THE ETHICAL INFRASTRUCTURE OF LEGAL PRACTICE IN LARGER LAW FIRMS: VALUES, POLICY AND BEHAVIOUR

CHRISTINE PARKER*, ADRIAN EVANS**, LINDA HALLER***, SUZANNE LE MIRE****, AND REID MORTENSEN*****

ABSTRACT

This paper examines the impact of the cultures and organisational structures of large law firms on individual lawyers' ethics. The paper suggests that large law firms in Australia should consciously design and implement 'ethical infrastructures' to both counteract pressures for misbehaviour and positively promote ethical behaviour and discussion. The paper goes on to explain what implementing ethical infrastructures in law firms could and should mean by reference to what Australian law firms are already doing and US innovations in this area. Finally, the paper warns that the 'ethical infrastructure' of a firm should not be seen merely as the formal ethics policies explicitly enunciated by management. Formal and legalistic ethical infrastructures that fail to support or encourage the development of individual lawyers' awareness of their own ethical values and ethical judgment in practice will be useless.

I INTRODUCTION

Lawyers often think about their own ethical behaviour as a matter of individual, independent judgment in the specific context of their own clients in their own situations.[1] Professional conduct law reinforces this assumption – it is

* ARC Australian Research Fellow, Melbourne Law School, University of Melbourne.
** Associate Professor, Faculty of Law, Monash University.
*** Senior Lecturer, Melbourne Law School, University of Melbourne.
**** Lecturer, School of Law, University of Adelaide.
***** Professor, School of Law, University of Southern Queensland.

1 For critiques of this assumption see Robert Gordon, 'The Independence of Lawyers' (1988) 68 *Boston University Law Review* 1; David B Wilkins, 'Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics' in Austin Sarat (ed), *Everyday Practices and Trouble Cases* (1998).

generally only individual legal practitioners who can be disciplined or otherwise held responsible for misconduct.[2]

Lawyers in Australia and around the world, however, increasingly work in organisations – large law firms, in-house corporate legal departments and government departments and agencies.[3] It is these organisational settings where much of the most socially and economically significant legal work takes place. Moreover, even within the law firm, much or most legal work is not done by individual lawyers but by teams of lawyers working under the leadership of one or more partners.[4] This means that ethical behaviour is no longer only an individual matter. As this paper shows, individual decisions and behaviours are likely to be affected by a range of factors at both the organisational and work team levels that either support or undermine ethical behaviour.

Since ethical behaviour in large law firms is influenced by the culture and organisational environment of the firm, it has been argued that law firms should consciously put in place 'ethical infrastructures' – formal and informal management policies, procedures and controls, work team cultures, and habits of

2 Cf Note, 'Collective Sanctions and Large Law Firm Discipline' (2005) 118 *Harvard Law Review* 2236; Ted Schneyer, 'Professional Discipline for Law Firms?' (1991) 77 *Cornell Law Review* 1 (arguing for the potential for discipline of firms and work teams as well as individual lawyers). But note that in two jurisdictions in the United States (New York and New Jersey) there are rules allowing for law firm discipline: Hal Lieberman et al, 'How Should We Regulate Large Law Firms? Is a Law Firm Disciplinary Rule the Answer?' (2002) 16 *Georgetown Journal of Legal Ethics* 203. There are also some situations where Australian law does recognise explicit or implicit obligations on law firms as firms. Since partners in firms have joint and several responsibilities for the actions of other partners and of employees, on rare occasions, regulators have sought the discipline of all of the partners for what seems to be the ethical failure of an employee: see, eg, *Legal Services Commissioner v Devenish* [2006] LPT 008. Liability can also attach to law practices for breaches of standards that, in effect, model the ethical commitments required of individual lawyers. These include, in particular, the liabilities imposed for tortious deceit, or for breach of trust or fiduciary duty. Further, a similar civil liability (through an indemnity or wasted costs order) can attach to the law practice as a whole for unethical conduct in the carriage of litigation: see The Hon Bill Pincus and Linda Haller, 'Wasted Costs Orders Against Lawyers in Australia' (2005) 79 *Australian Law Journal* 497. See also below n 78 and accompanying text. There are now situations where Australian law recognises forms of vicarious ethical responsibility. In incorporated legal practices and multi-disciplinary partnerships, one lawyer has the formal responsibility for the introduction, supervision and monitoring of the practice's ethical systems according to legislation: see *Model Bill (Model Provisions) – Model Laws Project* (2nd ed, 2006) ('*Model Laws*') ss 2.7.10, 2.7.40, and below nn 62 to 64. The failure of an ethical system by the misconduct of another lawyer can presumably therefore be attributed to a senior practitioner: see Christine Parker, 'Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible' (2004) 23 *University of Queensland Law Journal* 347, 372.

3 See, Note above n 2, 2336, 2339. In 2001–02 (the last year for which statistics are available) legal practices with 10 or more principals or partners in Australia employed 35.8 per cent (10 431) of the *practitioners* in private practice although they only made up only 1.2 per cent (91) of all *practices* in Australia: Australian Bureau of Statistics, *8667.0 Legal Practices Australia 2001-2002*, Canberra, (2003) 21.

4 See Kimberly Kirkland, 'Ethics in Large Law Firms: The Principle of Pragmatism' (2005) 35 *The University of Memphis Law Review* 631; 'Collective Sanctions' above n 2, 2336, 2339. See also Robert E Rosen, '"We're All Consultants Now": How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services' (2002) 44 *Arizona Law Review* 637.

interaction and practice that support and encourage ethical behaviour.[5] This paper examines whether large law firms in Australia should seek to design and implement ethical infrastructures.

The term 'ethical infrastructure' was originally coined in the United States to refer to policies and structures that support compliance with professional conduct rules.[6] In this paper we use a broader conception of ethical infrastructure that is concerned with positively promoting individual and corporate behaviours, structures and cultures that support the ethical values that lie behind the rules and laws that apply to lawyers. In our conception, law firm ethical infrastructures would likely be most effective where they ultimately aspire to equip and encourage each individual to develop and put into practice their own ethical values in dialogue with others in the firm, the profession and the broader community. As we argue in our conclusion, law firms with successful ethical infrastructures will need to understand ethics in broader terms than rule compliance.

The paper first briefly describes the ways in which the large law firm context can and does impact on ethical and unethical behaviour by individuals – making a prima facie case for conscious design of ethical infrastructures within law firms, and setting out the types of unethical behaviour that ethical infrastructures might be able to counteract.

Second, the paper explains what implementing ethical infrastructures in law firms could mean, and sets out some ways in which Australian law firms already implement ethical infrastructures. The paper goes on to make some suggestions (based mainly on United States research) about what elements of ethical infrastructure large Australian law firms should consider adopting, and how ethical infrastructures might best promote ethical behaviour beyond mere compliance with the strict terms of conduct rules and other legal requirements. Further research is needed in order to determine to what extent, and in what circumstances, different forms of ethical infrastructure in large law firms might promote ethical behaviour in the Australian context.

Third, the paper argues that the concept of ethical infrastructures for law firms has merit if, and only if, those infrastructures can interact with other countervailing pressures and management initiatives within law firms to support

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5 The term, 'ethical infrastructure' was coined by Ted Schneyer, 'A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms' (1998) 39 *South Texas Law Review* 245. See also Schneyer, above n 2. It was further developed by Elizabeth Chambliss and David B Wilkins, 'A New Framework for Law Firm Discipline' (2003) 16 *Georgetown Journal of Legal Ethics* 335; Elizabeth Chambliss and David B Wilkins, 'Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting' (2002) 30 *Hofstra Law Review* 691, 692 (defining 'ethical infrastructure' as 'organizational policies, procedures and incentives for promoting compliance with ethical rules').

6 The use of the term 'ethical infrastructure' in the references cited in n 5 has focused on formal policies and structures explicitly designed to ensure compliance with professional conduct rules. As explained here and below n 52 and accompanying text, this paper argues for a broader conception of ethical infrastructure that incorporates informal management policies and work cultures (not just formal management policies), and the promotion of ethical dialogue and values (not just compliance with professional conduct rules). For another author who uses this broader conception of 'ethical infrastructure' see Milton C Regan Jr, *Eat What You Kill: The Fall of a Wall Street Lawyer* (2004) 358–61.

ethical practice among work teams and individual lawyers. There is a danger that ethical infrastructure will simply amount to formal ethical structures that do not connect with informal work team cultures and individual lawyers' values in practice. The 'ethical infrastructure' of a firm should not be seen merely as the formal ethics policies explicitly enunciated by management. *All* management policies, priorities and initiatives – formal or informal, and explicitly stated or implicitly assumed – can either undermine or support ethical practice within a firm. Moreover, the lead partners, work cultures and 'taken-for-granted' practices in each work team within a large law firm will usually have a crucial influence on any individual lawyer's ability to identify ethical issues, resolve them satisfactorily and put their ethical judgment into practice. Large law firm ethical infrastructures that fail to connect with the diversity of work units within the firm will be of limited use.

II THE IMPACT OF THE LAW FIRM CONTEXT ON INDIVIDUAL LAWYERS' ETHICAL BEHAVIOUR

There has been a plethora of commentary and scholarship over the last 20 or 30 years exploring instances of illegal, unethical or, at least, questionable behaviour by commercial lawyers, and their clients with the help of the lawyers they retain. Although the main focus has been on US lawyers,[7] there have also been some well publicised examples of behaviour by Australian large law firm lawyers that commentators have labelled unethical.[8]

This questionable or unethical behaviour falls into two main categories. First, there are instances where lawyers and their firms allegedly breach their *ethical and legal obligations to their own clients* by acting despite conflicts of interest, or with dubious attempts at managing conflicts of interest.[9] Commentary, and judgments, have suggested that many larger law firms' policies for deciding whether to act in potential conflict situations and their use of information barriers for when they do so may be inadequate.[10] Other commentators have pointed to

7 For overviews of US research in this area see John M Conley and Scott Baker, 'Fall From Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street' (2005) 30 *Law & Social Inquiry* 783; Milton C Regan and Jeffrey D Bauman, *Legal Ethics and Corporate Practice* (2005). For further detail, see below nn 9 and 11.

8 See Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (2007) 212–42. For further detail, see below nn 9 to 13 and accompanying text.

