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Whistleblowing Attorneys and Ethical Infrastructures

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I. INTRODUCTION

The lament is an all-too-common one. New attorneys arrive at their law firms and find little to no guidance from senior attorneys.[1] They are given tasks they are not fully prepared to handle alone and left to sink or swim.[2] The result, all too often, is incompetent representation.[3]

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1. *See* Paul H. Burton, *What Money Can't Buy: Organic Mentoring in Law Firms*, 43 ARIZ. ATT'Y 12, 13 (2007) ("Organic, *mano a mano* mentoring is all but extinct in today's frenetic legal environment."); Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 281–83 (2000) (addressing the decline of mentoring at firms); Elizabeth K. McManus, *Intimidation and the Culture of Avoidance: Gender Issues and Mentoring in Law Firm Practice*, 33 FORDHAM URB. L.J. 217, 220 (2005) (noting the particular problem of lack of mentoring for female attorneys); Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 724–25 (1998) (noting the isolation many new attorneys experience in their firms); James Regan, Note, *How About a Firm Where People Actually Want To Work?: A "Professional" Law Firm for the Twenty-First Century*, 69 FORDHAM L. REV. 2693, 2706 (2001) (stating that African-American associates often cite the lack of mentoring as a reason for leaving a law firm).

2. *See In re* Yacavino, 494 A.2d 801, 803 (N.J. 1985) (per curiam) ("In the future . . . this attitude of leaving new lawyers to 'sink or swim' will not be tolerated.").

3. *See, e.g.*, Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, 717 A.2d 724, 730 (Conn. 1998) (affirming a malpractice verdict against an associate for the associate's failure to seek out supervision and noting the associate's defense that she "'assume[d] somebody was . . . watching, taking care of looking at my work'" (alteration in original)); *In re* Weston, 442 N.E.2d 236, 238, 240 (Ill. 1982) (disciplining supervising attorney for failing to supervise a subordinate attorney who ignored a matter assigned to him to the detriment of the client); *In re Yacavino*, 494 A.2d at 802, 804 (suspending junior attorney from the practice of law for three years for forging documents to cover his negligent handling of a matter); *In re* Barry, 447 A.2d 923, 926 (N.J. 1982) (Clifford, J., dissenting) (placing part of blame for young attorney's malpractice on law firm's failure to provide regular supervision); *In re* Myers, 584 S.E.2d 357, 360–61 (S.C. 2003) (per curiam) (disciplining supervising prosecuting attorney for failure to supervise deputy who had failed to provide defense counsel with relevant information); Fortney, *supra* note 1, at 282–83 ("Without mentoring, associates struggle to learn how to practice law competently and ethically."); *see also* Lewis v. State Bar of Cal., 621 P.2d 258, 261–62 (Cal.

This type of hands-off management style may have other consequences. A law firm that takes little interest in the professional development of its junior attorneys is likely to also be a law firm that lacks a culture of ethical practice. Where incompetence is tolerated, it is likely that other types of unethical practices are ignored and tacitly condoned. Unfortunately, where a firm lacks an ethical infrastructure, an attorney may lack any place to turn when the attorney observes unethical practices on the part of another attorney or faces a difficult ethical dilemma himself or herself.[4] The absence of any meaningful internal policies or mechanisms to which a subordinate attorney can turn in such instances places the attorney in a difficult position. The attorney can ignore any ethical concerns he may have, thereby contributing to the cycle of unethical practice within the firm and the legal profession at large, or the attorney can raise concerns with others either inside or outside the firm. The problem with the latter course of action is that such action may expose the "whistleblowing" attorney to retaliation by the law firm and loss of employment.[5]

Rule 5.1 of the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules") requires law firm partners to make reasonable efforts to supervise subordinate attorneys and to ensure that the firm has internal measures in place that give "reasonable assurance" that all lawyers within the firm are complying with their ethical obligations.[6] Despite the existence of these ethical duties, there is relatively little data regarding law firm compliance measures.[7] However, there are certainly enough judicial decisions involving attorneys who have been fired for blowing the whistle on unethical conduct[8] and anecdotes from law firm associates about the internal pressures within law firms to look the other

1981) (Bird, C.J., concurring) (stating that the burden of the duty of competence "appears to fall disproportionately on younger members of the legal profession who begin their careers as solo practitioners"); Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199, 212–13 (2007) [hereinafter Richmond, *Professional Responsibilities*] (noting the unwillingness of courts to excuse associates' incompetence when it results from lack of supervision).

4. The term "ethical infrastructure" is most closely associated with Professor Ted Schneyer. *See* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 10 (1991) (stating that "a law firm's organization, policies, and operating procedures constitute an 'ethical infrastructure'").

5. Richmond, *Professional Responsibilities*, *supra* note 3, at 247.

6. MODEL RULES OF PROF'L CONDUCT R. 5.1(a), (b) (2008).

7. *See* Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 FORDHAM URB. L.J. 119, 131 (2005) [hereinafter Chambliss, *The Nirvana Fallacy*] (noting that very little data exist on the "prevalence of compliance specialists" within law firms).

8. *See generally* Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043 (2008) [hereinafter Long, *Retaliatory Discharge*] (detailing cases).

way when confronted with ethical issues[9] to lead one to suspect that perhaps law firm compliance measures in this regard leave something to be desired. As importantly, despite the duties present in Model Rule 5.1, the reality is that law firm partners presently face little risk of disciplinary action for their failure to develop meaningful ethical infrastructures.[10]

The failure of the legal profession to do more to require law firms to develop ethical infrastructures that encourage the reporting, investigation, and resolution of internal reports of unethical conduct and to protect attorneys from retaliation when they report unethical conduct stands in marked contrast to the current trend in other areas of the law. In the employment discrimination field, the Supreme Court of the United States has interpreted federal law broadly in order to protect employees from retaliation when they complain about unlawful discrimination.[11] The major federal employment discrimination statutes provide protection from retaliation for internal as well as external whistleblowers, and in some cases the Court has held that employers are prohibited from retaliating against employees who engage in protected whistleblowing activity even when the anti-discrimination statute in question affords no explicit protection from retaliation.[12] In addition, the Court has given employers a strong legal incentive to adopt internal reporting and investigation procedures that allow employees to report suspected unlawful discrimination by granting employers an affirmative defense that sometimes allows employers to avoid liability for harassment committed by supervisors.[13] Similarly, in the

9. *See* Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 178 (2005) (quoting associate as saying "I know that my colleagues regularly falsely elevate their time entries").

10. *See infra* notes 106–115 and accompanying text.

11. *See, e.g.*, Gomez-Perez v. Potter, 128 S. Ct. 1931, 1936–37, 1943 (2008) (holding that the federal-sector provision of the Age Discrimination in Employment Act proscribes retaliation against employees for filing age discrimination complaints); CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951, 1954–55 (2008) (holding that the "equal contract rights" provision of the Civil Rights Act of 1964, § 1981, encompasses complaints of retaliation); Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 57, 63–64 (2006) (finding that the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 is not limited in scope to harms related to employment).

12. *See* Crawford v. Metro. Gov't, 129 S. Ct. 846, 849 (2009) (holding that Title VII's anti-retaliation provision protects employees who answer questions as part of an employer's internal investigation into a charge of harassment); *Gomez-Perez*, 128 S. Ct. at 1935–36 (holding that Age Discrimination in Employment Act prohibited employer from retaliating against federal employee who filed an administrative complaint of age discrimination despite the absence of a statutory anti-retaliation provision); *CBOCS West*, 128 S. Ct. at 1954–55, 1957–58, 1961 (holding that § 1981 prohibited employer from retaliating against employee who complained to managers about race discrimination despite the absence of a statutory anti-retaliation provision); *see also* Long, *Retaliatory Discharge*, *supra* note 8, at 1085–86 (discussing Title VII's protection for those who report wrongdoing internally as well as those who file formal discrimination charges with the Equal Employment Opportunity Commission).

13. *See infra* notes304-05and accompanying text.

corporate law world, there have been major changes in federal law in recent years requiring publicly traded corporations to develop more formal ethical infrastructures and to adopt procedures to encourage internal reports of wrongdoing.[14]

Yet, the legal profession, for whatever reasons, has chosen not to follow suit. The Model Rules do not speak directly to the issue of whistleblower protection for attorneys who report unethical conduct to disciplinary authorities. In addition, it appears that law firms have made only modest attempts to encourage firm attorneys to report suspected wrongdoing internally. In the summer of 2008, I conducted a survey of law firms regarding the measures they have taken to ensure that all attorneys within their firms are practicing in an ethical manner in accordance with Rule 5.1.[15] Of the 156 responding firms, only 15% reported that they had a written policy encouraging attorneys to notify someone within the firm about suspected unethical conduct on the part of another attorney.

The legal profession prides itself on the role it plays in the administration of justice and the fact that it is a self-governing profession.[16] A profession that is truly serious about protecting those it serves from the harmful consequences of unethical conduct would adopt a system that would hold employers accountable when they have failed to adopt reasonable measures designed to prevent and detect potentially harmful

14. *See infra* notes281-82and accompanying text.

15. The survey was a regional one, focusing on Tennessee. The survey was distributed to 710 law firms in the cities with the highest populations in the state: Memphis, Nashville, Knoxville, Chattanooga, Murfreesboro, Clarksville, and the Tri-Cities area (Bristol, Kingsport, and Johnson City). Initially, an attempt was made to distribute the survey to an appropriate individual at every law firm in Memphis, Nashville, Knoxville, and Chattanooga—by far the four largest cities in the state—by using information contained in the Tennessee Attorney's Directory or available online. Eventually, I also attempted to distribute the survey electronically to an appropriate individual at law firms in Murfreesboro, Clarksville, and the Tri-Cities area in order to provide a more representative sample of the state. The survey consisted of thirteen questions that respondents could answer online at a secure site. When e-mail addresses were available, the survey was distributed by e-mail. I later sent out a follow-up letter and survey by mail to the same individuals. Where e-mail addresses were not available, the survey was distributed by mail. One hundred fifty-six firms responded, making the response rate 22%. Like most surveys which are confined to a particular market, the most significant drawbacks to this survey are its small sample size and its confinement to one legal market. For example, the percentage of respondents from law firms consisting of over 100 attorneys was 4.5%, a higher percentage than exists on a national level (.7%) according to a 2000 American Bar Foundation study. CLARA N. CARSON, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, at 30 (2004). Because that 4.5% consists of only seven law firms, however, it would obviously be unwise to draw any firm conclusions about the ethical infrastructures that exist more generally on a nationwide basis.

16. *See* MODEL RULES OF PROF'L CONDUCT pmbl., cl. 6 (2008) ("As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."); *id.* cl. 11, 12 (noting the self-governing nature of the legal profession and stating that "[a]n independent legal profession is an important force in preserving government under law").

conduct. It would also promote the most efficient means of bringing misconduct to light and afford protection to those who do so. Currently, the legal profession does none of those things. Therefore, this Article will advocate for a change. More specifically, this Article will examine the duty of law firm partners to help ensure that lawyers within the firm are engaged in the ethical practice of law and the plight of would-be whistleblowers when firm partners fail to live up to this duty.

Part II will discuss the role that a law firm's ethical infrastructure—or lack thereof—may have on encouraging attorneys to make internal and external reports of suspected unethical conduct and the various reasons why attorneys (and particularly junior attorneys) often fail to make such reports. Part III will discuss the scope of a law firm partner's ethical obligations to help develop internal structures to encourage such reporting and the various shortcomings of the current ethical structure regarding the reporting of suspected professional misconduct and the protection of whistleblowing lawyers. Part III also will relate the results of the 2008 survey of law firms concerning their attempts to comply with Rule 5.1 and to encourage the internal reporting of unethical conduct. Part IV will offer several suggestions as to how the legal profession could do more to encourage law firms to promote the ethical practice of law while protecting would-be whistleblowers. In addition to proposing several interpretations of existing ethical rules, this Part will look to developments in the corporate and employment discrimination law fields in suggesting the addition of several new ethical rules to encourage attorneys to make internal reports of suspected unethical conduct and to protect those attorneys who make internal and external reports of suspected unethical conduct.

II. ETHICAL INFRASTRUCTURES AND WHISTLEBLOWING ATTORNEYS

A. The Influence of a Firm's Ethical Infrastructure on Individual Attorneys

The explanations for incompetent and unethical lawyering are limitless. One recurring theme, however, is that the culture and structure of a law firm may have a profound influence on the professional ethics of its individual lawyers. In 1991, Professor Ted Schneyer famously advanced the proposition that a law firm's "ethical infrastructure"—its "organization, policies, and operating procedures"—may be at least as likely to be the cause of unethical conduct and professional malpractice as "the individual values and practice skills" of the attorneys who make up the firm.[17] In other words, the failure of a firm to develop internal mechanisms that help

17. Schneyer, *supra* note 4, at 10.

prevent, identify, and root out unethical practices may permit such practices to flourish.

The increasing complexity of not just the law in general but also the law governing lawyers makes it difficult for even experienced lawyers to always understand their ethical responsibilities.[18] But the lack of adequate internal mechanisms within a law firm to address potential ethical problems may have particular consequences for newer lawyers. It is now almost an article of faith among law school graduates that legal education does an inadequate job of preparing young lawyers for the "real world" of the practice of law.[19] And it is almost an equally common refrain that law firms do a poor job of supervising and instructing new attorneys on the practice of law.[20] As an example, Professor Susan Saab Fortney cites the failure of law firms to provide training on billing matters, an area obviously fraught with potential ethical peril.[21] According to Fortney's 2000 survey of law firm associates, only 14% of respondents indicated that they received more than two hours of training on billing matters and 26% reported that they received no training whatsoever.[22] It is not just in the area of training on billing that the ethical infrastructure of some law firms may be lacking. Less than half of the respondents to Fortney's survey reported that their firms had written billing guidelines, and roughly a quarter replied that they did not know whether their firms had written guidelines.[23]

Professors Elizabeth Chambliss and David B. Wilkins have devoted significant time to studying the ethical infrastructures of law firms,[24] and they generally find firms wanting. Professor Chambliss concludes:

18. *See* Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 115 (2008) (stating that "law school graduates who have taken a basic professional responsibility course and who have passed the MPRE generally have only the most basic understanding of" legal ethics); Jonathan M. Epstein, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011, 1029 (1994) ("While every lawyer has an obligation to be familiar with the current ethical rules in his or her jurisdiction, this becomes practically impossible, especially if resources are not readily available.").

19. *See* Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623, 630 (2004) (explaining responses to a survey revealing that practicing lawyers believed most frequently that legal education should do more to prepare students for the practical aspects of law practice); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 681 (1990) ("Most new lawyers realize that there is a wide gulf between what they learn in their ethics classes and what happens in the world of practice.").

20. *See supra* note 1 and accompanying text.

21. Fortney, *supra* note 1, at 253–54.

22. *Id.* at 254 & n.87.

23. *Id.* at 253.

24. *See, e.g.*, Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691 (2002) [hereinafter Chambliss & Wilkins, *Promoting Effective Ethical Infrastructure*] (providing

> [R]esearch suggests that most law firms do a relatively poor job of monitoring firm-wide compliance with professional regulation. For instance, while most firms have formal procedures for identifying conflicts of interest, many firms lack formal procedures for addressing other ethical issues, such as lawyers' investment in clients' businesses and the withdrawal of client funds.[25]

Anecdotally, numerous decisions recount the tales of newer attorneys left to navigate difficult ethical waters with little to no supervision from supervising attorneys.[26] Of course, in some instances, the cases involve young attorneys whose moral compasses may already have been defective. In such cases, the failure of any meaningful compliance policies or procedures within the firm simply made it possible for the attorneys' incompetent and unethical practices to go undetected. But it is not difficult to imagine situations in which a newer attorney, left alone and with no guidance, confronts a difficult issue and in good faith tries, but fails, to act in a competent and ethical manner.

The failure of a law firm to adopt any meaningful policies or procedures to encourage the ethical practice of law may have broader consequences. Over time, organizations develop their own cultures, which may shape the values of those within the organization.[27] At the beginning of a lawyer's career in a law firm, it is natural to look to others to develop a sense of the prevailing norms within the organization.[28] Recent law school graduates in particular look "up and around" in order to learn what is expected of them.[29] And, as Professor Lisa G. Lerman has suggested, these

an example of Professors Chambliss and Wilkins's research and analysis of the "ethical infrastructure" within law firms).

25. Chambliss, *The Nirvana Fallacy*, *supra* note 7, at 127–28.

26. *See, e.g.*, *In re* Cohen, 847 A.2d 1162, 1166 (D.C. 2004) (involving a law firm in which "there was no system in place to impart rudimentary ethics training to lawyers in the firm, particularly the less experienced ones" and the "lack of a review mechanism which allowed an associate's work to be reviewed and guided by a supervisory attorney"); Ky. Bar Ass'n v. Weinberg, 198 S.W.3d 595, 596–97 (Ky. 2006) (involving an attorney who delegated a case to another attorney, who allowed the statute of limitations to run and then delegated the case to a subordinate attorney); *supra* note 3 and accompanying text.

27. *See, e.g.*, Christine Parker et al., *The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour*, 31 U.N.S.W. L.J 158, 163–64 (2008) ("Research demonstrates that bureaucratic corporate structures influence the ethical vision of those within them."); Milton C. Regan Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 942 (2007) (discussing how an organizational culture shapes individual values).

28. Lerman, *supra* note 19, at 681.

29. Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 643 (2005).

new associates may not be particularly critical of the ethical norms they are expected to mirror given their desire to succeed within the firm.[30]

Drawing upon social psychology research, Professor Andrew Perlman has recently argued persuasively that many of the situational factors that contribute to conformity in terms of decision-making are present in the practice of law.[31] Perlman defines "conformity" among professionals in terms of the suppression of "independent judgment in favor of a group's opinion" and the lack of "resistance in the face of illegal or unethical demands."[32] One factor associated with such conformity is the extent to which an ethical issue contains ambiguity and uncertainty. Legal ethics questions are often laden with ambiguity and, even when they are not, no one is as capable of "identifying (or manufacturing)" ambiguity as a lawyer.[33] Accordingly, Perlman concludes that "lawyers are especially susceptible to the forces of conformity," including organizational structures in which superiors hold long-term power over subordinates (such as the power firm partners possess over the career prospects of associates) and the lack of social status among subordinates, who are more likely to conform to protect their vulnerable positions.[34] This may be particularly true in mid-sized and larger law firms where junior lawyers often work in teams under the supervision of a partner.[35] Not surprisingly then, the realities of law firm practice may contribute strongly to the lack of independent decision-making and dissent among junior attorneys.

