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ARTICLE

THE ETHICAL WORLD OF SOLO AND SMALL LAW FIRM PRACTITIONERS

*Leslie C. Levin**

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* Professor of Law, University of Connecticut School of Law. I would like to thank Jon Bauer, Elizabeth Chambliss, Sean Griffith, and Jim Stark for their comments on earlier drafts of this Article. I am also deeply grateful to the forty-one attorneys who agreed to participate in the study described in this Article.

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*[Y]ou walk into a federal court judge's courtroom and you are a small practitioner with a personal injury case [and] it's like pooey [spits]. Why are you spoiling these rooms?*¹

I. INTRODUCTION

More than forty percent of all practicing lawyers work in solo or small firms of five or fewer lawyers.² These lawyers face many challenges. At a time when lawyers are increasingly employed within large organizations, solo and small firm practitioners³ often find themselves struggling for business, for control over their workload, and for respect. These lawyers tend to represent more individuals with personal plight problems than other lawyers, and they typically make less money than big firm

1. Interview No. 24 with personal injury lawyer practicing in a five-lawyer firm in Manhattan, N.Y. (Feb. 17, 2001). All of the interviews quoted in this Article are on file with the Author.

2. CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995, at 7-8 (1999) [hereinafter LAWYER STATISTICAL REPORT]; E-mail from Erin Eckhoff, Program Associate, American Bar Foundation, to Leslie C. Levin, Professor of Law, University of Connecticut School of Law (Jan. 12, 2004, 16:27 EST) (on file with Author) (reporting that in 2000, 424,138 lawyers, or 41.5% of all practicing lawyers in the United States, worked in firms of one to five lawyers).

3. Throughout this Article the term "small firm practitioner" is used to refer to lawyers who work in law firms comprised of no more than five lawyers.

attorneys.⁴ They report constant pressure to bring in clients and they confront frequent cash flow problems. Solo and small firm lawyers receive more lawyer discipline than other attorneys and—rightly or wrongly—they are often viewed as less “ethical” than other lawyers.⁵

This view of solo and small firm lawyers can be traced back to the early twentieth century, when the bar elite—which was composed primarily of Protestant corporate lawyers—attempted to curb the business-getting conduct of ethnic urban solo and small firm lawyers who practiced in areas such as personal injury and criminal law.⁶ By writing and seeking to enforce bar ethics rules that proscribed client-getting activities such as solicitation and regulated contingent fee practices, the organized bar conveyed the impression that these ethnic lawyers—who struggled for clients—were less ethical than other lawyers.⁷ For example, in the 1930s the prestigious Association of the Bar of the City of New York launched an intensive investigation into the solicitation practices of personal injury lawyers, who were primarily recent immigrants.⁸ In the 1950s the vast majority of the Chicago Bar Association’s disciplinary activity was aimed at limiting the solicitation practices of personal injury lawyers, who

4. See RICHARD L. ABEL, AMERICAN LAWYERS 206–07 (1989); John P. Heinz et al., *The Scale of Justice: Observations on the Transformation of Urban Law Practice*, 27 ANN. REV. SOC. 337, 352 (2001) [hereinafter Heinz et al., *The Scale of Justice*]; REBECCA L. SANDEFUR & JOHN P. HEINZ, WINNER-TAKE-ALL MARKETS FOR LEGAL SERVICES AND LAWYERS’ JOB SATISFACTION 11–15 (Am. Bar Found., Working Paper No. 9906, 1999).

5. Unless otherwise noted, when the term “ethical” or “unethical” is used in this Article, it is used in a narrow sense to refer to compliance with formal rules of professional conduct promulgated by the courts or the organized bar. A fairly recent study of large firm lawyers revealed that practicing lawyers tend to use the term in the same way and that they differentiate between “ethical rules” (meaning professional rules of conduct) and “morals” (meaning substantive issues of right and wrong). Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 843 (1998).

6. See JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 48–51 (1976) (noting that the ABA preoccupied itself with issues like the ethical proprieties of “ambulance chasing” and contingency fees).

7. See *id.* at 40–52; Fred C. Zacharias, *What Lawyers Do When Nobody’s Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1006–07 (2002) [hereinafter Zacharias, *What Lawyers Do*]. As Jerold Auerbach has noted, this focus on contingent fees and insistence that they be court-supervised was incongruous because no other attorneys’ fees were supervised at the time and corporate lawyers in all other contexts clung fiercely to the notion of freedom of contract. AUERBACH, *supra* note 6, at 46–48.

8. MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 20, 23–24 (1988); see also ABEL, *supra* note 4, at 144–45 (describing a disciplinary process focusing disproportionately on personal injury lawyers); AUERBACH, *supra* note 6, at 48–49 (describing the bar’s investigation into the evils of ambulance chasing).

were disproportionately Jewish.⁹ Since then, tort reform efforts and legal legends, such as “ambulance chasing” lawyers who use direct mail to attract clients, continue to foster the view of these lawyers as crassly commercial and possibly unethical.¹⁰

Academic studies by Jerome Carlin have also contributed to the view of solo and small firm lawyers as unethical practitioners. Carlin’s study of Chicago solo practitioners described the common practice of making payoffs to clerks and county officials.¹¹ Carlin’s study of New York City lawyers in 1960 revealed that solo and small firm practitioners were less likely than lawyers at larger firms to accept and adhere to the “elite” or “paper” norms of the bar.¹² He also concluded that individual practitioners and lawyers in smaller offices were more likely to violate ethical rules than lawyers in larger firms, in part because they face client pressures from lower status clients and because they were more likely to have one-shot relationships with their clients.¹³

Recent discipline statistics seemingly support the view that solo and small firm lawyers are unethical. Solo and small firm lawyers are disciplined at a far greater rate than other lawyers.¹⁴

9. Charles L. Cappell & Terrence C. Halliday, *Professional Projects of Elite Chicago Lawyers, 1950–1974*, 1983 AM. B. FOUND. RES. J. 291, 328. Indeed, the Chicago Bar Association went so far as to initiate legislation to impose a jail sentence on lawyers for solicitation. *Id.* at 329–30.

10. See Stephen Daniels & Joanne Martin, “*The Impact that It Has Had Is Between People’s Ears*: Tort Reform, Mass Culture, and Plaintiffs’ Lawyers, 50 DEPAUL L. REV. 453, 466–72 (2000); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 748–49 (1998); Herbert M. Kritzer & Jayanth K. Krishnan, *Lawyers Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases and Their Implications for Case Handling*, 21 LAW & POL’Y 347, 367 (1999). See generally Richard Abel, *Big Lies and Small Steps: A Critique of Deborah Rhode’s Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 1019, 1019–20 (1998) (noting that plaintiffs’ lawyers have been “unable to shed the aura of sleaze associated with vulgar advertising, ambulance chasing, and obscene contingent fees”).

11. JEROME E. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* 157–63 (1962) [hereinafter CARLIN, *LAWYERS ON THEIR OWN*].

12. JEROME E. CARLIN, *LAWYERS’ ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 52–61 (1966) [hereinafter CARLIN, *LAWYERS’ ETHICS*]. Carlin described “bar norms,” which proscribe behavior such as bribery, fraud, cheating, and stealing, as behavior norms that are generally accepted by lawyers regardless of practice setting and are basically indistinguishable from public notions of morality. *Id.* at 49–52. Carlin found that solo and small firm practitioners were less likely to accept “elite” or “paper” norms, which proscribe behavior that is not necessarily considered unethical in the wider community. *Id.* at 52. For example, solo and small firm lawyers were less likely to accept prohibitions against advertising or referral fees than lawyers in medium or large firm settings. *Id.*

13. *Id.* at 66–69.

14. See Bruce L. Arnold & Fiona M. Kay, *Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organization of Law Practice and Professional Self Regulation*, 23 INT’L J. SOC. L. 321, 337–38 (1995) (noting that solo practitioners receive

For example, in California, 78% of disciplinary cases prosecuted and completed in 2000–2001 were against solo practitioners, even though they represented only 23% of the lawyers practicing in that state.¹⁵ Similarly, 34% of Texas lawyers are solo practitioners, yet they receive 67% of all public sanctions.¹⁶ When Texas lawyers who practice in firms of two to five lawyers are added with solo practitioners, they make up 59% of all practicing lawyers yet they receive over 98% of all public discipline.¹⁷ Much of the discipline imposed on lawyers is for failure to communicate with clients and neglect of client matters.¹⁸ Fraudulent or

the majority of professional misconduct sanctions); Mark Hansen, *Picking on the Little Guy: Perception Lingers that Discipline Falls Hardest on Solos, Small Firms*, A.B.A. J., Mar. 2003, at 30 (discussing studies of attorney disciplinary actions in California, New Mexico, Virginia, and Oregon that indicate a higher rate of sanction imposition against solo and small firm practitioners). See generally Hal R. Lieberman, *How to Avoid Common Ethics Problems: Small Firms and Solos Are Often Subject to Disciplinary Complaints and Malpractice Claims*, N.Y.L.J., Oct. 28, 2002, at S4 (noting that the vast majority of New York attorneys subject to disciplinary complaints are small firm and solo practitioners).

15. STATE BAR OF CAL., INVESTIGATION AND PROSECUTION OF DISCIPLINARY COMPLAINTS AGAINST ATTORNEYS IN SOLO PRACTICE, SMALL SIZE LAW FIRMS AND LARGE SIZE LAW FIRMS 7–8 (2001) [hereinafter STATE BAR OF CAL. REPORT], available at http://www.calbar.ca.gov/calbar/pdfs/reports/2001_SB143-Report.pdf.

16. Frank William McIntyre, *Whose Interests Does Texas' Disciplinary Process Protect?*, TEX. LAW., Aug. 5, 2002, at 27.

17. *Id.* Similarly, in New Mexico, ninety-two percent of all discipline was imposed on solo and small firm lawyers. STATE BAR OF NEW MEXICO TASK FORCE ON MINORITIES IN THE LEGAL PROFESSION II, THE STATUS OF MINORITY LAWYERS IN NEW MEXICO: AN UPDATE 1990–1999, at 46 (2000) [hereinafter N.M. TASK FORCE ON MINORITIES].

18. See ATTORNEY GRIEVANCE COMM'N OF MD., 28TH ANNUAL REPORT: JULY 1, 2002 THRU JUNE 30, 2003, Exhibit B [hereinafter MD. ATT'Y GRIEVANCE REPORT] (stating that twice as many disciplinary actions were taken for neglect and failure to communicate than for any other violation), available at <http://www.courts.state.md.us/attygrievance/annualreport.pdf>; ATTORNEY REGISTRATION & DISCIPLINARY COMM'N OF THE SUPREME COURT OF ILL., 2002 ANNUAL REPORT, pt. II.D [hereinafter ILL. ARDC REPORT], available at http://www.iardc.org/AnnualReport02/2002main_annreport.html; MICH. ATTORNEY DISCIPLINE BD., 2003 ANNUAL REPORT app. B [hereinafter MICH. ATT'Y DISCIPLINE REPORT] (indicating that most discipline orders were due to problems with communication, lack of competence, and neglect of client matters), available at http://www.adbmich.org/download/2003_annualrpt.pdf; LAWYERS' PROF'L RESPONSIBILITY BD. OF MINN., ANNUAL REPORT 18 (2003) [hereinafter MINN. PROF'L RESPONSIBILITY REPORT] (stating that neglect and failure to communicate accounted for sixty out of eighty-one open probation files), available at <http://www.courts.state.mn.us/lprb/olpr03ar.htm>; see also DISCIPLINARY COMM'N OF THE SUPREME COURT OF IND., 2002–2003 ANNUAL REPORT app. D [hereinafter IND. DISCIPLINARY COMM'N REPORT] (finding problems with communication and diligence represented thirty-three percent of the grievances pending); *Report of the Office of Chief Disciplinary Counsel*, 59 J. MO. B. 238, 246 (2003) (indicating that the largest number of grievances filed was due to lack of diligence or failure to communicate with clients); VA. STATE BAR, OFFICE OF BAR COUNSEL, 2001–2002 ANNUAL REPORT 1 [hereinafter VA. STATE BAR REPORT] (indicating that most common sources of complaints were failure to communicate and neglect of client matters), available at <http://www.vsb.org/anreport/01-02>.

deceptive activity and improper management of trust funds are also common reasons for lawyer discipline.¹⁹

Of course, the fact that solo and small firm practitioners receive a disproportionate amount of discipline does not, in itself, prove that these lawyers are less ethical than their colleagues who work in other practice settings. Individual clients with personal plight problems may be more likely than corporate clients to file discipline complaints against their lawyers.²⁰ This may occur because individuals of moderate means have fewer mechanisms for redress when their lawyers engage in wrongdoing than do corporate clients.²¹ In addition, individuals are more likely to be emotionally invested in their personal plight matters or more adversely affected by their outcomes. It may be easier for under-financed discipline systems to successfully prosecute cases against solo or small firm practitioners—who have fewer resources to defend against these complaints—than it is to pursue large firm lawyers who may be able to hide behind the conduct of others.²² Finally, bias within the disciplinary system may account for a disproportionate amount of discipline being imposed on solo and small firm practitioners.²³

The discipline statistics do provide indications of the types of challenges facing solo and small firm practitioners. But they

19. See, e.g., ILL. ARDC REPORT, *supra* note 18, pt. II.A; MD. ATT'Y GRIEVANCE REPORT, *supra* note 18, Exhibit B; MICH. ATT'Y DISCIPLINE REPORT, *supra* note 18, app. B; MINN. PROF'L RESPONSIBILITY REPORT, *supra* note 18, at 18.

20. See, e.g., ILL. ARDC REPORT, *supra* note 18, pt. II.A (indicating that top areas of practice involved in complaints are criminal law, domestic relations, and tort); IND. DISCIPLINARY COMM'N REPORT, *supra* note 18, at app. D (indicating that almost fifty-eight percent of all grievances arose from criminal, domestic relations, and tort cases); VA. STATE BAR REPORT, *supra* note 18, at 1 (indicating that criminal law practice, family law, and personal injury law generated the most complaints); WIS. OFFICE OF LAWYER REGULATION, REGULATION OF THE LEGAL PROFESSION IN WISCONSIN: FISCAL YEAR 2001–2002, at app. 8B [hereinafter WIS. OLR REPORT] (indicating that sixty-three percent of all grievances arose from criminal law, family law or juvenile matters, and tort cases), available at <http://www.wicourts.gov/about/organization/offices/docs/olr0102fiscal.pdf>.

21. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 829 (1992); see also Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 47–51 (2002).

22. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 8–11 (1991); James Evans, *Lawyers at Risk*, CAL. LAW., Oct. 1989, at 45, 47; McIntyre, *supra* note 16, at 29.

23. See Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 62 & n.275 (1998) [hereinafter Levin, *Emperor's Clothes*] (describing opportunities for bias). It appears that bias may occur not only in the imposition of discipline, but also in the investigation of possible problems. See, e.g., Allyson Lee Moore, *Study Urges Changes in OAE Audits*, N.J.L.J., Nov. 21, 1991, at 1 (reporting that the Office of Attorney Ethics selected solo practitioners for random audits of their bank accounts three times more frequently than all other lawyers). But see STATE BAR OF CAL. REPORT, *supra* note 15, at 1 (finding that “there is no institutional bias against solo and small firm attorneys”).

provide only part of the picture, because many ethical issues arise in practice that are undetected by clients²⁴—who are the primary source of disciplinary complaints—or by the discipline system.²⁵ In some cases, lawyers themselves do not know that bar rules have been violated.²⁶ Even when complaints are made to disciplinary bodies, many violations of ethical rules are diverted outside the discipline system or are routinely under-enforced.²⁷ In order to get a better sense of the ethical world of these lawyers, it is therefore necessary to look beyond the statistics and more broadly into their practices and ethical decision-making.

One obvious question, however, is where to begin. Solo and small firm practitioners are a remarkably diverse group of lawyers who often arrive at these practice settings through very different career paths.²⁸ They work in virtually every imaginable practice specialty and office setting. Demographically they are also quite diverse, as more women, older attorneys, and minority attorneys join their ranks every year.²⁹ Yet these lawyers also share many similarities. They often work in similar office-sharing arrangements with other lawyers³⁰ and share common office management and cash flow problems. They also rely on professional networks for practice advice,³¹ confront similar ethical issues, and suffer from the perception that they are less ethical than other lawyers.

Thus, in order to study the ethical world of these lawyers, it is necessary, at the outset, to describe the world that they inhabit. While this has been done before, attempts to incorporate

24. Wilkins, *supra* note 21, at 824, 830.

25. *Id.* at 824–34; see also Levin, *Emperor's Clothes*, *supra* note 23, at 7 n.29.

26. ABEL, *supra* note 4, at 143.

27. See Diane M. Ellis, *A Decade of Diversion: Empirical Evidence that Alternative Discipline Is Working for Arizona Lawyers*, 52 EMORY L.J. 1221, 1231–36 (2003); Levin, *Emperor's Clothes*, *supra* note 23, at 26 & nn.120–21; Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 716–17 (1981); Zacharias, *What Lawyers Do*, *supra* note 7, at 999–1001.

28. See CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* 8 (1996).

29. See N.M. TASK FORCE ON MINORITIES, *supra* note 17, at 10–13; Marc Galanter, "Old and in the Way," *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1094–95 [hereinafter Galanter, *Old and in the Way*]; Richard O. Lempert et al., *Michigan's Minority Graduates in Law Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 431 (2000); Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 FORDHAM L. REV. 847, 849 (2001) [hereinafter Levin, *Preliminary Reflections*].

30. Levin, *Preliminary Reflections*, *supra* note 29, at 864–66.

31. *Id.* at 871–76; Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiff's Personal Injury Bar* 172–83 (2001) (unpublished Ph.D. dissertation, University of Illinois).

earlier studies into our current understanding of the ethical world of these lawyers must be done with care, because some of what we think we know about solo and small firm practitioners may no longer be true. Law practice has changed enormously for solo and small firm practitioners since Carlin studied these lawyers forty years ago. Technology has made legal research, law office management, and communication with colleagues easier for lawyers in all practice settings. There is increased specialization among lawyers. There are more lawyers who previously practiced in large law firms now working in solo and small firm settings. Mandatory continuing legal education (CLE) requirements in many states now cause lawyers to become more knowledgeable about—and possibly sensitized to—formal bar rules.

