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EXPLAINING THE SPREAD OF LAW FIRM IN-HOUSE COUNSEL POSITIONS: A RESPONSE TO PROFESSOR CHAMBLISS

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In recent years, a growing number of large law firms have established a position of in-house general counsel to the firm. In her article for this Symposium, Professor Elizabeth Chambliss analyzes qualitative empirical data to show how the lawyers who fill these positions conceptualize their roles, their authority, and their ethical duties. In this Response, I ask why law firms are increasingly establishing these roles. I examine three explanations for the spread of firm counsel positions among law firms: a rational explanation centering on the efficiency of bureaucratic organization; an institutional explanation highlighting the spread of practices already institutionalized among firms' corporate clients; and a broader cultural explanation focusing on the changing conception of ethics within the legal profession. The Response concludes by suggesting that the profession may be moving from a self-regulatory regime centered on ethics to a regime of market discipline based on disclosure.

INTRODUCTION

In recent years, a growing number of large law firms have established a position of in-house general counsel to the firm. The nature and scope of these positions vary across firms and appear to be

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evolving over time within firms.[1] Firm counsel jobs may be full-time or part-time. Work done on behalf of the firm may or may not be directly compensated, and compensation may take a variety of forms. Lawyers who fill these positions may or may not also represent external clients; they may be firm partners or hold a senior non-partner title; they may be hired from within the firm or from outside. Substantively, the work of firm counsel varies across firms, but it tends to emphasize the regulation of legal practice under professional rules of ethics, regulatory legislation, and malpractice law. Their responsibilities also increasingly extend to employment and insurance issues, supplier contracts, fee disputes with clients, and firm mergers. In her article for this Symposium, Professor Elizabeth Chambliss marshals data from focus group discussions and interviews with firm counsel to provide a most interesting glimpse into how the lawyers who fill these positions conceptualize their roles, their authority, and their ethical duties.

Why are law firms increasingly establishing firm counsel positions? The "common sense" answer is that law firms' needs for legal advice and representation have grown as the regulations governing lawyers have become more complex and clients and other parties have become more willing to take legal action against firms. For example, a law firm consultant explained the spread of firm counsel positions this way: "More and more firms are instituting the role of general counsel in response to a business climate that demands more accountability and better risk management."[2] This "common sense" explanation is a lay version of what social scientists call a "functional" explanation. The firm counsel position represents a *structure*—a way of structuring or organizing work and an aspect of the overall formal structure of the firm. A functional explanation of organizational structure takes the following form: organizations need to have a particular function performed (in this case, legal services) and so they create a structure to perform it (in this case, the firm counsel position).[3] A common problem with functional explanations,

1. *See* Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 565 (2002); Nancy Rubin Stuart, *A Lawyer's Lawyer: More Firms Establish In-House General Counsel Positions*, 180 N.J. L.J 1091, 1091 (2005); Jeff Blumenthal, *Survey: More Firms Using Their Own GC*, LEGAL INTELLIGENCER, June 1, 2005; Leigh Jones, *More Firms Hire General Counsel: GCs Help Reduce the Risk of Liability*, NAT'L L.J., June 6, 2005, at 1.

2. Stuart, *supra* note 1, at 1091.

3. *See* ARTHUR L. STINCHCOMBE, CONSTRUCTING SOCIAL THEORIES 80–101 (1968).

however, is that several alternative structures could perform the necessary function. Function alone cannot explain why organizations choose a *particular* structure. For example, a law firm could deal with the need for "more accountability and better risk management" by hiring outside counsel or by allocating firm work among several of the firm's existing lawyers.

In this Response, I examine three additional explanations for the spread of firm counsel positions among law firms: a rational explanation centering on the efficiency of bureaucratic organization; an institutional explanation highlighting the spread of practices already institutionalized among firms' corporate clients; and a broader cultural explanation focusing on the changing conceptualization of ethics within the legal profession. These are not necessarily competing theories; in fact, it is likely that each of them represents part of the story. I conclude with some thoughts about the implications of firm counsel positions and related developments for the regulation of the legal profession, and suggest that the profession may be moving from a self-regulatory regime centered on ethics to a regime of market discipline based on disclosure.

