Law Firm Partners as Their Brothers’ Keepers

Douglas R. Richmond

INTRODUCTION

Matthew Farmer, once a promising young partner in the Chicago office of Holland & Knight LLP, caused a stir in the legal world when, in August 2006, he was featured in a Wall Street Journal article about his former law firm’s allegedly fraudulent billing practices. Farmer accused a senior partner of billing fraud in connection with the firm’s defense of Pinnacle Corp. in a Minnesota case that Farmer won at trial. The senior partner’s allegedly fraudulent billing and the firm’s failure to act on Farmer’s well-documented complaints were the clear focus of the article. The story certainly raises questions about Holland & Knight’s internal controls. Yet it is clear after only minimal inquiry that the firm’s problems were not limited to alleged billing improprieties. Despite winning, Holland & Knight’s handling of Pinnacle’s defense appears to have been variously irresponsible. The Magistrate Judge assigned to the case criticized Farmer for using “unprofessional language” in a deposition, and deemed other conduct by him “independently sanctionable.” The District Judge awarded just over $15,000 in sanctions against Holland & Knight. The firm ran into more trouble when, after winning at trial, it moved for an award of attorney’s fees and costs. In denying the request, the court angrily accused Holland & Knight and Pinnacle of “[m]ore arrogance,” noted that the conduct for which they sought sanctions was the result of their misconduct, and, in closing, observed that “what [was] more disturbing than the total want of merit in defendants’ argument [was] that it betray[ed] their deviant and unprofessional belief” that they were even entitled to an award of fees and

1 Senior Vice President, Professional Services Group, Aon Risk Services, Chicago, Illinois. J.D., University of Kansas; M.Ed., University of Nebraska; B.S., Fort Hays State University. Opinions expressed here are the author’s alone.


3 Id. at B1–B2.

4 Id.


6 Id. at 382.

7 See Rottlund Co., 2005 WL 407860, at *1 (adopting Magistrate Judge’s recommendations relating to Holland & Knight’s sanctions).
The former chair of Greenberg Traurig LLP’s tax practice, Jay Gordon, resigned from the New York bar after admitting that he took $1.3 million in kickbacks for steering wealthy clients to dubious tax shelters. Gordon also admitted that he falsified billings exceeding $540,000 in a scheme to increase his annual bonus. Greenberg Traurig’s president and chief executive called Gordon’s misconduct “a regrettable and isolated situation” and added that the firm “had zero tolerance for [Gordon’s] ethical lapse.” Unfortunately, Gordon’s dishonesty clearly was not an isolated incident, as evidenced by the massive fraud perpetrated by disgraced former lobbyist Jack Abramoff while employed at the firm, as well as the imprisonment of two lawyers in the firm’s Philadelphia office on fraud, conspiracy and other felony charges arising out of firm-related activities. A partner in the firm’s Chicago office was named as an un-indicted co-conspirator in a federal public corruption case.

No partner has behaved as destructively as Paul Daugerdas, once head of the Chicago office of Texas-based Jenkens & Gilchrist. Daugerdas

9 Lynnley Browning, Lawyer Tied to Kickbacks Quits the Bar, N.Y. Times, Nov. 16, 2006, at C3.
10 Id.
11 Id. (quoting Cesar Alvarez).
13 Kolz, supra note 12, at 119 (discussing the criminal cases against Leonard Ross, who was of counsel to the firm, and Robert S. Grossman, a partner).
14 Id. at 119–20.
developed and marketed dubious tax shelters, and then wrote supporting opinion letters regarding those shelters for buyers,\textsuperscript{16} generating “hundreds of millions in fees” for his firm.\textsuperscript{17} Because the tax shelter practice was exceptionally profitable, the firm paid scant attention to Daugerdas’s activities. Unfortunately, the tax shelters were obviously questionable, and the provision of opinion letters represented a conflict of interest.\textsuperscript{18} As a result, the firm was sued by numerous former clients in a class action and faced possible federal criminal prosecution.\textsuperscript{19} The firm and its insurers settled the class action for approximately $108 million.\textsuperscript{20} The litigation with the former clients and the government investigation left the firm in “precarious financial shape,” as scores of lawyers fled.\textsuperscript{21} Jenkens & Gilchrist, which had more than 600 lawyers in 2001 before the tax shelter debacle became public,\textsuperscript{22} soon shrank to fewer than 300 lawyers.\textsuperscript{23} Daugerdas’ misconduct ultimately killed the firm.\textsuperscript{24} In March 2007, Jenkens & Gilchrist entered into a deferred prosecution agreement with the United States Attorney for the Southern District of New York in which it agreed to cease doing business almost immediately and pay a $76 million penalty to the Internal Revenue Service.\textsuperscript{25}

\textit{Weeks v. Baker & McKenzie,}\textsuperscript{26} which “sent shock waves through the legal community” when the trial court verdict came down in 1994,\textsuperscript{27} remains one of the best-known cases on law firm partners’ failure to police one another. In that case, a secretary in the law firm of Baker & McKenzie, Rena Weeks, recovered a multi-million dollar judgment against the firm and one of its partners, Martin Greenstein, for sexual harassment.\textsuperscript{28} Greenstein had a long and well-documented history at the firm of sexually

\begin{itemize}
  \item \textsuperscript{16} Braverman, \textit{Helter Shelter}, supra note 15, at 66–67.
  \item \textsuperscript{17} Id. at 68.
  \item \textsuperscript{18} Id. at 67, 70.
  \item \textsuperscript{19} Braverman, \textit{Tax Man}, supra note 15, at 22.
  \item \textsuperscript{20} Prof’l Servs. Group, Aon Risk Servs., \textit{Publicly Reported Legal Malpractice Settlements and Verdicts in Excess of $20 Million as of August 2007} (2007) (on file with author).
  \item \textsuperscript{21} Braverman, \textit{Tax Man}, supra note 15, at 22.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Of Counsel 700, \textit{Annual Survey of the Nation’s Largest Law Firms} 23 (2006–07) (listing law firm headcounts).
  \item \textsuperscript{25} Davies et al., supra note 24, at A1.
  \item \textsuperscript{28} \textit{Weeks}, 74 Cal. Rptr. 2d at 514.
\end{itemize}
harassing associates and staff before Weeks complained. Nonetheless, firm leaders did little more than scold him for his misconduct before finally requiring him to undergo sexual harassment counseling. The firm did not investigate Weeks’s allegations for more than a year after she filed an EEOC complaint. The firm finally forced Greenstein to resign not because of his sexual harassment of Weeks or the women who came before, but because in a deposition in Weeks’s case, a paralegal who worked with Greenstein testified that Greenstein had been backdating documents.

Cases such as these illustrate the harm that rogue partners can cause their law firms and clients, both monetary and reputational. The “specter of ‘rogues’ is serious,” especially in large law firms. It is an unfortunate fact that some percentage of the lawyer population is dishonest, dangerously disruptive, or both, just as with the population at large. The larger law firms grow, the more lawyers they hire, and the longer they exist as organizations, the greater the odds that they will encounter rogues. This is true even for the best firms.

Law firm principals—whether partners in a general or limited liability partnership, or shareholders in a professional corporation or limited liability company—have a professional duty to reasonably ensure that their peers conform their behavior to rules of professional conduct. Their appreciation of this duty, however, is uncertain. In one study of law firm principals, respondents “tended to reject the notion” that partners had a legal duty to monitor one another. Slightly more than half of the respondents indicated that law firm partners have an ethical duty to monitor other partners’ handling of client matters, while only forty percent believed that they had “a legal duty” to do so. Of course, such a legal duty clearly exists, and plaintiffs suing lawyers commonly accuse law firms and their partners of negligently supervising individual lawyers who are alleged to

29 Id. at 515–19.
30 Id. at 519–20 (discussing Greenstein’s sexual harassment counseling).
31 Id. at 520.
32 Id.
33 See also, e.g., Kelly v. Hunton & Williams, No. 97–CV–5631 (JG), 1999 WL 408416 (E.D.N.Y. June 17, 1999) (involving a partner in the New York office of a national law firm who, in addition to committing billing fraud, ran a Ponzi scheme from his office, ultimately defrauding investors of some $30 million).
37 Id.
have somehow erred. In suits against lawyers, plaintiffs and courts may rely on ethics rules to establish the standard of care, rendering irrelevant any perceived distinction between law firm partners’ supervisory duties as “ethical” rather than “legal.” For that matter, ethics rules derive from lawyers’ common law duties, and the two generally are quite similar.

Law firm partners’ duty to supervise their peers, or to take reasonable measures to ensure their supervision, has largely escaped scholarly examination. This is surprising, since law has always been a self-regulating profession, and lawyers’ obligation “to ensure that all members observe the profession’s ethical standards” is an important aspect of self-regulation. In any event, this Article is intended to remedy that deficiency. In doing so, it uses the term “partner” to refer to law firm principals regardless of the structure of their firms. Law firms have been historically structured as partnerships and most are structured that way today, albeit now in limited liability form. Furthermore, lawyers who are shareholders in professional corporations or limited liability companies still “conduct themselves as law partners as between themselves,” and the structure of a law firm as something other than a partnership does not affect its principals’ ethical

39 See John S. Dzienkowski, Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims, 36 S. Tex. L. Rev. 967, 976 (1995) (“In fact, many recent malpractice actions against large law firms have alleged negligence on the part of partners for failing to monitor the other lawyers’ conduct and for failing to act once a problem was discovered”).


41 See Fortney, Peer Review, supra note 36, at 292 (reporting this distinction).


43 See, e.g., Damron v. Herzog, 67 F.3d 211 (9th Cir. 1995) (discussing potential legal malpractice liability for conflict of interest on matter substantially related to matter previously handled for client, tracking in material respects conflict principles in Model Rule 1.9).


Part I examines the sources and contours of partners’ supervisory duties. Part II discusses law firms’ common structural approaches to satisfying partners’ supervisory duties.

I. SOURCES AND CONTOURS OF SUPERVISORY DUTIES

Law firm partners’ duty to supervise their peers is rooted in ethics rules and in various other areas of the law now embodied in section 11 of the Restatement (Third) of the Law Governing Lawyers. 47

A. Model Rule 5.1

The American Bar Association adopted the Model Code of Professional Responsibility in 1969, 48 and most states adopted it shortly thereafter. 49 The Model Code was silent on partners’ supervisory duties and responsibilities. 50 Nonetheless, courts occasionally disciplined lawyers for supervisory failures based on common law principles, 51 and rejected lawyers’ efforts to defend against charges of professional misconduct by attempting to shift blame to other lawyers in their firms. 52 In re Fata 53 is a representative case.

In re Fata involved two brothers, Francis and Joseph Fata, who practiced high-volume plaintiffs’ personal injury litigation in New York. Francis surrendered his law license in the face of numerous disciplinary charges related to fraud, soliciting clients, falsifying medical records and doctors’ billing statements, and falsifying court documents. 54 Disciplinary authorities continued their prosecution of Joseph, who denied knowledge of his brother’s misconduct. 55 The court rejected Joseph’s defense of ignorance, stating that he had to “share the burden of responsibility for the acts of his partner even though he claims he had no actual knowledge of

---

46 Bianco Prof’l Ass’n v. Home Ins. Co., 740 A.2d 1051, 1055 (N.H. 1999) (agreeing that lawyer’s practice in professional corporation did not alter his ethical obligations).
50 Dzienkowski, supra note 39, at 973.
52 See, e.g., In re Weston, 442 N.E.2d 236, 239 (Ill. 1982) (rejecting lawyer’s attempt to blame associate for problems in administration of estate); In re Berlant, 328 A.2d 471, 474 (Pa. 1974) (calling lawyer’s attempt to avoid discipline by blaming associate for drafting fraudulent contingent fee agreements “unavailing”).
54 Id. at 289–90.
55 See id. at 290 (describing Joseph Fata’s defense).
some of the acts.”