9 For examples from the US see Regan, above n 6; cf Susan P Shapiro, *Tangled Loyalties: Conflict of Interest in Legal Practice* (2002). For Australia see Adrian Evans, 'The Business of Conflicts: Reflections on the IBA 2000 Debate Surrounding "Conflicts of Interest"' (2000) 74(10) *Law Institute Journal* 23; Parker and Evans, above n 8, 161–6, 172–6. See also Richard Tur, 'Confidentiality and Accountability' (1992) 1 *Griffith Law Review* 73.

10 See Adrian Evans, 'A Mutuality of Interest' (2003) 77(7) *Law Institute Journal* 86; Steve Mark, 'Conflict of interests: A central issue for legal practice' (2003) 30 *Without Prejudice* 3. Cf Law Society of New South Wales in consultation with Law Institute of Victoria, *Information Barrier Guidelines* (2006). On information barriers see *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222; Andrew Mitchell, 'Chinese Walls in Brunei: *Prince Jefri Bolkiah v KPMG*' (1999) 22(1) *University of New South Wales Law Journal* 243; Lee Aitkin, '"Chinese Walls", Fiduciary Duties and Intra-Firm Conflicts – a Pan-Australian Conspectus' (2000) 19 *Australian Bar Review* 116.

widespread habits of overcharging and over-servicing clients in larger law firms.[11]

Second, there are situations in which lawyers may have breached legal and ethical obligations *to the courts, the fair operation of the legal system and the public* by assisting their clients in the commission or cover-up of illegal or unethical behaviour,[12] and the design of 'creative compliance' strategies for avoiding and evading legal obligations.[13]

In some cases lawyers have arguably breached ethical obligations in both categories because they have prioritised the interests of corporate management (the individuals who usually make the decisions about hiring and firing external

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11 For the US see Lisa G Lerman, 'Gross Profits? Questions About Lawyer Billing Practices' (1994) 22 *Hofstra Law Review* 645; Lisa G Lerman, 'A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation' (2006) 34 *Hofstra Law Review* 847. For Australia see Legal Fees Review Panel, *Discussion Paper: Lawyer's Costs and the Time Billing* (2006); Parker and Evans, above n 8, 195–9, 209–10; Adam d'Andreti, 'Forum: Stopping the Clock? The Future of the Billable Hour – Foreword' (2004) 27 *University of New South Wales Law Journal* 198, 198–249. The 2005 ABC drama *Hell Has Harbour Views* (30 January 2005, 8:30pm) based on Richard Beasley's novel of the same name (2001) includes much dark comedy on the effects of some law firm approaches to fee generation, referring in one segment to a grasping associate whose progress was assured because he had billed 25 hours in one (24 hour) day.

12 For the US see Susan P Koniak, 'Corporate Fraud: See, Lawyers' (2003) 26 *Harvard Journal of Law and Public Policy* 195; Milton C Regan, 'Teaching Enron' (2005) 74 *Fordham Law Review* 1139; William H Simon, 'Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct' (2005) 22 *Yale Journal on Regulation* 1; Eli Wald, 'Lawyers and Corporate Scandals' (2004) 7(1) *Legal Ethics* 54. See also the fictional accounts of lawyer criminality in various popular movies that draw on general assumptions about the culture of large law firms: *Michael Clayton* (Warner Bros, 2007) and *The Pelican Brief* (Warner Bros, 1993). A recent example in Australia of conduct that may fall into this category is *McCabe v British American Tobacco Australia Ltd* [2002] VSC 73 where lawyers allegedly provided advice about destroying documents relevant for tobacco litigation and then assisted in covering up the fact they had been destroyed, and also used various tactics to drag out proceedings brought by a plaintiff who was dying of cancer: Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies: Discussion Paper 73* (2007) 395–6; Camille Cameron, 'Hired Guns and Smoking Guns: *McCabe v British American Tobacco Australia Ltd*' (2002) 25 *University of New South Wales Law Journal* 768. Another alleged example is the way that lawyers for the Australian Wheat Board claimed privilege over a range of documents that were later found not to be privileged in an attempt to avoid disclosing the full extent of illegal conduct to an official inquiry: Australian Law Reform Commission, *ALRC Report 107: Privilege in Perspective: Client Legal Privilege in Federal Investigations* (2008) 490–1; Barbara R Mescher, 'The Business of Commercial Legal Advice and the Ethical Implications for Lawyers and Their Clients' (2007) *Journal of Business Ethics*; Parker and Evans, above n 8, 221–2.

13 Doreen McBarnet, 'Legal Creativity: Law, Capital and Legal Avoidance' in Maureen Cain and Christine B Harrington (eds), *Lawyers in a Postmodern World: Translation and Transgression* (1994) 73; Christopher J Whelan, 'Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice' (2007) 54 *Buffalo Law Review* 1067. A recent Australian example that might fall into this category is the James Hardie case where in-house and law firm lawyers were involved in a scheme to move the James Hardie company offshore and into a separate legal entity in order to avoid paying out any more than a set amount of damages to asbestos victims of its former subsidiary companies: Suzanne Le Mire, 'The Case Study: James Hardie and its Implications for the Teaching of Ethics' in Bronwyn Naylor and Ross Hyams (eds), *Innovation in Clinical Legal Education: Educating Lawyers for the Future* (2007) 25; Parker and Evans, above n 8, 236–41. See also Gideon Haigh, *Asbestos House: The Secret History of James Hardie Industries* (2006). Australian lawyers have assisted their clients to 'creatively' comply with their tax obligations: see John Braithwaite, *Markets in Vice: Markets in Virtue* (2005) 6, 37, 43, 48, 110–1. See also Doreen McBarnet, 'When Compliance is not the Solution but the Problem: From Changes in Law to Changes in Attitude' in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (2003) 229.

lawyers) over both their duty to the court and the law and their duty to their true client (that is, the corporation as a whole).[14]

It would be remarkable if Australian large law firm lawyers never behaved unethically. Although most probably behave ethically all or most of the time, there will always be some people who will do the wrong thing out of greed, laziness, or ignorance. This paper concerns the ways in which law firm cultures and structures can not only precipitate, but also needlessly amplify unethical behaviour.[15] There is no doubt that individual lawyers' values, skills and capacity for ethical discernment are very important in influencing ethical behaviour.[16] However, law firms and work teams structure and frame individual lawyers' ethical decisions and behaviours in three main ways:

(a) by limiting individual lawyers' capacity to 'see' ethical issues;

(b) by constraining or creating options and opportunities for individual lawyers to make ethical judgments and act on them; and

(c) by creating internal incentives, or magnifying external ones, that pressure individual lawyers to choose certain ethical behaviours.

We explain and give some examples of each of these below.

The effect that organisational structure has on the actions of individuals in business and governmental organisations has long been recognised by sociologists,[17] psychologists,[18] and management scholars.[19] Research demonstrates that bureaucratic corporate structures influence the ethical vision of

14 Le Mire, above n 13 (arguing in the context of the James Hardie case that the lawyers acted in accordance with management imperatives and that these were ultimately not in the client's best interests). See also Parker and Evans, above n 8, 228–9; William H Simon, 'Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict' (2003) 91(1) *California Law Review* 57.

15 Michelle M Mello and David M Studdert, 'Deconstructing Negligence: The Role of Individual and System Factors in Causing Medical Injuries' (2008) 96 *Georgetown Law Journal* 599, 610–3.

16 Josephine Palermo and Adrian Evans, 'Relationships Between Personal Values and Reported Behavior on Ethical Scenarios for Law Students' (2007) 25 *Behavioural Sciences and the Law* 121.

17 See, eg, Zygmunt Bauman, *Modernity and the Holocaust* (1989); Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002) 32–7; Diane Vaughan, 'Rational Choice, Situated Action, and the Social Control of Organizations' (1998) 32 *Law & Society Review* 23.

18 Albert Bandura, Gian-Vittorio Caprara and Laszlo Zsolnai, 'Corporate Transgressions Through Moral Disengagement' (2000) 1 *Journal of Human Values* 57; Kath Hall, 'The Psychology of Corporate Dishonesty' (2006) 19 *Australian Journal of Corporate Law* 268.

19 M David Ermann and Richard J Lundman (eds), *Corporate and Governmental Deviance: Problems of Organizational Behavior in Contemporary Society* (5th ed, 1996); Robert Jackall, *Moral Mazes: The World of Corporate Managers* (1988).

those within them. With the rise of the large law firm these insights are being applied to the effect of law firm context on lawyers.[20] Rhode notes that

> the attorney often is not an independent moral agent but an employee with circumscribed responsibility, organizational loyalty, and attenuated client contact ... Under such circumstances, professional ideals that presuppose personal autonomy and public responsibilities may prove difficult to reconcile with the internal dynamics of employing institutions.[21]

In the remainder of this part of the paper we outline what this research is telling us about how law firm context can and sometimes does influence the ethical behaviour of lawyers for the worse. In the second part of the paper we critically examine how law firms could and should use ethical infrastructure to 'design out' structural and cultural incentives for unethical behaviour, and promote ethical dialogue, behaviour and outcomes.

A Capacity to See Ethical Issues

The fact that within a large law firm there are many lawyers in different cities, sections and teams working for different clients means that no one individual lawyer in the firm will necessarily have all the information to identify situations where they might be about to behave unethically. They will not necessarily have the capacity to 'see' ethical issues as they arise.

A simple example is compliance with rules prohibiting acting for a client where there is a conflict of interest. Within a large, multi-state law firm no one individual lawyer will personally know whether any other lawyer in their firm is acting (or has acted) for a client in a related matter adverse to the proposed client, or whether any other lawyer in the firm has any other interest that might conflict with the duty to the new client.[22] For this reason most law firms now have sophisticated computerised conflicts checking systems to act as an organisational memory so that lawyers can begin to 'see' (by checking the system) whether taking on a new client may create an ethical problem.

A more subtle ethical consequence of the large law firm context is that work for one client will often be shared out among a number of individuals or even

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20 See, eg, Sharon Dolovich, 'Ethical Lawyering and the Possibility of Integrity' (2002) 70 *Fordham Law Review* 1629, 1670 (application of psychology to lawyering); Kim Economides and Majella O'Leary, 'The Moral of the Story: Toward an Understanding of Ethics in Organisations and Legal Practice' (2007) 10(1) *Legal Ethics* 5 (applying organisation and management studies to ethics in law firms); Kirkland, above n 4 (applying management research to ethics in law firms); David Luban, 'Integrity: Its Causes and Cures' (2003) 72 *Fordham Law Review* 279 (applying psychology to lawyer ethics); Milton C Regan, 'Risky Business' (2006) 94 *The Georgetown Law Journal* 1957 (applying management research on compliance systems to law firms); Tanina Rostain, 'Waking Up from Uneasy Dreams: Professional Context, Discretionary Judgment and The Practice of Justice' (1998) 51 *Stanford Law Review* 955, 964–6 (applying sociological research to ethics in law firms).