I. THE RATIONAL EXPLANATION: THE EFFICIENCY OF BUREAUCRACY

The rational explanation is actually a variant of the functional explanation, but it adds the element of efficiency. According to the rational view, organizations establish particular structures because such structures are the *optimal* ways of performing particular functions. Law firms establish firm counsel positions, then, because such positions provide greater net benefits than do other alternatives. The relatively high benefits and low costs of firm counsel positions derive from their bureaucratic nature.

In Max Weber's classic definition, bureaucracy is distinguished by a division of labor in which tasks are grouped into clearly defined and stable positions or "offices," and by a hierarchy of command in which each office is supervised by a single higher office.[4] Both the compensation and the authority of the officeholder derive from the performance of official duties, and not from other activities or personal characteristics. Officeholders devote their full time to their jobs, are selected on the basis of knowledge and competence, and work within constraints imposed by formal rules. Weber argued that

4. Max Weber, *Bureaucracy*, *in* THE SOCIOLOGY OF ORGANIZATIONS: BASIC STUDIES 7, 7–36 (Oscar Grusky & George A. Miller eds., 2d ed. 1981).

bureaucracy is technically superior to any other form of organization, including patrimonial and collegial forms based on personal status or relationships. In bureaucratic administration, "[p]recision, speed, unambiguity, [and] knowledge of the files ... are raised to the optimum point."[5] Moreover, despite the costs of hiring specialized personnel, bureaucracy is less costly than other structures because it avoids delays, incompetence, and friction among competing interests.[6]

Since Weber wrote, organizational scholars have concluded that the costs and benefits of bureaucracy vary with the characteristics of organizations and their environments; thus, bureaucracy may be optimal under some circumstances but not others. Two important contingency factors are the extent to which an organization's work is technical or routine (rather than calling for complex reasoning and judgment) and the organization's size.[7] Increasingly, law firm work and size are changing in ways that should favor the adoption of bureaucratic structures, at least at certain levels or in certain segments of firms.[8] Several factors make it increasingly costly for law firms to avoid a fixed division of labor based on special expertise. Tasks that are not strictly legal in nature, such as firm management, marketing, and human resources, are becoming increasingly complex and time-consuming. Within legal practice itself, the sheer amount of law is growing.[9] More and more of the law governing the activities of business clients consists of detailed regulations that call for technical

5. *Id.* at 19.

6. *Id.* at 20.

7. *See, e.g.*, Peter M. Blau, *A Formal Theory of Differentiation in Organizations*, 35 AM. SOC. REV. 201, 201–18 (1970) (arguing that increasing organizational size generates organizational differentiation, based on analysis of data on government agencies); Jerald Hage & Michael Aiken, *Routine Technology, Social Structure, and Organizational Goals*, 14 ADMIN. SCI. Q. 366, 370–73 (1969) (finding that the routineness of work is associated with centralization and formalization in social service organizations); Charles Perrow, *A Framework for the Comparative Analysis of Organizations*, 32 AM. SOC. REV. 194 *passim* (1967) (theorizing that the variability and analyzability of work tasks determine organizational structure).

8. *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 49–50, 77–87 (1991) (describing firms' weakening ties to clients and rapid growth); MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 6–7, 31 (1994) (describing law firms' increasing emphasis on financial success); ROBERT NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 57–59 (1988) (describing firms' increasingly competitive business environment); Elizabeth Gorman, *Moving Away from "Up or Out": Determinants of Permanent Employment in Law Firms*, 33 LAW & SOC'Y REV. 637, 639–42 (1999) (describing changes in law firms' work, client relationships, and culture).

