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Systematically Thinking about Law Firm Ethics: Conference on the Ethical Infrastructure and Culture of Law Firms

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FOREWORD

SYSTEMATICALLY THINKING ABOUT LAW FIRM ETHICS: CONFERENCE ON THE ETHICAL INFRASTRUCTURE AND CULTURE OF LAW FIRMS

*Susan Saab Fortney**

In 1991, Professor Ted Schneyer first used the term "ethical infrastructure" to refer to a law firm's organization, policies, and operating procedures that cut across particular lawyers and tasks.[1] In questioning how lawyer regulation focuses on the conduct of individual lawyers, he described the dynamics of practice and how various ethical breaches stem from organizational concerns that relate to lawyering in groups.[2] In advocating that firms be subject to discipline, he explained the following:

> Given the evidentiary problems of pinning professional misconduct on one or more members of a lawyering team, the reluctance to scapegoat some lawyers for sins potentially shared by others in their firm, and especially the importance of a law firm's ethical infrastructure and the diffuse responsibility for creating and

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1. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 10 (1991) [hereinafter Schneyer, *Professional Discipline for Law Firms*]. Ten years later, Professor Schneyer expanded the definition as follows: "Ethical infrastructures consist of the policies, procedures, systems, and structures—in short, the 'measures' that ensure lawyers in their firm comply with their ethical duties and that nonlawyers associated with the firm behave in a manner consistent with the lawyers' duties." Ted Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 585 (2011) [hereinafter Schneyer, *Broad Ethical Duties of Law Firm Management*].

2. Schneyer, *Professional Discipline for Law Firms*, *supra* note 1, at 16.

> maintaining that infrastructure, a disciplinary regime that targets only individual lawyers in an era of large law firms is no longer sufficient.[3]

Evidently, the Justices on the New York Court of Appeals found Professor Schneyer's argument to be persuasive. In 1996, New York amended its rules to provide for professional discipline of law firms.[4] Now, New Jersey and New York are the two states that allow law firms to be disciplined for breaches of professional conduct.[5]

Australian legislators also included the concept of ethical infrastructure in enacting statutory provisions that allowed nonlawyer ownership of incorporated legal practices.[6] The legislation first adopted in the state of New South Wales ("NSW") requires that incorporated law firms take measures to ensure the implementation and maintenance of "appropriate management systems."[7] As noted by Professor Schneyer, the Australian regulatory regime provides a "mechanism for enforcing" the firm's duty to maintain a "satisfactory ethical infrastructure."[8]

Other jurisdictions are integrating aspects of ethical infrastructure into their systems of lawyer regulation. For example, new legislation in the United Kingdom requires that firms appoint compliance personnel to ensure that their firms implement systems and controls to enable firm members to comply with legal requirements for solicitors.[9]

Bar associations are also examining the role that ethical infrastructure plays in affecting lawyer conduct.[10] In commenting on the

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3. *Id.* at 11.

4. N.Y. RULES OF PROF'L CONDUCT R. 5.1 (2013). For a thorough commentary on the New York experience with firm discipline, including a review of various cases where firm discipline was imposed, see generally ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED (2013).

5. *See* Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 2-3, 7 (2002) (providing background on firm discipline proposals).

6. Steven Mark & Tahlia Gordon, *Innovations in Regulation—Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 505-06 (2009).

7. *Id.* at 506. For an analysis of this requirement and the requirement that the firm appoint a director to manage firm compliance, see generally Susan Saab Fortney, *Tales of Two Regimes for Regulating Limited Liability Law Firms in the US and Australia: Client Protection and Risk Management Lessons*, 11 LEGAL ETHICS 230 (2009). For the perspective of the Australian regulator who spearheaded the mechanism for monitoring ethical infrastructure, see generally Mark & Gordon, *supra* note 6.

8. Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice*, 2009 J. PROF. L. 13, 31 (emphasis omitted).

