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### How and Why Do Lawyers Misbehave? Lawyers, Discipline, and Collegial Control

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## 6

### How and Why Do Lawyers Misbehave?

#### *Lawyers, Discipline, and Collegial Control*

*Lynn Mather*

A fundamental principle of professional labor is that the members of a specialized occupation, as professionals, enjoy autonomy. In sociologist Elliot Freidson's words, professionals "control their own work."<sup>1</sup> The practitioners themselves decide what constitutes acceptable or appropriate behavior. Professions establish rules and systems of self-regulation to teach and enforce the expected standards of conduct on their members. One way, then, to assess legal professionalism is to ask how well lawyers regulate themselves. The extensive literature on lawyer regulation paints a negative picture.

The Watergate scandal of the early 1970s brought renewed scrutiny to the legal profession. Although a variety of changes have occurred since then to improve lawyer regulation, numerous problems remain. Law schools now require students to take legal ethics, but such courses generally lack stature and respect. Bar discipline was reorganized in the 1970s to transfer some control from bar associations to agencies of state supreme courts.<sup>2</sup> State discipline agencies in turn have increased their investigation of grievances filed against lawyers. But the vast majority of grievances continue to be dismissed. Much professional discipline is private (such as a warning letter, reprimand, or confidential diversion program), which undermines public trust and confidence in the system.<sup>3</sup> Further, even the most common forms of public sanctions on lawyers (public censure, suspension, or disbarment) are specific to

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<sup>1</sup> ELIOT FREIDSON, *PROFESSIONALISM REBORN: THEORY, PROPHECY AND POLICY* 173 (1994).

<sup>2</sup> Michael J. Powell, *Professional Divestiture: The Cession of Responsibility for Lawyer Discipline*, 1986 ABF RES. J. 31 (1986).

<sup>3</sup> Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1 (2007).

that state, and nothing prevents a sanctioned attorney from seeking bar admission in another state (although they would be required to disclose any prior sanctions).

Suits for legal malpractice have multiplied and now provide a significant parallel source of regulation over lawyers.<sup>4</sup> Indeed, some attorneys specialize in professional liability law, unlike decades ago when very few lawyers were willing to represent a client in a suit against a professional colleague. Yet it is still difficult to win a legal malpractice suit, and some lawyers who lack insurance say they avoid it out of a belief that it will reduce their chances of being sued.<sup>5</sup> A growing number of jurisdictions are requiring lawyers to disclose whether they carry malpractice insurance, and the proportion of lawyers with such insurance varies considerably by practice area and by state.<sup>6</sup> Only Oregon mandates it for lawyers. Insurance companies have increasingly become important regulatory actors for the legal profession.

Other sources of lawyer regulation have also emerged in recent years, such as criminal prosecution for egregious lawyer misconduct, more aggressive judicial oversight over lawyers for rude, careless, or otherwise unprofessional conduct, and requirements imposed on lawyers who interact with certain administrative agencies (such as securities lawyers and the SEC). In short, multiple overlapping regulatory systems operate to monitor attorney conduct. Some of these alternatives (or additions) to bar discipline have emerged because of public hostility toward lawyers and a lack of evidence that the legal profession is able to regulate itself.

Despite the expansion of these regulatory structures, we still lack answers to basic empirical questions about lawyer behavior. How much lawyer misconduct is there? And are there any general patterns to it? Analysis of the data from state disciplinary board actions and legal malpractice claims provides one way to evaluate legal professionalism, by focusing on lawyer deviance. In this chapter, I explore the ethical violations lawyers commit, with the aim of increasing our understanding of the legal profession and its capacity to regulate itself. Besides considering formal sanctions resulting from bar grievances and legal malpractice claims, I examine informal sources of regulation and discipline for lawyers, including socialization, networks, and social norms that exist in different areas of legal practice. I conclude with two examples of how formal and informal discipline work together to produce and enforce norms of professionalism in practice.

<sup>4</sup> See, e.g., Manuel Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1661 (1994) (noting that, from 1970 to 1989, the number of lawyers sued for legal malpractice increased more than five times).

<sup>5</sup> LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 134 (2nd ed. 2008).

<sup>6</sup> Estimates of lawyers who carry malpractice insurance range from 65 to 90%, according to recent state bar surveys. *Id.*

PROFESSIONAL CONDUCT AND DEVIANCE<sup>8</sup>

Assessing the extent of attorney misconduct is challenging both as a matter of definition and data. The lack of a universal definition for *professional* lawyer conduct that applies across the entire legal profession creates a conceptual problem for any analysis of attorney *misconduct*. The ethical rules adopted by each state, typically based on the ABA's Model Rules of Professional Conduct, ostensibly define behavioral standards for all lawyers. But the rules only set bare minimums.<sup>7</sup> And, as numerous critics have argued, the rules are also indeterminate, vague, contradictory, and ignore the factual differences lawyers face across diverse legal work settings.<sup>8</sup>

At the same time, the secrecy of state bar disciplinary processes and the fact that malpractice cases are usually resolved through insurance settlements, not public trials, limit the availability of empirical data on this question. Even evidence of increased complaints to the bar or lawsuits filed against lawyers does not necessarily mean greater deviance because the increase could simply reflect more publicized regulation and/or general antilawyer sentiment in popular culture. Moreover, discipline numbers paint an incomplete picture of deviance because individuals are more likely to go to the bar with their grievances, whereas corporate clients might use market mechanisms to complain about attorney service – for example, seeking a fee reduction or simply taking their law work to another firm. And within a large law firm, unprofessional conduct is likely to be handled internally to avoid embarrassment to the firm. Thus, although bar discipline falls most heavily on solo practitioners and small firm lawyers, and proportionately less on large firm lawyers, “one cannot judge the prevalence of misconduct from the imposition of lawyer discipline.”<sup>9</sup>

<sup>7</sup> See, e.g., Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 731 (1994) (criticizing the bar's insistence on uniform ethical rules that produce “higher levels of abstraction and lower common denominators in regulatory standards than is desirable for ethical guidance”); see also Richard L. Abel, *Why Does the American Bar Association Promulgate Ethical Rules?*, 59 TEXAS L. REV. 639 (1981).

<sup>8</sup> See, e.g., David Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990); see also PAUL G. HASKELL, *WHY LAWYERS BEHAVE AS THEY DO* (1998). As an example of ambiguity in the Model Rules, compare two rules on the lawyer/client relationship. Rule 1.2 (a) requires a lawyer to “abide by a client's decisions,” but Rule 2.1 says to “exercise independent judgment and render candid advice.” Taken together, the Rules thus allow lawyers to act as a “hired gun” or to follow a more independent model of representation, according to their own ideology of legal practice and client expectations. The meaning of “professional” representation in the attorney-client relationship has become a matter for academic debate in theory and attorneys' discretion in practice. See Lynn Mather, *Fundamentals: What Do Clients Want? What Do Lawyers Do?* 52 EMORY L. J. 1065 (2003); see also Abel, *supra* note 7.

<sup>9</sup> Lisa Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879, 913 (2002); see also Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309 (2004); State Bar of California, *Investigation and Prosecution of Disciplinary Complaints Against Attorneys in Solo Practice, Small Size Law Firms and Large Size Law Firms* (2001).

