

July 2015

Why Lawyers are Different and Why We are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior - In-House Ethics Counsel, Bill Padding, and In-House Ethics Training

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**WHY LAWYERS ARE DIFFERENT AND
WHY WE ARE THE SAME:
CREATING STRUCTURAL INCENTIVES IN LARGE LAW
FIRMS TO PROMOTE ETHICAL BEHAVIOR—IN-HOUSE
ETHICS COUNSEL, BILL PADDING, AND IN-HOUSE
ETHICS TRAINING**

University of Akron School of Law—29 Oct. 2010

Miller-Becker Professional Responsibility Distinguished Lecture Series

*Ronald D. Rotunda**

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I. INTRODUCTION

In many ways, lawyers are different than other people. In other ways, we are, sadly, so much the same. What we often call “legal ethics” or “professional responsibility” is the law governing the practice of law. This law serves to make us different, but our compliance with it struggles against the fact that we are not born different: we struggle with the same demons as other mortals, and like them, we learn to rationalize our failings. And, when we believe that no one is looking, when we are anonymous, we are more likely to rationalize.

The structure of the large, modern law firm makes it easier for lawyers to be anonymous and to hide in the crowd where they are more likely to develop bad ethical habits. Hence, large law firms in particular should support structural changes that serve to counterbalance and compensate our natural tendencies to justify our misbehavior when we believe that no one is looking. There are few things that law firms can do, and case law applying the attorney-client privilege can support those structural changes. But first, let us turn to the differences between lawyers and other professions. These differences are not merely a difference in degree; they are a difference in kind.

II. THE ETHICS OF LAWYERS THAT MAKE US DIFFERENT

If a lawyer wins a case that she should have lost, she is particularly happy. After all, any lawyer can win a case if the facts and law are on her side; it takes a real lawyer to win a case on procedure. Laypeople do not understand that.

If someone hurls at you the charge of being “argumentative,” we know that is an insult. But for lawyers, it is a compliment. When lawyers were law students they told their friends, “Tomorrow, I will have an argument. Would you like to come?” “Thank you, yes,” we responded. Afterward they asked their guests, “Did you enjoy the argument?” Laypeople do not understand that.

When law students return home during the Thanksgiving break of their first year, their grandmothers may ask them, “How many laws did you learn so far?” “It does not work like that,” they respond. Laypeople do not understand that.

And, in law school we study ethics. Laypeople do not understand that either.

I recall a story of many years ago. Two law students married each other just before starting their third year of law school. After they had both graduated, they went to Scotland for a belated honeymoon at a

picturesque country inn. The proprietress asked them how long they had been married. “It’s been a year,” they said. “What,” she responded, “A year, and no wee little ones yet?” “Well,” they replied, “we had to finish school first.” Her response: “You mean in America you have to go to school for that too?” So, in America we go to school to study ethics. When we study legal ethics, we find that many of the rules are not intuitive. My first introduction to legal ethics was in eighth grade. The teacher told each of us to write a paper on what we wanted to be. I did not know any lawyers, but I knew I wanted to be one—although I did not know why. So, I wrote the state bar and asked for information on being a lawyer. The bar sent me its code of professional responsibility.

One of the rules of professional responsibility stated that it was *unethical to charge less than a certain amount of money per hour*.¹ I do not remember the exact amount, but I do remember that, whatever the hourly fee was, it was more than what my father earned in a good day.

Think about that—it would be unethical for a lawyer to charge less for an hour of work than a skilled blue collar worker charged for a full day of work. I did not understand the bar’s reasoning, because I was thinking like a buyer of legal services instead of like a seller. Sellers always complain about “price wars,” but we know that a buyer has never been wounded in one. Later, the Supreme Court—thinking like clients and not lawyers—held that minimum fee schedules violate the antitrust laws.²

Until then, no truly ethical lawyer would dare undercut his competitors. Consider what the New York State Bar Association solemnly warned in 1965: “[L]et it be known, by whatever means, that a lawyer [who] will customarily charge for his services less than the recommended fees set forth in a duly adopted schedule is not in accordance with Canon 12 and is unethical as a form of solicitation and

1. ABA Code of Professional Responsibility, EC 2-16 (“The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them.”); EC 2-17 (“[A]dequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.”); DR 2-101 (Publicity in General); DR 2-102 (Professional Notices, Letterheads, Offices, and Law Lists) (amended as of Feb. 17, 1976), *reprinted in*, THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 250, 354–55 (1976).

2. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). See Thomas D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 *FORDHAM L. REV.* 415 (1998).

advertising.”³ This ethics opinion was hardly a judicial orphan. It cited ABA Formal Ethics Opinions going back decades.⁴

When the Wisconsin Bar published and distributed its new fee schedule to state judges and lawyers, the bar greeted it with virtual applause: “The new schedule of minimum fees hit the Bar like a welcome rain on parched fields.”⁵ Within three years, it raised lawyers’ income by 25% to 50%.⁶ Price fixing has its advantages.

Of course we all like to earn more, because “more” is generally better than “less.” But other occupations do not claim that it is a sin to earn too little. That leads to my second introduction to legal ethics. The summer after my first year of law school, I worked in the law department of the First National Bank of Chicago. My father said that it was good working for a bank—indoor work, no heavy lifting—but he warned that the salaries are not that high. He was thinking of bank tellers. I told him my salary and his mouth dropped: I was earning substantially more than he was, and I was thirty years his junior.

My third introduction to legal ethics grew out of my work at the bank. It relates to the competitive advantage that the ethics rules give lawyers. This competitive advantage serves to lift incomes. Lawyers write the ethics rules so it should be no surprise that some rules help lawyers more than clients.⁷ When I was working for the First National Bank that summer, a legal ethics issue arose: “unauthorized practice.” As most lawyers know, it is “unauthorized practice” and a crime for a person not admitted to the state bar to practice law.⁸ The bank’s

3. N.Y. State Bar Association, Professional Ethics Opinion, No. 6 (Jan. 29, 1965), <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=10532>.

4. *An Attorney’s Adherence to an Obligatory Fee Schedule Which is Applicable to Every Case of the Same Nature Would Result in a Violation of Canon 12 of the Canons of Ethics*, 1930 ABA FORMAL OP. 28; *No Attorney Should Permit Himself to be Controlled By an Obligatory Minimum Fee Schedule Nor Should Any Bar Association Undertake to Impose Such Restrictions Upon Him*, 1937 ABA FORMAL OP. 171; *Although An Attorney Has a Right to Contract for Any Fee He Chooses So Long As It Is Not Clearly Excessive, Fees Should Ordinarily Be Arrived At By Consideration of the Factors Enumerated in Canon 12*, 1939 ABA FORMAL OP. 190; *The Habitual Charging of Fees Less Than Those Established by a Minimum Fee Schedule, or the Charging of Such Fees Without Proper Justification, May Be Evidence of Unethical Conduct*, 1961 ABA FORMAL OP. 302.

5. STATE BAR OF WISCONSIN, A HISTORY OF THE ORGANIZED BAR IN WISCONSIN ch. 19 (2011), available at <http://www.wisbar.org/AM/Template.cfm?Section=BarHistory&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=48673>.

6. *Id.*

7. See generally Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

8. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §§ 5.5-3- 5.5-6 (8th ed. 2010).

unauthorized practice issue surfaced because of a typical problem for many couples at the time. When the husband or wife died, the surviving spouse sometimes found that he or she could not get access to the joint bank account because of possible state estate taxes due. The spouse simply filed a form with the state indicating that no taxes were owed because the estate was so small.

The problem was that many bank customers were not educated enough to navigate the form. The bank, as a courtesy, would send these people to lawyers in its trust department and they would help them fill out the form. Some lawyers not working at the bank complained of the competition, arguing that the “bank” was engaged in the unauthorized practice of law.⁹ And so the bank, which charged no money for this activity, stopped offering the free service rather than fight the charge. Many courts—in the name of legal ethics—protect the lawyer’s monopoly over legal services so that the “bank” cannot practice law. This prohibition applies even when the people who perform that actual work are really lawyers (not an incorporeal “bank”), there is no claim that the work is incompetent, and these lawyers are admitted to the bar.¹⁰

Legal ethics thus told us first that it was *unethical* to charge too low a fee. Second, it was also *unethical* for banks to compete with lawyers—even when the bank used lawyers duly admitted to the bar, who performed competently, and provided a free service to its customers, who were not complaining. Third, given the restrictions on competition with lawyers, it should not be surprising that lawyers can make a lot of money. An iron law of economics is that whatever gives a person competitive advantage also raises his or her income, and some ethics rules serve to give lawyers a competitive advantage.

III. LEGAL ETHICS REFORM IN CONTEMPORARY TIMES

If you look at the ethics casebooks prior to the late 1970s, you will see that they include many cases about why lawyers should not compete by charging too little, or by advertising for business, or by helping non-lawyers practice law. That focus all changed after the Watergate scandal. Indeed, there was no required law school course in legal ethics

9. *See id.* at § 5.5-7.

10. Indeed, lawyers engage in unauthorized practice even if they are admitted to the bar, but that bar is in a different state. The well-known decision, *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1 (Cal. 1998), is but one example.

until the ABA began to require a course in legal ethics in response to our post-Watergate morality.¹¹

From a lawyer's perspective, the most heartfelt moment during the televised Senate Watergate Committee hearings occurred when John Dean, the former Counsel to President Nixon, testified. He had compiled a list of the people that he thought could be involved in a conspiracy to obstruct justice. Next to many of the names was an asterisk. One of the senators asked what those asterisks represented. They were the lawyers, John Dean said:

John Dean: I put a little asterisk beside each lawyer . . . how in God's name could so many lawyers get involved in something like this?¹²

Yes, indeed: how could so many lawyers be involved?

An old witticism is that one should be careful for what one wishes because it may come true. That saying applied to rules that mandated teaching the ABA Rules of Professional Conduct. When law professors analyzed the legal rules, they often did not like what they saw. A primary instrument of change in the law governing lawyers' ethics has been lawsuits, supported by scholarly research and commentary. The ethics rules have changed over the years, often because the courts have prodded, cajoled, and forced the organized bar to change.

The *Goldfarb*¹³ decision banned minimum fee rules and *Bates*¹⁴ held that blanket prohibitions on lawyer advertising violated free speech. Later, the American Law Institute continued its reform when it published the Restatement of the Law Governing Lawyers in 2000.¹⁵ Actually, it is called the Restatement, *Third*, although there was no first or second. Perhaps the ALI did that to confuse us, just like historians confuse us when we learn that there was a Napoleon III, but no Napoleon II.

Ethics reform has not led to a golden age for lawyers. Instead, it has witnessed calls for more reform, increased regulation, and high-

11. Thomas L. Shaffer, *Legal Ethics after Babel*, 19 CAP. U. L. REV. 989 (1990).

12. *Presidential Campaign Activities of 1972, Senate Resolution 60: Hearings Before the Select Comm. on Presidential Campaign Activities of the United States Senate*, 93rd Cong. 1054 (1973). This question is a common refrain. *E.g.*, *Lincoln Savings and Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990): "Where were these professionals . . . when these clearly improper transactions were being consummated? . . . Where also were the . . . attorneys when these transactions were effectuated?" *See also* Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility For Clients' Fraud*, 46 VAND. L. REV. 75 (1993).

13. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

14. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

15. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) (as adopted by the American Law Institute on May 12, 1998, but not published until 2000).

profile indictments of lawyers and those whom they have aided. There has been a revolution of rising expectations for lawyers. The legal business is changing rapidly and the future promises an increase in the rate of change.¹⁶

IV. THE PROBLEM OF ANONYMITY IN LARGE LAW FIRMS

More and more lawyers are practicing in large law firms. The bar authorities seldom mete out discipline to lawyers in these larger firm.¹⁷ That might lead one to think that large law firms must be more ethical. But, as we shall see, the rarity of bar discipline is not because lawyers in large law firms never stoop to ethics violations. Indeed, large firm lawyers are as human as the rest of us. Instead, what is happening is that these large law firms find that malpractice law suits and government enforcement actions are on the increase, and both rely on the ethics rules. That is where the action is. It is the malpractice suits based on ethical violations¹⁸ and the disqualification motions based on the ethics rules¹⁹ that have come to represent much greater danger to large law firms than bar discipline.²⁰ Recently, for example, a jury awarded \$103 million against a major law firm based on a conflict of interest charge.²¹ And there are the criminal cases: legal discipline (if it ever occurs) comes after the criminal prosecution for fraud.²²

16. THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* (2010) discusses many of the changes likely to occur.

17. Lisa G. Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 *HOFSTRA L. REV.* 847, 848 (2006).

18. *E.g.*, *Baldasarre v. Butler*, 604 A.2d 112 (N.J. Super. Ct. App. Div. 1992) (upholding a \$1.9 million judgment against a lawyer and his law firm because they attempted to represent both the seller and the buyer of real estate).

19. *E.g.*, *Lauella v. Ireland San Filippo*, No. H028700, 2006 WL 75355 (Cal. App. 6 Dist. Jan. 13, 2006). Note that this case is not reported in Cal.Rptr.3d. California Rules of Court, Rule 8.1115, restricts citation of unpublished opinions in California courts. The court upheld the trial court's decision to disqualify the plaintiffs' counsel based on a conflict of interest. *Id.* at *11.

20. Courts are also enjoining a lawyer involved in a conflict if there is no proceeding in which a court could disqualify the lawyer. *See, e.g.*, *Tekni-Plex, Inc. v. Tang*, 674 N.E.2d 663 (N.Y. 1996).

21. Julie Wernau, *\$103 Million Verdict Against Baker & McKenzie*, *CHICAGO TRIBUNE*, Oct. 26, 2010, available at <http://www.chicagotribune.com/business/ct-biz-1026-baker-mckenzie--20101026,0,5276111.story> ("The case centers on Joel Held, a Baker & McKenzie attorney based in Dallas, who represented both sides of an oil-rig-drilling business that turned sour for one client while benefiting the other, according to court documents.")

22. *See, e.g.*, Jay Weaver, *Ponzi Schemer Scott Rothstein Gets 50-Year Sentence*, *MIAMI HERALD*, Jun. 9, 2010, available at <http://www.miamiherald.com/2010/06/09/1671305/ponzi-schemer-scott-rothstein.html>.

The structure of the modern large law firm can be a breeding ground for ethics violations. It is not unusual for these mega-firms to be composed of hundreds of lawyers or over a thousand lawyers, stretching over many cities and two or more continents. By the end of the 1950s, only thirty-eight law firms in the entire country had more than fifty lawyers each.²³ As late as 1968, only twenty law firms numbered more than 100 lawyers.²⁴ Twenty years later, in 1988, 149 firms had more lawyers than the largest law firm in 1968.²⁵ The largest law firm of 1988 numbered nearly 1000 lawyers.²⁶ “By 2006, Baker & McKenzie had more than 3500 lawyers, DLA Piper had over 3300 lawyers,” and twenty other law firms had more than 1000 lawyers.²⁷ In 2008, thirteen law firms had gross revenues of over \$1 billion and another fifty-eight had revenues of more than \$500 million.²⁸

A difference in degree, when great enough, is also a difference in kind. A law firm of 500 lawyers is not simply ten times larger than a firm of fifty lawyers: it is qualitatively different because the large law structure gives a sense of anonymity to the lawyers in the firm. Few will know the names of all their colleagues, even in the city where the firm is located; even fewer will know the names of their partners in other cities; and fewer still will know the names of the associates, some of whom come and go with each passing month. Anonymity fosters an environment of shadows where bad ethics, like toadstools, thrive.