9. *Outcomes-Focused Regulation at a Glance*, SOLICITORS REG. AUTHORITY, http://www.sra.org.uk/solicitors/freedom-in-practice/OFR/ofr-quick-guide.page (last updated Oct. 11, 2011). For a description of the responsibilities of compliance officers, see *id.* In considering risk and compliance, the Solicitors Regulation Authority advises compliance officers to consider the firm's infrastructure. *Id.*

10. *See, e.g.*, CANADIAN BAR ASS'N, LEGAL FUTURES INITIATIVE, THE FUTURE OF LEGAL

limitations of complaints-driven regulation of lawyers, a recent report issued by the Canadian Bar Association explained:

> There is increased thinking about achieving better regulatory outcomes by focusing on enhancing the "ethical infrastructures" of law firms. This would prevent misconduct before the fact, rather than meting out punishment after the fact as a result of client complaints. While penalties to individual lawyers may be appropriate, law firms themselves also play a role either directly or indirectly.[11]

Although a number of scholars and decision makers have used the concept of ethical infrastructure to analyze conduct of firm attorneys, some have broadened their inquiry to examine the role of firm culture and organizational settings. For example, in a 2011 book, *Lawyers in Practice: Ethical Decision Making in Context*, commentaries based on empirical studies analyze ethical decision-making in different practice settings.[12] In doing so, the book explores "how organizational, economic, and client differences across the legal profession actually matter for the work that lawyers do and the decisions that they make."[13] Noting that "each practice context contains its own combination of formal and informal constraints which shape norms, values, and conduct of lawyers working within it," the editors explain that "[t]he economic, social, and organizational features of practice contexts" deserve "at least as much attention" as the formal rules of conduct.[14]

To advance the discourse related to law firm ethics and the impact of formal controls and informal influences on lawyer conduct, we convened on April 5, 2013 the *Conference on the Ethical Infrastructure and Culture of Law Firms* ("Conference" or "Symposium"). The Conference, conducted under the auspices of the *Hofstra Law Review* and the Maurice A. Deane School of Law at Hofstra University's Institute for the Study of Legal Ethics, was funded in part by the Abraham J. Gross '78 Conference and Lecture Fund at the Maurice A. Deane School of Law at Hofstra University. Experts who have studied issues related to law firm ethics, culture, governance, and lawyer

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SERVICES IN CANADA: TRENDS AND ISSUES 36 (2013), *available at* http://www.cbafutures.org/CBA/media/mediafiles/PDF/Reports/trends-isssues-eng.pdf?ext=.pdf.

11. *Id.* at 38.

12. *See generally* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT (Leslie C. Levin & Lynn Mather eds., 2012) [hereinafter LAWYERS IN PRACTICE].

13. Lynn Mather & Leslie C. Levin, *Why Context Matters*, *in* LAWYERS IN PRACTICE, *supra* note 12, at 3, 3.

14. Lynn Mather & Leslie C. Levin, *Epilogue* to LAWYERS IN PRACTICE, *supra* note 12, at 366, 369.

conduct participated in the program and contributed Articles to this Symposium Issue of the *Hofstra Law Review*.

The Symposium's first author, Ted Schneyer, serves as the Milton O. Riepe Professor Emeritus at the University of Arizona James E. Rogers College of Law. For over three decades, Professor Schneyer has been a thought leader among legal ethics scholars and bar leaders.[15] In particular, he has critically examined the regulation of the legal profession and the institutions that influence lawyer conduct.[16] As noted above, Professor Schneyer first focused on the collective responsibility of law firms to maintain an "ethical infrastructure" in advocating that law firms, as entities, be subject to professional discipline for misconduct.[17] Since that time, he has studied developments relating to regulation of firms as entities to assess the effectiveness of firm discipline and agency regulation of firms.[18] In examining the track record of disciplinary actions against law firms, in 2011, Professor Schneyer concluded that the use of law firm discipline in New York and New Jersey has been "quantitatively and qualitatively disappointing."[19] Professor Schneyer suggested that the reactive nature of discipline operates as an obstacle to disciplinary enforcement of rules imposing broad managerial duties.[20] Rather than relying solely on such a reactive approach, Professor Schneyer has recommended a proactive regulatory program be implemented to promote ethical compliance by drawing more effectively on firm management.[21]

In his Symposium Article, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, Professor Schneyer expounds on his earlier scholarship, making a compelling case for jurisdictions using more of a proactive approach to regulation than is currently employed in the United States.[22] Professor Schneyer's argument is very timely because the American Bar

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15. *See* Bruce A. Green, *Foreword: The Legal Ethics Scholarship of Ted Schneyer: The Importance of Being Rigorous*, 53 ARIZ. L. REV. 365, 365 (2011) (noting that no one writing in the field of legal ethics has been "more questioning, more probing, more skeptical" than Professor Schneyer).