*Lawyer Deviance: Case Studies from New York*

Richard Abel's recent book, *Lawyers in the Dock*, provides an important new analysis of lawyers' professional conduct by asking, "how and why lawyers misbehave."<sup>10</sup> Through detailed investigation of the disciplinary proceedings against seven New York lawyers, Abel examines the personality, background, family, and work pressures that led these men (all his cases were male) to betray their clients or engage in other professional misconduct and, ultimately, to be sanctioned by the New York bar. Abel acknowledges that his cases were not randomly selected; indeed, after reading more than 200 discipline files, he selected "extreme" cases that were "arguably more revealing."<sup>11</sup> The vivid portraits of these seven attorneys do show clearly how easily they made mistakes, large and small – often for what they believed to be good reasons. Nevertheless, even such rich, detailed cases cannot show the full extent and general characteristics of lawyer misconduct.

Abel describes the lawyers' *déviance* as their "betrayal of trust," yet the book never explicitly defines this fundamental notion, creating what Eli Wald describes in his book review as "a conceptual confusion" throughout the study.<sup>12</sup> This confusion is not surprising considering that it parallels the difficulty of defining professionalism in such a way as to clearly delineate the conduct expected from *all* lawyers, regardless of the type of legal work that they do, the cases they handle, or the clients they represent. Most of Abel's narrative and the lengthy cases themselves suggest that the "trust" these attorneys betrayed was their loyalty to clients. Abel has since explained that he meant "trust" to incorporate a broader meaning, including "attorney loyalty to other constituencies such as courts, opposing counsel, the legal system, and the public."<sup>13</sup> Finding the appropriate balance of loyalty to these different (and potentially conflicting) constituencies creates an uncertain range of ethical conduct.

Following the individualistic focus of the book's research, Abel concludes that "character is destiny,"<sup>14</sup> and one must only "look for greed or need (which often are indistinguishable)"<sup>15</sup> to explain what led the disciplined lawyers into such deep trouble. Deviance among attorneys is no different from deviance in other occupations, he suggests. It reflects some combination of a person's psychological makeup and

<sup>10</sup> RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* 53 (2008).

<sup>11</sup> *Id.* at 57.

<sup>12</sup> Eli Wald, *Book Review*, 59 J. LEGAL EDUC. 311, 331 (2009) (reviewing ABEL, *supra* note 10).

<sup>13</sup> *Id.* at 334–335. Abel gave his more expansive definition in a recorded interview at the Baldy Center for Law & Social Policy, see *id.* at 334, and in a published response to other reviews, Richard L. Abel, *Author Response*, 11 LEGAL ETHICS 126 (2008),

<sup>14</sup> ABEL, *supra* note 10, at 496.

<sup>15</sup> *Id.* at 492.

upbringing, severe stress or crisis, or other economic, family, and social pressures, often combined with substance abuse and depression.

Abel also looks beyond the individual stories to assess the social controls that exist to discipline lawyers in various work settings, and he is especially harsh on attorneys in solo practice. The book cites critics of the bar's disproportionate investigation of solo and small firm practitioners and notes that the harms of misconduct by large firm attorneys may in fact be more serious and "cost many more people much more money."<sup>16</sup> Yet, Wald argues that "by only selecting solo and small firm practitioners" for their deviance "the whole book sends an implicit message that this is where ethical lapses occur."<sup>17</sup> Even more than that, the book sends that message explicitly in its conclusion. Abel writes, "it is not clear that any lawyer should" practice *alone* today, given the difficulty of making appearances in court while also being in the office, the ease of missing deadlines without a calendar system in place, and the lack of financial incentive that a partner might provide to maintain a reputation.<sup>18</sup> Yet each of these arguments could apply to attorneys working in firms, both small and large: Multiple demands on lawyers prevent them from meeting court obligations; calendar systems are only as good as the people who create and employ them; partners who take advantage of their clients might also be willing to cheat on a partner.<sup>19</sup>

Instead of focusing solely on the personal history and details of individual lawyers, or on the difference in lawyers' professionalism according to firm size, I suggest we look more closely at the structure and culture of legal practice to see if there are patterns in lawyers' misconduct. In particular, I focus on the context in which lawyers work – that is, the work conditions, clients, law and legal institutions, and social networks commonly found in specific areas of law practice.

### *Lawyer Deviance and Collegial Control*

Consider the wide variation in the perceived "ethical conduct" of lawyers across forty-two areas of practice in Cook County, Illinois, as reported in a well-known 1995 survey by John Heinz, Robert Nelson, Rebecca Sandefur, and Edward Laumann.<sup>20</sup>

<sup>16</sup> *Id.* at 54–55.

<sup>17</sup> Wald, *supra* note 12, at 322.

<sup>18</sup> ABEL, *supra* note 10, at 525.

<sup>19</sup> See Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 GEO. J. LEGAL ETHICS 1549, 1589 (2009); see also Lerman, *supra* note 9, at 910 (commenting that although law partners might be deterred from taking firm funds through loyalty, "the glue of partner loyalty may be weaker than it used to be").

<sup>20</sup> JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005). The survey asked professors and legal researchers in Chicago to evaluate each field of legal work on several different dimensions, including

The *most* ethical attorneys in this reputation-based survey practiced in the areas of civil rights/civil liberties, international law, intellectual property, general family practice/poverty law, general corporate law, estates, and securities. By contrast, the attorneys who ranked the *lowest* on ethical conduct practiced in the areas of divorce, plaintiff personal injury, personal bankruptcy, and criminal defense. Moreover, this ranking of legal specialties based on ethical conduct changed very little between 1975 and 1995, according to Heinz and Laumann's identical survey, conducted twenty years earlier.<sup>21</sup>

This ranking, however, is based solely on *reputation* as judged by outside academics, so it does not provide direct evidence of ethical behavior. Nevertheless, its results can be compared with a ranking derived from a survey of law graduates from the University of Michigan law school based on their observation and knowledge of fellow practitioners in each legal area.<sup>22</sup> The Michigan survey also shows a hierarchical ranking of lawyers' ethical conduct according to different substantive legal fields.

In annual surveys conducted between 1980 and 2006 of Michigan law graduates 15, 25, and 35 years out of law school, 6,108 graduates answered a question asking the extent to which they agreed with the statement, "the lawyers with whom I deal (other than those in my own office) are highly ethical in their conduct."<sup>23</sup> Substantially more lawyers practicing in the areas of energy, banking, securities, real property, employee benefits, and estates agreed (mildly to strongly) that their peers in the field were highly ethical than did lawyers practicing in the areas of labor relations, criminal law, insurance, immigration, and civil rights/discrimination (which ranked lowest).<sup>24</sup> Other areas of practice such as corporate, intellectual property, environmental law, and domestic relations fell in between.

The Michigan survey data, although not without problems, provide stronger evidence of variation in ethical conduct by area of law since they are based observations

intellectual challenge, public service, freedom of action, and ethical conduct (described as "the reputation for ethical behavior of the lawyers doing the work"). *Id.* at 86.

<sup>21</sup> *Id.* at 86; cf. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982). The correlation between the 1975 and 1995 rankings was .90 based on twenty-seven specialties. HEINZ ET AL., *supra* note 20, at 328.