B. Internal Procedures for Reporting Misconduct and Whistleblowing Attorneys

> *Then, Paul realized how futile all this was. What were his choices? He could confront Calvin Morris, the best litigator at Stuyvesant & Main. As he thought about it, he realized that the conversation was a non-starter. Paul couldn't even imagine having the nerve to open his mouth. And what words would he*

30. Lerman, *supra* note 19, at 681. Professor Kimberly Kirkland has argued that large-firm lawyers are even more likely to adopt the norms of other firm attorneys than are attorneys in mid-sized and smaller law firms because large-firm attorneys spend much of their careers doing work for many different attorneys. Kirkland, *supra* note 29, at 637.

31. Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 451–52 (2007).

32. *Id.* at 453.

33. *Id.* at 460.

34. *Id.* at 460–61.

35. *See* Parker et al., *supra* note 27, at 168 ("[W]here 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 . . . ."); Schneyer, *supra* note 4, at 8 ("Many, perhaps most, of the tasks performed in large firms are assigned to teams.").

> *utter? "Sir, you lied yesterday in court." . . . All speeches Paul could conjure ended with the same result: Paul's prompt departure from the firm.*
>
> *Nor was there anyone else with whom he could talk. The client had never even met Paul. Going to another partner was too intimidating and, in any event, hopeless. Here was Paul, recently celebrating his thirtieth birthday and still required to call all partners by their last name . . . . No partner at Stuyvesant & Main would break ranks to side with an associate. Not on a question like this.*[36]

The failure of a law firm to develop a meaningful ethical infrastructure may, as a practical matter, mean that professional misconduct will often go unreported. A lawyer who observes another lawyer's misconduct faces a difficult problem. According to Model Rule 8.3(a), "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *shall* inform the appropriate professional authority."[37] There are any number of reasons why a lawyer might be disinclined to report the misconduct of another lawyer to disciplinary authorities. The lawyer might not "know"—a term denoting actual knowledge under the Model Rules[38]—that the other lawyer has engaged in the conduct in question. In other instances, the lawyer may be unsure as to whether the conduct in question amounts to an ethical violation at all, let alone one that raises a substantial question about the other lawyer's fitness as a lawyer. These are concerns that could potentially be addressed within a law firm through resort to some type of internal process, such as referral to an ethics counsel or committee charged with the responsibility of investigating such matters.[39] In the absence of such a mechanism, however, an attorney may be left without guidance and may all too quickly conclude that the matter is not worth pursuing.

Aside from such rule-based reasons for not reporting misconduct, many lawyers are reluctant to blow the whistle on other lawyers for both practical and philosophical reasons. The general public has somewhat mixed feelings about whistleblowers, and the legal profession, with the value it places on maintaining confidences, perhaps takes a particularly dim

36. Lawrence J. Fox, *I'm Just an Associate . . . at a New York Firm*, 69 FORDHAM L. REV. 939, 950 (2000).

37. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2008) (emphasis added).

38. *Id.* R. 1.0(f).

39. *See* Epstein, *supra* note 18, at 1029 (discussing the benefits of legal ethics specialists or committees within law firms).

view of such individuals.[40] But these types of pressures may be exacerbated by the absence of any type of ethical infrastructure to deal with reporting issues. This may be especially true for more junior attorneys, who may reasonably view the lack of any policy addressing the reporting of unethical conduct as a strong signal that such reports—particularly where they concern more senior attorneys—are unwelcome. Many large law firms at least now have designated ethics attorneys or committees to deal with ethics questions; however, in at least some firms, the designated individuals view their assignments as a distraction from the actual practice of law.[41] In one survey, when asked about the role of a firm's ethics committee, a respondent referred to the committee as the "no business committee."[42] Thus, some firms appear to do little more than pay lip service to the notion of developing an ethical infrastructure. Where such is the case, a law firm may, in the words of one author, "convey the symbolic message that ethical consultation is just one step above napping at one's desk" in terms of career advancement for associates.[43]

The lack of such internal procedures for the handling of suspected misconduct may be significant in terms of bringing the misconduct to light. One recent empirical study suggests that employees prefer an internal reporting option to an external reporting one, at least where the employee believes that the internal report is likely to produce an appropriate response.[44] Whistleblowers of all stripes recognize the possibility that they may be retaliated against by their employers and ostracized by their coworkers.[45] But, according to at least one study, external whistleblowers are more likely to face these consequences than are internal whistleblowers.[46] Therefore, as rational actors, attorneys—and particularly junior attorneys, who work in firms without any type of meaningful internal

40. *See* Long, *Retaliatory Discharge*, *supra* note 8, at 1045–46 (explaining how whistleblowing lawyers "face pressures unique to the practice of law").

41. Chambliss, *The Nirvana Fallacy*, *supra* note 7, at 128–29.

42. Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 FORDHAM L. REV. 739, 743 (1998).

43. Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 864 (1998).

44. Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. (forthcoming 2009) (manuscript at 28), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1114924.

45. *See* Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1053 (2004) (relating results of study finding that 82% of whistleblowers studied experienced harassment after blowing the whistle and that "many whistleblowers develop serious mental illness, such as depression").

46. Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 301–02 (1991).

reporting procedure—can frequently be expected to do nothing in the face of unethical conduct.

A young lawyer's natural inclination toward inaction is likely only intensified when the lawyer scans the legal landscape involving other attorneys who have reported the misconduct of other attorneys. At the state level, protection for whistleblowers varies dramatically from jurisdiction to jurisdiction. The majority of state statutes affording protection for whistleblowers protect external whistleblowers who report to government agencies but not those who make an internal report of wrongdoing.[47] Some jurisdictions have been willing to recognize a common law claim of wrongful or retaliatory discharge in violation of public policy for whistleblowers; however, once again, external whistleblowers often fare better than internal whistleblowers in such claims.[48] In addition to concerns about overburdening employers by creating too many exceptions to the employment at-will rule, courts sometimes rely on the somewhat specious argument that there is no public interest at stake in the case of an employee who is discharged for having reported illegal or unethical conduct to the employer rather than a public agency.[49]

Closer to home, if a lawyer who is contemplating making a report of another lawyer's unethical conduct happens to look at cases involving whistleblowing lawyers, the lawyer may be even less inclined to make the report. In numerous instances, lawyers have been fired after having reported the misconduct of another lawyer to disciplinary authorities, having raised the possibility of doing so, or having raised concerns over misconduct internally within a firm.[50] There are a good number of such cases, and the results are even more unpredictable than in cases of non-lawyer whistleblowers.[51] Although some courts have recognized these claims, whistleblowing lawyers who pursue legal action after being discharged may nonetheless face potentially significant obstacles. For instance, some attorneys have had success on a contract theory, arguing that adherence to the rules of professional conduct is an implied term of any lawyer's employment and that discharging an attorney for attempting to

47. Lobel, *supra* note 44 (manuscript at 14–15).

48. *Id.* (manuscript at 13).

49. *Id.* (manuscript at 14).

50. *See generally* Long, *Retaliatory Discharge*, *supra* note 8, at 1049–50 (categorizing these types of cases).

51. *See id.* at 1049–62 (summarizing the results of such cases); *see also* Anthony E. Davis, *Professional Responsibility*, N.Y.L.J., May 1, 2006 (describing associate's retaliation claim based upon his refusal to engage in unethical conduct); Mary Pat Gallagher, *Difrancesco Former Partner Ratchets Up Suit Against Firm*, N.J.L.J., Apr. 2, 2008 (describing whistleblower retaliation suit brought by former nonequity firm partner).

comply with the duty to report misconduct constitutes a breach.[52] Although potentially useful for some plaintiffs, this approach is of somewhat limited value because it only applies when the reporting attorney is complying with an ethical duty to report misconduct. An attorney who merely "does the right thing" absent any express duty would be unprotected from retaliation as a contractual matter.[53] As discussed in greater detail below, however, there is arguably no ethical duty to raise concerns about or make a more formal report of misconduct *internally* within a firm. Thus, an attorney who is contemplating making an internal report of ethical misconduct is unlikely to find much solace in the contractual approach.[54]

In the tort context, some courts have relied on the special confidentiality rules and other ethical obligations facing lawyers in refusing outright to recognize the retaliatory discharge claim of a whistleblowing lawyer or placing limitations on such claims.[55] As may be the case in a contract claim, a lawyer's retaliatory discharge claim might be barred because of the absence of an affirmative ethical duty to make an internal report of wrongdoing.[56] In addition, an internal whistleblowing lawyer may confront a jurisdiction's refusal to recognize internal whistleblower claims more generally.[57]

Even when a jurisdiction has a whistleblower statute, the whistleblowing attorney may be left without protection for other reasons. In *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*,[58] for example, an associate was discharged after informing state authorities that a

52. *See, e.g.*, Wieder v. Skala, 609 N.E.2d 105, 109 (N.Y. 1992) (finding implied obligations under the Code of Professional Responsibility in the contractual relationship between lawyers).

53. *See* Long, *Retaliatory Discharge*, *supra* note 8, at 1077–78 (noting that under the employment-at-will doctrine, an employer is free to discharge an employee at any time and for any reason).

54. It should be noted that where the attorney's report carries with it some express or implied threat to make a formal external report to disciplinary authorities, the attorney's contract claim may be more likely to succeed. *See Wieder*, 609 N.E.2d at 106 (permitting such a claim where attorney insisted that the law firm report the misconduct of another attorney to disciplinary authorities).

55. *See, e.g.*, Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487, 503–04 (Cal. 1994) (stating that in-house counsel's retaliatory discharge claim must be dismissed if satisfying the elements of the claim requires breaching the attorney-client privilege); Jacobson v. Knepper & Moga, P.C., 706 N.E.2d 491, 493–94 (Ill. 1998) (holding that law firm attorney's obligation to follow the Rules of Professional Conduct cannot "be the foundation for a claim of retaliatory discharge"); Balla v. Gambro, Inc., 584 N.E.2d 104, 108 (Ill. 1991) (refusing to extend the tort of retaliatory discharge to cover in-house counsel because of the attorney-client privilege).

56. *See* Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 884 (D.C. 1998) (barring such a claim because the attorney "failed to demonstrate the existence of a legal obligation to report to her superiors the improper conduct which she claims to have observed").

57. *See supra* notes 47–48 and accompanying text.

58. 896 So. 2d 787 (Fla. Dist. Ct. App. 2005).

partner had diverted funds from his former law firm, allegedly in violation of the jurisdiction's rules of professional conduct.[59] The Florida appellate court held that the associate had no claim under the state's whistleblower statute because that statute only protected an individual who had reported a violation of a "law, rule, or regulation" to a government agency; according to the court, Florida's Rules Regulating the Florida Bar did not qualify, despite their designation as "rules."[60]

In short, bringing misconduct to light carries with it the potential for retaliation. In contrast, the choice to remain silent in the face of unethical behavior carries relatively few risks for an attorney. An attorney will often have no express duty to make an internal report of misconduct.[61] And attorneys are rarely disciplined for their failure to report another lawyer's misconduct externally pursuant to Rule 8.3.[62] For many attorneys, the choice between reporting and keeping silent is, as a practical matter, quite simple.

The general reluctance of lawyers to raise concerns about another lawyer's misconduct has potentially serious consequences, however. Because of the nature of their jobs, attorneys are in the best position to observe and recognize unethical behavior on the part of other attorneys.[63] As such, they are in perhaps the best position to protect current and future clients from unethical behavior. If lawyers—either out of fear of being perceived as "snitches" or out of fear of being fired—are reluctant to notify others who are in position to address misconduct, the public's interest in an ethical legal profession is jeopardized.

III. RULE 5.1 AND ITS APPLICATION TO THE INTERNAL WHISTLEBLOWER SCENARIO

The Model Rules recognize the importance of law firms developing ethical infrastructures. In various ways, the Model Rules require law firm partners and those with managerial authority to try to ensure that attorneys within the firm are practicing in an ethical manner. However, there are several gaps in the current structure that limit the effectiveness of the Model Rules in dealing with the difficult problem of the attorney who must decide whether to make a report of ethical wrongdoing by another attorney.

59. *Id.* at 789–90.

60. *Id.* at 791.

61. *See infra* notes 90–96 and accompanying text.

62. *See* Perlman, *supra* note 31, at 475 (explaining that Rule 8.3 is "rarely enforced").

63. Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 265 & n.21 (2003).

A. Rule 5.1 and Ethical Infrastructures

Model Rule 5.1 describes the supervisory duties of law firm partners and other superiors. The rule establishes three separate, but inter-related, standards concerning an attorney's responsibility for the ethical practices of other attorneys within the firm. Under Rule 5.1(a), a partner or an individual attorney with managerial authority in a law firm has a duty to make reasonable efforts to ensure that the firm develops internal policies and procedures designed to promote compliance with the ethical rules.[64] Rule 5.1(b) is similar in scope, but speaks directly to the individual relationship between a supervising attorney and a subordinate attorney. The rule imposes a duty on the supervising attorney to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."[65] Finally, Rule 5.1(c) describes the situations in which a lawyer may be held responsible for the ethical transgressions of another lawyer.[66]

Although each part of Rule 5.1 addresses the supervisory responsibilities of attorneys within a firm, Rule 5.1(a) focuses most directly on forcing firms to develop "ethical infrastructures" that will encourage ethical practices within the firm.[67] Rule 5.1(a) provides,

> A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm

64. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2008); *id.* R. 5.1 cmt. 3.

65. *Id.* R. 5.1(b).

66. *Id.* R. 5.1(c). Specifically, Rule 5.1(c) provides as follows:

> A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Id. Under Rule 5.1(c), a lawyer is responsible for another lawyer's violation of an ethical rule if, among other situations, the lawyer "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." *Id.* Because the Model Rules define the terms "knows" or "knowledge" in terms of *actual* knowledge, *id.* R. 1.0(f), Rule 5.1(c) would seem to excuse a law firm attorney with managerial authority who did not "know" of a subordinate attorney's misconduct due to the law firm's failure to have in place any policy or procedure designed to detect such misconduct. An ABA Formal Ethics Opinion, however, takes the position that an attorney who lacks such knowledge due to the attorney's violation of Rule 5.1(a)'s duty to supervise may nonetheless face discipline for the other attorney's misconduct. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-429, at 3 (2003); *see also* Arthur J. Lachman, *What You Should Know Can Hurt You: Management And Supervisory Responsibility for the Misconduct of Others Under Model Rules 5.1 and 5.3*, 18 PROF. LAW. 1, 2 (2007) (analyzing the ABA opinion).

67. Schneyer, *supra* note 4, at 17.

> has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.[68]

As an obvious example, a law firm should have some procedures in place to detect prohibited conflicts of interest.[69] However, Rule 5.1(a) also plainly covers the spectrum of potential ethical violations, including competency and handling of client funds.[70]

Importantly, the scope of a partner's duty under Rule 5.1(a) does not depend on whether another attorney in the firm has actually committed an ethical violation.[71] Nor does it matter that a partner lacked direct supervisory authority over an attorney who committed an ethical violation or lacked knowledge of the violation.[72] Indeed, as one court has observed, a partner's lack of knowledge might actually help establish a violation of the rule.[73] What matters for purposes of Rule 5.1(a), according to the comments, is whether a partner has made "reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct."[74]

Despite imposing a duty to make "reasonable efforts" to encourage firm-wide compliance procedures, Rule 5.1(a) stops short of defining that duty with any degree of specificity. The comments explain that, as is the case with tort law's "reasonable person" standard, what constitutes a reasonable effort to ensure compliance varies with the structure and nature of the firm's practice.[75] "In a small firm of experienced lawyers," the

68. MODEL RULES OF PROF'L CONDUCT R. 5.1(a).

69. *See id.* R. 1.7 cmt. 3 ("To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved.").

70. *Id.* R. 5.1 cmt. 2; *see* Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 268 (1994) (discussing the way that Rule 5.1 requires supervision of attorneys' duty of competency).

71. *See* Miller, *supra* note 70, at 279 ("[F]ailure to make reasonable preventative efforts theoretically subjects every partner to professional discipline . . . regardless of any misconduct at all."). The comments clarify that the duty under Rule 5.1(a) applies not just to traditional law firm partners, but to others with similar managerial authority in other settings, such as the law department of a government agency. MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 1; *see also In re* Myers, 584 S.E.2d 357, 362 (S.C. 2003) (per curiam) (concluding that the rule applies to attorneys in government agencies).

72. *In re* Anonymous Member of the S.C. Bar, 552 S.E.2d 10, 14–15 (S.C. 2001); *see* Miller, *supra* note 70, at 279 (acknowledging that attorneys can violate the rule "regardless of the partner's remoteness from the violating attorney" or "the partner's knowledge or suspicion of any misconduct").

73. *In re Anonymous Member*, 552 S.E.2d at 15.

74. MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 2.

75. *Id.* cmt. 3.

comments explain, "informal supervision and periodic review of compliance with the required systems ordinarily will suffice."[76] In larger firms or firms with sophisticated practices, "more elaborate measures may be necessary."[77] Such measures might include establishing "a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee."[78] Commentators have suggested other possible compliance measures that might help satisfy this duty, including the establishment of a mentoring program or a legal or ethics counsel.[79] The limited case law on the subject suggests that the failure to have some type of review mechanism in place by which a supervisor may review an associate's work may also give rise to a violation of Rule 5.1(a).[80]

B. The Gap in Coverage

Despite the broad scope of Rule 5.1(a), there are numerous factors that work to limit its overall effectiveness in encouraging firms to develop a culture of ethical practice. Most obvious is the fact that the rule's "reasonable efforts" standard does not require law firm partners to establish any particular measures that firm lawyers should follow to guide them in their day-to-day practice or in the case of questionable ethical conduct. Other factors also work to create something of a gap in the coverage of the Model Rules when it comes to lawyers who suspect that another attorney is engaged in unethical conduct.

1. The Absence of Ethical Rules Regarding Internal Reporting of Misconduct

The Model Rules do not specifically require a law firm to establish a procedure for handling internal reports of ethical misconduct. Nor, except in limited circumstances, do the Model Rules speak directly to the internal handling of an ethical dilemma within a law firm. Rule 8.3(a) imposes an affirmative obligation on the part of a lawyer who knows of another lawyer's serious misconduct to make an external report of the unethical

76. *Id.*

77. *Id.*

78. *Id.*

79. *See, e.g.*, Lachman, *supra* note 66, at 6. The regulations accompanying the Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2006) (codified as amended in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., and 28 U.S.C.), contain a similar requirement. Supervisory attorneys must make "reasonable efforts" to ensure that subordinate attorneys conform to the Sarbanes-Oxley regulations. 17 C.F.R. § 205.4(b) (2008). Like the Model Rules, the regulations do not elaborate on what is meant by the term "reasonable efforts."