Efforts to study the ethical decision-making of solo and small firm practitioners must also consider the growing evidence that solo and small firm lawyers work in communities of practice that define professional norms³² and shape their conduct as lawyers. For example, a recent study of divorce lawyers reveals that they learn informal norms and flesh out their understanding of formal written rules through overlapping communities, which include lawyers in their own firms as well as adversaries and lawyers they encounter in bar associations.³³ Similarly, studies of personal injury lawyers reveal that they rely on networks of personal injury lawyers for advice and referrals and that these networks also operate informally to insure competent representation and to constrain behavior considered to be unacceptable according to that legal community's norms.³⁴

In an effort to learn more about the ethical world and ethical decision-making of solo and small firm practitioners, I asked forty-one lawyers in the New York City metropolitan area about their professional development, office practices, and work experiences. I wanted to explore how lawyers who work on their own—or in very small practice settings—learn professional norms and go about resolving ethical questions. These are

32. The term "norms" or "informal norms" is used throughout this Article in a broad sense to mean the social norms used in the community of practicing lawyers, which may or may not correspond with formal bar rules.

33. LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 61–63 (2001). Although that study does not focus specifically on small firm lawyers, eighty-one percent of the lawyers interviewed practiced as solo practitioners or in firms of five or fewer lawyers. *Id.* at 57.

34. Stephen Daniels & Joanne Martin, "*That's 95% of the Game, Just Getting the Case*": Markets, Norms and How Texas Plaintiffs' Lawyers Get Clients, at 20 (Am. Bar Found., Working Paper No. 9722, 1997); Parikh, *supra* note 31, at 154–55, 208–09, 219–20.

complex and difficult questions that I could only begin to explore in a preliminary study. I started from the premise that in order to understand the ethical world of solo and small firm practitioners, it is important to identify the settings in which they first learned to practice law and the physical and social context in which they currently practice.³⁵ These lawyers are often portrayed as isolated,³⁶ and I wanted to know how, if at all, other lawyers affected their ethical decision-making and from whom—if anyone—they sought advice. In order to better understand their conception of their ethical world, I asked about the ethical problems they encountered in practice, the steps they took to avoid these problems, and their actual ethical decision-making. As part of that inquiry I attempted to explore how formal bar rules, published discipline decisions, and other resources affect their ethical decision-making.³⁷

Part II of this Article provides a profile of the solo and small firm practitioners whom I interviewed and briefly describes their career paths and the ways in which they learned to practice law. Part III describes some of the steps these lawyers take to avoid ethical problems and provide competent representation through specialization, advice networks, and efforts to stay current on the law. Part IV describes some of the ethical challenges they encounter in practice including, *inter alia*, the “bad” client, office management problems, and conflicts of interest. Part V describes how they learn to resolve ethical problems and their ethical decision-making. It identifies some of the experiences and resources these lawyers draw upon when they seek to resolve

35. Some of these findings are described in more detail in my first report on my interviews with these lawyers. See Levin, *Preliminary Reflections*, *supra* note 29, at 858–78.

36. See, e.g., ABA, THE REPORT OF AT THE BREAKING POINT: A NATIONAL CONFERENCE ON THE EMERGING CRISIS IN THE QUALITY OF LAWYERS’ HEALTH AND LIVES—ITS IMPACT ON LAW FIRMS AND CLIENT SERVICES 7–8 (1991); BOSTON BAR ASS’N, TASK FORCE ON PROF’L FULFILLMENT: EXPECTATIONS, REALITY AND RECOMMENDATIONS FOR CHANGE (1997), available at <http://www.bostonbar.org/prs/fulfillment.htm>.

37. The interview questions in this preliminary study were primarily focused on the professional development of these lawyers, the organization of their offices, and their networks in order to avoid some of the resistance or other difficulties encountered when asking directly about ethical attitudes or ethical decision-making. See Peter Cleary Yeager & Kathy E. Kram, *Fielding Hot Topics in Cool Settings: The Study of Corporate Ethics*, in STUDYING ELITES USING QUALITATIVE METHODS 40, 45, 47 (Rosanna Hertz & Jonathan B. Imber eds., 1995). These inquiries sometimes generated useful information about how these lawyers developed their ethical attitudes in practice, how they attempted to avoid ethical problems, and how they went about their ethical decision-making. Late in each interview I approached the subject of ethics directly by asking the lawyers to describe ethical problems they encountered in practice, the frequency with which they encountered certain problems, whether they reached out to other lawyers or resources for help, and how they went about resolving these problems.

ethical issues. It notes, *inter alia*, that the ethical decision-making of solo and small firm lawyers is influenced by their communities of practice and especially their early practice communities. It also notes that formal bar rules play a relatively small role in their conscious, day-to-day decision-making. Part VI offers three observations based on the findings from this study. First, the findings are consistent with theories of social and cognitive psychology, which may be used to explain why lawyers do not tend to re-examine their decision-making as they move through practice. Second, theories of human behavior also help to explain why solo and small firm practitioners' negative views toward certain bar rules and of the lawyer discipline system may reduce the likelihood that these lawyers will be guided by formal rules when those rules conflict with informal bar norms. And third, much of the lawyer discipline that is imposed is not for conduct that flouts formal bar rules in favor of informal bar norms, but rather for conduct that departs from both formal rules and informal norms. This conduct often results from a breakdown of rational decision-making that occurs due to the exigencies of practice. Finally, the Article concludes by identifying additional research questions that should be pursued in order to better understand the ethical world of these lawyers.

II. PROFILE AND PROFESSIONAL DEVELOPMENT OF THE LAWYERS IN THE STUDY

The lawyers I interviewed in 2001 were randomly selected from a list of lawyers registered with the New York Office of Court Administration who practiced in the New York City metropolitan area.³⁸ Initially I sent letters to 181 lawyers whom I believed practiced in solo or small firm settings and then followed up with phone calls asking each lawyer to participate in an interview.³⁹ The attorneys were told that I was studying the work lives and professional development of solo and small law firm practitioners and that their names would not be associated with any responses given during the interviews. I ultimately conducted forty-one semi-structured interviews, which lasted on average from ninety minutes to two hours.

38. The lawyers practiced in the boroughs of Manhattan, Brooklyn, Queens, and Staten Island, and in Nassau County, Rockland County, Suffolk County, and Westchester County.

39. The names of attorneys were randomly selected from the attorneys registered with the New York Office of Court Administration who listed an address in the New York City metropolitan area. The methodology for selecting the attorneys is described in more detail in the Methodological Appendix at the end of this Article.

At the time of the interviews, most of the lawyers worked in solo practices or in firms of no more than five lawyers.⁴⁰ Fourteen of the lawyers practiced in partnerships, ten in sole proprietorships composed of a single principal and associates, and seventeen worked as solo practitioners. Over twenty percent of them had graduated from "elite" or "prestige" law schools, but most had attended regional or local law schools.⁴¹ Less than half of them had entered solo or small firm practice immediately after their law school graduation. Almost half of the lawyers I interviewed had worked as government lawyers or in law firms with more than twenty lawyers for at least two years before they moved into their present practices.

The lawyers I interviewed were not entirely representative of the solo practitioners and small firm lawyers who practice law in the New York City metropolitan area.⁴² No practitioners from the Bronx agreed to be interviewed, and because that is one of the most economically depressed counties in the New York City metropolitan area, the sample is not representative in this important respect. Only approximately thirty percent of the lawyers I interviewed were under the age of forty, which means that the sample was older than the general population of solo and small firm lawyers in New York State.⁴³ Almost twenty-nine percent were female, which was higher than the percentage of female lawyers who practice in solo or small firm settings in New York State.⁴⁴ Only two of the lawyers I interviewed were African American.⁴⁵

40. Two of the lawyers I interviewed worked in six-lawyer firms and three worked in difficult-to-categorize arrangements with up to seven lawyers.

41. The "elite" and "prestige" schools included Cornell, Harvard, Yale, University of Pennsylvania, New York University, and Georgetown. "Regional schools" have been defined as schools that are attached to major public or private universities that tend to serve a local constituency. SERON, *supra* note 28, at 160. In the present study, these schools included, *inter alia*, the University of Arizona, Boston University, Cardozo, Emory, and Fordham. "Local schools" are schools with less stringent admission standards that tend to be proprietary and maintain night school programs. *Id.* They included, *inter alia*, St. John's, New York Law School, and Touro.

42. I found no reliable demographic figures concerning the lawyers who practice in the New York City metropolitan area. It is therefore only possible to test the representativeness of the sample against the New York State figures provided in the American Bar Foundation's *Lawyer Statistical Report*.

43. A little more than thirty-nine percent of the lawyers in the state of New York who practice in solo and small firm settings are under age forty. LAWYER STATISTICAL REPORT, *supra* note 2, at 159. This does not necessarily mean, however, that the lawyers under forty are underrepresented in this survey. It is possible that proportionally fewer lawyers under forty work in solo or small firm practices in the New York metropolitan area, because many of the younger lawyers start their careers in the vast number of large and medium-sized firms concentrated in Manhattan.

44. According to the 1995 *Lawyer Statistical Report*, 24.3% of solo and small firm practitioners in New York State are women. *Id.*

45. There are no statistics indicating whether this is representative of the number

The lawyers' practices ranged from the traditional solo or small firm "personal plight" practice to sophisticated transactional or corporate litigation practices. Most of the lawyers in the sample practiced in the areas of family law, personal injury, real estate, commercial work, workers' compensation, and trusts and estates. However, some of the other areas of practice included banking, criminal law, common carrier law, education law, intellectual property, and securities. Six lawyers in this group predominantly represented large corporations, sophisticated investors, or governmental entities such as school districts.

The lawyers I interviewed typically worked in a rich social environment in which they learned from other lawyers. Some of them worked in office space dedicated exclusively to their firms or, more often, in suites of offices shared with other lawyers with whom they were not formally affiliated.⁴⁶ Most of these lawyers learned the skills they needed to practice law from observation of the lawyers around them and from guidance provided by lawyers both within and outside their offices.⁴⁷ Lawyers who started out in large organizations most often observed or received guidance from other lawyers in those organizations before they handled matters on their own. Lawyers who started out working in small law firms also typically received at least modest guidance from their employers. One such lawyer described her experience with her first employer, whom she described as a mentor, as follows:

We talked a lot about issues. I was the more level-headed of the two of us, so we ultimately developed a very good balance, but much of what I learned was [through] watching, although she was very receptive and very good about answering questions. I don't want to give you the impression, when I say watching, that it was because she discouraged learning [in] other ways. It wasn't the case. It was both—both watching,

of African Americans who practice in solo and small firm settings in New York City. It appears that slightly more than five percent of all employed lawyers are African American. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 381 tbl.588 (2002), available at <http://www.census.gov/prod/2003pubs/02statab/labor.pdf>. A 1995 survey of Chicago lawyers also revealed that African-American lawyers constituted five percent of the lawyers in that metropolitan area. John P. Heinz et al., *The Organization of Lawyers' Work: "Two Hemispheres" Re-Examined*, at 6 (Am. Bar Found., Working Paper No. 9706, 1998). However, there is evidence that proportionally more minorities work alone or in firms of ten or fewer lawyers than white lawyers, see Lempert et al., *supra* note 29, at 431, which suggests that somewhat more than five percent of all solo and small firm practitioners may be African American.

46. A handful of the lawyers worked alone from their homes, although all of these lawyers had previously worked in offices with other lawyers.

47. For a more extended discussion of the ways in which these lawyers learned skills, see Levin, *Preliminary Reflections*, *supra* note 29, at 871–88.

sitting in on meetings—did a lot of that—sitting down and going over documents, it was a nice combination.⁴⁸

Other lawyers who started out in small firms reported receiving significantly less explicit guidance from their employers and had more of a need to learn through observation and trial and error.

Not surprisingly, some of those who entered solo practice early in their careers needed to actively seek out guidance and were willing to take on new matters and learn as they went along.

From a legal standpoint, I wasn't so concerned, probably very naively at this point in retrospect, I wasn't as concerned about the law. I mean, I figured I could do whatever came down the pike; it was all a question of, you know, getting the work and then just handling it. I mean, I taught myself landlord-tenant law in one I think twenty-four [or] thirty-six hour period with every book I could get hands on. Every legal resource that I could pull. But that's the way I was attacking things. When you're—when you don't have the volume—which I didn't have at the point, you could take those steps, and take the time you need to actually concentrate.⁴⁹

As these lawyers tried to make a living, many of them took on a number of matters in a variety of substantive areas. As one lawyer recalled, "What was good about it in the beginning is that I did everything. You know, I just took everything that came in the door because I needed the money. And then you start, as you're going along, seeing what you like and what you don't like."⁵⁰

Yet even these solo practitioners often told stories involving another lawyer—who may have been a mentor, a suite mate, or the friend of a friend—who took the time to sit down and explain to them what they needed to do to represent their clients. One lawyer described his early experience with a suite mate:

He was a decent guy. He showed me how to handle—he did a lot of real estate. . . . And he helped me out a lot on the real estate end of the law—the contracts and certain subtleties—he was very, very helpful. He said, "Look, I am going over a contract, do you want to come in?" and I'd sit by him and he'd go over the thing, and this is the way he

48. Interview No. 33 with solo attorney practicing in Staten Island, N.Y. (Mar. 13, 2001).

49. Interview No. 21 with attorney practicing in a two-lawyer firm in Nassau County, N.Y. (Feb. 14, 2001).

50. Interview No. 28 with attorney practicing in a four-lawyer firm in Brooklyn, N.Y. (Mar. 1, 2001).

does it, you know, step-by-step, and it was fantastic, more than I could ever learn in law school. I had basic property law, but he was showing me contingencies and you know, that you don't lose the guy's down payment, you know—I mean, terrific stuff which has stayed with me. So he was very good that way.⁵¹

Others sought out suite mates to answer questions:

[Y]ou don't come out of law school knowing how to practice law, especially not on that level, and so it gives you a chance to observe more experienced lawyers in practice—how they do things. And, of course, there is the more obvious, . . . the sounding board. You can go to someone,—hopefully, you can—and you can say, "Gee, someone asked me this question and, well, how do you do it?"⁵²

Family members who were lawyers often provided substantial help to solo practitioners who were attempting to develop competence in areas with which they were unfamiliar.

While the lawyers I interviewed were willing to reach out for help when they needed to learn about practicing law, they rarely sought help when setting up their own solo or small firms. Those who started out in larger firms often adopted the office practices they had observed when they moved out on their own. Several others consulted books or attended law office management courses offered by the local bar. Most assumed that it was not complicated to set up a law office and that they could figure out what to do on their own. One lawyer who set up a small firm partnership after being an associate in a sixty-lawyer firm explained how he went about it as follows:

I did it by basically, we did it by basically learning as we went along. Really, I mean I had no idea. I bought a book from the bar association, which was very unhelpful. I called my accountant, who is my personal accountant, I used my accountant and he does businesses as well, so I asked him about how to go about getting a tax ID number, employer ID number, and from there I just sort of did it as I went along.⁵³

Most lawyers felt that they had not made significant mistakes in setting up their offices, but a few noted that they had made serious staffing errors as their practices grew.

51. Interview No. 38 with solo attorney practicing in Suffolk County, N.Y. (Mar. 19, 2001).

52. Interview No. 34 with attorney practicing in a two-lawyer firm in Queens, N.Y. (Mar. 13, 2001).

53. Interview No. 4 with attorney practicing in a three-lawyer firm in Manhattan, N.Y. (Jan. 25, 2001).

Although the lawyers practiced in a variety of physical settings, had significantly different types of clientele, and very different areas of expertise, many of them agreed that the tremendous pressure to bring in clients, along with cash flow, are the biggest challenges of working in a solo or small firm practice.⁵⁴ Some of the lawyers I interviewed explained these challenges:

The biggest challenge is continuing to have clients who come to see you. It's a never-ending battle of bringing in sources of business. Luckily again I haven't had to do much self-promotion, but I don't know from day-to-day from month-to-month from year-to-year where my business is coming from. In my particular area of law, as I said before, most of my work is one-time things. Client comes in, I do their estate planning, and they're gone.⁵⁵

Definitely development, definitely getting out and getting my own clients no matter what's going on; . . . it's very hard to be seen, it's very hard for anybody to even know that you're practicing, and that is the biggest challenge, the hardest thing to do. And starting now, three years, starting now I'm supposed to start to get my own clients, by five years I'm supposed to have a fifth to a quarter of my practice be my own clients, which is coming up soon and I'm not doing well.⁵⁶

Well, you know, making, making surviving, making a go of it is of course—the bottom line, the balance sheet, you know it's, that's, that can be very tough. I'm going through a very bad cash flow now where I'm not getting the checks in from the government. They owe me four or five checks that are back due. And I was just on the phone today trying to shake it loose—so . . . the cash flow is [always] a big problem . . .⁵⁷

54. Of course, the pressure to bring in clients is not a problem unique to solo and small firm practice. See, e.g., Dennis Curtis, *Can Law Schools and Big Law Firms Be Friends?*, 74 S. CAL. L. REV. 65, 68 (2000) (describing how large law firm partners had to actively pursue business and were concerned about the instability of their firms); Galanter, *Old and in the Way*, *supra* note 29, at 1094–95 (describing how older partners are pushed out of law firms if they do not bring in enough business). Nor is it new. See CARLIN, *LAWYERS ON THEIR OWN*, *supra* note 11, at 123.

55. Interview No. 20 with solo attorney practicing in Nassau County, N.Y. (Feb. 14, 2001).

56. Interview No. 17 with attorney practicing in a four-lawyer firm in Rockland County, N.Y. (Feb. 12, 2001).

57. Interview No. 19 with solo attorney practicing in New York, N.Y. (Feb. 13, 2001).

Well, it is always generating business. You have got to get enough business in to meet your monthly—that is always a challenge. Every time the phone rings it's a challenge. But—preparing for trials is always a challenge, that sort of thing. But you know, when you own your own business, you have to pay the bills. You have to—it's your show. So you always have to be on guard for that.⁵⁸

As Carroll Seron has reported, there is a financial insecurity that permeates this form of practice and many practitioners feel close to the financial edge.⁵⁹ This reality inevitably affects some of the ethical decision-making in which the lawyers engage, both on a conscious and a subconscious level.

III. EFFORTS TO PROVIDE COMPETENT REPRESENTATION

Forty years ago most lawyers practiced in solo and small firm practices, and it was not unusual for those lawyers to maintain general practices in which they did real estate closings, personal injury cases, wills, and small corporate transactions.⁶⁰ As the practice of law has become more complex and technology has increased the speed at which law is practiced, it has become both easier and harder for solo and small firm practitioners to keep up with changes in the law and to perform their work in a competent fashion.⁶¹ As a threshold matter, the ability of these lawyers to provide competent representation is affected by decisions they make about the number of areas in which they practice law, the number and types of clients they take on, their willingness to reach out to colleagues for assistance, and their diligence in staying abreast of changes in the law. Many of the lawyers I interviewed reported that they made conscious decisions concerning these issues that had the effect of increasing their ability to provide competent representation. Some of these strategies are described below.