This anonymity creates a problem for law firms. Several decades ago, when law firms were much smaller, a partner might be a little reluctant to do something that was ethically dubious (e.g., padding his legal bills) because of a fear that if his client complained and his partners discovered what he had done, they would forever look down upon him because of what he had done. The moral calculus changes when you do not even know the names of your partners or what they look like. There is less fear of shame, particularly when your rank and salary within the law firm depends on billing hours and keeping your clients happy.

As law firms have grown exponentially, and as partners' salaries have reached the high six figures, the ethical failings have kept pace. As a response to the Enron bankruptcy and the involvement of the legal and

23. Marc S. Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-To-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 749 (1990).

24. MORGAN, *supra* note 16, at 99-100.

25. Galanter & Palay, *supra* note 23, at 749.

26. *Id.* The largest law firm had 962 lawyers.

27. MORGAN, *supra* note 16, at 101

28. *Id.*

accounting professions, Congress enacted the Sarbanes-Oxley Act.²⁹ Among other things, Sarbanes-Oxley imposed new duties on lawyers,³⁰ some of whom were caught up in the scandals.³¹ Since the enactment of Sarbanes-Oxley, the federal government has filed quite a number of charges against lawyers who allegedly knew about or participated in corporate fraud. In this post-Enron world, fraud, sometimes garden variety fraud, continues. In recent years, the federal government has indicted an “astonishing number of lawyers” in corporate fraud cases.³²

Consider a few recent examples. In 2008, a former partner from the prestigious New York law firm, Sullivan & Cromwell, resigned from the New York bar after the firm learned that he billed his clients and firm more than \$500,000 in travel and entertainment expenses that were personal, inflated, or fictitious.³³ That same year, a former partner in the New York office of Latham & Watkins (another prestigious law firm) pled guilty to defrauding his clients and his own law firm of more than

29. In particular, see Sarbanes-Oxley Act of 2002 §307, 15 U.S.C. §7245 (2006), where Congress required the SEC to:

[I]ssue rules, in the public interest . . . setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

Id.

30. ROTUNDA & DZIENKOWSKI, *supra* note 8, at §§ 1.6-12(b), 1.6-12 (e)(4), 1.13-1(c), & 1.13-2(c).

31. See *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 235 F.Supp.2d 549, 610 (S.D.Tex. 2002) (“[P]rofessionals, including lawyers and accountants, when they take the affirmative step of speaking out, whether individually or as essentially an author or co-author in a statement or report, whether identified or not, about their client’s financial condition, do have a duty to third parties not in privity not to knowingly or with severe recklessness issue materially misleading statements on which they intend or have reason to expect that those third parties will rely.”); see also Benjamin Weiser, *Lawyer Gets 20 Years in \$700 Million Fraud*, N.Y. TIMES, July 14, 2009, available at <http://www.nytimes.com/2009/07/14/nyregion/14dreier.html> (“Marc S. Dreier, once a high-flying New York lawyer who orchestrated an elaborate fraud scheme that bilked hedge funds and other investors of \$700 million, was sentenced on Monday to 20 years in prison by a judge who rejected the government’s request for a much longer sentence.”).

32. Richard M. Strassberg, David B. Pitofsky & Samantha L. Schreiber, *Lawyers on Trial: Government Views Attorneys As ‘First Line Of Defense’ Against Corporate Malfeasance*, 234 N.Y. L.J. 9, col. 1 (2005).

33. *In re Spinelli-Nosedá*, 863 N.Y.S.2d 597 (N.Y. App. Div. 2008) (per curiam).

\$300,000 in false expenses.³⁴ In 2006, an intellectual property lawyer at yet another blue chip law firm resigned from the law firm and from the bar, in disgrace, after he admitted to “making affirmative misrepresentations to the firm in connection with his request for and receipt of reimbursement for various expenses, submitting false and fictitious letters and billings in connection with certain so-called pro bono clients, forging clients’ names on firm correspondence and making other misrepresentations to clients and lawyers.”³⁵ The bar suspended a former tax partner at Willkie Farr & Gallagher for one year. It turns out that over a course of two years, he billed clients for \$30,000 worth of personal long-distance calls.³⁶ And, let us not forget Webster Hubbell, who was President Clinton’s Associate Attorney General. He resigned under pressure in 1994 when his former law firm discovered billing fraud. He went to prison for sixteen months after he pled guilty to fraudulently charging almost \$500,000 for personal expenses and billing for legal work he never performed.³⁷

In 2004, Stephen Woghin, the former general counsel of Computer Associates, pled guilty to obstruction of justice in connection with coaching company employees to provide false testimony to investigators.³⁸ Two years earlier, the SEC charged that Franklin C.

34. Anthony Lin, *Former Latham Partner Pleads Guilty to Defrauding Clients, Firm*, N.Y. L. J., Mar. 31, 2008, <http://www.law.com/jsp/article.jsp?id=900005561071>.

35. *In re DiSalvatore*, 33 A.D.3d 195, 196 (App. Div., 1st Dept. 2006) (per curiam).

36. *In re Carmody*, 32 A.D.3d 173 (App. Div., 1st Dept. 2006) (per curiam). The lawyer “admitted that he misrepresented that the calls were related to work performed on behalf of clients, but he did not concede that his misconduct was deceitful.” *Id.* at 174. He blamed his conduct on stress resulting from his marriage breakup. *Id.*

37. Harry J. Maue, 1994: *A Bad Year for Legal Ethics*, 5 CORP. LEGAL TIMES 1 (1995), 1995 WLNR 5663944 (the allegations involved “over \$1 million in expenses and unbilled time charges”); Darlene Ricker, *Greed, Ignorance and Overbilling: Some Lawyers Have Given New Meaning to the Term “Legal Fiction.” Now the Profession is Asking Why, How Widespread and How Do We Stop It?* 80 A.B.A. J. 62 (1994); Lin, *supra* note 34.

38. DEP’T OF JUSTICE, FORMER COMPUTER ASSOCIATES EXECUTIVES INDICTED ON SECURITIES FRAUD, OBSTRUCTION CHARGES, Sept. 24, 2004 http://www.usdoj.gov/opa/pr/2004/September/04_crm_642.htm (“CA [Computer Associates] retained a law firm to represent it in connection with the government investigations. Shortly after being retained, the company’s law firm met with Kumar, Richards, Woghin and other CA executives in order to inquire into their knowledge of the practices that were the subject of the government investigations. During these meetings, the defendants and others allegedly failed to disclose, falsely denied and concealed the existence of the 35-day month practice. [The indictment explained that the goal of the ‘35-day month’ was to permit CA to report that it met or exceeded its projected quarterly revenue and earnings when, in fact, it had not.] Kumar, Richards, Woghin and others allegedly presented to the law firm an assortment of false justifications to explain away evidence of the 35-day month practice. The indictment alleges that Kumar, Richards and Woghin knew, and in fact intended, that the company’s law firm would present these false justifications to the U.S. Attorney’s Office, the SEC and the FBI in an attempt to persuade the government that the 35-day month practice never

Brown, the former vice chairman and chief legal officer of Rite Aid Corp., and others, “were responsible for one of the most egregious accounting frauds in recent history.”³⁹ In 2004, the jury convicted Mr. Brown of ten felony counts of lying to federal regulators. The judge sentenced the seventy-six-year-old lawyer and his new pacemaker to ten years in prison.⁴⁰

Compare that punishment with what the court meted out to Michael Milken, the junk-bond king of the 1980s whom the Government prosecuted after the 1987 stock market crash. Milken was no lawyer, but he was as sophisticated as anyone when it came to the securities laws. In 1989, Rudy Giuliani, then U.S. Attorney for the Southern District of New York, prosecuted Milken for ninety-eight counts of racketeering and fraud. Milken pled guilty to six counts of various securities and reporting violations. Judge Kimba Wood recommended a ten-year prison sentence, and said that Milken should serve at least thirty-six to forty months. In fact, he served only about twenty-two months and remained a wealthy man, with a net worth of at least \$700 million, even after paying \$900 million in fines and settlements (including civil law suits).⁴¹ Milken should be thankful that the harsher penalties have only come in recent years.

Not only have punishments increased, but the number of prosecutions has grown as well. During the first eight months of 2005, the SEC barred or suspended at least eighteen lawyers from practicing

existed. The indictment further alleges that *Kumar frequently instructed Woghin to meet with CA employees prior to their being interviewed by the government or the company’s lawyers to coach them on how to answer questions without disclosing the 35-day month practice.*”) (emphasis added). The problem of false witness-coaching is described in Lester Brickman & Ronald D. Rotunda, *When Witnesses Are Told What to Say*, WASH. POST, Jan. 13, 1998, at A15, col. 2-4.

39. SECURITIES AND EXCHANGE COMMISSION, SEC LITIGATION RELEASE NO. 17577 / JUNE 21, 2002, ACCOUNTING AND AUDITING ENFORCEMENT RELEASE NO. 1581 / JUNE 21, 2002, Securities and Exchange Commission v. Frank M. Bergonzi, Martin L. Grass, And Franklin C. Brown, 1:CV02-1084 (M.D. Pa.), <http://ftp.sec.gov/litigation/litreleases/lr17577.htm>.

40. Joseph Savage & Christine Sgarlata Chung, *Trends in Corporate Fraud Enforcement: A Calm During the Storm?*, 13 LAW J. NEWSLETTERS, BUSINESS CRIMES BULLETIN 1, 2 (2005), http://www.goodwinprocter.com/~media/Files/Publications/Attorney%20Articles/2005/Trends_in_Corporate_Fraud_Enforcement.pdf.

41. E.g., Reviewed by Daniel J. Kornstein, *Lawyer: A Life of Counsel and Controversy*, 220 N.Y. L. J. 2 (1998); Editorial, *Junk Sentence for Milken*, NAT’L REV., Dec. 17, 1990; *Milken Released To Halfway House*, 139 CHI. DAILY L. BULL. 1 (Jan.4, 1993); *Today’s News: Update*, 205 N.Y. L. J. 1 (March 5, 1991); Jayne O’Donnell & Richard Willing, *Prison Time Gets Harder For White-Collar Crooks*, USA TODAY, May 11, 2003, available at http://www.usatoday.com/money/companies/management/2003-05-11-bighouse_x.htm; JAMES B. STEWART, DEN OF THIEVES (1991); Emily Lambert & Monte Burke, *Dishonor Roll*, FORBES, Mar. 29, 2004, at 46.

before it.⁴² By comparison, it disbarred or suspended only three lawyers in all 2004, five in 2003, and only one each in 2002 and 2001.⁴³

In addition to criminal and SEC enforcement, there is the risk of tort liability and disqualification. One does not need an economics degree to conclude that lawyers pay more attention to legal ethics when the results affect their pocket books. One accomplished lawyer told me that, about twenty years ago when he began working for a well-known malpractice insurer, the head lawyer told him to first read the ABA Model Rules cover-to-cover. He was surprised: What does this have to do with insuring law firms? After a short time on the job, he learned that a major risk with blue chip law firms is not that they are likely to miss a statute of limitations. Rather, it is that large law firms will be involved in a conflict of interest or violation of another ethics rule that leads to tort liability.⁴⁴

There is a long list of blue chip law firms for which bar discipline may be the least of their worries. Instead, the problem is malpractice liability based on the violation of the ethics rules. Baltimore's Venable, Baetjer & Howard settled a lawsuit for \$27 million involving conflicts of interests.⁴⁵ New York's Milberg Weiss settled a malicious prosecution case for \$50 million. After losing a jury verdict for \$45 million for this malicious prosecution, it settled by wiring a check for \$50 million before the jury could deliberate on punitive damages.⁴⁶ A few years later, a Los Angeles federal grand jury indicted this law firm for obstructing justice, perjury, bribery, and fraud.⁴⁷ *In re Futuronics Corp.*⁴⁸ denied a law firm

42. Savage and Sgarlata Chung, *supra* note 40, at 1, 2

43. *Id.*

44. *E.g.*, Wernau, *supra* note 21 ("According to the complaint, the defendants drafted legal documents that established subsidiaries of the joint company in Evans' name and controlled by Cagle, without advising Evans that they had been created. The subsidiaries and Evans' assets were then used to obtain other loans, which would show up in the bank account of their company, then immediately be withdrawn for Cagle's other uses.").

45. Kirk Victor, *Venable Agrees to \$27M Accord*, 9 NAT'L L. J. 37, May 25, 1987, at 3. A precursor of some of these conflicts problems may be found in Ronald D. Rotunda, *Law, Lawyers and Managers*, in THE ETHICS OF CORPORATE CONDUCT 127-45 (1977).

46. Richard B. Schmitt, *Milberg Weiss Agrees to Pay \$50 Million to Settle Lexecon Case*, WALL ST. J., Apr. 14, 1999, at B17; Karen Donovan, *Milberg Weiss' \$50M Mistake: The Inside Story of Why Jurors Didn't Buy the Firm's Testimony*, NAT'L L. J., Apr. 26, 1999, at A1.

47. Julie Creswell, *Milberg Weiss Is Charged With Bribery and Fraud*, N. Y. TIMES, May 18, 2006, available at <http://www.nytimes.com/2006/05/18/us/18cnd-legal.html?ex=1305604800&en=b01b688a560ca3d5&ei=5088&partner=rssnyt&emc=rss>.

48. 655 F.2d 463, 468-71 (2d Cir. 1981), *cert. denied*, 455 U.S. 941 (1982). *See also* Halbert v. Yousif, 225 B.R. 336, 343 (E.D. Mich. 1998).

Upon review of the record, this Court concludes that the Bankruptcy Court correctly determined that Halbert violated several other fiduciary obligations that had been imposed upon him by bankruptcy law. Based on these acts of misconduct, the

over one million dollars in fees under the Bankruptcy Code because of a prohibited fee-splitting arrangement and its failure to comply with disclosure provisions for joint representation. This list will never be complete.

In the last few years we have witnessed what some are calling “the Great Recession,” accompanied by evidence of rampant corruption. There is Bernard Madoff who created a Ponzi scheme of \$50 *billion* or more!⁴⁹ Madoff did not invent dishonesty, but he surely perfected it. Normally, birds do not like to dirty their own nest, but that rule did not apply to Madoff, who lulled even his friends to invest in his scheme. He pretended to earn above-average returns with below-average volatility. What he really did was take the money for himself, while telling his investors they were doing very well. If an investor wanted to withdraw funds, Madoff gave them money he took from other investors. He did not earn any actual profit, but he lived like a king, until too many investors wanted their money back.⁵⁰

Recently, the former partner of a major law firm pled guilty to charges of conspiracy and tax evasion, earning up to ten years in prison. Prosecutors alleged defendants used tax shelters to generate over \$7 billion in fraudulent tax losses for at least 931 wealthy individuals. In 2005, two years before this partner’s law firm went out of business, “the firm agreed to pay \$81.6 million to clients who sued over bad tax-shelter advice.”⁵¹

The subprime mortgage mess has brought us a world-wide recession accompanied by executives who lavishly spent other people’s money. Financial analysts initially hailed John Thain as a hero for

Bankruptcy Court assessed the totality of Halbert’s violations and concluded that “[t]he only proper response” to those deficiencies was to deny his fee applications.