80. *See, e.g.*, *In re* Cohen, 847 A.2d 1162, 1166 (D.C. 2004) (finding a law firm's lack of an attorney review mechanism "troubling").

conduct to appropriate disciplinary authorities.[81] While an attorney who knows that another attorney has engaged in misconduct "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" must report out to disciplinary authorities,[82] nothing in the Model Rules imposes a duty on the part of such an attorney to first notify others within the attorney's law firm, despite the fact that it might obviously be in the interests of all parties concerned.[83]

The closest the Model Rules come to addressing such situations directly is Rule 5.2, which describes the duties of subordinate attorneys. Under Rule 5.2, a subordinate attorney remains responsible for the attorney's own ethical violation, despite the fact that the subordinate attorney was acting at the direction of a supervising attorney.[84] The subordinate attorney may avoid discipline, however, when she acts in accordance with a supervising attorney's "*reasonable* resolution of an arguable question of professional duty."[85] The comments explain that where an ethical question is "reasonably arguable," the subordinate attorney "may be guided" by the supervising attorney's reasonable resolution of the matter.[86] Therefore, one might plausibly argue that because the rule contemplates a dialogue between the subordinate and supervising attorneys, the rule presupposes a duty on the part of a subordinate to raise any concerns about the propriety of an action with her supervisors within the firm.

To date, however, no court that has considered such an argument has accepted the idea that Rule 5.2 imposes any type of affirmative duty on the part of a subordinate attorney to report questionable ethical conduct internally. In *Wallace v. Skadden, Arps, Slate, Meagher & Flom*,[87] the D.C. Court of Appeals rejected an associate's argument that implicit in Rules 5.1 and 5.2 was an obligation to report to her superiors within a law firm the improper conduct of other attorneys she claimed to have observed.[88] Accordingly, the court rejected her claim of wrongful discharge based on the theory that she had been retaliated against for having reported such

81. MODEL RULES OF PROF'L CONDUCT R. 8.3(a).

82. *Id.*

83. At least one bar association ethics opinion has suggested that such a duty should be imposed. *See* Ass'n of the Bar of the City of N.Y., Op. 82-79 (1982) (stating that it is desirable that an associate raise a matter of possible professional misconduct involving a partner within the firm before reporting to disciplinary authorities).

84. MODEL RULES OF PROF'L CONDUCT R. 5.2(a).

85. *Id.* R. 5.2(b) (emphasis added).

86. *Id.* R. 5.2 cmt. 2.

87. 715 A.2d 873 (D.C. 1998).

88. *Id.* at 884.

conduct internally.[89] The court opined that not only do the rules not expressly impose a duty upon a subordinate attorney to report misconduct to superiors within the firm, "on their face, the two Rules appear to have nothing to do with any such claimed obligation."[90]

In other situations, a firm attorney may have a duty to notify others within the firm about possible misconduct. Those situations, however, are fairly limited. Under Rule 5.1(c)(2), for example, a partner or supervising attorney is responsible for the misconduct of another attorney if the partner or supervising attorney knew of the misconduct but failed to take reasonable remedial action in time to avoid or mitigate the consequences.[91] Logically, reasonable remedial action might include notifying others within the firm of the misconduct so that appropriate action can be taken.[92] On its face, however, the rule applies only to partners (or those with comparable managerial authority) and attorneys with direct supervisory authority, not more junior attorneys. One could also argue that a lawyer's duty of competence would compel the lawyer to notify *someone* of another lawyer's misconduct that might adversely affect a client.[93] And in light of confidentiality concerns, the most likely someone in such a case would be another attorney in the same law firm. However, even if a successful argument could be made that the duty of competence requires internal reporting of ethical misconduct, the scope of such a duty would be limited. Because the duty of competence is one owed to a lawyer's client, a lawyer might only have a duty to make an internal report when the lawyer was involved in the representation of the adversely affected firm client.[94] In other instances, it might be consistent with a lawyer's duty of loyalty to the law firm as an employee to notify the firm of misconduct that might negatively impact the firm.[95] But in terms of express disciplinary rules, the

89. *Id.* at 883–84.

90. *Id.* at 884.

91. MODEL RULES OF PROF'L CONDUCT R. 5.1(c)(2).

92. *See* Long, *Retaliatory Discharge*, *supra* note 8, at 1051–52 (discussing internal whistleblowing).

93. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client."); *see also id.* R. 1.3 cmt. 1 ("A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

94. *See id.* R. 1.1 ("A lawyer shall provide competent representation *to* a *client*." (emphasis added)).

95. *See* Meehan v. Shaughnessy, 535 N.E.2d 1255, 1263, 1265 (Mass. 1989) (explaining that law firm partners owe each other fiduciary duties and that "'[e]mployees occupying a position of trust and confidence owe a duty of loyalty to their employer and must protect the interests of their employer'" (alteration in original) (quoting Chelsea Indus., Inc. v. Gaffney, 449 N.E.2d 320, 326 (Mass. 1983))); Lobel, *supra* note 44 (manuscript at 8) ("[A] loyal employee must view the good of the organization as a whole and behave according to what is best for the future of the corporation.").

Model Rules are generally silent on the specific issue of internal reporting of misconduct.[96]

2. The Absence of Ethical Rules Prohibiting Retaliation

The absence of any explicit duty on the part of a law firm or its partners to establish an internal reporting mechanism or on the part of subordinate attorneys to make an internal report of questionable ethical conduct is noteworthy because no other ethical rule specifically prevents retaliation when an associate makes such an internal report.[97] Moreover, no ethical rule explicitly prohibits a lawyer or law firm from retaliating against an attorney who makes an external report of misconduct to disciplinary authorities pursuant to Rule 8.3.[98] As the case law attests, the internal whistleblower may face retaliation from the employing law firm.[99] Yet, no Model Rule prohibits such action expressly.[100] As discussed in greater detail later, interference with or hindrance of the disciplinary process may

96. Rule 1.13 sometimes requires a lawyer who represents a corporate client to report unlawful conduct on the part of a person associated with the organization up the corporate ladder. MODEL RULES OF PROF'L CONDUCT R. 1.13(b). However, the rule only requires a lawyer to report such misconduct to the client, not to the lawyer's employer.

97. *See infra* Part IV.A.1 and accompanying text.

98. *See infra* Part IV.A.1 and accompanying text.

99. *See supra* notes 50–51 and accompanying text. In some cases, the attorney is part of a traditional law firm. *See, e.g.*, Kelly v. Hunton & Williams, No. 97-CV-5631, 1999 WL 408416, at *1 (E.D.N.Y June 17, 1999) (involving a law firm associate who was forced to resign after raising questions to firm management about partner's supposed overbilling); Jacobson v. Knepper & Moga, P.C., 706 N.E.2d 491, 492 (Ill. 1998) (reviewing a case in which a law firm associate who was fired for reporting the firm's illegal practices to a principal partner of the firm); Bohatch v. Butler & Binion, 977 S.W.2d 543, 544 (Tex. 1998) (involving a law firm partner who was discharged after raising concerns about billing practices to the firm's managing partner). In others, the attorney is employed by a corporation. *See, e.g.*, Heckman v. Zurich Holding Co. of Am., 242 F.R.D. 606, 608 (D. Kan. 2007); Gen. Dynamics Corp. v. Superior Court of San Bernardino County, 876 P.2d 487, 490 (Cal. 1994); O'Brien v. Stolt-Nielson Transp. Group, Ltd., 838 A.2d 1076, 1079 (Conn. Super. Ct. 2003); Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578, 581 (Del. Ch. 1994); GTE Products Corp. v. Stewart, 653 N.E.2d 161, 163 (Mass. 1995); Nordling v. N. States Power Co., 478 N.W.2d 498, 499–500 (Minn. 1991); Considine v. Compass Group USA, Inc., 551 S.E.2d 179, 180–81 (N.C. Ct. App. 2001); Parker v. M&T Chems., Inc., 566 A.2d 215, 217–18 (N.J. Super. Ct. App. Div. 1989); McGonagle v. Union Fidelity Corp., 556 A.2d 878, 879–80 (Pa. Super. Ct. 1989); s*ee also* Long, *Retaliatory Discharge*, *supra* note 8, at 1050 n.40 (noting and summarizing cases). Regardless of whether a lawyer works for a traditional law firm or the legal department of a corporation, the Model Rules treat the lawyer as working for a "firm." MODEL RULES OF PROF'L CONDUCT R. 1.0(c).

100. Rule 1.13(e) addresses the issue of retaliatory discharge in a limited sense. Under the rule, one who "reasonably believes that he or she has been discharged because of the lawyer's" decision to report *client* misconduct up the ladder of the *client's* corporate structure should inform "the organization's highest authority" about the lawyer's discharge. *Id.* R. 1.13(e). The rule does not, however, provide any protection from retaliation in the first place. Moreover, in the case of a law firm attorney, the rule does not prohibit the law firm from retaliating against the reporting attorney.

amount to conduct prejudicial to the administration of justice.[101] But it does not appear that any court has yet extended these principles to the situation in which an attorney is threatened or fired after having, internally, raised the possibility of making a formal disciplinary complaint about another attorney.[102]

3. The Other Weaknesses of Rule 5.1

The absence of ethical rules requiring internal reporting of suspected misconduct or prohibiting retaliation against internal or external whistleblowers is significant because of the added strain it places on Rule 5.1. The gaps in the rules in this respect create a concomitant need for law firm partners to have effective measures in place that attorneys can utilize in the event of an ethical dilemma. Unfortunately, as currently enforced, Rule 5.1 does not appear to be fully up to the task.

Depending upon the size of the firm or the stature of the individual partner within the firm, the ability of an individual partner to effectuate change may be quite limited as a practical matter. Law firms continue to rely on multi-tiered partnership structures in which non-equity partners sometimes lack management and decision-making authority.[103] Accordingly, some partners have little practical ability to influence a firm's creation of an ethical infrastructure. In addition, the further removed an individual partner is from another lawyer's misconduct, the greater the likelihood that disciplinary authorities will be reluctant to charge the partner with failing to make efforts to supervise the other attorney pursuant to Rule 5.1(b).[104] And because Rule 5.1, as written, does not impose vicarious

101. *See infra* notes 166–175 and accompanying text.

102. Some courts have treated an employer's decision to fire the internal whistleblowing attorney before the attorney has a chance to file a formal disciplinary complaint as a form of anticipatory retaliation and recognized a wrongful discharge cause of action. *See* Matzkin v. Delaney, Zemetis, Donahue, Durham & Noonan, P.C., No. CV044000288S, 2005 WL 2009277, at *1, *4–*5 (Conn. Super. Ct. July 19, 2005) (upholding the attorney's cause of action for wrongful discharge based on the law firm's termination of employment after learning of the attorney's intent to report misconduct); Wieder v. Skala, 609 N.E.2d 105, 106, 110 (N.Y. 1992) (same); *see generally* Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 983–84 (2007) [hereinafter Long, *The Troublemaker's Friend*] (discussing the theory of anticipatory retaliation).

103. *See* William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691, 1694 (2006) (detailing the rise of multi-tiered partnership structures); Robert W. Hillman, *Law, Culture, and the Lore of Partnership: Of Entrepreneurs, Accountability, and the Evolving Status of Partners*, 40 WAKE FOREST L. REV. 793, 821 (2005) (describing the multi-tiered structure of a law firm in which non-equity partners "did not participate in firm governance, apparently had no management authority, and presumably lacked the means or authority for monitoring the activities of equity partners").

104. *See* Miller, *supra* note 70, at 292–93 (speculating as to reluctance of disciplinary officials to impose sanctions for such "'innocent' acts of omission").

responsibility upon partners for the ethical violations of other attorneys,[105] partners may have less incentive to take an active role in matters having no direct bearing on their situation.

In addition to these shortcomings, the absence of disciplinary opinions involving Rule 5.1 suggests that the rule is under-enforced. There are relatively few disciplinary cases involving violations of Rule 5.1.[106] The typical case in which Rule 5.1 is implicated involves what Professor Irwin D. Miller described as situations involving "blatant lack of supervisory efforts,"[107] in which a law firm's partners have made virtually no attempts to ensure that firm attorneys are practicing in an ethical manner.[108] *In re Yacavino*,[109] for example, involved an associate who was suspended from the practice of law for forging a court order to conceal his negligent handling of an adoption.[110] In keeping with Rule 5.2, the fact that the associate had, in the court's words, been "left virtually alone and unsupervised" in a law firm of twenty attorneys was no excuse for the associate's misconduct.[111] While disciplining the attorney, the court also referenced the failure of the partners to live up to their duties as partners under Rule 5.1, and put law firms and their partners on notice that "this attitude of leaving new lawyers to 'sink or swim' will not be tolerated."[112]

105. *In re* Anonymous Member of S.C. Bar, 552 S.E.2d 10, 12 (S.C. 2001) (per curiam).

106. *See* Chambliss, *The Nirvana Fallacy*, *supra* note 7, at 126 (describing Rule 5.1(a) as a "disciplinary 'dead letter'" due to its lack of enforcement); Epstein, *supra* note 18, at 1015 (describing the "dearth of bar opinions or cases" on the subject of "what constitutes 'reasonable efforts' by partners to ensure" compliance with the Model Rules); Miller, *supra* note 70, at 285 (referring to the lack of disciplinary cases). For example, according to the Office of the General Counsel of the State Bar of Alabama, from September 1992 to December 2006, there were only thirteen violations of Rule 5.1. Alabama State Bar, Petition to Amend the Alabama Rules of Professional Conduct app. at 13-13, http://www.alabar.org/ogc/PDF/Petition_A_filed_Supreme_Court%20Oct12_2007.pdf (last visited May 19, 2009). In contrast, there were 636 violations of the rule relating to neglect of a client matter and 518 violations of the rule relating to communication with a client. *Id.*

107. Miller, *supra* note 70, at 285–86.

108. *See, e.g.*, *In re* Cohen, 847 A.2d 1162, 1166 (D.C. 2004) (involving a law firm in which "there was no system in place to impart rudimentary ethics training to lawyers in the firm, particularly the less experienced ones" and the "lack of a review mechanism which allowed an associate's work to be reviewed and guided by a supervisory attorney"); *In re* Weston, 442 N.E.2d 236, 239 (Ill. 1982) (involving an attorney who assigned a matter to an associate but was unable to supervise the associate due to "his duties and extensive travels as president of a national association" over a period of a few years); K,. Bar Ass'n v. Weinberg, 198 S.W.3d 595, 597 (Ky. 2006) (involving an attorney who delegated a case to another attorney, who allowed the statute of limitations to run and who then delegated the case to a subordinate attorney); *In re* Barbare, 602 S.E.2d 382, 383 (S.C. 2004) (involving a partner in a two-person law firm whose inadequate accounting system allowed for several instances of criminal fraud).

109. 494 A.2d 801 (N.J. 1985) (per curiam).

110. *Id.* at 802, 804.

111. *Id.* at 802–03.

112. *Id.* at 803.

One likely reason for the lack of disciplinary decisions involving Rule 5.1 is that firm lawyers are the most likely source of complaints. Yet, firm lawyers (or even former lawyers) are, for the reasons discussed previously,[113] unlikely to ever file a complaint about the lack of supervision or ethical infrastructures within a firm. As an example, over three years, one state disciplinary agency reported a total of twenty-six complaints of failure to supervise *non-lawyers* in violation of Rule 5.3 (the majority of which presumably came from the non-lawyers in question), but exactly zero complaints regarding the failure to supervise subordinate lawyers under Rule 5.1(b).[114] Yet, the opportunity for enforcement still exists. As Professor Miller has noted, "[a]rguably, every case of professional discipline, other than cases against sole practitioners, raises the question of whether reasonable (preventive) measures (Rule 5.1(a)) were in effect and whether reasonable (preventive) efforts (Rule 5.1(b)) were made."[115] Thus, virtually every case presents the chance to publicize and to promote the goals underlying Rule 5.1.

The lack of decisional law has meant that the scope of a partner's duties under Rule 5.1 (and 5.1(a) in particular) remains largely undefined. It seems clear that in virtually all situations, regardless of firm size or practice complexity, the failure to utilize a mechanism to review the work of at least junior attorneys should constitute a violation of Rule 5.1(a).[116] But how much further must a firm go in order to comply? In one instance, the D.C. Court of Appeals, although stopping short of imposing an affirmative duty under Rule 5.1(a), criticized a relatively small firm (twelve attorneys) for its failure to have a "system in place to impart rudimentary ethics training to lawyers in the firm, particularly the less experienced ones."[117] Although Rule 5.1(a)'s "reasonable efforts" standard makes it difficult to establish bright-line rules, is this the type of minimal compliance effort that virtually any firm should be expected to undertake? Without more decisions involving Rule 5.1, the contours of the rule remain largely undefined.

113. *See supra* notes 31–35 and accompanying text (discussing conformity within law firms).

114. *See Annual Report of the Lawyer Disciplinary Board*, W. VA. LAW., Mar./Apr. 2007, at 30 (reporting eight complaints for failure to supervise non-lawyers filed in 2006); *Lawyer Disciplinary Board Report*, W. VA. LAW., May/June 2006, at 34 (reporting nine complaints for failure to supervise non-lawyers filed in 2005); *Report to the Board of Governors from Lawyer Disciplinary Board*, W. VA. LAW., Jan./Feb. 2005, at 32–33 (reporting nine complaints for failure to supervise non-lawyers filed in 2002).

115. Miller, *supra* note 70, at 285.

116. *See generally In re* Cohen, 847 A.2d 1162, 1163, 1166–67 (D.C. 2004) (finding a Rule 5.1(c) violation for similar inaction in a firm of twelve attorneys).

117. *Id.* at 1163, 1166.

