12-1996

Are Law Firm Partners Islands unto Themselves? An Empirical Study of Law Firm Peer Review and Culture

Susan Saab Fortney
Texas A&M University School of Law, susanfortney2014@gmail.com

Recommended Citation

Susan S. Fortney, *Are Law Firm Partners Islands unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 Geo. J. Legal Ethics 271 (1996).
Available at: https://scholarship.law.tamu.edu/facscholar/486

Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture

SUSAN SAAB FORTNEY*

INTRODUCTION

It's 10:00 a.m. Do you know what your law partners are doing? Although the partners at Baker & McKenzie, the world's largest firm, could not answer this question, a San Francisco jury did answer a question presented to them regarding the conduct of a Baker & McKenzie partner. In 1994, the jury awarded 7.1 million dollars in punitive damages to a former Baker & McKenzie secretary who alleged that a Baker & McKenzie partner sexually harassed her.[1]

On the opposite coast, partners at the New York-based firm of Kaye, Scholer, Fierman, Hays & Handler (Kaye, Scholer) probably regret permitting Peter Fishbein, a senior litigator with no financial institution legal experience, to handle the regulatory examination of Lincoln Savings and Loan Association.[2] Mr. Fishbein's contentious approach and unfamiliarity with regulatory matters apparently contributed to the Kaye, Scholer nightmare, which threatened the

---

* Associate Professor of Law, Texas Tech University. A research grant for this study was funded by the Texas Bar Foundation. The author thanks the Board of Trustees of the Texas Bar Foundation for supporting this project. The author also appreciates the thoughtful comments of Professor Curtis J. Berger, Harvey J. Goldschmid, Teresa S. Collett, and Timothy W. Floyd. This article was written in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University.

1. Richard C. Reuben, *Award a Lesson for Firms, Baker & McKenzie*, A.B.A. J., Nov. 1994, at 19. The trial court judge reduced the jury's award by half. *See* Nancy Erika Smith, *Discrimination in Law Firms: Women Are Not Going to Take It Anymore*, NEW JERSEY LAW., Aug./Sept. 1995, at 8, 10 (arguing that Baker & McKenzie ratified harassment by failing to conduct an investigation into the defendant-partner's behavior). The number of discrimination claims lodged against law firms has increased substantially in the past few years. The U.S. Equal Employment Opportunity Commission reported that worker complaints against law firms increased 58% during the first half of the 1990s. Richard C. Reuben, *Statistics Show Substantial Leap in Gender, Age and Disability Claims*, A.B.A. J., Dec. 1995, at 12.

2. As described in a critical account of facts, Peter Fishbein "turned a routine examination of Lincoln into a contentious brawl." Susan Beck & Michael Orey, *They Got What They Deserved*, AM. LAW., May 1992, at 68-69. In its defense, Kaye, Scholer obtained an opinion from ethics expert, Geoffrey Hazard. Professor Hazard's opinion assumed facts emphasizing that Kaye, Scholer served as Lincoln's litigation counsel while the firm of Jones, Day, Reavis and Pogue acted as Lincoln's regulatory counsel. *See* Summary of Expert Legal Opinion of Geoffrey C. Hazard, Jr., *reprinted in* THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER, 381, 382-83 (PLI Corp. Law & Practice Course Handbook Series No. 779, 1992). According to John Villa, a prominent legal malpractice defense attorney, the assumption that Kaye, Scholer was acting as "litigation counsel" was important because "litigation counsel" have the "broadest leeway" to "characterize facts in a light favorable to the client . . . ." Steve France, *Just Desserts: Don't Cry for Kaye, Scholer*, LEGAL TIMES, April 6, 1992, at 28.

solvency of the law firm and ultimately cost the firm and its partners forty-one million dollars to settle the government's legal malpractice claims following the failure of Lincoln Savings and Loan Association.[3]

A recent law firm scandal capturing the headlines involves the venerable Richmond-based firm of Hunton & Williams. Some 120 victims have alleged that Scott J. McKay Wolas, a valued rainmaker and leading litigation partner in the firm's New York office, funneled 40 to 100 million dollars into a liquor sales Ponzi scheme.[4] In the firm's defense, the firm's managing partner insisted that Mr. Wolas' partners did not know of or authorize any of his investment activities.[5] In two federal cases, including one class action, filed against the firm and its partners, the plaintiffs' attorneys will attempt to show that the firm's partners should have known about Mr. Wolas' conduct, especially after three associates blew the whistle to firm management.[6]

In the wake of these cases and other multi-million dollar claims alleging attorney misconduct, law firm partners are re-examining their relative autonomy as well as their vicarious liability for the acts and omissions of their partners.[7] Many partners have attempted to limit their vicarious liability by reorganizing their firms as professional corporations, limited liability partnerships, or limited liability companies.[8] Yet, reorganization does not guarantee that a firm and its

---

3. *See* Michael Orey, *The Lessons of Kaye, Scholer*, AM. LAW., May 1992, at 3 (suggesting that the government's claims against Kaye, Scholer could have been avoided if a Kaye, Scholer banking regulatory lawyer had participated in the engagement). Although Kaye, Scholer earned gross revenues of $185 million in 1990 and averaged $660,000 in partner profits, the firm faced potential insolvency when its creditors refused to lend the firm additional amounts. *Id.* at 81. As illustrated by the threatened insolvency of Kaye, Scholer, the "traditional view of the law firm as a stable institution with an assured future is now challenged by an awareness that the largest and most prestigious firms are fragile economic units." ROBERT W. HILLMAN, LAW FIRM BREAKUPS: THE LAW AND ETHICS OF GRABBING AND LEAVING 1 (1990).

4. Ann Davis, *Scandal Embarrasses Virginia's Hunton*, NAT'L L. J., May, 13, 1996, at A1.

5. *Id.* at A23.

6. As explained by Professor Roy Simon, ethics expert at Hofstra University School of Law, Hunton & Williams should have immediately referred the matter to disciplinary authorities once the associates reported overbilling and false billing. *Id.* at A23 (describing other "red flags" that firm partners should have acted upon).

7. According to Professor S. S. Samuelson, at Boston University School of Management, "[l]aw firms face a fundamental dilemma in meeting the need for individual autonomy and centralized decision making while also responding to the economic demands of the environment for more centralized control and planning." S. S. Samuleson, *The Organizational Structure of Law Firms: Lessons from Management Theory*, 51 OHIO ST. L.J. 645, 661 (1990). In order to respond to the realities of today's marketplace, one law firm management consultant has recommended that firms alter their traditional pyramid structure to assess partners periodically. *See* Ward Bower, *Rethinking Law Firm Organization — The New Pyramid*, A.B.A. J., April 1989, at 90. Professors Galanter and Palay, the authors of THE TOURNAMENT OF LAWYERS: THE GROWTH AND TRANSFORMATION OF THE LARGE LAW FIRM (1991), agree that firms must rethink their organization, structure, and controls. In speculating on the large law firm's future, Professors Galanter and Palay predict that partnership status will become "less of a plenary or permanent reward, necessitating the design of additional incentives for performance and loyalty." Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C. L. REV. 905, 913 (1994).

8. *See* Dennis E. Curtis, *Old Knights and New Captains: Kaye, Scholer, The Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. CAL. L. REV. 985, 1014 (1993) (noting that firms have reorganized as professional corporations and limited liability partnerships in an attempt to "make their pockets shallower" so that they will be a less inviting target for legal malpractice claims). For a discussion of the nationwide trend of

principals will be shielded from liability.[9] The judiciary, in the exercise of its inherent power to regulate the legal profession, may reject statutory limits on principals' liability.[10] Even if courts recognize a limited liability shield that virtually eliminates the vicarious liability of law firm principals, the firm's assets and reputation remain at risk.[11] Some firms are, therefore, taking steps to protect the firm and its assets.[12] These steps vary from simple systems for avoiding conflicts of interest to more elaborate measures monitoring the conduct of all firm attorneys.[13]

Because the majority of the claims against firms relate to the conduct of their principals,[14] legal malpractice experts and commentators have recommended that law firms implement peer review to obtain information and to evaluate the work of firm principals.[15] Law firm peer review refers to the process in which firm principals evaluate the work of other firm principals. Such peer review takes

---

law partnerships to reorganize as limited liability firms, see Richard C. Reuben, *Added Protection*, A.B.A. J., Sept. 1994, at 54-57.

9. For a discussion of some of the ethical and practical obstacles practitioners may encounter as the result of reorganizing as limited liability firms, see Anthony E. Davis, *Limited Liability for Lawyers*, PROF. LAW., Aug. 1995, at 1.

10. *See* Debra L. Thill, Comment, *The Inherent Powers Doctrine and Regulation of the Practice of Law: Will Minnesota Attorneys Practicing in Professional Corporations or Limited Liability Companies Be Denied the Benefit of Statutory Liability Shields?*, 20 WM. MITCHELL L. REV. 1143, 1151 (1994) (referring to the split in the courts as to whether to allow attorneys to limit their vicarious liability). For example, the court in *Stewart v. Coffman* held that a shareholder in a law firm organized as a professional corporation was not vicariously liable for the legal malpractice of another shareholder. 748 P.2d. 579 (Utah Ct. App.), *cert. granted*, 765 P.2d 1277 (Utah 1988), *cert. dismissed*, Aug. 19, 1988 (unpublished order). *Contra* First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674, 675 (Ga. 1983) (rejecting the statutory limits on liability "in the interest of professionalism"). Recently, the Georgia Supreme Court overruled *Zagoria* "to the extent that it states that this court, rather than the legislative enabling act, determines the ability of lawyers to insulate themselves from personal liability for the acts of other shareholders in their professional corporation." Henderson v. HSI Financial Services, Inc., 471 S.E.2d 885, 886 (Ga. 1996). This reversal illustrates the uncertainty involved in predicting whether courts will recognize the new limited liability organizational structures.

11. Although a plaintiff could collect a legal malpractice judgment from the firm's insurance policy, other firm assets, and the personal assets of a wrongdoer, the plaintiff could not collect against the innocent partners' personal assets under the traditional theory of vicarious liability. Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47. VAND. L. REV. 1657, 1750 (1994).

12. As explained by the Director of Quality Assurance at Long & Levitt, a firm that specializes in legal malpractice defense work, firms are beginning to recognize that they can not rely solely on the skills and good intentions of individual lawyers. Daniel W. Hager, *Thriving in the 90's with Quality Law Practice*, 3 LEGAL MALPRACTICE REP. 1 (1994).

13. For a description of the procedures law firms have implemented, see Larry Smith, *Still Reeling in the Wake of S & L Suits, Law Firms Grope for Solutions*, OF COUNSEL, August 3, 1992, at 1.

14. According to American Bar Association statistics, attorneys with ten or more years of legal experience generate 66% of all malpractice claims. ABA STANDING COMMITTEE ON LAWYERS PROFESSIONAL LIABILITY, THE LAWYERS' DESK GUIDE TO LEGAL MALPRACTICE 31 (1992) [hereinafter LAWYERS' DESK GUIDE].

15. For example, Robert O'Malley, loss prevention counsel to the Attorneys' Liability Assurance Society (ALAS), a captive liability insurer insuring the nation's largest firms, has stressed the importance of peer review. Larry Smith, *Malpractice Update: Loss Control Not Always a Cure-All*, OF COUNSEL, Feb. 1, 1993, at 1. In his remarks at the Eighth Judicial Conference of the United States Court of Appeals for the Federal Circuit, O'Malley described how the legal malpractice problems afflicting large firms could be addressed through partner peer review. 133 F.R.D. 245 (1987).

different forms ranging from monitoring compliance with established firm policies and procedures including principals' completion of conflict of interest checks to more subjective performance assessment of the manner in which the reviewed principal handles his or her clients' problems.[16]

Commentators identify a number of benefits that result from peer review.[17] First, peer review has been heralded as a safeguard to reduce the risk of malpractice claims and grievances.[18] Peer review also enables firms to evaluate and enhance the quality of legal services. These efforts to improve the quality of legal services impress existing and prospective clients, thus helping the firm to retain existing clients and develop new business.[19] Facing increased competition, law firms may use peer review to distinguish themselves from other firms which have not taken steps to foster an ethical atmosphere where principals are accountable.[20] Implementation of peer review measures helps firm partners satisfy ethical duties under the various state versions of *Model Rules of Professional Conduct Rule* 5.1.[21] Under *Model Rule* 5.1(a), a partner must take reasonable steps to ensure that the firm has in effect measures giving reasonable assurance that all attorneys in the firm comply with the *Model Rules*.[22] Peer review may undercut an intra-firm perception that emphasizes "rainmaking" at

---

16. One commentator insists that subjective performance assessments include the following components: (1) a process to obtain critical, candid, and informed assessments of legal work performed; (2) a commitment to analyze such assessments and furnish direct and meaningful feed-back to the reviewed attorney; and (3) a recognition of the need to implement appropriate mechanisms or changes necessary to maintain and enhance quality and competence. Harry H. Schneider, Jr., *One Approach to Partner Peer Review: The Client Audit*, LAW. LIABILITY REVIEW, Aug. 1987, at 1-2.

17. For a thorough discussion of the objectives of peer review, see John F. Corrigan, *Assuring Quality Through Oversight of Partners and Other Quality Assurance Techniques*, *in* A.L.I.-A.B.A. COMM. ON CONTINUING PROF. EDUC., LAW PRACTICE QUALITY EVALUATION: AN APPRAISAL OF PEER REVIEW AND OTHER MEASURES TO ENHANCE PROFESSIONAL PERFORMANCE 301, 305-07 (1987) [hereinafter WILLIAMSBURG REPORT].

18. *See* Lawrence G. Baxter, *Reforming Legal Ethics in a Regulatory Environment: An Introductory Overview*, 8 GEO. J. LEGAL ETHICS 181, 211 (1994) (suggesting that firms are likely to impose internal controls such as peer review when the firm itself will be liable for professional misconduct).

19. *See* WILLIAMSBURG REPORT, *supra* note 17, at 305 (explaining that quality assurance can be a selling point). A survey of Fortune 500 general counsel revealed that 71% of the respondents indicated their selection of outside counsel would be influenced by a firm's implementation of a Total Quality Management Program. Nancy Blodgett, *More and More Firms Take the TQM Plunge*, LEGAL MGMT., May-June 1993, at 25.

20. *See* Hager, *supra* note 12, at 1 (suggesting that "an effective quality program will help separate those firms that thrive in the 1990s from those that stagnate or, as is more and more often the case, cease to exist").

21. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1995) [hereinafter MODEL RULES]. *See also Types of Practice*, LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) § 91:201-203 (Apr. 22, 1992) (discussing the various versions of *Model Rule* 5.1 adopted by states). A recently adopted New York disciplinary rule requires that law firms "make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules." 22 NYCCR Part 1200.5(a). The rule further states that a "law firm shall adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm." *Id.* In adopting this rule, New York became the first state to authorize professional discipline against entire law firms. Ann Davis, *N.Y. Makes Firms Liable*, NAT'L L.J., June 10, 1996, at A6.

22. MODEL RULES Rule 5.1(a) ("A partner in a law firm shall 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.").

the expense of other contributions. Peer review also cultivates an institutional perspective of the law firm as a team rather than an association of attorneys sharing offices.[23]

Despite the benefits, some skeptics question the feasibility of peer review because principals in law firms tend to function as islands unto themselves.[24] This opinion may not accurately reflect practitioners' perspectives on peer review or their ideology regarding law firm practice. As noted by Professors Robert L. Nelson and David M. Trubek, "We do not know how lawyers in various organizational and institutional locations throughout the profession see the contexts in which they operate, define the interests they pursue, and perceive obligations they must honor."[25] This Article addresses these questions by studying law firm peer review and the professional ideologies that affect law firm practice.

Using empirical data obtained from a survey of Texas law firms, this Article examines how attitudes and law firm culture affect peer review and principal accountability. My central thesis is that firms with a team culture are more likely to implement peer review than firms that function as a confederation of individual practitioners.[26]

After briefly describing the research design and the general profile of respondents in Part I, Part II discusses peer review measures used by the firms surveyed for this Article. Part III analyzes attitudes about peer review; Part IV focuses on the obstacles to peer review. Part V considers the connection between firm culture and the implementation of peer review measures. Finally, the conclusion explains how firm managers can reshape attitudes to address the resistance to peer review and institute peer review measures which serve the firm, its attorneys, its clients, and the community.