21 Deborah L Rhode, 'Ethical Perspectives on Legal Practice' (1984) 37 *Stanford Law Review* 589, 590–1.

22 Since, if one lawyer in a firm is affected by a conflict of interest then all lawyers in that firm are affected unless, in some circumstances at least, both clients give their fully informed consent and an adequate information barrier is put in place. See Gino Evan Dal Pont, *Lawyers' Professional Responsibility* (3rd edition, 2005) 165–7; Sandro Goubran, 'Conflicts of Duty: The Perennial Lawyers' Tale – A Comparative Study of the Law in England and Australia' (2006) 30 *Melbourne University Law Review* 88, 137–42.

work teams. Since individual lawyers will tend to specialise only on small parts of work for a client, they may not be in a position to understand enough of the big picture to appreciate the ethical significance of their own work. For example, a junior lawyer asked to prepare one document that is part of a major transaction may never have met the client or been involved in strategy meetings. The junior lawyer may not therefore be in a position to find out that the document they are preparing is part of a scheme to shift assets from one corporate entity to another, and which is thereby defrauding creditors and employees.[23] When information barriers are in place and rely on little more than personal undertakings, more senior lawyers may forget that they are constrained, and junior lawyers do not always ask them first if they are permitted to do something.[24]

Finally, and most seriously, where people work well together in teams, as in many large law firms, they will tend to develop shared ways of seeing their work and the world. This can be an important part of what helps them work well together, but it can also be dysfunctional where shared norms and cultures make people 'blind' to alternative world views and degrade their sensitivity and empathy to a range of different perspectives, values and concerns.[25] This sensitivity is an important aspect of being able to identify ethical issues as they arise. Lawyers who spend all their time with the same colleagues and clients can begin to see only the interests and values of their clients as significant. This is problematic because, although lawyers' duties to their clients are very important, they are not lawyers' only ethical obligations. In some cases, individual lawyers have felt so strongly aligned with the client and the work team that they no longer identified the ethical problems with conduct that the general public considered an unethical breach of the lawyers' duty to the court, such as devising creative legal strategies to avoid the spirit and intent of the law.[26]

Lawyers can also get so used to 'the way we do things around here', and the values exhibited by a particular leader or group, that they do not even think of ways in which others might think that these habits are unethical. For example, a litigation team might develop shared ideas about the sort of aggressive tactics that it takes to look after good clients and attract new clients. The 'goodness' of using these tactics becomes an almost unspoken, and unquestionable aspect of the culture of that team that all lawyers in the team are socialised into accepting – without even seeing alternative ways of handling litigation, or considering alternative views on the ethics of what they do.[27] This has been labelled 'groupthink' – 'a mode of thinking that people engage in when they are deeply

23 For other examples and analysis of this type of problem see Robert E Rosen, 'Problem-Setting and Serving the Organizational Client: Legal Diagnosis and Professional Independence' (2001) 56 *University of Miami Law Review* 179.

24 *Asia Pacific Telecommunications Limited v Optus Networks Pty Limited* [2007] NSWSC 350.

25 See Dennis Gioia, 'Why I Didn't Recognise Pinto Fire Hazards: How Organisational Scripts Channel Managers' Thoughts and Actions' reprinted in Ermann and Lundman, above n 19, 139–57.

26 See Luban, above n 20; Parker and Evans, above n 8, 222–4.

27 See Robert L Nelson, 'The Discovery Process as a Circle of Blame: Institutional, Professional and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behaviour in Corporate Litigation' (1998) 67 *Fordham Law Review* 773, 778–80.

involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action'.[28]

The development of a strong work team culture may be particularly ethically problematic where a work team is dominated by an individual (such as a lead partner) who takes an ethically questionable approach, where work is done exclusively for one or two clients whose work raises particular ethical temptations (such as tobacco companies), or where a large part of team income is derived from one client so that it is difficult to resist client pressure.[29] There may be quite different ethical cultures within different work teams and some of these cultures may not reflect the ethical values that the firm as a whole would want to commit itself to.[30]

B Options and Opportunities for Ethical Judgment

Where individual lawyers do see an ethical issue in their work, the large law firm context may constrain their options and opportunities to exercise their own ethical judgment to resolve the issue in what they consider to be an ethical way.

A simple example is that the billing of clients will usually be handled by a separate administrative unit in a large law firm according to policies set by the whole partnership or senior management. The individual lawyers who actually do the work, and even in some cases the lead partner on the file, may have limited or no capacity to set their own charge out rates, to decide how many hours allocated on time sheets to client work should actually be billed to the client, or whether the matter should be costed by hourly billing at all.

This gives the individual lawyers, who do the legal work for each client, little capacity to make sure they comply with their legal obligations in relation to costing and billing work, or to incorporate their own ethical judgments about what should be billed to the client or not. For example, a junior lawyer who is asked to prepare documents for discovery has little capacity to argue that the client should not be billed for all of her or his time on that file even though she or he might realise that most of the documents were in fact irrelevant to the litigation and wasting time.[31] Beyond ensuring that they do not 'pad' the hours they record, individual lawyers have to rely on other staff who cost bills, and the firms' systems and policies under which they do so, to ensure that they fairly bill clients.

The fact that legal work for one client is often shared out among a number of lawyers can also make it difficult for any individual lawyer to take responsibility

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28 Irving L Janis, *Victims of Groupthink: a Psychological Study of Foreign-Policy Decisions and Fiascoes* (1972) 9.

29 See Peter Margulies, 'Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime' (2006) 58 *Rutgers Law Review* 939, 973 (arguing that Enron's outside lawyers had such a close relationship with their client that they were less able to resist client pressure and see issues objectively).

30 See Elizabeth Chambliss, 'The Nirvana Fallacy in Law Firm Regulation Debates' (2005) 33 *Fordham Urban law Journal* 119, 150.

31 For some examples from a fictionalised account of a young lawyer's time at a big US law firm, see Cameron Stracher, *Double Billing: A Young Lawyer's Tale of Greed, Sex, Lies, and the Pursuit of a Swivel Chair* (1998) 91–4.

for responding to the ethical issues raised by that work. Unlike the examples given in section IIA above, an individual lawyer might see the big picture and its ethical implications but not be in a strong position to do anything about it since they are just one of many lawyers working for the client. This can cause particular problems for more junior lawyers supervised by lead partners who take the main responsibility for communicating with clients. But it can also be a problem whenever there are a number of lawyers working for one client. For example, one lawyer might see an ethical problem with the course a client wants to take, and draft a letter pointing this out to the client. However, in the Australian large law firm context, such a letter will inevitably be scrutinised by a more senior lawyer, and have to be signed by a partner, or a senior associate with signing authority, before it can be sent to the client. This standard procedure does see correspondence initiated by a junior lawyer modified or not sent at all and (largely as an essential aspect of the firm's risk management) it is meant to do just that. If these more senior lawyers do not see the ethical issue as a problem, or disagree with the junior lawyer's concern, then the concern is not likely ever to be conveyed to the client. The lawyer's ability to act responsibly according to his or her own ethical judgment is thereby undermined or thwarted. There may or may not be good reasons in a given case why the junior lawyer's view is not given to the client. But, regardless, it does mean that he or she does not have the capacity to take individual responsibility for his or her work.[32]

Analyses of how things went wrong in cases of organisational ethics failures have concluded that sometimes the very fact that a number of individuals all work on different aspects of a project means that none of them feels it is their individual responsibility to raise ethical concerns about that project. Hence there may be a number of individuals who have knowledge of a particular ethical problem, and could do something to prevent it (eg, by expressing concerns to top management), but none do so because each feels it does not fall into their narrowly defined job description.[33] Again, this is a particular danger for lawyers who might often (incorrectly) see their only job as achieving targets for billable hours and meeting client objectives.[34]

Some studies in the field of organisational psychology also point to subordinates' capacity to inflict harm on another person when authority figures

32 It has been reported that one of the law firm lawyers for James Hardie did draft a letter setting out his concerns about the implications of the proposed strategy to 'separate' the parent company from its liability to asbestos victims in terms of whether it meant that they had earlier misled the court and the market. But while he was away on holiday, his colleagues revised the letter to take out his ethical concerns. Later, the same ethical concerns were expressed in community and media responses to the strategy. See Haigh, above n 13, 310–2.

33 Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (1998) 125–31 and generally on the 'problem of many hands'; Jeffrey S Slovak, 'The Ethics of Corporate Lawyers: A Sociological Approach' (1981) 6 *American Bar Foundation Research Journal* 753.

34 Slovak, above n 33.

demand obedience and the surrounding culture supports their demand for obedience.[35]

If there is no appropriate and powerful forum or person within the work team or firm where ethical queries can be raised and collectively resolved, then there is little capacity for individual lawyers working in teams and firms to choose to exercise ethical judgment. Indeed where a team works closely together on a day-to-day basis it can be very difficult for individuals to step outside of that shared culture and question the ethics of a particular practice or decision because the individual does not want to appear disloyal, 'rock the boat', or suffer the consequences of questioning the actions of those with whom they work.

C Incentives and Pressures on Ethical Behaviour

The third and final way in which law firms can contribute to unethical behaviour by individual lawyers is through firm structures and cultures that create or magnify incentives for lawyers to behave unethically. These incentives can encourage lawyers who identify an ethical issue, and are perfectly capable of making and acting on an appropriate ethical judgment, to choose to ignore the problem and not exercise ethical judgment at all, or to act against their own 'better' judgment and not put their judgment into action. As one researcher concluded after studying the prevalence and causes of unethical behaviour in litigation among large law firm lawyers in the US:

> Many of [the] incentive systems [that do operate in large law firms] seem to be actively working against peak ethicality. When large firm informants were asked to propose firm-level changes that would promote ethical practice, many of their suggestions involved abolishing counter-productive structures, not enhancing beneficial ones. Among the culprits: billing pressures (including the use of billable hours as an all purpose performance measure), competitive compensation, emphasis on rainmaking, and the favorable treatment of aggressiveness in evaluation … The general sense seemed to be that, despite official policy statements, most firms were designed to reward behavior that was at best unrelated to ethicality, and at worst destructive of it.[36]

Some of these incentives originate within the culture of the firm, while others also reflect the firm level response to the commercial pressures of contemporary legal practice.