C. What Law Firms Do in Practice

1. Existing Studies of Law Firm Compliance Procedures

There have been a number of studies in the past decade touching on the question of how law firms develop and maintain ethical infrastructures. In addition to inquiring about law firm billing practices, Professor Fortney's 2000 study of law firm associates explored the extent to which law firms had systems or policies "for dealing with ethical concerns of attorneys" in place.[118] Her results suggest that ethical infrastructures are not as robust and widely used in the law firm setting as one might expect in light of the obligations that Rule 5.1 imposes. Only 54% of respondents replied that their firms did have such measures in place, with 22% reporting the absence of such measures and 24% indicating that they did not know if any kind of system or policy was in place.[119] Large firms were more likely to have formal systems—such as the existence of an ethics committee or scheduled ethics training—in place than were small and mid-sized firms.[120]

One frequently discussed option for resolving the myriad professional responsibility issues that can arise in a law firm is the use of an in-house ethics advisor.[121] The structure and responsibilities of such positions may vary widely,[122] but it is clear that the position of an in-house ethics expert is now fairly common at larger law firms. A 2002 study of large law firms by Professors Elizabeth Chambliss and David B. Wilkins revealed that each of the thirty-two responding firms had at least one partner with "special responsibility for promoting ethics and/or regulatory compliance."[123] According to a 2004 survey conducted by consulting group Altman Weil, nearly two-thirds of responding law firms in the AmLaw 200 had a designated general counsel, and in close to 90% of those firms, general counsel advised the firm on professional responsibility issues.[124]

118. Fortney, *supra* note 1, at 254.

119. *Id.*

120. *See id.* at 255 tbl.2, 256 (breaking down percentage of firms with formal ethics systems based on firm size).

121. *See, e.g.*, Epstein, *supra* note 18, at 1012–13 (advocating that firms utilize in-house ethics specialists or committees).

122. According to a study by Professors Elizabeth Chambliss and David B. Wilkins, for example, in many firms the individual held a formal position with a designated title and specific assigned duties. Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 565 (2002) [hereinafter Chambliss & Wilkins, *The Emerging Role*]. In others, the responsibilities and title of the position (for example, "our ethics guy") are less formal in nature. *Id.*

123. *Id.* The study's sample consisted of law firms ranging from 75 to over 1,000 attorneys. *Id.* at 561.

124. WARD BOWER, ALTMAN WEIL, INC., REPORT TO LEGAL MANAGEMENT: MAJOR LAW FIRMS EMBRACE GENERAL COUNSEL CONCEPT 1 & fig.1, 10 fig.10 (2004), *available at*

The extent to which the typical law firm associate has access to these kinds of designated ethics experts, however, is questionable. According to the Altman Weil survey, although high-ranking law firm partners typically had access to a firm's general counsel, less than half of the responding firms reported that associates were authorized to access these individuals.[125] And in small to mid-sized firms—where the vast majority of lawyers in private practice are employed—there are few designated ethics experts. In Professor Fortney's survey, only 15% of small-firm respondents indicated that they had a designated ethics expert or similar position, as compared to 35% of mid-sized-firm respondents.[126]

2. Results of the 2008 Study

My primary goals in conducting a survey regarding law firm ethical infrastructures were to obtain more data regarding the practices of smaller law firms and, more specifically, the extent to which law firms have in place measures for the internal resolution of ethical concerns. Regarding the first goal, most of the empirical research to date has focused on the practices of larger law firms. For example, Professors Chambliss and Wilkins' research into law firm compliance procedures was limited to law firms with a minimum of seventy-five attorneys.[127] Yet, according to a 2000 American Bar Foundation survey, only 1.5% of large firms in the United States consist of more than fifty attorneys.[128] Likewise, Professor Fortney's survey was limited to associates in law firms with more than ten attorneys.[129] Yet, according to the American Bar Foundation survey, nearly 90% of the law firms in the United States consist of ten or fewer lawyers.[130] Thus, despite the value of the previous surveys, there is a need for more data concerning the practices of smaller law firms. Of the respondents to my survey, 75% were from firms consisting of ten or fewer attorneys.[131]

http://www.altmanweil.com/dir_docs/resource/fa00e91f-9955-4dce-b6f4-d088b9fe2f0b_document.pdf [hereinafter ALTMAN WEIL SURVEY]. Professor Fortney's survey found that 56% of large firms that responded employed a designated ethics counsel. Fortney, *supra* note 1, at 255 tbl.2.

125. ALTMAN WEIL SURVEY, *supra* note 124, at 10 fig.9.

126. Fortney, *supra* note 1, at 255 tbl.2.

127. *See* Chambliss & Wilkins, *The Emerging Role*, *supra* note 122, at 561.

128. CARSON, *supra* note 15, at 30.

129. Fortney, *supra* note 1, at 246 n.35.

130. CARSON, *supra* note 15, at 30. By comparison, 87.3% of Tennessee law firms consist of ten or fewer attorneys, according to the American Bar Foundation Survey. *Id.* at 204.

131. Respondents were asked to indicate the size of their law firms. The results were as follows: 1–2 attorneys: 28 (17.9%); 3–10 attorneys: 89 (57.1%); 11–24 attorneys: 21 (13.5%); 25–100 attorneys: 11 (7.1%); over 100 attorneys: 7 (4.5%).

Nearly all of the respondents indicated that their firms had some type of policy or procedure in place to help firm attorneys resolve questions or concerns about their own ethical obligations in a matter.[132] The most frequently cited specific practices were the traditional up-the-chain-of-command approach of referral to the attorney's direct supervisor, managing partner, or practice area leader.[133] Respondents—particularly from smaller firms—also frequently cited more informal practices, such as consultation with other firm attorneys, colleagues in other firms, or representatives from the state disciplinary authority.[134]

Fewer respondents indicated that their firms used a designated ethics counsel (12%), general counsel with responsibility for ethics issues (5%), or ethics committee (5%) to help attorneys resolve their ethical dilemmas. Indeed, when asked specifically whether their firm had a designated ethics counsel, general counsel who handles ethics matters, ethics committee, or similar position, only 21% of respondents answered in the affirmative. Here, there was a clear distinction between the practices of larger and smaller firms. Not surprisingly, larger firms were more likely to report the existence of designated individuals within the firm charged with responsibility for handling ethics matters than were smaller firms. Of the respondents from firms with twenty-five or more attorneys, nearly 67% reported the existence of such individuals. Of the respondents from firms with ten or fewer attorneys, only 15% reported the existence of such individuals.

132. Only 4% of respondents—all of them from firms with fewer than ten attorneys—indicated that their firms had no measures in place to handle such matters.

133. Fifty-seven percent of respondents indicated that their firms used the practice of referral to a managing partner or practice area leader. Thirty-three percent reported the use of referral to a lawyer's direct supervisor. Respondents were free to choose from a list of possible policies or procedures. Specifically, respondents were asked the following question:

> If an attorney in your firm has a question or concern about his or her ethical obligations in a matter, what policies or procedures exist within the firm to help the attorney resolve the issue?
>
> Referral to designated ethics counsel
> Referral to general counsel
> Referral to ethics committee
> Referral to ombudsman
> Referral to managing partner or practice area leader
> Referral to attorney's direct supervisor(s)
> Referral to outside counsel
> Other (please explain)
> None

134. Forty percent of respondents chose the "Other" option from the list of options above. *See supra* note 133. When asked to explain, these informal practices were the most common explanations.

The survey yielded similar data with respect to policies or procedures regarding internal reporting of suspected misconduct on the part of another attorney. Most firms reported the existence of some type of policy or procedure that allows an attorney with concerns about suspected misconduct on the part of another attorney to resolve those concerns.[135] Again, respondents most frequently cited some form of referral up the chain of command as a specific existing practice in their firms.[136] However, only 15% indicated that they had a formal written policy that *encouraged* attorneys to notify someone within the firm about suspected misconduct involving another attorney. Once again, larger firms were more likely to report the existence of such a policy than were smaller firms. Of the responding law firms with fewer than twenty-five attorneys, only 10% reported the existence of such a policy.[137] Of the larger responding firms, a slight majority (56%) reported that they had such a policy.[138] With respect to small firms, these results are probably not surprising. For example, a firm consisting of two equal partners and no associates would obviously be unlikely to have a formal internal reporting system in place. However, of the respondents from firms with between eleven and twenty-four attorneys—firms that are almost certainly large enough to have and potentially benefit from formal infrastructures, including some type of internal reporting procedure—only one out of twenty-one (4.7%) reported the existence of such a policy. These findings appear consistent with the retaliatory discharge cases brought by whistleblowing lawyers; in contrast with many other whistleblower cases involving non-lawyers,[139] there is rarely, if ever, any mention of any type of internal reporting policy in existence at the law firms that encouraged internal reporting of misconduct.

One might suspect that if a firm encouraged the reporting of suspected misconduct that it would also offer some assurance of protection from retaliation as a matter of course. However, this is not necessarily the case. Although most of the respondents who indicated the existence of a policy encouraging internal reporting also indicated that the policy provided

135. Only 10% of respondents—all of them from firms of ten or fewer attorneys—reported that their firms lacked any such policy.

136. Fifty-four percent of respondents indicated that their firms used the practice of referral to a managing partner or practice area leader. Twenty-six percent reported the use of referral to a lawyer's direct supervisor.

137. The p-value for this question was $p < .001$.

138. While it seems safe to conclude that the existence of such policies are more common at larger firms, the relatively small number of responding law firms of more than twenty-five attorneys (eighteen total) makes it difficult to draw any conclusions about just how common the practice is at larger firms.

139. *See, e.g.*, Anda v. Wickes Furniture Co., 517 F.3d 526, 528 (8th Cir. 2008) (noting, in a discrimination case, the employer's anti-harassment policy, which instructed employees to report objectionable behavior).

assurance of protection from retaliation, 25% of respondents indicated that their policies did not contain any statement providing assurance of protection from retaliation.[140]

IV. POSSIBLE SOLUTIONS

As the law governing lawyers currently exists, Rule 5.1(a) does not require law firms or individual partners to take any specific action with respect to developing a firm's ethical infrastructures, the rule is only rarely enforced, and there is no guarantee of protection from retaliation for attorneys who make internal or external reports of unethical conduct. There are any number of ways in which these shortcomings could be addressed. For instance, a jurisdiction's disciplinary authority could establish a formal operating procedure of investigating whether a firm has complied with its obligations under Rule 5.1 every time an ethics complaint against a lawyer in the firm is filed. However, this Article focuses primarily on rules-based solutions to the current problem.

As this Part argues, protection from retaliation for attorneys who report misconduct is vital to the goal of promoting an ethical legal profession and promoting public confidence. Equally important to these goals is the creation of formal procedures within law firms designed to investigate and resolve concerns of possible unethical conduct. To those ends, this Part proposes several alternatives to the current regulatory framework regarding whistleblowing lawyers and the creation of ethical infrastructures—beginning with the most conservative and ending with the most far-reaching—in an effort to achieve these goals.

A. Rules-Based Approach to Prohibiting Retaliation Against Whistleblowing Attorneys

1. The Need for Protection from Retaliation

If the legal profession wants attorneys to take seriously their external reporting obligations under Rule 8.3 and to feel free to raise concerns internally over suspected unethical conduct, the profession, at a minimum, needs to afford lawyers with some protection from retaliation in such instances. At present, the Model Rules do not speak at length to the disciplinary process. In addition to the reporting requirement contained in Rule 8.3(a), Rule 8.1 prohibits a lawyer from making false statements of material fact in connection with a disciplinary proceeding, failing to

140. The survey did not yield a significant correlation between the size of the firm and the assurance of protection from retaliation. Eight out of ten responding firms with twenty-five or more attorneys reported that their policies provided assurances of protection, whereas ten out of fourteen of smaller firms reported the same. The p-value here was .509.

disclose a fact necessary to correct a misapprehension known to have arisen in the matter, and knowingly failing to respond to a lawful demand for information from a disciplinary authority.[141] These two rules represent the only explicit limitations on lawyers' conduct in connection with disciplinary proceedings.[142] No rule expressly addresses a lawyer's attempt to interfere with the disciplinary process or to intimidate or retaliate against those who participate in the process or otherwise seek to oppose conduct that conflicts with the ethical rules. Nor do the Model Rules expressly prohibit retaliation against lawyers who oppose unethical conduct internally.

This failure to adopt rules specifically protecting the sanctity of the disciplinary process stands in marked contrast to the protection afforded those who oppose unlawful or unethical conduct in some other contexts and those who participate in other formal processes designed to address wrongdoing. At the federal level, statutes that seek to address a specific problem (such as discrimination, safety, or environmental concerns) frequently contain protection for internal as well as external whistleblowers.[143] For example, the Sarbanes-Oxley Act ("Sarbanes-Oxley" or the "Act")[144] contemplates that employers will establish procedures to encourage and provide for the internal reporting of actions that may constitute a violation of securities law. Specifically, Sarbanes-Oxley requires publicly traded companies to establish internal procedures to address possible violations of securities law,[145] and envisions that employees will bring their suspicions of such violations to their supervisors. Thus, the whistleblower provision of the Act makes it unlawful to take action against an employee when the employee provides information or causes information to be provided to a person with supervisory authority over the employee or when the employee otherwise assists in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of Sarbanes-Oxley.[146] The Act also seeks to protect the sanctity of the enforcement process itself by prohibiting adverse action against those who "file, cause to be filed, testify, participate in, or

141. MODEL RULES OF PROF'L CONDUCT R. 8.1 (2008).

142. Rule 8.5 addresses choice of law issues with respect to disciplinary proceedings, but does not impose any ethical standard with which a lawyer must comply. *See generally id.* R. 8.5 (setting forth disciplinary authority and choice of law provisions).

143. *See* Lobel, *supra* note 44 (manuscript at 15) (noting the protection for internal whistleblowers in these types of statutes); *see generally* Cherry, *supra* note 45, at app. B (collecting federal statutes that contain whistleblower protections).

144. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., and 28 U.S.C.).

145. *Id.* § 105, 116 Stat. 759–64; *see also infra* notes 278–280 and accompanying text.

146. 18 U.S.C. § 1514A(a)(1)(C) (2006).

otherwise assist in a proceeding filed or about to be filed."[147] Thus, Sarbanes-Oxley seeks to protect the act of opposing or bringing to light internally what one reasonably believes amounts to a violation of the Act as well as the act of participating in the enforcement process itself.[148]

The major federal employment discrimination statutes likewise protect the act of internal reporting or opposition as well as more formal participation in the external remedial process. Title VII,[149] for example, provides protection from retaliation for an employee who opposes internally what the employee reasonably and in good faith believes to be conduct made unlawful by Title VII as well as for an employee who files a formal charge of discrimination, testifies, assists, or otherwise participates in a proceeding pursuant to Title VII.[150] The Americans with Disabilities Act ("ADA")[151] contains a similar provision making it unlawful for an employer "to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of" rights granted by the ADA.[152]

In enacting these provisions, Congress recognized that some type of protection for both internal reporting and external participation in the statutory remedial process was essential if the goals of the relevant statutes were to be attained. The tendency with these statutes has been to focus on the need to preserve employee access and willingness to access the statutory remedial processes.[153] Permitting employers to intimidate and retaliate against those who file charges concerning unlawful conduct would

147. *Id.* § 1514A(a)(2).

148. *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 77–78 (2007) (noting the potentially expansive breadth of protected activity under Sarbanes-Oxley). The regulations accompanying the Act contain language regarding the responsibilities of supervising attorneys relative to subordinate attorneys under their supervision that roughly tracks the language of Model Rule 5.1. *See* 17 C.F.R. § 205.4(b) (2008) (stating that a supervisory attorney must "make reasonable efforts to ensure that a subordinate attorney . . . that he or she supervises or directs conforms" to Sarbanes-Oxley's requirements). The same is true with respect to the duties of subordinate attorneys and Rule 5.2. *See id.* § 205.5(b) ("A subordinate attorney shall comply with [the Act] notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.").

149. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

150. *Id.* § 704(a), 78 Stat. 257 (codified as amended at 42 U.S.C. § 2000e-3 (2000)); *see* Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1125 (8th Cir. 2006) (interpreting 42 U.S.C. § 2000e-3 as prohibiting "opposition to practices that are not unlawful, if an employee acted based on good faith, objectively reasonable belief that the practices were unlawful").

151. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 and 47 U.S.C. §§ 225, 611 (2000)).

152. *Id.* § 503(b), 104 Stat. 370 (codified as amended at 42 U.S.C. § 12203(b) (2000)).

153. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (explaining that the primary purpose of the anti-retaliation provisions in the Civil Rights Act are to maintain "unfettered access to statutory remedial mechanisms").

undermine the goals of the relevant statute. But protecting the willingness and ability of employees to bring their concerns about improper behavior to superiors *within* an organization has its own salutary effects. By following established channels, an employee who brings suspected wrongdoing to the attention of others within the company provides the company with the opportunity to correct the offending behavior before further harm is done.[154] Thus, the ability and willingness of employees to notify appropriate individuals about the misconduct of others may obviate the need to go outside the confines of the company as well as prevent or mitigate future harm.

2. Using Existing Rules to Discourage Interference with the Disciplinary Process and Retaliation Against Whistleblowing Attorneys

As is the case with the Sarbanes-Oxley Act, Title VII, and other statutes, the legal profession should prohibit retaliation not just against those who report misconduct externally to disciplinary authorities, but against those who, in good faith, act reasonably in raising concerns about misconduct *within* a law firm. The Model Rules have undergone extensive revision in the last decade, prompting many states to evaluate what changes, if any, they wish to adopt.[155] Therefore, some jurisdictions may be suffering from ethics overload and are unlikely to adopt yet another series of substantive revisions to their rules. Even so, there are currently several existing rules of professional conduct, which, if disciplinary authorities were so inclined, could be used to prohibit retaliation against whistleblowing attorneys.

a. Prohibiting Retaliation Against External Whistleblowers: The Duty to Report, Conduct Prejudicial to the Administration of Justice, and Interference with the Disciplinary Process

There are several existing rules that relate indirectly to the problem of retaliation against lawyers who make external reports of misconduct to disciplinary authorities. One approach to the problem might be to

154. *See* Parker v. Bal. & Ohio Ry. Co., 652 F.2d 1012, 1019 (D.C. Cir. 1981) ("[B]y extending protection to employees who oppose discriminatory practices without recourse to the EEOC, Congress encouraged voluntary internal attempts to remedy discrimination."); *see also* Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (stating that the creation of internal mechanisms for addressing complaints of discrimination "could encourage employees to report harassing conduct before it becomes severe or pervasive").

