, 332-33.

87. *See* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT (1993). An example of a case in which disciplinary sanctions were imposed is *In re* Disciplinary Proceedings Against Vaughn S. Conway, 301 N.W.2d 253 (Wis. 1981).

88. *See* WOLFRAM, *supra* note 23, at § 3.6.2.

walls, they easily could be established, and not only for individual lawyers. Professor Schneyer recently has urged vicarious liability for law firms where ethics rules "implicate centralized firm functions, such as rules dealing with the handling of client funds, files and property."[89] Analogizing to the regulation of corporate crime, he also argues that finding a law firm vicariously liable for a ethical violation "would enable a court or agency to impose discipline even when it cannot practically determine who committed the underlying offense or it is reluctant to proceed against specific lawyers because such action would amount to scapegoating."[90] The scheme might recognize a defense to vicarious liability modeled on the "due diligence" defense built into the Securities and Exchange Commission's disciplinary system for broker-dealers.[91] Imposition of vicarious criminal liability and recognition of the due-diligence defense would drastically speed the adoption of monitoring techniques by law firms.

Schneyer argues that these measures are necessary to respond to the "increasingly bureaucratic nature of law firm governance."[92] Although his suggestions may seem a remote possibility today, they have already become the basis for one bar committee's recommendation that poor conflict checking procedures be grounds for law firm discipline.[93] There is also good reason to doubt lawyers' objectivity in evaluating the effectiveness of current sanctions to deter former-client conflicts. As Professor Rhode so trenchantly put it: "[A]ttorneys readily concede in other contexts [that] disinterested evaluation is impossible where the decisionmaker's status, income, and self-image turn on the result."[94]

One thing is clear: market growth in other businesses has sometimes attracted strong regulatory responses. It seems prudent not to discount this possibility for law firms as well.

IV. ETHICAL REPRISE: A MOVE TO SMALLER FIRMS?

The cacophony of regulatory response is only one of at least two potential responses to the market crescendo. Dissatisfied with the possibility or reality of regulating fire walls, law firms may turn their attention to part of the underlying problem—law firm size—as another way of ameliorating the

89. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 27 (1991).

90. *Id.* at 28.

91. *Id.* at 29.

92. *Id.* at 45.

93. *See* The Comm. on Professional Responsibility of the Ass'n of the Bar of the City of N.Y., *Discipline of Law Firms*, 48 REC. ASS'N B. CITY N.Y. 628, 639-40 (1993).

94. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 641 (1985).

problem of conflict of interest.

The risk of conflict between current and former clients can be reduced, but not eliminated, by sizing down and by avoiding mergers and lateral hires. For firms that do not fall below fifty lawyers in size, screens may remain available to ameliorate former-client conflicts.[95] Lawyers who take this alternative seriously will still be able to serve the needs of large clients with multifarious demands, as long as they respond creatively to their client's needs.

Palay and Galanter suggest that lawyers could even be forced to work alone or in small groups and still maintain their personal specialization much as today's boutiques do.[96] Corporate clients would probably have more done by in-house counsel, who represent only one client.[97] Lawyers wanting to provide a full menu of legal services could join networks or affiliation groups that link their clients to other lawyers for other services.[98] Brokers might even be used to guide clients to qualified lawyers in the network. Lawyers could also enlarge their service potential by relying more on "almost" lawyers such as paralegals[99] and by contracting out more routine tasks.[100] Insofar as these options reduce the opportunities to share confidences, they reduce the problem of taint and the need for screens.

Would these changes offer any benefits? Consider first the social utility of smaller law firms. Assuming that they could creatively network so as to provide efficient service,[101] will any other change be detectable?

Less legal bureaucracy may obviate the need for additional law firm regulation such as the kind Schneyer suggests. Forcing corporate clients to use a network of separate lawyers rather than one large firm may also limit their ability to manipulate the legal system against a less wealthy opponent. The current state of the profession "accentuat[es] the advantages of those able to invest in continuous service, advance planning, long term strategy and large manoeuvres."[102]

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95. *See supra* text accompanying notes 34-36.

96. GALANTER & PALAY, *supra* note 3, at 125.

97. *Id.* at 132.

98. Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C. L. REV 905, 921 (1994).

99. But see cases cited *supra* note 59 and Kelly A. Randall, Note, *Do Your Clients' Confidences Go Out the Window When Your Employees Go Out the Door?*, 42 HASTINGS L.J. 1667 (1991), for ethical issues raised by the use of support staff.