The court further observed that “[i]n a firm handling the number of negligence cases that Fata & Fata did, [Joseph] was under a duty to know what was going on” in the practice. Despite Joseph’s relative youth, the court disbarred him.

The ethical duty of supervision that existed during the time that the Model Code was the predominant measure of lawyers’ professional responsibilities was imprecise. Lawyers had no clear standard against which to measure their conduct. Courts attempting to enforce supervisory duties fashioned discipline based on the nature and severity of the underlying misconduct, the degree of supervising lawyers’ carelessness or neglect, and the reasonableness of supervisory lawyers’ claims that they were unaware of their subordinates’ or peers’ professional lapses. These ambiguities created the potential for senior lawyers to insulate themselves against liability or professional discipline by blaming junior lawyers for misconduct.

The drafters of the Model Rules of Professional Conduct, which succeeded the Model Code, recognized the importance of promoting lawyers’ supervisory responsibilities within their firms, and the problems posed by sporadic case law development of lawyers’ supervisory duties. They accordingly fashioned Model Rule 5.1, which now provides:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

56 Id.
57 Id.
58 Id. at 291.
59 Miller, supra note 51, at 276.
60 See Dzienkowski, supra note 39, at 973 (discussing the problems posed by the absence of supervisory duties in the Model Code).
61 See id. (“The drafters of the Model Rules realized the importance of law firms in educating lawyers about ethics rules and in enforcing ethical norms within the firm”).
62 See Miller, supra note 51, at 276 (noting the “sporadic case law development” of lawyers’ supervisory duties in the years leading up to the adoption of the Model Rules).
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.\(^6\)

Although the rule speaks of “partners” in law firms, it applies equally to shareholders in professional corporations and to members of other associations authorized to practice law.\(^6\)

1. Model Rule 5.1(a).—Rule 5.1(a) broadly states the supervisory duties owed by all partners. It prevents the most influential lawyers in a firm —partners—from ignoring the behavior of other lawyers in their firms.\(^6\) Moreover, because partners share in firm profits and are indirectly responsible for all legal work done in their firms, it is reasonable to make them accountable for the professional conduct of all of their lawyers.\(^6\)

Model Rule 5.1(a) exposes all law firm partners to professional discipline regardless of their “remoteness from the violating attorney, regardless of the partner’s knowledge or suspicion of any misconduct and technically, regardless of any misconduct at all.”\(^6\) Partners cannot escape Rule 5.1(a) violations by claiming to be unaware of other lawyers’ misconduct.\(^6\) The rule does not, however, impose vicarious liability.\(^6\) The issue when another lawyer violates ethics rules and potentially subjects a partner to professional discipline is whether the partner satisfied her own responsibilities under Rule 5.1(a).\(^7\) If a partner fails to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to ethics rules, she may be sanctioned completely apart and independent from any discipline imposed on the lawyers to whom her failure relates.\(^7\) On the other side of the coin, a partner who fulfills his duties under Rule 5.1(a) will not be disciplined for its alleged breach no

---


\(^6\) Id. cmt. 1.

\(^6\) In re Anonymous Member of the S.C. Bar, 552 S.E.2d 10, 14 (S.C. 2001).

\(^6\) See id. (explaining partners’ responsibilities under Rule 5.1 based on their overall responsibility for work done in their firms); Dzienkowski, supra note 39, at 973 (discussing Model Rule 5.1’s assignment of responsibility to partners based on benefit from firm profits).

\(^6\) Miller, supra note 51, at 279.

\(^6\) In re Anonymous, 552 S.E.2d at 15.

\(^6\) Id. at 14; Stewart v. Coffman, 748 P.2d 579, 581–82 (Utah Ct. App. 1988) (involving shareholder in law firm structured as professional corporation).


\(^7\) Richmond, Subordinate Lawyers, supra note 70, at 452.
matter how egregious the other lawyers’ misconduct.\textsuperscript{72}

Rule 5.1(a) does not specify what measures constitute “reasonable efforts” or what level of confidence qualifies as “reasonable assurance” in terms of achieving lawyers’ compliance with ethics rules. These determinations are fact–specific. They turn in part on the size of the firm and the nature of its practice.\textsuperscript{73} Large law firms may require elaborate policies and procedures, while in small law firms informal supervision may suffice.\textsuperscript{74} Firms with multiple offices typically require greater individual efforts by partners and more structural safeguards than firms with a single office. More elaborate policies and procedures also may be required if a firm practices in areas characterized by complex professional responsibility issues.\textsuperscript{75} A comment to Rule 5.1(a) seems to indicate that all firms, regardless of size, must institute policies and procedures “designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.”\textsuperscript{76} Clearly, though, Rule 5.1(a) does not make law firm partners guarantors of their colleagues’ professional conduct.\textsuperscript{77}

An interesting question is whether, under Rule 5.1(a), law firm leaders can be held to a higher standard of conduct than partners generally. This question arises out of the Delaware Supreme Court’s decision in \textit{In re Bailey}.\textsuperscript{78} In that case, the court disciplined James Bailey, a law firm managing partner, in connection with the mishandling of the firm’s books and records. In short, Bailey was guilty of a “sustained and systematic failure” to supervise the firm’s employees to ensure compliance with Delaware Lawyers’ Rule of Professional Conduct 1.15, which governs client trust accounts.\textsuperscript{79} In suspending him from practice for six months, the court stated: “A lawyer who accepts responsibility for the administrative operations of a law firm stands in a position of trust vis–à–vis other lawyers and employees of the firm. The managing partner must discharge those responsibilities faithfully.

\begin{itemize}
\item \textsuperscript{72} \textit{See In re Anonymous}, 552 S.E.2d at 15 (explaining the Rule 5.1(a) scheme).
\item \textsuperscript{73} \textit{Model Rules of Prof’l Conduct R. 5.1 cmt. 3} (2002).
\item \textsuperscript{74} \textit{Id. But see Ky. Bar Ass’n v. Weinberg}, 198 S.W.3d 595, 597 (Ky. 2006) (involving failure of informal supervision in small law firm; court noted that the firm did not have internal controls, such as a tickler system, diary system, etc.).
\item \textsuperscript{75} \textit{See In re Myers}, 384 S.E.2d 357, 361 (S.C. 2003) (quoting a comment to the South Carolina version of Rule 5.1 and explaining that a prosecutor’s office “is a law office where complex ethical questions arise, which necessitate[s] a more elaborate system to ensure that the attorneys in the . . . [o]ffice comply with the [ethics] [r]ules”).
\item \textsuperscript{76} \textit{Model Rules of Prof’l Conduct R. 5.1 cmt. 2.}
\item \textsuperscript{77} \textit{In re Anonymous}, 552 S.E.2d at 14 (stating that “partners are not required to guarantee that other attorneys in their firm will not violate the Rules of Professional Conduct”).
\item \textsuperscript{78} \textit{In re Bailey}, 821 A.2d 851 (Del. 2003).
\item \textsuperscript{79} \textit{Id. at 864.}
\end{itemize}
and diligently.” The court supported that statement by citing a comment to Rule 5.1(a), which would become effective in Delaware two months after the case was decided.

To be sure, law firm leaders—managing partners, chairpersons, executive or management committee members, and the like—share a special relationship with the partners they lead, and may be deemed to owe their fellow partners duties greater than those typically required by the fiduciary nature of partnership. These enhanced fiduciary duties do not derive from Rule 5.1(a), however, which makes no attempt to distinguish between partners in leadership roles and others who are not. Rather, law firm leaders’ enhanced duties to their co-partners flow from partnership law, which imposes a greater fiduciary duty on managing partners. Insofar as law firm leadership or management and Rule 5.1(a) overlap, the lesson is that law firm leaders are more likely to violate the rule than are average partners, because partners holding leadership positions are best positioned to enact policies or implement procedures intended to assure that all lawyers in the firm adhere to ethics rules.

2. Model Rule 5.1(b).—Rule 5.1(b) requires a lawyer with direct supervisory authority over another lawyer to make reasonable efforts to ensure that the supervised lawyer conforms to ethics rules. Whether a lawyer has direct supervisory authority over another lawyer depends on the facts. Although courts most often apply Rule 5.1(b) in cases where partners fail to supervise

80 Id. at 864–65 (footnote omitted).
81 Id. at 865 n.31.
83 See Model Rules of Prof’l Conduct R. 5.1(a) (2002) (referring only to law firm partners and lawyers who individually or together possess managerial authority comparable to that of a partner).
85 Model Rules of Prof’l Conduct R. 5.1(b).
86 In re Anonymous Member of the S.C. Bar, 552 S.E.2d 10, 13 (S.C. 2001).
associates, or senior government lawyers fail to supervise junior lawyers, it is common for law firm partners to directly supervise the work of other partners, and the rule clearly applies in that context.

A partner need not be the day-to-day supervisor of the lawyer committing the related misconduct for the rule to apply. A partner may violate the rule in connection with misconduct by a lawyer she directly supervises even if she did not control the details of the other lawyer’s work. A supervisory lawyer may be disciplined in connection with misconduct by lawyers he directly supervises even if he is unaware of it. Indeed, because Rule 5.1(b) imposes upon supervisory lawyers an obligation to make reasonable efforts to ensure that the lawyers they directly supervise conform to ethics rules, a partner may be disciplined even where the lawyers she is responsible for violate no rules themselves. In this way, Rule 5.1(b) is like Rule 5.1(a)—both impose preventive or prophylactic duties. Again as with Rule 5.1(a), partners’ liability under Rule 5.1(b) is direct rather than vicarious.

Rule 5.1(b) does not specify what a lawyer must do to have made “reasonable efforts” to ensure professionally responsible conduct by lawyers he directly supervises. At the very least, supervisory lawyers “must be available to answer questions from other lawyers and if they notice that a supervised lawyer’s conduct raises a question as to whether an ethical problem exists, the supervisory lawyer must address the

87 See, e.g., Fla. Bar v. Nowacki, 697 So. 2d 828 (Fla. 1997) (disciplining lawyer who delegated entire caseload to new associate); In re Farmer, 950 P.2d 713 (Kan. 1997) (hiring inexperienced lawyers to staff firm’s satellite office); Andrews v. Ky. Bar Ass’n, 169 S.W.3d 862, 863 (Ky. 2005) (disciplining lawyer under Rule 5.1(b) for failing to supervise associate who committed misconduct after being suspended for failing to pay bar dues); Ky. Bar Ass’n v. Devers, 936 S.W.2d 89 (Ky. 1997) (disciplining lawyer who sent unqualified associate to creditors’ meetings in bankruptcy case); Attorney Grievance Comm’n of Md. v. Ficker, 706 A.2d 1045 (Md. 1998) (sending inexperienced lawyer to try drunk driving case); In re Disciplinary Action Against Geiger, 621 N.W.2d 16 (Minn. 2001) (assigning inexperienced lawyers to represent client in employment litigation); In re Moore, 494 S.E.2d 804 (S.C. 1997) (disciplining lawyer who turned over all discovery in a case to an associate).

88 See, e.g., In re Myers, 584 S.E.2d 357, 360–61 (S.C. 2003) (finding that prosecutor violated Rule 5.1(b) by failing to supervise deputy).

89 See, e.g., Ky. Bar Ass’n v. Weinberg, 198 S.W.3d 595 (Ky. 2006) (reprimanding lawyer under Rule 5.1(b) for failing to supervise fellow partner and associate).