<sup>22</sup> This previously unpublished analysis of the survey data from 6,108 Michigan law graduates was done by David Chambers. Survey questions and results reported here are on file with the author. It is difficult to directly compare the 1995 survey data reported by Heinz, Nelson, Sandefur, and Laumann with the Michigan survey since the latter examines twenty-three categories of substantive law practice while Heinz and his colleagues examine forty-two specialties, and some of the specialties themselves were defined differently.

<sup>23</sup> *Id.*

<sup>24</sup> Overall, 59% of the Michigan lawyers surveyed agreed that their peers in the field where they spent the most time working were highly ethical, whereas 66% or more of lawyers practicing in the areas of energy, banking, securities, real property, employee benefits, and estates agreed with this statement, compared to 52% or fewer of the lawyers in the areas of labor relations, criminal law, insurance, immigration, and civil rights/discrimination.

by lawyers practicing in each area.<sup>25</sup> What might explain this hierarchy? Why should the area of law practice make such a difference? If *individual* characteristics (character, substance abuse, or family stress) are key to professional misconduct, then shouldn't the bad apples be spread more randomly across the legal profession? The alternative perspective that I propose here shifts the focus from the individual lawyer who misbehaves to the structure, organization, and content of legal work itself. That is, instead of taking a microview that looks at bad apples, we should take a macroview and look at "bad barrels" – conditions that foster attorney misconduct.<sup>26</sup>

I suggest in this chapter that we explore the work conditions, interactions, and values of lawyers in different communities of practice and situate lawyer deviance in each particular work context. Legal specialization, along with the stratification of the profession, impacts lawyers' understandings of what constitutes professional conduct and misconduct. That is to say, defining *unprofessional* conduct first requires a definition of *professional* conduct, and that depends on the context of lawyers' work. A conception of lawyer deviance that defines professionalism according to legal context, integrates two bodies of literature. On the one hand are the critics of the official ideology of the profession, an ideology that assumes universal ethics for all lawyers, influencing their conduct from the top down. In David Wilkins' classic critique, "we must abandon the traditional model's commitment to general, universally applicable ethical rules" in favor of midlevel principles for the regulation of lawyers.<sup>27</sup> Similarly, Judge Stanley Sporkin drew on his experience in securities law to call for separate codes of professional conduct for the various specialties, which would acknowledge the facts, problems, and responsibilities unique to each of them.<sup>28</sup> Robert Nelson and David Trubek argued, "there are multiple and competing visions of what it means to be a 'professional'"<sup>29</sup> and proposed instead that we examine different "arenas of professionalism," that is, "particular institutional

<sup>25</sup> Lawyers may not share a common standard for "highly ethical conduct" that is independent of the area in which they practice. Also, the most ethical fields tend to involve counseling and transactional work, whereas the least ethical fields involve adversarial negotiations or litigation. The former is less likely to be observed by professional peers than the latter. And it may simply be less possible to perceive highly ethical conduct in adversarial legal settings. Finally, these data come from graduates of only one elite law school.

<sup>26</sup> Blake E. Ashforth, Dennis A. Gioia, Sandra L. Robinson & Linda K. Trevino, *Introduction to Special Topic Forum: Re-Viewing Organizational Corruption*, 33 ACADEMY OF MGMT. REV. 670, 673 (2008); see also Levin *supra* note 20.

<sup>27</sup> Wilkins, *supra* note 8, at 515.

<sup>28</sup> Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993).

<sup>29</sup> Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 177, 182 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992).



settings in which groups construct, explicitly or implicitly, models of the law and of lawyering.”<sup>30</sup>

There is also a growing empirical literature describing the shared expectations and professional values of particular legal cultures and subcultures: divorce attorneys,<sup>31</sup> plaintiff personal injury networks,<sup>32</sup> criminal court workgroups,<sup>33</sup> solo and small firm attorneys,<sup>34</sup> legal services organizations,<sup>35</sup> prosecutors and government lawyers,<sup>36</sup> corporate litigators,<sup>37</sup> bankruptcy lawyers,<sup>38</sup> and even different law firms and the practice groups within them.<sup>39</sup> These distinct “communities of practice,” as my colleagues and I have suggested, consist of “groups of lawyers with whom practitioners interact and to whom they compare themselves and look for common expectations and standards.”<sup>40</sup> Such communities are multiple and overlapping. Experienced attorneys learn to navigate among them as they represent different types of clients or find themselves working in different practice areas or institutional contexts. It is within these diverse communities that we can identify “varieties of professionalism in practice.”<sup>41</sup> This bottom-up perspective on legal professionalism reveals lawyers’

<sup>30</sup> *Id.* at 179.

<sup>31</sup> See, e.g., LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* (2001); AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* (1995).

<sup>32</sup> See, e.g., HERBERT M. KRITZER, *RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES* (2004); Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiff's Practice in Texas*, 80 TEX. L. REV. 1781 (2004); Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiff's Personal Injury Bar* (2001) (unpublished Ph.D. Dissertation, University of Illinois at Chicago).

<sup>33</sup> See, e.g., JAMES EISENSTEIN, ROY B. FLEMMING & PETER F. NARDULLI, *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* (1988); JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1977); LYNN MATHER, *PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL CASE DISPOSITION* (1979).

<sup>34</sup> See, e.g., CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL FIRM ATTORNEYS* (1996); Levin, *supra* note 9.

<sup>35</sup> Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101 (1996).

<sup>36</sup> MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1978); PATRICK SCHMIDT, *LAWYERS AND REGULATION: THE POLITICS OF THE ADMINISTRATIVE PROCESS* (2005).

<sup>37</sup> DUFFY GRAHAM, *THE CONSCIOUSNESS OF THE LITIGATOR* (2005); Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631 (2005); Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837 (1998).

<sup>38</sup> MILTON C. REGAN, *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004).

<sup>39</sup> MICHAEL J. KELLY, *LIVES OF LAWYERS* (1994); MICHAEL J. KELLY, *LIVES OF LAWYERS REVISITED: TRANSFORMATIONS AND RESILIENCE IN THE ORGANIZATIONS OF PRACTICE* (2007); EMMANUEL LAZEGA, *THE COLLEAGIAL PHENOMENON: THE SOCIAL MECHANISMS OF COOPERATION AMONG PEERS IN A CORPORATE LAW PARTNERSHIP* (2001).

<sup>40</sup> MATHER ET AL., *supra* note 31, at 6.

<sup>41</sup> *Id.* at 176 (emphasis added).

shared expectations and norms in particularized practice settings, expectations that are socially constructed by attorneys working with specific clients, knowledge, legal rules, social networks, institutions, and workplace organizations.