Id. The court then concluded that:

[The] decision to deny attorney all fees for service that he provided in Chapter 11 case of debtor-corporation was not an abuse of discretion; but . . . attorney’s disinterestedness and disclosure violations in a Chapter 11 case of debtor-corporation did not permit any denial of compensation for services that the attorney performed in a separate Chapter 11 cases of corporate principals.

Id. at 336.

49. Stephen Gandel, *Wall Street’s Latest Downfall: Madoff Charged with Fraud*, TIME, Dec. 12, 2008, available at <http://www.time.com/time/business/article/0,8599,1866154,00.html>. See also, John Pacenti, *Madoff, \$17M in Losses Claimed: Miami Lawsuits Say Bank Funneled Money into Ponzi*, MIAMI DAILY BUS. REV. A1, 2010 WLNR 24768189 (12/15/10) (“Madoff’s \$65 billion Ponzi scheme”).

50. Ronald D. Rotunda, *Was Madoff Good for the Economy?*, CHI. TRIB., April 3, 2009, at 49.

51. Ashby Jones, *Former Jenkins Partner Pleads Guilty To Conspiracy, Tax Evasion*, WSJ BLOGS, LAW BLOG (Oct. 19, 2010, 5:18 PM), <http://blogs.wsj.com/law/2010/10/19/former-jenkins-partner-pleads-guilty-to-conspiracy-tax-evasion/?KEYWORDS=law+blog>.

selling Merrill Lynch & Co. Inc. to Bank of America to save the brokerage firm from imminent failure. Bank of America kept him to run the company's securities arm.⁵² Soon after that acquisition, the Merrill Lynch deal looked like a big mistake. Bank of America ousted Thain. Bank of America was concerned that Merrill's losses were far worse than expected, and that Thain had not fully disclosed all the red ink while Merrill was paying out bonuses.⁵³ While his company was hemorrhaging money, and shares were tumbling in value, Thain was spending \$1.2 million in corporate funds to renovate his office, buying such essentials as a \$1,400 wastepaper basket made of parchment and a pair of guest chairs costing nearly \$90,000.⁵⁴ After the market learned about Thain's ouster, shares of Bank of America jumped nearly 10%.⁵⁵ Think about that: Thain appears to have added nearly 10% to the value of this multi-million-dollar company by the simple act of leaving!

V. ANONYMITY AND ETHICS VIOLATIONS: WHY WE ARE THE SAME

The Great Recession's recent round of scandals illustrates several points. Unlike the financial scandals of the prior decades,⁵⁶ lawyers were not at the forefront, and for that we can be grateful. Still, we are

52. Hoovers Company In-Depth Records, 2011 WLNR 5699783 (3/24/11).

53. Heather Landy, *Former Merrill Chief Is Out at Bank of America*, WASH. POST, Jan. 23, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/22/AR2009012203628.html>.

54. *Thain's Office Overhaul Said to Cost \$1.2 Million*, N.Y. TIMES DEAL BOOK (Jan. 22, 2009, 1:21 PM), <http://dealbook.blogs.nytimes.com/2009/01/22/thains-office-overhaul-said-to-cost-12-million/>.

55. On January 22, after the market closed, is when Thain resigned. January 23, 2009, Bank of America stock closed at \$6.24; on January 22, it closed at \$5.71, or a difference of \$0.53. The stock increased nearly 9.28% right after Thain announced his ouster. BANK OF AMERICA HISTORICAL PRICE LOOKUP, <http://phx.corporate-ir.net/phoenix.zhtml?c=71595&p=irol-stocklookup&t=HistQuote> (last visited Aug. 30, 2010). Landy, *supra* note 53. John Thain became CEO of Merrill Lynch on December 1, 2007. *Id.* In September 2008, Bank of America acquired Merrill Lynch. *Id.* See also Matthew Karnitschnig, Carrick Mollenkamp & Dan Fitzpatrick, *Bank of America to Buy Merrill*, WALL ST. J., Sept. 15, 2008, http://online.wsj.com/article/SB122142278543033525.html?mod=special_coverage&mg=com-wsj. A few months later, on January 22, 2009, Thain resigned after disclosure that he had paid out \$4 billion in fourth quarter bonuses to Merrill employees, just before Bank of America acquired Merrill Lynch. Erik Larson, *Cuomo Said to Eye Return of \$4 Billion in Early Merrill Bonuses*, BLOOMBERG, Jan. 29, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aiCmAzh98Z70>.

56. See, e.g., *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987); *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263 (6th Cir. 1998) (en banc); *Vanguard Production, Inc. v. Martin*, 894 F.2d 375 (10th Cir. 1990) (title opinion used in selling oil and gas leases); *Vereins-Und Westbank, AG v. Carter*, 691 F. Supp. 704 (S.D.N.Y. 1988) (lawyer's letter to support issuance of surety bond); *Vega v. Jones, Day, Reavis & Pogue*, 17 Cal.Rptr.3d 26 (Cal. Ct. App. 2004); *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230 (Colo. 1995) (en banc).

not as different as we would like, for corrupt lawyers were well-represented in any lineup of the cast of characters of the present-day scandals. Granted, no lawyer created a multi-billion dollar Ponzi scheme like Madoff, but former Florida lawyer Scott W. Rothstein (now serving fifty years in prison) was no piker: he was the architect of a \$1.2 billion Ponzi scheme.⁵⁷

Sarbanes-Oxley did not stop the financial carnage, as we relearned that ancient truth: generals and politicians always seem to fight the last war. And we learned that while investment bankers and CEO's do not live under a code of ethics, we lawyers—who do live under such a code—had little problem in joining the corruption frenzy.

Finally, we learned that people of outstanding reputation continue to surprise us with their willingness to embrace corruption. Lawyers are no different in degree or kind from non-lawyers. Madoff was not a lawyer, but there are plenty of examples of lawyers who have breached their fiduciary obligations even if Madoff's avarice dwarfed theirs. Rothstein, for example, was considered an upright citizen: he gave millions to charity and created a firm that employed seventy lawyers,⁵⁸ many of whom had sterling reputations. Rothstein's firm included Ken Padowitz, a former prosecutor and national legal commentator; Carlos Reyes, a former South Broward Hospital district commissioner; Steve Abrams, a former mayor of Boca Raton; and William Berger, a former Palm Beach circuit judge.⁵⁹ Rothstein benefitted from their reputations and used those reputations for his own nefarious purposes.⁶⁰ As Professor David Luban has astutely remarked:

Most of us are inclined to think that the big problem in the ethics scandals is lack of integrity on the part of the principals. But if integrity means doing what you think is right, these men and women had integrity to burn. They got it the cheap way: once they did things, they believed those things were right.⁶¹

57. Jacqueline Bell, *Rothstein Ordered To Pay \$363M In Restitution*, LAW 360: THE NEWSWIRE FOR BUSINESS LAWYERS, Aug. 30, 2010, <http://www.law360.com/articles/190297>.

58. Weaver, *supra* note 22; Buddy Nevins, *Rothstein's Story: Jewish Kid from The Bronx Makes Waves*, BROWARDBEAT.COM (Oct. 22, 2008), <http://www.browardbeat.com/rothsteins-story-jewish-kid-from-the-bronx-makes-waves/> (last visited Aug. 30, 2010).

59. Nevins, *supra* note 58.

60. Rothstein used his law firm to “prop himself up as a flashy player among wealthy investors, society types, trendy entrepreneurs and prominent politicians—including Gov. Charlie Crist.” Weaver, *supra* note 22.

61. See David Luban, *Making Sense of Moral Meltdowns*, in *ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* 355, 365-66 (Susan D. Carle ed., 2005). Professor Luban is the Frederick Haas Professor of Law and Philosophy at Georgetown University Law Center. *Id.* at

VI. THE DANGERS OF ANONYMITY

Why do lawyers like Rothstein reject their legal training? There is no simple answer to this question. Professor Luban advises that we rationalize our corruption and conclude that what we do is not wrong.⁶² That is certainly true. Our legal ethics are a thinner veneer than we would like.

Another problem is anonymity. When we think no one is looking, when we are anonymous, we are more willing to do things that we would not do if we were alone and unobserved.⁶³ Justice Brandeis is famous for his view on privacy: the right to be left alone.⁶⁴ But he also spoke of the advantages of publicity when he advised, “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”⁶⁵

We can be anonymous by working in the dead of night. But, we also may be anonymous while lost in a crowd. In the modern large law firm, many lawyers are atomized. When we are truly alone, or when we are anonymous because we are part of a large group, we are more likely to act differently than if a street lamp were shining on us and others were looking. Whether we are truly alone or part of a large enough group of people (and therefore anonymous in a crowd),⁶⁶ we are more likely to fall short of our ethical duties.

We know that people often do things as part of a mob that they would never do if they were part of a small group. Lynch mobs depend on this fact. If the mob breaks up into smaller groups, the blood lust dissipates along with the anonymity that the mob offers. The lynch mob

355 n.1. As a nonlawyer, he often brings a refreshing, creative, and thoughtful perspective to legal problems.

62. *Id.* at 365-66.

63. Economic studies bear out this common sense intuition. *E.g.*, Todd L. Cherry, Peter Fryblom, & Jason F. Schgren, *Harnose the Dictator*, 92 AM. ECONOMIC REV. 1218 (No. 4, 2002); Elizabeth Hoffman, Kevin McCabe, & Vernon Smith, *Social Distance and Other-Regarding Behavior in Dictator Games*, 86 AM. ECONOMIC REV. 653 (1996); Elizabeth Hoffman, Kevin McCabe, Keith Shachat, & Vernon Smith, *Preferences, Property Rights, and Anonymity in Bargaining Games*, 7 GAMES & ECONOMIC BEHAVIOR 346 (1994).

64. “They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”, *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

65. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY—AND HOW THE BANKERS USE IT*, ch. V (1914), available at <http://www.law.louisville.edu/library/collections/brandeis/node/196>.

66. DAVID RIESMAN WITH NATHAN GLAZER & RUELE DENNEY, *THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER* (1950). Anchor Books-Doubleday published a revised and shortened version in 1953. It became a best seller. Riesman was trained as a lawyer, and was an editor of the *Harvard Law Review* when he was a law school student.

offers “the loss of responsibility through anonymity.”⁶⁷ That anonymity makes each individual member less inhibited, just as the large size of the mob helps each member to rationalize that he is doing something right, not something wrong.⁶⁸ Only an individual with strong convictions can dissuade a mob from carrying out its acts. These are the real heroes; most of us (if we do not join the mob) leave quietly, convincing ourselves that nothing can be done and there is no need to get involved.

We do not need a lynch mob to acquire anonymity and lose inhibitions. Any situation that affords anonymity allows us to act inconsistently with the way we would normally act. In a sense, we become part of a virtual lynch mob—a rather genteel lynch mob, to be sure, because we do not shout and rant. But we do act differently.

“A foolish consistency,” Emerson said, “is the hobgoblin of little minds”⁶⁹ Emerson was only speaking of *foolish* consistencies, but it is easy to slide over that distinction when we rationalize our indiscretions and conclude that what we did or did not do is really justified and acceptable. “Everyone does it,” we assure ourselves. The road of least resistance is to follow the herd.

The herd mentality accompanies bull markets that mark the end of bubbles and the beginning of major declines. We tend to do what others do, but only those who do not follow the herd are the ones to make the real money. We all know that we should buy low and sell high, but it is much easier to buy when everyone else is buying enthusiastically and much harder to buy when doom and gloom abound.⁷⁰ When the “smart money” buys, we buy.⁷¹ When people panic and sell, we sell. It is easier to buy high, when optimism abounds, and sell low, when pessimism is the order of the day, than to do the opposite. But most of us follow the herd.

67. 3 THE CORSINI ENCYCLOPEDIA OF PSYCHOLOGY 1009 (Irving B. Weiner & W. Edward Craighead eds., 4th ed. 2010).

68. PSYCHOLOGY FOR THE ARMED SERVICES 447 (Edwin G. Boring ed., 1945). Mob action in the military is called mutiny. *Id.* at 455. While it happens, it is rare because of the effort to discipline the troops. *Id.*

69. “A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.” Ralph Waldo Emerson, *Self-Reliance*, in ESSAYS 57 (First Series, 1865).

70. Economic empirical studies also bear out this fact that we tend to create bubbles in the stock market when we think we are smarter than others, for then we follow the “greater fool” theory—we just follow others rather than adding to the wisdom of the group. Vernon L. Smith, Gerry L. Suchanek, & Arlington W. Williams, *Bubbles, Crashes, and Endogenous Expectations in Experimental Spot Asset Markets*, 56 ECONOMETRICA 1119 (1988). See also, JAMES SUROWIECKI, THE WISDOM OF CROWDS 249-51 (2004) (discussing experiments).

71. ROBERT J. SHILLER, IRRATIONAL EXUBERANCE 158 (2d ed. 2005).

The herd mentality applies not just to the stock market. It applies to all of life. Consider the case of Kitty (Catherine) Genovese. Few people are old enough to remember, but it was national news a half-century ago. She was a twenty-eight-year old New York City woman stabbed to death near her home in the Kew Gardens section of Queens, New York, in 1964.⁷² At the time, newspapers reported that over three dozen people saw or heard her crying for help after she was stabbed.⁷³ It took her about a half-hour to die. The newspapers reported that others heard or observed portions of the attack but they closed their windows. They did not want to get involved. No one called the police until the final assault, each of them perhaps thinking that someone else would do it. Eventually someone did, but by then it was too late.

Sadly, the news reports are filled with ordinary humans acting in a most inhumane manner as apathetic bystanders. Search for “people ignore man dying on street” on Google and you will get thousands of hits. Last year in Detroit, a group of people were playing hockey on the frozen waters in the basement of an abandoned building. They found a dead, frozen body. They did not call the police, but they continued playing their hockey game. A reporter asked a homeless man living in the building if he had called the police. “No,” he said, “I figured someone else did.”⁷⁴ They followed the herd and did nothing.

In London, England, passers-by ignored the pleas for help of an eighty-one-year-old widow who had been mugged. She lay on the pavement pleading for help for ten minutes. Two women, who initially crossed to the other side of the street to avoid her, heard her cries, came to her aid, and called for help, but it was too late. She died in the hospital.⁷⁵

72. ENCYCLOPEDIA OF RAPE 91 (Merril D. Smith ed., 2004). E.g., A.M. ROSENTHAL, THIRTY-EIGHT WITNESSES: THE KITTY GENOVESE CASE (1999).

73. Later reports cast doubt on the complete accuracy of the New York Times story about the incident. This story was based on the initial police report. *Queens Woman Is Stabbed to Death in Front of Home*, N.Y. TIMES, Mar. 14, 1964, at 26. See also *Thirty-Eight Who Saw Murder Didn't Call the Police*, N.Y. TIMES, Mar. 27, 1964. The number of witnesses who heard the screams may be closer to a dozen, and the number who actually saw something may be a half-dozen. Jim Rasenberger, *Nightmare on Austin Street*, 57 AM. HERITAGE (Oct. 2006), available at http://www.americanheritage.com/articles/magazine/ah/2006/5/2006_5_65.shtml. Still, a half-dozen did not respond.

74. Charlie LeDuff, *Frozen in Indifference: Life Goes on around Body Found in Vacant Warehouse*, DETROIT NEWS, Jan. 28, 2009, available at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20090128/METRO08/901280491>.