100. Galanter & Palay, *supra* note 98, at 922; *see also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356 (1988); Marshall J. Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U. L. REV. 1115, 1157-1160 (1982).

101. Gilson and Mnookin argue that economies of scale can be achieved by firms "much smaller than today's large law firms." Gilson & Mnookin, *supra* note 6, at 317.

102. Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, *in* THE SOCIOLOGY OF THE PROFESSIONS 152, 172 (Robert Dingwall & Philip Lewis eds., 1983).

Smaller working units also remove the force of a large group ethic enforced through hierarchical governance.[103] This could have positive or negative effects, depending on the ideology of the hierarchy.[104] Organizations managed by those who value and reward compliance with ethics rules have a great deal of power to encourage and promote appropriate behavior. Management that ignores ethics rules, however, risks apathy or positive reinforcement of their violation. The latter is especially likely when some other goal of the organization, such as profit or a desire to win, conflicts with ethical obligations. It may also be more likely in firms that put business managers rather than ethicists in charge of management.

Structural pressures such as these will only be reversed by the fear of larger catastrophes created in an attempt to maximize short-term gains.[105] Faced with an internal norm to add clients or billable hours and the absence of any enforced conflict-of-interest rules, lawyers could easily fall into the trap of inadvertent violation of ethical obligations. Managers of a firm who wish to avoid such a result must do more than pay lip service to ethical rules. Neglect, even if benign, can too easily foster short-term economic benefit maximization at the expense of long-term risk avoidance.

Professor Lisa Lerman's recent study of the billing practices of large firms provides a good example of how law firm atmosphere can foster unethical behavior. Faced with demands for increasing numbers of billable hours and apparently wealthy clients who they thought would not notice, lawyers found it easy and unobjectionable to pad billable time.[106]

Additional insight into the relationship between law firm size and increased risk of unethical behavior requires further scrutiny of the training and incentives given to different groups of lawyers within firms. For example, recent data concerning young lawyers indicate that they express four major concerns about their employment: communication within a firm, professional-life-versus-personal-life issues, the need to do more pro bono work, and equal treatment.[107] Most of these concerns seem to reflect

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Litigation discovery is one area where large firms seem to have an advantage over small firms and sole practitioners. *See* INTERIM REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT 28 (1991).

103. *See* Alan S. Waterman, *Psychological Individualism and Organizational Functioning: A Cost-Benefit Analysis, in* ORGANIZATIONS AND ETHICAL INDIVIDUALISM 19, 41-42 (Konstantin Kolenda ed., 1988).

104. BARBARA CZARNIAWSKA-JOERGES, IDEOLOGICAL CONTROL IN NONIDEOLOGICAL ORGANIZATIONS 123-24 (1988).

105. As early as 1964, one study of large-firm lawyers noted that the conflicts rules were sometimes misunderstood and fairly often breached in practice. *See* Note, *Unchanged Rules in Changing Times: The Canons of Ethics and Intra-firm Conflicts of Interest*, 73 YALE L.J. 1058 (1964).

106. *See* Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 709-14 (1990).

107. *See* GALANTER & PALAY, *supra* note 3, at 128; AMERICAN BAR ASS'N, THE REPORT OF

lawyers' perceived lack of control over their professional lives.[108] The pro bono need suggests another theme. Young lawyers have been more systematically educated about professional responsibility issues than have their seniors. If left in smaller groups with greater control over their own destinies, those young lawyers may be able to develop creative strategies for solving ethical problems.

While it is no doubt true that negative workplace environments stress lawyers,[109] who as a result may offer less reliable advocacy, it remains to be seen what the same lawyers would do on their own. Smaller firms may offer hope for a higher quality of life. They do not guarantee, however, that left alone, lawyers will work less or care more.

Smaller firms may or may not dampen the excessively materialistic goals of some large-firm lawyers.[110] A decreased emphasis on extreme profit, regardless of firm size, should encourage more humane working environments, including those that allow personal trade-offs in lifestyle.[111] And lawyers who choose smaller working units will doubtless be less able to hide in an institution whose organization acts to absorb individuals into a corporate ethic. Such lawyers will necessarily take more responsibility for their own actions because they govern themselves.[112] The character of those actions will depend on the integrity and training of those lawyers.