Within these communities, lawyer behavior is constrained by the norms and practices of colleagues. This “collegial control” over work involves multiple dimensions:

It includes *shared languages, knowledge, and identities* that together reinforce common understandings of the challenges of particular kinds of legal work. It involves *internalized norms of conduct* learned in life, in law school, and during *socialization into practice*. It includes *pressures from peers* to behave in particular ways in order to function effectively in a system of *reciprocal relationships*. It involves *formal norms of conduct* and the *threat of sanction* for violating these norms. *Collective organization* and identity strengthen collegial control over work.<sup>42</sup>

These mechanisms of collegial control emerged from research on communities of practice among divorce attorneys in New England. Other aspects of control within communities of practice include the need to maintain a good reputation to attract clients – for example, in personal injury practice<sup>43</sup> – and lawyers’ advice networks – groups of lawyers who provide information and judgment to attorneys early in their careers and help shape expectations for solo and small-firm lawyers.<sup>44</sup>

Large law firms also have embedded controls built into the way they are organized and operate. Ethical consciousness among corporate litigators in large law firms, according to Kimberly Kirkland, is constructed through an organizational logic that depends on situational factors, following the “choice of norm” rule: In light of the varying informal expectations in a large firm, a lawyer learns to follow the guidelines of the partner or group for which she is working, and the best associates not only identify the appropriate norms but can navigate easily among them.<sup>45</sup> Mark Suchman found corporate litigators to have rather weak material controls within the firm, and somewhat stronger controls through culture – particularly, the selection, socialization, and interaction of associates and partners. But he notes that even these internal collegial controls, which used to sustain the firm as a community, have weakened as large firm practice has become more market driven.<sup>46</sup>

Although collegial control may be the most effective means of regulating lawyers, it is vulnerable on numerous counts. Lawyers not embedded in their firm or practice specialty may choose to defect from the norms of the community, or lawyers who

<sup>42</sup> *Id.* at 178 (emphasis added).

<sup>43</sup> See KRITZER, *supra* note 32. For discussion of reputation as a constraint on attorney escalation of conflict, see Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994).

<sup>44</sup> Levin, *supra* note 9, at 328–32.

<sup>45</sup> Kirkland, *supra* note 37.

<sup>46</sup> Suchman, *supra* note 37.

are unfamiliar with an area may be ignorant of the particular practices that guide successful specialists there. The next section explores two types of formal regulation of attorney conduct with an eye to what they might show about variation in misconduct across different areas of practice.

## FORMAL SANCTIONS AND AREAS OF PRACTICE

### *Bar Discipline*

Most states do not publish summary data about the characteristics of attorneys facing grievances. But data that are available show the top three practice areas for complaints about attorney misconduct to be in family law, criminal law, and personal injury, followed by real estate and probate, with the precise ranking of areas varying by state and method of counting.<sup>47</sup> Investigations against attorneys in Illinois in 2004, for example, were most frequent in matters of criminal law, domestic relations, tort, and real estate, in that order; only 6 percent of investigations ended with formal charges filed for attorney misconduct.<sup>48</sup> Such extensive screening is typical for attorney grievances. According to an analysis of state data submitted to the ABA for 2006, the average state agency investigates only 58 percent of the grievances it receives, only a fraction of those result in charges, and only 7.8 percent of investigations yield public discipline.<sup>49</sup> Some grievances are referred to other agencies such as fee arbitration or consumer protection, whereas others are dismissed or resolved informally without investigation.

Although criminal law and domestic relations usually top the charts for grievances or investigations, those areas typically drop in the rankings when it comes to disciplinary charges filed against lawyers. In Illinois in 2004, for example, although the ranking of *investigations* (in declining order of frequency) were (1) domestic relations, (2) criminal, (3) tort, and (4) real estate, the last two areas (tort and real estate) emerged as numbers one and two for *charges* filed. Similarly, reports from Maine and New Hampshire showed attorneys in criminal law and family law to have the highest proportion of docketed complaints against them (close to half of

<sup>47</sup> See Craig McEwen & Lynn Mather, *Client Grievances and Client Relationships: Central Challenges of Divorce Practice*, Paper Presented at Conference on Lawyers in Practice: Ethical Decision Making in Context (April 23, 2010) (noting that a search of websites for twenty states' grievance offices showed that most did not publish summary statistics on the nature of complaints, charges, and final sanctions).

<sup>48</sup> See Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois, ARDC Organizational Information, <http://www.iardc.org/orginfo.html> (last visited Feb. 18, 2010).

<sup>49</sup> Analysis of the ABA data was done by HALT, a legal reform group. See HALT, *Attorney Discipline Report Card 2006*, [http://www.halt.org/reform\\_projects/lawyer\\_accountability/report\\_card\\_2006/index\\_2.php](http://www.halt.org/reform_projects/lawyer_accountability/report_card_2006/index_2.php) (last visited Feb. 20, 2010).

all complaints came from just these two areas), but proportionately fewer family law and criminal attorneys were found guilty of misconduct.<sup>50</sup>

Professional discipline involves “both deviant behavior and agency response,” as Bruce Arnold and John Hagan conclude after comparing Canadian lawyers prosecuted for misconduct with an equal number of lawyers who received complaints but were not prosecuted.<sup>51</sup> Just as any understanding of crime rates rests on the nature of both defendant and police/prosecutorial behavior, the same holds true for explaining lawyer deviance. Arnold and Hagan found certain characteristics of attorneys (for instance, solo practice and inexperience) make them particularly vulnerable targets for complaints but that discipline agencies were also more likely to prosecute certain kinds of offenses – such as those involving financial harm to client or violation of trust accounts.<sup>52</sup> Similar to Canada, reports of discipline in the United States suggest a high likelihood of sanction for attorneys who have committed more serious professional violations, especially involving the abuse of financial trusts.<sup>53</sup> Other frequently sanctioned misconduct includes neglect, failure to communicate, and fraud.<sup>54</sup> Who gets disciplined depends in part, on “which misconduct the disciplinary agencies see fit to investigate” and on “whether the disciplinary agency has the resources to investigate misconduct where the perpetrator is a large firm lawyer.”<sup>55</sup>

What characterizes family law, criminal law, and personal injury such that attorneys handling these cases are more vulnerable to bar grievances? Since it is clients who most frequently initiate complaints (as opposed to other lawyers or judges), and these are personal plight areas of law, it is easy to see why individuals with few other outlets for complaints might turn to discipline agencies. Divorce, criminal, and personal injury cases involve emotional turmoil, high stress, pain, and suffering. Consequently, some client complaints against attorneys might simply be venting, scapegoating their lawyers for the fact that life has not gone as planned. Also, attorneys engaged in these areas of practice enjoy great autonomy due to the imbalance of information between the one-shot client and the experienced lawyer. Moreover, these attorneys usually work in sole practice or small firms where there is little or no oversight and little support staff. And in some of these areas (such as

<sup>50</sup> Maine Board of Overseers of the Bar, 2007 Annual Report; New Hampshire Supreme Court, Attorney Discipline System, 2008 Annual Report. The 2008 New Hampshire report does not show the area of law for sanctioned attorneys but this pattern is shown in an earlier analysis by New Hampshire bar counsel. See Thomas V. Trevethick, *Is There a Pattern in the Madness? A Statistical Survey of Conduct Complaints*, 36 N.H. B.J. 13 (1995).

<sup>51</sup> Bruce L. Arnold & John Hagan, *Careers of Misconduct: The Structure of Prosecuted Professional Deviance Among Lawyers*, 57 AM. SOC. REV. 771, 779 (1992).

<sup>52</sup> *Id.* at 777.

<sup>53</sup> See, e.g., New Hampshire and Maine reports, *supra* note 50.

<sup>54</sup> *Id.*

<sup>55</sup> Lerman, *supra* note 9, at 913.

criminal defense or divorce practice with a working-class clientele), there are class differences between lawyer and client that accentuate the power of the attorney. Thus, there are few obvious controls over attorney conduct in these personal plight areas, at least by comparison with lawyers in large law firms who work in bureaucratic structures surrounded by peers and staff, with sophisticated clients (general counsel or the financial officer for a corporation).