16. *Id.* at 365-68 (reviewing Professor Schneyer's many contributions in examining regulatory regimes and the institutional influences on the ethical conduct of lawyers).

17. Schneyer, *Professional Discipline for Law Firms*, *supra* note 1, at 10; *see supra* text accompanying notes 1-5.

18. *See* Schneyer, *Broad Ethical Duties of Law Firm Management*, *supra* note 1, at 604.

19. *Id.* at 614.

20. *Id.* at 616-17.

21. *Id.* at 619, 623.

22. *See* Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42 HOFSTRA L. REV. 233, 233 (2013) [hereinafter Schneyer, *Proactive Management-Based Regulation*].

Association ("ABA") Standing Committee on Professional Discipline ("ABA Committee") has commenced the first comprehensive review of attorney discipline in twenty years.[23] As the ABA Committee defines its scope of inquiry, Professor Schneyer urges committee members not to restrict their work to examining the disciplinary process.[24] Rather, he urges them to seriously consider how proactive regulation can be used to supplement professional discipline.[25]

In making this recommendation, Professor Schneyer uses the regulatory regime in NSW as a prototype of what he has termed "Proactive Management Based Regulation" ("PMBR") of firms.[26] He traces the developments in NSW, where legislators took the pioneering step of including the concept of "ethical infrastructure" in the statute that allows legal practitioners to incorporate their law practices, with no restrictions on non-lawyer ownership.[27] Professor Schneyer describes how management-based regulation developed out of the statutory provisions that imposed management and practice safeguards on Incorporated Law Firms ("ILPs," singularly "ILP").[28] First, the NSW legislation requires that the ILP appoint at least one "legal practitioner director" to be generally responsible for the management of legal services provided by the ILP.[29] Second, the director must ensure that the firm implements and maintains "appropriate management systems" to enable the provision of legal services in accordance with the professional obligations of legal practitioners.[30]

Because the legislation does not define "appropriate management systems," representatives from various organizations collaborated with the Legal Services Commissioner ("LSC") of NSW to develop ten objectives that management systems should address.[31] The "proactivity" element of the regulatory regime turns on a strategy involving a self-assessment process.[32] In this self-assessment process,

23. James Podgers, *A New Look*, A.B.A. J., Nov. 2012, at 24, 24.
24. Schneyer, *Proactive Management-Based Regulation*, *supra* note 22, at 234.
25. *See id.* at 245.
26. *Id.* at 235.
27. *Id.* at 238-40.
28. *Id.* at 240.
29. *Id.* at 240-41.
30. *Id.*
31. *Id.*
32. *Id.* at 242.

ILPs complete a self-assessment form reporting on their compliance with each of the ten objectives.[33]

After describing the NSW regulatory regime, Professor Schneyer points to empirical studies that reveal that the PMBR of firms has yielded positive results.[34] Despite these positive results, Professor Schneyer recognizes that adoption of PMBR may face resistance in the United States.[35] To address that concern, he explains how PMBR is consistent with provisions in the current ABA Model Rules of Professional Conduct as well as bar initiatives, such as law practice management programs.[36] He concludes the Article by commending "NSW-style PMBR programs as the best road forward," while suggesting that "courts which do not wish to go that far" can start the process of proactive regulation by adopting and strengthening Law Practice Management Assistance programs and by "requiring law firms to designate lawyer-managers to file occasional informational reports on the measures their firm takes to provide reasonable assurance that their lawyers will fulfill their first-order ethical obligations and their staffs will conduct themselves in a manner consistent with those obligations."[37]

In his Symposium Article, *Nested Ethics: A Tale of Two Cultures*, Professor Milton C. Regan, Jr., the McDevitt Professor of Jurisprudence and Co-Director of the Center for the Study of Legal Profession at the Georgetown University Law Center, also recognizes the value of programs to ensure that lawyers in firms "comply with their professional responsibilities."[38] He emphasizes the importance of promoting an ethical culture that complements and reinforces the ethical infrastructure

33. *Id.*

34. *Id.* at 235-37. In 2008, an empirical study conducted by Professor Christine Parker revealed that the complaints rates for ILPs went down by two-thirds after ILPs completed their first self-assessment forms and that ILPs complaints rates were one third compared to the complaints rates for non-incorporated firms. *Id.* at 237 & n.25 (citing Christine Parker et al., *The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour*, 31 U. N.S.W. L.J. 158, 160 & n.5 (2008)) (discussing the results of Parker's study). A mixed method empirical study that I conducted in 2012 also indicated that ILPs positively impacted the implementation of management systems. *See id.* at 238-40 (citing Susan Saab Fortney & Tahlia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L.J. 152, 156 (2012)) (reviewing pertinent results from my 2012 survey of ILPs with two or more solicitors in NSW).