90 In re Anonymous, 552 S.E.2d at 13.

91 Richmond, Subordinate Lawyers, supra note 70, at 455.

92 See, e.g., In re Wilkinson, 805 So. 2d 142, 145–46 (La. 2002) (suspending lawyer for violating Rules 5.1(b) and 5.3(b); law clerk–turned–associate never told the lawyer of relevant events and the lawyer was otherwise unaware of them).

93 Hazard & Hodes, supra note 49, § 42.2, at 42–4.1.


95 Model Rules of Prof’l Conduct R. 5.1(b) (2002).
situation promptly.” In this context, “being available” requires more than a supervising partner’s presence in an office. Rather, partners with direct supervisory responsibility must invite questions from lawyers they supervise, appropriately inquire into the status of matters they supervise, and reasonably consult with supervised lawyers on the manner in which they are carrying out those representations. The risk for partners directly supervising other partners is that they will feel no need to ensure professionally responsible behavior by those they supervise, assuming that those lawyers’ partnership status cinches their good judgment in situations with ethical implications. Where they would carefully scrutinize associates’ activities, they will not similarly monitor fellow partners’ conduct. Unfortunately, partnership status does not guarantee lawyers’ ethical or lawful behavior.

3. Model Rule 5.1(c).—Under Rule 5.1(c), a lawyer is responsible for another lawyer’s violation of ethics rules if (1) the lawyer orders, or knowing of the specific conduct involved, ratifies it; or (2) the lawyer is a partner in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the other lawyer’s conduct “at a time when its consequences can be avoided or mitigated but fails to take remedial action.” Rule 5.1(c)(1) is consistent with Model Rule 8.4(a), which makes it “professional misconduct” for a lawyer to “knowingly assist or induce” another lawyer to violate ethics rules, or to violate ethics rules through the acts of an agent. A lawyer who violates Rule 5.1(c)(1) necessarily violates Rule 8.4(a) as well. Rule 5.1(c)(2) imposes corrective or curative duties on lawyers. The rule plainly applies where the lawyer responsible for the underlying misconduct is another partner.

---

97 See In re Ritger, 556 A.2d 1201, 1203 (N.J. 1989) (reminding lawyers that fulfilling their supervisory responsibilities over other lawyers requires more than simple availability).
98 Model Rules of Prof’l Conduct, R. 5.1(c)(1); see, e.g., In re Asher, 772 A.2d 1161, 1169–70 (D.C. 2001) (disbarring lawyer who, among other things, violated Rule 5.1(c) by instructing subordinate lawyer to lie to court). By its plain language, Rule 5.1(c)(1) also applies to the lawyers involved practice in separate firms. See Neilson v. McCloskey, 186 S.W.3d 285, 286–87 (Mo. Ct. App. 2005) (“Joint responsibility for the representation [by separately–employed lawyers] entails the obligations stated in Rule 5.1 for purposes of the matter involved”).
99 Model Rules of Prof’l Conduct R. 5.1(c)(2).
100 Id. R. 8.4(a).
101 See, e.g., In re Asher, 772 A.2d at 1169–70 (finding Rule 5.1(c) and 8.4(a) violations where lawyer instructed a lawyer formerly in his employ to lie to court).
Although Rule 5.1(c) superficially appears to make partners vicariously liable for misconduct by other lawyers in their firms,\textsuperscript{103} that perception is incorrect.\textsuperscript{104} As the South Carolina Supreme Court explained in \textit{In re Anonymous Member of the South Carolina Bar},\textsuperscript{105} liability under Rule 5.1(c) is not vicarious “because the obligation does not arise merely from the relationship between the attorneys.”\textsuperscript{106} A partner’s violation of Rule 5.1(c) depends on his participation in the underlying misconduct, or his failure to prevent or mitigate it.\textsuperscript{107} On the other hand, if a partner does not know of the underlying misconduct, he is not subject to discipline under the rule. As with ethics rules generally, a lawyer’s knowledge for Rule 5.1(c) purposes may be inferred from the circumstances.\textsuperscript{108}

Of course, states may modify Model Rules and some modifications have profound implications for lawyers, as \textit{In re Cohen}\textsuperscript{109} illustrates. \textit{In re Cohen} involved Herbert Cohen, a partner in a twelve-lawyer firm. Cohen’s firm represented Dr. Carl Schleicher and his company, MRF, in registering the trademark “ESSIAC” with the United States Patent and Trademark Office (“PTO”).\textsuperscript{110} MRF had a business arrangement with David Dobbie, who was slated to be the exclusive distributor of products bearing the ESSIAC trademark. That arrangement pre-dated Schleicher’s and MRF’s retention of Cohen’s firm. Herbert Cohen’s son, Jonathan, who was an associate in the firm, handled most of the day-to-day work for Schleicher and MRF.\textsuperscript{111}

The firm initially communicated solely with Schleicher concerning the representation.\textsuperscript{112} Over time, Schleicher’s and Dobbie’s relationship soured, but Schleicher nonetheless directed the firm to communicate with Dobbie instead of him. As his relationship with Dobbie worsened, Schleicher

\textsuperscript{103} See, e.g., John M. Burman, \textit{The Supervisory Responsibility of Lawyers}, Wyo. Law., Apr. 2001, at 13, 16 (asserting incorrectly that Rule 5.1(c) creates vicarious liability).

\textsuperscript{104} Richmond, \textit{Subordinate Lawyers}, supra note 70, at 456; see, e.g., Stewart v. Coffman, 748 P.2d 579, 581–82 (Utah Ct. App. 1988) (concluding that Rule 5.1 did not create vicarious liability for lawyer who was shareholder in firm organized as a professional corporation).

\textsuperscript{105} 552 S.E.2d 10 (S.C. 2001).

\textsuperscript{106} \textit{Id. at 13}.

\textsuperscript{107} \textit{Id.} (explaining why Rule 5.1(c) liability is not vicarious); see, e.g., \textit{In re Galloway}, 729 N.E.2d 574, 575 (Ind. 2000) (involving agreed Rule 5.1(c)(2) violation); Attorney Grievance Comm’n of Md. v. Hines, 783 A.2d 656, 663–65 (Md. 2001) (suspending lawyer who knowingly allowed other lawyers in his firm to represent client in violation of conflict of interest rules for violating Rule 5.1(c)); \textit{In re Myers}, 584 S.E.2d 357, 362 (S.C. 2003) (disciplining prosecutor under Rule 5.1(c)(2) for failing to remedy deputy’s known misconduct).

\textsuperscript{108} \textit{Model Rules of Prof’l Conduct} R. 1.0(f) (2002); see, e.g., \textit{In re Disciplinary Proceedings Against Mandelman}, 714 N.W.2d 512, 528–29 (Wis. 2006) (discussing lawyer’s knowledge in light of his claims that he was unaware of his partner’s misconduct).

\textsuperscript{109} \textit{In re Cohen}, 847 A.2d 1162 (D.C. 2004).

\textsuperscript{110} \textit{Id. at 1165–64}.

\textsuperscript{111} \textit{Id. at 1164}.

\textsuperscript{112} \textit{Id.}
revoked that directive. Herbert Cohen knew of the acrimony between Schleicher and Dobbie. Nonetheless, at Dobbie’s direction, Jonathan Cohen filed an application to withdraw MRF’s trademark application. The withdrawal application was critical because, were the PTO to cancel the prior registration, the ESSIAC trademark would become available and Dobbie would be free to register it on his own, free of all ties to MRF. This posed a clear conflict of interest between Schleicher and MRF on the one hand, and Dobbie on the other. When Schleicher inquired of Jonathan Cohen concerning the status of the matter, Jonathan Cohen lied to him or ignored his requests for information. Schleicher repeatedly complained to Herbert Cohen in correspondence that the firm was mistreating him. When it became clear that Schleicher was seriously displeased with the firm’s representation, Herbert Cohen obtained a legal opinion that Schleicher remained a client of the firm and thus that a conflict of interest existed. The firm, thereafter, took steps to rectify the problems which had arisen, but Schleicher filed a disciplinary complaint against Herbert Cohen. The central issue in the case was Cohen’s alleged violation of District of Columbia Rule of Professional Conduct 5.1(c)(2), which provides:

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

(2) The lawyer has direct supervisory authority over the other lawyer or is a partner in the firm in which the other lawyer practices, and knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The emphasized text points out the key difference between the District of Columbia rule and Model Rule 5.1(c)(2)—the duties imposed under the District of Columbia rule go beyond those imposed by the Model Rule. Cohen argued that it was unfair to discipline him for his son’s dishonesty when he did not know of it, pointing out that Model Rule 5.1(c)(2) requires that a partner or supervising lawyer know of the underlying misconduct for there to be a violation. The court disagreed, explaining:

[I]n going beyond the model rule, [District of Columbia] Rule 5.1(c)(2) reflects what this jurisdiction has determined to be a fair and necessary balance. On the one hand, it is not a rule of imputed liability for the underlying

---

113 Id.
114 See id. at 1165 (discussing disciplinary hearing committee’s unchallenged findings).
115 Id. at 1164.
116 See id. (explaining that the opinion confirmed that Schleicher was a client).
117 Id. at 1164–65.
118 Id. at 1165 (emphasis added).
119 Id. at 1166.
120 Id.
conduct . . . . On the other hand, Rule 5.1(c)(2) in this jurisdiction represents
a judgment that attorneys supervising other lawyers must take reasonable
steps to become knowledgeable about the actions of those attorneys in
representing clients of the firm. As the [disciplinary authorities] explained,
the “reasonably know” provision was carefully crafted to encourage—
indeed to require—supervising attorneys to reasonably monitor the course
of a representation such as [Cohen’s] firm had undertaken on behalf of Dr.
Schleicher, denying them the ostrich–like excuse of saying, in effect, “I
didn’t know and didn’t want to know.”

In determining that Cohen violated Rule 5.1(c)(2), the disciplinary
authorities took into account the nature of the case, the length of the
representation, the small size of the firm, and the degree of supervision or
lack thereof. They concluded that he “reasonably should have known of
the withdrawal application and should have been able to take reasonable
remedial action to avoid its consequences,” and that “a lawyer of reasonable
prudence and competence would have made the inquiry necessary to
determine the status of the application proceeding.” The court adopted
these conclusions and suspended Cohen for thirty days.

In re Cohen involved underlying misconduct by an associate, but it is
easy to conceive of similar situations involving co–partners. For example,
consider a case in which a corporate or tax partner has a client with
intellectual property needs, and therefore asks a partner in her firm’s IP
practice group to represent the client in those matters. Alternatively, a
litigation partner might land a client with corporate or real estate matters
requiring representation, and accordingly ask partners in those practice
groups within his firm to assist the client. Partners with transactional
practices routinely rely on litigation partners to handle clients’ trials and
appeals. Regardless, the partner assigning or referring the work is not
absolved of her responsibilities under Rule 5.1(c) either by the fact that
the lawyers to whom she allocated responsibility are partners, or by the fact
that the matters involve substantive areas of the law that are outside her
scope of expertise.