A. Specialization

While some lawyers reported that when they started out in practice they did "everything," a number of them eventually

58. Interview No. 38 with solo attorney practicing in Suffolk County, N.Y. (Mar. 19, 2001).

59. SERON, *supra* note 28, at 14; see also MATHER ET AL., *supra* note 33, at 151; Stephen Daniels & Joanne Martin, "It's Darwinism—Survival of the Fittest: How Markets and Reputations Shape the Way in Which Plaintiffs' Lawyers Obtain Clients," 21 LAW & POL'Y 377, 394–96 (1999) [hereinafter Daniels & Martin, *It's Darwinism*] (explaining financial difficulties faced by the plaintiffs' bar).

60. ABEL, *supra* note 4, at 181.

61. See Levin, *Preliminary Reflections*, *supra* note 29, at 853.

made decisions about how many substantive areas of law they could handle competently, and most decided to limit their practices to a few substantive areas. Six of the lawyers I interviewed devoted virtually all of their time to a single area of practice, and another thirteen of the forty-one lawyers I interviewed devoted seventy percent or more of their time to a single area of practice. The areas of specialization included areas traditionally associated with solo and small firm practice such as bankruptcy, family law, personal injury, residential real estate, and wills and estates,⁶² as well as areas more commonly associated with larger firm practice such as corporate securities, mortgage banking, complex commercial litigation, and education.⁶³ The lawyers who specialized often worked in larger firm settings earlier in their careers. A slightly higher proportion of women specialized than men.⁶⁴ In addition to the lawyers who specialized, some of the lawyers I interviewed limited their practices to two or three areas of the law and viewed themselves as "specialists" in at least one of those practice areas.⁶⁵

However, one third of the solo and small firm lawyers I interviewed were true general practitioners who regularly practiced in four or more areas.⁶⁶ Most of them were male and worked outside of Manhattan. One important motivation for not

62. I am using the term "specialized" here to mean lawyers who devote seventy percent or more of their time to a single practice area.

Historically there has been less specialization in the personal services fields than in other practice areas. John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751, 761 (1998). Specialization by lawyers has increased over the last twenty years, however, and of the fields normally associated with solo and small firm practice, there has been a marked increase in the number of lawyers who specialize in personal injury work and a slight increase in the lawyers who specialize in criminal defense. *Id.* at 760–62; see also MATHER ET AL., *supra* note 33, at 52, 182–83 (noting the increase in lawyers who specialize in divorce law).

63. Other areas of specialization included criminal appellate work, land use, elder law, education law, and intellectual property.

64. The sample I interviewed was too small to determine whether this is generally true of female solo and small firm practitioners. However, a similar observation was made in a larger study of divorce lawyers. See MATHER ET AL., *supra* note 33, at 52 (reporting that women appeared disproportionately as divorce specialists and men appeared disproportionately as general practitioners).

65. For example, one lawyer who devoted sixty percent of her time to family law and forty percent of her time to representing children in guardianship cases viewed herself as a specialist in family law.

66. A general practitioner was a lawyer who often described himself as a general practitioner or, when asked to ascribe percentages to his practice, would do so as follows: "I would say thirty percent personal injury, another thirty is real estate, another thirty is criminal, and the other little stuff like divorces." Interview No. 41 with solo attorney practicing in Brooklyn, N.Y. (Mar. 22, 2001). Seron also found that the largest group of solo and small firm practitioners she interviewed reported having a "general" practice. SERON, *supra* note 28, at 168 n.13.

limiting their work to a single practice area appears to be economic. Even in small firms that appeared financially successful, lawyers were tempted to take on matters beyond their areas of expertise. As one lawyer explained, "You're in a small firm, you have cash flow issues, you believe that you have the ability to reach out to resources or maybe you hope you do and you would take that case on."⁶⁷ Another lawyer, who worked in the same office, described one of the challenges of small firm practice as follows:

Well I think as [partner's name] and I were talking about, the question of taking on matters in which you don't have a great deal of expertise. Do you do it, and if you do, how do you inform yourself? I would say that's a challenge, and that's a fun challenge in many ways. You know, the acquisition that [partner's name] and I took on was something that initially I said, "We can't do it," and he said, "Yes we can, and we can learn how to do it."⁶⁸

Some lawyers who do not specialize are also motivated by the desire to provide "cradle to grave" service to their clients who rely on them heavily for advice. One lawyer who described his practice as a "general practice" explained,

And again, that's more than anything an accommodation to clients. In fact, I got a call today from somebody who—bar association referral—in 1997 [had] a car accident, a horrible case, and we wound up settling it for a million bucks. The guy, he's called me to do a will, he's called me now [that] he's buying a house, you know, and there's no reason not to do that kind of thing.⁶⁹

The comments of a few of the lawyers I interviewed indicated that the pull to provide a range of legal services can be especially strong when the lawyer is rooted in the ethnic community⁷⁰ or when the lawyer feels that she is a trusted family lawyer.

67. Interview No. 7 with partner of primary interviewee (Jan. 31, 2001).

68. *Id.* (attorney practicing in a four-lawyer firm in Manhattan, N.Y.).

69. Interview No. 16 with attorney practicing in a two-lawyer firm in Nassau County, N.Y. (Feb. 9, 2001).

70. The study of ethnic enclaves and enclave economies is a growing area of research, see, for example, Janet W. Salaff et al., *Ethnic Entrepreneurship, Social Networks, and the Enclave*, in APPROACHING TRANSNATIONALISMS: STUDIES ON TRANSNATIONAL SOCIETIES, MULTICULTURAL CONTACTS, AND THE IMAGININGS OF HOME 61–82 (Brenda S.A. Yeoh et al. eds., 2003), but has not been addressed much in the legal profession literature. Lawyers working in ethnic communities raise interesting issues for scholars of the legal profession, as this type of practice raises ethical issues as well as access to justice issues. I am grateful to Elizabeth Chambliss for her insight that the legal representation of ethnic communities can be conceptualized as a type of specialization by client rather than by practice area. This specialization strategy may present special ethical problems and different conceptions of "diligence" and "competence" based on the

Lawyers who specialized were sometimes quite critical of those who did not, observing that the general practitioner often commits “naked malpractice,”⁷¹ and that “most people don’t know what they don’t know.” As one solo attorney observed, “I don’t think that there’s enough hours in the day to gain the knowledge that you need to do that.”⁷² Yet those who specialized were also aware of the difficulties that specializing created for the small firm practitioner, particularly in the face of competition from larger law firms.

What’s happening in the bigger cities, as you know here, elsewhere around the country, it’s very difficult for a small firm to survive unless you have a particular client—it’s very difficult—because you’re competing against these enormous firms that now decide they’ve got to become full service firms. And it’s a big challenge to try to compete [against] them. . . . So again, coming back to my limited area, until maybe ten, fifteen years ago the firms did not do work in the field that we now call intellectual property. They didn’t do copyright and entertainment. The big firms decide they better put that department in because clients want it. So they went out and hired people who supposedly knew something and I would say most of them that they put on didn’t know from nothing [laughs]. They worked someplace else and they had a very limited expertise but it’s very hard now to say, OK, I can do this or you can go to a big firm and they’ll do everything for you from cradle to grave. That’s a challenge. But—it’s a challenge. How do you get these people? How do you get the clients? In the past some firms would refer matters to you because you were a specialist and they would send them to you. Now, they don’t send those things out. They think they have a department that knows what its doing. So they keep them in there.⁷³

This problem was not viewed as limited to urban areas. A solo practitioner in suburban Nassau County noted,

What the bigger firms are doing is saying to a client, “Look, we can handle everything that you need, and we [don’t] necessarily have to be very expensive about it either. We can tailor it to your needs.” And it’s not that this is our

ethnic culture and community norms that differ from those recognized by the formal rules.

71. Interview No. 35 with solo attorney practicing in Suffolk County, N.Y. (Mar. 14, 2001).

72. Interview No. 33 with solo attorney practicing in Staten Island, N.Y. (Mar. 13, 2001).

73. Interview No. 13 with solo attorney practicing in Manhattan, N.Y. (Feb. 7, 2001); *see also* Heinz et al., *The Scale of Justice*, *supra* note 4, at 344 (noting that large firms add a broad range of competencies to encourage “one-stop shopping”).

alleyway and that is it. I think that there is a lot of deal making that gets made, and so some people feel, "Look, if I have enough business, I can do OK with the bigger firm, and I don't have to worry about whether a single attorney is too busy to handle matters." . . . I definitely have found that, especially over the last three to four years, that the merger and the expansion of the bigger firms is making a bigger impact here on Long Island.⁷⁴

Before leaving this topic, it is important to note that even the general practitioners who practice in several areas will not take on all matters that come into their offices. Many of the lawyers who did not specialize reported that they turn away certain matters that they will not do. Several of the lawyers decline to do certain types of work—including work typically associated with the solo or small firm practitioner such as wills, criminal law, and family law—because they do not like doing it or feel they cannot perform the work competently.⁷⁵ Referral fees provide some incentive to decline certain work, especially in the personal injury area.⁷⁶ In addition, flat fee billing used by some small firm practitioners provides economic disincentives for taking on new types of matters that would involve a steep learning curve.

At the same time, most of the solo and small firm practitioners I interviewed will at least occasionally take on matters outside their areas of specialization and, as noted, some routinely practice in four or more different areas of the law. When lawyers do this they are still required, by bar ethics rules, to represent their clients competently, making it important for them to have access to colleagues or other resources that can help them stay up-to-date with new developments in the law.

B. Advice Networks

For lawyers in solo and small firm practices, part of the key to performing competently is their ability to draw on the knowledge and judgment of other lawyers. Many of the lawyers I interviewed reported that they routinely reached out with questions that arose in practice, not only to other attorneys with

74. Interview No. 26 with solo attorney practicing in Nassau County, N.Y. (Feb. 28, 2001).

75. Similarly, Seron found in her study of solo and small firm lawyers that many attorneys in general practice avoided matrimonial matters. SERON, *supra* note 28, at 168 n.13.

76. See Daniels & Martin, *It's Darwinism*, *supra* note 59, at 392 (opting to send work to the heavy hitters when they do not have the expertise or financial resources to handle the case).

whom they were formally affiliated, but also to suite mates and to attorneys outside their offices. Many lawyers reported having a group of attorneys—ranging in size from three to twelve lawyers—to whom they would reach out with questions. The group of attorneys to whom a lawyer reaches out when the lawyer has a question in practice is referred to here as the lawyer's advice network.⁷⁷

These lawyers rely on advice networks early in their careers to learn how to practice law, and they typically look first to lawyers with whom they are formally affiliated, to suite mates and to lawyer friends. As they become more experienced, many of them still rely on those networks for questions of judgment, when they want to learn about a judge or an adversary, or when they face legal questions they have not previously confronted. As one sole proprietor explained,

It is so essential to my survival that I have the network that I do. One of the advantages of having spent time in a big firm is I do know a whole lot of people who are sort of big firm refugees like me, who are out there, out of a big firm, but still as smart as they ever were and even the guys who are still in the firms, who are my friends, who we eat lunch with, whatever, if I have a legal question I always make sure to research it as best I can first and then if I can't find the answer or if I just want somebody else to throw something off, in the securities area I have, you know, up to a dozen people but really two or three that I deal with on a regular basis who are so nice and so helpful and so patient and who are like the lawyers' lawyer type who we call because, you know, we don't know an answer but they do. . . . I'm very lucky and I couldn't survive without that network. I have a guy who I turn to on criminal matters—that I—in other words, since I can't offer all these things to clients; I have to know people who I can turn to.⁷⁸

The lawyers reported that the advice-giving was often reciprocal and was treated as "favors" when it passed between unaffiliated lawyers.

Advice networks are especially important when attorneys take on a matter in an area outside their normal areas of expertise. As one lawyer explained,

77. The advice networks of the lawyers I interviewed have been described in more detail in Levin, *Preliminary Reflections*, *supra* note 29, at 871–78.

78. Interview No. 29 with attorney practicing in a three-lawyer firm in Manhattan, N.Y. (Mar. 8, 2001).

Sometimes we get very worried about taking on matters in which we don't have a lot of expertise. You were asking before about getting advice and mentoring. [My partner] is very good at that. He reached out. He's doing a landmark commission property issue right now and he's reached out to a landmark lawyer to try to get expertise on that area. He wasn't going to wing it himself. He looked to be—for a mentor.⁷⁹

Lawyers also seek help in areas in which they practice when they encounter difficult issues. This description by a solo practitioner was typical:

Usually, I will call lawyers, other lawyers that I have known that I think know the information that I don't know. So I have a number of people—it depends on the issue because they can range from a complicated real estate matter, although I do real estate and I think I know it pretty well, but there is a lot that I don't know, I will call someone who I think has been around for a while, and that's [Attorney A]. I will call him. If it is a personal injury matter, I might call [Attorney B], who is in the next building. So it really depends on the nature of the—if I [had a] criminal case, I usually will call [Attorney C] because [he] is my long-time buddy. He used to be a district attorney and he knows that criminal defense stuff pretty well.⁸⁰

On occasion, however, lawyers reported that they sought advice from strangers, using the help of technology because their personal connections did not provide enough depth of expertise. For example, one experienced practitioner in Suffolk County explained,

The problem is there's so many—Suffolk County has 15,000 lawyers, 14,900 of whom are either real estate or criminal lawyers. [laughs] So again, the best place to find serious support when you have serious questions is to go to the terminal and start doing a significant amount of research, and if you've found one person who's good in a particular field, you usually find that the majority of the people turn out to be long-term relationships, and again the fields are fragmenting so quickly, and the specialization is getting so intense, and the number of boutiques is increasing dramatically so that you literally shop a case now if you've got something. The trick is knowing what you've got and knowing that you need help or knowing that it's over your

79. Interview No. 7 with attorney practicing in a four-lawyer firm in Manhattan, N.Y. (Jan. 31, 2001).

80. Interview No. 41 with solo attorney practicing in Brooklyn, N.Y. (Mar. 22, 2001).

head, or knowing that there is a cause of action there that you haven't noticed or knowing that there is a problem there you haven't noticed.⁸¹

Two other lawyers reported communicating with attorneys whom they did not know through the use of computer listservs when they needed an answer to legal or practical questions that arose in practice.⁸² These listservs not only serve as sources of information, but also help solo and small firm practitioners establish a sense of community with lawyers who practice in the same areas of substantive law or who share similar concerns.

The use of these networks by solo and small firm practitioners is significant not only because they can help improve the competence of individual lawyers, but also because in many cases, they are an important part of the communities of practice in which these lawyers operate and from which they learn professional norms. Of course, not all of the lessons taught are good ones, and not all of the advice is consistent. For example, one lawyer who said he frequently reached out explained the following:

A: Whenever I run into an issue, you know, could be—I don't know if I could put a time on it. Whenever there's something I want to bounce around, like for instance, I'm doing that with a case right now. I've been asking four or five different attorneys on something—I have a client who has run into a problem where—he made a false statement to the police [Explanation of problem deleted]

Q: So these four or five people you reach out to—

A: Oh, ten times. I mean sometimes it's ten people. I've talked to about this one to about twelve lawyers already. In the end—of course the greatest part is I've got twelve opinions.⁸³

Finally, it would be inaccurate to convey the impression that all of the lawyers I interviewed use advice networks or that lawyers reach out frequently to other lawyers in order to provide

81. Interview No. 35 with solo attorney practicing in Suffolk County, N.Y. (Mar. 14, 2001).

82. The use of computer listservs to seek information from other lawyers has become quite common in recent years. See, e.g., Hope Viner Samborn, *Colleagues in Space: Online Discussion Groups Prove Uniquely Informative—and Addictive*, A.B.A. J., Dec. 1999, at 80. A Google search reveals lawyer listservs sponsored by state and specialized bar associations for lawyers practicing in a wide variety of practice settings and in practice areas ranging from admiralty to workers' compensation law.

83. Interview No. 28 with attorney in four-lawyer firm in Brooklyn, N.Y. (Mar. 1, 2001).

competent representation to clients. While the majority of the lawyers I interviewed reached out to their advice networks at least once a week, a significant minority did not. In my relatively small sample, the lawyers who reached out to others for advice less than once a month tended to be men in solo practices, women partners, experienced lawyers who considered themselves specialists,⁸⁴ and lawyers over the age of seventy. There are several different reasons why these lawyers did not regularly seek advice. A few of the solo practitioners suggested that their personalities prevented them from reaching out. The two women partners in the study seemed to feel that advice-seeking was at odds with their role as problem-solver within the firm. In the case of some of the experienced attorneys who specialized, they felt that they had little need to reach out for advice because they were very familiar with the areas in which they practiced. Speaking for this group, one lawyer explained, "I talk to myself. It's unusual that I don't know the answer."⁸⁵ Some older attorneys reported that they rarely sought advice from other lawyers because members of their networks were no longer practicing law.

C. *Staying Up-To-Date on the Law*

Most of the solo and small firm lawyers I interviewed believed that they were able to stay up-to-date on the law in the areas in which they practiced. More than half of them reported reading the *New York Law Journal*, the local daily legal newspaper, on a regular basis.⁸⁶ The lawyers who specialized also often read a variety of trade and specialized legal materials because they felt it was essential to their representation of their clients. A few of the lawyers who worked in partnerships mentioned that colleagues in their firms helped them stay up-to-date on the law.

General practitioners relied heavily on written materials distributed by bar associations and on CLE courses, which are mandatory in New York,⁸⁷ to stay current on the law in the areas

84. Among the lawyers I interviewed, however, there were specialists who practiced more than twenty years who continued to make weekly use of their advice networks. These lawyers worked in the areas of civil rights law, education law, intellectual property, and personal injury.

85. Interview No. 2 with attorney practicing in a two-lawyer firm in Westchester, N.Y. (Jan. 23, 2001).

86. By "regular basis," I mean that they read or skimmed at least three of the five issues published each week.

87. Effective January 1, 1999, New York adopted mandatory CLE requirements that require lawyers to complete twenty-four credit hours of CLE every two years. N.Y.

in which they practiced. Indeed, most of the lawyers I interviewed found continuing legal education to be at least somewhat useful.⁸⁸ For these lawyers, CLE written materials, in particular, provided them with a way to stay up-to-date or to test whether they were staying up-to-date in their specialties. As one lawyer explained in a very common response, "There's a CLE course that's given every year by one of the associations called Statutory Updates where basically I just get the materials [laughs], but the outline's wonderful also because it tells you what's going on."⁸⁹

The local and specialized bar associations also play an important role in the efforts of these lawyers to stay up-to-date on changes in the law. All but four of the lawyers interviewed belonged to one or more state, local, or specialized bar association.⁹⁰ Most of the lawyers reported that they read bar publications with regularity, although many of the lawyers noted with some regret that they did not have the time to attend many bar-sponsored functions other than those that provided CLE credit.