9. *See* GALANTER & PALAY, *supra* note 8, at 41–42 (describing the dramatic increase in regulations and court and agency decisions).

expertise rather than generalized analytical skill or legal judgment. Corporate clients, who typically maintain in-house legal staffs, now turn to firms primarily for matters that call for highly specialized skills.[10] While the division of labor is growing finer, increasing firm size—now up to thousands of lawyers—is making it more and more difficult to coordinate the work of specialized lawyers through personal ties.

As the rational perspective would predict, law firms are moving toward increased bureaucratization.[11] Overall, roles are becoming more specialized by type of task, and a clearer hierarchy of authority is developing.[12] Compensation is increasingly tied to performance, firms are more willing to fill jobs from outside the firm based on skill, and firm work is increasingly governed by standard procedures and rules. The spread of firm counsel positions can be seen as part of this trend. Of course, as Professor Chambliss points out, the bureaucratization of the firm counsel role is not complete. Many firm counsel perform the role on a part-time basis while they maintain an outside practice; many come from the partnership ranks and have long-standing personal loyalties to the firm and other partners; and many feel that their authority stems from their outside practice or their personal ties, rather than from their positional authority as firm counsel.[13] Still, the firm counsel role has a fixed "jurisdiction" limited to matters involving the firm. It is subject to the hierarchical authority of firm management. As time passes, it is increasingly marked by full-time work, direct compensation, outside hiring, and formal rules.

Is efficiency the reason why firms are establishing bureaucratic firm counsel positions? It might be possible to test the rational explanation by examining whether the use of firm counsel varies with firms' mix of practice areas. If work on behalf of a firm calls for

10. *See* GLENDON, *supra* note 8, at 34 (stating that corporate clients turn to outside firms primarily for specialized expertise); ANTHONY KRONMAN, THE LOST LAWYER: THE FAILING IDEALS OF THE LEGAL PROFESSION 276, 284 (1993) (same); NELSON, *supra* note 8, at 61 (describing corporations' increasing reliance on in-house legal departments).

11. *E.g.*, GALANTER & PALAY, *supra* note 8, at 48–49 (discussing large law firms' tendency toward bureaucratic organization and management); NELSON, *supra* note 8, at 147–50 (same); Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, GEO. J. LEGAL ETHICS 335, 347 (2003) (noting a general trend toward the centralization and specialization of law firm management).

12. One aspect of this evolution toward specialized roles is firms' increasing use of permanent non-partnership-track positions, which often focus on narrow or technical areas of law. *See* Gorman, *supra* note 8, at 637.

13. Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515, 1549–50, 1555 (2006).

expertise different from that of most firm partners, assigning firm work to existing partners on a piecemeal basis is more costly.[14] Although all firm counsel deal with matters of professional responsibility and legal malpractice, they also often handle issues in areas that are not unique to law firms, such as employment, insurance, or supplier contracts. Firms that handle such matters as part of their client practices should be less likely to establish a firm counsel position than those that do not—boutique firms specializing in intellectual property or environmental law, for example—because they can efficiently meet the firm's own legal needs through reliance on firm lawyers who practice in those areas.

II. THE INSTITUTIONAL EXPLANATION: APPLYING A LEGITIMIZED TEMPLATE

An alternative explanation for the emergence of the firm counsel position is that law firms are imitating a practice that has become institutionalized among business corporations. Organizational structures or practices become institutionalized when they are taken for granted as the way things are done by a certain type of organization.[15] Institutionalized structures have two hallmarks. First, people find it difficult to imagine another way of doing things. Second, if they *can* imagine another way, it seems suspect and not what a legitimate organization of the relevant type would do. Law schools, for example, are full of institutionalized structures and practices.[16] Consider how nearly uniform the structure and curriculum of law schools are across the United States, and how little they have changed over the last several decades. It requires real mental effort to imagine how a law school could be different. To the extent that any law school implemented major changes that might be efficient—for example, shortening the program of study to two years—that law school would likely be seen as illegitimate.