Junior lawyers often only reach success within law firms via patronage networks – that is they need to obtain good and steady work from senior partners, and ultimately have opportunities to develop close relationships with clients, and attract new clients. This means that younger lawyers will have to fit in with the values of their patrons. Based on her in-depth interviews with young commercial lawyers in the US, Kirkland found that this has deeper ramifications for young lawyers' capacity to develop ethical judgment in the long term.[37] In large

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35 David J Luban, 'The Ethics of Wrongful Obedience' in Deborah L Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (2000) 94, 96–7 (referring to Stanley Milgram, *Obedience to Authority: An Experimental View* (1974)).

36 Mark C Suchman, 'Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation' (1998) 67 *Fordham Law Review* 837, 860.

37 Kirkland, above n 4.

bureaucratic law firms, junior lawyers get used to working in an environment where the relevant norms change frequently depending on who is their supervising partner on each matter and the lawyer-managers in the firm. They work on the basis that 'the appropriate norms to apply in a given situation are those of the people the lawyer is working for and with at the time'.[38] This encourages a morality characterised by 'organizational pragmatism rather than principled decision-making'.[39] This morality is shaped by the requirement for survival and success within the firm and the need to please patrons – including partners within the firm and the client's legal services managers outside the law firm. Moreover, the competitive nature of the 'tournament' for promotion to full partnership among junior lawyers and salaried partners can create even greater temptation to behave unethically to succeed, quite apart from whether senior lawyers in the firm approve of such behaviour.[40]

According to empirical research, the compensation culture for employed lawyers and the systems for sharing out the profits between partners are two of the biggest incentives for unethical behaviour in relation to overcharging, over-servicing and other breaches of obligations to clients.[41] Lawyers are financially rewarded almost solely on the basis of billable hours generated or clients attracted to the firm. Thus Corbin's analysis of her interviews with junior and senior lawyers in Queensland law firms 'shows that the graduates feel pressured by firm culture, but more specifically budgetary policies, which in their view limit their ability to provide a quality service to clients. More disturbingly, they object to their firms' use of budgeting targets as a performance measure for promotional purposes.'[42]

In 2005 Fortney published a study of large US firms' charging (billing) practices based on interviews and surveys with 'managing attorneys' and 4600 'supervised attorneys'.[43] Fortney hypothesised that a firm that imposed minimum billing targets would be likely to encourage a culture of overcharging, and 80 to 85 per cent of respondents confirmed that they worked in firms with minimum

38 Ibid 638.

39 Ibid 640. See also Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1, 13.

40 Marc Galanter and Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (1991).

41 See Susan Saab Fortney, 'Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements' (2000) 69 *UMKC Law Review* 239; Susan Saab Fortney, 'The Billable Hours Derby: Empirical Data on the Problems and Pressure Points' (2005) 33 *Fordham Urban Law Journal* 171 (discussed below at text accompanying notes 44 ff); Lisa G Lerman, 'Blue-Chip Billing: Regulation of Billing and Expense Fraud by Lawyers' (1999) 12 *Georgetown Journal of Legal Ethics* 205, 241, 266; Lerman 'A Double Standard for Lawyer Dishonesty' above n 11; William G Ross, 'Kicking the Unethical Billing Habit' (1998) 50 *Rutgers Law Rev*iew 2199; William G Ross, 'The Ethics of Hourly Billing by Attorneys' (1991) 44 *Rutgers Law Review* 1. Cf Herbert M Kritzer 'Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?' (2002) 80 *Texas Law Review* 1943.

42 Lillian Corbin, 'How "Firm" are Lawyers' Perceptions of Professionalism?' (2005) 8(2) *Legal Ethics* 265, 276–7. See also Matthew Coghlan, 'Young Lawyers Rebel Against Billable Hours', *Australian Financial Review* (Sydney), 4 August 2006, 1, 57.

43 Fortney, 'Soul for Sale' above n 41.

billing targets.[44] Survey analyses revealed that the average number of billable hours required by different law firms of their lawyers (and also the average number of hours actually billed) increased with firm size.[45] The larger the firm the higher the targets for billable hours they set for their employed lawyers, and the higher the number of hours those lawyers actually billed. Respondents were also clear that their prospects of both annual bonuses and promotion were directly linked to the extent to which they exceeded minimum billing targets.[46] One respondent described the competitive disadvantage for an ethical practitioner as follows:

> The 2000 billable hour requirement is an impossible task for an HONEST hardworking attorney. I am here every day at least 12 hours and NEVER take a lunch. But not everything is billable. I made my hours last year but did so only because I did not take a vacation. I HATE being an attorney! I have no life. I know that my colleagues regularly falsely elevate their time entries. They have to because they all take lunches everyday and leave at 5 or 6 every night.[47]

Fortney went on to comment:

> This quotation captures the dilemma for ethical attorneys. If a firm largely bases compensation on hourly production, ethical associates who refuse to pad time may function at a competitive disadvantage when compared to associates who inflate their time. Based on study findings from my 1999-2000 empirical study on billable hours expectations and firm culture, I opined that a serious deleterious effect of "quantifying" value may be the exodus of ethical associates who leave private law practice rather than rationalizing questionable billing practices.[48]

There is now increasing external competition among law firms to attract and retain clients. The degree of loyalty to the law firm has decreased with clients moving their legal work between several firms and corporate clients increasingly taking steps to control legal costs. These steps include the increased use of in-house legal services, 'beauty contests' between firms for new work, the pressure for legal services to be provided within a predetermined budget dictated by the client, and the increased supervision of legal services.[49] These external commercial pressures are being reflected and magnified on large firm lawyers by the incentive structures inside the law firm. This is leading to law firm cultures where lawyers achieve partnership, financial rewards and social esteem by proving how aggressively they can represent clients in litigation, or in transactional lawyering, designing innovative ways to get around the law and protect partisan client interests. In some of the ethical scandals that have hit the headlines in both the US and Australia, it seems that the lawyers and law firms have acted in ways that were subsequently judged unethical by the public at least partly because of their financial dependence on particular clients and pressure to

44 Ibid, 175.
45 Ibid 176.
46 Ibid.
47 Ibid 178 (emphasis in original).
48 Ibid. See also Parker and Evans, above n 8, 195–9.
49 See John Flood, 'Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice' (1996) 3 *International Journal of the Legal Profession* 169, 182; Rosen, above n 4. See also Robert L Nelson, 'Ideology, Practice and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm' (1985) 37 *Stanford Law Review* 503, 507.

please them. Moreover, even if increasing commercial pressures increases the chances that just one or two 'rogue' lawyers in a firm will succumb, where the rogue lawyer is part of a team, especially a leader of other lawyers, then their own unethical behaviour will affect others too as they pressure or influence others to act unethically and cover up their own misconduct.

D Summary

Unethical behaviour might originate in complex behavioural interactions between lawyers in teams, the atmospherics or culture of the team,[50] the bureaucratic systems of the law practice, and the internal and external pressures faced by the law firm and individual lawyer. It might also occur simply because of the size of the law firm and the fact that work for the one client is fragmented between individuals within teams and even spread across teams within the firm.

Diagram One graphically represents the way in which individual lawyers' values, skills and capacities interact with work team and law firm factors to influence the ethical character of lawyers' conduct. It indicates that the ethical behaviour of individual lawyers employed in large law firms is influenced by a number of different factors at different levels including firm culture, personal values, professional identity, client demands, work team supervisor's demands and so on. The ethical culture of the firm itself is made up of formal and informal elements (that is, both written policies and structures and informal habits and myths) and these are influenced by the individual lawyers within the firm, the external pressures they face from clients and their broader social and economic environment. *Diagram One* also indicates law firm structures and cultures are themselves (partially at least) responses to external pressures and demands that can affect lawyers' ethical behaviour for the better or worse. Finally, *Diagram One* includes a feedback loop from lawyers' conduct (on the right hand side) to the external pressures on law firms on the left hand side to indicate that the external pressures lawyers and their firms face will also be a response to how lawyers actually behave in practice. If unethical behaviour becomes more common, lawyers might expect governments and regulators to react with stronger regulatory controls.

This is not something unique to law firms. There is a rich literature on the particular ethical problems that can arise from the influence of group dynamics and organisational factors in businesses, government organisations and any human grouping, and how our notions of law and accountability should expand to address the collective aspects of ethical responsibility.[51]

It is easy to assume that each individual lawyer's values, ethical discernment and personal capacity should empower them to act ethically even in the face of all these organisational and other pressures to behave unethically. But it is more realistic to recognise that individual ethical behaviour needs the support of organisational level bulwarks to counteract organisational level pressures for

50 Schneyer, above n 2, 6.

51 See above nn 17–9. See also Bovens, above n 33; Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (2000).

unethical conduct. In practice, many firms do indeed have at least some such supports, as we show in the next section.

III THE VALUE OF ETHICAL INFRASTRUCTURE

Since the organisational (law firm) context of legal practice has such an important influence on unethical behaviour, some commentators have suggested that law firms should consciously implement 'ethical infrastructures'. A law firm ethical infrastructure means formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice that support and encourage ethical behaviour.[52] It might include the appointment of an ethics partner and/or ethics committee; written policies on ethical conduct in general, and in specific areas such as conflicts of interest, billing, trust accounting, opinion letters, litigation tactics and so on; specified procedures for ensuring ethical policies are not breached and to encourage the raising of ethical problems with colleagues and management; the monitoring of lawyer compliance with policies and procedures; and, ethics education, training and discussion within the firm.

In this part of the paper, we set out why conscious attention to developing an ethical infrastructure is necessary for the contemporary larger law firm, how large law firms in Australia and the US are already starting to adopt formal ethical infrastructures, and how these should further evolve.