35. *Id.* at 262-64.

36. *Id.* at 264.

37. *Id.* at 265.

38. Milton C. Regan, Jr., *Nested Ethics: A Tale of Two Cultures*, 42 HOFSTRA L. REV. 143, 143, 148 (2013) (noting that programs may produce great uniformity across the firm, while lessoning reliance on the probity of individuals).

of firms.[39] Conceptualizing the components that influence ethical behavior as "nested inside one another," Professor Regan identifies multiple levels of ethical behavior, starting with the first level of the individual who engages in decision-making, to the second level of the firm's ethical infrastructure comprising of formal policies and procedures.[40] The third level is the firm's ethical culture that provides the context for the first two levels.[41] The fourth level is organizational culture, which includes "management policies, priorities and initiatives" that may "undermine or support ethical practice."[42]

Professor Regan's conceptualization of "nested relationships" advances our understanding of law firm ethics and dynamics by explaining the links between the organizational and ethical cultures of firms. After discussing the evolution of formal law firm ethics programs, Professor Regan discusses how an organization's values, especially those related to how fairly the firm treats people who work there, can impact ethical attitudes and behavior.[43] Findings from a large empirical study of employees in companies with ethics and compliance programs reveal that there is a "strong relationship between perceived general fair treatment and ethics-related outcomes."[44] Drawing on these research findings, Professor Regan concludes by stressing the importance of firm leaders recognizing the "ethical implications of a wide range of practices, procedures, and decisions" such as those affecting promotions and advancement of individuals within a firm.[45] Firm leaders who understand the connection between business and ethics will be better prepared to make decisions because they appreciate the impact on ethical conduct. In analyzing the effectiveness of ethical culture, Professor Regan explains that members of an organization are more likely to be receptive to its ethical culture the more they identify with the organization.[46] Given the "fragility" of firms, Professor Regan notes that its partners may feel "it is hazardous to act as if their long-term self-interest is tied to that of the firm."[47]

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39. *Id.* at 144-45, 155-56. For the purposes of his analysis, Professor Regan uses the term "ethical culture" to refer to the values embodied in an organization's ethical program. *Id.*

40. *Id.* at 144-45.

41. *Id.*

42. *Id.* at 147 (internal quotation marks omitted) (citing Parker et al., *supra* note 34, at 161).

43. *Id.* at 158, 163.

44. *Id.* at 164-65 (internal quotation marks omitted) (citing LINDA KLEBE TREVIÑO & GARY R. WEAVER, MANAGING ETHICS IN BUSINESS ORGANIZATIONS (2003)).

45. *Id.* at 174.

46. *Id.* at 146.

47. *Id.* at 145 (noting that the risk of terminations or deequitizations may contribute to a heightened sense of vulnerability that can "prevent the formation of any deep sense of attachment to a firm").

In their Symposium Article, *The Relational Infrastructure of Law Firm Culture and Regulation: The Exaggerated Death of Big Law,* Professor Russell G. Pearce, the Edward & Marilyn Bellet Professor of Legal Ethics, Morality & Religion at Fordham University School of Law, and Eli Wald, the Charles W. Delaney, Jr. Professor of Law at the University of Denver Strum College of Law, explore cultural and organizational dimensions of attorney self-interest and relationships within law firms.[48] As suggested by the title, Professors Pearce and Wald respond to the commentaries that presage the death of Big Law.[49] In challenging "the death of Big Law" critique, they question its basic premise that "lawyers, law firms, and clients are captives" of what they call "autonomous self-interest" and that the individualist culture of large firms will ultimately threaten their ability to survive.[50] Rather, they propose another perspective on firm culture, one they call "relational self-interest," in which "all actors are inter-connected, whether [as] individuals [or in groups] . . . [and] cannot maximize [their] own good in isolation."[51]