75. The police reported that passers-by may have thought she was drunk. Charlotte Gill & Sophie Borland, *Woman, 81, Killed in Street Mugging "Ignored by Passers-By as She Called for Help"*, DAILY MAIL, Jan. 20, 2009, <http://www.dailymail.co.uk/news/article-1121642/Woman-81-killed-street-mugging-ignored-passers-called-help.html>; *Passersby Ignore Woman, 81, Dying on*

A month later in Washington, D.C., two assailants attacked a man who hit his head on a nearby car and fell to the ground. He lied there unconscious on a busy street for nineteen minutes while passersby and grocery store customers went about their business. When a grocery store employee finally called 9-1-1, the ambulance arrived within two minutes. But it was too late: the man died.⁷⁶

In April of 2010, a homeless man saved a woman from a knife-wielding attacker. The attacker then turned to this homeless hero and stabbed him. For one hour and twenty minutes, the man lay dying in a pool of his own blood. Video surveillance showed that sophisticated New Yorkers walked past without calling for help. One man stopped to take a cell phone photograph of the victim before leaving. Eventually, someone called 9-1-1, and firefighters came fifteen minutes later. By then, he was dead.⁷⁷ A few months ago, a man died on a highway ramp, just minutes from a hospital, while car after car drove past without stopping or calling for help. The video confirmed what the police reported: a body lay on the road, but “the number of cars that just drive by [is] incredible. No one stops. . . . No one’s calling, no one’s stopping. Cars just brake and move out of the way.”⁷⁸

How is it that humans act so inhumanely?⁷⁹ We did not evolve that way. Our DNA does not compel us to turn our gaze and move on, only

Street After Attack, FOX NEWS, Jan. 19, 2009, <http://www.foxnews.com/story/0,2933,480663,00.html>.

76. *People Ignore Man Dying on Street*, AOL NEWS, Feb. 2, 2009, <http://www.aolnews.com/story/people-ignore-man-dying-on-street/325776>. NBC News, Wash., D.C., Feb. 1, 2009, <http://www.nbcwashington.com/news/local/Passers-By-Ignore-Brutally-Beaten-Homeless-Man-on-Sidewalk.html>. There is a video of this incident on YouTube, http://www.youtube.com/verify_age?next_url=http%3A//www.youtube.com/watch%3Fv%3DGIr81Rkxu38

77. *Pedestrians Ignore Man Dying on N.Y. Sidewalk*, WCF COURIER, Apr. 25, 2010, http://wfcourier.com/news/local/article_b4b49386-508c-11df-9632-001cc4c03286.html; Michael van Poppel, *Pedestrians Ignore Dying Man on New York City Sidewalk*, THAINDIAN NEWS, Apr. 25, 2010, http://www.thaindian.com/newsportal/world/pedestrians-ignore-dying-man-on-new-york-city-sidewalk_100353804.html; Michael Connelly, *Video Shows Multiple Pedestrians Ignore Dying Man on New York City Sidewalk*, EXAMINER.COM, Apr. 20, 2010, <http://www.examiner.com/national-news-headlines-editor-in-national/video-shows-multiple-pedestrians-ignore-dying-man-on-new-york-city-sidewalk>; Adam Alter, *Needless Death on a New York Street*, PSYCHOL. TODAY, ALTERNATIVE TRUTHS, Apr. 30, 2010, <http://www.psychologytoday.com/blog/alternative-truths/201004/needless-death-new-york-street>.

78. Stephane Massinon, *No Good Samaritan for Dying Crash Victim; Police Say Drivers Ignoring Bodies on City Streets*, CALGARY HERALD, Aug. 22, 2010, available at <http://www2.canada.com/calgaryherald/news/city/story.html?id=46c487b1-ff79-488e-a26e-ea7e88024a71>.

79. We need not debate those who reject the theory of evolution. We can compromise: we can agree that I am not descended from the lower forms of life but you are.

stopping to use our cell phone to take a photograph of the incident. There is much evidence that the lower forms of life are more highly evolved than we are. For example, Bengal tigers nurse piglets. Bonobo apes (pigmy chimpanzees) are our closest ancestors. They help wounded birds to fly. A rhesus monkey will forgo the opportunity for food if pulling the chain that delivers the food will also electrically shock a companion. Seals (who are further down the evolutionary ladder than we are) rescue drowning dogs.⁸⁰

We think of ourselves as more highly evolved than monkeys or seals, who represent a lower form of life. How would we act if pulling the chain would cause an electric shock to another human? Do we still want the food? We might not do it for a banana, but we will do it for fifteen minutes of fame. The state-owned France 2 television channel recently aired a documentary about a fictional television show. As is all too often the case, the psychologists who conducted the experiment that led to the documentary were not entirely truthful to the participants. The experimenters recruited eighty volunteers and told them they would participate in a pilot for a new television show. The fake game show-reality program was called, “Le jeu de la mort,” or “The Game of Death.” The participants were ordinary French citizens who signed a contract saying that they would obey the presenter’s instructions.⁸¹ They did so, perhaps because they wanted their fifteen minutes of fame on television.

The glamorous hostess told the participants to administer electric shocks to rival contestants if they answered certain questions incorrectly. The participants dutifully did so, as they saw their rivals writhing in pain. Members of the studio audience, who also thought the “game” was real, chanted “punishment,” and urged the participants to increase the shock to what they thought were the other “players” (who were really actors). The participants saw the other “players” twisting with pain. The hostess told the participants that each time they pulled the lever the

80. FRANS DE WAAL, *THE AGE OF EMPATHY: NATURE’S LESSONS FOR A KINDER SOCIETY* (2009). De Waal’s research showed that altruism, not brute strength, is what is important for chimps. The “size and strength of male chimps is an extremely poor predictor of which animals will dominate the troop. Instead, the ability to forge social connections and engage in ‘diplomacy’ is often much more important.” Jonah Lehrer, *The Power Trip*, WALL ST. J., Aug. 14, 2010, at W1, available at <http://online.wsj.com/article/SB10001424052748704407804575425561952689390.html>.

81. CBC News, *Reality TV Lures Players into Sadistic Game*, Mar. 17, 2010, <http://www.cbc.ca/arts/tv/story/2010/03/17/game-of-death.html>; L’AFP, Channel 9 News, *9MSN, Contestants Torture Victims in “TV Show,”* Mar. 17 2010, <http://news.ninemsn.com.au/article.aspx?id=1028367>.

voltage of the shocks would increase. And pull the lever they did: they increased the electric shock to what they thought were 460 volts of electricity when the rival game show participant gave the wrong answer. Finally, their cries of “Let me go!” fell silent, and then the “players” appeared to die.⁸²

In spite of these cries, only 18% of the participants refused the host’s request to pull the lever. Out of eighty players, only sixteen walked out while sixty-four kept pulling the lever up to the maximum of 460 volts until the “player” appeared to die. The majority were just following the crowd. The herd mentality even affected one of the sixty-four participants who had Jewish grandparents who had suffered under the Nazis. Later she said, “Since I was a little girl, I have always asked myself why they [the Nazis] did it. How could they obey such orders? And there I was, obeying them myself.” Another said, “I was worried about the contestant. At the same time, *I was afraid to spoil the program.*”⁸³

We like to think that we are sophisticated. And, in the totem pole of sophistication, many of us would probably put the French at the top. Yet, our veneer of civilization is much thinner than we would like. Remember, a rhesus monkey will forgo the opportunity for food if pulling the chain that delivers the food will also electrically shock a companion.⁸⁴ But 80% of humans who participated in this fake game show had no trouble following the herd and shocking another human.

This French game show replicated the results of a much earlier, famous experiment that Professor Luban discussed.⁸⁵ It is called the Milgram Experiment, named after Dr. Stanley Milgram. The experimenter told the “teacher” that he or she was supposed to teach a “student” to memorize a pair of words. The punishment for a wrong answer was a shock from the “shock machine.” This machine had thirty levers, each clearly labeled with a voltage designation ranging from fifteen volts (“slight shock”) to 450 volts (“danger: severe shock”). The last switch was labeled “XXX.” This is like the carrot and stick, but without the carrot.

Milgram found that about 65% of the participants followed orders to inflict what they thought were increasingly painful electric shocks on an innocent person because the experimenter ordered them to do so.

82. CBC News, *supra* note 81; L’AFP, *supra* note 81.

83. CBC News, *supra* note 81; L’AFP, *supra* note 81.

84. DE WAAL, *supra* note 80, at 75. J. Masserman, M.S. Wechkin, & W. Terris, *Altruistic Behavior in Rhesus Monkeys*, 121 AM. J. PSYCHIATRY 584-85 (1964).

85. Luban, *supra* note 61.

They administered the “shocks” even though the “student” screamed and begged them to stop. Instead, the typical “teacher” just followed orders. The machine did not really administer shocks, but the teacher did not know that. With each “student’s” mistake, the experimenter told the “teacher” to administer a stronger shock. Eventually, the “student” stopped and fell silent, as if unconscious or dead.⁸⁶

Within all of us are both the good Dr. Henry Jekyll and the evil Mr. Edward Hyde.

VII. ALTRUISM AND THE CROWD

Our willingness to follow orders actually offers some hope because we are more likely to do the right thing if someone singles us out and asks us to be altruistic. We are more likely to follow that request, perhaps because we are no longer anonymous. We are more likely to act altruistically—to follow the best traits of the lower forms of life on the evolutionary scale—if we think someone is looking. A recent economics experiment illustrates this point. It is based on a version of the “dictator’s game.”⁸⁷ The experiment gives one person a sum of money, let us say \$10, to Player A, who is the “dictator.” The dictator is in charge and makes all the rules. Whatever the dictator decides is final.

This dictator can, if she chooses, divide that \$10 between herself and Player B. She can give away to Player B some of the cash, all the cash, or none of the cash. Whatever the dictator gives is a gift, and the gift can be zero. A significant majority of the dictators are altruistic; although they can do whatever they want, they will give 20% or more of their money to Player B, *if* the dictator and Player B are anonymous with respect to each other but the dictator is not anonymous with respect to the experimenter. However, those statistics are reversed if the dictator

86. Stanley Milgram, *Behavioral Study of Obedience*, 67 J. OF ABNORMAL AND SOCIAL PSYCHOL. 371-78 (1963); STANLEY MILGRAM, OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974); PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2007). Professor Zimbardo conducted the Stanford Prison Experiment in 1971, another study that showed how easy it was to turn pacifists into sadistic prison guards. See also Elizabeth Landau, *Charting the Psychology of Evil, Decades after “Shock” Experiment*, CNN.com, Dec. 19, 2008, <http://www.cnn.com/2008/HEALTH/12/19/milgram.experiment.obedience/>.

87. Karl Schurter & Bart J. Wilson, *Justice and Fairness in the Dictator Game*, 76 S. ECON. J. 130-145 (2009). Magnus Johannesson & Björn Persson, *Non-Reciprocal Altruism in Dictator Games*, 69 ECON. LETTERS 137-42, 137 (Nov. 2000) (using a double blind experiment, so that the decision of each dictator is anonymous both with respect to other subjects in the experiment and with respect to the experimenter, this double blind procedure significantly decreased the proportion of dictators who donated anything to 36% and the average donation decreased to 9% of the amount allocated).

has complete anonymity from both Player B *and* the experimenter. If the dictator knows that even the experimenter is in the dark—there is complete anonymity—then over 60% of the dictators keep everything for themselves and give no money to Player B. In short, if the dictator knows that the experimenter is watching (but Player B is in the dark), the dictator is much more likely to give money to Player B. If the dictator knows that no one is watching, the dictator becomes less altruistic. When we think that someone is watching us in particular and looking at us—when we are not anonymous—we behave better and are more likely to be altruistic.⁸⁸

Dr. Milgram conducted another experiment, not nearly as well known as his electric shock experiment, and its results also support this conclusion. His students boarded a crowded New York subway and asked someone already sitting down for his or her seat. About 68% of the people, if asked directly for a seat, got up and surrendered the seat.⁸⁹ In New York City! One male student asked an elderly female for her seat. The woman said that she would not give up her seat. Then, the woman's neighbor, a man, apparently felt bad by her rejection and so he offered the male student his seat. In a variation of the experiment, the experimenter asked for the seat but gave a lame excuse: he or she would hold up a paperback book and said, "Excuse me. May I have your seat? I can't read my book standing up." With this version, the percentage who gave up the seat dropped to 38%,⁹⁰ still a respectable percentage for hardened New Yorkers.

When the stranger singles us out, personally talks to us, and asks us for our seat, we are not anonymous as to him. If someone takes charge and says, "May I have your seat on this subway," then we are more

88. Elizabeth Hoffman, Kevin McCabe & Vernon L. Smith, *Social Distance and Other—Regarding Behavior in Dictator Games*, 86 AM. ECON. REV. 653-60 (1996). See also Schurter & Wilson, *supra* note 87. There is another version of the dictator game where the experimenters take videos of people in a mall who are the subject of the experiment. The people know that others can watch them: when people in the dictator's party can watch them live on a video feed as the dictator makes the decision, they give \$5 more (out of a \$20 pie) than when they cannot watch. Indeed, there are a lot of people who give everything away when they are being watched by the experimenter in a mall. Here is a sample of the decisions: SMILE, DICTATOR, YOU'RE ON CAMERA, <http://www.youtube.com/watch?v=vZHN8xyp6Y0> (Nov. 8, 2010). The dictator gives away even more money if the dictator thinks that Player B is an established charity instead of an anonymous student. Catherine C. Eckel & Philip J. Grossman, *Altruism in Anonymous Dictator Games*, 16 GAMES AND ECON. BEHAV. 181-91 (1996), <http://community.middlebury.edu/~jcarpent/EC499/Eckel%20and%20Grossman%201996%20GEB.pdf>.

89. Michael Luo, "Excuse Me. May I Have Your Seat?": Revisiting a Social Experiment, *And the Fear That Goes With It*, N.Y. TIMES, Sept. 14, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9D05E4DF1130F937A2575AC0A9629C8B63>.

90. Luo, *supra* note 89.

likely to give up our seat. Someone is looking at us and we are not anonymous. We might assume the questioner may be sick because we do not think that people will just tell a lie out of the blue. (By the way, the students in this experiment did not like to ask for a seat; they thought that it was unethical to give a false impression because their question suggested that they were sick.)⁹¹ If the questioner does look sick but does not ask us for a seat, we are not altruistic.⁹² Then, we are just one of many anonymous people in the subway and anonymity tends to bring out the darker side of our nature.

VIII. CREATING AN ETHICAL CULTURE: THE IN-HOUSE GENERAL COUNSEL

It is easy for a young associate or even a partner to be anonymous in a large firm. There are many lawyers who do not know their colleagues. In the old days, at least a common parking lot bound the law firm together, but that is no longer true because the law firm's offices stretch out over many cities. The lawyers know that the ones who do not contribute sufficiently to the firm's bottom line will find themselves shown the exit door.⁹³ This large turnover does not encourage loyalty to the firm.

In addition, there are financial incentives to keep the client happy. For the law firm as a whole, a client, even a major client, may constitute a miniscule portion of the law firm's profits. But for the particular partner in charge of the client's work, that client may represent a substantial part of that lawyer's billings.⁹⁴ Similarly, the associate may find herself working primarily on one client's case. In these circumstances, it is financially difficult for the lawyer to tell that client that what he or she asks is wrong, because the client may move elsewhere, to a law firm that is less ethically concerned.

