

A NEW FRAMEWORK FOR LAW FIRM DISCIPLINE

ELIZABETH CHAMBLISS & DAVID B. WILKINS

Professor Ted Schneyer was the first to call for "professional discipline" for law firms in his 1991 article by the same title. Schneyer called for the imposition of an entity duty of supervision under Model Rule 5.1(a), which currently imposes supervisory duties only on individual partners. He argued that the possibility of sanctions against firms was necessary to encourage partners to invest in structural controls, such as conflicts checking procedures, to promote firm-wide compliance with professional regulation. He referred to such, controls, collectively, as the "ethical infrastructure" of the firm:

[A] law firm's organization, policies, and operating procedures constitute an "ethical infrastructure" that cuts across particular lawyers and tasks. Large law firms are typically complex organizations. Consequently, their infrastructures may have at least as much to do with causing and avoiding unjustified harm as do the individual values and practice skills of their lawyers.

Schneyer based his proposal for law firm discipline on an analogy to corporate criminal liability, citing the increasing use of collective criminal sanctions in the regulation of business corporations. Just as some corporate wrongdoing is "inherently structural," Schneyer argued that "bureaucratic failings and collective decisions . . . play a significant causal role" in producing unethical conduct in law firms. Moreover, he argued, some types of collective sanctions, such as public censure or shaming, may be more effective against law firms than business corporations, because law firms belong to a "reasonably well-defined ethical community."

Schneyer's arguments have profoundly influenced subsequent debate about law firm discipline. Indeed, it is difficult to find a law review article or bar debate on the subject that does not begin with Schneyer's article. Yet while Schneyer deserves great credit for initiating the conversation on law firm discipline, we suggest that it is time to reconsider the regulatory framework that he proposed. As we argue below, using Rule 5.1 (a) as the vehicle for law firm discipline has contributed to confusion about the goals of regulation and led to an impasse in regulatory debate.

This paper proposes a new framework for law firm discipline. We argue, first, that law firm discipline should be distinguished from partners' supervisory duties under Rule 5.1 (a). Rule 5.1(a) as currently written is unenforceable in large law firms or in any firm with a centralized management structure. Indeed, many of the infirmities that opponents attribute to proposals for law firm discipline actually are infirmities inherent in Rule 5.1(a). Instead, we argue, the design and monitoring of structural controls within firms should be recognized-and regulated- as a specialized duty of management. We argue, further, that this duty of "structural supervision" is best fulfilled by in-house compliance specialists, such as law firm general counsel, loss prevention partners, and in-house ethics advisors. We propose that all law firms be required to designate at least one partner as the firm's compliance specialist and show how this approach avoids the problems associated with law firm discipline under Rule 5.1(a).