Nevertheless, we know from research on the different communities of practice in the divorce, criminal defense, and personal injury areas that informal collegial controls do exist and influence attorney conduct. Shared identities and knowledge, repeated interactions in social networks, informal norms, and the need to maintain a quality reputation in order to attract clients all contribute to lawyer professionalism in these particular areas of practice. Moreover, specialists in these fields know the risks of client complaints and incorporate defensive strategies in their practices where they can. Attorney deviance, in the macroview that I suggest here, could be explained in two ways: by attorney participation in subcultures of specialists with deviant norms, or by the activities of general practitioners without experience or knowledge in the specific area of law.

On the one hand are the subcultures of law practice that maintain and transmit norms that “in some cases, directly contribute to deviant behavior.”<sup>56</sup> Several of the cases of lawyer deviance described by Abel involved specialists who had learned sloppy or shady behavior from other lawyers. Leslie Levin, for example, discusses the impact on the lawyers in Abel’s book of particular community norms in real estate (a “pressurized place” with little help for a new lawyer), immigration (high-volume practice with clients from “travel agents”), and personal injury (with kickbacks to expedite settlements).<sup>57</sup> In each case, lawyers had observed practice norms from other attorneys with similar clients and work situations in these subcultures. Among divorce lawyers, for example, are a few specialists who handle an extremely high volume of cases for low fees and who struggle to provide competent representation to all their clients.<sup>58</sup> Other specialists in divorce include the small subgroup of attorneys who acknowledged being “unreasonable,” more litigious, and more likely to do whatever their client wanted.<sup>59</sup> Given that some divorce clients seek vengeance and may want to use the legal process to punish their spouse – by hiding assets or making false charges – divorce lawyers who follow a client’s wishes without question may find end up facing grievances from opposing counsel or the court. Lawyers in all of these examples specialize in the particular area of law but share a professional

<sup>56</sup> Levin, *supra* note 3, at 29.

<sup>57</sup> Levin, *supra* note 19, at 1558–59.

<sup>58</sup> MATHER ET AL., *supra* note 31, at 25–30.

<sup>59</sup> *Id.* at 51, 127–30.

ideology and type of practice, similar clients, and working conditions. That is, they develop their own community of practice, a subculture within the larger community of specialists, which embraces norms more likely to lead to professional deviance.

Nonspecialist practitioners constitute a second group of lawyers who, I suspect, are also especially vulnerable to grievances in fields such as divorce, criminal defense, personal injury, or real estate. The general practitioner who specializes in “doorway law” – taking whichever client walks through the doorway – is taking a professional risk. As one New York attorney explained, attorneys in general practice often engage in “naked malpractice” since “most people don’t know what they don’t know.”<sup>60</sup> Recent studies of small firm and solo practitioners have all found increased specialization among them, as a strategy for getting clients, a way to achieve competence, and a means to maintain a professional reputation. “The days of the solo or small-firm ‘general law practice’ appear to be over (or at least numbered).”<sup>61</sup>

Like general practice lawyers, specialists might be at greater risk if they take on clients outside of their specialty, such as the real estate lawyer who accepts a divorce client or a personal injury specialist who accepts a criminal case. Why would they do this? For the money – to pay the bills and generate some income for a business that is struggling.<sup>62</sup> Or as a favor – to provide full service perhaps to a family friend, business acquaintance, or previous client. Data on lawyers working outside of their normal specialty is difficult to obtain, let alone data to confirm my hunch that these lawyers receive a higher proportion of grievances. In research my colleagues and I conducted on divorce, we found that a surprisingly large proportion of divorce clients are represented by nonspecialists. Analysis of the dockets of over 4,000 divorce cases revealed that most lawyer names (66 percent in New Hampshire and 55 percent in Maine) appeared in only one or two divorce cases over a four-year period.<sup>63</sup> Such lawyers who represent only an occasional divorce client might consult with peers in the community for advice and information. But they also might decide to simply handle the case on their own and assume they can learn all they need to know,

<sup>60</sup> Levin, *supra* note 3, at 7.

<sup>61</sup> Karen L. Pascale, *Small Wonders: Lessons from Delaware’s Small Firms and Solo Practitioners*, 19 DEL. LAW. 17, 17 (2001); *see also* SERON, *supra* note 34; Levin, *supra* note 9.

<sup>62</sup> I recognize that an individual focus on deviance here could help explain why certain practitioners would choose to practice outside of their area of competence, just as a microlevel perspective could help answer why certain subcultures develop their own deviant norms. My point, which I return to in the conclusion, is that *both* perspectives are needed to understand attorney deviance and that the current focus rests too much blame on the individual practitioner, ignoring the complicity of law firms and the legal system itself.

<sup>63</sup> By contrast, a relatively small group of lawyers handled the majority of divorce representations. The 20% of the lawyers who were listed most frequently appeared in 56% of the New Hampshire cases and 65% of the Maine cases. MATHER ET AL., *supra* note 31, at 47–48. Note that, because we sampled counties in the two states, some of the lawyers with few cases may have been listed more often in a neighboring county or state.

taking a risk that they have the competence to identify and respond to the particular challenges of a divorce case.

### *Legal Malpractice*

Professional liability provides another set of formal controls over lawyers, along with the discipline of state agencies. And here too, certain fields of law appear to top the list in generating complaints. In 1985, the ABA Standing Committee on Lawyers' Professional Liability began to collect and publish statistics on claims against attorneys for malpractice, using data supplied by national insurance companies. In its latest study (2007), the ABA has data from more than twenty-five insurance companies, but because some companies do not participate (e.g., Attorneys' Liability Assurance Society), mid- and large-size law firms are underrepresented in their analysis.<sup>64</sup> Nevertheless, as in lawyer discipline, claims against attorneys for legal malpractice show a "remarkable consistency" over time by the area of law.

Plaintiff personal injury and real estate ranked first and second in the distribution of claims (with family law often third) in every ABA survey between 1985 and 2007.<sup>65</sup> Indeed these three legal areas supplied over one-half of the 40,486 claims against attorneys in 2007.<sup>66</sup> Some cautions about these data are in order, beside the fact that they overrepresent solo and small-firm attorneys. Since the data are based on insurance *claims*, it is obvious that attorneys without insurance are not included, nor are many large-firm lawyers who are insured through ALAS. As noted earlier, the likelihood of attorneys having malpractice insurance varies significantly by state and firm size. Moreover, proof of legal malpractice requires a finding that "but for" the negligence of the lawyer, the client would have won his case. Such a standard is especially difficult in a criminal case, in which criminal defendants must essentially prove their innocence if they are to succeed in a malpractice claim against an attorney. Indeed, very few malpractice claims are filed in criminal matters (5% in 2007). Finally, the likelihood of a malpractice claim also depends on the extent of the damages and on the ease of translating damages into monetary terms.

In their analysis of the claim data by field of law, the ABA cautions that additional information is necessary before concluding that certain areas are riskier than others. We lack the data, the report explains, to conclude that the high percentage of claims in personal injury cases "is disproportionate to the overall time spent in this area of legal practice."<sup>67</sup> But a comparison of malpractice claims in Florida with data on the Florida bar (using Martindale-Hubbell and membership in specialty bar sections)

<sup>64</sup> AM. BAR ASS'N, STANDING COMM. ON LAWYERS' PROF. LIABILITY, PROFILE OF LEGAL MALPRACTICE CLAIMS: 2004-2007 2, 17 (2008).