Technology also assists some lawyers in their efforts to stay up-to-date on developments in the law. For example, some use computer services that provide daily, weekly, or monthly updates on the law. Two attorneys described receiving CD-ROMs with updates of new developments in the law. Another one read the *New York Law Journal* online. Some lawyers pointed to the research that they performed through computer services such as Westlaw as their way of keeping up-to-date with the law. But a few older lawyers were not technologically competent and could not electronically check on developments in the law.

For solo and small firm lawyers, the cost and time commitment required to stay up-to-date on the law are substantial, and some lawyers are forced to balance those factors against other considerations. Women and solo practitioners were more likely to express doubts that they were able to stay up-to-

COMP. CODES R. & REGS. tit. 22, § 1500.22(a) (2003).

88. This finding may not accurately reflect the prevailing view because lawyers who were suspended from practice in New York due to failure to comply with CLE requirements deliberately were excluded from the list of possible subjects in this study.

89. Interview No. 16 with attorney practicing in a two-lawyer firm in Nassau County, N.Y. (Feb. 9, 2001).

90. Not surprisingly, less than twenty percent of the lawyers (seven) belonged to the American Bar Association. The ABA historically has been perceived as an elite institution and has had difficulty attracting solo and small firm practitioners. See ABEL, *supra* note 4, at 208; CARLIN, *LAWYERS ON THEIR OWN*, *supra* note 11, at 202; ABA TASK FORCE ON SOLO AND SMALL FIRM PRACTITIONERS, REPORT WITH RECOMMENDATIONS 14 (1991) [hereinafter ABA TASK FORCE].

date on legal developments than the other lawyers I interviewed. As one lawyer explained when asked whether he felt he was able to stay current on the law in the areas in which he practiced, "For the most part, yes. To some degree no, because you're just dealing with, you know, the daily every day things, so that it's hard to always stay abreast of what's going on in the law. The law's so expansive."⁹¹

Most of the lawyers I interviewed could not afford the cost of extensive libraries or the updates that accompany them. The lawyers who did not belong to bar associations or who had dropped bar memberships cited cost as an important reason. As a result, they missed out on an important resource for staying up-to-date on legal developments. Similarly, the cost of the *New York Law Journal* prevented several lawyers from subscribing to it, which meant that they did not have easy access to one of the quickest means available to stay current on new developments in their areas of practice.

Notwithstanding these challenges, one small indication that these lawyers were generally able to stay up-to-date on new developments in the legal profession could be seen in their knowledge of the then three-year-old requirement that all lawyers post the Statement of Client Rights in their offices.⁹² While a substantial minority of the lawyers I interviewed did not have this statement posted in their reception areas or offices, most of the lawyers had heard of the requirement, and some who did not have it posted had copies of the statement in their desk drawers or in-boxes. However, four of the attorneys—all solo practitioners—were altogether unaware that the requirement that they post a Statement of Client Rights in their offices applied to them.

Finally, it is worth noting that for some solo and small firm lawyers, staying fully up-to-date on the law is not necessarily required for competent representation of their clients in their day-to-day work. As some of them noted, they can research the law or reach out to a member of their advice network when they need it. Or in other cases, they may practice in areas of the law—such as residential real estate—where the law does not change that much from year to year. But having special knowledge and staying up-to-date on the law is a hallmark of being a

91. Interview No. 5 with solo attorney practicing in Queens, N.Y. (Jan. 25, 2001).

92. Effective January 1, 1998, every lawyer with an office in New York State is required to post a statement of client's rights in a manner visible to clients. N.Y. CT. R. 1210.1.

professional.⁹³ The process of staying up-to-date also encourages lawyers to feel a sense of connection to the legal profession, both by fostering direct communication between lawyers and by encouraging lawyers to read about the work of other lawyers and the law that governs them.

IV. OTHER ETHICAL CHALLENGES ENCOUNTERED IN PRACTICE

A. *Perception and Frequency of Ethical Challenges*

Lawyers face ethical issues—in the broadest sense of the term—on a daily basis. For example, lawyers confront moral issues when they pursue tactics or outcomes for their clients that disadvantage the public or third parties. Lawyers also regularly encounter ethical issues in the narrower sense of the term when they comply, or fail to comply, with formal rules of professional conduct. For instance, providing competent representation of clients, returning client phone calls, and maintaining client confidentiality are among the day-to-day challenges that most lawyers face. Yet when asked about the “ethical issues” they encountered in their practice, the lawyers I interviewed rarely paused to ask what was meant by this deliberately ambiguous term. The lawyers’ responses suggested that they usually interpreted the question to mean compliance with formal rules of professional conduct; only a handful of them interpreted it to include broader moral questions of right and wrong.

More significantly, many of the lawyers I interviewed did not appear to think much about the ethical issues they encountered in their day-to-day work lives. When initially asked about ethical issues they confronted in practice, several of them gave examples of unethical conduct in which *other* lawyers engaged. Even when they understood the question was about ethical issues that *they* encountered, many of them were hard-pressed to come up with more than one or two examples, suggesting that they were describing ethical “problems” that had required special attention. After some direct questioning about whether they had encountered certain types of ethical issues, more than half of the solo and small firm lawyers in the study reported that they encountered ethical issues at least once a year. A substantial minority reported that they encountered ethical issues “frequently” or even on a daily basis. This was especially true of lawyers who worked in certain personal plight areas such as

93. See ABEL, *supra* note 4, at 16.

family law, personal injury, workers' compensation and bankruptcy law, and also of lawyers with real estate practices.

Of course, the reports by lawyers that they did not encounter many ethical issues in their practices does not mean that they did not actually confront ethical issues with some frequency.⁹⁴ While a small number of the lawyers recognized that they constantly face ethical issues such as whether they represent their clients adequately, the responses of many of the lawyers I interviewed suggested that they simply did not think very much about legal ethics or that they did not consider the issues they confronted in moral or ethical terms. One lawyer explained that he did not confront ethical issues because "when you're dealing with big companies, it doesn't seem to come up." Another explained, half apologetically, that she found ethics "boring." In some cases lawyers appeared to be so acculturated to certain practices they did not consider the ethical issues implicated by those practices. For example, very few considered the ethical conflicts inherent in their contingent fee arrangements or the confidentiality issues raised by common telefax machines or secretaries in their office-sharing arrangements. In other cases certain problems arose so frequently—like clients who asked their lawyers to misuse a notary stamp—that lawyers had a "stock response" when the situation arose, so they did not initially describe these events as raising an ethical issue in their practices.

This lack of reflection and awareness concerning ethical issues may say something about the sample of lawyers I interviewed, but their responses seem consistent with earlier research indicating that lawyers do not always recognize or reflect upon many of the ethical issues that arise in their day-to-day work lives.⁹⁵ The responses also illustrate the challenges of

94. There are other possible explanations, including that these lawyers did not wish to discuss the subject or that they had not expected the question because they believed that the study focused on other issues. Refer to note 37 *supra*. Moreover, in some cases their reports may be accurate. For instance, some of the most inexperienced lawyers—meaning lawyers who had practiced less than five years—indicated that they infrequently faced ethical issues. They may face ethical issues infrequently because they deal less directly with clients, or because they believe that the ultimate responsibility for deciding ethical issues primarily falls to their employers.

95. See Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 587 (2002) (noting that large firm ethics advisors report that getting lawyers to spot ethical issues is one of their biggest challenges); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 536–38 (1985). For a discussion of some of the reasons why these lawyers may not conceptualize various issues they confront as "ethical" issues, refer to notes 240–45 *infra* and accompanying text.

studying lawyer ethics by means of self-reports of conduct, because those reports are no doubt affected by lawyers' desire to see themselves—and to be viewed—in a positive light.⁹⁶ Nevertheless, the responses provide at least a starting point for identifying some of the ethical challenges these lawyers encounter, even though the discipline reports suggest that the list of issues they provided is incomplete.⁹⁷

B. Common Types of Ethical Challenges

My interviews with the New York lawyers revealed that they face a variety of ethical issues in their daily lives, which range from issues that present serious moral challenges to more mundane problems that constitute violations of formal bar rules. In this section I identify some of the more common ethical challenges. In some instances these issues may arise precisely because the lawyers are in solo or small firm practices or because they tend to represent individuals in personal plight matters. In other instances their manner of dealing with an ethical problem may also reflect the small practice settings in which they operate.

1. *The "Bad" Client.* The lawyers identified a wide array of ethical issues they encountered, but one of the most common ethical challenges encountered by solo and small firm practitioners was the problem of a client who wished to engage in some form of fraud. One attorney stated, "I've had clients ask me to change documents, change dates, change amounts, and I have had people ask me to do that. And you gotta be like, whoa, I have had [that] lots of times, many, many times."⁹⁸ As another lawyer explained, "It's definitely clients who want to do stuff."⁹⁹

Some lawyers who frequently encountered clients who wished to engage in unethical conduct attributed this phenomenon to the nature of their practice specialty rather than to the size of their practice. For example, a lawyer who specialized in estate planning noted that many of his clients were in cash businesses and therefore "I'm constantly confronted with

96. Refer to note 236 *infra* and accompanying text.

97. For example, when asked about the ethical issues they had encountered in practice during the last few years, none mentioned improper withdrawal from representation or taking unauthorized action on a client's behalf, even though this type of conduct is typically the basis for some discipline. *See, e.g.,* ILL. ARDC REPORT, *supra* note 18, pt. II.B; WIS. OLR REPORT, *supra* note 20, at app. 8A.

98. Interview No. 41 with solo attorney practicing in Brooklyn, N.Y. (Mar. 22, 2001).

99. Interview No. 34 with attorney practicing in a two-lawyer firm in Queens, N.Y. (Mar. 13, 2001).

what my client is going to report.”¹⁰⁰ He observed, “Basically, my clients are hiring me to do things that are unethical.” For this reason, “If you want to be a lawyer and you want to practice [tax] law, sometimes you have to bend the law.”¹⁰¹ Similarly, a bankruptcy lawyer observed:

Every day, virtually every day I do bankruptcy consultation. Virtually every day the issues come up where the client says, “Well, what if I don’t disclose that?” And of course I never, never advise clients to hide assets or transactions, and so on. And, again, I feel like I have enough independence that there’s no part of my brain that says, well, you are not going to get the case because of this, and they are going to another lawyer. I don’t want that problem.¹⁰²

Matrimonial lawyers reported that clients often sought to underreport their income on financial disclosure statements; real estate and commercial lawyers said that money “under the table” in purchase and sale transactions was common;¹⁰³ and personal injury lawyers reported clients who faked the cause of their injury or who would ask about staying out of work longer than necessary to improve their chances of recovering a larger amount of money.

These situations present some of the most serious ethical challenges for lawyers, as well as some of the greatest personal risks, because of the potential civil or criminal liability if they help their clients engage in fraud. When asked why they thought that their clients felt that they could ask their lawyers for assistance in wrongdoing, the lawyers responded that clients simply expected this of lawyers:

Because they think lawyers are just—they think—I think the public’s perception of lawyers are that if you go to a lawyer, a lawyer can help you hide and cheat better than you can yourself. I think that that’s what’s—yeah. That’s what the public’s perception is. Amongst other things, of course.¹⁰⁴

100. Interview No. 20 with solo attorney practicing in Nassau, N.Y. (Feb. 14, 2001).

101. *Id.*

102. Interview No. 34 with attorney practicing in a two-lawyer firm in Queens, N.Y. (Mar. 13, 2001).

103. The problem with undisclosed cash in a real estate transaction is that it typically results in tax evasion, bank fraud, or other fraud. For example, homeowners who sell their homes for more than the amount reflected in their sales contract may avoid capital gains taxes if they then purchase a less expensive home. At other times, the contract indicates a higher purchase price than the “real” deal, or a larger down payment on the property, so that purchasers can obtain a larger mortgage than the bank might otherwise provide.

104. Interview No. 41 with solo attorney practicing in Brooklyn, N.Y. (Mar. 22, 2001).

[In most instances I believe it's because they have somebody, a friend, who told them to do it or they know of somebody who did that and became wealthy or they feel that if you're an attorney or a doctor it's appropriate to require of you. Something to facilitate or to make comfortable their position or some statement that they made or some representation.¹⁰⁵

There's an expectation that people have that you are going to lie for them. That you're going to make up things for them. That that's expected of them. I can't tell you how often people tell me—you get one or the other. You get one extreme or the other. . . . I find that people are either scrupulously honest or unbelievably dishonest and yeah, obviously it's with the dishonest ones that you run into ethical problems. That's the primary one that I find that happens.¹⁰⁶

A few of the lawyers I interviewed described conscious decisions to avoid certain clients in an attempt to limit ethical problems. The decision to refuse to take certain clients or certain types of matters is, however, a difficult one because of the challenges of making a living. As one veteran solo practitioner explained,

One of the things that the small firm attorney has to be, practitioner has to be very careful of is properly screening his cases and being able to turn, and that's, in a desire to take on cases, to build up a practice, to fill his plate, he has to be very discriminatory—and it's a big problem that they do that when they start out. I guess it is a problem you make as a rookie, but if you think that a case is going to have a big potential and it turns out to be nothing, you know I still cope with that to this day, in that if the client comes in and makes representations of all his injuries, or how much he's been put out by the chicanery of the defendants, I have a big case going to trial of false arrest and the guy's telling me he lost his business, lost his reputation, and so on, and you have to, you can't lose the trust in your clients. You can't tell 'em, potential clients, "I don't believe you. Show me proof." Cause right away you're building up distrust and you're not having good rapport with your client. So you accept [him] at his word, you take his word for it that it's true. And then it turns out that the proof ain't there. It's just a big house of cards he painted to get you to take the case, I mean, and then you're stuck with

105. Interview No. 22 with solo attorney practicing in Brooklyn, N.Y. (Feb. 15, 2001).

106. Interview No. 16 with attorney practicing in a two-lawyer firm in Nassau County, N.Y. (Feb. 9, 2001).

it. So the problem for the small practitioner is how do you prevent [the] urge, how do you control the urge to take on all comers, cause you want to build up a practice and you want to—you're eager to do work and learn some areas and take cases.¹⁰⁷

Of course, the pressure to take on clients also exists for larger firm lawyers, but there may be more institutional controls against taking on—or keeping—“bad” clients.¹⁰⁸

Nevertheless, some solo and small firm lawyers reported that they had declined to represent certain clients for ethical reasons. For example, a corporate securities lawyer reported that he “constantly” made decisions with ethical implications in his choice of clients he took on. “To some extent it’s this issue of what kind of clients do I want and what kind of clients do I not want. And I’ve taken a lot of time to really define what that is and in a [certain] sense that relates to ethics.”¹⁰⁹ He explained that he will not do an initial public offering because “every underwriter in that lower tier is disgusting scum.”¹¹⁰ The ability to turn away business is, however, a luxury reserved for lawyers who have developed economically successful law practices. As one successful estates lawyer explained, “Once you’ve been at this game for a while, I guess once you’ve amassed a couple of dollars, it’s a lot easier to say no to a client than to take it on.”¹¹¹

2. *Office Management Problems.* One common view of solo and small firm lawyers is that they often face problems arising from poor law office management, ranging from taking on too many matters, to poor filing and calendaring systems, to an inadequate understanding of the economics of law practice.¹¹² These problems can directly contribute to neglect of client matters and failure to communicate with clients, which are

107. Interview No. 19 with solo attorney practicing in Manhattan, N.Y. (Feb. 13, 2001).

108. See generally Arnold & Kay, *supra* note 14, at 329 (noting that a large law firm structure provides an important system of formal and informal controls).

109. Interview No. 29 with attorney practicing in a three-lawyer firm in Manhattan, N.Y. (Mar. 8, 2001).

110. *Id.* Of course, it is unclear whether this decision is driven primarily by the desire to be “ethical” or the desire to avoid liability. It was not uncommon at the time of these interviews for lawsuits to be brought against securities lawyers who had represented a company in connection with an IPO if the company subsequently went bankrupt. See Steven T. Taylor, *Economic Downturn Means More Malpractice Claims Against Attorneys and Firms*, OF COUNS., Aug. 2001, at 1, 6–7.

111. Interview No. 20 with solo attorney practicing in Nassau County, N.Y. (Feb. 14, 2001).

112. See, e.g., ABA TASK FORCE, *supra* note 90, at 17, 34–36; STATE BAR OF CAL. REPORT, *supra* note 15, at 17–18; N.M. TASK FORCE ON MINORITIES, *supra* note 17, at 46.

among the most common reasons for lawyer discipline.¹¹³ Contrary to the conventional view, however, most of the lawyers I spoke with reported that they had control over their caseloads and calendaring and filing systems. Only a small number indicated that these were recurrent problems in their practices. Of course, the lawyers I interviewed may have been uncomfortable sharing information that suggested that their office management was inadequate. Moreover, even if the lawyers I interviewed were being completely truthful, office management problems may be a more pervasive problem among solo and small firm practitioners than my small study indicates.¹¹⁴

A few of the solo practitioners I interviewed described making conscious decisions not to take on more work than they could comfortably handle. One lawyer with an appellate practice noted,

I've made a lifestyle choice to have time to do other things and I'm, you know, not that old, I'm 39 this year. I'm not 25 and I'm not going to stay up all night to finish a brief and so, within those parameters, it—too much can be too much. So I'm a little more careful about the size and very up front—in the beginning I was just so happy to get work and now I will—well, how big is it? Can we get more time? [I'm] going to see a lawyer on Saturday and he initially gets something due in a couple of weeks and I said, "Well if you can get more time, I can do it." I'll say that right away. And so rather than it be yes or no to the work, I've learned that very often you can get some time.¹¹⁵

Similarly, a general practitioner explained,

But I have also learned not to take as many cases now. You know what I'm saying? I used to be more aggressive in terms of trying to get clients. I used to go out like to social functions and business functions to meet business people and other folks like that just to get business. I don't do any of that anymore. Not that I am so big that I can't, it is just that I know—I am at a capacity and I can't take any more

113. Refer to note 18 *supra* and accompanying text.

114. One of the possible biases in the sample is that lawyers with more control over their work may have agreed to participate in this study. Those who lacked the time to return their clients' phone calls may have been less inclined to give up their time to speak with me. Indeed, a few of the lawyers who declined to be interviewed specifically referred to their work load as the reason why they declined to be interviewed.

115. Interview No. 23 with solo attorney practicing in Manhattan, N.Y. (Feb. 15, 2001).

type of thing. I am making some money and I have enough to do—that type of thing. So that's why I don't advertise.¹¹⁶

Most of the lawyers I spoke with seemed to feel that their workloads were manageable.¹¹⁷ This is not to say that most of the lawyers I interviewed did not work hard, and indeed, some of them reported working on average at least seventy hours a week. Moreover, there was a small number, mostly composed of male solo practitioners and sole proprietors, who felt that their practices controlled them to the point that their work interfered significantly with their personal lives.