I. SURVEY DESIGN

A. METHODOLOGY

The survey, conducted in the summer of 1995, targeted all Texas law firms

23. *See* Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329, 344-48 (1995) (discussing additional reasons why firms should consider peer review measures). Firms may institute peer review as a risk management measure because courts may not recognize statutory limits on attorney liability. Peer review measures also boost intra-firm communications and help firms in defending against claims that firm attorneys failed to monitor an alleged wrongdoer. *Id.*

24. At the 22nd ABA National Conference on Professional Responsibility, one conference participant expressed such skepticism, stating that "the problem is not finding out who the bad guy is, but in getting firms to do something about the situation." *Conference Draws Record Attendance*, PROF. LAW., Aug. 1996, at 20, 22 (quoting Peter Jarvis, a partner with the Portland firm of Stoel, Rives, Boley, Jones & Grey).

25. Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES 3 (Robert L. Nelson, et al. eds., 1992).

26. Management consultants use the terms "team" and "confederation" to characterize different approaches to group law practice. For a discussion of the differences in the two approaches, see MARY ANN ALTMAN & ROBERT I. WEIL, AN INTRODUCTION TO PRACTICE MANAGEMENT § 2.09 at 41-47 (2d ed. 1987).

with ten or more attorneys. The study did not include firms with less than ten attorneys because principals in such firms know each other and can rely on informal peer review rather than formal measures.[27] Using information obtained from the Interest on Lawyer's Trust Accounts Program (IOLTA) administered by the State Bar of Texas,[28] the survey instrument was sent to each firm's managing partner or principal.[29] The four-page survey instrument included questions on the firms' peer review measures and the respondents' attitudes on peer review, law firm liability, and firm culture.[30] The instructions asked recipients to respond within one month. The mailing included the four-page questionnaire, a self-addressed envelope, and a response card.[31]

B. POSSIBLE SAMPLING ERRORS

By mailing the survey instrument to all Texas firms that reported ten or more attorneys to the State Bar of Texas IOLTA program, possible sampling error was reduced.[32] The IOLTA list of firms proves to be more reliable than lists drawn

---

27. In comparing supervision and training in large and small firms, Professor John Dzienkowski suggests the following reasons why formal review takes on a different dimension in large law firms:

> In small firms, it is likely that individuals who practice together share common values and are of a similar mindset. Furthermore, clients of small firms are more likely to seek an individual lawyer in a firm rather than signing on with the firm itself because of the firm's reputation. In the large firm, partners are not likely to work with all of the other lawyers on a regular basis, and are more likely focused on the work within their section or practice or perhaps in one or two related areas.

John Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 976-77 (1995) (footnote omitted).

28. The Texas State Bar Rules establish the Texas Equal Access to Justice Program, commonly referred to as the "IOLTA Program" [hereinafter IOLTA]. These rules require that all practicing attorneys receiving "client funds that are nominal in amount" or "reasonably anticipated to be held for a short period of time" place the funds in an interest-bearing account. TEX. GOV'T CODE ANN. tit. 2, subtit. G., app., art. XI, § 5(A) (West Supp. 1996). Attorneys must provide the IOLTA Program with information on such accounts. *Id.* at § 5(C). Information gathered from these reports was used to compile the list of firms to whom questionnaires were mailed. If the IOLTA list did not indicate firm size, the firm was not sent a questionnaire. Although the vast majority of the firms reporting no firm size appeared to be solo practitioners, some firms in the target population could have been excluded if they did not have a firm size indicated on the IOLTA list.

29. The name of the firm's managing partner was obtained by contacting each firm. When a firm did not designate a managing partner, the survey instrument was sent to a member of the firm's management or executive committee. The survey instrument was sent directly to the firm's managing attorney because such an attorney logically sits in the best position to answer questions on firm policies and procedures, and may be more inclined to devote time to responding to a survey dealing with management issues.

30. The questionnaire included a fifth page for comments. Prior to finalizing the survey instrument, an informal pretest was conducted with a selected group of attorneys who criticized the survey instrument and technique. See Appendix for the final survey instrument.

31. The instructions asked the respondents to mail the response card separately from the questionnaire. This preserved the anonymity of the questionnaires, while still enabling the tracking of responses.

32. *See* FRANCES K. ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 17 (1981) (explaining that a mail survey provides a larger sample, increasing the external validity of the results and the degree to which conclusions can be generalized to the entire population).

from legal directories such as the Martindale-Hubbell Law Directory or the Texas Legal Directory. These directories only include descriptions of those firms that pay a fee to the publishers.[33] Conversely, the IOLTA listing covers all Texas firms since all Texas attorneys must report to the IOLTA program under Texas law.[34]

For technical reasons related to data entry, not all firms on the IOLTA list indicated the specific number of attorneys associated with the firm. To verify that the survey population included all of the largest Texas firms, I compared the survey population to a published list of "Texas' 100 Largest Firms of 1995."[35] This comparison indicated that only two firms were not included in the IOLTA list. The first firm was an out-of-state firm with only two Texas attorneys; the second split-off from another firm that was already included in the survey population. Subsequently this second split-off firm was also included in the survey population. Thus the survey included the one hundred largest firms in Texas.

C. POSSIBLE NONRESPONSE ERROR

A total of 191 out of 311 law firms responded to the questionnaires mailed,[36] resulting in an overall response rate of 61.4%.[37] Compared to other Texas bar surveys, the survey appears to have achieved among one of the highest response rates.[38] A number of factors may have attributed to the high response rate. First, the cover page of the questionnaire explained that the study was partially funded by the Texas Bar Foundation. That fact probably impressed respondents, as Texas attorneys perceive the Texas Bar Foundation as a prestigious group that funds worthy projects.[39] The cover page of the questionnaire included the insignia of the Texas Tech University and the address of the Texas Tech University School of

33. *See id.* at 21 n.12 (discussing the limitations of using the *Martindale-Hubbell Law Directory* in empirical research).

34. TEX. GOV'T CODE ANN. tit. 2, subtit. G., app., art. XI, § 5(C).

35. *Texas' 100 Largest Firms of 1995*, TEX. LAW., July 3, 1995, at Supp. 28.

36. The firms fell into the following categories: (1) 40 firms reported over 50 attorneys; (2) 62 firms reported 26 to 50 attorneys; and (3) 209 firms reported 10 to 25 attorneys. Although the IOLTA listing may have indicated that a firm had a certain number of attorneys, the actual number of firm attorneys may have changed by the time the respondent completed the survey instrument. By the time of the survey, 13 firms had reduced in size to less than 10 attorneys. The results also indicated an increase in the number of firms reporting more than 50 attorneys.

37. In the category of firms with over 50 attorneys, the response rate was 87.5%, followed by a response rate of 64.5% for firms with 26 to 50 attorneys. Firms with 10 to 25 attorneys had the lowest response rate (49.3%). The fact that 13 firms had lost attorneys and reported less than 10 attorneys explains the lower response rate for the category of firms with 10 to 25 attorneys.

38. *See* Letter from Dr. Cynthia Spanhel, Director of the State Bar of Texas Department of Research & Analysis to Susan Saab Fortney, dated 5/9/96 (reporting that the 61.41% rate appears to be among the highest response rate achieved on such a study conducted by the Texas State Bar Department of Research and Analysis) (on file with author).

39. *See, e.g.*, Richard Pena, *Texas Bar Foundation: A Window to the Future*, TEX. B.J., Oct. 1996, at 864. *See also* Tex. BAR FOUND. ANN. REP. (1995-1996) (describing the Texas Bar Foundation's mission to improve the legal system and the administration of justice through financial support of educational and charitable activities).

Law. The survey introduction underscored the fact that the responses would be anonymous. The introduction also communicated why the response was important. Specifically, the introduction emphasized that responses were imperative to provide an accurate picture of the attitudes and approaches of Texas law firms. The questionnaires were personally addressed to the firm's managing partner or an attorney acting in a management capacity. The questionnaire also indicated that survey results would be sent to the respondents, thus providing an additional incentive to respond. Finally, those who had not responded within one month were sent a second copy of the questionnaire.[40]

Attorneys may not have responded for different reasons including lack of time or interest.[41] Some attorneys who did not respond may have been reluctant to reveal that their firms had no peer review or limited peer review procedures. If that hypothesis were true, such a widespread failure to respond could result in nonresponse error since the survey results would not accurately reflect the practices and attitudes of all Texas firms. However, the survey results reveal that a large percentage of respondents did not use formal peer review procedures,[42] thus the results do not appear to suffer from this bias. Nothing indicates that nonrespondent firms differed from the respondents in size, composition, or any other statistically-relevant characteristic.

D. RESPONDENTS' GENERAL PROFILE

Respondents fell into four size categories: 35 respondents (18%) were "Large Firms" (more than 50 attorneys); 40 respondents (21%) were "Medium Firms" (26 to 50 attorneys); 103 respondents (54%) were "Small Firms" (10 to 25 attorneys). Although the survey did not target firms with less than 10 attorneys, 13 respondents (7%) indicated their firm included 2 to 9 attorneys. Evidently, these firms lost attorneys subsequent to reporting to IOLTA that such firms contained ten or more attorneys.

The survey responses reflect the efforts by most law firms to limit their principals' vicarious liability by reorganizing as professional corporations or limited liability partnerships. Although firms in Texas can operate as limited liability partnerships or limited liability companies, Table 1 shows that the majority of the respondents practice in firms organized as professional corporations.[43]

---

40. As a final measure, a student assistant called those persons who had not responded.

41. In declining to complete the questionnaire, one attorney stated that a "thoughtful response" would take over an hour.

42. For example, 169 respondents (88%) report that their firms do not use formal procedures for reviewing the work of principals, other than review conducted in connection with compensation decisions.

43. Following the storm of malpractice suits against major Texas law firms, the Texas legislature enacted various statutes to limit professionals' liability. In 1989, the Texas legislature modified the Texas Professional Corporation Act to explicitly state that "the corporation (but not the individual shareholders, officers or directors) shall be jointly and severally liable" with the tortfeasor. TEX. REV. CIV. STAT. ANN. art. 1528e, § 16

TABLE 1
LAW FIRM STRUCTURE

TYPE OF STRUCTURE	NUMBER OF RESPONDENTS	PERCENTAGE OF SAMPLE
General partnership	9	5%
Professional corporation[44]	110	57%
Limited liability partnership	67	35%
Limited liability company[45]	5	3%
Total	191	100%

In sum, 182 (95%) of the respondents practice in some form of limited liability firm or professional corporation.[46] By contrast, only 9 of the respondent firms (5%) function as general partnerships with unlimited liability. Such a disparity indicates that Texas firms have participated in the national movement to change their firm's structure and thereby limit their principals' vicarious liability.[47] More firms operate as professional corporations rather than limited liability partnerships or limited liability companies. Presumably, these firms incorporated before Texas enacted legislation enabling firms to operate as limited liability partnerships and companies.[48]

(West Supp. 1996). Following banking regulators' malpractice lawsuits alleging failure by principals to supervise their peers, the legislature in 1991 amended section 5 of the Texas Professional Corporation Act to state that "[a] shareholder of a professional corporation, as such, shall have no duty to supervise the manner or means whereby the officers or employees of the corporation perform their respective duties." *Id.* at art. 1528e, § 5. In 1991, the Texas legislature was the first in the nation to enact a limited liability partnership act. *Id.* at art. 6132b-3.03. That year the legislature also adopted a limited liability company act. *Id.* at art. 1528n.

44. This total includes one respondent who checked both the "general partnership" and "professional corporation" categories. This response was interpreted to refer to a general partnership composed of professional corporations, which placed the firm in the professional corporation category.

45. This total includes one firm described as a "professional limited liability company."

46. The actual liability shield varies depending on whether a firm operates as a limited liability partnership ("LLP"), limited liability company ("LLC"), or as a professional corporation ("PC"). Under the Texas Professional Corporation Act only the individual attorney and the PC are jointly and severally liable for the acts or omissions of the individual attorney. TEX. REV. CIV. STAT. ANN. art. 1528e, § 16. Other shareholders, officers, and directors are not liable for the misconduct of other firm attorneys or for other corporate debts. *Id.* A similar shield extends to members of LLCs. *See id.* at art. 1528n, § 11.05. Unlike LLCs and PCs, the Texas LLP only protects a partner from vicarious liability for another partner's malpractice. *Id.* at art. 6132b, § 15(2). Although the Texas LLP structure provides less protection than the LLC or PC structure, firms may still prefer the LLP structure because it allows the firm to continue to function as a partnership, avoiding state franchise tax. *Id.* at § 171.001(a).

47. *See* Deborah A. Demott, *Our Partner's Keepers? Agency Dimensions of Partnership Relationships*, LAW & CONTEMP. PROBS. 109 (1995) (discussing this trend and the consequences of allowing law firm partners to limit their vicarious liability).

48. The Texas limited liability partnership legislation originated as an alternative means for allowing professionals to limit their liability without subjecting themselves to the federal income tax consequences of practicing in professional corporations. R. Dennis Anderson et al., *Registered LLPs*, TEX. B.J., July 1992, at 728.

The following table shows firm organization and firm size.

TABLE 2
FIRM STRUCTURE AND FIRM SIZE

	LARGE FIRMS OVER 50 ATTORNEYS N = 35	MEDIUM FIRMS 26-50 ATTORNEYS N = 40	SMALL FIRMS 10-25 ATTORNEYS N = 103
General partnership	14%	3%	3%
Professional corporation	31%[49]	72%	58%
Limited liability partnership	51%	25%	36%
Limited liability company	3%	0%	3%

These percentages reveal that even the smallest firms in the survey operate as limited liability partnerships and companies. Multi-state obstacles and other complications related to large firm reorganization probably explain why the largest percentage of general partnerships is found among law firms with more than fifty attorneys.[50] However, the majority of law firms consisting of over fifty attorneys are organized as limited liability partnerships. Limited liability partnerships provide protection to law firm principals. Moreover, converting from a general partnership to a limited liability partnership appears to be much easier than converting to a professional corporation or limited liability company.[51]

II. PEER REVIEW MEASURES EMPLOYED

The questionnaire defined "peer review" as "the process in which law firm partners or principals monitor and evaluate the job performance of their colleagues."[52] Given the number of incorporated firms, the survey used the term

49. As discussed in note 44, one respondent checked both "professional corporation" and "general partnership." Assuming that the firm operates as a general partnership of professional corporations, the firm was included in the professional corporation category. The percentages in the large firm category do not total 100% because of rounding to the nearest whole number.

50. *See* Dzienkowski, *supra* note 27, at 987-88 (discussing problems interstate firms may encounter in reorganizing).

51. Lisa Isom-Rodriguez, *Limiting the Perils of Partnership*, AM. LAW., July-Aug. 1993, at 30. Unlike the simple procedure of registering as an LLP, the conversion to a professional corporation ("PC") or to a limited liability company ("LLC") requires that a firm rewrite its partnership agreement, form a board of directors, and appoint officers. *Id.* Moreover, registration as an LLP appears to be the most economical vehicle for obtaining limited liability, because the LLP structure avoids possible double taxation imposed on PCs and their shareholders, and avoids franchise taxes imposed on both Texas PCs and LLCs.

52. *See* Appendix, introduction to questionnaire. In this context, "colleagues" refers to other firm partners or principals.

"principal" to denote equity holders in law firms, including members of partnerships and shareholders in corporations.[53]

Peer review covers a spectrum of approaches and procedures designed to enable law firm principals to monitor and evaluate their fellow principals.[54] Traditionally, firms have confined partner review to the evaluation of partner productivity and contributions for compensation purposes.[55] Now, an increasing number of firms are setting the stage for peer review by adopting standard procedures and policies applicable to all firm attorneys. For example, firms typically implement policies and procedures relating to conflict checks, engagement letters, and opinion letters.[56] When firms actually monitor principals' compliance with established procedures and policies, they institute a rudimentary form of peer review.[57] Compliance with these technical standards can be determined by auditing selected client files.[58]

Firms also utilize peer review committees to obtain more substantive information on principal performance. The committee solicits information from the firm's principals, and in some cases, its associates.[59] In addition, a peer review committee can obtain client feedback by conducting a client audit.[60] This information helps the committee assess the principal's performance and client satisfaction.[61]

---

53. *Id.*

54. *See* John F. Corrigan, *Peer Review in the Law Office*, *in* THE QUALITY PURSUIT 61, 62 (Robert Greene ed., 1989) (describing peer review as an "expandable" term). For a description of peer review models, see RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2.31 (4th ed. 1996). *See also* Fortney, *supra* note 23, at 363-70 (describing models of peer review in law firms).