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14. One legal recruiter appeared to recognize this point, saying that firms were likely to establish firm counsel jobs when they realized "that you can't fill your own teeth. . . . It's better to get somebody whose full-time job it is to worry about cavities." Jones, *supra* note 1, at 17.

15. *See* Paul J. DiMaggio & Walter W. Powell, *Introduction* to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 1–40 (Walter W. Powell & Paul J. DiMaggio eds., 1991); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 340–63 (1977).

16. Educational institutions in general make extensive use of institutionalized practices. *See* Meyer & Rowan, *supra* note 14, at 354; Brian Rowan, *Organizational Structure and the Institutional Environment: The Case of Public Schools*, 27 ADMIN. SCI. Q. 259, 260 (1982).

According to institutional theorists, institutionalized structures are most likely to emerge and remain in place in situations where there are no clear criteria for evaluating the effectiveness of different possible organizational structures, and thus no rational way of deciding between them.[17] Typically, an institutionalized structure begins as an innovation introduced by a small number of organizations of a particular type or in a particular industry. The innovation is usually intended as a rational effort to gain an advantage or solve a problem. If the first-mover organizations do not go out of business and their innovation has appeal, other similar organizations try it. The more organizations adopt the innovation, the more legitimacy it gains. Eventually, it becomes taken for granted as the thing to do, and organizations adopt it regardless of whether or not it appears to serve any rational purpose for them.[18] Organizations engage in what DiMaggio and Powell call "mimetic isomorphism"—they unthinkingly imitate what everyone else seems to be doing.[19] Once a structure has become institutionalized in one industry or type of organization, it can jump to another. People are cognitively capable of creating a mental template of the structure, abstracting it from its original setting, and transposing it in a new one.[20] The structure can then become institutionalized in the new context as well.

This model seems to fit the spread of firm counsel positions. In-house counsel positions have been common among large business corporations for some thirty to forty years, and are clearly institutionalized in that setting.[21] As large law firms have grown in

17. *See* Meyer & Rowan, *supra* note 14, at 355–59.

18. For example, empirical research has shown that during the twentieth century cities initially adopted civil service reform in response to local needs, but later adopters did so regardless of local characteristics. Pamela S. Tolbert & Lynn G. Zucker, *Institutional Sources of Change in the Formal Structure of Organizations: The Diffusion of Civil Service Reform, 1880–1935*, 28 ADMIN. SCI. Q. 22, 33–35 (1983). Other research has shown that corporations' decisions to adopt multidivisional structures were influenced by the rate of adoption by other firms in their industries. Neil Fligstein, *The Spread of the Multidivisional Form Among Large Firms, 1919–1979*, 50 AM. SOC. REV. 377, 387–88 (1985).

19. Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality*, 48 AM. SOC. REV. 147, 151–52 (1983).

20. *See* William H. Sewell, Jr., *A Theory of Structure: Duality, Agency, and Transformation*, 98 AM. J. SOC. 1, 17–18 (1992).

21. From the 1960s through the 1980s, corporate legal staffs grew rapidly. *See* EVE SPANGLER, LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK 70–106 (1986); Nick Gallucio, *The Rise of the Company Lawyer*, FORBES, Sept. 18, 1978, at 168, 168. In most large corporations, in-house lawyers have long assumed the function of general counsel, while outside firms increasingly focus on the provision of specialized services on a

size and scope, and as the professional culture that prevailed in the middle of the twentieth century has broken down, firms have increasingly come to think of themselves as business organizations.[22] Templates for the structure of a business organization are readily available to law firms in the corporate clients they serve. Reports in the legal press suggest that firms have deliberately imitated corporate structural models.[23] As firm counsel positions become more legitimate and institutionalized, it may become the case that any firm that wants to be seen as a serious player will have to have one. If institutional processes are indeed operating, we can expect that over time the characteristics of the firm counsel role will become increasingly standardized across law firms and will increasingly coalesce around the corporate model.