Add to this mix the fact that psychologists tell us that we tend to follow orders. Granted, the ethics rules tell us that there is no defense to

91. *Id.*

92. *Id.*

93. *E.g.*, Dan DiPietro & Gretta Rusanow, *Trench Warfare: Citi's Midyear Law Firm Review*, AM. LAWYER, Sept. 8, 2010, <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202471736060&slreturn=1&hbxlogin=1> ("Most firms reduced equity partner head count in the first half of 2010, so it's clear that this is a focal point. We believe it will continue to be a priority throughout 2010."); Debra Cassens Weiss, *Report Predicts More Equity Partners Will Be Axed, Sees More Outsourced Work*, ABA JOURNAL: LAW NEWS NOW, Sept. 8, 2010, http://www.abajournal.com/weekly/article/report_predicts_more_equity_partners_will_be_axed_sees_more_outsourced_work.

94. Rotunda, *supra* note 45.

following bad orders.⁹⁵ But the existence of that principle does not make it easy for the associate to challenge the partner or for the partner to challenge his major client and tell him that either he will turn over the document or the client can walk out the door. However, a law firm will make it easier for the associate or the partner to do the right thing if it creates a structure that overcomes these disincentives to be ethical. The firm should create incentive to encourage the younger lawyers to ask questions without feeling that they are being insubordinate.

If one of the anonymous lawyers in a large firm challenges the senior associate or junior partner, that can be risky. Or, the young lawyer may believe that it would be risky to challenge the superior. To whom, then, should the lawyer raise questions? If the lawyer raises the ethical question to one of the supervisory lawyers, what does she do if she is also concerned but she is not certain of the right course of action? If the ethical question is difficult (and the most interesting questions are the more difficult ones), the law firm could hire outside counsel to consider the issue. Law firms do in fact do that at times, but that is also not the first alternative that the firm would grasp because the decision to hire outside lawyers is costly.

Let me share an old war story from years ago. A client did not want to disclose a particular document; instead, he wanted to get rid of it. I told the senior associate, and he told me that the partners did not want to know about it. However, I did not like that result. I wrote a legal memorandum politely describing the problem and discussing the case law requiring us to turn over the document. I sent it to the partners who promptly overruled the senior associate and turned over the document. Later, one of the partners called me in his office and thanked me for what I had done. “We could have gotten into a problem over that,” he said. The partner was promoting the right culture.

I did not lightly make the decision to go over the head of the associate in charge. It was not easy. However, the number of lawyers in the law firm was not that large (fewer than seventy lawyers), so I knew them and they knew me. That decision would have been harder for a young lawyer to make in a large, anonymous law firm. And, for many people, it would be harder to make in an uncertain economic climate.

Fortunately, there is another alternative. The firm could appoint one of its partners as its own in-house general counsel. This in-house

95. MODEL RULES OF PROF'L CONDUCT R. 5.2(a) (2009) (“A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.”). Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199 (2007).

counsel can offer candid and confidential advice to the younger lawyers. The creation of this office will signal that the law firm wants to create the right culture, and foster the right habits.⁹⁶

The in-house counsel is likely to be more objective than the lawyers initially involved with the matter. For one thing, the in-house counsel will not be personally involved with the particular matter. If the client is the problem, she should be viewing the client as a client of “the firm” rather than a client of the particular billing partner. The in-house counsel will make the decision more objectively than either the partner in charge or the senior associate. That is because the client’s billings may represent 20% or more of the billings of the partner or associate, but only a minute percentage of the billings of the entire law firm. If necessary, the in-house counsel can decide whether the issue is such that she should kick it upstairs to the relevant law firm committee (such as the committee that decides if there is a disqualification issue or a conflict of interests).

As discussed below, when the firm creates an in-house ethics counsel to whom partners and associates can easily confide about ethics issues, they promote the development of a culture of ethics. The existence of an in-house ethics counsel sends an important signal to all the lawyers in the firm. The associate can simply talk to another lawyer (the in-house counsel) confidentially. There is no need to go over anyone’s head. The law firm does not have to decide if the issue is worth the expense of hiring outside counsel.

If there is no in-house counsel to whom the junior associate can turn, the junior associate is less likely to turn to anyone. If others who hear Kitty Genovese’s plea for help do not respond, we are also less likely to respond and more likely to follow the herd of indifference. If the junior associate sees that the senior associate and the billing partner have decided not to turn over the document, it is harder for the junior associate to go over their heads and make waves. But it is easy to walk down the hall for a confidential conversation with the in-house counsel.

It is often difficult to make the initial decision to get involved. But if the firm makes that decision easier, more people are likely to make the first step. If we can easily and confidentially seek the solace of the in-house general counsel, we are less likely to follow the herd. Just as it is easy to ask *inside* counsel, it is a lot bigger step to seek the solace of the law firm’s *outside* counsel; it is a particularly big step for junior

96. Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 108-10 (2008).

associates. The existence of an in-house general counsel should encourage junior partners or associates (particularly junior associates) to report suspicions in a way that does not disadvantage those who do report.

Thus, it is becoming more common for law firms to appoint one of the partnership's lawyers as "general counsel" to the law firm.⁹⁷ A survey of the largest 197 law firms in 2005 reported that nearly 70% now have a designated general counsel. That is up from 63% in the prior year. Each is an inside counsel rather than an outside general counsel (*i.e.*, a lawyer in another law firm), and 92% of these general counsel are also partners in their firm.⁹⁸

It should take little effort for the young associate to turn to this general counsel, who may be the lawyer down the hall or on the next floor, in order to seek candid advice. When a lawyer sees a problem—or thinks she sees a problem but she is not sure and her colleagues do nothing—she can inform the general counsel about what she sees and know that she is speaking confidentially. The general counsel, by definition, will not be one of the passive bystanders who chose to walk around the fallen body crying for help. That is because it is the business of the general counsel to be involved; that is part of her job description. If the lawyer can confidentially seek advice or report to a general counsel, then that lawyer is less likely to passively do nothing.

The general counsel should aid in creating good habits. And, if the general counsel concludes there is no problem, the junior lawyer will have ethical reasons to defer to that decision.⁹⁹ If there is a problem, the inside counsel can take appropriate action to correct it. The empirical

97. Jonathan M. Epstein, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011 (1994); 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 (2002); Douglas R. Richmond, *Essential Principles for Law Firm General Counsel*, 53 U. KAN. L. REV. 805 (2005); Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721 (2005) [hereinafter Chambliss, *The Scope of In-Firm Privilege*]; Susan Saab Fortney, *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer's Lawyer*, 53 U. KAN. L. REV. 835 (2005); Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515 (2006) [hereinafter Chambliss, *Professionalization of Law Firm In-House Counsel*]; Davis, *supra* note 96.

98. Results of Confidential "Flash" Survey on Law Firm General Counsel, (Mar. 2005), http://www.altmanweil.com/dir_docs/resource/d0f1e347-e90b-40ae-9b92-808a7eff6ffd_document.pdf. See also Chambliss & Wilkins, *supra* note 97; Chambliss, *Professionalization of Law Firm In-House Counsel*, *supra* note 97 (law firms are increasingly relying on full-time in-house counsel); Davis, *supra* note 96.

99. MODEL RULES OF PROF'L CONDUCT R. 5.2(b) (2009) (subordinate lawyer does not violate the ethics rules by acting in accordance with a supervisory lawyer's reasonable resolution of an arguable ethical issue).

evidence demonstrates that: one study showed that, over a five-year period, law firms that employ a general counsel (or similar position, such as ethics advisor or loss prevention counsel) spend \$1 million less on defense costs and indemnity payments in connection with malpractice claims.¹⁰⁰ Because these firms are more ethical, they have fewer malpractice claims.

The law should encourage law firms to create an in-house legal counsel.¹⁰¹ The ethics rules authorize lawyers to seek confidential advice from other lawyers about their ethical duties.¹⁰² Although the ABA Model Rules do not use the title “in-house counsel,” they do specifically contemplate that law firms, particularly larger firms, may designate a senior lawyer as a designated ethics lawyer.¹⁰³ The ABA advises that a lawyer who consults the law firm’s general counsel in an effort to conform her conduct to the ethics rules is not engaging in a conflict of interest with the client. Instead, she is engaging in an “inherent” part of her work.¹⁰⁴

100. Anthony E. Davis, *The Emergence of Law Firm General Counsel and the Challenges Ahead*, 20 PROF. LAWYER, no. 2, 2010, at 1.

101. *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 U.S. Dist. 2007 WL 578989, at *7 (N.D. Cal. Feb. 21, 2007) (The court recognizes that law firms should and do seek advice about their legal and ethical obligations in connection with representing a client and that firms normally seek this advice from their own lawyers. Indeed, many firms have in-house ethics advisers for this purpose. A rule requiring disclosure of all communications relating to a client would dissuade attorneys from referring ethical problems to other lawyers, thereby undermining conformity with ethical obligations. Such a rule would also make conformity costly by forcing the firm either to retain outside counsel or terminate an existing attorney-client relationship to ensure confidentiality of all communications relating to that client. This court declines to follow such a strict rule, preferring one that is consistent with a law firm in-house ethical infrastructure. Accordingly, Thelen is to produce some but not all communications in which a Thelen lawyer seeks or gives advice on the firm’s ethical obligations to Marland.). *Versuslaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866, 878 (Wash. Ct. App. 2005) (“Lawyers in a law firm seeking legal advice from another lawyer in the same firm can assert the attorney-client privilege”) (citing *U. S. v. Rowe*, 96 F.3d 1294 (9th Cir. 1996)); *Hertzog, Calamari & Gleason v. Prudential Ins. Co.*, 850 F. Supp. 255 (S.D.N.Y. 1994); *In re: Sunrise Securities Litigation*, 130 F.R.D. 560 (E.D.Pa. 1989).

102. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(4) (2009) (lawyer may seek advice of other lawyer about ethical duties without losing confidentiality) and R. 5.1(a) (law firm should have measures in effect to assure that law firm complies with its ethical obligations).

103. MODEL RULES OF PROF’L CONDUCT R. 5.1, cmt. 3 (2009).

104. *In-House Consulting on Ethical Issues*, ABA Formal Ethics Op. 08-453 (Oct. 17, 2008), quoting N. Y. St. B. Assoc. Comm. on Prof’l Ethics, *Consultation with a Law Firm’s In-House Counsel on Matters of Professional Ethics Involving One or More Clients of the Law Firm*, Op. 789 (Oct. 26, 2005), 2005 WL 3046319, at *3 (“A lawyer’s interest in carrying out the ethical obligations imposed by the Code is not an interest extraneous to the representation of the client. It is inherent in that representation and a required part of the work in carrying out the representation.”).

Lawyers are less likely to violate the ethics rules when they seek objective advice from other lawyers about their ethical duties—e.g., is there a conflict of interest with another client,¹⁰⁵ or is there a conflict with the lawyer’s personal interest,¹⁰⁶ or is a client’s prospective waiver of a conflict of interest still valid in light of changing factual circumstances;¹⁰⁷ or, must the law firm withdraw from a particular case because of the client’s misstatements during discovery.¹⁰⁸

Instead of encouraging law firms to appoint a general counsel, several cases have shown hostility by denying the attorney-client privilege to lawyers who consult their law firm’s in-house general counsel.¹⁰⁹ The lawyer seeks legal advice from the general counsel on what to do in order to comply with the ethics rules. These cases argue that there should be no attorney-client privilege because the lawyer who consults with the law firm’s in-house counsel is in a conflict of interest with the law firm’s fiduciary duties to its client. That, says the courts, should cause the lawyer to lose the privilege. As one court argued:

Permeating the documents is consideration of how best to position the firm in light of a possible malpractice action. They clearly establish that the law firm was in a conflict of interest relationship with its clients.¹¹⁰

105. MODEL RULES OF PROF’L CONDUCT R. 1.7 (2009).

106. MODEL RULES OF PROF’L CONDUCT R. 1.8(j) (2009).

107. ROTUNDA & DZIENKOWSKI, *supra* note 8, at § 1.7-4(b); Davis, *supra* note 96, at 102.

108. Model Rules of Prof’l Conduct R. 3.3(a)(3).

109. *E.g.*, *In re Sunrise Securities Litigation*, 130 F.R.D. 560, 597 (E.D. Pa. 1989) (“[A] law firm’s communication with in[-]house counsel is not protected by the attorney client privilege if the communication implicates or creates a conflict between the law firm’s fiduciary duties to itself and its duties to the client seeking to discover the communication.”); *Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 285 (E.D. Pa. 2002) (“[T]o the extent that the seeking or obtaining of legal advice by one lawyer from another lawyer inside the firm ‘implicates or creates a conflict of interest,’ the attorney-client privilege between the lawyers in the firm is vitiated.”) (footnote omitted); *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 288 (S.D.N.Y. 2002) (“law firm cannot invoke the attorney-client privilege against a current client when performing a conflict check in furtherance of representing that client”); *Asset Funding Group, LLC v. Adams & Reese, LLP*, No. 07-2965, 2008 U.S. Dist. 2008 WL 4948835, at *4 (E.D. La. Nov. 17, 2008); *In re: SonicBlue Inc.*, Bankr. Nos. 03-51775, 03-51776, 03-51777, 03-51778-MM, 2008 U.S. Bankr. Ct. 2008 WL 170562, at *9 (Bankr. N.D. Cal. Jan. 18, 2008) (no privilege for the law firm because there was conflict of interest when the firm sought advice from another lawyer within the same firm).

110. *Koen Book Distrib.*, 212 F.R.D. at 286. *In re Sunrise Securities*, 130 F.R.D. at 595. *See also Burns ex rel. Office of Public Guardian v. Hale and Dorr LLP*, 242 F.R.D. 170, 173 (D. Mass. 2007) (“The ‘client’ invoking the privilege is H & D itself, which is being represented by another lawyer of the firm. Because the firm owed a fiduciary duty to Alexis Burns as the trust beneficiary, there is no policy reason why H & D should be allowed to withhold disclosure of information

Yet, in identical circumstances, these courts appear to be quite willing to protect the law firm's communications with its *outside* counsel.¹¹¹ That distinction makes little sense. If a lawyer really cannot confidentially consult with a lawyer in the same law firm about his or her ethical duties, then consulting with a lawyer in a different law firm is not any different.¹¹² It is just more expensive. If the lawyer seeks legal advice on what to do in order to comply with the ethics rules (including the ethical obligation of competence)¹¹³ it should make no difference to treat one consultation as a breach of fiduciary duties and the other as proper. Instead of encouraging lawyers to seek ethics advice, these cases serve to discourage that alternative by prescribing a procedure that is more costly.

The principle that motivates these courts—the argument that there is an inherent conflict of interest when the lawyer seeks advice of the in-house general counsel—is false. Assume for example, that the in-house general counsel advises a lawyer in the firm that this lawyer has committed malpractice. The ethics rules envisage that the law firm should advise the firm's client of the possible malpractice.¹¹⁴ It does not matter whether inside counsel or outside counsel has advised that there is malpractice. The case law shows that if the law firm discovers that it has committed malpractice, the lawyer should inform the law firm's client,¹¹⁵ as part of its duty to keep the client well-informed.¹¹⁶ The law

relevant to her claim. Because the privilege is inapplicable to this circumstance, the plaintiff's motion to compel will be allowed.”)

111. *In re Sunrise Securities*, 130 F.R.D. at 597 n.12. See also *Liberty Mutual Ins. Co. v. Tedford*, No. 3:07CV73-A-A, 2009 U.S. Dist. 2009 WL 2425841, at *6 (N.D. Miss. Aug. 6, 2009).

112. William T. Barker, *Law Firm In-House Attorney-Client Privilege Vis-à-Vis Current Clients*, 70 DEF. COUNS. J. 467, 471 (2003).

113. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009). It is no accident that competence is the first rule. The drafters believed that the first rule, the prime directive, is competence. ROTUNDA & DZIENKOWSKI, *supra* note 8, at § 1.1-1 (“Competence: the First Rule of Ethics”) (Thomson West, 2010-2011 ed.).

114. MODEL RULES OF PROF'L CONDUCT R. 1.4 & cmt. 3 (2009) (duty to inform client of “significant developments affecting” the representation), and cmt. 7 (“lawyer may not withhold information to serve the lawyer's own interest”). MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4) & cmt. 9 (2009). See also *In-House Consulting on Ethical Issues*, ABA Formal Ethics Op. 08-453 (Oct. 17, 2008) (“Duty to Inform the Client of an Ethics Consultation”).

115. For example of inside counsel delivering the bad news, see *Versuslaw, Inc. v. Stael Rives*, 111 P.3d 866, 878 (Wash. Ct. App. 2005). Lawyer Elvins was the Stael Rives lawyer who represented VersusLaw in its arbitration with Matthew Bender. Lawyer Dean was Stael Rives' in-house counsel (its loss prevention lawyer). Dean provided legal advice to Stael Rives attorneys on ethical and legal issues. Dean advised Elvins about Stael Rives' representation of VersusLaw in the arbitration and the two-year limitation for filing VersusLaw's claim for royalties under the License Agreement. When Elvins learned about a possible malpractice claim that its client could have against Elvins and the Stael Rives law firm, Elvins informed Acton, the President and CEO of

firm's obligation does not depend on whether inside or outside counsel has delivered the bad news.¹¹⁷

Lawyers are always supposed to do what they can to protect themselves from a malpractice lawsuit; that is called acting competently. It is not a conflict of interests for the lawyer to seek advice from another lawyer about what she should do to act competently and ethically.¹¹⁸ The law firm benefits both the client and itself when it creates procedures to assure that it acts competently and without conflicts. The ethics rules require that.¹¹⁹ Because the factual landscape is always changing and lawyers must apply the law to these changing situations, lawyers must constantly determine if they have violated any ethical rules. The ethical rules also place limits on how the lawyer can protect herself from malpractice: the lawyer may not ethically ask the client to sign a retainer agreement waiving his right to sue for malpractice.¹²⁰ But that limitation is a far cry from a rule that denies the attorney-client privilege to lawyers merely because they seek legal advice on how best to comply with their ethical duties. The ethics rules and good law firm practices "create an obligation to establish protocols, appropriate for the size and practice of the firm, to enable the firm to enforce these standards internally. To envision such a system without access to confidential advice on legal and ethical issues affecting the firm's obligations is difficult."¹²¹

Thus, the ABA Model Rules specifically authorize the lawyer to seek confidential legal advice in order for the lawyer and law firm to

VersusLaw. *See also, In re SRC Holding Corp.*, 364 B.R. 1, 37-42 (D. Minn. 2007) (law firm has duty to inform its client about malpractice claim that client may have against it) (no general counsel).

116. *See supra* note 114.

117. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20, cmt. c (2000) ("If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client. For example, a lawyer who fails to file suit for a client within the limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw.")

118. N. Y. St. B. Assoc. Comm. on Prof'l Ethics, *Consultation with a Law Firm's In-House Counsel on Matters of Professional Ethics Involving One or More Clients of the Law Firm*, Op. 789 (Oct. 26, 2005), 2005 WL 3046319, at *3.

119. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2009), requiring the 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."

120. MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(1) (2009).

121. N. Y. St. B. Assoc. Comm. on Prof'l Ethics, *Consultation with a Law Firm's In-House Counsel on Matters of Professional Ethics Involving One or More Clients of the Law Firm*, Op. 789 (Oct. 26, 2005), 2005 WL 3046319, at *2.

comply with the ethics rules.¹²² The ethics rules encourage lawyers to seek confidential advice from other lawyers in order to comply with their ethical duties of competence as well as their other ethical duties.¹²³ The Rules make no distinction between consulting a lawyer outside the law firm versus consulting a lawyer inside the law firm.¹²⁴

If lawyers must hire outside counsel in order to be protected by the privilege, it will be more expensive to seek advice, and that means fewer lawyers will seek the advice. In particular, younger lawyers, the junior associates, are a lot less likely to tell the partner that they need to seek outside legal advice to second guess what another partner is doing. It is a lot easier for the junior associate simply to walk down the hall or take the elevator to another floor and talk in confidence to the in-house counsel, whose job is to be the independent legal ear and independent conscience. Instead of encouraging this consultation, many courts are discouraging it. They are creating a regime where the junior associate has to tell the partner, “I am not sure that what you are doing is right; I want the law firm to pay to hire an outside counsel to second-guess you.”

The law should encourage lawyers to consult other lawyers on legal ethics issues for the same reason that the law encourages corporations to consult with their in-house counsel.¹²⁵ The attorney-client privilege encourages the client (in this case, the associate or partner with the ethics question) to speak candidly. It also encourages the general counsel of the firm to respond candidly. The privilege should encourage the in-house general counsel to conduct an internal investigation if that is appropriate, just as in-house corporate counsel conduct internal investigations when appropriate to keep the client out of trouble. The lawyer who becomes in-house counsel develops expertise on such issues

122. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4) & cmt. 9 (2009). See also *In-House Consulting on Ethical Issues*, ABA Formal Ethics Op. 08-453 (Oct. 17, 2008) (“The Model Rules contemplate the existence of some structure or process within a firm for resolution of questions about professional conduct . . .”) (citing MODEL RULES OF PROF'L CONDUCT R. 5.1 (2009)).

123. In fact, lawyers can make disclosures that would otherwise violate their duty of confidentiality in order to protect themselves from a charge of wrongful conduct. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5).

124. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 9 (2009).

125. Chambliss, *The Scope of In-Firm Privilege*, *supra* note 97. See also, e.g., *United States v. Buitrago-Dugand*, 712 F. Supp. 1045, 1048 (D.P.R. 1989) (“The attorney-client privilege exists to encourage people to seek legal advice freely and to speak candidly to the attorney without fear that the communication will be disclosed.”); *United States v. Saccoccia*, 898 F. Supp. 53, 57 (D.R.I. 1995) (“The purpose of the attorney-client privilege is to encourage the client to make full disclosure of all pertinent facts to the attorney so that the attorney may render informed legal advice with respect to the matters about which the attorney is consulted.”).

as conflicts of interest, applicability of attorney-client privilege, and so on. Of course the law firm has a fiduciary duty to its client, but, as Professor Elizabeth Chambliss has pointed out, the law firm's in-house counsel has a duty to the law firm, and courts should encourage this development.¹²⁶

The law firm's general counsel is more likely to be objective regarding a particularly lucrative client than the lawyer whose billings disproportionately depend on that particular client. A lawyer whose status and rank within the law firm depends on a major client is more likely to rationalize that what the client is doing is permissible. For example, the lawyer will strive mightily not to confront that client with a charge that the lawyer thinks the client has concealed a document that should be turned over in discovery. If the law firm confronts the client and loses the client, the law firm suffers a slight loss in business; if the billing partner confronts the client and loses the client, that partner may lose 20% or more of her entire billings.¹²⁷

And speaking of lawyers billing hours, let us turn to the issue of ethics of billing.

IX. BILLING HOURS AND ETHICAL HABITS

Aristotle tells us, in his *Nicomachean Ethics*, that we become ethical by building good habits and we become unethical by building bad habits: "excellence of character results from habit, whence it has acquired its name (*êthikê*) by a slight modification of the word *ethos* (habit)."¹²⁸ Excellence of character comes from following the right habits.

126. Chambliss, *The Scope of In-Firm Privilege*, *supra* note 97, at 1723-24.

127. Lawyers want to move up the law firm structure, from associates to partners, and from low-level partners to high-level partners. See Galanter & Palay, *supra* note 23; David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998). Ethics rules place some restrictions on lawyer mobility while market forces may encourage it. Jack P. Sahl, *Thinking about Leaving? The Ethics of Departing One Firm for Another*, 18 PROF. LAWYER, no. 1, 2008, at 2.

128. ARISTOTLE, *NICOMACHEAN ETHICS* BOOKS II-IV bk. II, at 1 (C.C.W. Taylor ed., trans., Oxford Univ. Press 2006). The first sentence of Book II, Chapter 1, states:

Excellence being then twofold, excellence of thought on the one hand and excellence of character on the other, excellence of thought comes into being and develops chiefly through teaching, which is why it requires experience and time, but excellence of character results from habit, whence it has acquired its name (*êthikê*) by a slight modification of the word *ethos* (habit).

Id.

Thinking of ethics as habit-forming may sound unusual to the modern mind, but not to Aristotle or the medieval thinkers who grew up in his long shadow. “Habit” in Greek is “*ethos*,” from which we get our modern word, “ethical.” In Latin, habits are *moralis*, which gives us the word, “moral.” Aristotle explains that we cannot alter nature by practice: we cannot teach or train a rock to roll up a hill no matter how often we throw it up. But we can alter ourselves by practice. We can train ourselves to be ethical by practice, just as we learn to play the harp by practice.¹²⁹

If Aristotle lived in modern times, he might explain what he meant in this way. Is it ethical to punish a person who makes a mistake while driving (e.g., once, he failed to make a full stop at the stop sign) and then kills a pedestrian? The driver, after all, did not *intend* to kill anyone; he just made a mistake. We say that he made a negligent mistake, but that only means that someone who is not negligent—the hypothetical “reasonable person” in the law of torts—would not have made the mistake. Is it right to punish the person because just once he made a mistake and did not make a full stop at the stop sign? He was not “reasonable” but he did the best that he could. He was not intentionally bad.

Aristotle might respond that it is not likely that the driver would spend his entire life coming to a full stop at every stop sign and then, one day, act contrary to the habits he had built over a lifetime. Instead, it is much more likely that our driver would make a series of decisions and eventually act by habit. He would stop at the stop sign, but then one day when he is in a hurry or it is late at night and no one is around, he would make a little less of a full stop. Later, he would repeat that behavior. Over time, he would make fewer full stops and more rolling stops, even when he was not that much in a hurry. Bit by bit, he would acquire a habit of not making full stops. And then, one day, he would run the stop sign and injure or kill a pedestrian. He slowly acquired a lifetime of bad habits.

The virtuous or ethical person would be building up quite a different set of habits. She would make a full stop at every stop sign. There would come a time when she was in a hurry, and it was late at night and no one was looking, and still she would come to a full stop. Like putting on a seat belt when you drive, eventually you have

129. *Id.* at 2-6. On this issue, the philosophy of east and west meet. Confucius said, “By nature, men are nearly alike; by practice, they get to be wide apart.” CONFUCIUS, THE CONFUCIAN ANALECTS, THE GREAT LEARNING & THE DOCTRINE OF THE MEAN 318 (James Legge trans., 2009). There is nothing new under the sun.

developed the habit of always making full stops. The ethical person makes the conscious choice to do what is right and to develop the proper habits.

The unethical person has made a different conscious choice, for example, the decision to lie. With practice, we can become habitual liars. We start off by making a conscious decision to lie. Magnetic resonance imaging (MRI) studies tell us that it takes more effort for us to lie than to tell the truth. The MRI shows structural abnormalities in people who habitually and pathologically lie, cheat, and deceive. Liars had a 22% to 26% increase in their prefrontal white matter and a reduction of a 36% to 42% in their prefrontal grey/white ratios compared to normal people.¹³⁰ Professor Adrian Raine, one of the authors of the study, said, "Lying takes a lot of effort."¹³¹ People have to work at it.¹³² And, like everything else, the more you work, the easier it becomes.

There is, sadly, a great deal of empirical evidence that many lawyers have decided to become habitual liars about the number of billable hours they work.¹³³ They are padding their bills and, over time, the padding becomes more frequent. Eventually, their fraudulent billing becomes excessive enough that the client or law firm discovers the deceit.

Consider a case that involved the billing practices of an up-and-coming partner at Mayer, Brown & Platt. When the law firm discovered what its partner, Richard A. Salomon, had done, it hired a national accounting firm to conduct an independent audit of Mr. Salomon's bills and then reimbursed ten corporate litigation clients almost \$500,000.

130. Yaling Yang et. al., *Prefrontal White Matter in Pathological Liars*, 187 BRIT. J. OF PSYCHIATRY 320-25 (2005).

131. Usha Sutliff, *Liars' Brains Wired Differently*, USC NEWS, Sept. 29, 2005, <http://www.usc.edu/uscnnews/stories/11655.html>.

132. Joshua D. Greene & Joseph M. Paxton, *Patterns of Neural Activity Associated with Honest and Dishonest Moral Decisions*, 106 PNAS (PROC. OF THE NAT'L ACAD. OF SCI., USA) 12505-12511 (July 21, 2009), <http://www.pnas.org/content/106/30/12506.full#abstract-1> ("Individuals who behaved honestly exhibited no additional control-related activity (or other kind of activity) when choosing to behave honestly, as compared with a control condition in which there was no opportunity for dishonest gain. In contrast, individuals who behaved dishonestly exhibited increased activity in control-related regions of prefrontal cortex, both when choosing to behave dishonestly and on occasions when they refrained from dishonesty. Levels of activity in these regions correlated with the frequency of dishonesty in individuals.") (emphasis added).

133. See, e.g., *Toledo Bar Assn. v. Stahlbush*, 126 Ohio St. 3d 366, 2010-Ohio-3823, 933 N.E.2d 1091 (disciplining an attorney who billed the juvenile court for more than 24 hours per day on at least three occasions, and more than 20 hours per day on five other occasions, in 2006"). In addition to billing over 24 hours a day on more than one occasion, Attorney Stahlbush billed 90.3 hours in a 96-hour period "and in a separate 144-hour period, she billed 139.5 hours." *Id.*

Salomon consistently billed more than 3000 hours per year.¹³⁴ That is over eight billable hours, every day of the year. There is no vacation, no weekend, and no July 4th barbeque. A lawyer told me that one year he billed an honest 3000 hours but the next year he was in the hospital. Not so for Mr. Salomon, who said he billed over 3000 hours one year after another. Should any of his partners have suspected something was amiss at some point during all those years? Compare these numbers with the average number of hours that a typical American works in a year: 1792. In the Netherlands, it is 1389.¹³⁵ But for Mr. Salomon it was over 3000, year after year after year.

Those who lie do not limit their lies to the number of hours billed. In another instance, also in Chicago, a very reputable lawyer for a very reputable law firm, Winston & Strawn, found himself caught in a financial scandal.¹³⁶ He was padding his expense account since shortly after becoming managing partner. And, when the law firm investigated, it found that like the person who makes the rolling stop, his padding did not stop there. The law firm, when it found out what was happening, promptly demanded and received the partner's resignation.¹³⁷ It was not easy for the law firm to uncover the problem because the partner in charge of monitoring the law firm's internal accounting was the fraudulent lawyer.¹³⁸ The wolf guarded the chicken coop.