To develop their thesis, Professors Pearce and Wald first examine the external and internal changes that commentators maintain have eroded the importance of reputational capital.[52] Their account of developments reveals that reputational capital actually is alive and well.[53] In fact, reputational capital and relationships may be more important in the current economic climate than they were in the golden age for law firms.[54]

Instead of joining the naysayers who believe that there is nothing that firms can do to change the course of events, Professors Pearce and Wald express optimism, suggesting that firms can take steps "to incentivize their lawyers and restrain their atomistic self-interested

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48. Russell G. Pearce & Eli Wald, *The Relational Infrastructure of Law Firm Culture and Regulation: The Exaggerated Death of Big Law*, 42 HOFSTRA L. REV. 109, 109-11 (2013).

49. "Big Law" is the popular term used to refer to the largest firms in the United States. *See* Noam Scheiber, *The Crisis at Washington's Ultimate Power Firm*, NEW REPUBLIC (Aug. 9, 2013), http://www.newrepublic.com/node/114255 (describing "Big Law" as the "200 or so" biggest law firms).

50. Pearce & Wald, *supra* note 48, at 110.

51. *Id.* (alternation in original) (quoting Russell G. Pearce & Eli Wald, *Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles*, 2012 MICH. ST. L. REV. 513, 514) (internal quotation marks omitted).

52. *Id.* at 111-14.

53. *Id.* at 112-14.

54. "Golden age" is the term used to describe the prosperity of large law firms in the late 1950s and early 1960s. *See* MARK GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 20 (1991) (describing the period as one in which large firms were prosperous, stable, and untroubled, enjoying stable relations with clients and steady growth).

conduct by building a relational infrastructure and culture."[55] In support of this position, they refer to studies that show that "economic relationships are social relationships and that mutual benefit better describes conduct than autonomous self-interest."[56] Using the relational self-interest lens, they assert that, "[t]he rewards an individual lawyer receives actually do depend upon the good of her colleagues and her firm."[57]

Query how firm leaders discern whether individual lawyers share a relational self-interest perspective, as opposed to an autonomous self-interest perspective. When evaluating prospective lawyers, such as lateral partners, are firms prepared to inquire as to the prospective hire's "fit" with the firm, especially when it comes to evaluating matters related to ethical conduct? Could firms design a questionnaire or interview template to obtain information on the individual's values and attitudes? On the flip side, when lawyers are evaluating a new firm, what inquiries can they make beyond asking about profits-per-partner and formal programs? As suggested by Professors Pearce and Wald, a prospective lawyer may seek information on the extent to which lawyers are supported and rewarded for collaboration and other non-monetary contributions to the firm.[58]

In addition to emphasizing the importance of relationships within firms, Professors Pearce and Wald maintain that building relationships and trust with clients is of paramount importance.[59] They also point to firms that have effectively reinvented themselves, partnered with clients, and cultivated client relationships to thrive, when other firms are struggling and losing corporate business.[60] Finally, Professors Pearce and Wald offer practical suggestions on how a relational approach can

55. Pearce & Wald, *supra* note 48, at 118.

56. *Id.* at 123 (citing Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 17 n.90 (2011) (referring to the work of a number of economists)).

57. *Id.* at 124.

58. *See id.* One firm that was among the fastest growing law firms in the *National Law Journal*'s top 350 ranked law firms during 2012 communicates the importance of firm culture when dealing with prospective hires. Todd Ruger, *Warm, Fuzzy and Collaborative*, NAT'L L. J., June 10, 2013, at 56. According to the chairman of Bulter, Snow, O'Mara, Stevens & Cannada, he tells recruits the following: "[I]f the dollar is the last and first thing on your list each morning, then Butler Snow might not be for you." *Id.* For a discussion of an empirical study that examined the connection between firm culture, attitudes, and peer review measures in law firms, see Susan Saab Fortney, *Are Law Firm Partners Islands unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS, 271, 306-10 (1996) (concluding 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").