A The Need for an Ethical Infrastructure to Evolve with the Large Law Firm

It is becoming more necessary for law firms to formalise and systematise ethical infrastructures as they change and grow larger. In the past, when law firms were smaller, informal mechanisms of mentoring, socialisation and collegial discussions were the primary means by which junior lawyers were taught to meet their professional conduct obligations, and senior lawyers and partners were kept in check. This traditional 'professional partnership'[53] model of law firm organisation could be quite effective at promoting ethical conduct by

52 See Schneyer, above n 5.

53 John Flood, 'Resurgent Professionalism? Partnership and Professionalism in Global Law Firms' in Daniel Muzio, Stephen Ackroyd and Jean-Francois Chanlat (eds), *Redirections in the Study of Expert Labour: Established Professions and New Expert Occupations* (2007) 3; Ashly Pinnington and Timothy Morris, 'Archetype Change in Professional Organizations: Survey Evidence from Large Law Firms' (2003) 14 *British Journal of Management* 85.

embedding lawyers 'within networks of social relations that provide ethical obligations, expectations … information channels and social norms'.[54]

Recently, however, many large law firms in the US, UK and Australia have shifted to a 'managed professional business' model of organisation.[55] In law firms that operate as managed professional businesses, traditional, informal controls are much weaker and less able to inculcate a common culture including common standards of ethical behaviour. As Flood explains:

> For much of the 20th century making partner was a stable marriage, for life. But from the 1980s on law firms became more entrepreneurial and business-oriented leading to lawyers moving between firms more often and taking clients with them. Law firms now resemble interlocking networks of specialisms held together by competitions for resources, especially associates.[56]

The increasing degree of mobility in the upper end of the legal profession – that is, how quickly experienced lawyers move in and out of the firm – makes it difficult to transmit a positive ethical culture throughout a whole firm. It is particularly challenging where a whole work team moves from one firm to another, or a smaller firm (with its own culture) is swallowed whole by a larger one. This sort of mobility increases the chances of disparate ethical cultures in different work teams, and the emergence of 'rogue' work teams in which the culture encourages ethically problematic behaviour.[57] Similarly, the high degree of specialisation in the contemporary large law firm means that different partners and work teams can develop quite different norms and behaviour depending on their area of practice, and that partners in different areas of practice may have little opportunity to understand or find out what each other are doing and whether it meets firm-wide ethical standards.[58]

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54 For empirical evidence that this type of embedding is effective at promoting ethical behaviour, see Bruce L Arnold and Fiona M Kay, 'Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organization of Law Practice and Professional Self-Regulation' (1995) 23 *International Journal of the Sociology of Law* 321, 339 (law firm 'social capital' is a significant explanatory factor in lawyer misconduct). See also S Arthurs, 'Discipline in the Legal Profession in Ontario' (1969) 7 *Osgoode Hall Law Journal* 235 (solo practitioners are more likely to give unethical and unskilled service probably because they lack the collegial and financial support of those in larger firms); Eliot Freidson, *Doctoring Together: A Study of Professional Social Control* (1975) (informal social control among medical practitioners who work in group practice is effective in either changing their behaviour or influencing them to resign).

55 Flood, above n 53, 3 (but Flood also notes that there can be elements of the traditional partnership model even in very large, commercially-oriented firms); Pinnington and Morris, above n 53 (but note that Pinnington and Morris also argue that this is not necessarily a complete 'archetype' change as elements of both models co-exist in the same firms). There is evidence that medium and large Australian law firms have been particularly quick to embrace bureaucratised management practices, at least compared with their counterparts in the UK: Ashly H Pinnington and John T Gray, 'The Global Restructuring of Legal Services Work? A Study of the Internationalisation of Australian Law Firms' (2007) 14 *International Journal of the Legal Profession* 147.

56 John Flood, 'Globalization and Large Law Firms' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (forthcoming). See also Emmanuel Lazega, *The Collegial Phenomenon: The Social Mechanisms of Cooperation Among Peers in a Corporate Law Partnership* (2001).

57 See Chambliss, above n 30, 150; Nelson, above n 27, 777; David B Wilkins, 'Who Should Regulate Lawyers?' (1992) 105 *Harvard Law Review* 799, 827 (citing the increased size of law firms and greater mobility of lawyers as increasing the prevalence of conflicts of interest).

58 For discussion of the negative impact of different ethical norms in different areas of practice in highly specialised law firms, see Kirkland, above n 4; Regan, above n 6.

Mayson has argued that as law firms get bigger and staff specialise more, it is important for them to think explicitly about building up their 'organizational capital' as well as their financial, physical, human and social capital. The concept of 'organizational capital' 'concerns the extent to which human and social capital are embedded in and supported by the firm through culture, collective reputation, communities of practice, strategic context, motivation, structure, contracts, routines, knowledge management, and systems'.[59] It belongs to the collectivity of the law firm, not to individual lawyers or work teams. As Mayson points out, 'organizational capital goes to the very heart of the firm's sustainability'.[60] A firm without this kind of 'capital' is 'a more or less empty, fragile, and less valuable shell'.[61]

As we have seen, large law firms are increasingly using bureaucratic management practices that incorporate commercial pressure into legal practice by, for example, requiring lawyers to meet certain billable hour targets, having client relations partners with the explicit job of ensuring that other lawyers (including other partners) are making clients happy, and implementing performance criteria and in-firm professional development all aimed at making sure lawyers meet client needs. If these new bureaucracies do not incorporate controls explicitly aimed at promoting ethical behaviour, they may in fact undermine ethical behaviour by putting pressure on lawyers to cut corners or do 'too much' for clients, and thereby undermine the value of the firm's 'organisational capital'.

Now that most Australian states allow legal practices to incorporate, and the first law firms are listing on the stock exchange, there is potential for even greater pressure on professional ethical responsibilities as incorporated legal practices adopt more commercial business structures, and encourage outside investors and non-lawyer staff to become shareholders in the law practice.[62] For this reason the legislative provisions that allow law firms to incorporate also require incorporated legal practices to have 'appropriate management systems' in place to deal with ethical issues – in effect, a requirement that incorporated legal practices consciously implement an ethical infrastructure as part of their new business structure.[63] The New South Wales Legal Services Commissioner has developed 'ten commandments' that incorporated legal practices' management

59 Stephen Mayson, 'Your Capital: Building Sustainable Capital: A Capital Idea' in Laura Empson (ed), *Managing the Modern Law Firm: New Challenges, New Perspectives* (2007) 141, 157.

60 Ibid.

61 Ibid.

62 Steve Mark, 'Notes on the Issue of Listing of Law Firms in New South Wales and the Incorporation of Law Firms' (Presentation to the Joint NOBC, APRL and ABA Center for Professional Responsibility entitled 'Brave New World: The Changing Face of Law Firms and the Practice of Law from a Professional Responsibility Perspective', San Francisco, 10 August 2007) <http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches> at 21 October 2007. See also Bruce MacEwan, Milton Regan and Larry Ribstein, *Law Firms, Ethics, and Equity Capital: A Conversation* (Georgetown Law, Center for the Study of the Legal Profession, 2007) (unpublished); Parker, 'Law Firms Incorporated', above n 2.

63 *Model Laws* s 2.7.9. One lawyer, the 'legal practitioner director', has responsibility for the introduction, supervision and monitoring of the practice's ethical systems. *Model Laws*, ss 2.7.9, 2.7.10. For multidisciplinary practices (MDPs), see *Model Laws* ss 2.7.39, 2.7.40. See also Parker, above n 2, 372.

systems must follow (see Appendix One) and a system for self-assessment and external audit as to how well incorporated legal practices are implementing them. The legal profession regulators have also been very concerned to make sure that potential ethical conflicts between duties to shareholders and professional ethical duties to courts and clients are dealt with.[64]

As law firm management and business structures evolve, 'a crucial question is whether law firms will be able to sustain a distinctive culture' that balances duty to client and duty to court 'rather than becoming purely market-driven organizations'.[65] This concern with the internal management structures within law firms is consistent with an increasing focus on similar structures within business firms to improve corporate ethics, social responsibility and regulatory compliance.[66] Indeed many large commercial law firms in Australia have lawyers who specialise in advising their business clients on how to implement regulatory and ethical compliance systems and who sell educational and management tools to clients for this purpose.[67] It is logical that large law firms might apply the same principles to themselves, and that regulators,[68] insurers,[69] clients,[70] and lawyers should all be interested in understanding and improving the ethical climate of law firms.

B The Beginnings of Ethical Infrastructure in Australian Law Firms

Most Australian law firms, especially larger law firms, already recognise that some aspects of ethical infrastructure are desirable and necessary in some areas as a matter of good practice, although they may not have thought of what they do as 'implementing an ethical infrastructure'.

For example, most law firms in Australia and elsewhere already recognise the need to have systems for checking for potential conflicts of interest before taking on a new client.[71] This generally includes screening software and regular

64 This has extended to the NSW Legal Services Commissioner reportedly negotiating with Slater and Gordon to ensure that a statement as to the primacy of the incorporated legal practices' (ILP) duty to the court was included in its prospectus before it could list on the Australian Stock Exchange: Mark, above n 62.

65 Milton C Regan, 'Taking Law Firms Seriously' (2002) 16 *Georgetown Journal of Legal Ethics* 155, 172.

66 See, eg, Parker, above n 17.

67 See Tanina Rostain, 'The Emergence of "Law Consultants"' (2006) 75 *Fordham Law Review* 1397.

68 See the brief discussion of regulatory requirements for incorporated legal practices in Australia, above at nn 62 to 64, and accompanying text. See also Steven Mark, 'Harmonization or Homogenization? The Globalization of Law and Legal Ethics – An Australian Viewpoint' (2001) 34 *Vanderbilt Journal of Transnational Law* 1169.

69 In the US and UK some legal insurers, especially the US insurer, Attorneys' Liability Assurance Society (ALAS), have promoted in-house ethical compliance efforts within law firms by giving discounts for firms with ethics partners etc: see Elizabeth Chambliss and David B Wilkins, 'The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms' (2002) 44 *Arizona Law Review* 559, 590. In Australia, at least one professional liability insurer does provide in-house training with a similar purpose.

70 For example, the Victorian state government has extensive ethical, pro bono and equal employment opportunity requirements on law firms that do work for it: see State of Victoria, *Legal Services to Government Panel Contract* (2002).

71 See Law Society of New South Wales in consultation with Law Institute of Victoria, *Information Barrier Guidelines* (2006) guideline 2.

circulation of new client lists.[72] Most larger firms also have a system (usually a designated 'conflicts partner' and perhaps a conflicts committee) for deciding what to do where potential conflicts are identified. Most larger Australian law firms would also have firm-level infrastructure in place to comply with trust accounting and liability insurance rules,[73] and systems designed to make sure they bill clients only in compliance with contractual and professional conduct requirements.[74]

Although Australian conduct regulation does not explicitly require law firms to have in place practices for making sure clients know who they can complain to and systems for receiving and resolving complaints, [75] it is now seen as a basic requirement for any business to have a basic complaints handling system in place and to let customers know about it.[76] Many larger firms also have sophisticated systems in which client relations partners are assigned to particular clients from whom they solicit feedback before any complaints become big issues. Many larger Australian firms have also implemented quality assurance programs to avoid malpractice liability.[77]

In Australia, however, there is no professional conduct obligation for legal practices, apart from incorporated legal practices and firms in multi-disciplinary partnerships, to have in place an overarching ethical infrastructure.[78] Such an initiative has not yet seemed sufficiently important to government, but this could change at short notice, especially in the wake of a scandal in which unethical conduct by large firm lawyers is uncovered. The 'ten commandments' framework

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72 Susan Saab Fortney and Jett Hanna, 'Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest' (2002) 33 *Saint Mary's Law Journal* 669, 689, 697.