155. *See* Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 638 & n.1 (2005) (discussing the ABA's Ethics 2000 initiative and the response of state bars).

recognize that inherent in a lawyer's duty under Rule 8.3(a) to make a disciplinary complaint about misconduct that reflects adversely on another lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects is a duty on the part of the lawyer's employer or the subject of the disciplinary complaint not to subvert the disciplinary process. In *Iowa Supreme Court Board of Professional Ethics and Conduct v. Miller*,[156] a former in-house lawyer made a threat to her former employer that if the employer did not provide her with compensation for her dismissal and withdraw a disciplinary complaint it had filed against her, she would file charges with the Securities and Exchange Commission against the employer as well as charges of sexual harassment and trade libel.[157] The Iowa Supreme Court held that making these threats amounted to a violation of the rule regarding the reporting of serious misconduct to disciplinary authorities.[158] In the court's view, the duty to report misconduct "implies a duty by the subject attorney not to frustrate that process, and an attempt to interfere in the grievance process is a basis for discipline."[159]

Another approach would focus on a lawyer's duty to avoid engaging in conduct prejudicial to the administration of justice under Model Rule 8.4(d).[160] The language of the rule is unquestionably broad and has been the subject of vagueness criticisms.[161] Although courts and disciplinary authorities have adopted various interpretations of Rule 8.4(d),[162] the interpretation most faithful to the actual language of the rule focuses on whether, in the words of one court, the conduct "impedes or subverts the process of resolving disputes; it is conduct which frustrates the fair balance of interests or 'justice' essential to litigation or other proceedings."[163]

156. 568 N.W.2d 665 (Iowa 1997).

157. *Id.* at 666.

158. *Id.* at 667.

159. *Id.*

160. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2008).

161. *See, e.g.*, *In re* Discipline of Attorney, 815 N.E.2d 1072, 1078 (Mass. 2004) (stating that the broad language of the rule "presents the risk of vagueness and arbitrary application" (internal quotation marks omitted)); Grievance Adm'r v. Fried, 570 N.W.2d 262, 265 (Mich. 1997) (per curiam) (noting that application of such a "broad rule" requires caution).

162. *See, e.g.*, Att'y Grievance Comm'n v. Childress, 770 A.2d 685, 694 (Md. 2001) (finding that an attorney who had solicited sex from minors violated rule).

163. *In re* Friedman, 23 P.3d 620, 628 (Alaska 2001); *see also* People v. Jaramillo, 35 P.3d 723, 731 (Colo. 2001) (stating that the rule "requires proof of some nexus between the conduct charged and an adverse effect upon the administration of justice"); Fla. Bar v. Pettie, 424 So. 2d 734, 737–38 (Fla. 1982) (noting that Florida's version of Rule 8.4(d), barring conduct prejudicial to the administration of justice, prohibits those activities that "undermine[] the legitimacy of the judicial processes").

Examples include manufacturing conflicts of interest in order to force recusal[164] and lying under oath.[165]

Several courts have held that the rule applies not just to conduct in connection with traditional litigation, but also to attempts to prevent others from filing disciplinary complaints.[166] In *Florida Bar v. Frederick*,[167] the Florida Supreme Court held that an attorney who required clients to sign a release agreeing to not contact the Florida Bar with complaints concerning the attorney or to withdraw any complaints they had previously filed before he would release funds to the clients amounted to a violation of Florida's version of Rule 8.4(d).[168] Rejecting the attorney's argument that the rule applied only to conduct in a judicial proceeding, the court stated that "conduct that prejudices our system of justice as a whole also is encompassed by" the rule.[169] Similarly, in *Lawyer Disciplinary Board v. Artimez*,[170] the West Virginia Supreme Court of Appeals concluded that an attorney who negotiated a similar arrangement with a client had likewise engaged in conduct prejudicial to the administration of justice.[171] After noting that "'[t]he principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice,'" the court concluded that the attorney's attempt to avoid the ethical obligations and disciplinary process that governed his actions amounted to a violation of Rule 8.4(d).[172]

164. *E.g.*, *Fried*, 570 N.W.2d at 267 ("A lawyer who joins a case as co-counsel, and whose principal activity on the case is to provide the recusal, is certainly subject to discipline.").

165. *E.g.*, *In re* Mason, 736 A.2d 1019, 1022 (D.C. 1999) (finding that an attorney engaged in conduct "prejudicial to the administration of justice" when the attorney lied under oath to a federal agency).

166. *See, e.g.*, People v. Vsetecka, 893 P.2d 1309, 1310 (Colo. 1995) (per curiam) (offering to pay firm to stop a disciplinary investigation); *In re* Wilson, 715 N.E.2d 838, 841 (Ind. 1999) (per curiam) (inserting a term into a settlement agreement with a client that required the client to withdraw a disciplinary complaint); *In re* Tartaglia, 798 N.Y.S.2d 458, 460–61 (N.Y. 2005) (per curiam) (improperly interfering with an investigation into a complaint of professional misconduct); *In re* Conduct of Boothe, 740 P.2d 785, 787, 790 (Or. 1987) (per curiam) (negotiating with a client for an assurance that the client would not file litigation against an attorney); Missouri Supreme Court Advisory Opinion, Formal Op. 122, at 1–2 (2006) (attempting to "purchase the silence of complainants" against an attorney). In some states, such conduct is specifically prohibited by rule. *See, e.g.*, ILL. RULES OF PROF'L CONDUCT R. 1.8(h) (West 2004 & Supp. 2008) ("A lawyer shall not enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Attorney Registration and Disciplinary Commission.").

167. 756 So. 2d 79 (Fla. 2000) (per curiam).

168. *Id.* at 83, 87.

169. *Id.* at 87.

170. 540 S.E.2d 156 (W. Va. 2000).

171. *Id.* at 163–65.

172. *Id.* at 164–65 (quoting Daily Gazette Co. v. Comm. on Legal Ethics of the W. Va. State Bar, 326 S.E.2d 705, 706 (W. Va. 1984)); *see also In re* Discipline of Eicher, 661 N.W.2d 354,

Several courts have also held that retaliation and intimidation directed at others for their conduct in connection with the disciplinary process amounts to conduct prejudicial to the administration of justice.[173] In one instance, an attorney was disciplined after threatening to retaliate against individuals who filed disciplinary complaints against him by filing lawsuits against them.[174] In another, an attorney attempted to intimidate a witness in a disciplinary proceeding against the attorney.[175]

By enforcing Rule 8.4(d) against law firm attorneys who retaliate against other firm attorneys who participate in the disciplinary process, disciplinary agencies and reviewing courts can further the goals underlying the Model Rules while hopefully reducing the number of instances of retaliation. The effects of retaliation are not limited to the immediate victims of retaliation. Instead, employer retaliation is often an attempt to send a warning to others not to engage in similar behavior.[176] In the case of retaliation against attorneys who comply with their ethical duty to report out unethical conduct, retaliation has the effect of chilling participation in the disciplinary process, a result that unquestionably "impedes or subverts" the disciplinary process. And as the purpose of the disciplinary process is to safeguard the public interest in the administration of justice, retaliation against attorneys who participate in the disciplinary process fits neatly within the prohibition against conduct prejudicial to the administration of justice.

Of course, the ability of the existing ethics rules to combat retaliation in the legal profession depends on both the willingness of attorneys to report instances of retaliation and the willingness of disciplinary authorities to prosecute lawyers and firms who engage in such action. Neither action is particularly common at present. The organized bar's past experience with enforcement, however, suggests the possibility that a few highly publicized prosecutions under Rule 8.4(d) for retaliation might have the desired deterrent effect.[177]

365 (S.D. 2003) ("Attempting to bargain away a disciplinary complaint also constitutes conduct that is prejudicial to the administration of justice." (citation and internal quotation marks omitted)).

173. *E.g.*, Fla. Bar v. Perlmutter, 582 So. 2d 616, 617 (Fla. 1991) (per curiam); *In re* Friedland, 416 N.E.2d 433, 438–39 (Ind. 1981) (per curiam); *In re Discipline of Eicher*, 661 N.W.2d at 365.

174. *Perlmutter*, 582 So. 2d at 617.

175. *In re Friedland*, 416 N.E.2d at 435.

176. NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1088 (7th Cir. 1987).

177. When, for example, the Illinois Supreme Court disciplined an attorney solely for his failure to report pursuant to Rule 8.3(a), "Illinois's bar disciplinary authorities observed a substantial increase in Rule 8.3 reports." Perlman, *supra* note 31, at 475.

b. Prohibiting Retaliation Against Internal Whistleblowers: Conduct Prejudicial to the Administration of Justice, The Duty to Report, and the Duties of Firm Partners and Subordinate Lawyers

Disciplinary authorities and reviewing courts could take a similar approach with respect to the problem of retaliation against those who make internal reports of suspected misconduct. If, as discussed, law firm retaliation or intimidation directed at an attorney who makes an external report of misconduct amounts to conduct prejudicial to the administration of justice,[178] then retaliation or intimidation that occurs because the firm believes an attorney is *contemplating or planning* to file such a report is equally prejudicial to the administration of the disciplinary process. Several courts have sensibly concluded that this type of "anticipatory retaliation" amounts to unlawful retaliation in the employment discrimination context.[179] As long as there is a causal connection between the adverse action and the filing of the disciplinary complaint, it is immaterial whether the adverse action occurred prior to or after the filing of the complaint; it is retaliation and it undermines the disciplinary process.

Similarly, disciplinary authorities and reviewing courts could, in good faith, recognize the existence of an implied ethical duty not to interfere with the disciplinary process that is implicated with the filing of an internal report of suspected misconduct. If, as at least one court has concluded, Rule 8.3(a)'s command that attorneys report serious misconduct to disciplinary authorities implies a duty on the part of the subject attorney not to interfere with the disciplinary process,[180] then the theory of anticipatory retaliation should make it unethical for the subject attorney to take adverse action in anticipation of the filing of a disciplinary complaint. Provided the reporting attorney has acted reasonably and in good faith in raising concerns internally over suspected misconduct by another attorney, an implied ethical duty on the part of firm partners exists not to retaliate against or seek to intimidate the reporting attorney.

Likewise, disciplinary authorities might recognize the existence of an implied ethical duty not to retaliate against an attorney who makes an internal report of suspected misconduct stemming from Rules 5.1 and 5.2. Rule 5.2 is clear that a subordinate attorney's violation of the ethical rules is not excused simply because the subordinate was acting at the direction of a

178. *See supra* notes 160–175 and accompanying text.

179. *E.g.*, Beckel v. Wal-Mart Assocs., Inc., 301 F.3d 621, 624 (7th Cir. 2002); Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993); EEOC v. Bojangles Rests., Inc., 284 F. Supp. 2d 320, 328 (M.D.N.C. 2003); *see also* Long, *The Troublemaker's Friend*, *supra* note 102, at 983–84 (explaining that several federal courts have held that anticipatory retaliation is actionable in employment discrimination cases).

180. *See supra* notes 156–159 and accompanying text.

superior.[181] But the comments to Rule 5.2 just as clearly contemplate a dialogue between the subordinate and a supervising attorney taking place over "reasonably arguable" questions of professional responsibility.[182] Therefore, it hardly seems a great stretch to conclude that an implied ethical duty exists on the part of firm partners not to retaliate against a subordinate who, in good faith, raises "reasonably arguable" questions concerning the subordinate's ethical obligations in relation to a dialogue with a supervising attorney.

Finally, a broader ethical duty might be said to exist in Rule 5.1(a)'s command that law firm partners "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."[183] Simply stated, a firm partner who retaliates against a firm attorney who has raised concerns about the ethical behavior of another attorney has not made the "reasonable efforts" required by the rule. The same is true of the firm partner who knows of the retaliation but stands silent as it occurs. The comments explain that firms should implement measures to "detect and resolve" possible ethical problems.[184] Stifling internal reports of suspected misconduct or permitting such stifling is the opposite of what the rule envisions. Accordingly, state disciplinary authorities should treat such conduct as a violation of Rule 5.1(a).[185]

3. Adopting Specific Anti-Retaliation Ethical Rules

Another partial solution to the problem of retaliation against attorneys who make either external or internal reports of misconduct about another attorney would be to adopt a new ethical rule prohibiting such conduct. Federal whistleblower protection provisions are premised on the need to preserve the willingness of employees to utilize the external mechanisms in place to remedy unlawful conduct and the desirability of encouraging internal opposition and reporting of unlawful conduct.[186] The same logic applies to imposing an explicit anti-retaliation or intimidation provision in a jurisdiction's legal ethics code.

181. MODEL RULES OF PROF'L CONDUCT R. 5.2 (2008).

182. *Id.* R. 5.2 cmt. 2.

183. *Id.* R. 5.1(a).

184. *Id.* R. 5.1 cmt. 2.

185. See Douglas R. Richmond, *Law Firm Partners as Their Brothers' Keepers*, 96 KY. L.J. 231, 258–59 (2008) [hereinafter Richmond, *Law Firm Partners*], for an argument that the failure of a law firm partner to raise questions internally about the possible misconduct of another firm attorney may amount to a breach of fiduciary duty.

186. *See supra* notes 146–154 and accompanying text.

Lawyers will likely always be reluctant to report the misconduct of another lawyer. Many non-lawyer employees are reluctant to report wrongdoing for fear of retaliation, despite the existence of statutory anti-retaliation provisions.[187] Given the high value the legal profession places on confidentiality, lawyers might, if anything, be more reluctant than non-lawyers to make an external report of wrongdoing. But this is all the more reason why it makes sense to explicitly prohibit retaliation against lawyers who take such action. In addition to providing some measure of assurance for potential whistleblowers, an explicit prohibition on intimidation or retaliation sends a message to lawyers that informing disciplinary authorities about another lawyer's serious misconduct is not just an ethical requirement the legal profession regards with a wink and a nod, but an action that the profession values and encourages.

Of course, the protections afforded by Sarbanes-Oxley, Title VII, and other measures are statutory in nature. The ethical rules governing attorneys, while often codified, are not statutes in the literal sense and are not designed to be the basis for civil or criminal liability.[188] Therefore, the inclusion of an anti-retaliation rule might raise two possible objections. First, some might argue that there is something unseemly or unnatural about including a prohibition on retaliation against whistleblowers in what is fundamentally a code of ethics. However, most state codes of ethics already contain other more mechanical and statute-like measures. Rule 8.1 already regulates the mechanics of the disciplinary process to some extent by prohibiting lawyers from knowingly making false statements in connection with the disciplinary process or failing to respond to a request for information from a disciplinary authority.[189] Rule 8.5 is simply a choice of law provision wrapped up in ethical garb.[190] Thus, an anti-retaliation rule would not amount to an anomaly within the rules of professional conduct.

Another possible objection is that an ethical rule prohibiting retaliation would not, by itself, afford a discharged attorney any remedy. Some states have enacted statutes designed to prevent interference with the operation of

187. *See* Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995) (reporting results of study showing why employees do not report instances of discrimination to their employers).

188. *See* MODEL RULES OF PROF'L CONDUCT pmbl., cl. 20 (stating that the rules "are not designed to be a basis for civil liability").

189. *Id.* R. 8.1.

190. *See id.* R. 8.5 (noting the scope of disciplinary authority, and setting forth choice of law provisions).

other types of professional disciplinary processes[191] or state ethics commissions.[192] Given the similarly important role that the legal disciplinary rules and process play, individuals who report suspected violations of these rules or who participate in the disciplinary process are deserving of similar protection. Therefore, a separate whistleblower protection statute for lawyers might be desirable. However, the inclusion of an anti-retaliation provision within a state's ethics code might accomplish two things. First, the inclusion of such a rule might amount to the clear expression of public policy courts require in deciding whether to recognize a common law tort claim of retaliatory discharge in violation of public policy.[193] Thus, the inclusion of an anti-retaliation rule might make it more likely that a discharged attorney would obtain a remedy. In addition, the inclusion of an anti-retaliation rule would be important because of the statement it would make about the collective values of the legal profession.[194] Although a whistleblower statute might be desirable, it is particularly appropriate for the legal profession—an almost entirely self-regulating profession—to adopt ethical rules providing this type of protection in order to instill confidence in the public.[195]

191. *See, e.g.*, KY. REV. STAT. ANN. § 311.990(6) (West 2008) (making it a misdemeanor to impede, obstruct, threaten, or interfere with the State Board of Medical Licensure or any of its members, or of any officer, agent, inspector, or investigator of the board, in the performance of their duty to regulate the professional conduct of medical professionals).

192. *See, e.g.*, IND. CODE ANN. § 4-2-6-13 (LexisNexis 2008) (prohibiting retaliation against an employee because the employee filed a complaint with, provided information to, or testified before state ethics commission). Other statutes make it illegal to retaliate against a health care provider because the provider objects to or refuses to participate in what the provider reasonably believes is a practice in violation of the law or the ethical standards of the medical profession and that the provider reasonably believes poses a risk to public health. *E.g.*, MASS. GEN. LAWS ANN. ch. 149, § 187(b)(3) (LexisNexis 2004 & Supp. 2008).

193. *See generally* Long, *Retaliatory Discharge*, *supra* note 8, at 1090–97 (discussing the possibility of a professional code of ethics to serve as the expression of public policy necessary to support a retaliatory discharge claim).

194. *See* Brenda Jones Quick, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response to Discrimination on the Rise*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 54 (1993) (noting the ability of ethical rules to send a message to the public about the values of the legal profession).

195. Adopting such a provision might also increase the odds that whistleblowing attorneys would prevail under the common law theory of retaliatory discharge in violation of public policy. In deciding whether to recognize a retaliatory discharge claim, courts often impose the requirement that the firing offend "a clear public policy which is evidenced by an unambiguous constitutional, statutory, or regulatory provision." Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 864 (Tenn. 2002) (internal quotation marks omitted); *see also* Collins v. Rizkana, 652 N.E.2d 653, 657 (Ohio 1995) (stating that one element of a retaliatory discharge claim is that a "'clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law'" (quoting Henry H. Perritt Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 398 (1989)). The inclusion of an anti-retaliation provision within a jurisdiction's rules of professional conduct might qualify.

B. Structural Approach to the Plight of Whistleblowing Attorneys: Improving Ethical Infrastructures

The enforcement measures described above would represent a welcome change to the current state of affairs. However, they represent a piecemeal approach to a larger problem. Although imposing discipline in the case of retaliation against a whistleblowing attorney addresses one aspect of the problem, the larger issue is that the ethical infrastructures of many law firms lack any structure designed to encourage the internal reporting, investigation, and resolution of ethical misconduct.

Currently, the Model Rules focus almost exclusively on external reporting to disciplinary authorities as the means of addressing lawyer misconduct. However, in light of the numerous problems associated with the operation and enforcement of Rule 8.3(a)'s external reporting requirement, it is time that jurisdictions began experimenting with encouraging the internal reporting of suspected misconduct. Therefore, this Section suggests various ways the legal profession can encourage firms to develop their ethical infrastructures, including internal reporting, investigation, and resolution procedures.