III. THE CULTURAL EXPLANATION: CHANGING CONCEPTIONS OF PROFESSIONAL ETHICS

Both the rational and institutional explanations for the spread of firm counsel positions largely accept the premise that firms need legal services, and focus on explaining why firms adopt a particular structure—the firm counsel position—to perform that function. A third approach—which is compatible with the other two—focuses on the changes in firms' cultural environments that have led them to feel a need for legal services in the first place. In this connection, it is important that most firm counsel spend much of their time on matters relating to the professional conduct of firm attorneys.[24] It is not immediately obvious that these issues create a need for legal services at all, whether structured in the form of a firm counsel position or otherwise. Thus, an underlying cause of the emergence and spread of firm counsel positions is a change in the legal profession's culturally

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case-by-case basis. *See* GALANTER & PALAY, *supra* note 8, at 49–50; SPANGLER, *supra*, at 100; Abram Chayes & Antonia Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277–78 (1985); Robert Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*, 1981 AM. B. FOUND. RES. J. 95, 130. The role of in-house counsel has continued to grow in importance as the law has become an increasingly salient feature of the business environment. *See* Robert Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 459 (2000).

22. *See* GALANTER & PALAY, *supra* note 8, at 68; GLENDON, *supra* note 8, at 6–7, 31; KRONMAN, *supra* note 10, at 291.

23. For example, the *Legal Intelligencer* argued that "as larger firms move toward a corporate business model, specialization becomes more prominent. If firms have chief marketing, finance and operating officers, why not have a chief legal officer?" Blumenthal, *supra* note 1.

24. *See supra* note 1.

shared understanding of the regulation of professional conduct. We might call this a *cultural* explanation.[25]

In the classic model of the professions, the culture of the professional community is itself the principal means of regulation of professional conduct.[26] Shared values and corresponding norms of behavior develop and are sustained informally through interaction and consensus. Although the details of these norms vary across professions, their substance focuses on restraining professionals from taking advantage of their specialized knowledge to the detriment of individuals who lack that knowledge and thus cannot easily evaluate a professional's conduct. Professional norms especially emphasize the protection of clients, who are necessarily placed in a position of dependence on the professional and must trust that professional not to abuse his or her power.[27]

Individual professionals are brought into conformity with this culture through two mechanisms: socialization and peer control. Through socialization early in their careers, professionals internalize their profession's values and norms.[28] First, professionals develop a conception of what "most people" in the profession think—an image of the "generalized other" in the professional community—that operates as a kind of internal police and constrains their behavior. Second, because people generally minimize psychological dissonance by converting constraints into preferences, most professionals come to endorse the dominant values and norms. Professionals then reward or sanction their own behavior with feelings of self-approval or self-disapproval and correspondingly high or low self-esteem. Peer control operates as a kind of back-up mechanism. When other members of the professional community discover that one of their

25. Of course, the institutional explanation is also a cultural explanation, but one that is focused more narrowly on a particular institutionalized practice.

26. *See* William J. Goode, *Community Within a Community: The Professions*, 22 AM. SOC. REV. 194, 196–98 (1957) (arguing that the larger society allows professional autonomy because professional communities undertake to socialize and control their members).

27. Thus, according to the American Medical Association, one of the central principles of medical ethics holds that "[a] physician shall, while caring for a patient, regard responsibility to the patient as paramount." AM. MED. ASS'N, PRINCIPLES OF MEDICAL ETHICS, Principle VIII (2001), *available at* http://www.ama-assn.org/ama/pub/category/2512.html. In the legal profession, the first and largest section of the American Bar Association's Model Rules of Professional Conduct deals with the lawyer-client relationship. MODEL RULES OF PROF'L CONDUCT R. 1.1–.18 (2003).