73 Existing legislation does recognise that law practices have ethical obligations including in respect of client money (*Model Laws, s* 3.3.5) and the insurance of client money in fidelity funds (*Model Laws*, s 3.6.9).

74 The *Model Laws* obligate lawyers to provide, in great detail, written advice as to costs to clients at the commencement of a new retainer: *Model Laws* Division 3 Costs disclosure, ss 3.4.10–20**.**

75 With the exception of complaints about costs, see *Model Laws* s 3.4.10(1)(h).

76 Empirical research shows that almost all larger Australian businesses have at least rudimentary customer complaints systems in place regardless of size, industry etc: Christine Parker and Vibeke Nielsen, 'Do Businesses Take Compliance Systems Seriously? An Empirical Study of the Implementation of Trade Practices Compliance Systems in Australia' (2006) 30 *Melbourne University Law Review* 441. From time to time 'client care' professional rules or legislation have required law firms to appoint and notify clients of a 'client care officer' as the client's first point of contact within the firm. But see Christine Parker, *Just Lawyers: Regulation and Access to Justice* (1999) 21–2, 153 reviewing research showing lack of firm compliance with Australian, English and Scottish conduct regulation aimed at requiring firms to implement 'client care' systems, such as complaints handling systems. However the complaints process requirements are more developed in relation to costs than in other areas, and this may mean firms have more developed infrastructure in this area as well: the details of the person to discuss costs with must be disclosed and the avenues for complaints stated (*Model Laws* s 3.4.10 (h) and (i)).

77 Dal Pont, above n 22, 79.

78 The closest thing is the requirement in professional conduct law that practitioners *appropriately supervise* more junior professional staff and administrative staff to ensure no unethical conduct occurs. But this duty to supervise is mainly in relation to a lawyer supervising work that is done by others directly in relation to that lawyers' own clients. See Dal Pont, above n 22, 466, 568. In the US context see Schneyer, above n 2; and Chambliss and Wilkins, 'Promoting Effective Ethical Infrastructure', above n 5. Both of these papers analyse the possibility of law firm discipline on the basis of the duty to supervise. Chambliss and Wilkins argue that law firms should be required to put in place an ethical infrastructure as a duty of management rather than just as part of the duty of individual lawyers to supervise individual employees.

for regulating appropriate management systems in incorporated legal practices (shown in Appendix One) are certainly an essential framework for competent and ethical practice that do go beyond the absolute basics to address the organisational factors that can lead to unethical behaviour in large law firms. But they are under-developed as yet.[79] Existing quality assurance programs may have an ethical dimension, but are focused mainly on keeping clients happy, rather than ethical obligations, especially ethical obligations owed to the court and the law.[80]

There has been little reporting or research on the extent to which Australian law firms have implemented ethical infrastructures and what impact they have on ethical behaviour. Research in the US has suggested that most law firms there have inadequate structural controls in place – although larger firms are more likely to have some sort of ethical infrastructure.[81] Chambliss and Wilkins conclude from their review of all the available research[82] that almost all law firms have formal procedures for identifying conflicts of interest, and 'most firms have formal policies or procedures regarding directorships, trusteeships, and audit opinion letters'.[83] Some US firms are developing specific and mandatory protocols to prevent liability triggered by breach of legislative rules such as insider trading.[84] For example, a firm policy might state that lawyers cannot invest in a client's business either without approval, or at all, and compliance with the policy is then monitored. But most firms lack formal procedures for addressing other ethical issues, such as the withdrawal of client funds, and do not have their own billing guidelines or training. Most periodically monitor compliance with firm conflicts procedures, but little is done to monitor compliance with other formal ethical requirements. No comparable studies have

79 There is however some preliminary evidence that clients complain less about New South Wales ILPs than other firms because they have appropriate management systems in place: see Centre for Applied Philosophy and Public Ethics, *Complaints and Self-Assessment Data Analysis in relation to Incorporated Legal Practices*, Report prepared by Professor Seamus Miller and Mathew Ward for the New South Wales Office of the Legal Services Commissioner (2006) (available upon request from the Office of the Legal Services Commissioner).

80 Parker, above n 2, 377–8.

81 Chambliss and Wilkins, 'Promoting Ethical Infrastructure', above n 5, 700.

82 Ibid 697–9; Chambliss, above n 30, 127–8. Chambliss and Wilkins' summaries draw on their own work and four small scale surveys conducted between 1992 and 1999 by other authors: Susan Saab Fortney, 'Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture' (1997) 10 *Georgetown Journal of Legal Ethics* 271; Fortney, 'Soul for Sale' above n 41; Stephen R Volk, Arthur N Field and Joseph T McLaughlin, 'Law Firm Policies and Procedures in an Era of Increasing Responsibilities: Analysis of a Survey of Law Firms' (1993) 48 *Business Lawyer* 1567; Lee A Pizzimenti, 'Screen Verite: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?' (1997) 52 *University of Miami Law Review* 305.

83 Chambliss and Wilkins, above n 69, 7. See also Richard W Painter, 'Rules Lawyers Play By' (2001) 76 *New York University Law Review* 665, 732 (reporting that the New York provisions for discipline of law firms means that now firms are 'required to have a policy for checking proposed engagements against records of prior engagements to prevent impermissible conflicts. Many law firms voluntarily have adopted formal policies on issues such as assumption of corporate directorships, new clients and new matters, opinion letters, client conflicts, firm and personal investment, firm audits and client funds, record retention' etc).

84 Mona L Hymel, 'Controlling Lawyer Behaviour: The Sources and Uses of Protocols in Governing Law Practice' (2002) 44 *Arizona Law Journal* 873.

yet been undertaken in Australia to assess whether procedures like these are in place, and effective.

C Ethics Partners

In the US over the last 10 years many larger law firms 'have begun to address the gaps in internal supervision by appointing individual partners to be specially responsible for monitoring compliance with professional regulation'.[85] These specialists have a range of titles, including 'ethics advisor', 'loss prevention' or 'risk management partner', and firm 'general counsel', which do not necessarily correspond exactly with their actual role.[86]

After the McCabe case,[87] some Australian legal professional associations also encouraged law firms to appoint ethics partners and put in place more general measures to promote ethical discussion and 'reporting up' of potential ethical problems. In 2002 Kim Cull, then President of the Law Society of New South Wales, encouraged law firms to introduce 'ethics partners' and for the legal profession to protect whistleblowers within the legal profession.[88] In the same year the Law Institute of Victoria launched a program for law firms to appoint 'a partner or senior consultant to be the designated ethics practitioner' as a point of first contact for all solicitors in the firm with an ethical question or problem.[89] Some law firms have also hired ethics consultants to audit their ethical infrastructure and suggest changes in the wake of issues that have arisen in the media.

The ethics specialist role within US law firms has mostly evolved from a person responsible solely for monitoring compliance with conflicts checking and screens into a broader role (although for many ethics specialists conflicts is still the main function).[90] Chambliss and Wilkins' description of a broader in-house ethics practice is a useful starting point for considering what an ethics partner could do to promote ethical behaviour:

> they provide counselling on a wide range of issues, including conflicts and intake (which they list first); attorney-client privilege and work product; advertising and solicitation; communication with represented parties; lateral hiring and departure; fees, billing and trust accounts; mandatory and permissive withdrawal; and the duty to report misconduct by other lawyers. Moreover, in addition to individual counselling, [they] alert the firm to regulatory developments, help the firm develop standardized forms (such as conflicts waivers), provide in-house ethics training, publish a quarterly professional responsibility newsletter, maintain intranet and internet

85 Chambliss, above n 30, 129–30.

86 Chambliss and Wilkins, above n 69. See also Elizabeth Chambliss, 'The Professionalization of Law Firm In-House Counsel' (2006) 84 *North Carolina Law Review* 1515.

87 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73. See also above n 12.

88 Kim Cull, 'Ethics and Law as an Influence on Business' (2002) 40 *Law Society Journal* 50.

89 John Cain, 'Good Ethics Requires Constant Vigilance' (2002) 76 *Law Institute Journal* 4, 4. See also Fergus Shiel, 'Push for Ethics Advisers at Law Firms', *The Age* (Melbourne) 6 September 2002, 7; Katherine Towers, 'Ethics Standards Under Attack', *Australian Financial Review* (Sydney) 7 March 2003. The Law Institute of Victoria through its Ethics Committee said it would provide ongoing training for the ethics practitioners and started an Ethics Liaison Group as a direct result of that.

90 Chambliss and Wilkins, above n 69, 566–7.

> resources, and -when necessary - respond to bar complaints and motions for disqualification.[91]

Chambliss and Wilkins illustrate this description by quoting the way one of the ethics partners they interviewed describes his own role:

> I have spent an awful lot of time developing our intranet site as an ethics and loss prevention library. We have links to every third party source I can find … And then the materials I have created … I have, say, an outline on each of the major rules of Professional Conduct and if somebody said, "well, what's the rule on such and such, can you contact a former employee under Rule 4.2," I may well have that on hand … And then you're able to say to people, "here's the answer and here's why…"…. If I did a job description I would have a section on systems monitoring and systems planning. That is, I spend a certain amount of time making sure our trust account is working the way it is supposed to … We do a fair amount of non-lawyer ethics training too, and I think that's important … because the people in marketing and trust accounts and so forth … how do you know what is going on or what is not coming to your attention? … Try getting all the secretaries in the firm together and tell them what proper notarization practice is, and see if you don't get a few phonecalls afterwards…[92]

These descriptions of the role of an in-house ethics specialist clearly imply that a firm that takes its ethical infrastructure seriously might need to make the ethics partner a fulltime, specifically compensated position. In Australia, the largest law firms now have full-time coordinators for pro bono who are appropriately supported and compensated in their roles.[93] They also have systems for taking account of lawyers' pro bono work in calculating 'billable' hours worked. It does not appear that Australian law firms have yet put the same amount of care into the role of the separate ethics (or often simply conflicts) partner. Yet having a compensated ethics partner position, and appropriate time sheet options for raising, discussing and receiving advice on ethical problems would be an important way for a firm to show how serious it is about ethical behaviour. If firm managers want lawyers to have the capacity to see ethical issues, and the opportunity to make and act on ethical judgments, then the firm needs to provide the time, resources and incentives for lawyers throughout the firm to be able to do so.