55. *See* William Freivogel, Specific Forms of Partner Peer Review (Apr. 19-20, 1990) (unpublished manuscript, on file with the author) (originally prepared for the A.B.A. Standing Committee on Lawyers' Professional Liability Conference, Partner Peer Review: An Idea Whose Time Has Come) (explaining that the compensation process has generally moved away from lock-step allocation of income based on seniority to allocation based upon other factors such as business controlled and hours worked).

56. As revealed by a 1992 study of fifty law firms nationwide, the majority of respondents utilized computerized conflicts systems, required engagement letters, and required second partner review of formal opinion letters. 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, 1571, 1573, 1581 (Aug. 1993).

57. The Denver firm of Rothgerber, Appel, Power & Johnson has successfully incorporated technical standards review into their peer review program. Scott Graham, *Four Divergent Approaches to Peer Review*, RECORDER, May 24, 1991, at 5.

58. *See* Anne E. Thar, *Start a Peer Review Program*, 82 ILL. B. J. 447, 447 (1994) (suggesting that file review focus on the following items: conflicts checks, engagement letters, organization, documentation, and client communication).

59. Although associates may not be able to evaluate the partners' lawyering skills, associates can provide "valuable feedback on partners' skills as supervisors, teachers and mentors." Daniel W. Hager, *Measuring Quality*, 3 LEGAL MALPRACTICE REP. 30 (1994) (suggesting that supervisory reviews help the firm determine if firm personnel are functioning as a team).

60. Rather than using an internal committee, firms may retain outside consultants to conduct client audits. The firm committee or outside consultants may interview clients or may rely on client survey forms. *See* HENRY W. EWALT, THROUGH THE CLIENT'S EYES: NEW APPROACHES TO GET CLIENTS TO HIRE YOU AGAIN AND AGAIN 167-68 (1994) (providing sample survey forms).

61. The Seattle-based firm of Perkins Coie pioneered client audits conducted by firm attorneys. The firm uses

A. FIRM CONTROLS ON PRINCIPALS SERVING AS OFFICERS/DIRECTORS

The questionnaire inquired about specific peer review measures. Numerous questions asked whether the firm had established policies and procedures relating to the delivery of legal services. The first set of questions asked whether the firm adopted various internal controls. The responses reveal that many firms have taken steps to avoid problem areas identified by legal malpractice insurers and commentators.[62] For example, legal malpractice experts recommend that firms prohibit or carefully monitor firm attorneys acting as officers or directors of for-profit entities.[63] Legal malpractice plaintiffs, most notably the federal banking regulators, target attorneys serving on clients' boards of directors.[64] To avoid exposure for conflicts created when attorneys serve on corporate boards, some firms have adopted internal policies prohibiting such service.[65]

Indeed, the majority of the respondent firms appreciate the risks associated with attorney-directors and have firm policies to manage the problem.[66] A total of

---

client audits to develop business, improve client relations, and prevent malpractice claims. Amy Bach, *Partners Succumb to Checkup From Peers*, AM. LAW., May 1992, at 30, 32.

62. *See* Dennis J. Block et al., *Lawyers Serving on the Boards of Directors of Clients: A Survey of the Problems*, INSIGHTS, Apr. 1993, at 3, 8 (explaining that professional liability insurers have discouraged the practice of attorney-directors and have added policy provisions specifically excluding all malpractice claims relating to conduct that occurred when a member of the law firm held an executive office with a client corporation); *see also* Reilly C. Atkinson & Edward F. Donohue, *Risks of Serving on a Client's Board of Directors*, 2 LEGAL MALPRACTICE REP. 5 (1990) (providing recommendations on dealing with coverage gaps created when attorneys serve as directors and related malpractice prevention techniques).

63. *See, e.g.*, Jett Hanna, *Business Ties with Clients Still Perilous*, TEX. LAWYERS' INSURANCE EXCHANGE LEGAL MALPRACTICE ADVISORY, No. 2, 1995, at 2 (warning against attorneys serving on corporate boards because such service is "fraught with perils"). For a discussion of law firm policies dealing with attorneys serving on corporate boards, see David B. Parker et al., *Law Firm Liability Under the Federal Securities Laws*, INSIGHTS, March 1992, at 19.

64. *See* Charles F. Byrd & Isabella W. Sammons, *FDIC Legal Action Against Attorneys and Other Professionals*, 108 BANKING L. J. 420, 422 (1991) (explaining that banking regulators claims against attorneys commonly involved attorneys who served on the financial institutions' boards of directors). Paul Grace, former Associate General Counsel and Director of FSLIC Litigation, acknowledged that the federal banking regulators would be more likely to investigate and sue attorneys who served as members of the boards of directors of failed financial institutions. John Villa, *Liabilities of Bank and Thrift Counsel*, *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC 483, 493 (PLI Comm. Law & Litig. Practice Course Handbook Series No. A-666, 1993). Attorney-directors appear "to be increasingly popular targets of lawsuits." *See* Gail Diane Cox, *For Lawyers, Lure of the Boardroom Has Its Perils: Serving on a Client's Board Can Lead to Conflicts that Could Get an Attorney Fired or Sued. Will the ABA Ban the Role?*, NAT'L. L.J., July 1, 1996, at B1, B2 (attributing the "dearth of case law" to the frequency of settlement because of the difficulty in defending conflict of interest claims against attorney-directors).

65. *See* Geoffrey C. Hazard, *Conflict of Two Roles*, NAT'L L. J., March 25, 1996, at A21-A22. An ABA Litigation Section Task Force on the Independent Lawyer is examining the role of attorneys who serve as counsel and director to client corporate entities. In connection with this study, Professor Susan R. Martyn of the University of Toledo School of Law surveyed her school's alumni. The results indicate that 26.8% of the respondents have served as directors of corporations, while only 9.3% note that they are currently serving as corporate directors. Among the persons who currently serve as corporate directors, 40.5% practice as solo practitioners. For a discussion of the results, see Susan R. Martyn, *Lawyers as Directors: Who Serves and Why?*, *in* 22ND NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY, May 30-June 1, 1996, at Tab. 10.

66. For a thorough discussion of the ethical and liability problems created when an outside counsel serves in

129 respondents (68%) indicated that their firms require prior approval or simply prohibit principals serving as officers or directors of for-profit entities. The results also show that the larger the firm, the more likely it is to monitor principals' directorship activities.[67]

Evidently, firms are less concerned about exposure arising from their attorneys serving on the Board of Directors of not-for-profit entities.[68] Only 63 respondents (33%) answered that their firms monitor principals serving as officers or directors of not-for-profit entities. Firms may be less concerned about attorneys serving as directors of nonprofit corporations because directors of such corporations have less exposure than directors of for-profit corporations.[69]

B. FIRM CONTROLS ON PRINCIPALS SERVING AS FIDUCIARIES AND ENTERING BUSINESS TRANSACTIONS WITH CLIENTS

The results show that principals recognize their vulnerability when firm attorneys hold fiduciary positions.[70] A total of 103 respondents (54%) reported that their firms require approval or prohibit principals from serving as trustees or holding some other fiduciary position.[71] A law firm's professional liability policy

---

the dual capacity of attorney-director, see Craig C. Albert, *The Lawyer-Director: An Oxymoron?*, 9 GEO. J. LEGAL ETHICS 413 (1996). For a survey of the problems which arise when an outside counsel serves on the board of directors of a client, see Block et al., *supra* note 62, at 3.

67. Eighty-five percent of the Large Firms (29 firms) monitor directorships, 72% of the Medium Firms (29 firms) monitor directorships, and 62% of Small Firms (64 firms) monitor principals serving as directors of for-profit corporations.

68. *See* Ronald Chester, *The Lawyer as Charitable Fiduciary: Public Trust or Private Gain?*, 25 PAC. L.J. 1353 (1994) (analyzing the fiduciary duties of care and loyalty of attorneys who serve as directors or trustees of charitable organizations).

69. This reaction mirrors the sentiments of some legal malpractice experts who believe that attorneys serving on charitable boards face significantly less liability exposure than those serving on the boards of for-profit entities. *See* Robert E. O'Malley & Harry H. Schneider, *Danger: Lawyer on Board*, 79 A.B.A. J., July 1993, at 102 (attributing heightened liability for service on for-profit corporations to the threat of shareholder derivative suits). Although the standard of care applied to the performance by nonprofit directors of their duties generally parallels the standard applied to directors of for-profit corporations, a number of states have enacted legislation shielding uncompensated directors of charitable corporations from liability to third persons. DANIEL L. KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 23, 99 (1988). *E.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 84.004 (West 1996) (providing that a "volunteer who is serving as an officer, director, or trustee of a charitable organization is immune from civil liability for any act or omission resulting in death, damage, or injury if the volunteer was acting in the course and scope of his duties or functions as an officer, director, or trustee within the organization").

70. Attorneys' exposure varies depending on the nature of the fiduciary position. For a discussion of the conflicts of interest created when an attorney serves as a testamentary fiduciary, see April A. Fegyveresi, Note, *Conflicts of Interests in Trust & Estate Practice*, 8 GEO. J. LEGAL ETHICS 987, 992-95 (1995). *See also* Edward J. Boyle et al., *Insurance Coverage for Attorneys, Accountants, and Insurance Brokers Serving as ERISA Fiduciaries or Corporate Directors*, *in* PROFESSIONAL LIABILITY INSURANCE FOR ATTORNEYS, ACCOUNTANTS, AND INSURANCE BROKERS 481 (PLI Litig. & Admin. Practice Course Handbook Series, PLI Order No. H4-4992, 1986) (reviewing problems created when attorneys serve as fiduciaries under an employee benefit plan).

71. Because the survey did not ask respondents to describe the firm's areas of practice, the results do not indicate whether firms with extensive trust and estate practice monitor or prohibit attorneys serving in fiduciary positions. Firms with such a practice may permit attorneys to serve in such positions because fiduciary practice

may cover claims arising out of trustee activities while specifically excluding claims relating to directorship activities.[72] This may explain why a smaller percentage of firms monitor attorneys serving in fiduciary positions than the percentage of firms that monitor attorneys' activities as directors of for-profit corporations.

The majority of the respondents also appreciate the risks involved when a firm principal accepts stock or other investment interests in lieu of fees: 117 respondents (61%) reported that their firms monitor principals acceptance of stock in lieu of fees. In addition, 96 firms (50%) monitor firm principals investing in business ventures with clients.[73] Firms that have not instituted any such procedures may not recognize the potential malpractice exposure resulting from situations when attorneys enter into business transactions with clients. If such investments are permitted, the firm and its attorneys are subject to legal malpractice actions alleging conflicts of interest, negligence, and fraud.[74] If the firm is sued, the firm's legal malpractice policy may not provide coverage since such policies commonly exclude claims relating to attorneys' business ventures.[75]

C. INTERNAL PROCEDURES AND EFFORTS TO MONITOR PRINCIPALS' COMPLIANCE

The majority of the respondents do not have procedures to monitor daily firm affairs such as withdrawal of client funds. Surprisingly, only 67 respondents (35%) require that two or more principals sign for withdrawals of client funds.

A series of questions asked whether the respondent's firm conducts periodic reviews to determine their principals' compliance with various office procedures. Responses indicate that firms are more likely to monitor compliance with office procedures relating to firm finances than procedures relating to client representation matters. For example, 157 respondents (82%) reported that their firms

---

can result in a profit to the firm, depending on the amount of assets under management. For a discussion of the economics of fiduciary practice, see William D. Haught, *Task Force Continues Study on Attorneys in Fiduciary Roles*, 128 TRUSTS AND ESTATES, Apr. 1989, at 14, 16.

72. Volk et al., *supra* note 56, at 1571.

73. As expected, only a small fraction of the respondents (16 firms representing 8%) reported that their firms monitor the personal investments of principals.

74. DENNIS HORAN & GEORGE W. SPELLMIRE, JR., THE ASSOCIATES' PREMIER FOR PREVENTION OF LEGAL MALPRACTICE 4 (1987) (reporting on the results of hundreds of cases). For a discussion of the conflicts and traps created when attorneys invest with clients, see E. Gregory Martin & Michael G. Martin, When Doing Deals is Risky, A.B.A. J., July 1996, at 80. Because courts will scrutinize business transactions with clients and presume the transactions to be fraudulent unless proven otherwise, "lawyers who start out as investors in clients' businesses could find themselves winding up as insurers." In addition to malpractice exposure, client "[r]elationships can suffer, investment freedom can be compromised, and well-laid financial plans can become muddled." Jon Newberry, Perilous Partnerships, A.B.A. J., Aug. 1996, at 106.

75. JO ANN FELIX-RETZKE, PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE 310 (1983) (explaining the scope of the typical business pursuits exclusion).

periodically review for compliance with billing procedures,[76] while only 46 respondents (24%) reported that their firms monitor compliance with office procedures related to seeking litigation sanctions. Other responses also indicate that firms focus on compliance with procedures affecting firm finances and profitability. Regarding the review of principals' compliance with office procedures, 152 firms (80%) keep a watchful eye on accepting contingent fee cases and 123 (64%) monitor procedures relating to engagement letters and fee agreements.

Additional responses confirm that firms tend to be less concerned over matters not directly affecting the "bottom line." For example, only 59 respondents (31%) indicated that their firms monitor compliance with procedures relating to sending "non-engagement" letters, slightly more (84 firms or 44%) do so in the case of client screening procedures.[77]

Monitoring compliance with conflict of interest procedures is the strongest example of a practice that deviates from the pattern among firms of focusing on financial matters rather than client service matters. Reportedly, 144 firms (75%) periodically review their principals' compliance with conflict of interest procedures.[78] The national attention focused on conflict of interest problems probably accounts for these results.[79] Law firm managers have learned that a conflict of interest can only be identified if all of the firm's attorneys, including principals, comply with the office procedures.[80]

D. OPINION LETTER PROCEDURES

Managing attorneys of large law firms should also appreciate the importance of firm-wide guidelines and procedures for issuance of legal opinions. These procedures provide quality control and reduce the firm's liability exposure for opinion letters. By taking steps to avoid improvidently rendered opinions, law firms may be able to avoid state disciplinary and regulatory actions, as well as

---

76. Most of the respondents from Large Firms (33 firms representing 94%) reported that their firms periodically review principals' compliance with office procedures relating to billing.

77. Attorneys send "non-engagement letters" to nonclients to clarify and document the decision not to represent a nonclient. These non-engagement letters should help to prevent recipients from incorrectly believing or asserting that the attorney agreed to render legal services. RONALD E. MALLEN & JEFFREY M. SMITH, PREVENTING LEGAL MALPRACTICE § 211, at 114-15 (1989) (describing different approaches to non-engagement letters).

78. Approximately 86% of the respondents in Large Firms reported that their firms periodically review principal compliance with office procedures relating to conflicts of interest.

79. Commentators view conflicts of interest problems as the most pervasive and difficult problems that practitioners face. For a comprehensive discussion of the conflicts of interest rules with illustrative cases, see GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 1 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT §§ 1.7-1.19 (1996 Supp.).

80. Annually , firms must answer a questionnaire on legal malpractice insurance applications which asks for a description of the firm's conflict of interest system. *See* LAWYERS' DESK GUIDE, *supra* note 14, at 187-88 (describing conflicts of interest procedures and other types of information that an applicant must describe in detail in order to obtain legal malpractice coverage).

civil and criminal liability.[81] For example, by implementing good faith internal procedures for rendering opinion letters, a firm may be able to defend against a finding of scienter under the federal securities laws.[82] In addition to providing some assurance against claims, internal review procedures assist firms in developing uniform approaches to opinion matters, educate attorneys on relevant developments, and provide a pool of experienced and knowledgeable attorneys with whom difficult or novel issues may be discussed.[83] Internal peer review procedures for opinion letters may also insulate the attorney handling the transaction against pressure from clients to give broad opinions and may shield the attorney from unreasonable demands from attorneys on the other side of the transaction.[84]

A firm's internal procedures depend on the nature of the firm's practice and composition.[85] Larger firms may rely on committees to review opinions. This approach enables committee members to enforce consistency and to develop an expertise in rendering opinions.[86] Where a committee is not used, firms may require that opinions be reviewed by one or more principals not involved in the transaction who practice in the area of the law that is the subject of the opinion letter.[87]

Although commentators and various bar committees highly recommend internal review procedures,[88] a majority of respondents do not require committee or second principal review. Only 38 firms (20%) utilize committee approval of all written opinions. A more frequently reported practice (in 66 firms or 35%) is that

---

81. *See* John P. Freeman, *Current Trends in Legal Opinion Liability*, 1989 COLUM. BUS. L. REV. 235, 235-239 (1989) (explaining that an opinion could lead to a number of claims including claims based on negligent malpractice, negligent misrepresentation, common law fraud, securities law violations, civil conspiracy, breach of fiduciary duty, aiding and abetting a breach of duty, actions under the Racketeer Influenced Corrupt Organizations statute, and penalties under the Internal Revenue Code).