59. Pearce & Wald, *supra* note 48, at 112.

60. *Id.* at 119-20, 141-42.

make firms more competitive and more diverse, while promoting professionalism and ethics.[61] They emphasize the importance of firms taking steps to "protect its key asset—reputational capital—by putting in place a relational infrastructure that is likely to build and develop its human capital, while limiting opportunistic and individualistic conduct."[62] Within the firm, they explain that firms can "promote relational self-interest through institutional policies and practices that build trust."[63] Using Professor Regan's "nested relationships" framework, firm leaders should recognize that almost every decision they make can foster or undermine trust and connectedness.[64] Professors Pearce and Wald suggest that firms that understand the importance of relational self-interest in the long-run will do well by doing right.[65]

One test of whether a law firm may do well by doing right is how firm lawyers respond to the discovery of their own malpractice. A firm's culture and infrastructure will directly influence how lawyers handle situations when things go wrong. In his Symposium Article, *Law Firm Malpractice Disclosure: Illustrations and Guidelines*, Professor Anthony V. Alfieri examines thorny issues related to professional error and disclosure to clients.[66] Specifically, he focuses on lawyer and law firm acts of delay in communicating information to clients and withholding information from clients.[67] In tackling the topic, Professor Alfieri poses the following questions: (1) "[W]hen may a lawyer or law firm permissibly *delay* disclosure of information to a client about an error-related incident of malpractice?" and (2) "[W]hen may a lawyer or law firm permissibly *withhold* information from a client about such an incident and its consequences?"[68] Professor Alfieri tackles these questions by first reviewing the law and rules applicable to commencement of the client-lawyer relationship and duties owed clients.[69] This discussion of fiduciary norms under agency law and professional conduct rules provides the foundation for understanding lawyers' duties to act when lawyers discover their own professional errors.

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61. *Id.* at 136-40.
62. *Id.* at 141.
63. *Id.* at 133.
64. *See* Regan, *supra* note 38, at 144-45.
65. Pearce & Wald, *supra* note 48, at 140-41.
66. Anthony V. Alferi, *Law Firm Malpractice Disclosure: Illustrations and Guidelines*, 42 HOFSTRA L. REV. 17, 25-31 (2013).
67. *Id.* at 118-19.
68. *Id.* at 118.
69. *Id.* at 25-31.

To apply the common law principles and professional conduct rules, Professor Alfieri uses illustrations, each addressing different aspects of the attorney-client relationship, beginning with formation of the relationship, through discovery of malpractice, and ending with the termination of representation after firm lawyers determine that their interests materially impaired their professional obligations.[70] His discussion illuminates a number of areas of concern that previously have received limited attention, such as the propriety of disclosing confidential information to the firm's malpractice insurance carrier.[71] In considering different concerns, Professor Alfieri analyzes the issue from the vantage points of firm lawyers and clients.[72]

Professor Alfieri's Article addresses important questions for lawyers in the trenches and those of us who believe that lawyers need guidance on the proper course to take when they discover acts or omissions that could constitute professional malpractice. Above all, his Article and illustrations underscore the importance of lawyers cautiously proceeding, understanding their professional obligations and the consequences of their conduct, including the failure to disclose information and withdraw from representation. To assist lawyers in navigating a course of action when they discover the possibility of their own malpractice, Professor Alfieri uses best practice guidelines to "establish instructive baseline norms for reporting law firm error, for timing and framing the content of that reporting, and for evaluating the impact of post-disclosure conflicts of interest on the client-lawyer relationship and the quality of lawyer representation in both litigation and transactional cases."[73]

On the theme of relationships and ethical culture, Professor Alfieri notes that the guidelines related to handling disclosure to clients and post-disclosure conflicts "comport with the core belief in the lawyer's professional obligation 'to make the interests of the client paramount, even at some personal risk, loss or inconvenience to himself.'"[74] Drawing on the model of "lawyer-as-friend," he emphasizes the client-lawyer relationship as a relationship of trust.[75]

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70. *Id.* at 24-25, 29, 34-35, 38-39, 44.

71. *See id.* (using an illustration to discuss the issues associated with consulting the firm's malpractice insurance carrier and outside professional liability counsel).

72. *See, e.g., id.* at 29, 34-35.

73. *Id.* at 53.

74. *Id.* at 48 (quoting Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 705 (1977)).

75. *See id.* (referring to the aspirational view of lawyer-as-friend promoted by scholars, including Charles Fried).