The lawyers I interviewed reported that they were able to keep track of their client matters, appointments, and filing dates. Only a few of the lawyers I interviewed kept track of their caseloads with sophisticated computer programs designed specifically for their own practices or with case management software by Saga or Time Matters, which are designed for legal practices.¹¹⁸ A significant minority relied on simple calendaring software, such as Microsoft Outlook, to keep track of appointments. The majority of lawyers—including some with volume practices—relied on paper calendars or PDAs to keep track of their meetings and court appearances.

While the vast majority of the lawyers I interviewed felt that their calendaring systems functioned well—with only rare exceptions—one solo lawyer described how a poor calendaring system can have serious consequences:

I've never defaulted in 30 years. But that's just for the record. In truth, I have, but I—am I allowed to talk? I've had to beguile my way out, you know. I've had to fudge a little bit. By that I mean I missed a federal court deadline for filing a case that proved to be extremely—it was a big winner—and it was very important for the client—but I, it was excusable, I was trying a case and I forgot, I was so caught up in it I forgot I had to file. So I created a whole—I created a situation of, you know I didn't have the notice in

116. Interview No. 41 with solo attorney practicing in Brooklyn, N.Y. (Mar. 22, 2001).

117. On average, most solo and small firm lawyers work fewer hours than most large firm lawyers. ABA YOUNG LAWYERS DIVISION, THE STATE OF THE LEGAL PROFESSION 1990, at 22 (1991); *see also* ABA YOUNG LAWYERS DIVISION, SURVEY: CAREER SATISFACTION 11 (2000). In addition, more lawyers who work on a part-time basis work in solo and small firms than in larger private practice settings. *See* THE STATE OF THE LEGAL PROFESSION 1990, *supra*. Indeed, four of the lawyers I interviewed were working on a part-time basis ranging from fifteen to thirty hours per week.

118. This is consistent with reports that most solo and small firms do not use case management programs of any sort. *See* ABA, 2001 LEGAL TECHNOLOGY SURVEY REPORT: LAW OFFICE TECHNOLOGY 70 (2002); NADINE C. WARNER, TECHNOLOGY USE IN SOLO AND SMALL FIRM PRACTICE 9 (2001).

time and so on and it and I got it, I hate to say this but we're on the tape, but I did get away with it [laughs]. So I can't say in truth I've been perfect, but for the record I've somehow walked the straight and narrow. I've walked between the Scylla and Charybdis of the default, which is the bane of the attorney's existence, the default, cause as you know, there's no defense to that. In a malpractice case against an attorney, missing a deadline is malpractice per se. I don't think there's really a defense. . . . Sure enough, I put the notice of the decision in the file, didn't docket it, missed the deadline for the hearing request and man did I have to do a lot of double-talk to [laughs] get out of that. I was in a big hole. So, those are critical things, but I manage.¹¹⁹

Of course the problems described above might not have arisen if the lawyer had more support staff, but the amount of support staff varied greatly among the lawyers I interviewed. A few lawyers relied on extensive support staff to help them service and manage their practices. This was especially true of lawyers with active personal injury, workers' compensation, or volume litigation practices. Some of those lawyers reported employing support staff at a ratio of three or more support staff to one lawyer. It was not uncommon, however, for the lawyers I interviewed only to employ a part-time secretary. Solo practitioners were somewhat more likely than lawyers in firms to work with little or no support staff,¹²⁰ but on occasion even solo practitioners employed extensive office support.

It is difficult to determine whether the level of support staff employed by these lawyers was adequate for their needs. A significant minority of the lawyers I interviewed felt that they did not have adequate support staff. Yet the view of some of the other lawyers who said they had "adequate" support staff was often colored by the economics of law practice. Some of the lawyers felt that they performed more support functions than they would like, but stated that given their finances, their support was "adequate." For example, one solo practitioner who worked without a secretary or a computer answered the question about whether he felt like he had adequate support staff by

119. Interview No. 19 with solo attorney practicing in Manhattan, N.Y. (Feb. 13, 2001).

120. Four of the lawyers I interviewed worked in practices without any in-house secretarial staff. Three out of the four were solo practitioners. This is consistent with a recent survey that shows that lawyers in solo practices are more likely to do all of their own word processing than lawyers in small firms. See ABA, 1999 LEGAL TECHNOLOGY SURVEY REPORT 159 (2000) (reporting that 41.07% of solos do all of their own word processing as compared to 7.14% of lawyers in firms of two to nine lawyers).

saying, "Yeah. At the level of my business, I think I have enough. If my business increases a little bit I'm going to have to have some more."¹²¹ In addition, because the flow of work is often uneven, and downturns in work directly affect their capacity to pay for support, some of the lawyers noted that the question of whether the support staff was "adequate" varied greatly depending upon the work flow.

Even the lawyers who felt they had "adequate" support staff did not seem to consider support for file-keeping in their calculation, as many of those lawyers noted that they did their own filing or that their filing was not getting done. Yet inadequate file keeping can have serious consequences for clients and their lawyers. For example, one lawyer described what she encountered when she started out in a small personal injury firm:

When I first came to the firm they had a lot of the cases and it's hard to explain but they were totally disorganized and in a state of [dis]array where nobody knew what the status was of anything. Answers would come in and they'd be put in files and filed away and two years later, I join the firm and [Interrogatories Before Trial] weren't done, so in the beginning we kind of got together a lot more because I was—I can't work this way.¹²²

Unless the lawyer attends to the filing regularly, it can get out of control. In one solo practitioner's office, papers were piled everywhere and he explained,

[O]ne area that I'm very hurting is I don't have a file clerk. Someone to do the filing of the papers and you don't see that in a small practice, in a solo practice. I never heard of someone having a file clerk, and I sure don't. And that's an area that as far as management of the office, because you see what we have. We're all over the place [papers are piled everywhere], the files are constantly pulled out and left around because I don't have time in the day to tend to housekeeping, and it's a problem because if a file is missing or misplaced, it's gone for all purposes. And then if there's a critical moment when you have to retrieve it instantly and you can't, you know you're behind the eight ball. You can't respond to your party or you can't deal with the adversary. So one area that I would like to really improve is file—just physical file management of the files. My secretary does no

121. Interview No. 8 with solo attorney practicing in Manhattan, N.Y. (Jan. 31, 2001).

122. Interview No. 12 with attorney practicing in a three-lawyer firm in Nassau County, N.Y. (Feb. 6, 2001).

file work. Absolutely none. . . . Boy, you know, it's always the simple, humble things that mean a lot, you know keeping your files in order and in place, ah I can't tell you how much time I lose to files that you can't find that are misplaced and that you have to get your hands on and it's slowing you up and if someone's on the phone [laughs] you say, all right, just a minute, I'll get the file, and you pull the drawer out and it's not there. Now what do you do? What do you tell them, you know? "Call back, I don't have the"—what are you going to say to them? You can't tell them "I can't find your file." You can't say that. So that's—that is I've found to be a critical area that I don't know how to—I really couldn't, I really couldn't afford or justify a file clerk, *per se*, see that's—I really couldn't do that. . . . [B]ut it is critical and you know I wind up doing it but it takes away from the practice and I wish I could improve that.¹²³

A volume practice can also present other serious problems when a lawyer is working without sufficient support staff. As the lawyer quoted above explained,

There is a big ethical issue of the fact that you can't always prosecute your cases as diligently as you should because you tend to—I do—you tend to go with volume, you tend to have a volume practice—I think that's true, there may be a correlation there, as the firms get smaller, the volumes that they handle get larger. Cause you know they're not, you know little guys really aren't representing—they're not on big huge retainers, so don't have big fat cat clients to keep funneling the money in so you work on volume and the big ethical issue there is you can't always be pressing or really [working] each case. So a lot of things really do lie fallow where you don't attend to it for a very long time and that would be not acting diligently. . . . So you have to say that something's done before it's done, like a client says, "Well, have you done the bill of particulars yet? Have you done the papers yet? Have you filed the note of issue yet?" And sometimes you say you have, but you [laughs] really haven't, you have to redeem your statement there but that's what—that's an ethical problem because the cases get protracted that way, you just can't attend to them as diligently as you should. . . . So that's a problem.¹²⁴

Even a few solo lawyers who did not have volume practices noted the difficulty of attending to all of their cases as diligently as they should, due in part to inadequate office support staff.

123. Interview No. 19 with solo attorney practicing in Manhattan, N.Y. (Feb. 13, 2001).

124. *Id.*

Finally, life events can sometimes cause even a well-run practice to become temporarily unmanageable for lawyers, especially when they are working on their own. One of the solo practitioners I interviewed described how serious surgery had made it extremely difficult for him to keep his practice going while he was recovering, especially because he had no secretary. When asked whether he felt he had adequate support staff he replied,

A little over a year ago I blew out my knee and had reconstructive knee surgery and being alone—needless to say, things were a mess. I had my wife—my wife was literally coming in a day or two a week, one on the weekend, she would take a day off, just to write checks and pay bills [laughs]. You know, it was ridiculous. I had—no. Absolutely not [laughs]. [pause] One of the hardest things I ever went through.¹²⁵

Another solo attorney described how a client had threatened to file a grievance against her because she had failed to promptly handle a client matter after the unexpected death of the lawyer's husband. In these cases the lack of a partner, associate, or paralegal made the task of handling client matters diligently virtually impossible for periods of time, even for the most conscientious lawyers.

3. Problems Created by Office Sharing and Office Affiliations. The ways in which solo and small firm lawyers share offices and form affiliations with other lawyers also present some ethical challenges not normally present in larger firm practices. Many solo and small firm practitioners practice in office suites with other lawyers, and the use of common secretaries, common telefax machines, and shared conference and file rooms poses risks to client confidentiality when lawyers are not formally affiliated.¹²⁶ Casual conversations with suite mates and the use of speaker phones present similar kinds of risks.¹²⁷ Indeed, several of the common office practices of the lawyers who were

125. Interview No. 16 with attorney practicing in a two-lawyer firm in Nassau County, N.Y. (Feb. 9, 2001).

126. See, e.g., N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 680 (1990) [hereinafter NYCLA, Op. 680] (noting that access to files gives access to clients' confidences and secrets); Ass'n of the Bar of the City of N.Y., Op. 80-63 (1982) [hereinafter ABCNY, Op. 80-63] (noting risks of inadvertent disclosure of client confidences when secretaries of different law firms cover for one another).

127. See, e.g., D.C. Bar, Op. 303 (2001) (noting the risks when unaffiliated lawyers in office-sharing arrangements rely on each other as sounding boards for advice on legal issues).

interviewed ran counter to bar ethics opinions which counsel great caution in office-sharing arrangements.¹²⁸

The lawyers I spoke with rarely mentioned the potential problems raised by these office arrangements. One of the few lawyers who raised the issue described the problem that arises from shared filing areas as follows:

Absolutely. Now these are people I like, trust and don't ever expect to do so, but you know, I—in the course of all the things you should be doing in a small firm, I should have locks on those file cabinets. I should actually have fire safe cabinets, which I don't. I don't.¹²⁹

Only one of the lawyers I interviewed noted the possibility that papers left out on a table in a conference room used by unaffiliated lawyers can also lead to breaches of client confidentiality.

While common file areas are only a problem if an unaffiliated lawyer deliberately rifles through or reads the files of another attorney, and documents left out on a table may be relatively rare, other confidentiality breaches were more common and more likely. As noted, the lawyers I interviewed indicated that they frequently turned to other lawyers in their suites as part of their advice networks, and it was obvious that they did not always conceal the identities of their clients when they did so. For example, during one interview, I witnessed an attorney telling his suite mate, who was a partner in a separate firm, that he wanted to talk with him about how to handle a matter for a client whom he named by name. Similarly, a few of the lawyers I interviewed shared a secretary with lawyers with whom they were not affiliated, but seemingly gave no consideration to the confidentiality problems these arrangements raise. The risks of compromising confidentiality are also present when unaffiliated lawyers share a receptionist—which was a very common practice in the offices I visited—but the lawyers I interviewed seemed unconcerned about the possible risks.¹³⁰

128. For example, lawyers who actually share rooms in the same office space but who are not in the same firm have been deemed to be associated in a firm for purposes of conflict of interest rules. See, e.g., N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 715 (1999); NYCLA, Op. 680, *supra* note 126; ABCNY, Op. 80-63, *supra* note 126.

129. Interview No. 29 with attorney practicing in a three-lawyer firm in Manhattan, N.Y. (Mar. 8, 2001).

130. Some state bars have noted the need for lawyers to take steps to protect client confidentiality when employing a receptionist who works for unaffiliated lawyers. See, e.g., State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1997-150 (1997); Ky. Bar Ass'n, Op. E-417 (2001); State Bar of Wis., Op. E-00-02 (2000). This seems to be a wise approach, as there is no reason to believe that receptionists will

One of the other ethical problems that arose in office-sharing arrangements was that the lawyers often formed affiliations with other lawyers that they termed "of counsel" relationships, when they were often such loose relationships that they could not properly be described in that way. The principal characteristic of the "of counsel" relationship is "a close, regular, personal relationship," but not one of a partner or associate.¹³¹ Office sharing in itself, however, does not suffice to permit the representation that a lawyer is "of counsel," and it must mean more than an occasional collaborative effort among otherwise unrelated lawyers or firms.¹³² Nevertheless, many of the lawyers I interviewed held themselves out as having "of counsel" relationships with a variety of lawyers both in their offices and outside their offices, even though they consulted only infrequently and did not have a close, regular relationship.

Some of the reasons for extending these "of counsel" titles to lawyers with whom they had minimal contact include making the practices appear larger to potential clients and enabling the "of counsel" lawyers to obtain more favorable health or malpractice insurance. One lawyer who employed two associates in his office and had occasional relationships with four or five other off-site lawyers explained that he struggled with how to present all the names on his letterhead:

I have decided to remove all names from the letterhead after much thought. Part of it was that it was just changing too often and part of it was OK, there's [lawyer's own name], line. Two associates, line. Four or five "of counsels." Looked funny. Even if I put the "of counsels" over here. I'd rather people imagined the size of the firm at this point and when I changed the name from "Law Office of [lawyer's name]" to "[lawyers' name] and Associates" about a year and half ago, I wanted people to understand I'm not a solo guy any more. And so there was a temptation to keep putting the names on but no, I don't—and so when I market always I'll tell people this is a nine lawyer firm and you know only if people start asking in more detail do I explain,

automatically be mindful of confidentiality concerns. Indeed, as I was sitting in one reception area waiting to interview a lawyer who shared office space with other lawyers, I overheard a receptionist telling her coworkers about a woman who was married to a notorious member of organized crime who had come in to consult a divorce lawyer that day.

131. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-357 (1990) [hereinafter ABA, Formal Op. 90-357]; Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 1995-8 (1995) [hereinafter ABCNY, Formal Op. 1995-8].

132. ABA, Formal Op. 90-357, *supra* note 131; ABCNY, Formal Op. 1995-8, *supra* note 131.

you know how the relationship works. We do have written agreements with each of the "of counsel."¹³³

However, one of the problems with the practice, in addition to potentially misleading the public,¹³⁴ is that it encourages lawyers to communicate more freely with other lawyers—both those who are referred to as "of counsel" and those who are not—without adequately safeguarding confidentiality or considering conflict of interest rules.

4. *Conflicts of Interest.* The office arrangements and affiliations described by the lawyers I interviewed presented potential—yet mostly unrecognized—conflict of interest problems. Most of the lawyers I interviewed had no formal system for checking conflicts of interest among their clients, relying on an "in your head" method when new clients sought representation. The "mental checklist" type of response was typical when lawyers were asked about their conflicts-checking procedures:

It's in your head check, which is OK because we know—senior moments aside—[laughs] the type of work we do is not generally such that it's going to get us into a conflict of interest situation because so many of the clients are individuals with a products liability case. So it's not a situation where conflicts come up a lot. They have occasionally come up more typically when multiple people come to you that ask you to represent them and you see a potential conflict among the people that are there, but it's not generally a situation where you know you represented one side at one time and you're representing another side on the other. It doesn't typically happen because of the nature of the work we're doing.¹³⁵

Informal. Me. I know every one of my clients. I know who their families are, having grown up in the community, to a large extent. I know the interactions between different

133. Interview No. 29 with attorney practicing in a three-lawyer firm in Manhattan, N.Y. (Mar. 8, 2001).

134. New York Code of Professional Responsibility DR 2-102(B)-(C) prohibits the use of misleading firm names. N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-102(B)-(C) (codified at N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.7 (2003)). Nevertheless, it is extremely rare for lawyers to be publicly disciplined for using misleading firm names or misleading the public about the size of the firm, and no cases were found in New York in which lawyers were disciplined for the misuse of the "of counsel" appellation. *But see In re Balcacer*, 740 N.Y.S.2d 192, 192–93 (App. Div. 2002) (imposing discipline on solo practitioner who advertised in a manner suggesting that he had several attorneys associated with him).

135. Interview No. 10 with attorney practicing in a six-lawyer firm in Manhattan, N.Y. (Feb. 1, 2001).

areas and different persons so I would know if there was a conflict.¹³⁶

These practices are at odds with New York's formal bar rule requiring that a law firm "shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements" in order to avoid conflicts.¹³⁷

Nevertheless, most of the lawyers I interviewed employed erratic and informal conflicts-checking procedures even when they worked in law firms with other lawyers. These lawyers felt that they knew what their partners or associates were working on or informally canvassed their colleagues as new matters came in. The following responses to questions about procedures for checking for conflicts of interest were common:

In a big firm you have them all the time. In a firm this small it's very rare. We get a lot of matters because of conflicts with other lawyers. If I think there might be a conflict with other lawyers in the firm, there's three other lawyers, and [I] just walk down the hall and just ask them. But it really is not a significant issue. It just doesn't happen.¹³⁸

Only informal. There are only two lawyers here, we pretty much know who all of the clients are. There is nothing formal at all. Look, my partner sits in the next office. Basically unless we both close our doors, I can hear who he is talking to, and he can hear who I am talking to. So, it's really just very informal. Also, since we have different types of practices. He practices in one area, and I practice in another. Clearly, I know if somebody came in and wanted to sue [his partner's major corporate clients], we are not touching that.¹³⁹

136. Interview No. 21 with attorney practicing in a two-lawyer firm in Nassau County, N.Y. (Feb. 14, 2001). These responses were similar to Susan Shapiro's findings based on interviews that she conducted of Illinois lawyers. She labeled as "ostriches" those lawyers who had no conflicts-checking procedures and believed there were rarely conflicts problems. Susan P. Shapiro, *When You Can't Just Say "No": Controlling Lawyers' Conflicts of Interest*, in SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW 322, 331-33 (Patricia Ewick et al. eds., 1999). She described as "elephants" those who run through a mental checklist of their clients to determine whether there is a conflict. *Id.* at 333-34.