28. Goode, *supra* note 26, at 196 (discussing processes of socialization); W. Richard Scott, *Professionals in Bureaucracies—Areas of Conflict*, *in* PROFESSIONALIZATION 265, 265–67 (Howard Vollmer & Donald Mills eds., 1966) (contrasting professional self-control with external bureaucratic control).

peers has violated the community's norms of professional conduct, they apply the social sanctions of disapproval and ostracism. In practice, however, peer control is often quite weak. Peer control itself runs counter to one of the central values of any profession—professional autonomy. As a result, professionals tend to resist efforts to establish structures for systematically observing or punishing improper behavior.[29] Moreover, peer control depends upon effective socialization. Social sanctions are only effective for individuals who are sufficiently integrated into their professional communities to care about what their peers think of them.[30] Thus, the regulation of professional conduct occurs primarily through *self-regulation* by individual professionals.

This classic model of individual self-control, backed up by peer control, is what we traditionally mean by "professional ethics." The very term "ethics" calls to mind the idea of *internal* standards of proper and moral behavior that individuals apply to themselves, rewarding themselves with an internal sense of honor. However, the fit between the classic model of professional self-control and reality has been worsening across all the professions, including law, for some time.[31] There are many reasons for this change, but perhaps the central factor is the gradual disintegration of well-defined, coherent professional communities that are able to sustain their own independent cultures.[32] Bar associations, like other professional associations, have responded by elaborating more and more extensive formal codes of ethics.[33] In addition, government regulation of lawyers is growing in a piecemeal fashion ancillary to regulation of lawyers' clients.[34] As a result, the meaning of the term "ethics" for lawyers has gradually shifted from an emphasis on internally held morality to an emphasis on externally imposed rules.[35]

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29. *See* Eliot Freidson & Buford Rhea, *Processes of Control in a Company of Equals*, 11 SOC. PROBS. 119, 124–29 (1963) (analyzing and interpreting evidence of weak peer control among physicians).

30. *See id.* at 129.

31. *See* Eliot Freidson, *The Changing Nature of Professional Control*, 10 ANN. REV. SOC. 1, 3 (1984).

32. Law firms' imitation of institutionalized corporate structures is one example of the legal profession's current cultural permeability.

33. *See* Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1756–57 (2005); Freidson, *supra* note 31, at 13–19.

34. Chambliss, *supra* note 33, at 1757.

35. *See* Mark Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 842–43 (1998). The two conceptualizations of ethics—as internal virtue and as external rules—are not inherently incompatible, and can, in theory, exist side by side. However, the social supports for the

This shift in the conceptualization of ethics has profound implications for law firms' perception of a need for legal services. If "ethics" denotes internal ideals toward which each lawyer should strive, then ethical issues do not create a need for *legal* counsel. What law firms might need, in that case, is the equivalent of a chaplain—someone to provide advice on murky issues of right and wrong and coaching in how to resist temptations to behave unethically. But if ethics are externally imposed requirements that carry, at least potentially, externally imposed penalties for their violation, they have become analogous to other legal requirements. The lawyer's concern then shifts from trying to be virtuous to trying to avoid liability. In this context, ethical issues clearly do create a need for legal advice. Without this shift in the nature and meaning of professional ethics, the question of how firms should *structure* the provision of legal advice—by establishing firm counsel positions or otherwise—probably would not arise.

IV. FROM ETHICS TO DISCLOSURE?

All three of the theories discussed above lead to the prediction that firm in-house general counsel positions are likely to become increasingly common. The rational view and the institutional view suggest that firm counsel positions will increasingly mirror the bureaucratic corporate model. The institutional perspective also suggests that these positions will become increasingly standardized across large firms, regardless of their particular characteristics. The emergence of firm counsel and the attendant shift from internalized to externally-imposed professional ethics raise another issue, however. If lawyers are no longer concerned with meeting internalized moral expectations, and if firm counsel are primarily concerned with ensuring that their firms avoid liability, who, if anyone, will restrain opportunistic behavior by large firms and their lawyers? Although ethical codes have been formalized and elaborated, their actual enforcement is relatively infrequent. When it does happen, it is usually directed toward sole and small-firm practitioners with a retail clientele, not toward the larger firms that are more likely to employ in-house firm counsel.[36]

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first understanding have largely faded away, and its consequent weakening has spurred the development of the second.

36. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 6–7 (1991).

In the case of large firms with corporate clients, it seems likely that clients themselves will increasingly control lawyers' conduct through the discipline of the market. In the classic professional model, codes of ethics were largely intended to level the playing field between clients and lawyers by preventing lawyers from unfairly using their specialized knowledge to their own advantage at clients' expense. That made sense when most clients were individuals or small businesses. Today's clients are much more sophisticated. They are national or global corporations with extensive experience in complex transactions and advanced capabilities to evaluate risk. Even more important, with the advent and growth of in-house corporate counsel staffs, the individuals involved in purchasing outside legal services are generally lawyers themselves. Because corporate clients have more or less the same knowledge that lawyers have, they can monitor and evaluate the legal services they receive. Essentially, they can protect themselves.

That is, they can protect themselves as long as they receive adequate information. It is possible, then, that the segment of the bar that serves corporate clients will find itself under pressure to shift from a logic of self-control through professional ethics to a logic of enabling clients to make their own decisions based on the disclosure of relevant information. Under a disclosure regime, law firms would presumably be required to provide specific information concerning their policies, practices, and past performance to potential clients and regulating bodies. Areas covered could conceivably include, among other things, time billing practices and fee calculation, past representations creating a potential for conflict of interest, and past success rate in litigation.

This alternative logic is not new. A regime of disclosure, rather than a regime of professional ethics, currently governs finance professionals such as securities dealers and investment advisors. Thus, the web site for the National Association of Securities Dealers ("NASD") announces, "We believe that the most potent form of investor protection is investor education."[37] In response to concerns that hedge fund managers may be fleecing investors, the Securities and Exchange Commission has implemented additional disclosure requirements, rather than disciplining fund managers for unprofessional conduct.[38] Disclosure requirements can be imposed by

37. Nat'l Ass'n of Securities Dealers, http://www.nasd.com (last visited Jan. 6, 2006).

38. *See* David F. Swensen, *Invest at Your Own Risk*, N.Y. TIMES, Oct. 19, 2005, at A21. Interestingly, although Swensen feels that disclosure requirements are inadequate to protect most investors, he does not advocate the development of a system of professional

professional associations on their members, as they are by the NASD, as well as by government agencies. Nevertheless, under the logic of disclosure it is clients, not professionals, who ultimately evaluate professionals' performance.[39]

A disclosure regime would necessarily create responsibilities at the firm level, rather than at the level of the individual lawyer. Firms, not individual lawyers, would need to compile the relevant information and present it to its designated recipients. Firms would therefore need to establish ongoing firm-wide systems for collecting information. Although such systems might well come under the ultimate supervision of the firm counsel, they would likely be maintained on a day-to-day basis by nonlawyer compliance specialists. Thus, a disclosure regime would bring about the development of a firm "infrastructure"—not exactly the "ethical infrastructure" that Professor Chambliss and others have called for,[40] but still an infrastructure that might be equally—or more—effective at protecting clients.[41]

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ethics for hedge fund managers. *Id.* Instead, he argues that only the most savvy institutional investors should be allowed to invest in hedge funds. *Id.*

39. Of course, disclosure requirements are not incompatible with codes of ethics. In a world in which clients were empowered to monitor and assess their lawyers' conduct, however, the need for such codes would be reduced.

40. Chambliss & Wilkins, *supra* note 11, at 342; Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 716 (2002); Schneyer, *supra* note 36, at 17–20, 23.

41. A disclosure regime would presumably be less relevant for the protection of parties other than clients. Such parties do not stand in a relationship of trust with a lawyer, however, and a lawyer's conduct with respect to them is likely to be governed by the same laws that apply to all persons (rules barring fraudulent conduct or insider trading, for example).