Finally, with respect to Rule 5.1(c)(2), some ethics commentators suggest
that the rule is subject to “knowledge creep,” meaning that courts and
disciplinary authorities may impose a constructive knowledge requirement
on partners, or managerial or supervisory lawyers in cases where those
lawyers have not satisfied their duties under Rules 5.1(a) or (b). While it

121 Id. (footnote omitted).
122 Id. at 1166–67.
123 Id. at 1167.
124 Id.
125 Arthur J. Lachman, What You Should Know Can Hurt You: Management and Supervisory
Responsibility for the Misconduct of Others Under Model Rules 5.1 and 5.3, Prof. Law., 2007, at
1–2.
is arguably true that the Rule 5.1(c)(2) duty to rectify misconduct is likely to arise in the wake of Rule 5.1(a) and (b) violations, the plain language of Model Rule 5.1(c)(2) imposes an actual knowledge requirement, and basic interpretive principles compel the conclusion that its drafters intended the language used. If the drafters of Model Rule 5.1(c)(2) intended for partners or managerial or supervisory lawyers to sometimes face potential discipline based on alleged constructive knowledge, they surely would have added the phrase “or reasonably should have known” to the rule, as did the District of Columbia in its version of Rule 5.1(c)(2), or as New York has done in its equivalent rule. The fact that they did not is telling. Accordingly, courts and disciplinary authorities should refrain from reading into Model Rule 5.1(c)(2), or state rules like it, a constructive knowledge requirement that clearly does not exist.

B. Restatement Section 11 and Other Law

Section 11 of the Restatement (Third) of the Law Governing Lawyers is very similar to Model Rule 5.1. Section 11 provides:

(1) A lawyer who is a partner in a law–firm partnership or a principal in a law firm organized as a corporation or similar entity is subject to professional discipline for failing to make reasonable efforts to ensure that the firm has

---

126 See id. at 2–3 (quoting Miller, supra note 51, at 278 & n.86).

127 Model Rules of Prof’l Conduct R. 5.1(c)(2) (2002) (stating that responsibility will lie where the managerial or supervisory lawyer “knows of the [other lawyer’s] conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action”) (emphasis added).


129 D.C. Rules of Prof’l Conduct R. 5.1(c)(2) (2007) (providing for discipline where a partner, lawyer with comparable managerial authority, or lawyer with direct supervisory authority over another lawyer “knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action”).

130 N.Y. CODE OF PROF’L RESPONSIBILITY DR –0(D)(2) (2005) (providing for discipline where a partner or supervisory lawyer “knows of [unethical] conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct” in time to remedy it, or avoid or mitigate its consequences).

131 The “vast majority of jurisdictions” have enacted versions of Model Rule 5.1 that require actual knowledge of misconduct by partners or managerial or supervisory lawyers for the imposition of professional discipline. Lachman, supra note 125, at 4. The District of Columbia and New York are the only jurisdictions that presently appear to impose constructive knowledge standards in their versions of Rule 5.1. Id. at 5.
in effect measures giving reasonable assurance that all lawyers in the firm conform to applicable lawyer–code requirements.

(2) A lawyer who has direct supervisory authority over another lawyer is subject to professional discipline for failing to make reasonable efforts to ensure that the other lawyer conforms to applicable lawyer–code requirements.

(3) A lawyer is subject to professional discipline for another lawyer’s violation of the rules of professional conduct if:

(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(b) the lawyer is a partner or principal in the law firm, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial measures.132

Although section 11 refers to the remedy of professional discipline, the Restatement addresses lawyers’ civil liability.133 In this way, it is distinct from Rule 5.1, which is clearly focused on professional discipline. A lawyer may violate Rule 5.1 without incurring tort liability, because while ethics violations do not depend on harm to the client, tort liability requires monetary damages.134

Like Model Rule 5.1, section 11 does not impose vicarious liability.135 The issue under section 11 is whether the lawyer being sued has satisfied her own obligations as a partner or supervisor.136 Lawyers’ supervisory failures may expose them to sanctions or contempt of court penalties.137 Such failures clearly may breach lawyers’ duty of care to clients.138 Courts generally recognize negligent supervision as a valid cause of action in the lawyer liability context.139 In Federal Deposit Insurance Corp. v. Nathan,140 for example, the FDIC sued the law firm of Lackshin & Nathan and its

---

133 Id. at xxi.
134 Rotunda & Dzenkowski, supra note 96, § 5.1–4, at 893.
136 Id.
137 See, e.g., In re Aguilar, 97 P.3d 815, 820 (Cal. 2004) (finding that lawyer committed contempt of court when he failed to assign a substitute lawyer to argue an appellate case in place of a subordinate lawyer who left the firm shortly before scheduled oral argument).
lawyers in connection with the failure of Continental Savings Association. A partner, Bernard Fischman, argued that the FDIC’s complaint failed to state a claim against him because he did none of the transactional work at issue. The court rejected Fischman’s argument because the complaint alleged that he was directly liable for failing to supervise the other Lackshin & Nathan lawyers, and for failing to deter their negligent and unethical conduct.

Insofar as partners’ liability for the torts of their co–partners goes, the most significant development in tort and partnership law in recent years has been the proliferation of limited liability partnerships (“LLPs”). The LLP movement started in Texas in the wake of the savings and loan (“S&L”) crisis. As the government went about recouping the billions of dollars it spent cleaning up the S&L mess, it sued the directors and officers of failed thrifts, as well as the professionals who served the institutions in their heyday. The government’s allegations against the law firms and lawyers included both direct and vicarious liability theories. As a result, the Texas legal community saw the need to limit the liability of lawyers who were neither negligent nor participants in alleged wrongdoing, and the first LLP statute was born. All states now permit general partnerships to register as LLPs.

Most LLP statutes now limit partners’ vicarious liability for all partnership debts and obligations, thus providing so–called “full shield”

---

141 Id. at 897.
142 Id. at 898.
143 Additionally, a number of law firms have organized as limited liability companies, or LLC’s. For a shareholder in an LLC to be liable for another lawyer’s misconduct, she must have participated in the misconduct or directly supervised the wrongdoer. See, e.g., Keszenheimer v. Boyd, 897 So. 2d 190, 193–94 (Miss. Ct. App. 2004) (finding no liability); Babb v. Bynum & Murphrey, PLLC, 643 S.E.2d 55 (N.C. Ct. App. 2007) (declining to hold partner liable for failing to investigate fellow partner’s possible misconduct where he was unaware of it); In re Disciplinary Proceedings Against Reitz, 694 N.W.2d 894, 901–02 (Wis. 2005) (explaining lawyers’ personal liability when practicing in limited liability organizations in a case in which the respondent practiced in a firm organized as an LLC).
146 Burger, supra note 144, at 179.
147 Id.
148 Susan Saab Fortney, High Drama and Hindsight: The LLP Shield, Post–Andersen, Bus. L. Today, Jan./Feb. 2003, at 46, 47 [hereinafter Fortney, High Drama].
For example, the Minnesota statute provides in pertinent part:

An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation solely by reason of being or so acting as a partner . . . .

Illinois has an identical full shield statute.

Other statutes provide varying degrees of so-called “partial shield” protection. For example, the Texas LLP statute provides:

(2) A partner in a registered limited liability partnership is not individually liable, directly or indirectly, by contribution, indemnity, or otherwise, for debts and obligations of the partnership arising from errors, omissions, negligence, incompetence, or malfeasance committed while the partnership is a registered limited liability partnership and in the course of partnership business by another partner or a representative of the partnership not working under the supervision or direction of the first partner unless the first partner:

(A) was directly involved in the specific activity in which the errors, omissions, negligence, incompetence, or malfeasance were committed by the other partner or representative; or

(B) had notice or knowledge of the errors, omissions, negligence, incompetence, or malfeasance by the other partner or representative at the time of occurrence and then failed to take reasonable steps to prevent or cure the errors, omissions, negligence, incompetence, or malfeasance.

Under both full and partial shield statutes, law firm partners remain liable for their own errors, and partners in direct supervisory roles may be liable for their related failures. And, even though individual partners may avoid vicarious liability, the entity remains liable for partners’ actions. Thus, partners still bear financial risk in cases in which their capital contributions to the LLP are exposed, or where a plaintiff attempts to satisfy a judgment out of the firm’s accounts receivable, thereby starving the firm of income.

---

149 Id.
150 Minn. Stat. § 323A.0306(c) (2006).
154 Jones, supra note 144, at 29.
155 These risks are most likely to be realized where a firm does not have professional liability insurance, the firm’s policy limits are inadequate, or the firm’s policy does not provide
establish a partner’s standard of care, LLP statutes may foreclose a partner’s
tort liability even in situations where the partner’s acts or omissions violate
the rule.\textsuperscript{16} Unfortunately for partners, the LLP remains a relatively recent
creation and the scope of its liability protection is unclear.\textsuperscript{157} Related case
law is not richly developed.\textsuperscript{158}

The problem with LLPs from a professional responsibility perspective,
some scholars contend, is twofold. First, this organizational form diminishes
partners’ willingness to devote time and resources to risk management.\textsuperscript{159}
While general partners with potentially unlimited liability have an incentive
to supervise the work of other partners, that incentive is eliminated by
LLP statutes’ vicarious liability shield.\textsuperscript{160} Second, in states where the LLP
statute permits supervisory liability, that potential exposure discourages
partners from supervising their colleagues or from engaging in broader risk
management.\textsuperscript{161} Neither argument is persuasive.

First, the argument that LLP statutes’ elimination of vicarious liability
diminishes partners’ willingness to supervise their peers assumes that
partners appreciate their supervisory obligations when practicing in
general partnerships. That is uncertain.\textsuperscript{162} Second, the argument ignores
the fact that most law firms purchase professional liability insurance in
amounts adequate for their practices, such that on a daily basis partners do
not weigh personal liability exposure in their relations with colleagues.\textsuperscript{163}
Third, this argument overlooks the fact that law firms’ reputations give
them “an incentive to perform risk–reduction functions even without, or as
a supplement to, strong liability rules.”\textsuperscript{164} Individual partners rely on their
firms’ reputations to supplement their own.\textsuperscript{165} Most partners are or should
be motivated by reputational risk to ensure colleagues’ professionally
responsible behavior.\textsuperscript{166} Fourth, partners’ misconduct may harm an entire

\begin{small}
\begin{thebibliography}{99}
\bibitem{Burger} See Burger, supra note 144, at 182.
\bibitem{Kus} See, e.g., Kus v. Irving, 736 A.2d 946, 947 (Conn. Super. Ct. 1999) (explaining that even
if plaintiff came forward with admissible evidence that two partners violated Rules 5.1(a) and
(c), the Connecticut LLP statute defeated that claim on the facts presented).
\bibitem{Jones} Jones, supra note 144, at 21.
\bibitem{Burger2} Burger, supra note 144, at 176.
\bibitem{Fortney} Fortney, High Drama, supra note 148, at 47.
\bibitem{Id} Id.
\bibitem{Id2} Id.
\bibitem{Fortney2} See Fortney, Peer Review, supra note 36, at 292 (reporting results of a study of law firm
principals in which respondents “tended to reject the notion” that partners had a legal duty
to monitor one another).
\bibitem{Telephone Interview} Telephone Interview with Lucian T. Pera, Chair, Professional Conduct Committee,
Business Law Section, American Bar Ass’n, in Memphis, Tenn. (Oct. 23, 2006).
\bibitem{Ribstein} Larry E. Ribstein, Limited Liability of Professional Firms After Enron, 29 J. Corp. L.
\bibitem{Id} Id. at 439.
\bibitem{Id} Id. at 443.
\end{thebibliography}
\end{small}
firm by impairing important client relationships, or by causing key clients to terminate engagements.\textsuperscript{167} Fifth, a partner’s supervisory failures are likely to be deemed to be a basis for direct liability rather than an aspect of vicarious liability, or are likely to fall within one of the exceptions for liability found in partial shield statutes.\textsuperscript{168} Either way, LLP status affords partners no protection and therefore provides no disincentive. Sixth, while practice in an LLP may allow lawyers to avoid tort liability, it does not shield them from professional discipline under Rule 5.1(b).\textsuperscript{169} Seventh, even as many law firms have transitioned to limited liability partnerships, they are also devoting significant resources to risk management. This is partly evidenced by the emergence of the law firm general counsel position.\textsuperscript{170} If LLP shields are a disincentive to partners’ attempted assurance of colleagues’ professional responsibility, one would expect to see opposite trends. Eighth, partners in LLPs must accept supervisory responsibility because it is an integral part of law firm risk management, and firms must manage their risks as a means of reducing professional liability insurance costs. Insurers expect firms to embrace risk management, and tend to favor from a pricing standpoint those that do.