134. Sherrie F. Nachman, *Mayer, Brown Partner Exiled*, 16 THE AM. LAW. 26 (1994) (an ex-partner said Salomon was "a pathological liar . . . [and] the most incredible overbiller."); Randall Samborn, *Mayer, Brown & Platt Overbillings Detailed*, 16 NAT'L L. J., May 9, 1994, at A4, col. 4; *Sidebar: News of The Profession*, 16 NAT'L L. J., June 27, 1994, at P. A5, col. 2 ("sources say Mr. Salomon, who claims to have suffered from an obsessive-compulsive disorder that led to the overbilling"); Harry J. Maue, 1994: *A Bad Year for Legal Ethics*, 5 CORP. LEGAL TIMES, May 1, 1995, at 1. See, e.g., Darlene Ricker, *supra* note 37; See also Karen Dillon, *Katten Partner Resigns after Alleged Overbilling*, 17 AM. L., Apr. 1995, at 13 ("It's a pathetic scenario that is becoming all too common: a well-respected senior lawyer at a top firm watching his career unravel amid allegations of what amounts to petty theft. The latest example is Glenn Nadell, the former head of tax at Chicago's Katten Muchin & Zavis, who quietly resigned in February after an internal audit discovered allegedly 'questionable' billing of expenses to a client, according to name partner Allan Muchin. In all, Muchin says, the 42-year-old Nadell allegedly overbilled clients for a total of less than \$50,000 in phony or inflated expenses over a three-year period.")

135. Catherine Rampell, *South Koreans Put In Most Hours*, N.Y. TIMES, ECONOMIX (May 12, 2010, 12:42 PM), <http://economix.blogs.nytimes.com/2010/05/12/s-koreans-put-in-most-hours/> (referring to the Report of the Organization for Economic Cooperation and Development, for 2008).

136. Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879, 890-900 (2002).

137. David Margolick, *A Theft Scandal Ravages a Career At a Leading American Law Firm*, N.Y. TIMES, May 13, 1994, available at <http://www.nytimes.com/1994/05/13/us/a-theft-scandal-ravages-a-career-at-a-leading-american-law-firm.html?pagewanted=all>.

138. Erin White, *More Law Firms Are Auditing Themselves to Catch Billing Errors*, WALL ST. J., July 14, 1998, at B8.

Among other things, the firm discovered that the lawyer had hired his wife (a partner at Chapman & Cutler, another prestigious law firm) to collect on a bill on behalf of his law firm. His wife charged her husband's law firm \$250,000 to collect on that bill, even though his wife never collected the money owed. As managing partner, he approved his wife's bill.¹³⁹

The firm dug deeper and discovered "systematic, worsening abuses over a six-year period," totaling an additional \$500,000.¹⁴⁰ He took money that was not his, was not caught, and started taking more—like the person who makes one rolling stop, and then another, and then it becomes his habit. Eventually, the court sentenced him to two years in prison for mail fraud and tax evasion. His wife, who was a lawyer at Chapman & Cutler, had her own problems as well. Among other things, the firm discovered that she had billed many hours when she was on vacation with her boyfriend and not working at all. The court sentenced her to a year and a day in prison.¹⁴¹

When lawyers engage in sharp practices they create a culture prejudicial to ethical behavior. The young associates will learn from that culture. The junior associates are more likely to take their cues from the senior associates who become partners rather than the senior associates who do not. And, if the associates being promoted are the ones padding their bills, the junior associates will know what to do.

Disgruntled clients are increasingly auditing law firm bills¹⁴² and what they find is not pretty. We do not know how serious this problem is, but one survey of lawyers found that 23% of them said that they had billed two clients for the same hour of work; 66% said they knew of specific instances of bill padding.¹⁴³ Clients are becoming more concerned, and are now more likely to challenge their bills by turning to legal auditors. That, in turn, has led to the creation and rapid growth of companies that specialize in auditing legal bills.

139. Margolick, *supra* note 137.

140. *Id.*

141. Lerman, *supra* note 136, at 897 & n.146.

142. *E.g.*, Claire Hamner Matturro, *Auditing Attorneys' Bills: Legal and Ethical Pitfalls of a Growing Trend*, 73 FL. B. J. 14 (May 1999), <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Subjects/554C2B2514BE522985256ADB005D6261>.

143. David Segal, *In the Business of Billing?*, WASH. POST, Mar. 22, 1998, at H1, available at <http://www.washingtonpost.com/wp-srv/business/longterm/ethics/ethics2.htm>; See also Michael D. Goldhaber, *New Study Shows Fraudulent Billing Not an Isolated Matter*, N.Y. L. J., Oct. 12, 1999, at 1 (1999); Herbert M. Kritzer, *The Commodification of Insurance Defense Practice*, 59 VAND. L. REV. 2053, 2070-92 (2006) (bill auditing and litigation guidelines).

Legal auditing is a growth industry.¹⁴⁴ One former litigator started a legal audit service using as the corporate headquarters his maid's room in his New York City apartment. A decade later, his company occupied a 20,000 square-foot office, employed 130 people, and audited \$60,000 in legal bills on a typical business day.¹⁴⁵

In one case, legal auditors found, the law firm charged the corporate client \$24,053 for drafting injunction papers that the firm never filed. The law firm charged \$177,251 when the people whom the law firm used to staff the case met to update each other on how the case was going.¹⁴⁶ Another legal audit uncovered that one firm charged \$37,000 for air travel and restaurant expenses and did not have a single receipt. For three months, one firm had billed twelve hours a day for a lawyer hospitalized in a coma from a car accident.¹⁴⁷

If a lawyer says that he spent two hours reading a court decision and found out that it was not helpful, it is difficult for the client to prove that the lawyer is a liar. But if the lawyer is in a coma, it is much easier for the disgruntled client to prove bill padding. It also calls into question all the other hours that the lawyers billed.

One case that led to discipline involved Michael Romansky, a senior partner of a major, national law firm, McDermott, Will & Emery. Mr. Romansky reviewed a bill prepared for a client, Dr. Siepser, and decided to add three hours to the 2.5 hours that the associate had billed.¹⁴⁸ The firm, like many major law firms, typically bill by the hour.¹⁴⁹ The firm had told Dr. Siepser that it would bill based on the number of hours that lawyers worked on the matter, "but Romansky added the hours anyway."¹⁵⁰ He also decided that the firm should not send Dr. Siepser any details on "how the bill was calculated or how much time had been recorded."¹⁵¹ By mistake, the firm sent the time

144. One such firm calls itself: *The Devil's Advocate: Legal Fee Management & Litigation Consulting*. Its webpage is at: <http://www.devilsadvocate.com/Default.htm> (last visited Sept. 3, 2010). It advises: "Our clients include major corporations, government agencies, law firms, insurance companies, and anyone else who pays substantial legal fees, needs to examine the reasonableness of legal fees, or wishes to analyze litigation." *Id.*

145. Milo Geyelin, *Crossing the Bar: If You Think Insurers are Tight, Try Being One of Their Lawyers*, WALL ST. J., Feb. 9, 1999, at A1, col. 1 & A8, col. 1. See also ROTUNDA & DZIENKOWSKI, *supra* note 8, at §§ 1.5-(1)(c), 1.5-5(a), (b).

146. Segal, *supra* note 143.

147. *Id.*

148. Lerman, *supra* note 17, at 849.

149. Ronald D. Rotunda, *Moving from Billable Hours to Fixed-Fees: Task-Based Fees and Legal Ethics*, 47 U. KAN. L. REV. 819 (1999).

150. Lerman, *supra* note 17, at 849.

151. *Id.* at 850.

records to the client, which led to the discovery. Further investigation led to other problems involving other clients.¹⁵² The court ended up suspending Mr. Romansky for thirty days, although the Bar Counsel had recommended a six-month suspension.¹⁵³ One judge, dissenting to the light discipline, viewed the case differently. She agreed with Bar Counsel, who had recommended a six-month sanction, because Mr. Romansky had not only added hours not worked to the bills of various clients, but had

“engaged in deceptive and dishonest actions relating to his practice of law, in one instance formulating and submitting a forged letter to assist respondent in the internal investigation of his billing practices, and in the other assigning an associate to work on a matter for his father and then instructing her to bill the time to another client’s account.”¹⁵⁴

He had developed a habit of deceit.

A lawyer at another firm said he billed clients, on average, nearly 1200 hours per month in 1990 and 1991. His low month for billable hours was 851 hours and his high month was 1547 hours. He not only apparently worked very hard but he also defied the iron laws of mathematics and of time: in a month of thirty-one days there are only 744 hours, but he billed 1547 hours.¹⁵⁵

A Chapman & Cutler partner claimed that he billed 6022 hours in one year, 1993.¹⁵⁶ And, he had billed over 5000 billable hours for several years prior to that.¹⁵⁷ The lawyer claimed that he worked on bankruptcy matters for fifty-two all-nighters in a row! There was no evidence that any clients complained, and the law firm and the individual lawyer who charged these astronomical hours defended the billings.¹⁵⁸ But lawyers from other law firms were incredulous.¹⁵⁹

152. *Id.* at 850-54.

153. *In re Romansky*, 938 A.2d 733, 743 (D.C. 2007). The Disciplinary Board agreed with the Hearing Committee that Mr. Romansky had “deliberately increased the hours billed in order to charge a premium that he was not entitled to,” but the court concluded that his actions amounted to negligent conduct, not reckless conduct. *Id.* at 737, 739.

154. *Id.* at 744 (Kramer, J., writing separately with respect to Section VI) (internal parentheses excluded without indication, identifying two other matters).

155. Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 211 (1997).

156. Lerman, *supra* note 136, at 892, 905-06, 918.

157. Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207, 209 n.14 (2000); Lerman, *supra* note 136, at 892 n.93.

158. Eleanor Kerlow, *Turbulence Of 1994 Puts Law Firm Management On View*, 14 No. 1 Of Counsel 1, *8 (Jan. 2, 1995); Charles Silver, *Flat Fees And Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 211 (1997-1998).

In a typical day, it takes a lawyer more than eight hours of time to work eight *billable* hours. For example, the lawyer cannot charge for time spent on law firm committee work or similar administrative matters. The partner cannot bill a client for the time he discusses with his partners what should be that year's bonus for a given associate. This partner will spend time on continuing legal education, a bar meeting, or client development. That is not billable either. When the lawyer is eating lunch, taking a coffee break, chatting with a colleague about last night's baseball game, or using the restroom, that is not work that he can bill to any client.

A billable hour is time spent working on a legal matter for the benefit of the client. The lawyer who seriously claimed to bill clients for 6022 hours in one year must bill, on average, over 16.5 hours each and every day of 356 days a year. There are only 8760 hours in an entire year. That lawyer is claiming to work more than sixteen hours *every* weekday and also *every* Sunday and *every* Saturday. He must be in the office working on client matters on Christmas Day, July 4th, December 31st, and January 1st. If he takes even one day off, he has to bill over sixteen hours on some other days, but on each of those other days he was already working over sixteen hours. On average, he has to spend less than eight hours a day to sleep—apparently sleep was not necessary for this lawyer who claimed to have worked all night for fifty-two days (and nights) in a row. Out of the 7.5 hours left in each day, he must not only sleep but also eat, commute to work, read a newspaper, shower and shave, dress himself, take a shower, pay his bills, etc. If he were a prisoner of war instead of a highly paid law partner, the Geneva Convention would forbid him from going fifty-two days without sleep.

When a lawyer claims to work that many hours, one would think that his partners know that something is amiss. However, perhaps his colleagues did not mind the increased income that the law firm earned. The lawyers who overbill may be moving up in the firm pecking order at an above-average rate. The more senior lawyers may close their eyes to what they do not want to see. Other lawyers, particularly the junior associates, may conclude that they should exaggerate their hours if they also wish to climb up the partnership ladder.¹⁶⁰ They may well

159. *E.g.*, Segal, *supra* note 143; Richmond, *supra* note 157, at 209 n.14.

160. *See, e.g.*, Richmond, *supra* note 95, at 202-03 (discussing an instance where a law firm linked associate compensation to billable hours). Several associates complained that another associate was padding his hours. That associate "admitted inflating his time," but the law firm did nothing. *Id.* Later, the supervising partner championed the promotion of the hour-padding associate

rationalize what they are doing: “everyone does it;” “I shouldn’t reduce my billable hours for the thirty-minute chat with a friend, because I was still thinking about the client;” “I only read this newspaper briefly, and I really did that to see if there is anything that might inspire me about the client, so I’ll charge him for my newspaper break.”

There is an old joke about the client who questioned the lawyer about part of his bill. “What is this \$100 charge for?” asked the client. The lawyer replied: “That’s when I was walking downtown. I saw you on the other side of the street, crossed over to say hello, and found out that it wasn’t you.”¹⁶¹ Clients may not enjoy this vignette as heartily as lawyers.

It is unlikely that the lawyer who overbills starts off by billing 1800 hours in a year and then jumped up to 6000 the next year. More likely, as Aristotle suggested, the lawyer will add a little extra time to his bill, and the lawyer will notice that no one challenges him. Next time, he adds a few more hours. He justified his actions. Perhaps he was tired, and so does not subtract the time he was taking a little nap, because he was still thinking about the problem, even if only subconsciously. Or, he adds a little this time because he recalls that he may not have earlier counted hours that he should have. He is only making up the difference. Later, he does not subtract the time he spent during his coffee break; it was just a short break and it helped him think. Eventually, he adds more time. Ultimately, he may be caught, or maybe not.

We do not wake up one morning and decide to become crooks; we decide to rationalize, and in so doing, we develop a habit of padding hours. Over time, the habit becomes more habit-forming, and we pad a bit more. The habit is not limited to keeping track of our hours. It can permeate everything. If we are involved in discovery and the other side is not cooperative, we may decide to become uncooperative, although the proper remedy is to go to the judge, not to engage in self-help. And if the judge does not want to get involved, if like Kitty Genovese’s neighbors he closes the window and averts his eyes, he also helps to support our self-help habit, because we know that the judge is not helping us. Instead of arguing that a document is protected as work-product, it is simpler not to produce it and leave it off of any list of disputed documents.

to full partnership. *Id.* What kind of culture is that law firm creating? The question, of course, is rhetorical.

161. The URL for lawyers’ jokes on my home page is as follows: <http://www1.chapman.edu/~rotunda/lawyer.htm> (last visited Apr. 1, 2011). *See also* MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE (2005) (analyzing and discussing hundreds of lawyer jokes).

Ethical law firms want to build ethical habits. They do not want their lawyers billing phantom hours. One structural change that these law firms can institute is to have its bills (or, at least, its larger bills) subject to routine audit. Indeed, that is what some firms are doing.¹⁶² The auditors work for the law firm, not the client, so they can report the problem and give the firm an opportunity to correct it.

A law firm that institutes this change sends a message to every partner and associate: it is better for the law firm to catch the error (whether or not intentional)¹⁶³ than for the law firm to react to a client's complaint. And it is better for the lawyer not to pad his hours because it will not look good if the law firm's auditors discover the padding.

Right now, if a partner bills an unusually large number of hours, e.g., over 5000 hours in a single year,¹⁶⁴ there is an economic incentive of partners in large firms to avert their eyes because the firm benefits from the large number of billable hours, as long as the client does not complain.¹⁶⁵ The greater the number of hours that any lawyer bills, the greater the profits per partner—unless the partner is caught. If the

162. Annette S. Biesecker, *The Legal Audit: A How To Manual for Internal Auditors*, ACCOUNTINGWEB, May 2, 2000, <http://www.accountingweb.com/item/16236>; White, *supra* note 138.

163. For example, the auditor that one law firm employed discovered that it almost charged one client \$8,000 for a hotel its lawyers did not use. White, *supra* note 138.