<sup>65</sup> *Id.* at 4.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 3.

done by Manuel Ramos in 1995 suggests that claims do *not* occur disproportionately in particular areas of law, such as personal injury and real estate.<sup>68</sup> On the other hand, a study of liability claims at firms of thirty-five or more attorneys found that “a firm’s type of practice, geographic region, and size *were* significantly related to both the total number and aggregate dollar amount of claims resolved from 1992–1996,” with corporate practice having the greatest exposure.<sup>69</sup>

Whether or not claims data demonstrate *disproportionate* risk for certain practice areas, it is clearly the case that insurance companies believe in variation by legal fields and they set their premiums accordingly. For example, one application form for lawyers’ professional liability insurance, which runs more than ten pages plus supplements, asks first about total billings and size of firm.<sup>70</sup> The very next set of questions probes a lawyer’s area of practice in great detail. There is a matrix listing eighteen areas of law in one column – banking, general corporate, tax, employment, copyright/patent, domestic relations, oil and gas, among others – and next to each area is space to indicate the percentage of total gross billings derived from that area of practice for two separate years. Further information on the nature of clients (plaintiff versus defense, creditor or debtor, management versus union) is requested for *each* area of law that represents more than 10 percent of the applicant’s practice. According to the executive vice-president of a large Connecticut insurance company, “area of practice plays a large role in the underwriting and pricing of legal malpractice risks, as do other factors such as geography and firm size.”<sup>71</sup> And an attorney with over twenty years experience in insurance law said, “I learned quickly that there are five areas of law you don’t touch unless you do it all the time. You need to specialize or else you can get yourself in Big Trouble.” When asked to name those five areas, he responded, “tax, patents, domestic relations, ERISA, and corporate real estate.”<sup>72</sup>

## DEFENSIVE STRATEGIES IN DIVORCE AND CORPORATE PRACTICE

How does the interaction of collegial control with the formal structures of lawyer discipline and professional liability work? This section presents two examples of

<sup>68</sup> Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client Is Safe*, 47 FLA. L. REV. 1, 52 (1995).

<sup>69</sup> *Harris Study Confirms Value of Risk Management for Law Firms*, <http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/9-11-97/315250&EDATE> (last visited Sept. 8, 2009) (emphasis added).

<sup>70</sup> See Application for Lawyers Professional Liability Insurance for Lloyd’s Insurance (December 2, 2001) (on file with author).

<sup>71</sup> E-mail from Executive Vice-President of large Connecticut insurance firm that handles professional liability policies (Sept. 9, 2009) (on file with author).

<sup>72</sup> Confidential Interview with Maryland lawyer (Jan. 7, 2009) (on file with author).



informal practices described by divorce attorneys and by lawyers in corporate law work: Choose Your Client Carefully and Cover Your Ass (CYA). Both of these strategies address ethical challenges, as attorneys see them, and help constitute professionalism in practice. That is to say, these are everyday practices used by experienced, specialized lawyers in response to what they perceive can get them into trouble.

### *Choose Your Client Carefully*

The importance of client selection typically ranks high on any listing of advice for lawyers, whether in solo or small-firm practice or in large firms. “Pick the right clients,”<sup>73</sup> cautions Pascale, and avoid “the ‘bad’ client,”<sup>74</sup> writes Levin, since it is clients who often push attorneys to engage in unethical conduct or have unreasonable expectations. Divorce clients “often sought to underreport their income on financial disclosure statements,” according to lawyers interviewed in New York.<sup>75</sup> In interviews with divorce lawyers in New England, my colleagues and I asked whether they screened clients, and more than 90 percent said they did.<sup>76</sup> Some attorneys said that they used their initial interview as an opportunity both to hear the client’s expectations and to explain their style of divorce representation. “They decide if they can work with me and I decide if I can work with them,” as one lawyer said.<sup>77</sup> Other lawyers mentioned using their secretaries to report rude or obnoxious behavior from clients as they sat in the waiting room or complained about having to wait for an appointment. The most common adjective attorneys used to describe a client who might be rejected was “difficult.” One type of “difficult” client was the vengeful, unrealistic, or stubborn spouse who was “totally out for blood.” Because most divorce lawyers prided themselves on being “reasonable,” they were wary of potential clients who were not. “Difficult” clients also included those who would be especially demanding of the attorney’s time:

[p]eople ... who look like they are going to think they are my only clients...  
[s]omeone who is going to want to be able to pick up the phone and call you four, five, six times a week and want you there to hold their hand and to talk with them about everything.<sup>78</sup>

A “red flag” signaling a difficult divorce client was the person who had a prior divorce attorney. The fact that the client was unhappy with one lawyer suggested that she

<sup>73</sup> Pascale, *supra* note 61, at 18.

<sup>74</sup> Levin, *supra* note 9, at 338.

<sup>75</sup> *Id.* at 338.

<sup>76</sup> MATHER ET AL., *supra* note 31, at 213 n.12.

<sup>77</sup> This quote and the material following comes from MATHER ET AL., *supra* note 31, at 93–95. I also draw directly from our lawyer interviews. For details on data and methods of this study, see *id.* at 195–201.

<sup>78</sup> *Id.* at 94.

might also be dissatisfied with the next one. As one lawyer explained her screening process:

I do not represent people who have previously had another attorney and want to get rid of that attorney. Under no circumstances. Because the reason they are leaving is probably because they don't like what they are being told. And if I have general respect for that attorney, I will not get myself involved in someone else's garbage.<sup>79</sup>

Another attorney said, "If you've got somebody coming in from another office, then you instinctively smell trouble. . . . If they have been a pain in the rump to another lawyer, then they are going to be a pain in the rump to you."<sup>80</sup>

What is interesting about these comments is not whether divorce lawyers *actually* turn away "difficult" or "recycled" clients – obviously many do not – but instead, what they reveal about how lawyers *think about* choosing clients. Experienced divorce attorneys have learned that overly demanding clients – especially those who lack the funds to properly compensate the attorney – can be a risk to represent. Who wants to return phone calls from someone who is unrelenting in their demands, their anger, or their grief? Such difficult clients are precisely the ones who might file a grievance with the bar for an attorney's lack of communication. Moreover, the social network of other divorce lawyers provides a warning sign to alert lawyers to clients who might pose problems for them. Interestingly, this informal knowledge among divorce lawyers echoes advice on how to prevent malpractice claims:

Many malpractice claims can be avoided by identifying and refusing to work with problem clients. Experienced practitioners recognize the following characteristics as "red flags":

- The client is changing attorneys in the middle of a case;
- The case already has been rejected by one or more firms;
- The client wants to proceed with the case out of principle, regardless of cost. . . .<sup>81</sup>

Although most divorce lawyers self-identified (and were named by their peers) as "reasonable" lawyers who shared the same generally cooperative approach in divorce negotiation and tried to avoid scorched-earth tactics, some attorneys specialized in a more adversarial or litigious style. Clients who left their first divorce lawyer were more likely to seek out and ultimately retain an attorney with a more litigious approach.<sup>82</sup>

<sup>79</sup> Confidential Interview (on file with author).