1. The Benefits of Internal Whistleblowing

Although the duty to make external reports of serious misconduct to disciplinary authorities plays an important role in rooting out unethical practice, internal reporting of suspected lawyer misconduct offers several advantages. Internal reporting is more consistent with traditional notions of professional responsibility and, therefore, the self-image of most lawyers, than external reporting. Therefore, it is more likely to be an effective method of rooting out professional misconduct.

External reporting has two distinct disadvantages in terms of bringing to light lawyer misconduct. First is the concern common to whistleblowers of all kinds that "reporting out" either amounts to disloyal conduct or will be perceived as such. The traditional notion of employee loyalty involved unquestioning faithfulness.[196] Accordingly, the external whistleblower, in particular, has long been viewed in some quarters as inherently disloyal.[197]

196. *See* Lobel, *supra* note 44 (manuscript at 8) (explaining that pre-modern employment law originated from master-servant principles in which "a faithful servant employee followed orders and exercised fidelity without question").

197. *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 161–62 (1994) (characterizing arbitration decisions in the collective bargaining context as concluding that "whistleblowing to either government officials or the media constitutes 'go[ing] public,' which is detrimental to the employer and, thus, disloyal" (alteration in original)); Terry Morehead Dworkin, *Whistleblowing, MNCs, and Peace*, 35 VAND. J. TRANSNAT'L L. 457, 463 n.42 (2002) ("Studies of whistleblowers indicate that the best predictor of retaliation is external

To be sure, more modern conceptions of loyalty emphasize greater independent judgment on the part of an employee.[198] Furthermore, the public's attitude toward whistleblowers has warmed in recent years because of various corporate scandals.[199] This trend is reflected in the ethical rules governing lawyers as well.[200] Under the former version of Rule 1.13, an attorney who learned of an organizational client's serious wrongdoing was precluded from notifying others outside of the organization about the misconduct except to the extent the disclosure was permitted by one of the narrow confidentiality exceptions.[201] Under the revised Rule 1.13, after "reporting up" the corporate ladder, an attorney who knows of client misconduct is now permitted to "report out" to the extent the attorney "reasonably believes necessary to prevent substantial injury to the organization."[202]

Despite the general softening of attitude toward whistleblowing, there is still considerable suspicion regarding external whistleblowers. Reporting outside the confines of the organization potentially exposes the organization to adverse publicity and financial harm.[203] And regardless of one's conception of employee loyalty, conduct that potentially exposes one's employer to harm certainly raises concerns over loyalty, no matter how noble the motivation.[204] It is perhaps for this reason that employees generally prefer an internal reporting option.[205] As Professor Richard E. Moberly has stated, "An internal disclosure channel provides a way for

whistleblowing." (citing Janet P. Near et al., *Explaining the Whistle-Blowing Process: Suggestions from Power Theory and Justice Theory*, 4 ORG. SCI. 393, 399 (1993))); Jonathan Macey, *Getting The Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899, 1901 (2007) (stating that whistleblowers "traditionally have been considered tattletales and otherwise viewed with suspicion").

198. *See* Lobel, *supra* note 44 (manuscript at 8) (explaining that today employees are expected to exercise "discretion and independent judgment," recognizing their role in "assisting the organization in operating within the bounds of legality").

199. *See* Macey, *supra* note 197, at 1901 (stating that whistleblowers "have recently enjoyed a distinct rise in popularity").

200. *See* Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 732–33 (2004) (noting the changes to the Model Rules regarding disclosure of client confidences following the passage of Sarbanes-Oxley).

201. *See id.* at 802 n.300 (commenting on the former version of Model Rule 1.13(b)).

202. MODEL RULES OF PROF'L CONDUCT R. 1.13(c)(2) (2008).

203. *See* Terry Morehead Dworkin & Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 AM. BUS. L.J. 241, 242 (1987) (stating that "negative publicity, investigations, and administrative and legal actions . . . usually ensue after external whistleblowing").

204. *See* Lobel, *supra* note 44 (manuscript at 8) ("[A] loyal employee must view the good of the organization as a whole and behave according to what is best for the future of the corporation.").

205. *See supra* note 44 and accompanying text.

employees to demonstrate their loyalty by disclosing misconduct without having to report colleagues to 'outside' authorities."[206]

Attorneys in law firms may be particularly susceptible to fears that their external reports to disciplinary authorities of another attorney's misconduct are either inherently disloyal or will be viewed as such. Although working in any organization may produce feelings of loyalty toward the organization, the special characteristics of law firm employment are particularly likely to lead to loyalty of the blind obedience type.[207] This is undoubtedly one of the reasons why the external reporting obligation of Rule 8.3(a) often goes unfulfilled.[208] Some in the legal profession view those who make external reports of wrongdoing with particular disdain, as evidenced by the long list of derisive names for Rule 8.3(a), such as the "squeal rule,"[209] the "snitch rule,"[210] and the duty "to 'rat' on one's colleagues."[211] In short, external reporting of unethical conduct is at odds with the self-image of many lawyers.

The second disadvantage of a system of external reporting of ethical misconduct is that a lawyer's duty of confidentiality may prevent the lawyer from ever making the report. When a lawyer's duty to make an external report of misconduct comes into conflict with a lawyer's duty not to reveal information relating to the representation of a client without the client's consent under Rule 1.6,[212] the duty of confidentiality prevails.[213] Although a comment to Rule 8.3(a) advises that "a lawyer *should* encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests,"[214] a client's lack of consent prevents a lawyer from ethically making a report of misconduct to disciplinary

206. Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1142.

207. *See supra* notes 31–35 and accompanying text.

208. *See* Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-regulation*, 12 GEO. J. LEGAL ETHICS 175, 202 (1999) [hereinafter Richmond, *Duty to Report*] (stating that when "an unethical lawyer and a potential reporting lawyer work in the same law firm, there is little chance that even serious misconduct will be reported to disciplinary authorities" due to the reporting lawyer's sense of loyalty and fear of retaliation).

209. Geoffrey C. Hazard Jr., *"Squeal Rule" Considered for Change*, NAT'L L.J., Mar. 26, 1990, at 13.

210. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635, 682 (2006).

211. Larry O. Natt Gantt II et al., *Professional Responsibility and the Christian Attorney: Comparing the ABA Model Rules of Professional Conduct and Biblical Virtues*, 19 REGENT U. L. REV. 1, 87 (2006).

212. MODEL RULES OF PROF'L CONDUCT R 1.6(a) (2008).

213. *See id.* R. 8.3 cmt. 2 ("A report about misconduct is not required where it would involve violation of Rule 1.6.").

214. *Id.* (emphasis added).

authorities. Therefore, at least some serious misconduct is unlikely to go reported to disciplinary authorities as a result of the interplay between rules. Internal reporting within a firm presents no such problems. As a result, an internal reporting process has distinct advantages in terms of addressing misconduct that would otherwise go unreported.[215]

An internal reporting device offers a number of other benefits. As discussed, establishing a process whereby attorneys can raise concerns of unethical behavior internally before that behavior has harmful consequences for clients makes practical sense for law firms in terms of litigation and reputational costs.[216] Relying on institutional theory, Professors Chambliss and Wilkins have suggested that the creation of a formal, ethical infrastructure may also signal to key constituents, such as clients and potential firm members, that the firm has high ethical standards—a characteristic the firm may use as a selling point.[217] From the perspective of the legal profession more broadly, the existence of an effective internal reporting device also relieves some of the burden on disciplinary authorities, thereby allowing authorities to save enforcement costs and direct their efforts in a more efficient manner.[218] Part of the justification for Rule 8.3(a) is that lawyers are better situated to detect and recognize unethical conduct on the part of other lawyers than are clients.[219] If this is true, then lawyers within the same firm are uniquely positioned to detect the misconduct of their colleagues and fulfill the goals of the rule.[220]

The legal profession's embrace of such devices would also send a welcome and much-needed signal to the public that the profession truly is capable of policing its members. An external reporting requirement that is vague, rarely enforced, and infrequently followed may lead to the view, both within the legal profession and outside, that the legal profession is not

215. *See generally* Lobel, *supra* note 44 (manuscript at 27) (noting that, due in part to confidentiality concerns, "internal speech is frequently the most reasonable, if not the only, path for an employee who witnesses" misconduct).

216. *See id.* ("[A]llowing the employer to first investigate and correct possible violations prevents potential high costs to both the employee and the organization, which will avoid harms to its reputation and the costs of undergoing a government investigation."); *see generally* Davis, *supra* note 18, at 106 (discussing the need for law firms to have clearly defined reporting procedures to ensure effective management).

217. Chambliss & Wilkins, *Promoting Effective Ethical Infrastructure*, *supra* note 24, at 710.

218. Lobel, *supra* note 44 (manuscript at 27).

219. *See* Greenbaum, *supra* note 63, at 265 (explaining that lawyers, "because of their training in the law, and their day-to-day interactions with other lawyers, are better situated than most to observe and evaluate the conduct of other attorneys").

220. *See* Richmond, *Duty to Report*, *supra* note 208, at 203 ("[C]olleagues are almost surely best positioned to observe and act on misconduct by other lawyers in their firms.").

willing to regulate itself.[221] This is especially true when the profession does little to nothing to protect those who actually obey the rule and suffer adverse consequences as a result.[222]

But most importantly, the establishment of effective, formal structures for dealing with internal reports of unethical conduct contributes to a sense of shared values within an organization, which makes it more likely that firm lawyers will come forward with concerns about misconduct within the firm.[223] The existence of a formal, internal reporting process sends a message to the members of a law firm that professionalism and compliance with ethical rules are a shared value and that the firm takes seriously any individual concerns in this regard.[224] In this regard, the creation of such a formal process is, in the words of Professors Chambliss and Wilkins, "*culturally* symbolic."[225] But the symbolism may also produce practical results. Although whistleblowers understandably fear retaliation, one of the strongest disincentives to whistleblowing is the whistleblower's fear that the employer will do nothing to address the whistleblower's concerns.[226] By instituting formal policies and procedures for handling internal reports of unethical conduct—including assurances that no retaliation will occur—law firms can help alleviate both of these concerns.[227] In addition, where a law firm demonstrates a formal commitment to being receptive to ethical concerns, an institutional norm of ethical practice may be more likely to develop.[228]

Of course, it is unlikely that there will be a massive rise in the number of internal reports of misconduct should such formal procedures become the norm in the legal profession. The pressures—both intrinsic and extrinsic to the legal profession—that dissuade attorneys from reporting misconduct to disciplinary authorities will also undoubtedly dissuade some attorneys from

221. *See* Greenbaum, *supra* note 63, at 275–76 (stating that a poorly drafted rule harms the public image of the profession).

222. *See supra* notes 99–102 and accompanying text.

223. *See* Lobel, *supra* note 44 (manuscript at 27) (explaining the benefits of an effective internal reporting system); *see generally* Davis, *supra* note 18, at 109 (stating a law firm's culture is "not an adequate basis for uniform risk management" and that written policies and procedures related to risk management are necessary).

224. *See generally* Chambliss & Wilkins, *Promoting Effective Ethical Infrastructure*, *supra* note 24, at 713 (stating that the creation of internal compliance procedures signals to lawyers that the firm takes ethics seriously).

225. *Id*.

226. Moberly, *supra* note 206, at 1143–44.

227. *See id.* at 1143 (arguing that the structure of an organization's internal reporting process can reduce concerns over disloyalty and retaliation).

228. *See* Chambliss & Wilkins, *Promoting Effective Ethical Infrastructure*, *supra* note 24, at 714 (drawing upon organizational theory to argue that a relationship exists between structure and development of a culture).

taking advantage of whatever internal reporting system a law firm may implement. However, as between a system that relies exclusively on external reporting and a system that relies on both internal and external reporting to root out misconduct, the choice should be obvious. Ultimately, the legal profession must encourage its members to develop internal reporting procedures to complement the pre-existing duty to report misconduct to disciplinary authorities.

2. The Requirement That Firms Have an Internal Process for the Reporting and Investigation of Suspected Misconduct Is Implicit in Rule 5.1(a)

Assuming that the legal profession should encourage greater reliance on internal reporting of suspected misconduct, the question becomes how this can best be achieved. One could rely on law firms to voluntarily develop such procedures out of a sense of self-interest. Even if one takes such an optimistic view of the willingness of law firms to take such steps, the existence of such procedures would be spotty. A better solution would be to interpret Rule 5.1(a) as requiring the existence of such procedures and enforcing the rule accordingly against individual law firm partners or partners in management or policy-making positions.

a. Rule 5.1(a)'s Implicit Requirement that Firms Have an Internal Process for the Reporting and Investigation of Suspected Misconduct

As written, Rule 5.1(a) could support the imposition of a duty to have an internal reporting system in place. At present, a law firm partner has a duty to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that *all* lawyers in the firm conform to the Rules of Professional Conduct."[229] Thus, partners have a duty to make reasonable efforts to, in the words of a comment to the rule, "detect and resolve" ethical violations committed by any member of the firm.[230] Surely then, a law firm must do *something* to increase the odds that ethical violations will be brought to the attention of relevant individuals within the firm (detection) and dealt with appropriately (resolution). And the comments are clear that when the rule uses the term "measures," it is referring to "policies and procedures" and "systems"[231]—that is, infrastructure. As a specific example of such policies and procedures, a Michigan ethics opinion states that under its version of Rule 5.1 "each firm

229. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2008) (emphasis added).

230. *Id.* R. 5.1 cmt. 2.

231. *Id.* cmts. 2 & 3.

is obligated to establish and administer a record retention policy or plan, to educate all lawyers and nonlawyers in the firm as to its operation, and to monitor compliance."[232]

Of course, many law firms have failed to develop internal compliance policies and procedures in other areas, such as billing procedures,[233] where the rule would seem to mandate it. The failure of firms to do so, however, is hardly an argument for why no such duty exists. In other areas, Rule 5.1(a)'s malleable "reasonable efforts" and "reasonable assurance" language makes the establishment of bright-line rules mandating certain types of compliance procedures undesirable. It would make little sense, for example, to require that a large law firm have a single, across-the-board policy dictating to attorneys how they must keep track of filing and other important deadlines.

Promulgating an internal reporting and investigation policy is a different matter. Although such systems might take any number of forms depending upon the size and structure of a law firm, providing a mechanism by which suspected misconduct can be addressed internally goes to the essence of what Rule 5.1(a) is about. Without such a mechanism, it is virtually impossible for a firm to give "reasonable assurance that all lawyers in the firm conform" to a jurisdiction's ethical rules. In addition, unlike the case of procedures for keeping track of filing deadlines, where individual attorneys in a firm may have their own acceptable preferences, firm attorneys need a uniform policy for addressing suspected misconduct if the firm is to deal with such matters effectively—no matter the size of the firm.

A New York ethics opinion suggests that the existence of a system that encourages internal reporting and that provides for investigation and resolution of suspected misconduct is an integral component of compliance with Rule 5.1(a).[234] According to the opinion, a firm has a duty to have "procedures in place to respond to ethical inquiries or lapses."[235] In addition, a firm has "a duty to make inquiries where it has reason to believe

232. State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. No. R-5 (1989), *available at* http://www.michbar.org/opinions/ethics/numbered_opinions/r-005.htm (last visited May 13, 2009).

233. *See* Chambliss, *The Nirvana Fallacy*, *supra* note 7, at 128 (noting that most firms lack billing guidelines and "do little or nothing to train new associates about proper billing procedures").

234. The duty for New York attorneys is contained in the New York Lawyer's Code of Professional Responsibility. *See* N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 1-104(A) (2007) (requiring a law firm to "make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules").

235. N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Opinion No. 762, at 6 (2003), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=18773 (last visited May 13, 2009).

there is a likelihood that there may be ethical problems."[236] These statements suggest the existence of a duty to investigate and respond to allegations of possible misconduct by attorneys within the firm. Thus, a firm fails to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm are practicing in an ethical manner where the firm lacks a device for investigating and responding to suspected misconduct that is brought to the firm's attention. What these measures might look like is discussed in greater detail below.[237]

Rule 5.1(a) applies to an individual lawyer's reasonable efforts, but not to those of a whole firm. But in New York, the duty is on a *law firm* to "make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules."[238] However, the central message of the opinion—that "reasonable efforts" to detect and resolve unethical conduct necessarily include some type of reporting, investigation, and resolution procedure—applies with equal force to current Rule 5.1(a).

b. Implying a Duty on the Part of Firm Leaders to Establish an Internal Process for the Reporting and Investigation of Suspected Misconduct

Don't blame you, don't blame me, blame the fellow behind the tree.[239]

A complimentary approach would be to impose a duty on firm *leaders* to develop internal reporting, investigation, and resolution measures. Because Rule 5.1(a) is a rule of *individual* professional responsibility, it may be difficult to identify which partners failed to make the reasonable efforts required to ensure that the firm has an ethical infrastructure in place. This is arguably one of the rule's failings. The size or complex bureaucracy of some law firms may make it difficult for disciplinary authorities to determine which partners made what efforts to influence the development of a firm's ethical infrastructure.[240] Moreover, a firm's structure may limit

236. *Id.*

237. *See infra* Part IV.B.3.

238. N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 1-104(A) (2007); *see* Lachman, *supra* note 66, at 1 (noting that New York's ethics codes provide for law firm discipline).

239. *Cf.* Editorial, *Everybody Else Did It*, WALL ST. J., Oct. 16, 2008, at A14 (crediting the late Senator Russell Long as stating that the core truth of tax policy was "Don't tax you, don't tax me, tax the fellow behind the tree").

240. *See* Schneyer, *supra* note 4, at 10–11 (stating that it is difficult to identify the parties responsible for a firm's failure to develop an ethical infrastructure "because it is difficult to attribute omissions to specific individuals in a group"); *see also* Elizabeth Chambliss & David B.

the managerial and decision-making authority that some partners possess.[241] Therefore, as a practical matter, some partners possess little ability to influence firm policy, let alone the ability to ensure that the firm maintains internal policies and procedures designed to promote the ethical practice of law.

Firm leaders, however, stand in different shoes. Many law firms now employ centralized management structures which delegate much of the firm's business management to relatively few individuals.[242] For some of these individuals, management of the firm constitutes their sole or primary duty.[243] As a result of this delegation of authority, many firm partners lack the practical ability to monitor the actions of other partners or influence firm policy regarding monitoring.[244] But a law firm's managing partner or members of a firm's management committee possess the ability to enact internal policies and procedures designed to promote compliance with the ethical rules. For purposes of Rule 5.1(a), the buck should stop with them. For example, the comments following Tennessee's current version of Rule 5.1 specifically acknowledge this reality by providing that when a law firm's partners delegate centralized managerial authority to a single or small group of individuals, only those individuals are subject to the duty imposed by Rule 5.1(a).[245]

A 2003 decision from the Delaware Supreme Court hints at the idea of a heightened duty on the part of managing partners, and those in similar positions of authority, to ensure that firms have measures in place that guarantee attorneys are practicing in an ethical manner. *In re Bailey*[246] is a disciplinary case involving a managing partner charged with violations of Rule 1.15.[247] Specifically, an audit had revealed "numerous deficiencies in

Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 339 (2003) [hereinafter Chambliss & Wilkins, *A New Framework*] (noting similar concerns).