82. Darrel A. Rice & Marc I. Steinberg, *Legal Opinions in Securities Transactions*, 16 J. CORP. L. 375, 408-9 (1991).

83. Richard H. Rowe, *Law Firm Internal Opinion Review Procedures*, *in* OPINIONS IN SEC TRANSACTIONS 427, 433 (PLI Corp. Law & Practice Course Handbook Series No. 725, 1991).

84. ARNOLD S. JACOBS, OPINION LETTERS IN SECURITIES TRANSACTIONS, Intro. at 43 (1991).

85. Firms that handle a substantial amount of securities work should devote more attention to their internal procedures and policies than firms that only render more traditional opinion letters.

86. JACOBS, *supra* note 84, at 43.

87. The Securities and Exchange Commission required such an approach in the settlement of the National Student Marketing case against the firm of White & Case. The settlement required that the partner handling the transaction consult with at least two other firm partners if faced with instances of possible client misconduct, and that an experienced securities partner independently review certain registration statements and opinion letters. Securities and Exchange Comm. v. National Student Marketing Corp., [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,027 (D.D.C. 1977).

88. *See, e.g.*, Rice & Steinberg, *supra* note 82, at 440-41 (urging the use of internal review and standard opinion forms to provide guidance and to avoid "reinventing the wheel"). Bar association sections have also recommended internal procedures. *See, e.g.*, Corp. & Banking Law Section, State Bar of Georgia, Report on Legal Opinions to Third Parties in Corporate Transactions, *in* BUSINESS OPINIONS 1992: THE USE AND IMPLICATIONS OF THE ABA ACCORD AND GUIDELINES, at 142 (PLI Corp. Law & Practice Course Handbook Series No. 774, 1992) (recommending that Georgia firms reduce their procedures to writing).

written opinions be approved by two principals. And, 113 respondents (59%) require a "standard approach" to legal opinion letters.

E. AUDIT RESPONSE PROCEDURES

A significant number of firms exercise additional precautions with regard to audit opinion letters,[89] a strategy encouraged by organized bar groups over the past twenty years. In 1976, the American Bar Association (ABA) adopted the ABA Statement of Policy Regarding Lawyers' Responses to Auditor's Requests for Information (ABA Statement).[90] The ABA Statement provides specific guidelines for attorneys drafting audit responses and recommends a format for responses to auditor's inquiries.[91] Commentators recommend that firms follow the ABA guidelines and adopt specific procedures, such as two partner review of audit responses.[92] Firms testify to the benefits derived from utilizing second-partner review procedures. For example, firms report that second-partner review helps them insure that attorneys involved in a particular transaction possess the appropriate expertise to provide an opinion and enables the firm to identify situations where the opining partner has a potentially distracting personal interest.[93] A majority of the respondents (145 or 76%) reported that their firms require principal approval of all audit opinion letters.[94] The survey's results indicate that a majority of the firms follow at least one element of the ABA's guidelines for audit reply letters.

F. DESIGNATION OF IN-HOUSE ETHICS COUNSEL

In response to the explosion of legal malpractice awards, many firms have

89. Annually clients send their attorneys letters requesting that their attorneys provide information to accountants auditing the clients' financial statements. The client letters inquire about certain types of matters including loss contingencies, such as litigation claims and assessments to which the attorneys devoted substantial attention. In response to the audit inquiries, the attorneys send "audit response letters" giving the auditors information needed to form an opinion regarding the clients' financial statements. *See* John W. Allen & Donald F. Tucker, *Traps to Avoid When Drafting Auditor Response Letters*, BRIEF, Spring 1993, at 48 (describing pitfalls attorneys should avoid in responding to audit inquiry letters).

90. The ABA Statement of Policy is reprinted at 31 BUS. LAW. 1709 (1976) and appears in the ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW, COMMITTEE ON AUDIT INQUIRY RESPONSES, AUDITOR'S LETTER HANDBOOK (1976).

91. Leland C. de la Garza, *Auditor's Letter: Understanding and Responding to an Audit Inquiry Letter*, TEX. B.J., Jan. 1994, at 22-23.

92. *See, e.g.*, Charles D. Lee, *When Professionals Collide — Lawyers' Responses to Auditors' Requests*, J. KAN. B. A., Feb. 1992, at 27; Frederick D. Lipman, *Responding to Auditors' Letters*, LEGAL ECON., Oct. 1989, at 23 (outlining a variety of procedures that law firms should implement when responding to auditors).

93. For a description of various benefits described by large firms that are members of the Attorneys' Liability Assurance Society, Inc., see Richard Rowe, *Attorney's Responses to Auditors' Requests for Information, in* OPINIONS IN SEC TRANSACTIONS Appendix B (PLI Corp. Law & Practice Course Handbook Series No. 725, 1991).

94. Another law firm study reflected concern over the handling of law firm audit responses. According to that study, nearly every firm required that a partner sign an audit response. Volk et al., *supra* note 56, at 1574.

appointed firm members to serve as ethics counsel or on ethics committees.[95] Reportedly, the primary motivation behind the appointment of in-house ethics counsel is the need to establish an attorney-client privilege with respect to communications between firm members.[96] Unlike routine communications between firm attorneys, communications with ethics counsel should qualify for protection under the attorney-client privilege when such communications have been made for purpose of facilitating the rendering of legal services.[97] Thus, the designation of ethics counsel assists with any later claim of the attorney-client privilege for communications between firm members and the ethics counsel acting in a capacity as professional legal advisor.[98]

Although the desire for confidentiality may have spurred firms to designate ethics counsel, firms realize other practical benefits from designating an in-house attorney as ethics counsel.[99] First, ethics counsel can develop the requisite expertise to handle ethics problems.[100] Appointment of ethics counsel helps the firm meet its responsibilities under a state's version of *Model Rule* 5.1, requiring that partners make reasonable efforts to ensure compliance with the *Model Rules* by members of the firm, including other firm principals.[101] An ethics counsel or committee can also serve in an ombudsman capacity by providing neutral advice and assistance when firm attorneys face ethical dilemmas. By appointing an ombudsman, the firm signals to insiders and outsiders its commitment to creating

---

95. For a discussion of the general counsel movement among law firms, see Daniel B. Kennedy, *New Trend is General Counsel in Firms*, A.B.A. J., Jan. 1995, at 29.

96. *See* 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 (referring to accounts from firms that have joined the "general counsel bandwagon"). *See infra* Section IV.B.3 for a discussion of the confidentiality of intra-firm communications.

97. Although the attorney-client privilege applies when an attorney seeks legal advice from another attorney, it does not apply to a person when a person seeks business advice or speaks to an attorney merely as a friend. *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 223 (2d ed. 1994) (explaining that " 'legal advice' turns on the intent of the client in making the communication").

98. A person who seeks legal advice from an attorney may invoke an unqualified privilege not to testify concerning the contents of a confidential communication that was made by the client or the client's agent to the attorney or the attorney's agent, unless the protection is waived. CHARLES L. WOLFRAM, MODERN LEGAL ETHICS § 6.3.1, at 251 (1986) (referring to the Wigmorian conception of the attorney-client privilege which is the best known formulation of the privilege).

99. For a discussion of the external and internal reasons for appointing an ethics committee and guidelines for implementing an ethics committee, see Jonathan M. Epstein, Comment, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011, 1013-38 (1994).

100. Legal ethics has evolved as a substantive area of law. As explained by one commentator, "[t]he collection of rules that goes by the name of 'legal ethics' is every bit as much a subject-matter area of law as Employee Retirement Income Security Act, federal income taxation or litigation. As a matter of self-preservation . . . [n]o competent firm should treat ethics differently." Peter R. Jarvis, *Ethics Advisers Watch Over Firms*, NAT'L L.J., July 13, 1992, at 15.

101. MODEL RULES Rule 5.1(a). Although the *Texas Disciplinary Rules of Professional Conduct* [hereinafter *Texas Rules*] are based on the *Model Rules*, the *Texas Rules* do not include the provisions of *Model Rule* 5.1(a). TEXAS RULE 5.01 (1995).

a high moral climate within the law firm.[102] As explained by Professor Charles Wolfram, "[A] law firm that assumes some collaborative responsibility for the moral climate of the firm's practice can improve morale, the quality of work, and perhaps, the moral standards of the firm's lawyers and other employees."[103]

The survey results reflect that Texas firms have participated in the national trend to appoint in-house counsel. The majority of respondents (73%) indicated their firms have an appointed principal or committee to handle ethics or malpractice problems. Interestingly, only 117 firms (61%) have a principal or committee assigned to handle risk management[104] and quality assurance.[105] The results indicate that firms may be more inclined to designate individuals to handle ethics problems once they arise rather than rely on risk managers who might be able to take steps to avoid problems before they arise.[106] The results also suggest that the larger firms are more likely than the smaller firms to appont a principal in the firm or a committee to handle ethics and risk management matters.[107]

G. VEHICLES FOR OBTAINING INFORMATION ON PEERS

Approximately half of the respondents report that their law firm sections and departments engage in some peer review, though predominately on an informal basis.[108] Some informal peer review occurs at section or department meetings. A total of 95 respondents (50%) reported that department heads or section leaders conduct regular meetings where participants discuss the principals' as well as associates' work.

---

102. *See* Epstein, *supra* note 99, at 1030-31.

103. WOLFRAM, *supra* note 98, § 16.2.1, at 881 (referring to commentators' observations on institutional responsibility). In his seminal piece advocating law firm discipline, Professor Ted Schneyer emphasizes the importance of institutional responsibility in developing a firm's organization, policies, and operating procedures as the firm's "ethical infrastructure." Ted Schneyer, *Professional Discipline for Law Firms*, 77 CORNELL L. REV. 1, 10-11 (1991).

104. ANTHONY E. DAVIS, RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS 16 (1995) ("Risk management is the establishment of institutional, i.e., firm- or practice-wide policies, procedures, or systems sometimes referred to as risk-management 'tools' designed to minimize risk within the firm and its practice.").

105. With increased competition for clients, more firms may utilize quality assurance managers. Ronald Mallen, the dean of legal malpractice, predicted that in ten years quality assurance managers in law firms will be "as common as firm administrators are now." Stephen G. Hirsch, *At Long & Levitt, Quality is Job One*, AM. LAW., Dec. 23, 1991, at 2.

106. *See* William H. Fortune & Dulaney O'Roark, *Risk Management for Lawyers*, 45 S.C. L. REV. 617, 626-35 (1994) (contrasting "proactive risk management" with "reactive risk management" which occurs after malpractice claims arise).

107. All Large Firms (n=35) have designated a principal to handle ethics or malpractice problems. The percentage goes down to 87% for Medium Firms and to 60% for Small Firms. The responses to the question that asks whether the firm has designated a principal to handle risk management and quality assurance matters reflects a similar pattern. Approximately 86% of Large Firms have done so, while only 70% of Medium Firms have designated such a principal. Only 52% of Small Firms have designated such a principal.

108. While only 35 respondents (18%) indicated that the principals within the same section formally review one another, 97 respondents (51%) reported that department heads or section leaders monitor the progress of all matters in their sections.

In response to a general question regarding peer review programs, 65 respondents (34%) noted that their firms designate a principal or committee to evaluate the manner in which principals handle client matters.[109] At the same time, only 20 firms (10%) employ formal procedures for reviewing the work of principals, other than a review conducted in connection with compensation decisions. These responses indicate that while 65 firms (34%) have taken the first step of designating a person or committee to evaluate principals' work, less than one third of that number (20 firms) have actually adopted formal procedures for such review. As expected, these results show that the review of principals is largely completed on an informal basis by managing partners or management committees.

Eighteen respondents described their firm's peer review procedures for reviewing the work of principals. These descriptions also indicate that most peer review procedures are conducted informally, often within sections or departments.[110] Two respondents stated that principals in the firm regularly review one another. Firm meetings also provide an opportunity for firm principals to conduct informal reviews of other principals' work. One respondent reported that the firm recently implemented a peer review program whereby principals review all other principals and each principal obtains a summary of the other principals' comments.

According to the survey responses, firm principals tend to rely more on the feedback from firm attorneys than from clients. When asked about the sources of information on their principals' performance, 106 respondents (55%) reported that they seek information exclusively from the firm's other principals while 69 firms (36%) also obtain information from firm associates. Only 58 firms (30%) solicit information from clients.[111] The number of firms who formally seek client feedback should increase as firms compete more aggressively for clients and, accordingly, take measures to improve client satisfaction.[112]

Survey responses indicate a relationship between firm size and a law firms reliance on its principals reviewing each other.[113] The results also reveal that

---

109. The responses to this question also indicate that as firms grow, they adopt more formal management structures. About half of Large Firms (17 firms) have designated a principal or committee to evaluate the manner in which principals handle client matters. This percentage decreases to 43% in Medium Firms (17 firms) and further decreases to 26% in Small Firms (27 firms).

110. Of the 18 respondents who described their firms' peer review programs, four indicated that section or department chairs monitored performance and/or conducted section meetings.

111. The results indicate that Small Firms and Medium Firms tend to seek client feedback more than Large Firms.

112. In a national survey of law firms' marketing strategies, 34.4% of the 128 participating firms reported that their firms formally audit client satisfaction. *See* Larry Smith, *TQM Engine Gathers No Steam, According to* OF COUNSEL *Marketing Survey*, OF COUNSEL, Dec. 6-20, 1993, at 1.

113. A total of 22 respondents from Large Firms (65%) reported that their firms formally sought feedback on principal performance from other principals; 22 respondents from Medium Firms (55%) reported that their firms formally sought feedback from other principals; and only 54 respondents from Small Firms (52%) relied on principals' feedback.

smaller firms tend to solicit associate feedback more frequently than larger firms.[114]

As expected, the survey results confirm that the larger the firm, the more likely it is to be more bureaucratic, imposing more controls on the conduct of principals. Of the thirty-four questions relating to peer review measures, the responses to twenty-seven questions indicate a relationship between a firm's size and the implementation of formal peer review measures. Obviously, principals in smaller firms can more easily rely on informal mechanisms to evaluate one another.[115] As firms expand, these principals cannot rely on informal measures alone, but need to institute more formal procedures.

III. ATTITUDES ON PEER REVIEW

The questionnaire sought information on respondents' attitudes on peer review. One question asked the respondents to identify the advantages of peer review. As illustrated in Table 3, respondents identified advantages benefitting the firm as well as the firm's clients. A smaller number of respondents identified specific advantages of peer review procedures that affect a firm's culture, such as intra-firm communication and team-building, as shown below.

TABLE 3
ADVANTAGES OF PEER REVIEW

ADVANTAGES CHECKED	PERCENTAGE OF RESPONDENTS	NUMBER OF RESPONDENTS (TOTAL N = 191)
Controls liability losses	69%	131
Improves the quality of legal services	68%	129
Identifies principals with problems affecting performance	60%	114
Prevents principals from becoming too autonomous	51%	98
Avoids disciplinary violations	49%	93
Boosts intrafirm communication	45%	85
Helps shape attitudes that the firm is a team	44%	84
Serves marketing purposes	22%	42

114. A total of 40 respondents from Small Firms (39%) indicated that they sought feedback on principals performance by asking associates. In the category of Medium Firms, 15 respondents (38%) indicated that their firms sought associate feedback. In the Large Firms, only 21% of the respondents (7 firms) reported that their firms sought associate feedback on principals' performance.

115. One survey respondent expresses this sentiment in the following comment:

> In a small firm such as ours, our 'peer review' and control come in many ways, all of which are informal. In a small firm, where there is good communication, the principals each know on a fairly regular basis what the other principals are doing and whether their clients are happy with their representation or not.

As indicated in Table 3, only 22% of respondents believe peer review serves marketing purposes. Respondents whose firms utilize formal peer review procedures mark this advantage more often than other advantages.[116] These responses indicate that firms sometimes employ formal peer review procedures to impress clients.

Firms might strengthen their peer review measures if they believe that principals have a duty to monitor their peers. Respondents tended to reject the notion that principals have a legal duty to monitor one another. Slightly over half of the respondents (55%) indicated that principals have an ethical duty to monitor other principals' handling of client matters.[117] By comparison, only 40% of the respondents believe that principals have a legal duty to perform the same review.[118] This attitude may help explain why more firms have not instituted formal peer review procedures. It is likely that more firms would implement peer review measures if the firm's principals believe that they have a legal duty to monitor their peers.