<sup>80</sup> *Id.* at 94–95.

<sup>81</sup> Stephen M. Blumberg, *Risk Management: Preventing Malpractice Claims*, 13 *LEGAL ECON.* 52, 52 (1987) (emphasis added).

<sup>82</sup> In divorce cases where both parties are represented (which was less than half the cases), about 10% of the parties had more than one attorney listed as attorney of record in the case docket. Analysis of the docketed cases for the lawyers we interviewed showed that lawyers who were most likely to be the

The economics of divorce practice led some lawyers to take whatever clients they could get, regardless of how difficult these clients might be. Attorneys with high-volume, low-fee divorce practices could not afford to be selective. These lawyers were especially at risk for misconduct, especially neglect, because of taking on more cases than they could handle. One lawyer admitted sheepishly that his caseload was too high:

Well, I think it would be healthier for me and for the clients if I decreased it some, maybe charged a little more, or something. And wasn't quite so on the edge here as far as getting things done. Risking doing sloppy work. . . . I mean, I've got some cases that are seriously neglected here. And I keep promising people I'll get to it.<sup>83</sup>

Other attorneys, perhaps just starting out in practice or coming from a different legal specialty (for example, to handle a divorce for a friend or colleague), lacked the knowledge to read the cues about problem clients in divorce and might not have realized the difficulties that some clients could bring. In sum, experienced divorce attorneys learned that one way to avoid complaints about misconduct was to be selective in accepting clients, but not all practices allowed lawyers that strategy.

Corporate attorneys also learn the importance of choosing clients carefully. In large law firms, avoidance of conflict of interest is key in taking on a new client. Office organizational policies institutionalize such screening, for instance, by saying "you cannot get a billing number until you get a conflicts clearance."<sup>84</sup> Screening clients helps lawyers avoid bar grievances and protects against complaints of malpractice. According to the ABA's *Risk Management: Survival Tools for Law Firms*,

The best time for lawyers and firms to protect themselves is when a client first seeks to engage them. . . . Many sources of potential risk posed by clients . . . can be readily identified at or before the time of engagement.<sup>85</sup>

The authors of this ABA guide draw on the Kaye Scholer malpractice case to emphasize such issues as the competence of the firm to handle the case and the scope of services to be provided. Kaye Scholer was sued by (and ultimately settled with) the federal Office of Thrift Supervision for the law firm's role in keeping Lincoln Savings & Loan afloat even when the bank was no longer solvent. Had the law firm focused on banking regulation and defined the scope of their representation accordingly, they might have acted differently and thus avoided liability.<sup>86</sup> Similarly,

second lawyers scored significantly higher on seeing litigation as an important skill in divorce practice than did lawyers who were first lawyers. MATHER ET AL., *supra* note 31, at 85.

<sup>83</sup> *Id.* at 26

<sup>84</sup> Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 692 (2002).

<sup>85</sup> ANTHONY E. DAVIS & PETER R. JARVIS, *RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS* 5 (2d ed. 2007).

<sup>86</sup> *Id.* at 4–6

a popular legal ethics text cites client selection as one of two practices that carry a high risk of triggering professional liability: “accept any client and any matter that comes along.”<sup>87</sup> The Harris survey of large law firms (discussed earlier) provides empirical support for such advice. The survey found that one of the two most effective risk management practices to reduce claims costs in large firms involved client screening. Specifically, “firms that have a separate partner or committee to oversee the acceptance of new clients and engagements, on average, paid out approximately \$800,000 less for their largest claim.”<sup>88</sup>

Attention to client selection helps lawyers maintain professional standards and avoid complaints against them by rejecting problem clients and seeking to establish an appropriate match between lawyer and client *before* representation begins. Once engaged by a client, how do lawyers address potentially problematic situations or gray areas of conduct? Many examples abound. Defensive strategies described by attorneys as CYA in divorce law practice and in corporate litigation show that the same label refers to very different conduct in these two communities of practice. Examination of these strategies sheds light on the values and institutional constraints lawyers face in these two areas.

### Cover Your Ass

In any area of legal practice, there are bound to be ethical challenges that require discretionary judgment and where poor decisions can get an attorney in trouble. From experience and through their peers, lawyers learn to identify these situations and to protect themselves, taking precautions to “cover your ass” should a complaint be brought. The risk of complaint depends on the area of practice. Here, I explore two different domains, divorce and corporate litigation, where lawyers report systematic use of CYA.

Divorce attorneys frequently face disagreement with their clients over settlement.<sup>89</sup> The most common conflict arises between vengeful, unrealistic clients who insist on more than they are entitled to and ask their lawyer to use the legal process to strike back at their spouse. But the reverse occurs as well. A client, whether out of guilt, sorrow, or fatigue, sometimes wants to sign an agreement for much less than he or she is entitled to. When presented with these two hypotheticals, divorce lawyers report that they would try to educate and persuade clients in both situations to be reasonable – to soften expectations in the first situation and to have more backbone in the second. If persuasion was not successful, lawyers faced the difficult choice of whether

<sup>87</sup> LERMAN & SCHRAG, *supra* note 5, at 130. The second high-risk practice that they mention, discussed earlier, is to “practice outside your area of expertise.”

<sup>88</sup> *Harris Study Confirms Value of Risk Management for Law Firms*, *supra* note 69.

<sup>89</sup> This section draws on MATHER ET AL., *supra* note 31, at 87–109.

to continue to represent the client. Some would continue representation in both situations. But lawyers were more than twice as likely to say they would withdraw from the case when the client was making unreasonably high demands than when the client was selling herself short. Collegial controls in the form of peer pressure from other lawyers, lawyers' interest in maintaining a reputation for reasonableness, and judicial disapproval steered many lawyers away from making excessive demands for clients in court. The reverse situation, however, led to a different response.

If, after an attorney's best efforts at persuasion, clients were adamant about selling themselves short to obtain the divorce, lawyers typically said they would continue to represent the client, with some explicitly invoking the ethical rule in favor of client self-determination. Most lawyers added that they would also write a CYA letter explaining that the client was accepting the divorce agreement against the lawyer's advice. As one divorce attorney put it:

If the client insists on going through with it, then what I would generally do is write a long letter that I will require them to sign before I'll continue representation. That serves a couple of purposes. When they see it in writing and show it to some friends, by and large, they will change their mind and decide not to go through with it. But in the event that they do go through with it, I won't be sued for malpractice.<sup>90</sup>

Although 60 percent of lawyers interviewed said they would write CYA letters when faced with these situations, analysis of lawyers' responses showed that those most specialized in family law were most likely to write them. Family law specialists (devoting 75% or more of their practice to family law) were twice as likely as nonspecialists (devoting less than 25% of their practice to family law) to refer to CYA letters when the client wanted less than the lawyer recommended. Lawyers embedded in the network of family law specialists undoubtedly shared horror stories of grievances and malpractice complaints from clients who later complained about getting an unfair divorce settlement. These lawyers knew the value of CYA, in contrast to attorneys lacking experience in divorce who thought they could protect themselves simply by saying it was the client's choice to settle.