Turning from how lawyers and firms handle their own mistakes to how we lawyers handle others' mistakes, Professor Ronald D. Rotunda's Symposium Article, *Applying the Revised ABA Model Rules in the Age of the Internet: The Problem of Metadata*, analyzes legal ethics issues related to inadvertent disclosure of information, focusing on the inadvertent disclosure of metadata in electronic documents.[76] As noted by Professor Rotunda, "[t]he culture of every law firm must emphasize competence."[77] Comments to ABA Model Rule 1.1 explain that competence requires that lawyers learn about the "benefits and risks associated with relevant technology."[78] This duty of competence is implicated when lawyers do not understand the technology that they use and fail to recognize that an electronic document contains metadata.[79] Professor Rotunda urges lawyers to understand the technology, and to take precautions to not disclose metadata in the first place, rather than relying on recent changes to the ABA Model Rules of Professional Conduct that effectively lessen the impact of mistakes or inadvertent disclosure.[80]

After reviewing the ABA's handling of ethics and evidence issues related to technology, internet chat rooms, and electronic communications, Professor Rotunda analyzes the 2012 changes to Model Rule 4.4(b), that expanded the reach of the Rule to require a lawyer to promptly notify a sender if the lawyer receives electronically stored information and the lawyer knows or reasonably should know that the electronically stored information was inadvertently sent.[81] Professor Rotunda argues that the new Comments to Model Rule 4.4 confuse lawyers' obligations by effectively giving metadata an "exalted position."[82] Should lawyers use the information that was inadvertently disclosed to benefit their clients, or should they refrain from doing so? If the law permits the receiving lawyer to use a physical document, Professor Rotunda concludes that, "the receiving lawyer should be able to examine and use all of the information within the document, including information embedded within the document."[83] Professor Rotunda's critique of the ABA's stance on inadvertent disclosure raises the

76. Ronald D. Rotunda, *Applying the Revised ABA Model Rules in the Age of the Internet: The Problem of Metadata*, 42 HOFSTRA L. REV. 175, 192-94 (2013).

77. *Id.* at 175.

78. *Id.* (quoting MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2012)).

79. *Id.* at 175.

80. *Id.* at 175-76.

81. *Id.* at 189-91 (citing MODEL RULE OF PROF'L CONDUCT R. 4.4 & cmts. (2013)).

82. *Id.* at 230-31.

83. *Id.* at 230.

question of whether the ABA can do a better job of formulating rules to guide lawyers and their firms in making ethical decisions.

In his Symposium Article, *Ethical Decisionmaking and the Design of Rules of Ethics*, Professor John S. Dzienkowski makes recommendations on how the ABA can improve processes related to the drafting, deliberation, and adoption of rules of professional conduct.[84] After providing a historical background and discussing specific problems in lawyering that affect the ability of ethics rules to regulate lawyer conduct, Professor Dzienkowski offers suggestions for improving the design of the ethics rules.[85] Among other recommendations, he suggests including client perspectives in the drafting process, depoliticizing the rulemaking by changing the process of requiring that rules be adopted by the ABA House of Delegates, and adding interpretive comments to improve the clarity of the rules.[86] At a time when critics question the need to change rules, Professor Dzienkowski advocates that the ABA take a systematic approach, obtaining empirical data about the operation of current rules, the existence of law firm practices, and the manner in which lawyers and firms comply with rules and meet professional obligations.[87]

Interestingly, over ten years ago at another Hofstra University School of Law conference, Professors Elizabeth Chambliss and David Wilkins proposed strategies for additional empirical research related to the ethical infrastructure of law firms.[88] Since that time, a number of researchers have conducted empirical studies related to the ethical infrastructure and culture of law firms.[89] Three of these studies examined aspects of the impact of the proactive regulation of law firms that Professor Schneyer discussed in his Symposium Article.[90] Professor Christine Parker conducted a 2008 study based on complaints data

84. John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 87-102 (2013).

85. *Id.*

86. *Id.* at 102-105.

87. *Id.*

88. *See* Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 704-05, 714-16 (2002) (describing their own research agenda and recommending other steps for research on ethical infrastructure).

89. *E.g.*, Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 565-66 (2002) (discussing a study based on information obtained from focus groups and interviews with lawyers in thirty two large law firms); Susan P. Shapiro, *If It Ain't Broke . . . An Empirical Perspective on Ethics 2000, Screening, and the Conflict-of-Interest Rules*, 2003 U. ILL. L. REV. 1299, 1306-08 (drawing on data obtained from Chicago lawyers responsible for dealing with conflicts-of-interest issues).