IV. OBSTACLES TO PEER REVIEW

The study indicates that perceived obstacles deter or prevent firms from formalizing their peer review procedures. A number of respondents question the advisability and feasibility of peer review. There appear to be two major obstacles to implementing peer review: (1) concern for the autonomy of law firm principals and resistance to the concept of peer review and (2) administrative burdens of peer review.

A. PRINCIPAL AUTONOMY

Attorneys may resist peer review if they believe that any review of principals' work and performance interferes with the attorneys' autonomy. As explained by one commentator, peer review "arouses fear and loathing in many lawyers and firms" because it challenges individuality and the "cottage industry structure of most large law firms."[119]

---

116. Of the 42 respondents whose firms designate a person or committee to evaluate the manner in which principals handle client matters, 18 (43%) believe that peer review advances marketing.

117. Presumably, the number of respondents who believe that principals have an ethical duty to monitor their peers would be greater if the *Texas Rules* imposed such a duty. *See supra* note 101. Unlike *Model Rule* 5.1(a), the *Texas Rules* do not require a partner to make reasonable efforts to ensure that the firm implements measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct. MODEL RULES Rule 5.1(a).

118. Only 17 respondents (9%) "strongly agreed" with the statement that firm principals have a legal duty to monitor the manner in which other firm principals handle client matters. A larger percentage (12%) "strongly agreed" with the statement that firm principals have an ethical duty to monitor the manner in which other principals handle client matters.

119. Anthony E. Davis, *The Long Term Implications of the Kaye, Scholer Case for Law Firm*

In identifying the disadvantages of peer review, 60 respondents (31%) indicated that they believe peer review impinges upon the autonomy of individual principals. Additionally, 35 (18%) note that peer review interferes with personal client relationships.

Further analysis of these responses reveals differences between attitudes of the respondents whose firms have formalized peer review procedures compared with those whose firms have not. Of the 60 respondents who believe that peer review impinges on autonomy, 55 (92%) practice in firms with no formal peer review procedures to monitor the manner in which principals practice. By contrast, only 5 (8%) of the respondents who believe that peer review impinges on principals' autonomy practice in firms with formal peer review measures.[120] Attorneys who practice in firms that have not implemented peer review may be more likely to perceive peer review as a threat to attorney autonomy than attorneys who practice in firms that have implemented formal peer review measures. Finally, of those respondents who cited the disadvantages of peer review, the highest number (136 respondents or 71%) noted that they believe that peer review can create ill will and resentment among principals. Concern about possible discord resulting from peer review may therefore be a significant barrier to implementing formal review procedures.

Attorneys who believe that peer review impinges on their autonomy apparently view such autonomy as the ability to serve clients without interference from third parties, including other firm principals. Autonomy is perceived to be at odds with on-going accountability to their colleagues.[121] Professional autonomy tends to be "an ambiguous concept that has been defined in various, inconsistent ways."[122] If autonomy is defined as control over how work is performed and evaluated, then peer review does indeed restrict independence. On the other hand, peer review does not impinge on an attorney's independence if professional autonomy refers to the ability of law firms to function as "a buffer between the illegitimate desires of . . . clients and the societal interest."[123] This professional

---

Management — Risk Management Comes of Age, 35 S. TEX. L. REV. 677, 692 (1994) (recommending that firms implement some level of peer review as part of their risk management program).

120. The responses to other questions reflect a similar pattern. For example, 31 (89%) of the 35 respondents who believe that peer review interferes with client relationships practice in firms with no formal peer review. The percentage of respondents who believe that peer review interferes with personal client relationships goes down to 11% for respondents who practice in firms with formal peer review measures other than review conducted in connection with compensation decisions.

121. *See* Robert O'Malley, *Lawyer Liability: How to Keep It From Exploding*, 16 SPG. BRIEF 15, 16 (1987), *available in* WESTLAW (warning that the environment of "rugged individualism" where partners are "virtually autonomous" often threatens law firm stability).

122. Robert L. Nelson, *Ideology, Practice, & Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 506 (1985) (footnote omitted). For an analysis of different perspectives of professional independence, see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 6-30 (1988).

123. ERWIN O. SMIGEL, THE WALL STREET LAWYER 342 (1964) (quoting TALCOTT PARSONS, THE LAW & SOCIOLOGY 69 (W. Evan ed., 1962)).

autonomy enables firm attorneys to exercise independent judgment, free from outside influences. Using this conceptualization, peer review does not threaten professional autonomy.

If firm principals function as a team, attorneys perceive clients as "firm clients" rather than clients belonging to the individual principal.[124] If a firm engages in peer review to improve the delivery of its legal services to firm clients, then peer review does not encroach on principals' turf. Rather, peer review "may provide a stronger basis for independence, on the assumption that remaining competent and effective — for individuals and organizations — requires an occasional dose of disinterested advice and constructive criticism."[125]

B. ADMINISTRATIVE OBSTACLES

1. DEFINING STANDARDS FOR PEER REVIEW AND ADMINISTRATIVE COSTS

Even if firm principals recognize that peer review does not threaten their autonomy, some still question the feasibility of peer review, given the nature of law practice and high degree of legal specialization.[126] Others do not believe that peer review is possible, perceiving law as "more of an art than a science."[127] These critics do not believe that peer review standards can be developed.[128]

Of the survey's respondents, 78 (41%) believed that attorneys cannot agree on standards for evaluating legal competence.[129] In comparing the legal profession to other professions that have instituted peer review measures, 41 respondents

---

124. One respondent differentiated "firm clients" in describing the following disadvantage to peer review: "Inconsistent, in fact antithetical, to a professional relationship between an attorney and his client assuming the client is not a 'firm' client."

125. *See* ALI-ABA COMM. ON CONTINUING PROFESSIONAL EDUCATION, ENHANCING THE COMPETENCE OF LAWYERS app. c, at 535 (1981) (posing the discussion question of whether law practice peer review has any future in a legal profession notorious for its strong ideological commitment to independence of the practitioner).

126. *See* Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 MINN. L. REV. 697, 703-04 (1988) (suggesting that under the traditional model of an attorney as an autonomous professional, the degree of discretion involved in attorneys handling daily tasks and ambiguous matters makes it difficult for attorneys to monitor each other).

127. WILLIAMSBURG REPORT, *supra* note 17, at 327 (quoting a conference participant who differentiated other professions like accounting, medicine, and engineering which are more "sciences than arts").

128. Although skeptics do not believe that standards of legal competence can be established, the American Law Institute-American Bar Association ("ALI-ABA") Committee on Continuing Professional Education attempted to do so in defining the "Criteria of Attorney Competence." ALI-ABA COMM. ON CONTINUING PROF. EDUC., A MODEL PEER REVIEW SYSTEM, at 11-26 (Discussion Draft Apr. 1, 1980). In defining competence, the Model System stresses six qualities to be considered: knowledge, skills, practice management, awareness of the clients' needs, self-awareness, and capability. *Id.* at 11. In 1992, ALI-ABA also published a series of checklists that an attorney or law firm can use to assess performance and abilities. ALI-ABA COMM. ON CONTINUING PROF. EDUC., A PRACTICAL GUIDE TO ACHIEVING EXCELLENCE IN THE PRACTICE OF LAW, at 249-309 (1992). Risk management experts have also created various checklists and questionnaires to be used in law firm self-audits. *See, e.g.*, DAVIS, *supra* note 104, at 121.

129. Among this group, 9% (18 respondents) "strongly agreed" with the statement that lawyers cannot agree on standards for evaluating lawyer competence.

(21%) strongly agreed with the statement that "[u]nlike accounting or medicine, lawyering skills cannot be easily evaluated or monitored." Similarly, 46 respondents (24%) agreed that principals cannot evaluate the substantive knowledge and competence of other principals due to the high degree of legal specialization. About one half of the respondents (92 firms or 48%) also agreed that principals can only be effectively monitored by principals in the same area of legal practice.[130]

These views may assume that peer review involves "second guessing" substantive decisions made by principals. If a peer review program is limited to a "technical standards" review, however, the fact that principals specialize in different areas of the law should not pose an obstacle to peer review.[131] Similarly, specialization among principals may not affect principal review programs based on associate feedback or client audits.

Individuals who insist that principals cannot assess the performance of other principals seem to ignore the fact that firm principals regularly critique and evaluate associates' work.[132] Evidently, they believe that when associates graduate into partner ranks, that some transformation occurs, hampering the ability to evaluate partner performance.

Some critics oppose peer review, arguing that it will impose unnecessary burdens and costs on busy practitioners, resulting in unnecessary overlawyering.[133] A total of 84 respondents (44%) indicated that they believe that peer review will take too much time away from billable practice. Law firms should, therefore, design programs that minimize the "burden, delay and ex-

---

130. A study conducted by *The Wall Street Journal* indicates that even experts practicing in the same area of the law differ in their judgments on the same legal problem. In this study, a reporter posed as a man selling his home and needing review of a sophisticated sales contract. After the reporter consulted lawyers at six legal clinics and two traditional law firms, a panel of three experts reviewed the advice rendered to the reporter. The experts concluded that none of the attorneys identified all the defects in the contract. Moreover, the experts themselves could not agree on all their judgments. Hal Lancaster, *If Your Legal Problems Are Complex, a Clinic May Not Be the Answer*, WALL ST. J., July 3, 1980, at A1. This study reveals that even experts in the same area differ on their substantive evaluation and recommendations.

131. With "technical standards review" firm members develop and review compliance with certain procedural standards designed to improve the overall quality, delivery, and profitability of work produced. *Technical Standards Checklist for Partner Review*, OF COUNSEL, Jan. 15, 1990, at 11. For example, the designated firm members could review selected client files for general organization, existence of executed fee agreements, existence of conflicts information on new case memoranda, and other facts identified on the checklist. *Id.* (providing a specimen checklist for technical standards review). For a description of one firm's approach to reviewing files to determine if the reviewed partner has complied with clearly defined technical standards, see Fortney, *supra* note 23, at 366-67.

132. MALLEN & SMITH, *supra* note 54, § 2.31, at 204-05 (noting that nearly every firm engages in some form of associate review). Typically, partners review associates working under the partners' supervision or working in the partners' section.

133. As explained by one respondent, "Good attorneys have barely got time to properly care for their own clients. . . . The idea of routinely double-checking a competent attorney's work is stupid, cost prohibitive and only effective as an appearance activity."

pense, [while] maximiz[ing] the potential for a good quality assurance program."[134]

2. UTILIZING PEER REVIEW RESULTS

In designing peer review programs, firms must determine how to handle the results of the peer review process. Specifically, the firm's principals must decide whether peer review will affect compensation packages of those reviewed. Some firms intentionally conduct peer review at a time other than compensation evaluation time.[135] Other firms consider peer review results in making compensation decisions.[136]

In the survey, 123 respondents (64%) indicated that peer review should be conducted at a time other than concurrently with an evaluation of compensation.[137] This preference was expressed in the responses received from law firms ranging in size from the largest to the smallest without any apparent relationship between the responses and the size of the firm.[138] Respondents from firms organized as general partnerships appear to be the most concerned about separating peer review process from any evaluation of compensation.[139] Attorneys may perceive that peer review is less threatening if dissociated from the compensation process.[140]

3. DISCOVERY PROBLEMS AND POSSIBLE PRIVILEGES

A plaintiff in a legal malpractice suit against a firm and its attorneys may seek peer review communications unless they are privileged. A written report showing that a firm considers one of its attorneys to be deficient in knowledge or skill can

---

134. Corrigan, *supra* note 54, at 62. For practical suggestions on implementing and administering a peer review program, see Joel A. Rose, *The Trouble with Harry . . . Dealing with the Problem Partner*, *in* THE QUALITY PURSUIT (Robert Greene ed., 1989) (recommending procedures, policies, and forms).

135. For example, the Denver-based firm of Rothgerber, Appel, Powers & Johnson keeps peer review separate from compensation decisions in order to promote "honesty and openness." Scott Graham, *Four Divergent Approaches to Peer Review*, RECORDER, May 24, 1991, at 5.

136. The Los Angeles-based firm of Latham & Watkins uses the review in allocating bonuses. *Id.*

137. Another 25 (13%) indicated that peer review should be conducted at the same time as compensation review time, 27 (14%) indicated that no peer review should be conducted, and 16 (8%) did not answer the question.

138. Presumably, principals in larger firms would express more concern about connecting peer review to compensation decisions because principals in larger firms tend to earn more than principals in smaller firms. *See* RICHARD L. ABEL, AMERICAN LAWYERS 194, 201 (1989) (referring to numerous studies which confirm the relationship between firm size and partnership income).

139. Seven out of eight respondents who practice in general partnership firms believe that peer review should be conducted at a time other than compensation review time.

140. *See* Ward Bower, *Game Plan for Law Firms*, A.B.A. J., Nov. 1990, at 82, 84 (suggesting that firms could overcome reluctance to peer review if peer review was "purely constructive in nature," and not connected to compensation).

severely damage the firm's defense of a malpractice claim.[141] If the plaintiff learns that a peer review or risk management program revealed an internal problem that the firm failed to remedy, the plaintiff could obtain punitive damages.[142] The failure to remedy a problem could also adversely affect the firm's ability to obtain legal malpractice insurance if insurance underwriters gain access to peer review information.[143]

Understandably, attorneys expressed concern over the possibility that peer review results may be obtained by third parties; 13 respondents (7%) indicated that their firms do not engage in formal peer review because the results might be discoverable. Moreover, 68 respondents (36%) indicated that their firms would be more likely to institute peer review measures if peer review communications were protected from discovery. A total of 164 respondents (86%) believed that peer review should be afforded confidentiality so that third parties cannot discover the results of peer review.

Discoverability of peer review results hinges on whether the firm had a reasonable expectation of confidentiality.[144] The answer to this question depends on a number of factors including who conducted the review and who had access to the results.[145] Depending on the answers to these questions, the attorney-client privilege may protect firm communications.

APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE

Whether the person who directed or conducted the peer review was acting in a legal capacity may enable the firm to rely on the attorney-client privilege. The privilege may apply if the person who initiated peer review acted as the firm's legal counsel. A firm may retain outside counsel or may designate an in-house attorney to serve as the firm's general counsel or ethics counsel.[146]

The desire of firms to protect intra-firm communications has motivated a

---

141. MALLEN & SMITH, *supra* note 54, § 2.31, at 205.

142. In seeking punitive damages, the plaintiff could argue that the firm partners acted with reckless disregard in failing to remedy a problem of which they had notice.

143. *See* Edmund B. Spaeth, Jr., *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers*, 61 TEMPLE L. REV. 1211, 1227 (1988) (referring to a statement characterizing peer review as "one excellent, broad, and very hard club in the hands of insurance underwriters").

144. *See* Patricia Wilson, Law Firm Management Reviews: Damned If You Do; Damned it You Don't (undated) (unpublished manuscript, on file with the author) (analyzing the confidentiality issues associated with law firm risk management audits).

145. Other issues relate to: (1) the person who requested the audit; (2) the date of the alleged malpractice; (3) whether the firm complied with audit recommendations; (4) the reason why evidence of the audit is being offered; and (5) applicable statutes and regulations. *Id.*

146. If a firm does not possess in-house expertise to handle ethics and malpractice matters, the firm should "make advance arrangements with outside counsel who can help address such matters on a timely, effective basis." Jarvis, *supra* note 100, at 17.

number of firms to create a position of in-house general counsel.[147] The Attorneys Liability Assurance Society (ALAS), a malpractice mutual insurance company funded by some 350 of the country's largest law firms, spearheaded this national movement by encouraging its member firms to designate loss-prevention counsel.[148] Robert O'Malley, chairman of ALAS, believes that communications between the firm members and their officially-appointed counsel should enjoy protection under the attorney-client privilege.[149]

Although the attorney-client privilege based on intra-firm communication privilege is a largely untested idea, two courts have recognized that the attorney-client privilege may apply. *In re Sunrise Securities Litigation* examined this question in the Eastern District of Pennsylvania.[150] The federal district court held that the attorney-client privilege may apply to communications between attorneys within a law firm when the attorney who gives the advice acts as in-house counsel to the law firm.[151] To establish that the privilege applies, the law firm must satisfy the traditional test for the attorney-client privilege.[152] Specifically, the firm must show that:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by the client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[153]

In addition to satisfying the traditional requirements for establishing the attorney-client privilege, the *Sunrise Securities* court stated that the law firm consultation with in-house counsel must not create a conflict of interest between the law firm's fiduciary duties to itself and its duties to the client seeking to

---

147. *See* Kennedy, *supra* note 95, at 29 (generally discussing the risk of the attorney-client privilege not being upheld).