137. N.Y. CODE OF PROF'L RESPONSIBILITY DR 5-105(E) (codified at N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.24(E) (2003)). This disciplinary rule became effective May 22, 1996. Ass'n of the Bar of the City of N.Y., Formal Op. 2003-03 (2003).

138. Interview No. 7 with attorney practicing in a three-lawyer firm in Manhattan, N.Y. (Jan. 31, 2001).

139. Interview No. 34 with attorney practicing in a two-lawyer firm in Queens, N.Y. (Mar. 13, 2001).

Only three of the lawyers reported formal conflicts-checking procedures that included the use of computer software.

Some associates in the firms reported even less conflict checking than the partners described. When asked about conflicts checking, one associate responded,

I've wondered about that. [At my previous firm], we had a little clipboard. Each lawyer would check off everything if they recognized anything and if they had a conflict, they'd know about it. That was that many lawyers, there was a lot more to just keep in your head. [The partner] has never asked me about new clients and I've often wondered that he probably should have a little bit, you know, I usually don't find out about a new client until like three days later. So there should be a little something about conflict checking. I have been around for ten years, you know, and I do know people.¹⁴⁰

Similarly, another associate who had worked in a firm almost four years, when asked about conflict-checking procedures replied, "I'm not certain how they actually go about it, so I believe it's very informal."¹⁴¹

Significantly, the lawyers I interviewed did not report checking with "of counsel" lawyers who worked in their offices even though "of counsel" lawyers are considered part of the firms with which they are affiliated for conflicts of interest purposes.¹⁴² One lawyer who was "of counsel" to a six-lawyer law firm and who had worked in the firm's offices for eleven years had never been consulted about possible conflicts. He added,

They may have a written procedure. I haven't been asked to fill out any form to avoid conflicts of interest. Being a small local firm, it's probably easier to detect something like that than it might be in a larger firm, although I'm not sure. Occasionally I've worried about that.¹⁴³

Not surprisingly, then, the lawyers I interviewed never consulted with their off-premises "of counsel" to determine

140. Interview No. 31 with attorney practicing in a three-lawyer firm in Nassau County, N.Y. (Mar. 11, 2001).

141. Interview No. 30 with attorney practicing in a three-lawyer firm in Manhattan, N.Y. (Mar. 8, 2001).

142. See *Nemet v. Nemet*, 491 N.Y.S.2d 810, 811 (App. Div. 1985); ABCNY, Formal Op. 1995-8, *supra* note 131 (noting that if the "of counsel" designation is employed for purposes of analyzing conflicts of interest, "of counsel" and the firm are one unit).

143. Interview No. 11 with attorney practicing in a six-lawyer firm in Nassau County, N.Y. (Feb. 6, 2001). This mirrors Susan Shapiro's report that in small Illinois firms, "[m]any firms and of counsels do not have a clue about the caseload of their counterpart." SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE 223 (2002).

whether those "of counsel" lawyers represented clients with interests adverse to their own clients. As one sole proprietor with several off-premises "of counsel" relationships responded when asked about whether he had conflicts-checking procedures that included checking with his "of counsel" lawyers,

The honest answer is, not really. However, you know cause my feeling is—look, [lawyer's name] is of counsel to three major law firms and I guarantee you, they don't consult with him on every new client and then say, "[H]as any of these other firms you worked with [had] a conflict because you're of counsel to multiple firms?"¹⁴⁴

Similarly, even though lawyers who share space may be deemed in some cases to be in the same firm for conflicts of interest purposes,¹⁴⁵ none of the lawyers I interviewed reported checking with their suite mates to determine whether their clients had adverse interests that would require disqualification under conflicts rules.

Most of the lawyers reported that client conflict problems arose infrequently in their practices, estimating that they encountered such problems less than once a year. A minority of the lawyers indicated that they encountered conflicts more frequently in the areas of family law, entertainment law, personal injury (driver-passenger conflicts), and when the lawyers represented people within a local ethnic community. One lawyer who represented an ethnic community in Nassau County explained,

You have people who come in—clients who come who say, listen, I need to buy, I want to buy this business, I'm buying it from my friend. It's very easy. We're best friends. You know, we've known each other for 45 years, our kids hang out together. We're the best of friends. But we'd like you to prepare the paperwork for both us. OK. What do you mean I need another attorney? Why would I need another attorney? I mean we're friends. Everybody knows what we're doing here. We're not trying to hide anything. There's no problem. I've found that friends can—that friendships can be destroyed very quickly and usually very precipitously after certain events and so, yeah, you're faced with opportunities like that almost every week, if not every month. When somebody comes in, oh, I just want to transfer

144. Interview No. 29 with attorney practicing in a three-lawyer firm in Manhattan, N.Y. (Mar. 8, 2001).

145. See NYCLA, Op. 680, *supra* note 126 (noting that unaffiliated lawyers who share offices and have access to one another's files may be treated as one firm for conflict of interest purposes).

the deed to my house to so-and-so. What's the problem? What do you mean you have to do a title search? Why?¹⁴⁶

Conflicts arising from transactions between family members were also reported.

A few of these lawyers represented parties on both sides of a dispute after obtaining conflict waivers from both parties, or the lawyer represented one party while the other side was unrepresented. For example, more than one lawyer who did matrimonial work indicated that she would sometimes represent both sides in an uncontested divorce:

Sometimes. Sometimes with the consent from both sides, but a couple will come and say, "You know what, it's been three years, it's just not working out." They have no kids, we'll divide up the property, you know they basically have done everything and it's just a question of the lawyer doing the paperwork and getting it filed.¹⁴⁷

This joint representation was not reported to be a common practice among the matrimonial lawyers I interviewed, although it was somewhat more common for them to represent a client against an unrepresented spouse. Larger studies also suggest that divorce is an area in which it is not unusual for only one lawyer to handle a divorce for a client while the other spouse is unrepresented, notwithstanding the obviously adverse interests of the parties and the problems this presents for the lawyer.¹⁴⁸

The practice of representing only one side when the other side is unrepresented also occasionally occurs in some commercial contexts. For example, a corporate lawyer described such a situation:

I'll tell you, I'll give you the most common conflict I deal with. I represent investment banks and venture capital. And every corporate lawyer has this problem. Every once in awhile they say, OK, we—I represent the investors in these deals, but once in a while they say, "You know this company that we're about to invest in doesn't have a good lawyer, we want you to be their lawyer." And of course I'd say yes, but then I don't represent the investors in that deal. They

146. Interview No. 21 with attorney practicing in a two-lawyer firm in Nassau County, N.Y. (Feb. 14, 2001). For further discussion of the types of conflicts that arise for lawyers who represent ethnic communities, see SHAPIRO, *supra* note 143, at 77–78.

147. Interview No. 15 with attorney practicing in a five-lawyer firm in Manhattan, N.Y. (Feb. 9, 2001).

148. MATHER ET AL., *supra* note 33, at 43–45; SHAPIRO, *supra* note 143, at 83–85 (describing how an attorney facing an unrepresented spouse in an "amicable divorce" can compromise his or her client's position on important matters, such as child support, by consciously or unconsciously trying to represent both spouses).

either get somebody else or sometimes they just don't have a lawyer, frankly. If they're experienced, capable venture capital investors, they can make that decision on their own. So a venture client of mine said, "Hey, we really want you to help this company, it would be good for everybody, you'll still draft the documents as if you were our lawyer, but you're not and we'll go without a lawyer." And I know they're very sophisticated. So I'm representing the company and I wasn't—I didn't negotiate the deal. The term sheet is agreed upon and signed before they ever called me. So the substance of the business deal I was not involved in. So now I have to draft the documents. And I said to my associates, "Look we're the company's lawyers. And you write it like the company's lawyers." And they may not like it and they may have to comment on it and even though that's where our bread is buttered, they have to understand that our job is to zealously represent this company. And we're not going to be obnoxious about it, we're not going to go overboard, we're not going to, you know—our client the company doesn't have any leverage anyway, because they're the money and he needs it, but we clearly drafted a much more favorable company document. They were not annoyed. They understood we had to do it. They came back and said hey, you know, here's fifteen things that you had in our other deal that we want them. And we changed them.¹⁴⁹

What was often striking about these accounts was that the lawyers did not seem to recognize that both parties probably obtained somewhat less favorable deals than they might have obtained if both sides had been represented by separate counsel.

When the lawyers I interviewed identified a nonwaivable conflict among clients, some of them routinely referred one party to a lawyer who provided cross-referrals of his conflicts. This practice was especially common among personal injury lawyers. As one associate explained the firm's relationship with another personal injury firm,

They refer conflicts to us, we refer conflicts to them, but usually that's done before it gets to me, that's what I'm saying. So it's probably more than I know, but I would say maybe about 10%, maybe a little less, of our cases [are] conflicted out one way or the other. Either we got it from somebody or we conflicted somebody out.¹⁵⁰

149. Interview No. 29 with attorney practicing in a three-lawyer firm in Manhattan, N.Y. (Mar. 8, 2001).

150. Interview No. 12 with attorney practicing in a three-lawyer firm in Nassau County, N.Y. (Feb. 6, 2001). For a detailed discussion of the referral networks of personal injury lawyers, see Parikh, *supra* note 31, at 117–70.

Susan Shapiro, in her study of Illinois lawyers, has identified the even more troubling practice of routinely referring individuals who present a conflict to an office mate with whom the lawyer is not formally affiliated.¹⁵¹ Indeed, she found that lawyers who share office space sometimes do not formally affiliate with one another precisely so they can avoid conflicts of interest while keeping all of the legal fees in-house.¹⁵² This practice of routine cross-referrals of conflicts raises questions about whether the lawyers representing parties with adverse interests can be truly independent and zealous advocates for their clients.

5. *Escrow.* Escrow account violations are potentially a sensitive subject for lawyers because the mishandling or improper taking of client money from those accounts runs counter to public notions of morality and violates one of the most well known of the bar rules. I doubted whether any lawyers would admit they had improperly maintained client funds, and I therefore did not seek to determine whether the lawyers had, in fact, ever violated those rules. Nevertheless, any effort to understand the ethical world of solo and small firm practitioners cannot ignore this topic because much public discipline is imposed due to these violations.¹⁵³ In this study, I therefore attempted to explore what these lawyers knew about the rules governing the maintenance of client escrow accounts as a first step toward understanding their compliance with these rules.

Before describing the responses of these lawyers, it is important to note that the rules for maintaining clients' funds are detailed and not all self-evident. New York lawyers are required to maintain funds that they receive in a fiduciary capacity from a client or third party in a segregated account or in an Interest on Lawyer Account (IOLA).¹⁵⁴ IOLA accounts are to be used when the funds are too small or are expected to be held for too short of a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client or beneficial owner.¹⁵⁵ There are specific notification and record-keeping requirements concerning these accounts,

151. SHAPIRO, *supra* note 143, at 219–21.

152. *Id.* at 221.

153. See ILL. ARDC REPORT, *supra* note 18, pt. II.B, chart 8 (recording that the “[i]mproper handling of trust funds” was the second most common type of attorney misconduct); MICH. ATT’Y DISCIPLINE REPORT, *supra* note 18, at 8 (reporting that a mishandling of funds was the second largest category of discipline). Refer to notes 162–63 *infra* and accompanying text.

154. See N.Y. JUD. LAW § 497(4) (McKinney Supp. 2004).

155. *Id.* § 497(2).

which include, *inter alia*, the requirement that the lawyer promptly notify the client or third party of the receipt of funds in which the client or third party has an interest and the requirement that the records be maintained for seven years.¹⁵⁶

The lawyers I interviewed all professed to be aware of the need to safeguard clients' money, but not surprisingly, the younger attorneys who did not have responsibility for maintaining client escrow accounts knew little about the specifics of the rules. Some of the lawyers who had responsibility for maintaining the accounts said they learned what to do by asking mentors, suite mates, or relatives, or by going to their banks and seeking assistance in setting up the accounts. Relatively few said that they learned the rules in law school or through bar-sponsored activities.

While virtually all of the lawyers noted that they kept their bank records for the prescribed seven years or "forever," it was unclear whether they understood all of the rules governing escrow accounts. As one lawyer noted, "the actual setting up of the account wasn't the problem, it was making sure you didn't get into trouble."¹⁵⁷ Another lawyer, who had responsibility for maintaining these accounts, complained that the rules were complex and difficult to understand:

[T]here is no set rule about how to run your escrow account. It's kind of like everybody gets self-policed. I think that's very dangerous. You know I just very recently created a new account . . . So I created this closing account. And the closing account's specifically for real estate closings for the week and I fund it by moving the—from my IOLA account into the funding account . . . There's no step or rule—no one gives you a pattern—saying this is how you should manage your account. No one does that. Everybody's afraid to talk about it or go near it because they're afraid of regulation of it. OK. And I think that's a problem and I think that somehow someone should look into it. That's not taught in law school. It's not taught any place . . .

But you know what, you make mistakes. I did that—I can go sometimes three months without balancing my check—I mean I go crazy finding some stupid mistakes that we made. You know, there really is no way—no one says what's the right practice—I mean how many lawyers get in trouble because of their escrow accounts? Probably the single most

156. N.Y. CODE OF PROF'L RESPONSIBILITY DR 9-102(C)–(D) (codified at N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.46(C)–(D) (2003)).

157. Interview No. 40 with solo attorney practicing in Manhattan, N.Y. (Mar. 22, 2001).

thing that lawyers get in trouble for. Nobody sets up a pattern for it. And there really should be some way of saying, "This is what we want you to do." Some format. This is how you should be keeping your account. But nobody wants to.¹⁵⁸

The lawyers' responses indicated that they do not get much on-the-job instruction concerning the maintenance of escrow accounts. As one lawyer recalled, the advice he received from his mentor, who taught him how to set up the account was simply, "Don't fuck with your escrow account. Never touch it."¹⁵⁹ Another lawyer noted,

I've had three former associates lose their tickets on stupid things and in my heart of hearts if I'm—I never sat them down and when they were putting their office—talk about not being a good mentor. I taught them really how to do a great job in the courtroom. I never told them that there's no such thing as immediate credit on a check and if your check goes into the escrow account and the bank says they're giving you immediate credit, they're really drawing off somebody else's funds and commingling funds is a lose-your-ticket kind of offense and people only hear about it if a check bounces and if you have [a] reporting bank, which every small office does, it never happens until your banker's on vacation. And you get immediate credit from the branch manager who knows that they give you immediate credit, and they cash an escrow check, and then it bounces, and your friends who's there who would never let your escrow bounced check go through because that's automatically reported by banking [inaudible] and the guy loses his ticket. Suspended three years. I testified for him. And you know, and I—in my heart of hearts, I don't think he did anything wrong.¹⁶⁰

The associates in law firms admitted that they knew virtually nothing about the rules governing the maintenance of accounts for their clients. When I asked one associate to explain what he knew about the rules governing the maintenance of escrow accounts he replied, "Yeah, that's all I know. You need an escrow account."¹⁶¹

158. Interview No. 28 with attorney practicing in a four-lawyer firm in Brooklyn, N.Y. (Mar. 1, 2001). Although these rules may be no clearer to lawyers in large firm practices, those lawyers may be insulated from the need to master the rules by bookkeepers or managing partners who devote time to insuring that they fully understand the rules.

159. *Id.*

160. Interview No. 24 with attorney practicing in a five-lawyer firm in Manhattan, N.Y. (Feb. 17, 2001).

161. Interview No. 17 with attorney practicing in a four-lawyer firm in Rockland County, N.Y. (Feb. 12, 2001).

Although escrow account violations are not the largest source of complaints against lawyers, they are viewed as the most egregious violations of client trust, and therefore result in the most severe discipline.¹⁶² Because the discipline imposed for failure to properly maintain escrow accounts is often public in New York, the lawyers I interviewed perceived, incorrectly, that escrow account violations were the most common reason for the imposition of lawyer discipline.¹⁶³ Although this perception might—theoretically—cause lawyers to fully familiarize themselves with all of the relevant rules, the reality seems otherwise. The reported cases suggest that client money is often deposited in segregated accounts¹⁶⁴ but that discipline is imposed, at least in part, for violations of rules about which lawyers may be unaware, such as the client's right to receive interest on funds in an escrow account,¹⁶⁵ the prohibition against depositing a lawyers' funds in an escrow account,¹⁶⁶ and the need to provide a client with a formal accounting before taking legal fees and costs from an escrow account.¹⁶⁷

Of course, ignorance is not the only reason for violations of the rules governing the maintenance of escrow accounts. Pure

162. See, e.g., *In re Wilson*, 409 A.2d 1153, 1157–58 (N.J. 1979) (establishing the rule that “strictest discipline” be imposed in misappropriation cases and that “mitigating factors will rarely override the requirement of disbarment”); *In re Stevens*, 741 N.Y.S.2d 536, 541 (App. Div. 2002) (noting the “Court’s policy of disbarring attorneys who intentionally misappropriate funds”); *In re Tepper*, 730 N.Y.S.2d 498, 500 (App. Div. 2001) (finding a two-year suspension appropriate for “escrow account bookkeeping irregularities and careless and non-venal invasions of client funds”); ILL. ARDC REPORT, *supra* note 18, pt. II.D, chart 15 (showing that disbarment was imposed as a penalty more often for improper management of client or third party funds than for any other attorney violation); Lieberman, *supra* note 14 (noting that “failure . . . to adhere to the basic principles of client/fiduciary trust accounting is the single major reason today why lawyers are disbarred or suspended”).

163. This misunderstanding about the most common reasons for discipline is due in part to the fact that most discipline imposed in New York is private. N.Y. STATE BAR ASS’N COMM. ON PROF’L DISCIPLINE, 2001 ATTORNEY DISCIPLINE REPORT 3 tbl.1 (2002).

164. My review of fifty New York cases in which lawyers were disciplined for escrow account violations revealed that only a minority of the violations in those cases were for failure to place client funds in segregated accounts.

165. See *In re Gross*, 723 N.Y.S.2d 51, 52 (App. Div. 2001); *In re Slavin*, 622 N.Y.S.2d 747, 748–49 (App. Div. 1995); *In re Schreibman*, 621 N.Y.S.2d 153, 154 (App. Div. 1995); *In re Collins*, 607 N.Y.S.2d 999, 999 (App. Div. 1994) (imposing discipline based in part on a lawyer retaining the interest owed on escrow funds in violation of New York Code of Prof’l Responsibility Rule 9-102).