Corporate litigators also report disagreement with their clients, portraying them as "amoral, short-sighted and excessively aggressive."<sup>91</sup> In private conversations with one another, litigators share what Duffy Graham calls the "two rules of practice. The first rule is The Client is the Enemy. The second rule is Don't Forget the First Rule."<sup>92</sup> Overt tensions between lawyer and client do not arise because of fear of malpractice, according to Graham. Instead, Kirkland explains, litigators shape their conduct according to the expectations of different audiences (clients, partners,

<sup>90</sup> *Id.* at 105.

<sup>91</sup> Suchman, *supra* note 37, at 848.

<sup>92</sup> GRAHAM, *supra* note 37, at 55.

judges, the media) constituted by what the situation demands.<sup>93</sup> How do litigators respond to clients who expect overly aggressive discovery and no-holds-barred litigation? Suchman found one group of litigators among his informants deferred to their clients, adopting an agency or hired-gun approach, and another group saw themselves as fiduciaries who “would make at least a cursory effort at moral suasion if they felt their client was in the wrong.” Some litigators in the second group added, “that a ‘CYA [cover-your-ass] letter’ might suffice to discharge the attorney’s advisory obligations.”<sup>94</sup> Given the relative power of clients over litigators and the relative weakness of judges in sanctioning attorneys, litigators see their biggest risk as not sufficiently deferring to their clients.

In-house counsel, speaking on behalf of the corporate clients they work for, not surprisingly see any efforts of outside litigators to exercise independent decision making in counseling to be “at best redundant with the in-house counsel’s own moral stewardship – and, at worst, subversive of the very principle of client control . . . either an unethical waste of resources or an unethical attempt at manipulation.”<sup>95</sup> Litigators must walk a fine line between excessive aggressiveness and excessive caution. But the informal norms of their practice see zealous advocacy as a litigator’s central responsibility and allow it to trump other ethical rules. The organizational logic of large law firms reinforces unquestioning client loyalty, as Kirkland writes,

Junior lawyers are agents for the lawyers who supervise them . . . not autonomous counselors who consult internal or fixed standards . . . and advise their superiors about the appropriate course of action. Large-firm litigators approach their relationships with, and obligations to, their clients the same way. They must understand their client’s will and they have an affirmative moral obligation to zealously advance that will.<sup>96</sup>

Litigators can express any moral qualms in a CYA letter but they know that they must act in accordance with their client’s wishes and aggressively play the game of litigation as defined by their peers and opposing counsel.

What do these two examples from two very different areas of practice suggest? First, experienced divorce lawyers and corporate litigators both recognize the risks posed by unquestioning acceptance of any client, and some institutionalize ways of screening clients to avoid problems. Second, when conflict arises between attorney and client over uncertain choices of judgment, many informal constraints – from peers, the firm, opposing counsel, the court, and the market for clients – influence a lawyer’s decision making. Third, the matrix of collegial control operates differently

<sup>93</sup> Kirkland, *supra* note 37, at 713–15.

<sup>94</sup> Suchman, *supra* note 37, at 849.

<sup>95</sup> *Id.* at 850.

<sup>96</sup> Kirkland, *supra* note 37, at 719.

in the two areas of practice. In divorce, it reinforces the lawyer's independent judgment over client demands for overly aggressive representation. But in corporate litigation, collegial control reinforces the lawyer as agent of the client and encourages aggressive representation. Finally, a lawyer's attempt at self-protection through a CYA letter is aimed at avoidance of a grievance or malpractice claim in divorce, where such oversight is common. The CYA letter in corporate litigation is aimed at self-protection for an attorney in the unlikely event of investigation from a senior partner, outside agency, or court. In short, there is a dramatic divide between professionalism in these two communities of practice. What is considered unprofessional conduct in one is praised in the other.

### CONCLUSION

Assessing how well the American legal profession regulates itself is a more complicated task than first appears. Although individual stories of lawyer deviance point to glaring weaknesses, systematic data is difficult to obtain. Individual states control their own disciplinary processes and few publish aggregate data that includes details on characteristics of attorney, firm size, nature of grievance, area of law, and the type of discipline imposed, including private sanctions. Data on legal malpractice claims are similarly limited. Many insurance companies, especially those covering large law firms, will not share information with the ABA for its report, leading to a skewed picture of legal malpractice. Even with more complete and better data on discipline and claims, we still would lack a clear picture of attorney misconduct without knowing something about the complaint process. How often do clients or others come to perceive attorney misconduct and then decide to do something about it, and in which cases and practice areas does this occur? Ideally we would have a survey like the Civil Litigation Research Project, which traced the trajectory of citizen grievances in different areas of law to discover which became lawsuits.<sup>97</sup>

Using the limited data available, I have outlined a picture of lawyer deviance that situates *un*professional conduct within the informal professional norms found in various communities of practice. Instead of individual explanations for deviance, I have suggested a focus on the social networks and collegial controls in particular areas. I do not believe that most lawyers who misbehave can be identified simply by their poor character or greed. Indeed, studies of white-collar crime dismiss those as "folk theories" and instead emphasize the social context in which criminal activity

<sup>97</sup> The Civil Litigation Research Project conducted a survey of households about grievances to understand how disputes became civil lawsuits. See results and discussion in the *Special Issue on Dispute Processing and Civil Litigation*, 15 LAW & SOC'Y REV. 485. In 1976, a study was published about client perceptions and complaints about attorney conduct. See Eric H. Steele and Raymond H. Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917 (1976).

occurs and the available rationales or techniques of “neutralization” that individuals use to justify their actions to themselves and others:

What the criminology literature tells us . . . is that it is not about character and it is not about values. On the contrary, it is various aspects of the *situation* that individuals find themselves in, what they *think* about this situation, and what they *expect others* to think about the situation, that plays the major role in determining how they conduct themselves.<sup>98</sup>

By looking at particular situations of client representation in context, looking at what lawyers think about those situations and, most importantly, what they expect others to think and to do, we can better understand attorney misconduct.

Collegial control provides cues to reinforce professionalism even if some of those communities of practice push the boundaries of what others would consider professional conduct. The very breadth of “legal professionalism” and its claim to universality provides lawyers working in different areas with the tools to neutralize their conduct. Thus, corporate litigators who push boundaries for their clients with their zealotry can overlook their moral qualms and point to client self-determination as they engage in what might be questionable conduct. Communities are fluid and overlapping, however, and attorneys may go back and forth among them, just as the dynamics of a large law firm continuously force attorneys to attend to shifting expectations of those around them.

Finally, an emphasis on professionalism *in practice* might help in “the rekindling of lawyer professionalism”<sup>99</sup> by redirecting attention to the multiple ways that lawyers learn and are taught to behave in their everyday practices. Informal collegial control selectively incorporates and reflects what lawyers think about formal discipline and about what they think other lawyers think about it.

<sup>98</sup> Joseph Heath, *Business Ethics and Moral Motivation: A Criminological Perspective*, 83 J. OF BUS. ETHICS 595, 610 (2008). Heath draws on criminological works such as J.W. COLEMAN, *THE CRIMINAL ELITE: THE SOCIOLOGY OF WHITE COLLAR CRIME* (1989) and Gresham Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664. Abel cites this criminological literature in his opening chapter as well. ABEL, *supra* note 11, at 28–38.

<sup>99</sup> AM. BAR ASS'N, *IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM* (1986).