148. For a discussion of the responsibilities and experiences of the loss control partners in ALAS firms, see Larry Smith, *Firms Relying on Loss Control Partners for Internal Surveillance*, OF COUNSEL, Feb. 19, 1990, at 3.

149. Taylor, *supra* note 96, at A22; *see also* Amy Boardman, *Firms' Answer to Outside Pressures: In-House GCs*, TEX. LAW., June 6, 1994, at 1, 38 (quoting a general counsel of a Texas firm who stated that his designation as general counsel would probably help from an evidentiary standpoint if the firm invokes the attorney-client privilege).

150. *In re* Sunrise Securities Litigation, 130 F.R.D. 560, 595 (E.D. Pa. 1989).

151. *Id.*

152. *Id.*

153. *Id.* (quoting the attorney-client privilege test set forth in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass 1950) and adopted by the Court of Appeals for the Third Circuit in *In re Grand Jury Investigation*, 599 F.2d 1224, 1233 (3d Cir. 1979)).

discover the communications.[154] Applying this rule, the court limited the attorney-client privilege to those documents that did not contain communications or legal advice in which the firm's representation of itself conflicted with its representation of the client seeking the documents.[155] Therefore, following the *Sunrise Securities* rationale, the attorney-client privilege may not apply when communications directly relate to the client who is seeking discovery. Conversely, when the communication does not directly relate to the client or former client seeking discovery, the attorney-client privilege should protect the peer review communications.

Recently, the Ninth Circuit in *U.S. v. Rowe*[156] extended the attorney-client privilege to cover an internal firm investigation conducted by law firm associates. Charles E. Rowe, the firm's managing partner, asked two associates to investigate possible mishandling of client funds by Walter Lee McElravy, the firm's chief financial officer.[157] When a federal grand jury investigating McElravy subpoenaed the associates seeking information on their conversations with Rowe, Rowe asserted the attorney-client privilege.[158] Finding that Rowe had not established the attorney-client privilege, the district judge ordered the associates to testify.[159] On appeal, the Ninth Circuit held that the attorney-client privilege applied to the confidential communications between Rowe and the associates, who effectively acted as in-house counsel.[160] According to the court, a firm member should "not be stripped of privilege because the hiring of the professional was convenient."[161]

---

154. The court reasoned that when events cause firm attorneys to seek advice of the firm's in-house counsel, the advice may hinder the firm's representation of the client, creating a conflict of interest between the firm and the client. *Sunrise Securities*, 130 F.R.D. at 595-97.

155. If Client B seeks to discover communications relating to Client A, no conflict arises between the firm and Client B with respect to the communications relating to Client A. Because no conflict arises, the firm should be able to shield the communications from Client B provided that the other elements of attorney-client privilege exist.

156. 96 F.3d 1294 (9th Cir. 1996).

157. Rowe also asked that the California State Bar take "appropriate action" against McElravy. *Id.* at 1295.

158. While the privilege question was pending, McElravy was sentenced to a 46-month prison term after pleading guilty to embezzling $850,000 from various client accounts. Gail Diane Cox, *Court Expands Client Privilege*, NAT'L L.J., Oct. 14, 1996, at A6.

159. After interviewing the associates in camera, the district judge explained that "the associates were never told they were working as the firm's attorneys; that they didn't bill the firm or record hours expended on the firm's behalf; and that, because they were far less experienced than Rowe, '[t]hey were certainly taking direction from him.' " 96 F.3d at 1296.

160. As noted by the court, the existence of the privilege does not turn on whether counsel functions as in-house counsel or outside counsel. *Id.* (quoting Jack B. Weinstein et al., 2 WEINSTEIN'S EVIDENCE ¶ 503(a)(2)[01] at 503-30 (1996)).

161. 96 F.3d at 1297. In rejecting the government's argument that the attorney-client privilege did not apply because the associates were engaged in fact-finding, the court also concluded that the attorney-client privilege does not distinguish between fact-finding and lawyering. *Id.* at 1296-97 (criticizing commentators who suggest that investigative work does not qualify as "professional legal services"). The Ninth Circuit remanded the case for consideration of the government's final arguments that the crime/fraud exception and waiver defeat the privilege. *Id.* at 1297-98.

The Rowe opinion can be cited in arguing that the attorney-client privilege shields internal firm communications made to facilitate the rendition of legal services by one firm attorney to another.[162] Still, the protection provided under *Rowe* may not reach routine peer review communications, when a firm member is not actually consulting another attorney in connection with a legal problem.[163]

APPLICATION OF THE SELF-CRITICAL ANALYSIS PRIVILEGE

Given that firms cannot always use the attorney-client privilege to shield communications from discovery, firms may attempt to rely on other protections provided under common law, including the self-critical analysis privilege.[164] The Federal Rules of Evidence require that privileges "be governed by principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."[165] Citing this authority, some courts have recognized a self-critical analysis privilege against the disclosure of information developed or produced during the course of certain internal corporate proceedings.[166] Such a privilege serves societal interests by enabling a party's employees and representatives to engage in critical analysis and evaluation of the party's conduct "unfettered by the fear that the comments may be discoverable and used adversely."[167] Because disclosure would detrimentally affect candid analysis, confidentiality must be preserved to maintain the objectivity necessary for meaningful self-critical analysis.[168] The self-critical analysis privilege centers

---

162. Because the person seeking information in *Rowe* was the government rather than a client, the *Rowe* opinion does not address the potential conflict of interest that may arise when a client seeks information that pertains to the client from a firm. When such a conflict arises, the attorney-client privilege does not apply under the reasoning used in the *Sunrise Securities* case. *See supra* notes 150-154 and accompanying text.

163. Although ethics experts should welcome the *Rowe* decision, one has already expressed reservations about the court's reasoning. *See, e.g.*, Cornelia Wallis Honchar, *Law Firm's Internal Investigation Gets Sticky*, CHI. DAILY L. BULL., Nov. 8 1996, at 6 (recommending that firms hire outside counsel to avoid the question of whether the attorney-client privilege applies).

164. Some commentators and courts refer to the "self-evaluative privilege." *See, e.g.*, Nancy C. Crisman & Arthur F. Mathews, *Limited Waiver of Attorney-Client Privilege and Work-Product Doctrine in Internal Corporate Investigations: An Emerging Corporate "Self-Evaluative" Privilege*, 21 AM. CRIM. L. REV. 123 (1983) (tracing the evolution of the self-evaluative privilege).

165. FED. R. EVID. 501. States' evidence rules contain provisions which parallel Rule 501 of the *Federal Rules of Evidence*. *See, e.g.*, COLO. R. EVID. 501.

166. *See, e.g.*, Combined Communications Corp. v. Public Serv. Co., 865 P.2d 893, 898 (Colo. Ct. App. 1993).

167. Michael J. Holland, *The Self-Analysis Privilege: Obscuring the Truth but Safeguarding Improvement?*, 25 FALL BRIEF 52 (1995), *available in* WESTLAW. Without protection, self-investigative audits and evaluations can provide a "valuable 'road map' to persons who want to show" a pattern of disregard or negligence. Jo-Christy Brown & Kelly A. MacDonald, *Texas Audit Privilege*, STATE BAR SECTION REPORT: HEALTH LAW, Autumn 1996, at 6 (explaining that the Texas Environmental Health and Safety Audit Privilege Act encourages businesses to conduct health and safety compliance audits and correct problems because it eliminates the fear that audit documents will be subject to discovery).

168. As stated by one commentator, "[w]ithout confidentiality there will be a loss of candor." James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analysis*, 51 GEO. WASH. L. REV. 551, 563 (1983).

around confidentiality and pits the need for truth in litigation against the value of confidentiality in obtaining complete and candid reports.[169] To encourage critical self-evaluation, some courts have employed the self-critical analysis privilege "to protect certain information from discovery particularly where public policy outweighs the needs of litigants and the judicial system for access to information relevant to the litigation."[170]

A federal district court in the District of Columbia first recognized the self-critical analysis privilege in *Bredice v. Doctors Hospital, Inc.*[171] In *Bredice*, a medical malpractice plaintiff sought discovery of medical peer review communications.[172] The court denied discovery on the basis that absent "extraordinary circumstances," the communications of medical staff committees should be protected.[173] The court emphasized the importance of maintaining the confidentiality of internal proceedings explaining:

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleagues' conduct in a malpractice suit.[174]

On the basis of the "overwhelming public interest" served by confidentiality, the court applied a qualified privilege to the committee's internal communications.[175]

Shortly after the *Bredice* decision, another federal district court in *Banks v. Lockheed-Georgia Co.*[176] applied the self-critical analysis privilege to an employment discrimination case. In *Banks*, the court denied the plaintiff's request for production of internal material prepared by the employer's equal employment opportunity team. Because the team was charged with studying the company's

---

169. *See* John F. X. Peloso, *The Privilege for Self-Critical Analysis: Protecting the Public by Protecting the Confidentiality of Internal Investigations in the Securities Industry*, 18 SEC. REG. L.J. 229, 230 (1990) (focusing on the dilemma posed to government or private parties by required organizational self-audits).

170. Granger v. National R.R. Passenger Corp., 166 F.R.D. 507, 508 (E.D. Pa. 1987).

171. 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

172. The plaintiff requested production of reports and minutes of any board or committee meetings concerning the death of Frank Bredice. The hospital objected to the production of the minutes and reports of the peer review meeting where the death was discussed because the objective of such a meeting was the improvement of patient care and treatment through self-analysis. 50 F.R.D. at 249-50.

173. *Id.* at 251. As noted by the court, the Joint Commission on Accreditation of Hospitals requires that accredited hospitals rely on medical peer review committees. *Id.* at 250.

174. *Id.*

175. *Id.* at 251.

176. 53 F.R.D. 283 (N.D. Ga. 1971).

internal problems, the court concluded that disclosure would discourage companies from making efforts that would positively affect employment practices. Following the lead of the *Bredice* court, the *Banks* court focused on the public policy of encouraging companies to review their own conduct and to undertake socially desirable action.[177]

Following *Bredice* and *Banks*, courts have recognized the self-critical analysis privilege in different contexts including antitrust,[178] product safety,[179] securities,[180] and environmental law[181] cases. Courts have identified four prerequisites that must be satisfied before applying the privilege:

1. The critical self-analysis must have been undertaken by the parties seeking protection;
2. The public must possess a strong interest in preserving the free flow of the type of information sought;
3. The information must be of the type that its free flow would be curtailed if discovery were allowed; and
4. Any document produced must have been prepared with the expectation of confidentiality and the confidentiality must, in fact, have been maintained.[182]

Applying these criteria, a self-critical analysis privilege should protect law firm peer review communications. First, law firm peer review communications are generated as part of a process for monitoring conduct and detecting internal problems. Second, clients and non-clients alike possess a strong interest in law

---

177. *See* Edward Brodsky, *Self-Critical Analysis*, N.Y. L.J., Jan. 18, 1993, at 3 (suggesting that the self-critical analysis privilege be applied in a corporate context so that companies will not be discouraged from undertaking socially desirable action).

178. *See, e.g.*, Cameron v. New Hanover Mem'l. Hosp., 293 S.E.2d 901, 915 (N.C. App. 1983) (minutes of hospital committee meetings privileged as "good faith" communications where "those present had a corresponding interest in the administration of the hospital").

179. *See, e.g.*, Roberts v. Carrier Corp., 107 F.R.D. 678 (N.D. Ind. 1985) (information communicated by corporate deponent to Consumer Product Safety Commission was privileged, but only where it contained critical self-analysis).

180. *In re* Crazy Eddie's Sec. Lit., 792 F. Supp. 197, 205-206 (E.D.N.Y. 1992) (relying on the self-evaluative privilege to protect the accounting firm's peer review report and internal review of the firm's audit work). *But see In re* Salomon Inc. Sec. Lit., No. 91-CIV. 5442, 1992 WL 350762 (S.D.N.Y. Nov. 13, 1992) (allowing private litigants to discover the broker-dealer's internal reports created in connection with the broker's compliance efforts).

181. *See, e.g.*, Reichhold Chem., Inc. v. Textron, Inc., 157 F.R.D. 522 (N.D. Fla. 1994) (landowner entitled to privilege for self-critical reports analyzing past conduct and resulting environmental consequences).

182. A 1983 note in the *Harvard Law Review* articulated the first three criteria for the privilege derived from court opinions. Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1086 (1983). The Court of Appeals for the Ninth Circuit added the fourth prerequisite in *Dowling v. American Hawaii Cruises Inc.*, 971 F.2d 423, 426 (9th Cir. 1992). Although the Ninth Circuit did not expressly adopt the privilege, it did state that any such privilege does not protect routine internal reviews of safety matters before the problem arises. Therefore, the Ninth Circuit distinguished between investigation conducted before and after a problem arises. According to the court, those investigations conducted before a problem arises are not conducted with the expectation that they will remain confidential. *Id.*

firm peer review which promises to improve the quality of legal services. Third, any possible disclosure of peer review communications threatens uninhibited self-analysis and evaluation. Finally, law firms can satisfy the fourth prerequisite by taking steps to preserve the confidentiality of peer review communications. For example, the law firm could appoint a peer review partner to oversee the process. This partner could educate participants on confidentiality issues, including how to avoid waiver by disclosure to third parties such as malpractice insurers.

Although a law firm might try to rely on a self-critical analysis privilege, its uncertainty overshadows its utility.[183] The majority of state courts[184] and most federal courts refuse to adopt a common law peer review privilege.[185] In the context of academic peer review proceedings, the U.S. Supreme Court refused to recognize a federal common law privilege against disclosure.[186]

The reluctance of most courts to adopt a common law peer review privilege may have led legislators to enact statutes to protect and encourage medical peer review.[187] At least forty-six states now have laws to protect medical peer review activities.[188] Congress expressed its support of professional peer review activities by enacting the Health Care Quality Improvement Act of 1986 (HCQIA).[189]

---

183. *See* Joseph E. Murphy & Roselee M. Oyer, *Securities Litigation: The Self-Evaluative Privilege and Beyond*, C110 ALI-ABA 423, ORGANIZING FOR CORPORATE COMPLIANCE: TOWARD STANDARDS (1995) (explaining that uncertainty relates to inability to predict whether a court will recognize the privilege and whether the qualified privilege must yield to accommodate the plaintiffs' needs). The protection that the privilege provides the private litigant will depend on "the nature of the claim, the forum in which it is litigated and the provisions of state law." Thomas F. O'Neil III & Adam H. Charnes, *The Embryonic Self-Evaluative Privilege: A Primer for Health Care Lawyers*, 5 ANNALS HEALTH 33, 44 (1996).

184. Charles David Creech, Comment, *The Medical Review Committee Privilege: A Jurisdictional Survey*, 67 N.C. L. REV. 179, 191 (1988).

185. Susan O. Scheutzow & Sylvia Lynn Gillis, *Confidentiality and Privilege of Peer Review Information: More Imagined Than Real*, 7 J. HEALTH & L. 169, 182-83 (1992-93).

186. In *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182 (1990), the Supreme Court declined to exercise its authority under *Federal Rule of Evidence* 501 to recognize a privilege in an area where "it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." 493 U.S. at 189.

187. Scheutzow & Gillis, *supra* note 185, at 170-71. In 1991 the United States Sentencing Commission's adoption of Sentencing Guidelines for Organizations sparked a renewed interest in the creation of a statutory basis for the self-evaluative privilege. Lawrence J. Zweifack, *Internal Corporate Investigations*, *in* SECURITIES LITIGATION 531 (PLI Corp. Law & Practice Course Handbook Series No. 905, 1991). These guidelines provide an incentive for companies to conduct internal investigations in response to allegations or evidence of wrongdoing and to implement compliance. To encourage internal investigations, at least fourteen states have enacted environmental audit protection statutes, and Maryland has extended a self-evaluation privilege for the records of compliance review committees in banks. Joseph E. Murphy & Ilise L. Feitshans, *Protecting the Compliance Audit*, *in* CORPORATE COMPLIANCE 667, 677-78 (PLI Corp. Law & Practice Course Handbook Series No. 943, 1996).