166. Indeed, one of the lawyers with whom I spoke mentioned that he kept “extra” money in the escrow accounts—presumably his money—in order to ensure that his escrow account was never underfunded. Nevertheless, this violates the rules concerning the maintenance of client funds in New York. See *In re Sloan*, 732 N.Y.S.2d 296, 297 (App. Div. 2001); *In re Nicotera*, 702 N.Y.S.2d 425, 425–26 (App. Div. 2000); *In re Imperatore*, 630 N.Y.S.2d 87, 88 (App. Div. 1995).

167. *In re Vaughn*, 582 N.Y.S.2d 145, 146 (App. Div. 1992).

venality accounts for some violations. In other cases, lawyers may not have the time or support staff to comply with the rules.¹⁶⁸ In addition, the economic precariousness of some solo and small firm practices tempts some lawyers to "borrow" from escrow accounts to pay firm operating costs or other expenses.¹⁶⁹ If this occurs, then these lawyers are likely to be discovered because New York banks are required to report to the Central Registry at the Lawyers' Fund for Client Protection when an overdraft in a client escrow account occurs.¹⁷⁰

V. RESOLVING ETHICAL PROBLEMS IN PRACTICE

As previously noted, the solo and small firm practitioners I interviewed, like other lawyers, do not seem to recognize many of the ethical issues that arise in practice.¹⁷¹ In some cases, this may be due to ignorance of formal bar rules.¹⁷² In other cases, however, this may be because the lawyers learn and conform to informal bar norms that prevail in the communities in which they practice. Many of those informal norms are consistent with formal bar rules, and lawyers may cease to think of their routine conduct in terms of the formal rules. Occasionally, however, lawyers believe that by acting in accordance with accepted informal norms, they are doing nothing "unethical," and may

168. Many of the lawyers I interviewed indicated that they did not employ a bookkeeper even on a part-time basis. A review of the disciplinary decisions suggests that in some cases, lawyers would not have encountered some of the ethical charges they faced if they had had a bookkeeper to maintain the financial records required by New York law. See, e.g., *In re Kay*, 755 N.Y.S.2d 315, 316 (App. Div. 2003); *In re Ford*, 732 N.Y.S.2d 115, 115-16 (App. Div. 2001).

169. See, e.g., STATE BAR OF CAL. REPORT, *supra* note 15, at 18.

170. See N.Y. COMP. CODES R. & REGS. tit. 22, § 1300.1(e) (2003). The Lawyers' Fund will then report this information to the appropriate disciplinary committee. *Id.* § 1300.1(g). An audit then follows and other violations of client escrow rules may be detected. See Victoria Rivkin, *Steps for Avoiding Disciplinary Committee Complaints*, N.Y.L.J., Sept. 25, 2000, at 1 (reporting that an attorney bouncing a check in an escrow account "face[s] an automatic audit by the disciplinary committee covering six months worth of financial records").

It should be noted, however, that while solo and small firm practitioners may be more likely to be caught with overdrafts in their escrow accounts, this does not mean that larger firm lawyers comply strictly with the rules governing those accounts. It may simply be that larger firms—which may maintain more money in escrow accounts or may have more cash available to cover "problems"—may be less likely to bounce checks. And in some jurisdictions, larger firms may be less likely than solo attorneys to be targeted for random audits. See, e.g., Moore, *supra* note 23 (discussing how New Jersey's program for randomly auditing law firms to uncover ethical violations disproportionately selected solo practitioners for review).

171. Refer to note 26 *supra* and accompanying text; refer also to Part IV.A *supra*.

172. The term "formal bar rules" is used here to encompass both the written lawyers' rules of professional responsibility and any additional court regulations, statutes, or cases governing the professional conduct of lawyers.

cease to consider the fact that those norms conflict with formal bar rules.¹⁷³

There is evidence that lawyers in large law firms learn certain informal norms from their firm colleagues.¹⁷⁴ But when lawyers practice on their own or in small firms that can often be characterized as loose associations of practitioners, what is the source of their understanding of those informal norms?

In their study of divorce lawyers in Maine and New Hampshire, Lynn Mather, Craig McEwen, and Richard Maiman described the ways in which the lawyers, who were primarily solo and small firm practitioners, gained their understanding of informal bar norms. They identified the several communities of practice from which those lawyers learned informal norms, including the lawyers whom they oppose in divorce cases, other lawyers who practice divorce law, the lawyers in their firms, and the lawyers who work within the same geographic area.¹⁷⁵ One of their insights about the interplay between informal norms and what they call “formal [i.e., written] norms” is quoted here:

[f]ormal rules of professional conduct clearly do not determine the behavior of divorce lawyers in their everyday practices. Nonetheless, the rules matter both in their aggregate as a representation of a collective sense of professional responsibility and in their specific guidance—when they provide it—about how to behave under certain circumstances. Given the frequent ambiguity and inconsistency of such rules . . . it should not be surprising that knowledge, interpretation, and understanding of them vary individually and collectively in response to the demands and incentives of the workplace. But the fact of variability does not deny the simultaneous reality of a loose

173. For example, unaffiliated lawyers who work in an office suite may adopt the informal norm of discussing client matters with their suite mates for the purposes of obtaining advice. Refer to Part IV.B.3 *supra*. Although this advice may directly benefit their clients, the lawyers seemingly do not consider that they are revealing client confidences in violation of the formal bar rules.

174. See, e.g., 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, 247–49 (2000); Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773, 778–79 (1998); Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 826–27 (1998); Suchman, *supra* note 5, at 862–67 (describing the mechanism of imparting informal norms via socialization).

175. MATHER ET AL., *supra* note 33, at 41–45, 47–48, 56–61.

but meaningful professional community of lawyers with both formal and informal norms.¹⁷⁶

Thus, before considering how lawyers in solo and small firms engage in ethical decision-making, it is useful to state the obvious: Informal bar norms are often the outgrowth of formal bar rules and so compliance with formal rules may occur—consciously or unconsciously—when a lawyer conforms to certain informal bar norms. For example, the practice of criminal defense attorneys not to inquire whether a client actually committed the crime charged enables the attorney to comply with the formal bar rule of not “knowingly” submitting false evidence to the tribunal.¹⁷⁷ In other cases, however, the informal norm may be inconsistent with formal bar rules, such as the practice of attorneys paying for the costs and expenses of litigation,¹⁷⁸ notwithstanding formal bar rules that prohibit such payments.¹⁷⁹ In those cases, lawyers who follow the informal bar norm may not think of their conduct as “ethical decision-making” or, if they do, they are not concerned with compliance with formal bar rules, which they may view as lacking legitimacy or any “moral” component.

It is also important to note that I am using the term “decision-making” in its broadest sense. As the preceding discussion suggests, at times lawyers’ conduct proceeds almost unconsciously and lawyers are guided by informal norms that have been so internalized that there is no conscious realization that there is any ethical issue to “decide.” At other times, lawyers realize that an ethical issue is raised that must be decided, and on those occasions their decision-making more closely resembles the other types of more conscious and systematic decision-making in which lawyers routinely engage in their professional lives.¹⁷⁹

In this Part, I describe the process by which the lawyers I interviewed learned to resolve ethical problems as new lawyers and the means by which they determine how to resolve ethical issues as they proceed through practice. I also describe their

176. *Id.* at 47.

177. See, e.g., KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 103–11, 122–23 (1985).

178. See, e.g., Zacharias, *What Lawyers Do*, *supra* note 7, at 999–1000 & 1000 n.136 (noting that class action and plaintiffs’ attorneys often violate the rule “prohibiting lawyers to pay for the costs and expenses of litigation” because of the need to front litigation costs for contingency fee clients).

179. See, e.g., Mark Neal Aaronson, *Thinking Like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1, 10–11, 24–29 (2002) (detailing the decision-making techniques taught to and used by lawyers).

conscious use of formal rules to help them resolve ethical problems, as well as their attitudes toward the disciplinary process, and how those attitudes may affect their compliance with formal bar rules.

A. *The New Lawyer and Ethical Problems*

New lawyers entering practice learn to resolve ethical problems by looking to other lawyers. As noted, there is evidence that lawyers in solo and small firm practices learn informal bar norms from overlapping communities of practice, including lawyers in their own offices, lawyers against whom they litigate or negotiate, and other lawyers in their practice communities.¹⁸⁰ For example, divorce lawyers in Maine and New Hampshire have been found to learn from one another and conform to the norm of the "reasonable" divorce lawyer, who rejects overzealous advocacy and seeks a fair result for both parties.¹⁸¹ Some Texas personal injury lawyers avoid television advertising, which they view as offending some of the norms of their professional community and fear may result in the loss of lawyer referrals of business.¹⁸² Rural lawyers in Missouri learn the bar norm of "reciprocity," which at times outweighs their willingness to engage in zealous advocacy on behalf of their clients.¹⁸³

Similarly, the lawyers I interviewed learned informal bar norms through their communities of practice, starting with observations of other lawyers and conversations within their law offices.¹⁸⁴ Indeed, their office-sharing arrangements often create rich social environments from which they learn a great deal during their early years in practice.¹⁸⁵ Some of the newer lawyers described lessons they had absorbed that related to ethical decision-making through observation or overhearing other lawyers talk, such as learning the importance of only notarizing a document when the signatory was actually present. Other lawyers reportedly relied heavily on their office mates for their understanding of ethical rules and bar norms, regardless of

180. See, e.g., MATHER ET AL., *supra* note 33, at 56–63.

181. *Id.* at 114–15.

182. See Daniels & Martin, *That's 95% of the Game*, *supra* note 34, at 20, 26.

183. Donald D. Landon, *Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice*, 1 AM. B. FOUND. RES. J. 81, 83, 108–11 (1985).

184. This is not surprising. Large firm lawyers also seem to learn certain norms primarily through observation and other lawyer "talk." For example, a study of large firm litigators suggests that these lawyers learn aggressive litigation behavior as much through observation of firm colleagues and stories within their firms as through direct discussion or instruction. Sarat, *supra* note 174, at 826–27.

185. Levin, *Preliminary Reflections*, *supra* note 29, at 889.

whether they were formally affiliated. Indeed, even lawyers who entered solo practices immediately after law school seemed to learn a great deal from more experienced practitioners with whom they shared office space. For example, one such lawyer recalled the following about an attorney with whom he shared space during his early years in practice:

He said always call your clients back, and this is the secret of a small—you know, one of the great problems that people have with lawyers is that they don't make calls back. Of course they don't tell you that they call forty-two times, and you know that if you don't call forty-two times back that that—but you know, always make sure that you communicate with your client and I follow and practice that.¹⁸⁶

Another lawyer relayed how he had learned from more experienced practitioners while sitting in a bar at the end of the day:

But these guys would hang out at the . . . bar across from Federal Plaza, which has the greatest Nestle pie in the world, and I used to eat my Nestle pie and they would tell war stories and I would sit there and listen. And if you questioned them, they will give away the store. They will tell you quite frankly how certain things are done. And that's how I learned.¹⁸⁷

Although many of the early lessons are acquired through listening and passive observation, when new lawyers confronted serious ethical issues such as client fraud, some of them talked about reaching out to mentors or advice networks for guidance. For example, one lawyer told the story of running down the hall to consult with her partner, who was also her father-in-law, when she suspected that a long-time firm client had manufactured a personal injury claim. A solo practitioner explained that he was about to call a lawyer in his advice network to talk about a client who wanted to testify falsely at an upcoming criminal trial. Not surprisingly, sometimes the advice the lawyers received conformed with formal bar rules and sometimes it did not. For example, a solo practitioner described a situation in which the parties wanted to pay cash under the table in a real estate transaction. In that case she spoke separately to

186. Interview No. 28 with attorney practicing in a four-lawyer firm in Brooklyn, N.Y. (Mar. 1, 2001).

187. Interview No. 35 with solo attorney practicing in Suffolk County, N.Y. (Mar. 14, 2001).

three lawyer-relatives in her advice network about how to handle the closing:

Q: OK, and what did they tell you?

A: That that's just how it works sometimes. Just make sure that you're not in the room where the cash is happening, you know? Go get a cup of coffee.¹⁸⁸

This exchange raises interesting questions about the effect of organizational practice form on ethical advice-giving and ethical decision-making. In other words, it is possible that advice-giving may be more conservative within law firms, where partners share liability and reputational interests, than it is within office-sharing arrangements or informal advice networks. Further research would be needed to determine whether differences in advice-giving can be traced to the organizational forms of practice.

It appears that the conclusions that these lawyers reach the first few times they confront a particular ethical problem may provide a template of sorts that is used throughout their legal careers absent an extraordinary event, such as a disciplinary complaint, that may cause them to reconsider their practices. For example, some older lawyers described a stock response to ethical issues that was developed by watching a mentor or employer during their early years in practice. One lawyer described his response to what he said was the weekly problem of workers' compensation clients who were interested in defrauding insurance carriers: "My policy, which I inherited from my father, is basically to throw them out immediately, and I do. They always manage to find someone that will represent them but we won't."¹⁸⁹ Another lawyer, who had been closely mentored during his first three years in practice, recounted the lesson that he still followed that he should not knowingly "overlook something" in a real estate transaction because his mentor had told him he should never "mortgag[e] [his] future."¹⁹⁰

As these responses suggest, early experiences in practice may have a profound impact on ethical decision-making and

188. Interview No. 1 with solo attorney practicing in Westchester, N.Y. (Jan. 23, 2001). This practice violates N.Y. Disciplinary Rule 7-102(A)(7), which prohibits a lawyer from assisting a client in conduct that the attorney knows to be illegal or fraudulent. N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(7) (codified at N.Y. COMP. CODES R. & REG. tit. 22, § 1200.33(A)(7) (2003)).

189. Interview No. 35 with solo attorney practicing in Suffolk County, N.Y. (Mar. 14, 2001).

190. Interview No. 28 with attorney practicing in a four-lawyer firm in Brooklyn, N.Y. (Mar. 1, 2001).

behavior. For example, it appears that there are some ethical challenges—such as cash under the table in a real estate transaction—to which these attorneys seem to respond differently depending upon their early experiences with the problem. Although it is possible that the lawyers' own personal morality also affects their responses to this issue, at least some of the lawyers I interviewed indicated that their personal morality did not play much of a role in their responses to this problem. Indeed, one young lawyer who self-described herself as a "good person" and who claimed, "if something doesn't feel right, I'm not going to do it,"¹⁹¹ routinely looked the other way when cash was passed under the table in real estate transactions. Regardless of how lawyers arrive at their initial determination of how to handle an ethical challenge, the responses of the lawyers I interviewed suggest that once the "answer" to particular ethical issues is determined, it often continues to guide the lawyer in practice.¹⁹²

B. Experienced Lawyers and Ethical Advice-Seeking

The experienced lawyers I interviewed indicated that they worked alone to resolve most ethical issues they encountered. This may be explained, in part, by the fact that when the issue is one that arises frequently in practice, the experienced lawyer does not feel the need for help in deciding how to proceed because she has previously decided on the appropriate response.¹⁹³ In

191. Interview No. 32 with attorney practicing in a two-lawyer firm in Rockland County, N.Y. (Mar. 12, 2001).

192. It is unclear whether this is also true of young lawyers who work in large firm practice. There is research suggesting that the ethical culture of large firms is not clear, at least with respect to certain discovery practices. See, e.g., Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 716 (1998); Sarat, *supra* note 174, at 827 (finding that young lawyers in large firms often cannot identify shared norms). There also appears to be great cynicism among young associates about the large firm experience, see, e.g., Curtis, *supra* note 54, at 74–77, which may cause these lawyers to question the lessons that they learn in their early years of practice. Indeed, a few of the small firm lawyers I interviewed who had worked in large firms spoke with disdain about the ways in which some ethical issues relating to billing and conflicts were handled in those firms. It seems likely, however, that lawyers who start their careers in large firm practices and remain in those practices for several years, will continue to be guided by the answers they reach in early practice when engaged in later ethical decision-making. Refer to notes 233–46 *infra* and accompanying text (suggesting that once lawyers conform to certain group behavior they will not be able to "turn back"). See generally Tanina Rostain, *Waking Up from Uneasy Dreams: Professional Context, Discretionary Judgment, and The Practice of Justice*, 51 STAN. L. REV. 955, 965 (1999) (suggesting the longer a lawyer stays at a firm, "the more deeply ingrained the firm's normative narratives will become in her professional self-conception").

193. It may also be the case that more experienced small firm lawyers do not consult with other lawyers because they are typically not employees and do not need the approval

some cases, that response may be based on informal bar norms to which the lawyer is acculturated. In other cases, that response may be viewed as the "obvious" answer to an ethical problem, which they believe to be correct based on their familiarity with ethical rules or their personal values. In still other cases, lawyers described a response that may be based on an established office practice that embodies an ethical rule. For example, when clients ask for money to support themselves during litigation, lawyers may regard the response as "administrative" rather than ethical, citing to established policies within their offices.

When the lawyers described the ethical problems that they encounter repeatedly, they sometimes referred to their "stock response" or "policy" or "script." For example, one lawyer explained, when a client asked him to do something that he viewed as unethical,

I tell people when someone does come in here my general script is "Listen, I worked very hard to become a lawyer. Can you afford to give me a half a million dollars a year? Cause that's what you [are going to] cost me. So if you can't pay me a half a million dollars, then I can't do anything for you." I mean that's what it's going to cost me if I lose my license.¹⁹⁴

Another lawyer described his well-established practice for dealing with people who did not report their income and then wanted to make a claim for lost wages:

There are a great many people who are involved in serious automobile accidents who haven't filed income tax in years. Now they suddenly they realize that their no-fault benefits depend on income. So suddenly they want wages. And they want to show their income. If they go to the appropriate accountant or lawyer who advises them that they're in time to file the tax return and tell the truth, they may be able to pull it off. But in many cases they want documents back-dated, they want to commit fraud. And our policy is to tell them that you've made your bed of roses and [now] it's time to pick the thorns out of your backside.¹⁹⁵

When the experienced lawyers I interviewed recognize an ethical issue they have not previously encountered, they will sometimes speak to their partners, associates, suite mates, or advice networks about ethical questions, although most lawyers

of an employer in order to keep their jobs.

194. Interview No. 28 with attorney practicing in a four-lawyer firm in Brooklyn, N.Y. (Mar. 1, 2001).

195. Interview No. 35 with solo attorney practicing in Suffolk County, N.Y. (Mar. 14, 2001).

described few instances of reaching out to others to discuss such issues over the past few years. In some of those cases, these conversations occurred in order to ask about the propriety of the conduct of another lawyer or in instances in which the lawyer's own conduct was being challenged, rather than to ask how they should proceed with a problem that they had encountered and identified on their own. Most often the questions they raised related to possible conflicts of interest or how to handle situations with clients who wished to lie.