The argument that personal exposure on a supervisory liability basis under partial shield statutes effectively discourages partners in LLPs from supervising colleagues or participating in risk management fares no better. For example, how is supervisory liability under LLP statutes less desirable than the liability to which general partners are exposed? If, as critics contend, LLP status discourages partners’ supervision of colleagues by eliminating the economic incentive to supervise that vicarious liability as a general partner creates, how can the allowance of supervisory liability via an LLP statute be negative? The permission of liability in this context is simply a restoration of the economic incentive to supervise that scholars desire.

It is further difficult to understand how supervisory liability under an LLP statute can discourage partners from exercising supervisory responsibilities when the same obligation exists under Rule 5.1(b). Basic business principles also dictate partners’ supervision of colleagues. Firms must deliver acceptable service to maintain client relationships, and quality assurance in the form of partner supervision is an indispensable service component. Finally, there is no empirical evidence that partners in LLPs have retreated from supervisory roles as a result of perceived liability

\textsuperscript{167} See Donald E. Aronson & Bruce D. Heintz, Playing Defense, Am. Law., Mar. 2007, at 73, 73 (preserving client relationships is an important aspect of law firm risk management).

\textsuperscript{168} See generally Burger, supra note 144, at 189–91 (raising this issue).


\textsuperscript{170} See Elizabeth Chambliss, The Scope of In–Firm Privilege, 80 Notre Dame L. Rev. 1721, 1721–22 (2005) (discussing law firms’ increasing reliance on general counsel and noting firm counsels’ contribution “to firm–wide compliance with professional regulation”).
exposure.

C. Model Rule 8.3(a)

In most states, lawyers are required to report misconduct by other lawyers and may be disciplined if they do not.171 This duty flows from Model Rule 8.3(a), which provides: “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”172 The Rule 8.3(a) duty is qualified. It attaches only to violations that raise “a substantial question” about a “lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,”173 meaning that lawyers are required to report only serious misconduct by other lawyers.174 Whether a violation is sufficiently serious to require reporting depends on the judgment of the lawyer weighing the issue or situation.175

Of course, a lawyer must “know” of serious misconduct by another lawyer to have a duty to report that lawyer to professional authorities. The test for knowledge under Rule 8.3(a) has been variously explained by courts. In Attorney U v. Mississippi Bar,176 for example, the Mississippi Supreme Court stated that “[t]he supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred.”177 In Skolnick v. Altheimer & Gray,178 the Illinois Supreme Court indicated that the duty to report arises where the lawyer “could reasonably infer from the circumstances of the events revealed” that reportable misconduct had occurred.179 The Louisiana Supreme Court held that reporting is required “where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred.”180

Regardless of the test, the key is that a lawyer’s knowledge may be

172 Model Rules of Prof’l Conduct R. 8.3(a) (2002).
173 Id.
174 See Rotunda & Dzienkowski, supra note 96, § 8.3–(d)(1), at 1180 (asserting that Rule 8.3(a) is intended to limit lawyers’ duty to report to only “more serious violations”).
175Model Rules of Prof’l Conduct R. 8.3(a) cmt. 3 (stating that complying with Rule 8.3(a) requires “[a] measure of judgment”).
176 Attorney U v. Mississippi Bar, 678 So. 2d 963 (Miss. 1996).
177 Id. at 972.
179 Id. at 15.
180 In re Riehmann, 891 So. 2d 1239, 1247 (La. 2005).
inferred from the circumstances.\textsuperscript{181} This is an objective standard.\textsuperscript{182} Lawyers cannot escape their reporting obligations through creative rationalization or feigned ignorance.\textsuperscript{183}

A common concern of lawyers weighing their duty to report is timing. Must they report another lawyer’s serious misconduct immediately, or do they enjoy some degree of discretion? There is no clear answer. Rule 8.3(a) is silent on timing, but courts have disciplined lawyers who waited an unreasonably long time to report misconduct.\textsuperscript{184} The best that can be said is that a lawyer must report another lawyer’s misconduct “timely . . . under the circumstances.”\textsuperscript{185}

1. Rule 8.3(a) in the Partnership Context: The Prospect of Retaliation.—While law firm partners never expect to be faced with a duty to report a fellow partner’s perceived misconduct, such circumstances do occur.\textsuperscript{186} These situations are stressful and, depending on the size of the firm, the nature of the suspected misconduct, and the personalities and stature of the partners involved, a partner’s report of a peer’s potential misconduct may threaten collegiality and chill some relationships. If a partner does report a co–partner’s serious misconduct to disciplinary authorities, she may fear that her firm will retaliate against her.\textsuperscript{187} Bohatch v. Butler & Binion\textsuperscript{188} suggests that this fear is well–founded.

Colette Bohatch was a partner in the Washington, D.C. office of Texas–based Butler & Binion.\textsuperscript{189} The office’s managing partner was John McDonald and another partner, Richard Powers, also worked there. The three lawyers worked almost exclusively on Pennzoil business. As a partner, Bohatch received internal firm reports on lawyers’ billings.\textsuperscript{190} Reviewing these reports, she became concerned that McDonald was overbilling Pennzoil.\textsuperscript{191} She discussed the matter with Powers and they jointly reviewed

\begin{flushleft}
\textsuperscript{181} See Skolnick, 730 N.E.2d at 15; Attorney U, 678 So. 2d at 971–72.
\textsuperscript{182} In re Riehlmann, 891 So. 2d at 1247.
\textsuperscript{184} See, e.g., In re Riehlmann, 891 So. 2d at 1247–50 (disciplining lawyer who waited five years to report); In re Anderson, 769 A.2d 1282, 1284 (Vt. 2000) (involving lawyer who waited nine months to report misconduct associated with client trust account).
\textsuperscript{185} In re Riehlmann, 891 So. 2d at 1247.
\textsuperscript{187} Bohatch v. Butler & Binion, 977 S.W.2d 543 (Tex. 1998).
\textsuperscript{188} Id. at 544.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\end{flushleft}
McDonald’s time records. This review heightened her concerns. She then reported her concerns to the firm’s managing partner, Louis Paine, and to two members of the firm’s management committee, R. Hayden Burns and Marion McDaniel. Paine and Burns investigated Bohatch’s complaint. They reviewed Pennzoil bills and supporting records. They also discussed the matter with Pennzoil’s in–house lawyer, John Chapman, who was the firm’s primary contact at Pennzoil. Chapman told them that Pennzoil was satisfied that McDonald’s bills were reasonable.

In August 1990, Paine met with Bohatch and told her that the firm’s investigation had revealed that her concerns about McDonald’s billing practices were unfounded. He added that she should begin seeking other employment and immediately after this meeting the firm stopped assigning her work. In January 1991, the firm denied Bohatch her year–end partnership distribution for 1990 and reduced her expected compensation for 1991 to zero. The firm finally stopped paying her in June 1991. In August 1991, the firm told her to vacate her office by November. Bohatch found new employment in September 1991. She sued the firm in October 1991, and the firm expelled her from the partnership three days later.

Bohatch alleged three theories of liability in her suit against the firm: wrongful discharge, breach of fiduciary duty, and breach of contract (the firm’s partnership agreement) based on the duty of good faith and fair dealing. The trial court granted the firm partial summary judgment on Bohatch’s wrongful discharge claim and on her claims for breach of fiduciary duty and breach of the duty of good faith and fair dealing for conduct occurring after Bohatch’s expulsion. The trial court allowed the remaining claims for conduct occurring before Bohatch’s expulsion to go to trial, and a jury found that the firm breached both its fiduciary duty to Bohatch and its partnership agreement. Ultimately, Bohatch was awarded $327,000 in compensatory damages and $237,000 in punitive damages. Both sides appealed.

191 Id.
192 Id.
193 Id.
194 Id.
195 Id.
196 Id.
197 Id.
198 Id. at 544–45.
199 Id. at 545.
200 Id.
201 Id.
202 Id.
203 Id.
204 Id.
The Houston Court of Appeals concluded that “the firm’s only duty to Bohatch was not to expel her in bad faith” and, based on the facts, the court determined that the firm did not breach its fiduciary duty to her.\footnote{Id.} The court of appeals did conclude, however, that the firm had breached its partnership agreement and that Bohatch was accordingly entitled to damages of $35,000 in lost earnings for 1991.\footnote{Id.} Bohatch then sought review by the Supreme Court of Texas.

The Supreme Court of Texas began its analysis by noting that while partnership is a fiduciary relationship and imposes upon partners the duties of loyalty and utmost good faith, it is at heart a voluntary association.\footnote{Id. at 546.} This case presented an issue of first impression: “whether the fiduciary relationship between and among partners creates an exception to the at–will nature of partnerships; that is . . . whether it gives rise to a duty not to expel a partner who reports suspected overbilling by another partner.”\footnote{Id. (quoting Waite v. Sylvester, 560 A.2d 619, 623 (N.H. 1989)).} The court answered this question by looking to the common law of partnership.\footnote{Id.}

The supreme court observed that courts in other states have held that a partnership may expel a partner for purely business reasons, to protect relationships within the partnership or with clients, or “to resolve a ‘fundamental schism’” within the firm.\footnote{Id. (quoting Fitz–Gerald v. Hull, 237 S.W.2d 256, 264 (Tex. 1951); Gelder Med. Group v. Webber, 363 N.E.2d 73, 77 (N.Y. 1977)).} The court stated that “[t]he fiduciary duty that partners owe one another does not encompass a duty to remain partners or else answer in tort damages.”\footnote{Id. at 6.} Nonetheless, Bohatch and several legal scholars supporting her as amicus curiae argued that public policy considerations compel the recognition of a limited duty to retain partners who blow the whistle on co–partners’ misconduct. The extension of partners’ fiduciary duty in this context is necessary, they argued, “because permitting a law firm to retaliate against a partner who in good faith reports suspected overbilling would discourage compliance with rules of professional conduct and thereby hurt clients.”\footnote{Id. (quoting Waite v. Sylvester, 560 A.2d 619, 623 (N.H. 1989)).} While recognizing that this argument was forceful, the court rejected it, explaining:

A partnership exists solely because the partners choose to place personal confidence and trust in one another . . . . Just as a partner can be expelled, without a breach of any common law duty, over disagreements about firm policy or to resolve some other “fundamental schism,” a partner can be expelled for accusing another partner of overbilling without subjecting the
partnership to tort damages. Such charges, whether true or not, may have a profound effect on the personal confidence and trust essential to the partner relationship. Once such charges are made, partners may find it impossible to continue to work together to their mutual benefit and the benefit of their clients.\textsuperscript{213}

Two dissenting justices warned that the permission of “retaliation against a partner who tries in good faith to correct or report perceived misconduct virtually assures that others will not take these appropriate steps in the future,” and that the court’s approach would “send an inappropriate signal . . . that the rules of professional responsibility are subordinate to a law firm’s other interests.”\textsuperscript{214} The majority was sensitive to this concern, but reasoned that it was secondary to the preservation of trust between partners.\textsuperscript{215} At the same time, the court was unwilling to release whistleblowers from their ethical duty to report fellow partners’ serious misconduct, and stated:

We emphasize that our refusal to create an exception to the at–will nature of partnerships in no way obviates the ethical duties of lawyers. Such duties sometimes necessitate difficult decisions, as when a lawyer suspects overbilling by a colleague. The fact that the ethical duty to report may create an irreparable schism between partners neither excuses failure to report nor transforms expulsion as a means of resolving that schism into a tort.\textsuperscript{216}

Ultimately, the court held that the firm “did not owe Bohatch a duty not to expel her” for reporting McDonald’s alleged overbilling.\textsuperscript{217} The court agreed, however, that the firm had breached its partnership agreement. It therefore affirmed the court of appeals’ judgment.\textsuperscript{218}

_Bohatch_ is a dreadful decision from a policy perspective. The dissenting justices were correct—the opinion plainly discourages partners from reporting colleagues’ misconduct. The court’s expectation that partners will report co–partners’ misconduct regardless of the potential consequences is delusional. As I have explained elsewhere:

Given the choice between potential personal and professional ruin and potential discipline should his failure to report ever come to light, almost every lawyer will gamble (1) that his failure to report will never be discovered (even if the other lawyer’s misconduct is); and (2) that he can avoid or mitigate any sanction for not reporting the misconduct. These are

\textsuperscript{213} Id. at 546–47 (citation omitted).
\textsuperscript{214} Id. at 561 (Spector, J., dissenting).
\textsuperscript{215} Id. at 547 (majority opinion).
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
This is a policy error with consequences for clients. There are cases in which partners’ misconduct, despite being serious, is so subtle that it is likely to be discovered only by another lawyer in the same firm. If another partner discovers the misconduct but fears retaliation if she reports it, she has no incentive to make a report because there is a strong possibility that the misconduct will never come to light otherwise. Under Bohatch, the fact that her report of her fellow partner’s misconduct would be made in good faith will not spare her expulsion. It is the client who suffers in the end.