Another trend evident in American law firms has been the appointment of firm general counsel to manage malpractice claims encountered by the firm.[94] Some research suggests that it may be that more than two-thirds of the top 200 American law firms have a general counsel.[95] Law firms seem to be creating general counsel positions out of a concern for risk management in a climate where law firms are seen as potential targets for lawsuits, particularly in

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91 Ibid 566–7, summarising Peter R Jarvis and Mark J Fucile, 'Inside an In-House Legal Ethics Practice' (2000) 14 *Notre Dame Journal of Law, Ethics and Public Policy* 103.

92 Chambliss and Wilkins, above n 69, 574–5 (quoting one of their interviewees).

93 National Pro Bono Resource Centre, *Mapping Pro Bono in Australia* (2007). See also Andrew Boon and Robert Abbey, 'Moral Agendas? Pro Bono Publico in Large Law Firms in the United Kingdom' (1997) 60 *Modern Law Review* 630.

94 Susan Saab Fortney, 'Why Do Law Firms Need a General Counsel? The Changing Structure of American Law Firms' (2005) 53 *University of Kansas Law Review* 835.

95 Studies cited in Chambliss, above n 30, at 131–2.

malpractice and employment law arenas.[96] The general counsel is usually concerned with ethics only in a peripheral way, with the appointment of general counsel being a 'good business decision in terms of loss prevention, quality client service and lawyer satisfaction'.[97]

This indicates the danger that appointment of an in-house ethics specialist may morph into a formal position that is more about protecting the firm's finances and reputation than actually encouraging and supporting ethical dialogue within the firm. There is a tension between two different roles that might both be necessary in a well-managed, ethical law firm: on one hand is the ethics 'guru' or 'rabbi' – someone who anyone in the firm can go to with ethical queries and problems and who can raise ethical issues with relevant people up and down the chain of management; and, on the other hand is the law firm general counsel/risk manager who provides advice to management on how to handle legal issues and prevent loss for the firm. Some US firms employ firm counsel to whom employee lawyers can go for help with external issues (for example, conflicts of interest) and also an ombudsman to deal with the concerns of associates about internal issues within the firm in a way that is more confidential to the individual with the concern (for example, complaints or concerns about a partner).[98]

D Evolving Ethical Infrastructures

It is not enough to have an ethics partner. Adequate ethical infrastructure would need adequate attention to a range of areas where ethical problems can arise. Two specific areas where research and commentary suggests that it might be particularly important for large law firms to think about ethical infrastructure beyond conflicts of interest are billing and litigation practices. We briefly discuss these two areas for illustrative purposes.

In relation to billing, mere compliance with legal obligations and contractual principles are not enough to inculcate ethical behaviour. The law is mainly aimed at making sure that the client understands and agrees to the fees to be charged so that the firm can legally recover those fees if the client later does not pay up. But an ethical law firm would want to make sure the fees it charged were not only authorised by a properly constituted contract with the client after full disclosure,

96 Fortney, above n 94, 846.

97 Ibid 850. See also Douglas R Richmond, 'Why Do Lawyers Need a General Counsel? The Changing Structure of American Law Firms' (2005) 53 *University of Kansas Law Review* 805, 807 (describing the appointment of general counsel as 'part of a good business model'). See also Anthony V Alfieri, 'The Fall of Legal Ethics and the Rise of Risk Management' (2006) 94 *Georgetown Law Journal* 1909; cf William H Simon, 'The Ethics Teacher's Bittersweet Revenge: Virtue and Risk Management' (2006) 94 *Georgetown Law Journal* 1985.

98 Chambliss, 'The Professionalization of Law Firm In-House Counsel', above n 86.

but also that the fees were actually reasonable in all the circumstances.[99] This would require attention to how differences in hourly charge-out rates are determined, communicated and justified to enquiring clients,[100] whether there are any, and if so what 'padding' conventions are there within the firm. It would require using billing software that includes safeguards against double-billing and padding, and adequate, ethically sensitive bill review or double-checking procedures. A firm concerned with ethical billing, and not providing ethical disincentives to its lawyers, might also reconsider the need for hourly billing in all circumstances given its ethical implications,[101] and would set billable hours targets for lawyers with a view to them being achievable without padding or unreasonable working hours.

Litigation is one area of practice that can raise particularly difficult ethical issues – that are not able to be easily resolved by the application of conduct rules and the law of lawyering – particularly in relation to obligations in discovery, not misleading the court or the other side, and excessive use of adversarial litigation tactics. This is one area where the problems of no-one taking responsibility for ethical evaluation of advice given and actions taken can be very real. These difficulties may exist despite formal policies that value ethics, because informal work team cultures and incentives promote aggressive adversarialism to advance client interests.

It has been suggested that ethical infrastructure in this area might include internal law firm controls on the use of certain litigation tactics. This would apply, for example, to certain types of motions to a court that have been identified as often being used for solely tactical purposes (for example, motions to disqualify a lawyer on the other side, or to seek personal costs orders against a lawyer). A firm could require that a litigation lawyer could not initiate that type of motion until its proposed use had been ethically reviewed by another lawyer in the firm from a different section who is not involved in the case to make sure that it is being appropriately used.[102]

It has also been suggested that special care be taken to make sure that personnel are rotated where there is a lot of work being done for one client over a

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99 It is implicit in the whole of the regulatory structure, and consistently endorsed by the courts, that lawyers should charge *reasonable* fees only, and clients can certainly challenge fees on the basis that they are not reasonable (*Model Laws*, ss 3.4.44). But there is currently no express obligation on lawyers to do so in the first place. See, eg, *Veghelyi v The Law Society of New South Wales* (Unreported, Supreme Court of New South Wales, Court of Appeal, Kirby P, Mahoney and Priestley JJA, 6 October 1995) 6–7. The Australian Law Reform Commission suggested to the 2005 New South Wales Legal Fees Review Panel that, in accordance with the approach taken by the American Bar Association, an express requirement be enacted to do so, together with practice rules which give guidance on the calculation of a reasonable fee. See American Bar Association, *Annotated Model Rules of Professional Conduct* (3rd edition, 1996) rule 1.5; Legal Fees Review Panel, *Report: Legal Costs in New South Wales* (2005). All Australian states and territories are now expected to mandate reasonable charging practices under the emerging national *Model Laws*.

100 Legal Fees Review Panel, above n 99.

101 See, eg, Kate Gibbs, 'Hours of (Billable) Justice', *Lawyers Weekly*, (Sydney), 5 April 2007, 18–9; Chris Merritt, 'Fixed-price Contracts Give Billable Hours the Elbow', *The Australian*, (Sydney) 3 November 2006, 24.

102 Nelson, above n 27, 789.

long period of time,[103] and that law firms require their clients to formally assure them as part of discovery processes that no documents that might be considered relevant have been withheld or destroyed.[104] Another step would be for firms to periodically evaluate or 'audit' different work teams' carriage of litigation in the past to see whether ethical standards could be improved. This could involve asking clients, and even the other side, whether they perceived any ethical problems in how the law firm lawyers behaved as well as having an independent team review the material documenting the decisions made throughout the case. [105]

IV CONCLUSION: THE DANGERS OF BUREAUCRATISING ETHICAL INFRASTRUCTURE

Informal collegial controls that might have worked in a previous context to support ethical behaviour are now being undermined by new, more bureaucratised management structures that lack any ethics focus. To the extent that larger law firms bureaucratise the way they deliver services to clients, they should also concern themselves with their ethical infrastructure. There is potential for management systems that are not explicitly designed to encourage ethical behaviour to actually discourage it. This is ultimately unsustainable in terms of its effects on ethical behaviour in the firm, and also on the culture and reputation of the firm as a whole – since ethical obligations to client and court or law are so central to legal service delivery. If firms do not develop effective ethical infrastructures, regulators may step in and impose their own requirements.

Despite the great opportunity to promote positive ethical cultures within law firms through implementing ethical infrastructures, there is also, however, a danger that regulators and law firm management will be satisfied with symbolic or formalistic ethics management initiatives that do not make any difference to everyday actions and behaviours, and are not supported by commitment to ethical values by lawyers throughout each firm.

The 'ethical infrastructure' of a firm is not just about the formal ethics policies enunciated by management. As we have seen, other formal and informal management policies and work team cultures will also either undermine or support ethical practice. Putting in place formal ethical infrastructures will not necessarily mean that lawyers within the firm will use them as intended. For example, research has suggested that associates will still be reluctant to question the conduct of partners, even if guaranteed confidentiality.[106]

There is also a danger that ethical infrastructure initiatives will be narrowly designed to enforce compliance only with lawyers' clearest and most visible

103 See Corbin, above n 42, 288.

104 Nelson, above n 27, 807. Note that the Australian Law Reform Commission's recently proposed requirement that lawyers sign off on privilege claims goes some way towards this suggestion: Australian Law Reform Commission, *Privilege in Perspective,* above n 12.

105 Nelson, above n 27, 806. See also Fortney, 'Are Law Firm Partners Islands Unto Themselves?' above n 82.

106 Chambliss, above n 30, 148–9, citing Robert Nelson, 'Uncivil Litigation: Problematic Behaviour in Large Law Firms' (1997) 8 *Journal of Kansas Bar Association* 8, 24.

legal obligations (often duties to the client, including trust account separation, rather than duties to the court and the legal system as a whole), but that they will fail to support or encourage the development of individual lawyers' awareness of their own ethical values and ethical judgment as to how to apply them in practice. The application of moral theory to lawyers' ethics suggests that a crucial aspect of individual lawyers' expression of their own ethical values and judgment should be a law firm context in which lawyers are encouraged and empowered to individually and together deliberate over what ethics requires of them in different situations – and then, importantly, to put the outcomes of those deliberations into practice.[107] Formal policies must support this, for example by allowing time sheet options for ethical discussion, but cannot create such a culture without imaginative leadership.