188. For an analysis of the various approaches used by states, see Creech, *supra* note 184, at 182-89.

189. 42 U.S.C.A. §§ 11101, 11111-11152 (West Supp. 1994). HCQIA statutorily grants antitrust immunity to medical peer review participants when the review conforms to the standards articulated in HCQIA. For a discussion of the HCQIA provisions, see Jeanne Darricades, Comment, *Medical Peer Review: How Is It Protected by the Health Care Quality Improvement Act of 1986?*, 18 J. CONTEMP. L. 263 (1992). HCQIA only

Thus, federal and state legislation affords some protection to peer review communications and participants, thus encouraging and promoting medical peer review.[190] By the same logic, legislators should extend protection to the legal profession to encourage attorneys to engage in self-critical analysis in law firms and law offices.[191]

A few states have already enacted legislation to protect certain risk management activities conducted by organized state bar groups. For example, the following Louisiana statute provides immunity and confidentiality not to Louisiana law firms, but to persons involved in the state bar's risk management program to protect those individuals from being forced to reveal information obtained as a result of the program:

> Any past or present loss prevention counsel functioning as such in the position approved by the Board of Governors of the Louisiana State Bar Association, Louisiana State Bar Association committee member, staff member, or person receiving information from such counsel, committee member, or staff member who has been involved in any loss prevention program, shall not be required to report any acts or disclose any information concerning the acts or omissions of a member of the Louisiana State Bar Association received during, or in connection with, loss prevention activities. Such counsel, committee member, and staff member shall be privileged and immune from any suit, claim, demand, court order, action, proceedings, or discovery request brought in connection with loss prevention duties or activities performed for any Louisiana State Bar Association member.[192]

North Carolina utilizes a different approach by amending its disciplinary rules for attorneys. The definition of "confidential information" in Rule 4 of the *North Carolina Rules of Professional Conduct* includes "information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program

---

provides limited protection from discovery by restricting access to certain information that peer review committees report. *Id.* at 278.

190. Legislators have also encouraged accounting peer review by protecting communications made in connection with quality review programs. For example, the Texas Public Accountancy Act of 1991, section 15B established a quality review program and provides that reports, opinions, and papers formulated in connection with quality review or peer review are "privileged and may not be subject to discovery, subpoena, or other means of legal compulsion for release to any person except the [Texas Board of Public Accountancy] and [are] not admissible as evidence in any judicial or administrative proceeding except for a board hearing." TEX. REV. CIV. STAT. ANN. art. 41a-1, § 15B(c) (West Supp. 1996).

191. Opponents of the self-evaluative privilege insist that it undermines the ability to discover truth in litigation by enabling parties to conceal evidence. *See* Joseph E. Murphy, *The Self-Evaluative Privilege*, 7 J. CORP. L. 489, 495 (1982) (examining the common-law privilege within the context of corporate communications, and proposing two statutory alternatives). This criticism, which can be leveled against other discovery privileges, ignores the salutary effects of internal review and the limited scope of the self-evaluative privilege. Although self-policing can occur regardless of potential discovery, the self-evaluative privilege promotes the objectivity necessary for critical evaluations. *See* Flanagan, *supra* note 168, at 563 (referring to peer review in medical, academic, and other professional organizations).

192. LA. REV. STAT. ANN. § 37:220 (West 1995).

approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance."[193] This rule enables the North Carolina Lawyers Management Assistance Program (LMAP) to conduct confidential in-house audits.[194] Because the rule treats information acquired about attorney conduct as confidential, LMAP attorneys do not have a duty to report professional misconduct to disciplinary authorities.[195]

Model Rule 8.3 takes a similar approach to exempt attorneys from the mandatory reporting of information gained while serving as members of lawyers' assistance programs.[196] As explained by the Comments to the *Model Rules*, confidentiality encourages attorneys and judges to seek assistance through association assistance programs.[197] The *Model Rule* provisions recognize that the success of such programs depends on maintaining confidentiality. To encourage internal peer review and assistance, similar protection should be afforded to internal law firm peer review programs.

Until the time that legislatures or courts provide such protection, law firms must carefully approach peer review in a way to obtain the highest degree of confidentiality.[198] Firm managers should determine what protection may be available under applicable disciplinary rules and statutes. Thereafter, each firm

---

193. N.C. RULES OF PROFESSIONAL CONDUCT Rule 4 (1995). Lawyers' assistance programs for impaired attorneys now exist in every state. Michael J. Crowley, *Alcoholic Lawyers: Are they Being Coddled by Attorney Discipline Systems?*, A.B.A. J., Jan. 1996, at 39. These lawyers' assistance programs operate as confidential referral, prevention, intervention, and education resources, stressing both confidentiality and separation from the attorney discipline systems. Patricia Sue Heil, *Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline*, 24 ST. MARY'S L.J. 1263, 1284-5 (1993). These programs use trained professionals and volunteers to provide guidance and support to impaired attorneys who are referred to the program. In this sense, the lawyers assistance programs provide a type of external peer assistance which can be differentiated from internal peer review measures implemented by law firms. If law firm peer review reveals or suggests attorney impairment, firm managers could refer the impaired attorney to a lawyers' assistance program. For a practical guide to "managing lawyer impairment," see Paula A. Barran, *Professional Responsibility and Law Firm Management: Managing Lawyer Impairment*, ABA 22ND NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY, May 30-June 1, 1996, at Tab. 2.

194. Following the audit, attorneys receive an evaluation of their management practices and recommendations without fear of discovery. *See* Alice Neece Mosely, *Nancy Byerly Jones: Leading the Way for the Law Practice Program*, N.C. ST. BAR Q., Summer 1993, at 22-23 (interview with the director of the law practice assistance program and risk management counsel for the North Carolina State Bar).

195. Under *North Carolina Rule of Professional Conduct* 1.3, the duty to report does not apply to confidential information. N.C. RULES OF PROFESSIONAL CONDUCT Rule 1.3(c) (1995).

196. *Model Rule* 8.3(a) requires lawyers to report professional misconduct when they possess "knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." MODEL RULES Rule 8.3(a). Subsection (c) of the rule provides an exception for information protected under the confidentiality rule and information gained when a lawyer is serving as a member of an approved lawyers assistance program. MODEL RULES Rule 8.3(c). *Compare* TEXAS RULES Rule 8.03(c) (enabling attorneys to report professional misconduct to an approved peer assistance program, rather than to the disciplinary authorities, when the reporting attorney believes that another attorney is "impaired by chemical dependency on alcohol or drugs or by mental illness").

197. MODEL RULES Rule 8.3 cmt 5.

198. For example, peer review could be conducted by law firms' general counsel or ethics counsel.

must formulate a policy relating to the creation and retention of records related to peer review.[199]

V. FIRM CULTURE AND PEER REVIEW

As the survey results illustrate, principals' willingness to seriously consider peer review and implement peer review measures depends to a large extent on firm culture. Despite the amorphous nature of firm culture, many commentators have discussed the role that culture plays in law firms. In his recent book Professor Michael Kelly asserts that "culture or house norms . . . play a dominant role in the way a lawyer practices."[200] Anthony T. Kronman, Dean of Yale Law School, explains that "culture" refers to "the attitudes and interests that the members of a group share and that define, for them, the point or purpose of their participation in it."[201]

Law firm management consultants view culture as the philosophical foundation supporting the relationships among the attorneys, the working environment, firm governance, and practice management.[202] As the firm's philosophical foundation, culture determines a number of aspects of firm practice.

Various survey questions elicited the respondents' philosophies on the following:

(1) whether the firm's principals take an institutional approach and function as a team or whether they operate as a group of practitioners sharing office space ("confederation approach"),

(2) the degree of autonomy individual principals enjoy and the extent to which they are accountable to other principals for the management of their individual practices, and

(3) the extent to which clients "belong" to the firm or to the individual attorneys.[203]

---

199. Because malpractice plaintiffs may attempt to discover peer review communications, some commentators recommend that firms not retain any documentation. For example, Robert O'Malley, loss prevention counsel for ALAS, cautions firms not to "leave a paper trail." Martha Middleton, *Are Firms Ready for Peer Review*, NAT'L L.J., Aug. 24, 1987, at 1, 10. In the absence of documentation, plaintiffs could still attempt to obtain the information through deposition testimony. MALLEN & SMITH, *supra* note 54, § 2.31, at 205.

200. In a recent book, Professor Kelly uses stories to show how culture acts as a crucial determinant of the quality of professional life. MICHAEL KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE 18 (1994).

201. ANTHONY T. KRONMAN, THE LOST LAWYER 291 (1993) (discussing the radical changes in the character of law firms' internal cultures).

202. Gerry Malone, *What Is This Thing Called Law Firm Culture?*, *in* LAW OFFICE MANAGEMENT 515 (PLI Comm. Law & Practice Course Handbook Series No. 478, 1988). Malone suggests that the ultimate success or failure of the law firm turns on its firm culture. *Id.*

203. For a discussion of the importance of these perspectives in considering a possible merger, see GERRY MALONE & HOWARD MUDRICK, ANATOMY OF A MERGER 11-12 (1992).

A. DO PRINCIPALS HAVE A TEAM OR CONFEDERATION PERSPECTIVE?

Law firm management experts resoundingly recommend that firm principals cultivate a team mentality among the firm's attorneys and staff.[204] In a team culture, attorneys elevate the firm's interests above individual interests.

The survey responses indicate that the majority of the respondents appreciate the importance of functioning as a unit rather than a confederation of individual practitioners. A total of 112 respondents (59%) agreed or strongly agreed with the statement that a firm should stress interdependence of principals. About the same percentage (61% or 116 of the respondents) believed that attorneys in a law firm should operate as a single entity in representing clients.[205]

Surprisingly, a number of respondents did express a confederation perspective. Thirty-six respondents (19%) stated that firm attorneys should not operate as a single entity in representing clients and 25 respondents (13%) believed that a firm should not stress the interdependence of principals. Only 17 respondents (9%) agreed that a law firm merely exists to facilitate each attorney's practice by providing assistance such as support staff, library resources, and insurance coverage.[206]

Survey responses indicate that attorneys whose responses reflect the confederation perspective are more likely to practice in firms that have not implemented peer review measures. Two questions relating to opinion letter procedures illustrate this pattern. Of the 25 respondents who disagreed or strongly disagreed with the statement, "[a] firm should stress the interdependence of principals," 21 (84%) practice in firms that do not require committee approval of all written opinions. Sixteen respondents (64%) who disagreed or strongly disagreed with the statement practice in firms that do not require two principal approval of all written opinions.

B. ARE PRINCIPALS ACCOUNTABLE TO OTHER PRINCIPALS?

Other responses indicate a similar connection between cultural attitudes and the extent to which principals practice autonomously from one another. Approxi-

---

204. *E.g.*, Ward Bower, *What Kind of Firm Will Yours Be?*, L. PRAC. MGMT., March 1990, at 40 (noting that "a team approach to law practice generally facilitates specialization, effective client service, backup, internal referral and delegation, leverage, and increased profitability"). Ward Bower, a principal with the consulting firm of Altman & Weil, has written various pieces distinguishing "team" and "confederation" firms. *See also* ALTMAN & WEIL, *supra* note 26.

205. Although the results do not suggest a connection between firm size and the percentage of respondents who believed that firms' principals should operate as a single entity in representing clients, the results do indicate that the percentage of respondents who believe that firms should stress interdependence of principals increases as the firm size increases.

206. Of this group, only two respondents "strongly agreed" that a law firms exists merely to facilitate each lawyer's practice by providing assistance such as support staff, library resources and insurance coverage. No respondents from Large Firms agreed with the statement that firms exist merely to facilitate each lawyer's practice.

mately 88% of the 32 respondents who strongly agreed or agreed with the statement, "[e]ach principal as a master of his/her own craft should be permitted to practice with little or no supervision from other firm principals," practice in firms with no formal peer review measures for reviewing principals' work. Among the 30 respondents who strongly agreed or agreed with the assertion that each principal as a master of his/her own craft should be permitted to practice with little or no supervision from other firm principals, 25 (83%) practice in firms that have not adopted procedures for monitoring principals who work outside their area.[207] Perhaps this reflects the view that principals operate as a confederation of individuals who tolerate the "inconvenience of practicing together [because it] improves an individual's financial return."[208]

C. ARE CLIENTS ATTRACTED TO INDIVIDUAL PRINCIPALS OR TO FIRMS?

In the confederation organizational culture, principals emphasize their personal relationships with their clients. By contrast, in a team culture, principals view clients as "firm clients" rather than clients who "belong" to individual attorneys.[209]

Attorneys who believe that clients hire individual attorneys and not law firms may perceive clients as "belonging" to the originating attorney. A slight majority of the respondents (54% or 103) believe clients hire individual attorneys and not law firms .[210] Among respondents who believed that clients hire individual attorneys, 89% practice in firms that have not instituted formal procedures for the review of the work of principals.[211] This suggests that principals may not implement peer review measures when they believe that clients hire individual attorneys rather than firms.[212] As firm loyalty wanes,[213] attorneys may be more inclined to see clients as their personal clients in whom they have sole proprietary

207. The results reflect a similar connection between attitudes and the adoption of procedures to monitor principals working outside their area. Eighty-two percent of those respondents who agreed or strongly agreed with the statement that "[l]aw firms merely exist to facilitate each lawyer's practice," work in firms that have not adopted procedures for monitoring principals who work outside their areas of practice.

208. *See* KELLY, *supra* note 200, at 186-87 (contrasting a firm that functions as a community with a firm that operates as a group of individuals).

209. Management in a team firm disperses responsibility for clients throughout the firm rather than vesting responsibility in the hands of an individual principal. *Id.* at 193.

210. Among this group of 103, 84 respondents (82%) agreed that clients hire individual attorneys and not law firms while 19 (18%) strongly agreed with the statement.

211. Presumably, attorneys in the largest firms would be more likely to believe that clients are attracted by firm reputation. The survey reveals no such relationship between firm size and the belief that clients hire individual attorneys and not law firms.

212. For a discussion of the factors that have caused a "loosening" of the internal and external bonds that have linked firm members and their clients, see KRONMAN, *supra* note 201, at 277-78.

213. *See* John F. Sutton, Jr., *Lawyers Today: Wise Professionals or Mere Skill Technicians?*, 35 S. TEX. L. REV. 741, 745 (1994) (reviewing ANTHONY T. KRONMAN, THE LOST LAWYER (1993)) (describing the consequences of client loyalty "toppling" and clients shopping among firms).

interest.[214] These attitudes undermine law firm solidarity and the sense of a firm-wide team.[215]

VI. CONCLUSION — RESHAPING FIRM CULTURE

In surveying peer review measures and attitudes on law firm practice and partner accountability, the study examined how firm principals conduct themselves once they band together in law firms and how they perceive their relationships with their peers. Although the concept of law firm peer review may appear to be novel, the study revealed that firms are in fact engaging in some forms of peer review. Most firms reported periodically monitoring principals' compliance with procedures relating to firm finances, but devoted less vigilance to procedures related to client service. Some firms heed the warnings of malpractice experts and institute controls to deal with problems such as conflicts of interest and attorneys' service as members of boards of directors of for-profit corporations. Yet, peer review tends to be conducted informally, predominately within law firm sections or departments. A large percentage of respondents recognize one or more advantages of peer review procedures, so one might expect to find a high number of firms with formal procedures. Respondents, however, perceive countervailing disadvantages and obstacles to peer review. Some obstacles can be addressed by persons outside the law firm. For example, state legislators can provide protection of peer review communications from discovery in any subsequent litigation. In an effort to encourage quality control and risk management, malpractice insurers could allow a premium discount for law firm peer review programs.[216]

Successful implementation of peer review ultimately turns on attitudes and structures within law firms. The study results indicate that attorneys who share an institutional perspective are more likely to implement peer review measures than attorneys who function as a confederation of individual practitioners. It may be that firms can only overcome resistance to peer review by "cultivating a collegial atmosphere wherein quality is revered to the point that partner autonomy becomes secondary to the recognized benefits of quality enhancement."[217] In this process, attorneys should recognize the advantages of functioning as a team,

---

214. *See* BRADFORD W. HILDEBRANDT & JACK KAUFMAN, THE SUCCESSFUL LAW FIRM: NEW APPROACHES TO STRUCTURE AND MANAGEMENT 10 (1988) (reporting that in recent years more clients have shifted to hiring lawyers, not law firms).

215. *See* Joan Wagner Zinober, *Improving Partner Relationships*, L. PRAC. MGMT., Mar. 1990, at 24-25 (emphasizing that treatment of clients as firm clients rather than private clients of an individual attorney differentiates attorneys who practice as a team from those who simply share overhead).

216. According to the survey results, 94 respondents (49%) indicated that their firms would institute peer review if legal malpractice insurers provide a premium discount for peer review. Of that group, 57 respondents (30%) noted a numerical value for the desired discount. The amount of premium discount that respondents noted varied from 3% to 30%, with an average of 13%.