Justice Hecht, in a concurring opinion, circumvented this concern by focusing on the fact that Bohatch’s concerns proved to be unfounded. He reasoned that Bohatch’s expulsion did not breach the firm’s fiduciary duty because “a mistake so serious indicates a lack of judgment warranting expulsion,” and it is indisputable that a firm may expel a partner for a serious error in judgment in either client or firm affairs. If Bohatch and McDonald had disagreed about tactics in a Pennzoil case, or over the operation of Butler & Binion’s Washington office, Justice Hecht explained, “the firm could have determined that she be expelled for the health of the firm, even if [she] had acted in complete good faith. Reporting unethical conduct where none existed is no different.”

With all due respect, Justice Hecht is flat wrong on all points. He first errs by reasoning that a partner’s good faith but mistaken report of a peer’s perceived misconduct necessarily indicates a serious lack of judgment. To the contrary, a partner who ignores obvious signs of serious misconduct—thereby exposing her firm to potential liability and reputational injury, and herself to professional discipline—is guilty of far worse judgment. Indeed, knowing inaction in this situation may constitute a breach of trust or amount to recklessness, and therefore violate the partner’s duty of care to the law firm. Second, Rule 8.3(a) does not require lawyers to be certain

219 Richmond, Duty to Report, supra note 183, at 203.
221 Id. at 1021.
222 Id.
223 Id. at 1022.
225 Id.
226 Id.
227 See Margaret Kline Kirkpatrick, Comment, Partners Dumping Partners: Business Before Ethics in Bohatch v. Butler & Binion, 83 MINN. L. REV. 1767, 1802 (1999) (“Just because a reporting attorney turns out to be wrong does not necessarily mean that he or she exercised poor judgment in reporting”).
of another lawyer’s misconduct before reporting it; responsibility for deciding whether an ethical violation has actually occurred rests not with the reporting lawyer, but with disciplinary authorities and state supreme courts.

Third, reporting a fellow partner’s potential unethical conduct in good faith is different from other instances warranting expulsion of a partner for the “health of the firm.” It is not the same as expelling a partner for alcohol abuse, for repeatedly disruptive and improper behavior in client development, or for illegal conduct and tortiously interfering with other partners’ contract rights. It is not the same as falsely reporting a fellow partner’s misconduct in a bad faith attempt to gain revenge or some personal advantage, which clearly justifies expulsion. Rather, in states that have adopted Rule 8.3(a), honestly reporting other lawyers’ serious misconduct is every lawyer’s duty. Rule 5.1(c) arguably compels a partner who reasonably believes that a co-partner is engaged in misconduct to initiate an internal investigation, and lawyers in a firm who expel a partner who in good faith requests such an inquiry violate Rule 5.1(a) by doing so.

Both the majority and the concurrence were convinced that a partnership cannot survive the loss of confidence and trust that accompany fellow partners’ accusations of misconduct, and thus determined that a partnership can lawfully expel a reporting partner to restore or maintain organizational harmony. There was nothing in the record, however, to suggest that Bohatch’s report of McDonald’s suspect billing practices to firm leaders threatened Butler & Binion as a whole. If the firm attempted to make that argument at trial, the jury apparently rejected it based on the evidence presented. In any event, it is unwise to assume that one partner’s report of another partner’s misconduct will irreversibly harm a firm. This is especially true in large law firms. Furthermore, it is equally likely that a law firm will be fractured where a partner does not report a colleague’s serious misconduct and the misconduct later is revealed in a fashion or at a time that its harm to the firm cannot be avoided or mitigated.

Finally, the court in Bohatch inadequately analyzed partners’ reciprocal duties of good faith. Generally speaking, the fiduciary nature of partnership

---

229 In re Riehlmann, 891 So. 2d 1239, 1247 (La. 2005).
230 Bohatch, 977 S.W.2d at 555 (Hecht, J., concurring).
235 Bohatch, 977 S.W.2d at 546–47 (majority opinion); id. at 554 (Hecht, J., concurring).
236 See Kirkpatrick, supra note 227, at 1795 (contending that the court in Bohatch overemphasized the possibility of firm divisions following partners’ reports of misconduct).
imposes upon partners a duty to act toward one another in “good faith and fairness.”

Partners may breach their duty of good faith by expelling a fellow partner for a predatory purpose, as where a firm allegedly engages in a clandestine plan to wrongfully expel some partners for the financial gain of other partners. This is true even where the firm’s partnership agreement permits expulsion without cause. The duty of good faith should prevent partners from retaliating against a fellow partner for her legitimate efforts to report and remedy misconduct within the partnership. If it does not, the doctrine is essentially meaningless. Not surprisingly, other courts have found that law firms’ expulsions of partners who were internally investigating possible misconduct by fellow partners raised triable issues of bad faith.

In the end, the decision in *Bohatch* cannot be defended. The case was wrongly decided and other courts should not follow it. Law firms should not be permitted to retaliate against partners who in good faith report serious misconduct by their peers. To allow firms to do so is unwise from a policy standpoint and incorrect as a matter of partnership law.

2. **Summary.**—Partners are obligated to report fellow partners’ serious misconduct to disciplinary authorities within a reasonable time. Nothing about their status as co-partners of offending lawyers excuses their duty to report, discomforting though it may be. A partner’s report of a fellow partner’s serious misconduct to firm leaders may satisfy her duties under Rule .1, but internal reports do not excuse her duty to report the matter to disciplinary authorities.

Additionally, partners may be required under Rule 8.3(a) to report...
impaired colleagues to professional authorities. An impaired lawyer is an unfit lawyer for purposes of the rule if the impaired lawyer’s condition materially affects his ability to represent clients; on this point courts are clear. A lawyer may be impaired as a result of alcohol abuse, chemical dependency, depression, mental illness, or dementia or diminished mental capacity attributable to age or illness. A partner may attempt to obtain help for an impaired partner through other lawyers or resources within the firm and, if the firm responds appropriately, the partner’s duty to report may be excused. A partner cannot avoid her duty to report an impaired colleague to disciplinary authorities, however, by referring the impaired lawyer to an approved lawyers’ assistance program.

D. Law Firm Discipline

Model Rules 5.1 and 8.3(a) are focused on individual lawyers. Two states—New Jersey and New York—make law firms subject to discipline. New Jersey Rule of Professional Conduct 5.1, entitled “Responsibilities of Partners, Supervisory Lawyers, and Law Firms,” provides in pertinent part:

(a) Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization’s work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.

New York rules state that “[a] law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules,” and mandate that “[a] law firm shall adequately supervise, as appropriate, the

246 See Model Rules of Prof’l Conduct at R. 1.16(a)(2) (2002) (requiring lawyers to withdraw if their mental or physical condition “materially impairs” their ability to represent clients).
247 See, e.g., State ex rel. Okla. Bar Ass’n v. Burns, 145 P.3d 1088, 1095 (Okla. 2006) (expressing the “strong belief that substance abuse is incompatible with the fitness of an individual to practice law”).
249 Id. at 4.
250 Id. at 5.
251 See Model Rules of Prof’l Conduct R. 5.1 (referring to “a partner” and “a lawyer”); id. R. 8.3(a) (referring to “[a] lawyer”).
253 Id. R. 5.1(a) (emphasis added).
work of partners, associates and nonlawyers who work at the firm.”

The idea of law firm discipline originated with Professor Ted Schneyer, who in a 1991 article advocated it as a necessary response to the growth of large law firms and their team-based approach to practice. Professor Schneyer theorized that law firm discipline would (a) solve evidentiary problems associated with assigning professional responsibility to individual members of practice teams; (b) surmount authorities’ alleged reluctance to scapegoat individual lawyers for misconduct in which other lawyers participated; and (c) recognize the diffuse responsibility in large law firms for failing to create and maintain an “ethical infrastructure.”

Professor Schneyer’s well-intentioned thesis was arguably unsound when he advanced it and is weaker today. To begin, courts and disciplinary authorities have no difficulty assessing individual responsibility in cases in which lawyers in large law firms misbehave, and they have shown no reluctance to discipline multiple lawyers for violations arising out of the same factual nucleus. The fact that disciplinary authorities prosecute more solo and small firm lawyers than they do large firm lawyers is attributable to the fact that clients of large law firms who believe that they have been wronged tend to sue instead of initiating disciplinary action.

In addition, law firms have come far in erecting ethical infrastructures in the years since Professor Schneyer’s article appeared. The structural controls that he found lacking and the absence of which, in his view, justified law firm discipline, now exist in almost all large law firms.

Law firm discipline has not been welcomed even by groups committed to fostering ethical lawyering. For example, when the ABA revised the Model Rules in connection with its Ethics 2000 initiative, the drafters rejected proposed amendments to Model Rule 5.1(a) that would have

255 Id. DR 1–104(c).
258 Id. at 11.
259 See, e.g., In re Brown, No. 389, 2005 WL 2883961 (Del. Oct. 18, 2005) (the case is also referenced in the Atlantic Reporter in a “Table of Decisions Without Published Opinions” in 886 A.2d 1277) (disciplining lawyer for misconduct in which his partner was also involved); In re Chasanov, No. 390, 2005 WL 2883572 (Del. Oct. 18, 2005) (the case is also referenced in the Atlantic Reporter in a “Table of Decisions Without Published Opinions” in 886 A.2d 1277) (disciplining lawyer for misconduct in which his partner was also involved); In re Watley, 802 So. 2d 593 (La. 2001) (suspending two lawyers for shared misconduct).
261 See infra notes 277–338 and accompanying text.
provided for law firm discipline. Among the groups who resisted the proposed amendments was the National Organization of Bar Counsel (“NOBC”). NOBC members enforce ethics rules that regulate lawyers’ professional conduct in the United States. William P. Smith, III, General Counsel of the State Bar of Georgia, later described law firm discipline as “probably the damn fooliest idea” of which he had ever heard.