241. *See supra* note 103 and accompanying text.

242. *See* Chambliss, *The Nirvana Fallacy*, *supra* note 7, at 127 ("Most large law firms have moved away from decentralized, collegial governance and instead have extensive management hierarchies . . . .").

243. *See id.* (noting that members of the law firm management hierarchy often include "professional (full-time, specialized) managers").

244. *See* Robert W. Hillman, *Whatever Happened to the Market for Partners' Desks? The Milberg Indictment as an Inquiry into Accountability*, 2 MD. J. BUS. & TECH. L. 415, 423 (2007) (stating that such delegation "lessens the role of partners in monitoring the actions of each other").

245. TENN. RULES OF PROF'L CONDUCT R. 5.1 cmt. 1 (2008).

246. 821 A.2d 851 (Del. 2003) (per curiam).

247. *Id.* at 853. The partner was also charged with violations related to dishonesty, conduct prejudicial to the administration of justice, and failure to supervise non-lawyer employees. *Id.* at 856. However, the crux of the court's opinion and the disciplinary charges involved Rule 1.15 violations. *See id.* at 853 (explaining that the primary issue in the case was whether the managing partner engaged in misconduct with respect to the mishandling of the law firm's books and records).

the [f]irm's bookkeeping obligations."[248] Addressing the partner's argument that he had not engaged in "knowing misconduct" for purposes of imposing discipline, the court stated that even if there was no evidence that the partner had ordered or implicitly directed the invasion of client funds, "the sustained and systematic failure of a managing partner to supervise a firm's employees to ensure compliance with Rule 1.15 may not be characterized as simple negligence."[249] Specifically, it was the partner's role as managing partner that supported the court's conclusion. According to the court, "the managing partner of a law firm has enhanced duties, vis-à-vis other lawyers and employees of the firm, to ensure the law firm's compliance with its recordkeeping and tax obligations under the Delaware Lawyers' Rules of Professional Conduct."[250] Although recognizing that a managing partner cannot guarantee flawless accounting, "it is the managing partner's responsibility to implement reasonable safeguards to ensure that the firm is meeting its obligations with respect to its books and records."[251]

There are several reasons to be cautious about reading *In re Bailey* too broadly. For example, the managing partner in question was not charged with a Rule 5.1(a) violation for failure to take reasonable steps to ensure that the firm had measures in place to promote compliance with the rules regarding safeguarding client property and bookkeeping.[252] That said, a fair reading of the opinion establishes that the court's conclusion about the "enhanced duties" of a managing partner is grounded every bit as much on the principles underlying Rule 5.1(a) as it is the special rules regarding maintaining client property and bookkeeping. In a footnote, the court stated that it actually found support for its conclusion about those with managerial authority for a law firm in a comment accompanying Rule 5.1.[253] Indeed, in a subsequent decision, the Delaware Supreme Court associated *In re Bailey* with the responsibilities of firm managers under Rule 5.1.[254]

The existence of internal measures for ensuring compliance with the ethical rules regarding bookkeeping and the safeguarding of client funds is

248. *Id.* at 854.

249. *Id.* at 863–64 (footnote and internal quotation marks omitted).

250. *Id.* at 853.

251. *Id.* at 865.

252. Moreover, under Delaware's Rules of Professional Conduct, attorneys were required to certify that their accounting practices were in compliance with the Rules, and law firm attorneys could generally satisfy this requirement by expressly stating that they were relying on their firm's managing partner's assurance that the firm itself was in compliance with the rules. *Id.* at 864 n.30.

253. *See id.* at 865 n.31 (describing Delaware's ethical rules with respect to managerial authority). The comment was apparently not in effect at the time of the disciplinary change, but had recently been adopted in Delaware. *See id.* (noting the effective date of the new ethics provisions).

254. *See In re* Froelich, 838 A.2d 1117, 1120 n.13 (Del. 2003) (per curiam) (discussing the court's earlier decision in *In re Bailey*).

simply one facet of a firm's ethical infrastructure. If a managing partner has special responsibilities by virtue of Rule 5.1 for ensuring that the firm has measures in place to comply with the ethical rules in the specific context of safeguarding of client funds, then it logically follows that a managing partner has special responsibilities concerning the development of other aspects of the firm's ethical infrastructure. Every law firm partner has the obligation to make reasonable efforts to establish internal policies and procedures designed to ensure firm-wide compliance with the ethical rules.[255] The concept of "reasonableness," however, varies depending upon the circumstances. A reasonable person is required to exercise any superior abilities the person may possess.[256] The leadership of a law firm (such as managing partners and members of management, executive, or similar committees) possesses the ability to set firm policy and implement change. Therefore, it should be a relatively simple matter for such individuals to establish internal reporting and investigation policies and procedures. Because such policies and procedures are essential to fulfilling the purpose of Rule 5.1, it should be the unusual case where a managing partner or similar figure should be able to avoid discipline where a firm lacks such measures.[257]

Directing enforcement efforts toward firm leaders also has practical advantages for disciplinary authorities. Perhaps one reason why enforcement efforts under Rule 5.1(a) have been so lacking is because disciplinary authorities are reluctant to discipline partners for acts of omission rather than acts of commission.[258] However, another possible explanation might be that the size and structure of many firms simply makes it extremely difficult for disciplinary authorities to enforce the rule. Unless disciplinary authorities are willing to take a dart-board approach and randomly target selected partners to see if they have complied with the rule, they must investigate every partner's efforts to establish internal compliance procedures and policies. In contrast, once disciplinary

255. *See Epstein*, *supra* note 18, at 1024 (citing the opinion of an ethics expert with respect to law firm partners' duty to establish measures that ensure attorneys in a firm conform to the rules and standards of professional conduct).

256. *See* RESTATEMENT (SECOND) OF TORTS § 289 cmt. m (1965) (explaining that the reasonable person "is required to exercise the superior qualities that he has in a manner reasonable under the circumstances").

257. *See* Richmond, *Law Firm Partners*, *supra* note 185, at 240 ("[L]aw firm leaders are more likely to violate [Rule 5.1(a)] than are average partners . . . ."); *see generally* Lachman, *supra* note 66, at 6 ("[A] strong argument can be made that the managing lawyers who have failed to take [steps to ensure that all lawyers are in compliance with the ethical rules] should bear at least some responsibility for the underlying misconduct resulting from that failure.").

258. *See* Miller, *supra* note 70, at 292–93 (explaining the difficulties with imposing disciplinary sanctions against partners and supervising attorneys).

authorities identify the locus of a firm's decision-making authority—a relatively easy task—they can direct their attention to these individuals.

In short, courts and disciplinary authorities should read Rule 5.1(a), as written, as imposing a duty upon law firm partners to make reasonable efforts to ensure that the firm has in place an internal complaint and investigation procedure through which attorneys can raise concerns over suspected misconduct. And, at least in the case of firm leaders, the rule should also be read as typically imposing a duty to see to it that the firm actually develops such policies and procedures.

3. The Creation of a Firm-Wide Duty to Establish an Ethical Infrastructure, Including a Process for the Reporting and Investigation of Suspected Misconduct

Enforcing Rule 5.1(a) against firm partners or firm leaders who fail to establish an internal process for the reporting and investigation of suspected misconduct would represent an improvement on the current state of affairs. However, in order for Rule 5.1(a) to fulfill its purposes, it should be amended to impose a *firm-wide* duty with respect to the implementation of a law firm's ethical infrastructure, rather than simply an individual duty. In doing so, the legal profession should look to recent reforms in corporate governance.

a. Firm-Wide Responsibility for the Establishment of an Ethical Infrastructure

Any discussion of professional discipline for law firms begins with a 1990 article by Professor Ted Schneyer. In the article, Professor Schneyer focused primarily on Rule 5.1(a) and the development of a firm's ethical infrastructure.[259] Since that time, various authors have debated the merits of imposing discipline against a firm as a whole for its failures in this regard.

Opponents have raised a number of objections to firm-wide discipline in general and such discipline more specifically in the case of Rule 5.1(a). These include the arguments that such discipline is unnecessary because most law firms (at least large ones) already have ethical infrastructures in place[260] and unfair because it subjects "innocent" partners to fines and other sanctions stemming from conduct they had nothing to do with.[261] Whatever the merits of these arguments, the objection that has thus far had

259. *See, e.g.*, Schneyer, *supra* note 4, at 18 (discussing the use of Rule 5.1(a) as a tool to establish an effective ethical infrastructure).

260. *See supra* note 138 and accompanying text (reporting that most large law firms have ethical infrastructures in place).

261. Richmond, *Law Firm Partners*, *supra* note 185, at 262–63.

the most traction is that firm-wide discipline would reduce individual accountability.[262] In short, imposing a duty on a law firm as a whole to institute policies and procedures designed to promote the ethical practice of law, opponents argue, would encourage attorneys to "shirk their own supervisory duties"[263] and lead to a "lack of personal responsibility for ethics compliance" more generally.[264] Indeed, it was this concern over reducing personal accountability that led the ABA Ethics 2000 Commission to narrowly decide against adopting such a firm-wide duty.[265]

There are several responses to this argument. One is the point raised previously that, even if every partner in a firm were inclined to make reasonable efforts to develop the firm's ethical infrastructure, the structure of many law firms effectively precludes the ability of some partners to do so.[266] Another response is that in light of the unwillingness or inability of partners to effectuate meaningful change and the unwillingness or inability of disciplinary authorities to enforce the rule as written, it is difficult to see how imposing firm-wide discipline would lead to an increase in individual shirking.[267] If anything, law firm discipline for failure to make reasonable efforts to ensure that all lawyers in the firm are practicing in an ethical manner seems more likely to lead firm partners to take an active interest in the firm's ethical infrastructure.[268] Given the lack of enforcement of the current rule, partners have reduced incentive for taking an interest in the monitoring and supervision of other attorneys whose actions do not directly impact the partner.

Ultimately, perhaps the strongest response to opponents of law firm discipline in this context is that because the rule seeks to encourage firm-wide policies and procedures designed to ensure compliance with the

262. *See* Chambliss, *The Nirvana Fallacy*, *supra* note 7, at 125 (recognizing the "key argument" against firm-wide liability that such a rule could undermine individual accountability).

263. *Id.* at 126.

264. Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 21 (2002); *see also* Richmond, *Law Firm Partners*, *supra* note 185, at 262 (arguing that firm-wide discipline "reduces the likelihood that individual lawyers will comply with ethics rules"); *see generally* Davis, *supra* note 18, at 95–96 (noting the argument that reliance on ethics advisors and committees within law firms may cause firm lawyers to shift responsibility for ethical decisionmaking and moral judgment to others).

265. Chambliss, *The Nirvana Fallacy*, *supra* note 7, at 125; Margaret Colgate Love, *The Revised ABA* Model Rules of Professional Conduct*: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 470–71 (2002).

266. *See supra* note 103 and accompanying text.

267. *See* Chambliss, *The Nirvana Fallacy*, *supra* note 7, at 129 ("Law firm discipline may not be the answer to inadequate supervision, but it is hard to argue that law firm discipline could make matters worse.").

268. *See* Schneyer, *supra* note 4, at 8 (explaining that under the current model of individual liability, firm partners have "an incentive to shift responsibility for an ethical breach onto others in the firm").

ethical rules, it is only fitting that the duty to develop those policies rest with the firm itself. Currently, Rule 5.1(a) speaks directly to the responsibility of an individual lawyer to influence a firm's compliance procedures. But the ultimate focus of the rule is on the firm itself. The goal of the rule is "to ensure that *the firm* has in effect measures giving reasonable assurance that all lawyers in the firm" are practicing in an ethical fashion.[269] Although the legal profession should certainly encourage individual partners to be actively engaged in the process of shaping formal policies and procedures within a firm, it is the end result that is most important in this context.

An organization's policies represent the organization's official position on a matter and may be relevant for purposes of determining the organization's civil liability in other contexts.[270] In the employment discrimination context, for example, the existence of an anti-harassment policy with a complaint and investigation procedure that allows a company to effectively respond to a sexual harassment complaint internally may limit the employer's vicarious liability for such harassment.[271] Why then should a law firm, which stands to benefit or incur liability on the basis of its policies and procedures in other contexts, be excused from professional discipline on the basis or absence of its compliance policies and procedures?[272]

b. Lessons from Corporate Law

Recent corporate law reforms provide one possible model for the revision of Rule 5.1.[273] The Sarbanes-Oxley Act contains a rough analogue to Rule 5.1 in terms of the development of ethical infrastructures. In order

269. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2008) (emphasis added).

270. *See, e.g.*, Leibowitz v. Cornell Univ., 445 F.3d 586, 592–93 (2d Cir. 2006) (per curiam) (discussing employer's official and unofficial policies as the bases for potential liability in a breach of contract action).

271. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (explaining that employers can raise as a defense to vicarious liability for sexual harassment the existence of an anti-harassment policy with a compliant procedure).

272. One response is that as between a rule of individual discipline and firm discipline, the rule least likely to produce negative consequences for individual attorneys is, paradoxically, a rule of individual discipline. Thus, it is the rule the legal profession has chosen. *See* Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 454 (2008) (advancing the proposition that many legal issues are "decided in the way that offers the best result for the legal profession" as a whole).

273. *See generally* Schneyer, *supra* note 4, at 23–24 (suggesting the appropriateness of corporate criminal liability as an analogy to law firm discipline).

to increase investor confidence in the accuracy of financial information,[274] the Act requires publicly traded companies to adopt a code of ethics or to explain to the Securities and Exchange Commission ("SEC") why they have not done so.[275] According to SEC regulations, a code of ethics is a set of *written* standards that are:

> reasonably designed to deter wrongdoing and to promote:
> (1) Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;
> (2) Full, fair, accurate, timely, and understandable disclosure in reports and documents that a registrant files with, or submits to, the Commission and in other public communications made by the registrant;
> (3) Compliance with applicable governmental laws, rules and regulations;
> (4) The prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and
> (5) Accountability for adherence to the code.[276]

Like Rule 5.1, Sarbanes-Oxley and accompanying regulations seek to encourage publicly traded corporations to promote ethical and lawful conduct. They go further than Rule 5.1, however, in that they more explicitly require corporations to develop internal structures for dealing with possible misconduct and more explicitly require a locus of responsibility for the corporation's handling of misconduct.

As discussed, Sarbanes-Oxley provides protection from retaliation for internal whistleblowers.[277] However, it does more than simply provide protection for those who make internal reports of misconduct. Under Section 301, a company's audit committee must establish procedures for "the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters."[278] An audit committee must also establish procedures for "the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."[279] If a publicly traded corporation fails to implement these procedures, the national securities

274. *See* Cherry, *supra* note 45, at 1055 (explaining that the purpose of Sarbanes-Oxley Act is "to increase transparency in financial markets, which allows investors to rely on the accuracy of financial information").

275. 15 U.S.C. § 7264(a) (2006).

276. 17 C.F.R. § 229.406(b) (2008).

277. *See supra* note 146 and accompanying text.

278. 15 U.S.C. § 78j-1(m)(4)(A) (2006).

279. *Id.* § 78j-1(m)(4)(B).

exchanges and national securities associations are prohibited from listing the securities of the corporation.[280]

Sarbanes-Oxley does not require that a corporation adopt any particular reporting procedure.[281] The SEC opined that the circumstances and needs of a small issuer with relatively few employees might be completely different than those of a large, multi-national issuer and, therefore, a "one-size-fits-all" approach was undesirable.[282] The failings of pre-Sarbanes-Oxley internal reporting procedures, however, provide a clue as to what procedures the SEC and Congress envisioned. Prior to Sarbanes-Oxley, many corporations adopted internal reporting systems in which reports "flowed up through the corporate management hierarchy."[283] Out of either self-interest or concerns about sanctions against the corporation, corporate executives often failed to pass along the relevant information to the corporation's directors.[284] According to the SEC, an internal reporting procedure must "cultivate open and effective channels of information."[285] For this reason, it may be that in order for a company's complaint procedure to comply with Sarbanes-Oxley, complaints about accounting practices must be routed to a corporation's audit committee, a committee that, under the Act, must consist entirely of independent directors who receive no compensatory fee when acting within their committee or board capacity.[286] Regardless of the exact form a corporation's reporting procedure takes, any effective procedure will have a mechanism by which employees may bypass the traditional management hierarchy.[287] In theory,

280. *Id.* § 78j-1(m)(1)(A).

281. *See* Standards Relating to Listed Company Audit Committees, 68 Fed. Reg. 18,798 (Apr. 16, 2003) (to be codified at 17 C.F.R. pts. 228, 229, 240, 249 and 274) (clarifying that the SEC is "not mandating specific procedures that the audit committee must establish").

282. *Id.*

283. *See* Moberly, *supra* note 206, at 1135.

284. *Id.* (explaining that disclosure channels requiring complaints to flow through the corporate hierarchy placed employee disclosures "at risk of management blocking and filtering").

285. Standards Relating to Listed Company Audit Committees, 68 Fed. Reg. at 18,798.

286. *See* 15 U.S.C. § 78j-1(m)(3)(A)–(B) (2006) (setting forth the criteria for an audit committee); Marian Exall, *Compliance with Sarbanes-Oxley Complaint Procedures Requirement Could Prove Challenge to Audit Committees*, CORP. COUNS. WKLY. NEWSL. (Bureau of Nat'l Affairs), June 25, 2003 ("The audit committee must be intimately involved in the receipt and handling of employee complaints, as well as making initial decisions about the implementation of the process."); Moberly, *supra* note 206, at 1138 (stating that Sarbanes-Oxley requires that independent directors on the board's audit committee receive whistleblower disclosures).