217. Corrigan, *supra* note 54, at 62.

rather than a group of individuals. When a firm stresses a team approach, principals may view interdependence "in a positive, community light, rather than as a policing function."[218]

Law firm management consultants encourage such an institutional approach, insisting that it "results in a more economically successful firm as well as a more pleasant working environment."[219] As explained by management consultants, "cultivating the right culture" where attorneys talk about "we" rather than "me," harvests success.[220] Some go so far as to warn that failure to re-engineer firm culture results in the extinction of the firm.[221]

These consultants do not believe that culture should be left to chance; rather they recommend that firm leaders take steps to shape a positive culture where peer review is only one aspect of quality control and client service.[222] First, firm leaders should examine their own attitudes relating to firm practice, client service, and principal accountability. As explained by Professor Robert Nelson, "professional values related to organizational policies arise inside the firm and reflect the managerial ideology of the elite in power."[223] Because professionalism within a firm is constructed according to the firm's particular history and interests of its powerful partners,[224] implementation of successful peer review measures will turn on whether the firm's leaders support the effort.

Assuming the firm's leaders reach some consensus on the need for peer review measures, these individuals must then determine the best vehicle for exploring the matter with the remainder of the firm.[225] Firm leaders may appoint a task force to study the matter or could devote a retreat to discussing the principals' views of firm practice.[226]

---

218. Brian W. Smith & M. Lindsay Childress, *Avoiding Lawyer Liability in the Wake of Kaye, Scholer*, 8 ST. JOHN'S J. LEGAL COMMENT. 385, 401 (1993).

219. Malone, *supra* note 202, at 517.

220. Susan Hightower & Brenda Sapino, *Cultural Evolution*, TEX. LAW., Jan. 22, 1996, at 1, 18.

221. *See, e.g.*, Ronald M. Martin, *The Empowered Firm*, *in* TOTAL QUALITY MANAGEMENT FOR LAW FIRMS 1993: TURNING AWARENESS INTO ACTION 101 (PLI Comm. Law & Practice Course Handbook Series No. 664, 1993) (arguing that attorneys must work "smarter" and more efficiently in order to thrive); *see also* Hightower & Sapino, supra note 220, at 18 (suggesting that a "deficient corporate culture" struck the death blow for Johnson & Wortley, one of the largest firms in Texas).

222. *See* Bower, *supra* note 204, at 40 (listing a number of choices a firm must make in order to define itself). For recommendations from firm leaders who want to take steps to change their firms' cultures to be client-centered and compatible with the current buyers' market, see F. Leary Davis, *Back to the Future: The Buyer's Market and the Need for Law Firm Leadership, Creativity and Innovations*, 16 CAMPBELL L. REV. 147, 184-187 (1994).

223. This conclusion is based on the findings of a study of four large Chicago law firms, two with bureaucratic structures and two without such structures. ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 220 (1988) (emphisis omitted).

224. Nelson & Trubek, *supra* note 25, at 207.

225. *See* Scott Hunter, *Alignment: The X Factor of Success*, TEX. LAW., Apr. 15, 1996, at 33 (discussing the importance of firm principals possessing a vision and aligning individual goals in a team effort).

226. For guidance on organizing a retreat where short and long term goals can be explored, see Stephen Weinstein, *Planning a Law Firm Retreat*, 7 PRAC. LAW. 15 (1993); *see also* Joel A. Rose, *The Changing Nature*

When a firm's principals aspire to build and maintain a team, the principals must change firm structures that undermine team culture. For example, the firm might want to alter a compensation system that gives substantial credit for origination of new legal business.[227] Instead, firms could emphasize collective marketing rather than the individualistic, entrepreneurial "eat what you kill" approach.[228] Shifting the approach can help law firms avoid ethical and morale problems created when firms emphasize business development.[229]

As the firm's principals change the firm's structures and their attitudes on firm practice they should become more receptive to the implementation of a risk management program requiring some peer review measures.[230] Principals may come to realize that they must surrender some independence for the overall benefit of the firm.[231]

Principals must then tailor peer review procedures to the firm's individual circumstances and the principals' perspectives.[232] Depending on the size of the law firm, its principals may designate individuals or committees to deal with particular problem areas.[233] Once the objectives, scope, and type of review are identified, firm management can propose procedures for principals' approval. The principals should also be consulted on administrative matters including decisions on the use and documentation of peer review results. Thereafter, firm

of the Firm's Culture, N.Y. L.J., Aug. 8, 1995, at 5 (recommending firms use questionnaires to identify issues and assess attitudes in preparation for firm retreats).

227. *See* Duncan C. Smith, *Total Quality Leadership*, L. PRAC. MGMT., March 1993 at 34 (recommending that firms' compensation systems and methods of governance reinforce team building). For an account of the experience of a large Texas firm which has abandoned the "eat what you kill" philosophy and adopted a more comprehensive scheme that includes production and origination as well as community service, pro bono work, teamwork, and management contributions, see Amy Boardman, *High Risk Strategy Pays Off for Gardere*, TEX. LAW., April 10, 1995, at 1, 31.

228. *See* Hightower & Sapino, *supra* note 220, at 19 (suggesting that firms aggressively compete for business while maintaining "a level of professionalism and collegiality"); *see also* Eric Milstone, *Slicing the Pie*, A.B.A. J., April 1996, at 26 (describing the slow movement in law firms to consider attorneys' total contributions in tailoring compensation plans to match firms' long-term goals).

229. As recognized by Chief Justice Rehnquist, the "eat what you kill" system can lead to ethical difficulties. William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 155 (1987). Recognizing the problems with such an approach, many firms have moved away from a mechanistic approach of rewarding business development. *See* Larry Smith, *Firms De-emphasize Rigid Formulas for Rainmaking*, OF COUNSEL, Nov. 19, 1990, at 4.

230. *See* Middleton, *supra* note 199, at 1, 10 (reporting that negative attitudes toward peer review are changing). As stated by Robert O'Malley of ALAS, partners "see the handwriting on the wall .... They have too many claims, too many liabilities and too many embarrassing incidents that could have been prevented if individual partners had less autonomy and individual authority." *Id.*

231. *See* John Hurley, *In Search of the New Paradigm: Total Quality Management in the Law Firm —A Case Study*, 43 EMORY L. J. 521, 536 (1994) (discussing the importance of lawyers surrendering some status and prerogative in connection with a Total Quality Management program).

232. *See* Bradford W. Hildebrandt, *Managing in a Recession*, N.Y. L.J., Dec. 11, 1990, at 4 (emphasizing the importance of customizing peer review to the specific law firm).

233. For identification of various committees to handle dangerous situations and causes of legal malpractice claims, see Robert E. O'Malley, *Preventing Legal Malpractice in Large Firms*, 20 U. TOL. L. REV. 325, 361-63 (1989).

leaders should assume significant responsibility to ensure that attorneys meet firm standards and comply with firm policies.[234]

In monitoring the manner in which attorneys handle client matters, technical standards review promises to be the type of peer review that will encounter the least resistance from principals. By adopting standards, firms may condition principals to accept more intrusive peer review measures by creating an environment of accountability.

In this context, accountability encompasses both individual and corporate dimensions.[235] On the individual level, firm attorneys must take responsibility for the manner in which they practice law. Understanding that their acts and omissions may subject the firm and the other firm members to liability and possible damage to their reputations, firm members should be willing to participate in peer review. On both an individual and corporate level, attorneys and their firms are accountable to the legal profession for maintaining the highest ethical standards.[236] Finally, law firms and the legal profession must be held accountable for assuring that the system of self-regulation protects the public. Such accountability may earn the public trust by demonstrating that firm attorneys are dedicated to keeping their own houses clean.

---

234. Bradford W. Hildebrandt, *The Role of Practice Management*, N.Y. L.J., Oct. 13, 1992, at 4. All firm attorneys must then make good faith efforts to follow adopted policies and procedures because failure to follow policies and procedures can give rise to liability. *See* Baxter, *supra* note 18, at 211-12 (explaining that accounting firms have learned a painful lesson that failure to follow practice manuals can generate malpractice suits).

235. *See* PAUL Y. ERTEL & M. GENE ALDRIDGE, MEDICAL PEER REVIEW: THEORY AND PRACTICE 386-87 (1977) (analyzing the different aspects of public and professional accountability within the context of medical peer review).

236. *See* Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 700-01 (1994) (urging that organizations employing attorneys substantially increase ethical conduct through "monitoring and reward structures" because research on corporate compliance structures reveals that internal methods of securing compliance work more effectively than external oversight structures).

APPENDIX–QUESTIONNAIRE

Professor Susan Fortney of Texas Tech University is conducting a study of law firm culture and peer review measures in Texas law firms. A grant from the Texas Bar Foundation partially funded the expenses of this survey.

As a managing attorney your response is important to reflect accurately attitudes and approaches in Texas firms. Please take 5-10 minutes to complete the attached survey to provide information and to register your opinions.

For the purpose of this survey "peer review" means the process in which law firm partners or principals monitor and evaluate the job performance of their colleagues. The term "principal" is used to denote any equity holder in a law firm including a member of a partnership and shareholder in a corporation.

This survey does not intend to suggest standards or practices that should be followed.

When you have completed the survey, please send the survey in the enclosed envelope and separately mail the attached postcard. The postcard will be used to send survey results to persons completing the survey.

PLEASE RESPOND BY AUGUST 1, 1995.

DO NOT INDICATE YOUR FIRM NAME.
YOUR RESPONSES WILL BE ANONYMOUS.

THANK YOU FOR YOUR ASSISTANCE.

INSTRUCTIONS: MOST OF THESE QUESTIONS CAN BE COMPLETED BY EITHER CHECKING A RESPONSE OR BY FILLING IN A BLANK. IF A QUESTION SEEMS INAPPROPRIATELY OR INCOMPLETELY STATED FOR YOUR SITUATION, FEEL FREE TO WRITE AN EXPLANATION IN THE MARGINS OR ON THE ENCLOSED COMMENT SHEET.

What is the size of your firm including all branch offices?

_____More than 50 attorneys
_____26 to 50 attorneys
_____10 to 25 attorneys
_____2 to 9 attorneys

What is the structure of your firm?

_____General partnership
_____Professional corporation
_____Limited liability partnership
_____Limited liability corporation

Do withdrawals of client funds require the signature of two principals?

Yes _____ No _____

Does your firm require

Committee approval of all written opinions?
Yes___ No___

Two principal approval of all written opinions?
Yes___ No___

Principal approval of all audit letter responses?
Yes___ No___

A standard approach to legal opinion letters?
Yes___ No___

Does your firm have a principal or committee designated to

Handle ethics or malpractice problems?
Yes___ No___

Handle risk management and quality assurance?
Yes___ No___

Evaluate the manner in which principals handle client matters?
Yes___ No___

Does your firm participate in "cold review" whereby an attorney not connected with a client matter reviews facts and circumstances of certain matters such as litigation filings and securities offerings?

Yes _____ No _____

Does your firm have procedures to monitor the following activities by firm principals?

Investing in business transactions with clients
Yes _____ No _____

Other personal investments of principals
Yes _____ No _____

Accepting stock in lieu of fees
Yes _____ No _____

Principals' outside employment
Yes _____ No _____

Principals' outside speaking and writing engagements
Yes _____ No _____

Principals serving as expert witnesses
Yes _____ No _____

Does the firm require approval or prohibit principals serving as

Officers or Directors of for profit entities?
Yes _____ No _____

Officers or Directors of not-for-profit entities?
Yes _____ No _____

Trustees or holding some other fiduciary position?
Yes _____ No _____

Does your firm have procedures relating to

Periodic physical examination of principals?
Yes _____ No _____

Principals working outside their area of practice?
Yes _____ No _____

Do principals within the same section formally review one another?

Yes _____ No _____

Do department heads or section leaders

Conduct regular meetings where principals' work as well as associates' work is discussed?
Yes _____ No _____

Monitor the progress of all matters in a section?
Yes _____ No _____

Does your firm conduct a periodic review to determine if principals are complying with office procedures relating to the following?

Calendar control
Yes _____ No _____
Client screening
Yes _____ No _____
Conflicts of interest
Yes _____ No _____
Seeking litigation sanctions
Yes _____ No _____
Responding to sanctions motions
Yes _____ No _____
Suing clients
Yes _____ No _____
Engagement letters and fee agreements
Yes _____ No _____
Billing
Yes _____ No _____
Non-engagement letters
Yes _____ No _____
Screening new litigation
Yes _____ No _____
Accepting contingent fee cases
Yes _____ No _____

Do firm managers formally seek feedback on a principal's performance by asking the following persons for information?

Clients	Yes ____	No ____
Associates	Yes ____	No ____
Other principals	Yes ____	No ____

Other than the review conducted in connection with compensation decisions, does your firm have any formal procedures for reviewing the work of principals?

Yes _____ No _____

If "yes", please describe briefly your procedure. If "no", skip to the next section.

____
____
____
____
____
____
____
____
____

WE ARE INTERESTED IN YOUR OPINIONS REGARDING PEER REVIEW.

Which of the following do you identify as an advantage of peer review? Please check all advantages you see.

Improves the quality of legal services _____
Controls liability losses _____
Avoids disciplinary violations _____
Boosts intrafirm communication _____
Identifies principals with problems affecting performance _____
Serves marketing purposes _____
Helps shape attitudes that the firm is a team _____
Prevents principals from becoming too autonomous _____

Which of the following do you identify as a disadvantage of peer review?
Please check all disadvantages you see.

Peer review interferes with personal client relationships. _____
Peer review impinges upon the autonomy of individual principals. _____
Peer review will take too much time away from billable practice. _____
Peer review can create ill will and resentment among partners. _____
Describe other disadvantages

____
____
____

Should peer review be conducted at a time other than compensation review time?

Yes_____ No _____
If no formal review should be conducted, check here _____

Should reviews of principals be conducted (check one):

In house _____
By outside consultants _____
By both outside consultants and firm insiders _____
If no formal review should be conducted, check here _____

Should law firm peer review be afforded confidentiality so that third parties can't discover the results of peer review?
Yes _____ No ____

If your firm does not have any formal peer review measures, answer the following questions, otherwise, skip to the next section.

a. **Does your firm not engage in formal peer review because its results might be discoverable?**
Yes _____ No _____

b. **Would your firm be more likely to institute peer review measures if peer review communications were protected from discovery?**
Yes _____ No _____

c. **Would your firm institute peer review measures if legal malpractice insurers provided a premium discount of**
____ (complete a percentage, e.g. 5%)
____ (check here if no discount would cause your firm to institute peer review)

==

DO YOU AGREE OR DISAGREE WITH THE FOLLOWING STATEMENTS?

USE THE FOLLOWING SCALE TO INDICATE YOUR OPINION BY PLACING A NUMBER IN BLANK.

1	2	3	4	5
STRONGLY DISAGREE	DISAGREE		AGREE	STRONGLY AGREE

____ Clients retain a law firm expecting that firm principals monitor the performance of individual attorneys.

____ Firm principals should make reasonable efforts to ensure that the firm has measures giving reasonable assurance that the conduct of all attorneys conforms to applicable ethical rules.

____ Firm principals have a legal duty to monitor the manner in which other firm principals handle client matters.

____ Firm principals have an ethical duty to monitor the manner in which other firm principals handle client matters.

____ Unlimited liability provides an incentive for attorneys to monitor the conduct of one another.

____ Firms should monitor principals to control liability and to protect firm assets including its reputation.

____ Regardless of the structure of a firm, all firm principals should be subject to civil liability for injuries caused by any wrongful act or omission of any firm principal.

1	2	3	4	5
STRONGLY DISAGREE	DISAGREE		AGREE	STRONGLY AGREE

____ Vicarious liability should not be imposed on all firm principals because injured persons can be compensated by insurance and other firm assets.

____ If firm principals inquire into another principal's work, they will lose any liability shield provided by the PC, LLC or LLP structure.

____ Lawyers cannot agree on standards for evaluating legal competence.

____ Due to the high degree of legal specialization principals can't evaluate the substantive knowledge and competence of other principals.

____ Principals can only be effectively monitored by principals practicing in the same area.

____ Unlike accounting or medicine, lawyering skills cannot be easily evaluated or monitored.

____ A firm should stress the interdependence of principals.

____ Firm attorneys should operate as a single entity in representing clients.

____ Each principal as a master of his/her own craft should be permitted to practice with little or no supervision from other firm principals.

____ Law firms exist merely to facilitate each lawyer's practice by providing assistance such as support staff, library resources and insurance coverage.

____ Clients hire individual attorneys not law firms.

____ Lack of supervision is the main characteristic distinguishing a principal from an associate.

____ Clients should not be billed for time devoted to monitoring.

____ Peer review among partners is not necessary because attorneys engage in self-evaluation and improvement.