Critics oppose law firm discipline on the basis that it fails basic cost–benefit analysis—its potential benefits are relatively low when compared to its potentially high costs. They express three principal concerns in this vein. First, law firm discipline is unnecessary. Rule 5.1(a) applies to all lawyers in a firm, as well as to the firm’s leaders, and firm leaders would be the proper targets in cases in which law firm discipline might be seen as appropriate. Firms can only act or fail to act through their partners. In addition, if law firm discipline were truly necessary, more than two states would have adopted rules providing for it, and the states that have adopted such rules would have enforced them more frequently than they have. Second, law firm discipline is unwise because it lessens individual lawyers’ responsibility by shifting responsibility to their firms. It thus reduces the likelihood that individual lawyers will comply with ethics rules. Third, law firm discipline is unfair. More particularly:

[Law firm discipline . . . is fundamentally at odds . . . with lawyer disciplinary procedures carefully designed to assure fairness to those accused of disciplinary violations. It raises the specter of the innocent being punished along with the guilty, and will inevitably create a sense of unfairness about the lawyer disciplinary process.

The result of imposing discipline for a “firm violation” of the legal ethics rules will be to visit sanctions on innocent lawyers who had nothing to do with, and may not even have been aware of, the conduct that caused the
firm’s violation . . . [T]he only apparent sanctions for “firm violations” . . . will be reprimands, monetary fines, or perhaps limitations on the future conduct of firm lawyers. But innocent lawyers in the firm will be subjected to these sanctions just as surely as will the guilty ones. These innocent lawyers will share in the opprobrium and adverse client reaction caused by a firm reprimand. Innocent partners will, in effect, pay a portion of any fine imposed upon the firm. And innocent firm lawyers will be just as subject to limitations on future conduct of firm lawyers as those whose actions, or failure to act, caused the violation. Indeed, in the case of many “firm violations”, any discipline imposed on the firm would undoubtedly penalize far more innocent firm lawyers than guilty or responsible ones.274

Whatever the merits or drawbacks of law firm discipline, the issue is largely dormant outside of New Jersey and New York. Even there, law firm discipline is not a substitute for individual accountability by partners. Both states have rules that make partners individually responsible for their peers’ conduct in the same fashion as Model Rules 5.1(b) and (c).275 Law firm discipline is a risk, however, for firms that appear before some government agencies. For example, the Securities and Exchange Commission may suspend a law firm from practicing before it.276

II. SATISFYING PARTNERS’ SUPERVISORY DUTIES

In small law firms, it is relatively easy for partners to ensure fellow partners’ compliance with ethics rules. Partners in small firms are likely to share common values and perspectives.277 They generally practice in a single office and often are familiar with all or most of the firm’s clients or cases. But law firms are growing increasingly large. There are at least 600 law firms in the United States with 100 or more lawyers.278 The 100 largest firms employ over 70,000 lawyers collectively.279 The top 250 firms employ just over 121,423 lawyers in the aggregate.280 Partners in these firms may not know one another—or at least not know each other well—and they often do not work together.281 Additionally, large law firms tend to have multiple offices—often in different states and commonly in different countries. Although many partners in large law firms are engaged supervisors and

274 Id.
275 N.J. Rules of Prof’l Conduct R. 5.1(b) & (c) (2006); N.Y. Code of Prof’l Responsibility DR 1–104(b) & (d) (2005).
276 Rotunda & Dzienkowski, supra note 96, § 5.1–3, at 896–97.
277 Dzienkowski, supra note 39, at 976.
278 See Of Counsel 700, supra note 23, at 19–28 (listing firms with headcounts).
279 Alison Frankel, Growing Pains, Am. Law., May 2006, at 94.
281 See Dzienkowski, supra note 39, at 976–77 (describing generally the nature of partners’ practices in large law firms).
devoted mentors, and strive to ensure ethical practice by other lawyers, the size and geographic spread of their firms limit their reach or complicate their efforts. It is simply difficult for partners in large law firms to routinely fulfill their obligations under Rules 5.1(a) and (b).²²²

Difficult though it is for partners in large law firms to ensure their peers’ professionally responsible practice, they have powerful incentives for doing so. Beyond the personal threat of professional discipline under Rule 5.1, partners’ misconduct may expose their firms to serious civil liability. As of August 2007, there were at least forty–five publicly–reported verdicts against or settlements by law firms exceeding $20 million in a string of cases dating back twenty years.²²³ There have been a number of other settlements by or verdicts against law firms that, while less than $20 million, have still reached eight figures.²²⁴ Seven–figure settlements and verdicts dot the lawyer liability landscape.²²⁵

Large law firms have responded to these risks by imposing structural

²²² Partners may violate Rule 5.1(a) in connection with misconduct in a law firm office different from the one in which they work. See, e.g., In re White, 623 S.E.2d 394, 396 (S.C. 2005) (disciplining lawyer for Rule 5.1 violation related to misconduct in two offices).


controls on their lawyers, or, as some might say, by erecting an “ethical infrastructure.”26 These controls satisfy partners’ duties under Rule 5.1(a) because firms implement them with their partners’ authority, participation and support. This Part examines three common structural controls: (a) law firm policies; (b) law firm general counsel; and (c) partner peer review. It ends with a word on law firm culture.

A. Law Firm Policies

Most large law firms have enacted policies intended to promote ethical behavior and reduce professional liability risks. For example, firms employ policies to guide their lawyers on responding to audit letter requests; reporting or responding to claims against the firm; protecting client confidentiality; responding to client misconduct; billing practices; serving as directors or officers of outside entities; using engagement letters; serving as fiduciaries; investing in clients; accepting stock in lieu of fees; suing clients for fees; preparing opinion letters; handling sensitive litigation matters, such as disqualification and sanctions motions; documenting the decision not to represent a client or prospective client in a matter; trading securities based on information learned at the firm; terminating engagements; testifying or producing documents in matters related to the firm’s services; and more. In addition to guiding lawyers’ ethical behavior, law firm policies indirectly reduce the risk of misconduct by allowing lawyers an easily explained reason for resisting a client’s or supervisor’s unethical or unlawful directive, as where a partner refuses to comply with a client’s or senior partner’s request that she engage in prohibited conduct by saying that her firm’s policy on the subject prevents her from doing so.

Some observers see a downside in firms’ adoption of risk management policies—that these policies will establish the standard of care in any action against the firm.287 If lawyers violate their firms’ policies, those violations may evidence a breach of duty. This objection is fundamentally flawed because it incorrectly assumes that the firm’s internal standard will be higher than the standard of care to which an expert witness will testify in any litigation.288 In addition, the scenario in which a firm’s policy is used against it appears to have played out only once, in Dean Foods Co. v. Pappathanasi.289 The plaintiffs there sued the Boston law firm of Rubin & Rudman LLP for negligence and negligent misrepresentation related to an opinion letter prepared by one partner and countersigned by a second. The

26 See Schneyer, supra note 257, at 10 (coining the term “ethical infrastructure”).
27 See, e.g., RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2.1, at 59 (2007 ed.) (making this point).
288 Id.
firm had a policy regarding the preparation of opinion letters. In holding the firm liable, the court noted a “significant breakdown in the careful process established at Rubin and Rudman regarding opinion letters,” and observed that one of the partners responsible for the flawed opinion letter “seem[ed] to have overlooked the firm’s policy on opinion letters.” The court ultimately awarded the plaintiffs compensatory damages of just over $7.2 million.

To those who see law firm policies as troublesome in light of the Dean Foods case, five points must be made. First, most large firms have enacted such policies. Thus, a large firm that does not have policies is equally likely to be faulted on that ground. Second, plaintiffs’ use of law firms’ policies to establish a standard of care or to explain lawyers’ duties is apparently not a widespread problem, as evidenced by the dearth of related case law. Third, while it is true that lawyers may violate their firms’ policies, that is no reason to eschew policies. Policies that are obeyed prevent far more problems than violations of policies spawn in litigation. The risk of complications in litigation from policy violations merely emphasizes the need for firms to (1) educate lawyers on their policies and the reasons behind them, thereby increasing the likelihood that their lawyers will adhere to the policies; (2) enact only those policies that are truly worthwhile in light of their practices; (3) draft policies carefully; and (4) regularly evaluate their policies’ continuing utility. Fourth, lawyers’ violations of firm policies should be irrelevant in litigation. Organizations’ internal safety policies generally do not create a duty or establish a standard of care, and their violation does not evidence negligence. To hold otherwise would discourage companies from crafting safety policies that benefit customers and third parties. By analogy, firms’ internal ethics or risk management policies should not establish duties or standards of care owed by the firm or its lawyers because to so hold would discourage firms from enacting policies which, by aiming to ensure ethical and prudent practice, materially benefit clients and others with whom the firm deals. Finally, to the extent that law firms’ internal policies reflect “best practices,” they surely cannot be used to establish duties or standards of care. “Best practices” are merely

---

290 Id. at 8–9.
291 Id. at 17.
292 Id. at 20.
293 See Mallen & Smith, supra note 287, § 2.1, at 59 (noting that law firm loss prevention policies reduce the likelihood of errors by lawyers “even if an attorney makes an error that could have been prevented by complying with a prevention control adopted by the firm”).
295 Strickland, 849 S.W.2d at 133.
aspirational ideals.  

B. Law Firm General Counsel

An ever-growing number of law firms are appointing general counsel, accelerating a trend that began in the 1990s. In a 2006 survey, for example, eighty-five percent of the law firms responding indicated that they had designated general counsel, up from sixty-nine percent in 2005. Of the firms with general counsel, thirty-five percent reported that the role was full-time. While most law firm general counsel were partners in their firms before accepting the general counsel’s position, firms occasionally look outside their ranks for general counsel. At least two large law firms have hired senior lawyers from corporate law departments to fill the position, while another appointed a former law school dean as general counsel.

Law firms’ reliance on general counsel is positive. “This arrangement heightens ethical awareness by fixing responsibility in one lawyer to whom other lawyers, whether partners or associates, may turn for a more objective evaluation of legal ethics issues.” Law firm general counsel tend to be personally committed to ethical practice, and to promoting ethical practice and regulatory compliance within their firms. They clearly assist their firms in resolving problems internally, before the lawyers involved or clients experience serious or lasting consequences.

Law firm general counsel serve as an important resource for lawyers who “want to practice law the right way,” but who are not currently familiar with ethics rules.


300 Id. at 4.


303 Rotunda & Dzienkowski, supra note 96, § 5.1–1, at 888.

304 Chambliss, In–House Counsel, supra note 298, at 1561.

305 Richmond, Essential Principles, supra note 298, at 807.

306 Chambliss, In–House Counsel, supra note 298, at 1564 (quoting a law firm general
Fortunately, most general counsel report that the partners in their firms attempt to comply with ethics rules.  

General counsels’ responsibilities can vary significantly between law firms. In all firms, though, general counsel strive to ensure ethical practice by the firm’s lawyers and reduce the firm’s liability exposure. Related activities include coordinating the firm’s loss prevention efforts; investigating alleged malpractice or misconduct by firm lawyers; educating lawyers on professional responsibility and liability issues; consulting with lawyers on business acceptance and conflict of interest issues; coordinating or preparing responses to disciplinary complaints and disqualification motions directed at firm lawyers; and reviewing law firm marketing materials to ensure compliance with ethics rules related to advertising and solicitation.

The institutionalization of law firm general counsel is not without its critics. Some scholars worry that “the creation of ethics specialists in an increasingly complex and highly regulated ethics environment may pose some challenges to the continuing goal of individual ethics awareness and accountability.”

Especially with respect to junior lawyers, the development of the general counsel position communicates that ethics is said to be “just another area of specialization, one in which someone else is developing expertise so you don’t have to. This runs the risk of shuttling the consideration of ethics to the designated individuals, taking ethical issues out of the mainstream discourse.” These academic musings are detached from the realities of modern law practice.