90. *See* Schneyer, *Proactive Management-Based Regulation*, *supra* note 22, at 112.

relating to lawyers in incorporated law firms in NSW.[91] That study found a dramatic decrease in the number of disciplinary complaints against practitioners in incorporated law firms that completed the self-assessment process.[92] The study report ends by calling for more empirical research.[93]

In 2011, Professor Parker and Lyn Aitken published an article discussing the findings of a survey conducted by the Queensland Legal Services Commission.[94] The survey, called the "Workplace Culture Check," included questions related to ethical infrastructure and workplace culture of law firms.[95] Based on the survey findings, Professor Parker and Aiken determined that there were strong differences between how junior and senior lawyers perceived some aspects of ethical infrastructure in their firms, especially differing in their sense of their own capacity to raise and address ethical concerns.[96] The researchers conclude by commenting on the need for research into "precisely what ethical supports law firms already have in place, how they are perceived, and what impact they have on perceptions, thinking, and behavior."[97]

Most recently, I completed a 2012 mixed method empirical study related to the impact of the new regulatory regime requiring that Australian incorporated law firms complete a self-assessment process reporting on their management systems.[98] The findings from this study revealed that the self-assessment process has indeed contributed to directors examining their firms' management systems and fortifying the firm's ethical infrastructure.[99] The article based on that study outlined an

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91. Christine E. Parker, Tahlia Gordon & Steve A. Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Incorporated Legal Profession in New South Wales*, 377 J.L. & SOC'Y 466, 478-81 (2010). The research model used complaints data to study whether regulating ILPs improves "ethical management and behaviour as indicated by lower rates of complaint about practitioners in ILPs." *Id.* at 468.

92. *Id.* at 485-88. The study found that the complaints rate for ILPs went down by two-thirds after the ILP completed their initial self-assessment, and that the complaints rate for ILPs that completed the self-assessment process was one-third of the number of complaints filed against non-incorporated law firms. *Id.* at 487-88.

93. *Id.* at 494.

94. Christine Parker & Lyn Aitken, *The Queensland "Workplace Culture Check": Learning from Reflection on Ethics Inside Law Firms*, 24 GEO. J. LEGAL ETHICS 399, 407-09 (2011).

95. *Id.* Fourteen law firms completed the "Workplace Culture Check" survey as a form of "participatory action research." *Id.* at 408-11. For an explanation of the differences between "participatory action research" and systematic social science research, see *id.* at 410-11.

96. *Id.* at 429-30.

97. *Id.* at 434-35 (explaining the lack of "[d]eep research," and the need for developing new tools to facilitate reflection and focus attention on the need for organizational change).

98. Fortney & Gordon, *supra* note 34, at 168.

99. *Id.* at 175-78.

agenda for research related to management-based regulation of law firms, as well as other issues more generally related to the ethical culture and infrastructure of law firms.[100]

The message from these studies is clear—law firms are a "research rich" environment for study. As researchers explore new empirical projects, they should collaborate with representatives from law firms, regulators, malpractice insurers, and other stakeholders in identifying issues to study and designing research models to yield meaningful results.[101] We are delighted that the *Conference on the Ethical Infrastructure and Culture of Law Firms* provided a forum for scholars, regulators, and practitioners to exchange observations and consider issues that merit additional research and examination.

On a go-forward basis, we also hope that the Symposium Articles published in connection with the *Conference on the Ethical Infrastructure and Culture of Law Firms* inspire further examination by scholars, regulators, and practitioners committed to improving lawyers' ethical conduct. Thanks to the participants in the Conference, the Abraham J. Gross '78 Conference and Lecture Fund, and the *Hofstra Law Review* for their contributions and support in advancing the understanding of the impact of ethical infrastructure, ethical culture, and organizational culture on how lawyers discharge their responsibilities and balance their duties to clients, the courts, and each other.

100. *See generally id.*

101. For an outline of practical steps that researchers might take to foster collaborations related to empirical research on the legal profession, see Susan Saab Fortney, *Taking Empirical Research Seriously*, 22 GEO. J. LEGAL ETHICS 1473, 1477-78 (2009).

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