287. *See* Exall, *supra* note 286 ("An existing procedure that directs all complaints to management, and leaves it up to management to decide whether and how to investigate, will not be adequate."); *see also* Standards Relating to Listed Company Audit Committees, 68 Fed. Reg. at 18,798 (providing that "[m]anagement may not have the appropriate incentives to self-report all questionable practices" and that an "employee or other individual may be reticent to report concerns regarding questionable accounting or other matters for fear of management reprisal").

such procedures should lead to more internal reporting of suspected misconduct and less retaliation from management.[288]

The Organizational Sentencing Guidelines ("OSG"), which were amended in 2004 following numerous corporate scandals,[289] place a similar emphasis on the use of formal structures to promote "an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[290] Under the OSG, a corporation's criminal penalties for violations of law may be increased or reduced depending upon the absence or presence of "an effective compliance and ethics program."[291] An effective program is one that is reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct.[292] This also necessarily entails responding appropriately to criminal conduct once it has been detected and taking adequate disciplinary measures against individuals who have engaged in criminal conduct or failed to take reasonable steps to prevent or detect criminal conduct.[293]

The OSG make clear that an essential part of an effective compliance and ethics program is a formal procedure that allows employees to raise concerns about possibly unlawful conduct without fear of retaliation. This procedure may include "mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct."[294] As mentioned, Sarbanes-Oxley similarly requires that a corporation's audit committee develop procedures for confidential, anonymous reporting of concerns over questionable practices.[295] Such measures should, theoretically, encourage employees to be more forthcoming about their concerns of illegal or unethical behavior taking place within an

288. *See* Moberly, *supra* note 206, at 1143 (stating that requiring upper levels of the corporation to receive complaints reduces retaliation from supervisors and managers and encourages more whistleblowing as a result).

289. *Id.* at 1134 n.125.

290. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(2) (2008).

291. *Id.* § 8B2.1(a).

292. *Id.* § 8B2.1(a)(2).

293. *Id.* § 8B2.1(b)(6)–(7).

294. *Id.* § 8B2.1(b)(5)(C).

295. *See supra* note 279 and accompanying text.

organization.[296] At least partly in response to these measures, anonymous ethics hotlines are now increasingly common in the corporate world.[297]

A similar idea exists in the employment discrimination field. Employers may sometimes avoid vicarious liability for a supervisor's unlawful harassment of an employee if they adopt effective mechanisms that allow for the reporting, investigation, and resolution of suspected discrimination.[298] In order to avail itself of the defense, an employer must effectively communicate the existence of its policies and procedures to its employees.[299]

Finally, both Sarbanes-Oxley and the OSG contain provisions requiring companies to develop accountability measures. Both require that a corporation have designated individuals who are responsible for the development and implementation of compliance procedures. Sarbanes-Oxley designates specifically a corporation's audit committee as having this responsibility.[300] The OSG do not identify any particular individuals within an organization as being the responsible parties, but they do make clear that a corporation's board of directors and "[h]igh-level personnel" share responsibility for the establishment of an effective compliance and ethics program.[301] For a corporation's program to qualify as an effective compliance and ethics program, high-level personnel must ensure that the organization has a program, and specific individuals within this group must

296. *See* Lobel, *supra* note 44 (manuscript at 57) (describing anonymous reporting as an "important way" to reduce the fear of retribution); Moberly, *supra* note 206, at 1143 (finding that because Sarbanes-Oxley allows anonymous reporting of wrongdoing, "employees' fear of retaliation should be minimized").

297. *See* Cherry, *supra* note 45, at 1074 (noting the use of anonymous hotlines); Lobel, *supra* note 44 (manuscript at 57) (same); *see also* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 864 (2007) (noting that as part of its settlement agreement with the federal government, accounting firm KPMG agreed to establish a hotline to encourage internal whistleblowing). For an example of such a hotline, see Ernst & Young's web-based EY/Ethics Hotline, https://secure.ethicspoint.com/domain/en/report_custom.asp?clientid=6483 (last visited May 19, 2009).

298. *See* Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1314 (11th Cir. 2001) (explaining that, to demonstrate that an employer took reasonable care to prevent and correct harassment, an employer's policy must contain reasonable complaint procedures and that the employer must have taken reasonable steps to correct the harassment); *see also supra* note 271 and accompanying text. The affirmative defense is available only where the harassment has not resulted in a tangible employment action and where the employee has unreasonably failed to take advantage of any corrective measures the employer has in place or otherwise to avoid harm. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

299. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998) (holding that the employer could not utilize the defense because it failed to effectively disseminate its policy).

300. *See* 15 U.S.C. § 78j-1(m)(4)(A) (2006) (providing that an audit committee must establish procedures for "the receipt, retention, and treatment of complaints").

301. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2)(A)–(B) (2008).

be assigned overall responsibility for the program.[302] The organization must delegate day-to-day operational responsibility to specific individuals within the organization, who must "report periodically to high-level personnel and, as appropriate, to the governing authority."[303] In addition, the organization's governing authority must be knowledgeable about the content and operation of the program and exercise reasonable oversight with respect to the implementation and effectiveness of the program.[304]

c. Application to the Legal Profession

The differences between the corporate world and the legal profession would make it impossible to transfer the provisions of either Sarbanes-Oxley or the OSG wholesale to the ethical rules governing lawyers. For example, there is no direct parallel in the legal profession to the role that independent directors play in the corporate world.[305] In addition, the small size of many law firms would make it impossible to require the kind of accountability and monitoring structure the OSG envision. Ultimately, the diversity within the legal profession in terms of the size and structure of law firms makes it impossible to establish a "one-size-fits-all" rule.[306] Nonetheless, there are certainly lessons that the legal profession can learn from corporate law in terms of amending Rule 5.1 to provide for more meaningful obligations with respect to the development of ethical infrastructures.

Rule 5.1 should be rewritten to dispense with the vague "reasonable efforts" language and to make explicit the requirement that firms develop ethical infrastructures. Borrowing from the OSG,[307] law firms should be required to develop an effective compliance and ethics program. A program would be effective when it is reasonably designed, implemented, and enforced so that it generally will be effective in assisting all lawyers in the firm in the ethical practice of law and in preventing and detecting unethical conduct.[308] The nature of an effective compliance and ethics program would, of course, vary depending upon the size and structure of a firm. A firm consisting of a husband and wife with no associates could

302. *Id.* § 8B2.1(b)(2)(B).

303. *Id.* § 8B2.1(b)(2)(C).

304. *Id.* § 8B2.1(b)(2)(A).

305. *See supra* note 286 and accompanying text.

306. *See* Chambliss & Wilkins, *A New Framework*, *supra* note 240, at 345 ("[T]here is little prospect of defining structural standards that make sense for all firms.").

307. *See supra* note 291 and accompanying text (describing how the OSG requires corporations to develop effective ethics programs and increases or decreases criminal penalties based on the existence of such programs).

308. *See supra* note 292–294 and accompanying text (describing requirements of an effective compliance and ethics program under the OSG).

hardly be expected to develop the same types of formal structures that a much larger firm could. However, an effective program would, at a minimum, have certain characteristics.[309]

First, the legal profession should follow the example of Sarbanes-Oxley and the OSG and require that law firms—regardless of size—designate an individual partner or group of partners within the firm as having responsibility for the development and overall administration of a firm's ethical infrastructure.[310] In addition to providing a measure of accountability, this requirement would force firms to focus on and adequately fund their compliance procedures.[311] In keeping with the OSG, the individuals designated with responsibility for developing and administering a firm's compliance program should be required to report periodically to the partnership (or firm leadership, such as a managing partner or management committee). All partners within a firm should also be required to be knowledgeable about the firm's compliance procedures and exercise reasonable oversight regarding the implementation and effectiveness of the program. These requirements should help prevent the firm's decisionmakers and, more generally, its partners from remaining ignorant of the firm's ethics structures and address the concerns about encouraging partners to shirk their oversight responsibilities.[312]

In advocating for a similar approach, Professors Chambliss and Wilkins concluded that, based on their research, designated in-house compliance specialists "play a significant role in promoting ethical

309. For an example of a firm compliance program, see Davis, *supra* note 18, at 125–31.

310. *See supra* notes 300–304 and accompanying text. A similar requirement exists in Australia. In New South Wales, Australia, legal service providers are permitted to form Incorporated Legal Practices ("ILPs"), which enable the organization "to incorporate and provide legal services either alone or alongside other legal service providers who may, or may not be 'legal practitioners.'" Steven Mark & Georgina Cowdroy, *Incorporated Legal Practices—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN ST. INT'L L. REV. 671, 671 (2004). An ILP must designate at least one legal practitioner as a "solicitor director," who, in addition to being responsible for the management of the legal services provided by the ILP, is responsible for ensuring that the ILP has "appropriate management systems" in place to ensure that legal services are provided in a competent and ethical manner. *See id.* at 681–87 (describing the duties of solicitor directors).

311. *See* Chambliss & Wilkins, *A New Framework*, *supra* note 240, at 348–49 (stating that the requirement to identify a specific, responsible partner would provide an incentive for managers to focus on compliance efforts and help the law firm justify the cost of investing in proactive compliance efforts).

312. *See* David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV. 1781, 1808 (2007) (stating that OSG's requirements "should go a long way in ensuring that the top management and the board of directors are not 'out of touch' with the ethical environment of the organization"); *supra* note 263–265 and accompanying text (discussing concerns that imposing a firm-wide duty under Rule 5.1 would encourage shirking of individual responsibility).

awareness and the quality of structural controls within firms."[313] A firm's designation of such individuals imposes a measure of accountability on a firm's compliance procedure as well as further investing firms in the compliance process.[314] The specific measures that the designated individual or individuals implement may vary widely depending upon the size and structure of a firm.[315] Research suggests, however, that the more the measures become integrated within a firm, the more likely partners and associates are to utilize the measures.[316]

Another component of an effective compliance and ethics program would be the establishment of measures to encourage firm attorneys to make internal reports of suspected unethical conduct on the part of other attorneys and to seek guidance concerning their own ethical obligations without fear of retaliation.[317] The existence of a formal policy encouraging reports and inquiries concerning ethical obligations would help promote an organizational culture and atmosphere that values compliance with ethical norms in a more direct manner than Rule 5.1 currently does.[318] Admittedly, in some firms—such as a small firm with no junior attorneys—it may make little sense to have an internal reporting policy. Ordinarily, however, the existence of an internal reporting policy should be considered an essential part of an effective compliance and ethics program. Borrowing from the OSG and employment discrimination law, law firms should also be required by rule to respond appropriately to any requests for guidance or reports of suspected misconduct they receive, including, where appropriate, disciplining an attorney who has engaged in misconduct.[319]

The nature of a firm's program could easily vary, depending upon the nature of the firm. For example, confidential or anonymous reporting might

313. Chambliss & Wilkins, *A New Framework*, *supra* note 240, at 347.

314. *Id.* at 348–49.

315. *See generally* Chambliss & Wilkins, *The Emerging Role*, *supra* note 122, at 576–83 (describing the effect of firm size on the extent to which firms invest in in-house compliance specialists and other ethical infrastructure).

316. *See id.* at 580–83 (discussing the willingness of partners to seek out the services of a full-time ethics specialist and the consequent willingness of associates to do the same). For this reason, ethics compliance should be the primary job responsibility of this individual where resources permit. This makes it more likely that firm lawyers—particularly associates—will view the individual as being quasi-independent and, therefore, view the individual as a legitimate resource. *See* Lobel, *supra* note 44 (manuscript at 57) (explaining that the presence of quasi-independent compliance professionals can make employees more comfortable utilizing internal procedures).

317. *See* Davis, *supra* note 18, at 106 (arguing that "law firms need clearly defined reporting procedures"); *supra* notes 294–297 and accompanying text.

318. *Cf. supra* note 290 and accompanying text (noting OSG's emphasis on promoting organizational cultures that encourage ethical conduct and a commitment to compliance with the law).

319. *See supra* notes 290–293, 298–299 and accompanying text.

be impossible for smaller firms. At a minimum, however, any internal reporting procedure would ordinarily have to do the following in order to satisfy the amended rule:

> (1) encourage firm lawyers to seek guidance as to their ethical obligations and report suspected unethical conduct on the part of other firm lawyers;
> (2) provide assurance of protection from retaliation for those who take such action;
> (3) provide a means whereby firm lawyers may take such action, including a system of confidential reporting and reporting to individuals other than immediate supervisors where practicable;
> (4) provide for effective investigation; and
> (5) provide for prompt and effective response, including internal discipline where appropriate.[320]

In order to fulfill the purposes of Rule 5.1, it is essential that law firms have formal structures in place to handle ethics questions and reports of suspected misconduct. Firms must also effectively promote these structures and encourage attorneys to utilize them without fear of retaliation. According to Professor Orly Lobel, "[e]mployees are more likely to use internal procedures when the procedures are formally established and the corporation asserts its commitment to a fair process."[321] Consequently, it is essential that law firms provide assurance of protection from retaliation where an attorney reports suspected wrongdoing on the part of another or raises concerns about the attorney's ethical obligations.[322] All law firms, regardless of size, should also have measures in place to ensure that firm attorneys can seek guidance when confronted with difficult ethical issues.

320. *Cf.* Marc I. Steinberg & Seth A. Kaufman, *Minimizing Corporate Liability Exposure When the Whistle Blows in the Post Sarbanes-Oxley Era*, 30 J. CORP. L. 445, 457 (2005) (listing measures necessary for an effective complaint procedure under Sarbanes-Oxley).

321. Lobel, *supra* note 44 (manuscript at 57).

322. In his excellent article on legal ethics and risk management, Anthony E. Davis provides, in an appendix, parts of his firm's risk management policies. Under these written policies, all attorneys in the firm have an *obligation* to report suspected misconduct on the part of another attorney. The list of types of misconduct that must be reported under the policy is fairly lengthy (for example, "any known or suspected instance of alcohol or other substance abuse"). Davis, *supra* note 18, at 126. Thus, the reporting obligation is quite extensive. Nothing in the policy contained in the appendix, however, provides lawyers of the firm with any assurance that they will not suffer adverse consequences if they make such a report. Thus, firm lawyers must report many forms of misconduct (and some forms that they might not be ethically obligated to do under the Model Rules), but if they do, they have no assurance they will not be fired for doing so. From the perspective of an attorney in the firm (particularly an associate), this seems like the worst of all possible worlds. It is worth noting once again that this is similar to the approach that the legal profession as a whole takes with respect to external reporting of lawyer misconduct, and the results there have hardly been a success. *See supra* notes 50–60 and accompanying text (discussing instances in which attorneys have been fired for reporting or threatening to report unethical conduct and the general reluctance of attorneys to make external reports of misconduct).

Although it might not be practicable for smaller firms to have a designated ethics "expert" to whom lawyers may refer ethics questions, smaller firms might be able to satisfy the requirement by directing firm lawyers with ethics-related questions to utilize the bar-approved legal ethics hotlines that exist in many jurisdictions in consultation with the individual or individuals in the firm charged with administration of the firm's ethical infrastructure.[323]

In order to encourage internal reporting and inquiries, firms should, where feasible, develop reporting and inquiry procedures that allow attorneys to bypass the traditional chains of command. Attorneys may be less likely to raise concerns about their own ethical dilemmas or the suspected misconduct of other attorneys to their direct supervisors or managing partners who have substantial control over the fate of the attorney's career. Similarly, information may be less likely to flow up the chain of command than where there is a designated, semi-independent point person outside the normal chain of command.[324] As an example, many larger law firms currently designate an attorney within the firm as the designated point person for ethics-related questions.[325]

The investigation and resolution obligations are also critical. Firm attorneys—and associates in particular—are less likely to report suspected wrongdoing if they do not believe their concerns will be taken seriously.[326] By requiring law firms to investigate suspected misconduct and take their own disciplinary action against offending attorneys, the legal profession can encourage firms to internalize their ethical obligations to a greater extent than they are currently required. The requirement would have benefits for the disciplinary process as well. The fact that a firm has investigated and disciplined an attorney would not eliminate the independent duty under Rule 8.3 to make an external report to disciplinary authorities.[327] In many instances, however, it might obviate the need for disciplinary authorities to devote significant resources to their own investigation into misconduct.

Finally, an effective compliance and ethics program would internalize systems and procedures reasonably designed to enable firm attorneys to

323. For examples of state bar hotlines, see State Bar of California Ethics Hotline, http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10131 (last visited May 19, 2009), and State Bar of Georgia—Ethics Helpline, http://www.gabar.org/ethics/ethics_helpline_faqs/ (last visited May 19, 2009).

324. *See supra* notes 283–288 and accompanying text.

325. *See* Chambliss & Wilkins, *The Emerging Role*, *supra* note 122, at 559 (discussing the growth in the use of in-house ethics advisors in large firms).

326. *See* Moberly, *supra* note 206, at 1144 (stating that "[s]tudies of whistleblowers demonstrate that an even larger concern than retaliation is the fear that nothing will be done in response to a whistleblowing complaint").

327. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2008) (setting forth the attorney's ethical obligation to report the misconduct of another attorney).

practice in a competent and ethical manner. The comments to Rule 5.1 already reference this idea by suggesting that firms utilize procedures "designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."[328] At least one item in the list needs greater emphasis: supervision of inexperienced lawyers. Although the means of supervision may vary depending upon the size and structure of a firm, the comments should be amended to place greater emphasis on the need for meaningful supervision and the means by which it may be accomplished.

V. CONCLUSION

Ultimately, it is something of an embarrassment that the legal profession does not do more to encourage firm lawyers to raise concerns within their firms about suspected misconduct and protect those who comply with their ethical obligations to report serious misconduct to disciplinary authorities. Although there is considerable disparity in the law concerning the extent of protection that should be afforded to internal versus external whistleblowers who report suspected violations of the law, protection from retaliation is increasingly viewed as vital if the goals underlying the law in question are to be advanced. Adverse views toward internal whistleblowers are changing and, in many instances, the law reflects this. In the corporate world, there is increasing recognition that internal structures designed to foster a culture of ethical behavior and encourage employees with knowledge of corporate misfeasance to share that information internally are to be encouraged. Yet, the legal profession, while paying lip service to these ideas, has done little as a practical matter to advance them.

In order to provide reasonable assurance to the public at large that law firms are places where ethics are taken seriously, the legal profession should take steps to provide protection for lawyers who raise reasonable, good faith concerns about possible misconduct occurring within the firm. This can be accomplished in any number of ways. At the most conservative level, disciplinary authorities could simply enforce existing disciplinary rules to prohibit legal employers from attempting to intimidate or retaliate against would-be whistleblowers. In terms of a holistic approach that addresses not just the issue of retaliation against whistleblowers but the development of meaningful ethical infrastructures within law firms, firms should be required to establish more formal procedures for promoting the ethical practice of law, including the receipt, investigation, and resolution of internal reports of unethical conduct.

328. *Id.* R. 5.1 cmt. 2.