First, the creation of the law firm general counsel position and firms’ reliance on other ethics specialists reflects the complexity of law practice today. Most busy lawyers are unable to stay abreast of the frequent case law developments and regulatory changes that affect practicing lawyers. Law practice is now a “pervasively regulated vocation.” While it may be a delightful scholarly exercise to urge the elimination of “dense” ethics rules and other regulations governing lawyers and replace them with “a document that would be easily reviewable by every practicing lawyer, twice a year, one which would create a shared set of norms acknowledged and reinforced even by those lawyers too busy to spend much time on

---

307 Id. at 1563.
308 See Richmond, Essential Principles, supra note 298, at 815–16 (identifying logical responsibilities for general counsel).
310 Id. at 159–60 (footnotes omitted).
ethics,”

that is not going to happen in the foreseeable future.

Nor is the practice of law going to simplify or slow any time soon. The long and short of it is that lawyers who want to practice ethically sometimes require related guidance. Whether they obtain that guidance from a law firm general counsel or a single document plainly expressing professional norms is irrelevant.

Second, while some have expressed the concern that the availability of law firm general counsel “does not assure adequate attention to matters of professional responsibility because lawyers need to know when they need to consult the experts,”

this argument ignores critical points. For starters, lawyers in firms with general counsel—even junior associates—are not mindless. They generally possess the intellect and instinct to know when they should seek advice or direction on ethics or professional liability issues. Even if they do not initially consult the general counsel about an issue, they are likely to consult another lawyer whose judgment they trust, and between the two of them, they generally will reach an appropriate conclusion about involving the general counsel. Furthermore, this concern appears to assume that general counsel do not regularly reach out to lawyers within the firm to make their availability known and to educate them on problems common to their practice areas. In fact, effective general counsel work diligently to accomplish these things. They recognize that theirs is a “walking–around job.”

Third, few lawyers consult their firms’ general counsel without first having studied the problem with which they are seeking the general counsel’s assistance. They often have read the ethics rules they think apply, as well as cases construing those rules. They frequently have debated the situation with other lawyers working on the matter or with other lawyers in their practice groups before they approach the general counsel. In other words, the presence of general counsel does not deprive lawyers of “ownership of ethics principles.”

And even if individual lawyers want to abdicate responsibility for complying with ethics rules by foisting their problems onto firm counsel, they cannot. Lawyers are always responsible for their own conduct. “Advice of counsel” is not a defense to

---

312 Raymond, supra note 309, at 170.

313 The organized bar has employed ethics rules as a means of regulating lawyers’ conduct for over a century. See Rotunda & Dzienkowski, supra note 96, § 1.1(b), at 2 (explaining the Alabama Bar Association’s adoption of a Code of Ethics in 1887); id § 1.1(c), at 2–3 (describing the American Bar Association’s approval of the Canons of Ethics in 1908).

314 Raymond, supra note 309, at 161.

315 Richmond, Essential Principles, supra note 98, at 814.

316 Raymond, supra note 309, at 154.

317 See In re Howes, 940 P.2d 159, 164 (N.M. 1997) (observing that case law clearly establishes “that an attorney is always answerable for his or her own actions”).
professional discipline. Nothing about the presence of law firm general counsel removes from partners their obligations under Rules 5.1(b) and (c). As for junior lawyers, Model Rule 5.2 generally does not permit them to dodge compliance with ethics rules by consulting general counsel.

C. Partner Peer Review

Practice and risk management specialists have long recommended that law firms engage in partner “peer review,” which refers to a process by which partners “monitor and evaluate the job performance” of their peers. Partner peer review is controversial. Partners find the evaluation of peers “much less palatable than the rather commonplace practice of reviewing associates.” This is true even though committees of partners and practice group leaders conduct limited peer review in most law firm compensation processes. The difference, it seems, is that broader peer review offends partners’ sense of independence and is potentially insulting. Many aspects of law practice allow for great professional flexibility. The fact that two partners may approach a task differently does not necessarily mean that one of them is wrong and the other is right—all it means is that there are different ways of approaching the particular task. It would therefore be annoying at best and demeaning at worst for partners charged with reviewing their peers to, say, meet with a fellow partner and criticize her work or instruct her on doing things in a way the reviewers arbitrarily deem

---

318 Colorado v. Katz, 58 P.3d 1176, 1187 (Colo. 2002); Attorney Grievance Comm’n of Md. v. Pennington, 876 A.2d 642, 656 (Md. 2005); In re Hilson, 863 N.E.2d 83, 9 (Mass. 2007).

319 Model Rule 5.2(b) provides that “a subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” Model Rules of Prof’l Conduct R. 5.2(b) (2002). Junior lawyers who invoke this rule as a defense to professional discipline generally lose. See, e.g., In re Ockrassa, 799 P.2d 1350, 1353–54 (Ariz. 1990) (rejecting junior prosecutor’s defense based on consultation with superiors); Colorado v. Casey, 948 P.2d 1014, 1016–17 (Colo. 1997) (sanctioning associate where ethics rule clearly applied); Statewide Grievance Comm. v. Glass, No. CV95 0144258 S, 1995 WL 541810, at *2 & n.1 (Conn. Super. Ct. Sept. 6, 1995) (declining to excuse associate’s dishonesty); In re Douglas’ Case, 809 A.2d 755, 761–62 (N.H. 2002) (rejecting Rule 5.2(b) defense because question of professional duty was not arguable); In re Kelley’s Case, 627 A.2d 597, 600 (N.H. 1993) (rejecting associate’s Rule 5.2(b) defense because “there could have been no ‘reasonable’ resolution of an ‘arguable’ question of duty”); In re Howes, 940 P.2d at 164–65 (rejecting junior prosecutor’s Rule 5.2(b) defense because “there was no ‘arguable question of professional duty’”); In re Bowden, 613 S.E.2d 367, 368–69 (S.C. 2005) (rejecting Rule 5.2(b) defense and reprimanding associate).

320 Fortney, Peer Review, supra note 36, at 280.


322 Id.

Firms that engage in partner peer review take several approaches. First, some firms audit partners’ files for compliance with firm policies. Auditors examine files to determine whether partners are complying with firm policies regarding client intake procedures, engagement letters, billing practices, second partner review of audit letter responses or opinion letters, engagement termination letters, and so on. Second, firms may interview clients and ask them to evaluate the services being rendered. These interviews typically are conducted outside the presence of the lawyers performing the clients’ work. Alternatively, firms may send clients surveys that are then summarized by firm managers and shared with affected partners. Third, some firms employ so-called “upward reviews,” which ask associates to evaluate partners with whom they work. Partners in leadership roles then review the evaluations and appropriately communicate with partners about the information received. Junior lawyers are a helpful source of information on partners’ demeanor, treatment of subordinates and staff, adherence to firm policies, billing and timekeeping practices, communications with clients, supervisory habits and effectiveness, and compliance with critical deadlines. Fourth, firms may ask partners to submit annual reports confirming their payment of taxes, identifying boards on which they serve, listing outside business interests, identifying investments, and addressing any other financial areas with ethical implications or that can create risk exposure. Law firm leaders then review these reports and, if necessary, consult with partners whose reports suggest reasonable cause for concern. Fifth, a few firms attempt to evaluate partners’ substantive performance in their practice areas. As noted previously, however, this approach is potentially difficult and commonly meets resistance.

Although firms have not widely embraced partner peer review, all of the forms outlined above except perhaps for the second (client surveys) and the fifth (substantive practice reviews) should be acceptable to most partners if the reasons for them are properly explained. Auditing files for compliance with firm policies is innocuous. Asking partners to accept evaluations by associates or staff who work for them is perhaps bothersome, but it should not be. Corporations routinely ask employees to evaluate managers (sometimes called “360-degree” reviews), and teachers are

---

324 Schneider, supra note 321, at 104.
325 Id.
326 See id. (calling this approach “essential”).
328 Carlson, supra note 327, at 36.
329 See Schneider, supra note 321, at 104 (listing most of these items).
evaluated by their students. Partners may learn helpful information from associates' evaluations. The key is crafting an appropriate evaluation instrument. Requiring partners to provide information on their finances and outside interests is at worst an inconvenience. Any reluctance to accept such processes should be outweighed by the benefit to the firm in terms of satisfying partners' supervisory duties and minimizing risk to the firm.

D. Law Firm Culture

Before concluding, the subject of law firm culture merits a brief mention. Law firm “culture” is not easily defined or explained. Essentially, law firm culture “is the system of beliefs that members share about the goals and values that are important to them and about the behavior that is appropriate to attain those goals and live those values.” Law firm culture is a powerful force. From a professional responsibility standpoint, a law firm’s culture clearly can influence its lawyers’ conduct.

Firms’ efforts to develop ethical cultures are laudable. Law firms with positive cultures are sure to experience fewer serious professional liability or misconduct claims than firms with undesirable cultures. Law firm culture is not, however, a structural control in the mold of firm policies, the appointment of general counsel, or the implementation of partner peer review. Rather, a positive law firm culture is the result of successful structural controls or the informal efforts of the firm’s lawyers and staff, or both. Partners cannot claim that the existence of an ethical culture satisfies their duties under Rules 5.1(a) or (b). “Culture” is neither a “reasonable effort” nor a “measure” intended to ensure lawyers’ professionally responsible conduct.

In addition, partners’ reliance on firm culture to ensure colleagues’ compliance with ethics rules is unwise for at least three reasons. First,


331 See Schneider, supra note 321, at 104 (identifying malpractice risk avoidance as a compelling reason for law firms to adopt some form of partner peer review).

332 See Timothy L. Fort, Getting That Culture Thing, Nat'l L.J., Feb. 5, 2007, at 22 (stating that organizational culture is a “mysterious topic” and “a squishy concept”).


334 See David H. Freeman, Making Organizational Changes Stick, Of Couns., July 2006, at 13, 14 (discussing law firm culture).

335 See Model Rules of Prof'l Conduct R. 5.1 cmt. 3 (2002) (observing that “the ethical atmosphere of a firm can influence the conduct of all its members”).

336 See id. R. 5.1(a) (“A partner in a law firm ... shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct”); id. R. 5.1(b) (“A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct”).
different lawyers may have different perspectives on a firm’s culture. Associates and partners may perceive a firm’s culture quite differently. In law firms with multiple offices, the culture may vary between offices despite efforts at socialization. Second, a firm’s culture may change in ways that are not immediately recognized through the lateral addition of lawyers, or through mergers with other firms. Law firm growth of any fashion increases the difficulty of cultivating and maintaining a positive firm culture. Third, some lawyers are not influenced by firm culture. Indeed, an unwillingness to conform to a firm’s culture is a distinguishing characteristic of rogue partners.

**Conclusion**

Law firm partners are duty–bound to make reasonable efforts to ensure that their firms have in place measures affording reasonable assurance that all lawyers in their firms, including their fellow partners, conform to ethics rules. Partners are obligated as direct supervisors of other lawyers to see that those lawyers, again including their peers, comply with ethics rules. If they know of a fellow partner’s misconduct at a time that it can be avoided or mitigated, they must take appropriate action. Partners must fulfill their supervisory duties with respect to their peers even if they find them distasteful or inconvenient, or think them unreasonable given the size or geographic spread of their firms. Partners’ failure to satisfy their supervisory duties may subject them to professional discipline, and may expose them and their firms to civil liability. Law firm partners clearly are their brothers’ keepers.

---


338 Fort, supra note 332, at 22; Sager, supra note 337, at 89–90.
Reprinted with permission.