There is a particular danger that in an increasingly commercialised and bureaucratised law firm environment, ethical infrastructure initiatives will major on spelling out and enforcing 'beyond compliance' devotion to clients, but minor on lawyers' overriding, ethical obligations to the court and the law. These latter obligations are often more vague in current expressions of professional conduct rules. Identifying situations where the duty to the court and the law are at risk often requires greater awareness by individual lawyers of their own values and greater sensitivity to the interests and values of other stakeholders in a situation. Working out how to avoid breaching duties to the court and the law in the face of client demands or commercial pressures is also likely to require much open discussion, contextual ethical judgment, and imaginative leadership. It will be difficult to lay down bright line rules.[108]

It may be hard to persuade everyone that this sort of process is productive and positive for the firm's growth. But law firm ethical infrastructures will only be useful if everyone within the firm is explicitly encouraged to raise ethical issues so that ethical problems can be identified, discussed and resolved – and people are not punished for raising them in the first place. Any discussion of ethical issues is desirable. Not only does it increase the likelihood of more ethical decisions in individual cases, but if the process includes not only upward communication, but also neutral dialogue with colleagues[109] – 'the ability to sound others out' as it were – this will itself heighten and broaden the level of moral sensitivity within the organisation, and also lower the levels of stress experienced by individual decision makers.

The most important aspects of ethical infrastructure are less tangible than management systems for ensuring compliance with ethical rules. They have much more to do with the way the culture of the law firm connects with and

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107 See, eg, Adrian Evans and Josephine Palermo, 'Preparing Australia's Future Lawyers: An Exposition of Changing Values Over Time in the Context of Teaching About Ethical Dilemmas' (2006) 11 *Deakin Law Review* 103; Reid Mortensen, 'Agency, Autonomy and a Theology for Legal Practice' (2002) 14 *Bond Law Review* 391, 411–3; Parker and Evans, above n 8.

108 See Chambliss, above n 30, 147 (suggesting that some types of ethical issues will respond better to more formal processes within a firm, for example, potential trust account breaches, while informal, social processes are more conducive to resolving others, for example, time costing and discovery).

109 Frederick Bird, *The Muted Conscience: Moral Silence and the Practice of Ethics in Business* (1996) 25.

empowers individual lawyers to express their own ethics and values in their work, especially by feeling free to raise ethical issues with colleagues and superiors – and have those queries taken seriously, discussed and, where necessary, acted on.

In law firm practice, individual ethical lawyers cannot do without an ethically supportive firm structure. Equally, ethical structures are less than effective without individual lawyers who personally commit to ethical practice. Ethical infrastructure must be aimed at promoting an ethical practice that involves:

- Awareness and understanding by individual lawyers of:
  - Their own personal values;[110]
  - The range of different approaches to ethical decision-making;
  - The standards set out in the rules and law on professional conduct (trying to follow the rules is just one approach to ethical decision-making);
  - Their own preferred ethical approach ('ethical position');
  - Day-to-day situations where ethical issues may arise;
  - Informal signals in legal practice of the risk of unethical conduct; and,
  - The ability to identify them when they occur.
- A capacity and willingness by individual lawyers to:
  - Discuss their own ethical position with others in the firm;
  - Seek to understand the ethical position of others within the firm;
  - Make a judgment about competing ethical positions in complex situations; and
  - Act on that judgment.
- An environment within the law firm in which all staff (lawyers and support staff) are encouraged to, and do, discuss with their colleagues ethical questions about their own work and work within the firm more generally.
- This 'ethical conversation' is viewed in the firm in a positive, aspirational light and as an opportunity to improve the way the firm operates, and is seen as a proactive, natural part of the way the practice chooses to operate.

110 It is likely to be the case that the longer an individual has been part of the current firm, the more he or she has internalised the values of the firm. It has also been suggested that 'ethical imprinting' occurs within the first experience of law practice and does not necessarily change with the current firm: Chambliss, 'The Nirvana Fallacy', above n 30, 149, citing Leslie C Levin, 'The Ethical World of Solo and Small Firm Practitioners' (2004) 41 *Houston Law Review* 309, 379. See also, Adrian Evans and Josephine Palermo, 'Lawyers and Ethics in Practice: The Impact of Clinical and Ethics Curricula on Lawyers' Ethical Decision-Making', in 'Monograph No 1 – Innovation in Clinical Legal Education: Educating Future Lawyers' (2007) *Alternative Law Journal* 11.

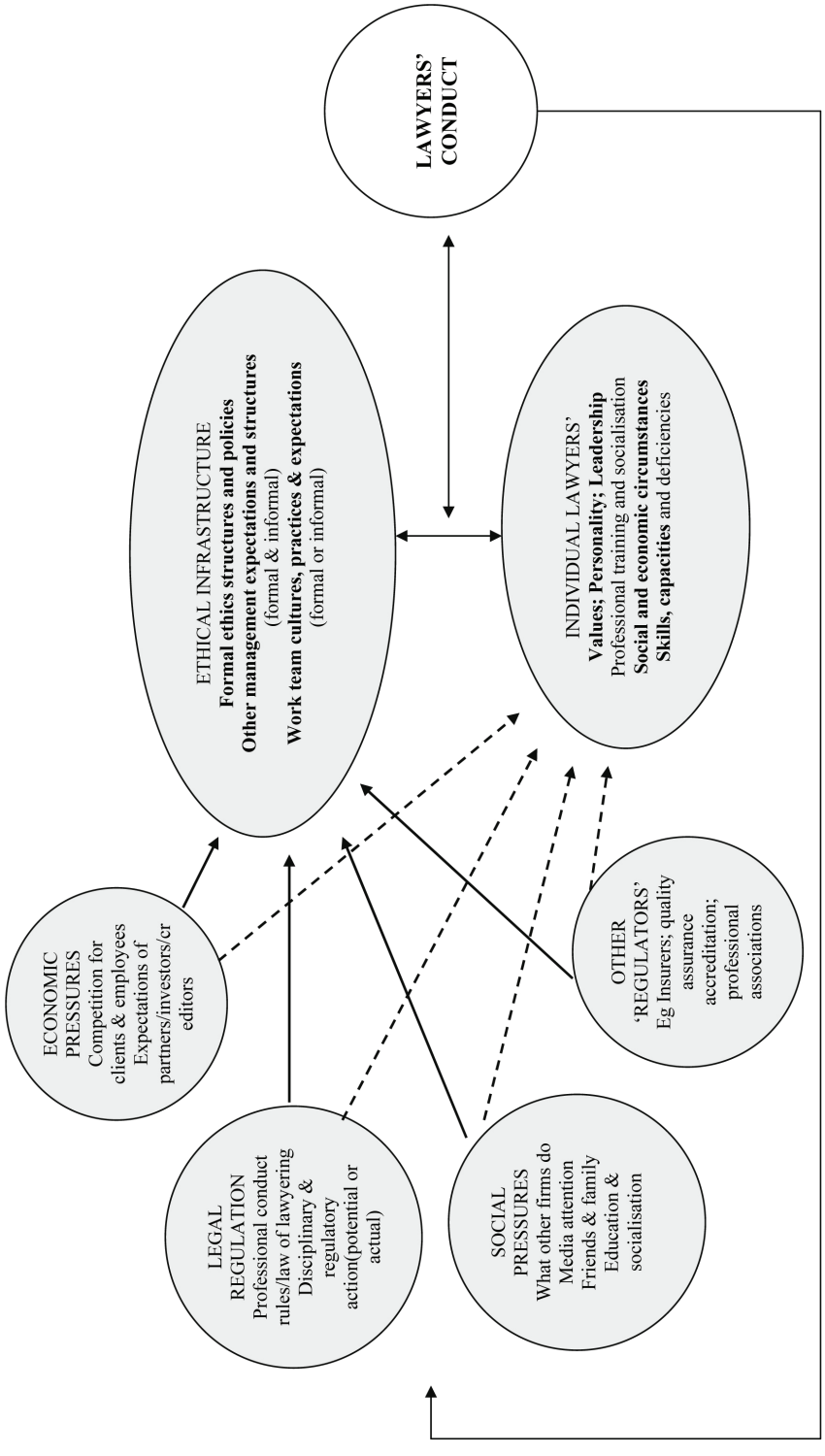
It is not seen simply as a reaction to 'compliance management', and the firm aims to transcend oppressive, punitive overtones associated with terminology such as 'regulation', 'compliance', 'performance management', and 'whistleblowing'. At the very least, those who do raise ethical questions do not face recriminations, even where this has the potential to displease a client or have adverse financial consequences for the firm.

- The existence within the firm of ethically supportive structures and management practices.

It should not be a question of relying on either formal or informal processes; it is appropriate that firms have both legalistic, formal reporting procedures to deal with ethical breaches involving those members of the firm who are 'beyond the reach of soft, cultural controls',[111] while simultaneously encouraging a culture of open, two-way dialogue and mutual support.

111 Chambliss, above n 30, 128, .

Diagram 1: External Pressures, Ethical Infrastructure and Ethical Practice



Appendix 1: The 'Ten Commandments' for Incorporated Legal Practices[112]

The ten areas to be addressed to demonstrate compliance with the 'Appropriate Management Systems' requirement for incorporated law firms as required by the NSW Legal Services Commissioner. It is understood that the same approach will be followed in Victoria and Queensland.

(1) Negligence – (providing for competent work practices).

(2) Communication (providing for effective, timely and courteous communication).

(3) Delay (providing for timely review, delivery and follow up of legal services).

(4) Liens/file transfers (providing for timely resolution of document/file transfers).

(5) Cost disclosure/billing practices/termination of retainer (providing for shared understanding and appropriate documentation n commencement and termination of retainer along with appropriate billing practices during the retainer).

(6) Conflict of interests (providing for timely identification and resolution of "conflict of interests", including when acting for both parties or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions etc).

(7) Records management (minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, iling, rchiving etc and providing for compliance with requirements regarding registers of files, safe custody, financial interests).

(8) Undertakings (providing for undertakings to be given, monitoring of compliance and timely compliance ith notices, orders, rulings, directions or other requirements of regulatory authorities such as the OLSC, courts, costs assessors).

(9) Supervision of practice and staff (providing for compliance with statutory bligations covering licence and practising certificate conditions, employment of persons and providing for proper quality assurance of

112 Ten areas to be addressed to demonstrate compliance with 'Appropriate Management Systems' Office of the Legal Services Commissioner, <http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_tenobjectives> at 6 August 2007.

work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services).

(10) Trust account regulations (providing for compliance with Part 3.1 Division 2 of the Legal Profession Act and proper accounting procedures).