In other cases, the excessive billing hardly appears inadvertent. Audits have discovered that lawyers have charged clients for (1) flying personal aircraft to destinations rather than using commercial airlines; (2) purchasing a cell phone; and (4) buying clothes, on the theory—said the particular lawyer—that he needed his clothes laundered and he could not find laundry facilities in a city the size of Cleveland, so he bought new clothes. Adam C. Altman, *To Bill, or Not To Bill?: Lawyers Who Wear Watches Almost Always Do, Although Ethical Lawyers Actually Think About It First*, 11 GEO. J. LEGAL ETHICS 203, 216-17 (1998).

164. Richmond, *supra* note 157, at 209 n.14 (referring to this case and finding the number of hours claimed as simply “ridiculous[]”).

165. Douglas Richmond counsels law firms on how to avoid trouble by false billing. Some partners do not like the associates to hear this advice. He relates the following:

I was asked to speak to the associates at a regional office of a major Midwestern law firm about billing practices. I was invited to speak by a partner and a staff member who were organizing an associate-training program. When the firm's managing attorney (a partner in his fifties) learned of my intended presentation, he angrily canceled it. Why? He apparently felt threatened when he learned that I planned to tell the associates that they should record their telephone time accurately: to use the timing feature on their telephones when possible and to remind them that most telephone calls probably should be billed at one-tenth (0.1) of an hour.

Id. at 209 n.19. Why does a five-minute phone call take thirty minutes? Because, the partner claimed that every telephone call is a “distraction” and it takes at least a half-hour to overcome this distraction. *Id.* Hence, the person who called must pay top dollar for the lawyer's “inability to switch intellectual gears.” *Id.*

partner who has final approval of the bills is the one who engaged in padding the bills, we should not be surprised that the billing partner thinks her bills are fine.

In contrast, in-house auditors who do not partake in profit-sharing (they would be paid by year or by the project), have no incentive to roll-over and ignore bill padding. Instead, like other auditors, they would question the unusual, eyebrow-raising bills. If the auditors receive no adequate justification, the leadership of the law should be less likely to approve the billing. Without this structural change, the partner who approves his or her own bills knows that his value in the law firm increases because (short of a disgruntled client filing a lawsuit) the high-billing partner is a firm asset instead of a firm liability.

X. CREATING AN ETHICAL CULTURE THROUGH ETHICS EDUCATION

The examples we have been discussing concern outright fraud. In many other instances lawyers pad their hours in a way that is more difficult to uncover. The lawyer does not claim to work more hours in a week than there are in a week. Instead, the lawyer may engage in double-billing, *i.e.*, billing two clients each for work performed at the same time that was beneficial to both clients. Or, the lawyer may bill the client for a recycled legal memorandum. “Recycling” occurs when the lawyer bills the client by the hour for the work (e.g., research or drafting) that the lawyer had already performed at another time for a different client. For example, the lawyer writes a legal memorandum for Client #1, a project that takes twenty-five hours of work. A few months later, a second client asks a similar question, and the lawyer spends three hours updating the memorandum but charges twenty-eight hours (the initial twenty-five hours plus three hours to update) to Client #2. In all situations, the lawyer has told the client that the law firm bills by the hour, not by the project.

Lawyers have told me that they are worried that some associates may be padding their hours by double-billing or by billing for recycled work product. And, they ask me, why do we teach that in law school? We do not teach them that. The students figure that out all by themselves, or they learn it at the law firm. They learn by seeing what the older lawyers do, and they take note of which lawyers become partners.

In 1994, the ABA Ethics Committee published a Formal Opinion that made it very clear that lawyers who inform the client that they are

billing the client based on hours worked may not pad those hours because the lawyers think the results obtained justify premium billing.¹⁶⁶ Similarly, lawyers who spend ten hours writing a memorandum of law and then distribute it to three different clients may not charge each client for the ten hours, thereby totaling thirty hours of billable hours when they are only performing ten hours of work. A lawyer who sits in a plane for five hours traveling to a hearing for Client #1, while using those five hours to read documents for Client #2, may not charge Client #1 for five hours of travel time while simultaneously charging Client #2 for five hours of reading documents.¹⁶⁷

Education in legal ethics does not turn an unethical lawyer into an ethical one. If you want to steal, you can do that even if you know the Rules of Professional Conduct by heart. Just as the Devil can quote scripture, the unethical lawyer can quote the ABA Model Rules. However, learning the law of ethics can give us *scienter*. By that I mean that the educated lawyer will not do something wrong—create a conflict of interest, violate a client confidence, etc.—by mistake. And that, at least, is some progress.

Legal education offers some hope with respect to bill padding. In 1991, before the ABA Formal Opinion in 1993, a survey of lawyers showed that about 50% said that they never engaged in double-billing, but 50% could not say that.¹⁶⁸ By 1994-1995, the survey showed that about 75% of the lawyers said that they never double-billed.¹⁶⁹

Similar surveys showed that the number of lawyers who shunned recycling also increased. In 1991, only 12.4% of respondent-lawyers said that it was never ethical for a lawyer to bill a client for work that the lawyer originally undertook for another client but then “recycled” for the

166. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379 (1993).

167. This issue has garnered much scholarly commentary. See, e.g., Sonia S. Chan, *ABA Formal Opinion 93-379: Double Billing, Padding and Other Forms of Overbilling*, 9 GEO. J. LEGAL ETHICS 611 (1996); WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* (1996); Kevin Hopkins, *Law Firms, Technology, and the Double-Billing Dilemma*, 12 GEO. J. LEGAL ETHICS 95 (1998); Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999); JOHN W. TOOTHMAN & WILLIAM G. ROSS, *LEGAL FEES: LAW AND MANAGEMENT* (2003); Douglas R. Richmond, *For A Few Dollars More: The Perplexing Problems of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63, 65 (2009). See also *People v. Espinoza*, 35 P.3d 552, 555 (Colo. O.P.D.J. 2001) (lawyer disbarred for inflating her billing hours and for other unethical conduct).

168. ROSS, *supra* note 167, at 83.

169. *Id.*

second client. By 1994-1995, that number increased from 12.4% to 65%.¹⁷⁰

Another survey a few years later, 1999 to 2000, confirms that the trend is continuing. The survey asked lawyers, “During the last year, have you ever billed two clients for work performed at the same time (e.g., billing one client for reviewing a deposition while billing another client for travel time)?”¹⁷¹ This time, 86% said no.¹⁷² When the survey asked if the lawyer billed more than the revision time when revising and recycling a document originally prepared for another client, 83% of the respondents said no.¹⁷³

Granted, some may argue that such surveys do not measure what lawyers do, only what lawyers say when asked. Lawyers may not be becoming more honest but only more hypocritical. Perhaps I am too Pollyannaish, but even that interpretation gives us hope. Hypocrisy is the tribute that vice pays to virtue. At a minimum, the surveys show that attitudes are moving in the right direction and lawyers now know that double-billing is wrong. If they are ethical, then they now know what to stop doing.

The change in attitude after the ABA Formal Opinion rejecting double-billing and recycled work product does not mean that the ABA Formal Opinion *caused* the change. Logicians refer to an old principle, *post hoc ergo non propter hoc*. This principle is so old that we refer to it in a language long dead. It means “after this not therefore because of this.” A sequence of events does not prove that the former caused the latter. I can hit a drum when a solar eclipse starts and the eclipse will then end, but not because of my drum skills. Correlation does not prove causation.

Still, the ABA Formal Opinion (as well as the well-publicized lawsuits by disgruntled clients objecting to bills) should give incentive to law firms to train their associates in order to avoid future problems. And, the evidence is consistent with the conclusion that education reduces the problem. In the 1994-1995 survey, nearly 60% of the lawyers had never heard of ABA Formal Opinion 93-379.¹⁷⁴ By 1999-2000, the number of lawyers who had never heard of the ABA Opinion

170. Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 U. MO.-KAN. CITY L. REV. 239, 258 (2000-2001).

171. *Id.*

172. *Id.*

173. *Id.*

174. ROSS, *supra* note 167, at 266, Question 17(c) (reporting that 57% had never heard of ABA Formal Opinion 93-379).

fell to 50%.¹⁷⁵ People cannot follow an ethics opinion if they do not even know of its existence. The change in the poll results offers some hope that law firms are making an effort to teach the younger lawyers what they most assuredly learned in their law school course in Legal Ethics but what they most assuredly must have forgotten.¹⁷⁶

When a law firm gives in-house ethics training in the principles governing double-billing, it will be creating a positive ethical culture. It will also be sending a message to its lawyers that it cares about ethics. In-house ethics training will not prevent fraudulent lawyers from padding their hours, but it will prevent lawyers from violating ethics rules because of ignorance.

Lawyers have an economic incentive to pursue Continuing Legal Education (CLE) in areas where they practice. For example, lawyers who practice in the area of securities understand that they need to keep up on the latest cases and regulations under the Sarbanes-Oxley statute. But lawyers do not have the same economic incentive to keep up with the latest case law on lawyer disqualification, or the latest ethics opinions on double billing. Every lawyer practices in the area of legal ethics but often does not know that. Hence, there is a greater need for CLE in the area of legal ethics, which is a subject area that is more apt to be forgotten. It is not enough for the general counsel to the law firm to keep up with the latest law; he or she must communicate the important cases and ethics opinions to the other lawyers in the law firm so they will know what to do.

Or, we can decide to shut the window like Kitty Genovese's neighbors, not get involved, and avert our gaze.

XI. CONCLUSION

Lawyers are more than ever interested in their ethical obligations. They should be, because malpractice law suits and government enforcement actions—both based on the Rules of Professional Conduct—are on the increase.

Our ethics rules make lawyers different than other professionals, and the popular culture does not always understand us. When a medical doctor treats a patient, there is no doctor on the other side representing the disease. Not so for lawyers. In most cases where lawyers are

175. Fortney, *supra* note 170, at 259.

176. See, e.g., THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 114 (10th ed. 2008).

involved, each side has a lawyer, and each client does not appreciate the lawyer on his side defending the adversary.

The popular culture often criticizes lawyers for being too tough, for acting like a James Cagney character when Cagney played the villain (Tom Powers in *The Public Enemy*¹⁷⁷), not the song and dance man (George M. Cohan in *Yankee Doodle Dandy*¹⁷⁸). Yet, the same people critical of “Rambo litigators” freely admit that, when they have a problem, they want the lawyer who plays hardball.¹⁷⁹ Let the other side choose a cream puff to represent him. Society places a dual role on lawyers—the general populace expects lawyers to be tough (and they fault us if we act like door-mats), but the general populace also wants us to be gentle and kind (and we are faulted if we act like Cagney-doubles). Psychologists predict that these self-contradictory expectations lead lawyers to be depressed, because people internalize qualities that others project on them. As one New York Gestalt psychologist explains: “Nobody ever says they want a nice lawyer. They say, ‘I want a barracuda. I want a real throat-slitter.’ So lawyers have these qualities dumped on them.”¹⁸⁰

We should not be surprised that lawyers are often depressed because they are taking on society’s distaste for what they do. Lawyers in general—and trial lawyers in particular—lead tense lives. It is no accident that, when the Association of Trial Lawyers of America offered a two-hour crash course on stress management, it drew a healthy crowd.¹⁸¹ There are, sadly, increasing number of reports about lawyers committing suicide.¹⁸²

177. *THE PUBLIC ENEMY* (Warner Bros. Pictures 1931).

178. *YANKEE DOODLE DANDY* (Warner Bros. Pictures 1942).

179. William A. Brewer III & John W. Bickel II, *Etiquette of the Advocate? Courtesy Codes Serve No Useful Purpose And, Moreover, Are Potentially Counterproductive*, *TEX. LAW.*, Mar. 21, 1994, at 20, 21; James Podgers, *Public: “Shyster” OK—If He’s on Your Side*, 67 *A.B.A. J.* 695 (June 1981).

180. Amy Stevens, *Why Lawyers Are Depressed, Anxious, Bored Insomniacs*, *WALL ST. J.*, June 12, 1995, at B1, col. 3 & B7, col. 5.

181. The course was offered at ATLA’s July, 1995 annual meeting. See Richard B. Schmitt, *Trial Lawyers, Under Fire, Take Case to the Politicians*, *WALL ST. J.*, July 21, 1995, at B2, col. 1.

182. E.g., Brian Baxter, *Reed Smith Partner’s Death Deemed a Suicide*, *THE AMLAW DAILY*, July 21, 2010, <http://amlawdaily.typepad.com/amlawdaily/2010/07/reed-smith-suicide.html> (reporting the suicide of a fifty-seven-year-old partner); Steven Harper, *Silent Grief*, *THE AMLAW DAILY*, July 21, 2010, <http://amlawdaily.typepad.com/amlawdaily/2010/07/harperdeadlyserious.html> (reporting other suicides); Ashby Jones, *On Suicide Within Big Firms: “Seeking Help . . . is Proof of Strength”*, *WALL ST. J. L. BLOG* (Aug. 3, 2010, 4:55 PM), <http://blogs.wsj.com/law/2010/08/03/on-suicide-within-big-firms-seeking-help-is-proof-of-strength/?KEYWORDS=On+Suicide+Within+Big+Firms>.

One need not rely on such anecdotal evidence, for more scientific studies come to the same conclusion. Surveys of lawyers typically show that severe depression is more likely to occur among lawyers than among other occupations.¹⁸³ Another study showed high elevations of the testosterone hormone in prisoners, cold-call salespeople, the unemployed, and—no surprise here—lawyers.¹⁸⁴ Ministers, priests, and farmers, by the way, were at the low end of the scale.¹⁸⁵ A recent survey showed that mid-level associates at big law firm are unhappy; they are earning six-figure salaries at a time when many lawyers are looking for work. Yet they are unhappy, with the lowest level of satisfaction since 2004.¹⁸⁶

There is no simple magic bullet that will make lawyers feel better about what they do, or make society appreciate what lawyers do. However, there are a few things that law firms, particularly large law firms, can do to make lawyers feel less anonymous and more ethical. Firms should create, and the law should encourage, structural incentives to reduce anonymity and promote ethical habits. Firms should appoint in-house general counsel, in whom lawyers could easily and confidentially confide if they have ethical questions about their own conduct or the conduct of others. Firms should set up procedures for routine in-house auditing of legal bills to catch fraudulent or inadvertent padding of hours before the client raises questions. Firms should provide for in-house ethics training to prevent lawyers from violating ethics rules because of ignorance. Court decisions should not make it more difficult for law firms to create structural incentives that encourage lawyers to get into the habit of following the rules that already exist. Thus, the attorney client privilege should protect lawyers who consult with other lawyers about their ethical obligations for the same reason that the privilege protects clients when consulting with their lawyers: confidentiality promotes candid advice.

183. Stevens, *supra* note 180, at B1.

184. Anita Sharpe, *Spit Testing May Be Hard to Swallow In the Workplace*, WALL ST. J., Nov. 29, 1993, at A1, A5, col.4. The survey measured the testosterone level in spit because that is a non-evasive way of testing.

185. *Id.*

186. *Associates Survey 2010: National Rankings*, AM. LAW., Sept. 1, 2010, http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202470242761&src=EMC-Email&et=editorial&bu=The%20American%20Lawyer&pt=Am%20Law%20Daily&cn=Am_Law_Daily_09012010&kw=THE%20CHARTS%3A%20National%20Rankings. The 2010 Survey showed that “associates’ satisfaction has dropped to the lowest level in six years.” <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202470848460&slreturn=1&hblogin=1>. See also, Drew Combs, *Associates Survey 2010: The Lucky Ones?*, AM. LAW., Sept. 1, 2010 (“Midlevel associates’ overall satisfaction level is down to the lowest level in six years.”).