The few completed behavioral studies of lawyers offer tentative factors that predict a lawyer's compliance with ethics rules. Jerome Carlin conducted a study of New York lawyers and concluded: "Adherence to ethical norms, then, is a product of *both* inner disposition, which is more or less evenly distributed in the bar, and situational controls . . . ."[113] His work also

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AT THE BREAKING POINT, A NATIONAL CONFERENCE ON THE EMERGING CRISIS IN THE QUALITY OF LAWYERS' HEALTH AND LIVES—ITS IMPACT ON LAW FIRMS AND CLIENT SERVICES 27 (1991). And for a discussion of how firms attempt to define their roles in society, see generally Jack L. Sammons, Jr. & Linda H. Edwards, *Honoring The Law in Communities of Force: Terrell and Wildman's Teleology of Practice*, 41 EMORY L.J. 489 (1992).

108. *See* Amee McKim, Comment, *The Lawyer Track: The Case for Humanizing the Career Within a Large Law Firm*, 55 OHIO ST. L.J. 176 (1994).

109. *See* YOUNG LAWYERS' DIV., AMERICAN BAR ASS'N, THE STATE OF THE LEGAL PROFESSION: 1990 56, 80 (1991).

110. *See generally* Judith L. Maute, *Balanced Lives in a Stressful Profession: An Impossible Dream?*, 21 CAP. U. L. REV. 797 (1992). Many of the most successful new firms in recent years have been led by senior partners who subordinated personal gain to the firm's development. *See* Gilson & Mnookin, *supra* note 6, at 388-89 (citing Steven Brill, *Leadership*, AM. LAW., Sept. 1983, at 18).

111. *See* John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1045 (1983); GALANTER & PALAY, *supra* note 3, at 127-129.

112. *See* Leubsdorf, *supra* note 111, at 1045; *cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1993).

113. JEROME E. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 148 (1966). This study was an outgrowth of an earlier Carlin study of Chicago lawyers. *See* JEROME

suggests that lawyers tend to adopt the moral values of their clients.[114] Heinz and Laumann's more recent study of the Chicago bar confirms this observation.[115]

Small firms are as affected by external market pressures as large firms, but today they have several new weapons in their arsenals to ameliorate the effects of those pressures. Lawyers can advertise to find business[116] and in many jurisdictions can receive a proportion of a client's fee for referring the client to another lawyer.[117] Small firms also lack some of the internal pressures of the "tournament" created by partnership structure,[118] and, given their size, are less likely to encounter potential conflicts.

Heinz and Laumann found that large-firm lawyers tend to rely on smaller client bases than their small-firm colleagues.[119] Thus, to the extent that small firms do not depend heavily on any given client, the loss of a few potential clients due to conflicts should not be as disastrous for small firms as for large firms.

The fact that large-firm lawyers spend more time on fewer clients suggests a final area for attention: the effect that clients have on lawyers. Because all lawyers advocate to some degree, they often seek to reduce personal dissonance by adopting the viewpoint of those clients upon whom they most depend. If smaller units of lawyers bring with them a greater diversification of their client bases, the bar as a whole may have an opportunity for renewed independence.

V. CONCLUSION

The exponential growth of large law firms has brought with it an exponential increase in the potential for conflicts of interest. Large law firms argue that fire walls should be allowed as safe harbors against the use of former-client confidences. Some courts have agreed with this approach, but very little thinking has been done about its long-term consequences.

E. CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO (1962).

114. *See* CARLIN, LAWYERS' ETHICS, *supra* note 113, at 66-83.

115. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 359 (1982).

116. *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988), *rev'g* 726 S.W.2d 299 (Ky. 1986); Bates v. State Bar, 433 U.S. 350 (1977), *aff'g in part and rev'g in part* 555 P.2d 640 (Ariz. 1976).

117. *But cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1993) (limiting the ability of lawyers to split fees).

118. *See supra* part I.B.

119. *See* Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 528-30 (1985).

Faced with the specter of greater regulation, perhaps including criminal sanctions, lawyers can choose to limit liability in two ways. Some may opt for elaborate monitoring techniques that may support a due-diligence defense to liability. Others may prefer, or may be forced by court decision, to address a significant part of the underlying problem: law firm size.

If large firms become worried enough about the problem of regulatory cacophony, they may choose to size down or split up as means of avoiding conflicts of interest. Smaller law firms may offer potential for creative marketing, better quality of life for lawyers, and renewed lawyer professionalism in client service.