Lawyers in partnerships appeared to prefer discussing ethical problems with lawyers in their firms and were somewhat less likely to reach out to suite mates or lawyers in the community. Most sole proprietors appeared to discuss those issues with suite mates or other members of their advice networks rather than with associates in their own firms. The lawyers who specialized were more likely to reach out to the communities of specialists with whom they practiced than to the lawyer who happened to work next door. Several lawyers reported that they sought the advice of relatives, including those with no legal training, when they had ethical questions.¹⁹⁶ Ten lawyers also reported that they called a bar association or a bar ethics hotline for advice, although only two of these lawyers indicated that they had used this resource with any frequency.

Finally, there was a sizable minority of lawyers who did not report consulting with anyone in recent years in order to resolve ethical problems. Perhaps because many solo practitioners self-describe themselves as "independent," the solo practitioners over fifty, in particular, tended to rely on their own judgment to resolve ethical issues. For example, when asked whether, in recent years, he had reached out to anyone to talk about how to resolve conflict of interest issues, one solo lawyer replied, "No. It's my responsibility and my responsibility alone. I'd make the decision. I would be the one who would receive the—how may I say it?—the backlash."¹⁹⁷

196. The lawyers I interviewed often sought the advice of lawyer-relatives with whom they may or may not be formally affiliated. Eight of the lawyers described their lawyer-relatives as mentors to whom they reached out for advice, including advice about ethical issues. The relatives were parents, spouses, in-laws, uncles, and cousins. A few other lawyers reported the practice of at least occasionally seeking the advice of their lawyer and nonlawyer relatives.

197. Interview No. 22 with solo attorney practicing in Brooklyn, N.Y. (Feb. 15, 2001).

C. The Role of Bar Codes

The lawyers I interviewed were generally aware of many of the rules that appear in formal bar codes. It is likely that lawyers learn about some of the rules embodied in formal bar codes even before they reach law school.¹⁹⁸ More systematic exposure to these rules typically begins in law school professional responsibility courses.¹⁹⁹ New York bar applicants must then demonstrate knowledge of the Model Rules of Professional Conduct in order to pass the Multistate Professional Responsibility Examination, which is required for admission to the New York bar.²⁰⁰ New York lawyers are also exposed biannually through mandatory CLE to instruction in ethics and professionalism, including some of the rules in the New York Code of Professional Responsibility (the “New York Code”).²⁰¹

Interestingly, however, the lawyers I interviewed indicated that they rarely consulted bar codes when deciding how to handle ethical issues.²⁰² Very few lawyers ever looked at the New York Code to resolve ethical issues they encountered in practice. The

198. Popular television shows often feature problems that raise ethical issues for lawyers who must consider their obligations under bar codes. Moreover, my own observation from asking first year law students about what they know of the ethical obligations of lawyers is that they often do a good job of listing many of the obligations that appear in formal bar codes.

199. Prior to the mid-1970s, law schools' efforts to instruct students in legal ethics were uneven, at best. See Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 37 (1992). In 1974, the American Bar Association first mandated that accredited law schools require that students receive some instruction in professional responsibility issues, including the Code of Professional Responsibility. *Id.* at 38–39. The ABA now requires that law schools provide instruction in “the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct of the American Bar Association.” ABA SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS § 302(b) (2003).

200. Starting in 1980, states began to require that bar applicants pass the Multistate Professional Responsibility Examination in order to be admitted to the state bar. Leslie C. Levin, *The MPRE Reconsidered*, 86 KY. L.J. 395, 399 & n.14 (1997). New York adopted this requirement effective July 1982. N.Y. CT. R. 520.7. Prior to that time, New York lawyers were expected to study for a possible “ethics” question on the essay portion of the New York State bar examination, which required them to demonstrate familiarity with the New York Code of Professional Responsibility.

201. As part of New York's mandatory CLE, lawyers are required to take four credit hours of instruction in ethics and professionalism every two years. N.Y. COMP. CODES R. & REGS. tit. 22, § 1500.22(a) (2003).

202. This is consistent with the report of practitioners in other practice areas. See, e.g., 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, 713 (1998) (“I had cause to refer to the Model Rules of Professional Conduct exactly twice in eight years; I almost never heard any other lawyer refer to them.” (footnote omitted)).

following exchange with a solo lawyer who had been practicing law for twenty years was typical:

Q: How often a year do you look at the New York [Code] of Professional Responsibility?

A: [Forms a "0" with thumb and finger.] That's a zero.

Q: OK.

A: Never.

Q: Do you have [it] here?

A: I probably have a copy from when I got sworn in.²⁰³

Many freely admitted that they did not keep up-to-date on changes in the New York Code and that they had not consulted it since law school. In answer to my question about whether they kept up with changes in the Code, more than one lawyer laughingly responded, “[t]hey change”? For some lawyers, New York’s recent requirement that lawyers take four hours of CLE related to legal ethics and professionalism every two years²⁰⁴ is the only time they are forced to look at or think about rules of professional conduct. Some of them expressly attributed their ability to stay up-to-date on changes in the New York Code to the mandatory CLE.

Many lawyers maintained the attitude that they need not consult the New York Code or other ethical rules because they considered themselves ethical or they “know what to do.” These responses were typical:

If there’s anything of a major issue such as an IOLA account, and you know, I’d always expect to hear it from colleagues also, but in terms of ethical conduct, you know I use common sense. And if it’s something that’s gonna raise a red flag, I know that there’s a problem.²⁰⁵

I certainly have been familiarized with those, you know, I’ve seen the sections, but not that I’ve actually looked. I pretty much know, I think, what has confronted me. I pretty much know off the top of my head what is ethical and what isn’t ethical but and again [CLE] keeps me in touch with current issues, ethical issues. I can’t say I’ve actually opened up the Code and had to look at anything,

203. Interview No. 1 with solo attorney practicing in Westchester County, N.Y. (Jan. 23, 2001).

204. Refer to note 201 *supra*.

205. Interview No. 4 with attorney practicing in a three-lawyer firm in Manhattan, N.Y. (Jan. 25, 2001).

no. . . If it doesn't feel right, I don't do it, you know, so that's really the way I am.²⁰⁶

Less often, the lawyers viewed the ethical issues that they confronted in practice as practice-specific questions or moral ones that were not answered by the New York Code.

In still other cases, lawyers felt there was a "disconnect" between the New York Code and the realities of practice, and so they viewed some of the formal bar rules as having little relevance to their professional lives. As one noted, "the problem with real life and the ethics portion of the bar exam is they don't necessarily equal."²⁰⁷ A small number of lawyers simply felt that certain of the formal rules do not, or should not, apply to solo and small firm practitioners.

I understand the rule. I have no right to commingle funds. I understand that. I have no right to suborn perjury. And I know what I'm supposed to do, but from the business end, so many of those rules just lose context when you get down to the solo practitioner. I know that every notary is supposed to be taken in front of the person on a completely filled out form. I also know that there's not a lawyer in [the] universe when his client comes in and needs a half a dozen medical authorizations, doesn't after six, after eight, and they sign them blank and they fill them out later because you can't have somebody sit in your office for an hour. And I know that if they sign them in front of me, the secretary notarizes them because I tell her to, but she didn't see the signature, I hope you're not taping this part, can I go to jail—notary jail for that? But that kind of stuff, out at the next level, it's a completely different problem.²⁰⁸

As a result, some lawyers were unapologetic about not following certain formal bar rules. For example, some personal injury lawyers indicated that they accepted or paid referral fees long before New York's Code was revised to lift the prohibition against referral fees.²⁰⁹ Other lawyers routinely referred potential

206. Interview No. 12 with attorney practicing in a three-lawyer firm in Nassau County, N.Y. (Feb. 6, 2001).

207. Interview No. 31 with attorney practicing in a three-lawyer firm in Nassau County, N.Y. (Mar. 11, 2001).

208. Interview No. 24 with attorney practicing in a five-lawyer firm in Manhattan, N.Y. (Feb. 17, 2001).

209. Until September of 1990, New York lawyers were not permitted to pay referral fees for work that was referred to them by other lawyers when the referring lawyer did not work on the matter. *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 609 (1990). In that year, the New York Code of Professional Responsibility was revised to allow lawyers to pay referral fees to lawyers who did no work so long as the client consents and each lawyer assumes joint responsibility for the representation. N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-107(A) (codified at N.Y. COMP. CODES R. & REGS. tit. 22,

clients whom they could not represent due to conflicts of interest to other attorneys with whom they had close working relationships. These attitudes are consistent with Carlin's finding forty years ago that small firm and individual practitioners accept certain formal bar rules that are consistent with community-wide notions of morality, but not certain "elite norms" that interfere with their business-getting activities.²¹⁰

D. The Impact of Lawyer Discipline

The subject of lawyer discipline was rarely raised spontaneously by the lawyers I interviewed,²¹¹ but it was clear that these lawyers are mindful of the threat of discipline and seek to minimize their risks in certain respects. One indication of their concern could be seen when, in an effort to ascertain their familiarity with bar rules, I asked them how long they were supposed to maintain their records relating to their escrow accounts. Virtually all of them—including those who knew of the seven-year record retention requirement—responded that they kept their records "forever," in an apparent effort to avoid any possible problems with discipline authorities on that score.

Although the majority of the lawyers I interviewed reported that they had never had a grievance filed against them, concern about lawyer discipline or liability seemed to have a profound effect on lawyers who had had some exposure to the discipline system. One lawyer who had had a client file a grievance due to a fee dispute that was not pursued by disciplinary authorities explained how that experience had affected him:

[T]here are many areas which are difficult, but the most difficult area I find lately is whether or not I want to render service to a particular client. I now have the luxury of thinking twice before whether or not I want to render service, because I can sometimes know in advance that a certain client may put me into a position where either we're going to have a disagreement over the nature of my services or we're going to have a disagreement over my fee. And I don't want to be in that position. So from my experience now, I would just as soon reject a particular matter knowing up front that there may be those kinds of concerns.²¹²

§ 1200.12(A) (2003)); see also NYCLA, Op. 680, *supra* note 126.

210. CARLIN, *LAWYERS' ETHICS*, *supra* note 12, at 51–52.

211. Toward the end of the interviews, I asked the lawyers whether they had ever been the subject of a discipline complaint, and at that point they would sometimes volunteer their views about the discipline system.

212. Interview No. 20 with solo attorney practicing in Nassau County, N.Y. (Feb. 14, 2001).

Another lawyer who reported that he had gotten into trouble when he notarized an affidavit that a client claimed he had not read stated that he had changed "everything" about his practice when notarizing.

In some cases, lawyers expressed bitterness over the manner in which solo and small firm lawyers are treated by the disciplinary authorities. One lawyer noted the disproportionate tendency to go after solo firm lawyers:

[W]hen you look at them, when you read the decisions as I do, it's a disproportionate number of solo guys who get nailed and I don't believe in a heartbeat that the Wall Street guys are so much more ethical. I don't believe that they notarize legitimately every document that goes in their [papers]. I don't believe that they don't futz around with escrow money or you know—not intentionally, not bad stuff, but this little stuff. I think the solos—they get killed.²¹³

Another described the stress created by unfounded disciplinary complaints:

I got a complaint about, a woman was trying to hire me for a separation agreement, and I did the separation agreement, and after I did it, I was calling her, and she paid money. It was only \$500. . . . Six months, eight months [later] she resurfaced, I never could find the lady. I went the whole process of putting it all together, and now she demanded everything back because she had reconciled with the fellow that she wanted to separate from. I said, "No." I said, "Look, you shouldn't get all your money back." I got a complaint. It is easy to get a complaint in this business, and it is stressful, it's not like—there are some of us that do bad things, and I am not saying that there is no need for it, but it is a really—you don't even understand how stressful that is. That is like very stressful. You can't even do any work, it's so stressful.²¹⁴

A few lawyers said that they settled disputes with clients just to avoid the aggravation and the risks of an unfavorable discipline decision, even when they felt that the client was wrong.

Although some lawyers said that they religiously read the lawyer discipline decisions in the *New York Law Journal*, many do not read the *Law Journal* or do not read it with frequency,²¹⁵ so they do not come across reports of lawyer discipline. Some

213. Interview No. 24 with attorney practicing in a five-lawyer firm in Manhattan, N.Y. (Feb. 17, 2001).

214. Interview No. 41 with solo attorney practicing in Brooklyn, N.Y. (Mar. 22, 2001).

215. Refer to note 86 *supra* and accompanying text.

lawyers who read the discipline decisions were sometimes mystified by the sanctions or disapproved of the discipline that was imposed for what they viewed as hyper-technical violations of the formal bar rules. For example, one such lawyer noted,

And it always amazes me, because without a doubt the people I think should be let off have the heaviest fines, and the people that I think did something really terrible get a slap on the wrist. So I don't always get it.

There was one, there was an attorney who—I mean he had some problems but he like—he commingled the funds. He didn't even steal it, it was like—I don't know, he was suspended for six years or something. I am like, that could happen, and then you read somebody stole the money, and suspended two years or whatever.²¹⁶

Another lawyer observed,

I'm really offended by the idea that a lawyer can make a single or even inadvertent mistake or office staff can make a mistake [maintaining client funds] and a lawyer is held responsible and the most terrible things happen, but if prosecutors suborn perjury or withhold exculpatory evidence or lie about the evidence they have, nothing happens....²¹⁷

Some lawyers who regularly read the discipline decisions indicated that they believed the major reason for lawyer discipline was misuse of client funds:

I mean, I read almost every disciplinary decision that's published in the *Law Journal* or the local bar news, and you know, most of them of course relate to idiot lawyers who you know, either [they] don't know how to maintain an IOLA account or they know how to maintain it but they decide to use it as their source of funding, so plus I've also been involved in a couple of tax cases involving lawyers whose names will go unmentioned, who've been—who've gotten their asses in a jam for violating the use of their IOLA accounts. So I'm very keenly aware of what the requirements are.²¹⁸

216. Interview No. 40 with solo attorney practicing in Manhattan, N.Y. (Mar. 22, 2001).

217. Interview No. 3 with solo attorney practicing in Manhattan, N.Y. (Jan 24, 2001).

218. Interview No. 20 with solo attorney practicing in Nassau County, N.Y. (Feb. 14, 2001).

Another lawyer who was asked whether he read the discipline decisions answered,

I look at the patterns, and the pattern is very similar. The pattern is [dipping into] escrow for money. Is this what this is really all about? [laughs] This is one of these—and I guess statistically—you probably would know the answer—I guess 85%, 90% of [disciplined] lawyers at this point [are] involved in misappropriation or misapplication of funds.²¹⁹

Many of the lawyers were unaware that the main reasons for lawyer discipline are neglect of client matters and failure to communicate with clients, because discipline on those grounds was often no greater than a private admonition and was therefore unreported in the *Law Journal* or in other publications that these lawyers were likely to read.²²⁰

VI. SOME OBSERVATIONS

Drawing any conclusions from socio-legal studies is tricky, both when looking at a single small study and when trying to connect it up with earlier research. The interests, biases, and methods of scholars vary significantly and this will inevitably color what they find.²²¹ The age of some studies and the small size of others may also militate against making broad generalizations based on their results. William Felstiner has correctly noted that putting together the empirical socio-legal studies could be like fitting together a mosaic; but then again, it may not. As he observes: "We may not have a mosaic; we may have a jumble of ill-fitting and misshapen pieces."²²²

It is therefore important to stress that any conclusions drawn from this preliminary study are necessarily tentative, and any effort to connect it to other research must be done with great care. The pool of lawyers I interviewed was small and, in many ways, quite diverse. Previous practice settings, practice specialties, current law office setting, clientele, and location may account for profound differences in the ways that lawyers perceive their roles as professionals, perform their work, and

219. Interview No. 26 with solo attorney practicing in Nassau County, N.Y. (Feb. 28, 2001).

220. In New York, only disbarments, suspensions, and censures are published. See ABA CENTER FOR PROF'L RESP., SURVEY ON LAWYER DISCIPLINE SYSTEMS 2002, at Chart II (2003) (indicating that New York imposes more than twice the number of private sanctions as compared to public sanctions).

221. William L.F. Felstiner, *Synthesizing Socio-Legal Research: Lawyer-Client Relations as an Example*, 8 INT'L J. LEGAL PROF. 191, 195–96 (2001) (questioning the reliability of the picture of the typical attorney-client relationship these studies create).

222. *Id.* at 197.

engage in ethical decision-making. For example, lawyers who practice family law may have very different attitudes toward the importance of “fairness” when reaching settlements than personal injury lawyers.²²³ Lawyers who represent ethnic communities may have different concerns when considering conflicts of interest than lawyers who represent large corporate clients.²²⁴ Lawyers who practice in Staten Island, where there are approximately 1100 lawyers, may have a different view about the importance of candor in their communications with their adversaries than lawyers who practice in Manhattan, where more than 70,000 lawyers are registered to practice law.²²⁵

And so with these important caveats, I offer three tentative observations about the findings from this preliminary study. First, the ethical decision-making described by the lawyers I interviewed is strikingly consistent with behavioral theories that have been advanced by social and cognitive psychologists. Those theories provide insight into how these lawyers reach ethical decisions and why they seemingly do not reconsider those decisions as they move through practice. Second, the responses from the lawyers suggest that unless we change some of the formal bar rules and make the discipline system more consistent and more transparent—or unless we can change lawyers’ *perceptions* of the bar rules and the discipline system—it may be very difficult to increase compliance by solo and small firm practitioners with certain formal bar rules. And third, there are times when, due to difficult personal circumstances or other reasons, lawyers do not follow formal rules or the informal norms of the legal community, and it is at this point where rational decision-making breaks down and where lawyer discipline is most likely to be imposed.

223. Compare MATHER ET AL., *supra* note 33, at 114–16 (stating that divorce lawyers typically consider “fairness” and not partisan advocacy as the most important factor in serving their clients), with Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC’Y REV. 275, 285–89, 295–301 (2001) (discussing how some personal injury lawyers, when they view the tortfeasor’s actions as egregious, will pursue the tortfeasor’s home).

224. Lawyers who routinely represent clients within an ethnic community are often themselves embedded in that community and face pressure to take on matters that raise obvious conflicts by clients with whom the lawyers may have family or social ties. Refer to note 146 *supra* and accompanying text. See also SHAPIRO, *supra* note 143, at 77. Lawyers with large corporate clients face different concerns, as they must consider whether to decline to take on new clients simply to avoid being conflicted out of representing larger, more lucrative clients that may later contact them for representation. *Id.* at 365–66.

225. See N.Y. ST. UNIFIED CT. SYS., 25TH ANNUAL REPORT OF CHIEF ADM’R OF THE COURTS 35 (2002) (reporting 70,719 attorneys registered in Manhattan and 1,149 attorneys registered in Staten Island in 2002), available at <http://www.nycourts.gov/reports/annual/pdfs/2002annualreport.pdf>.

A. Psychological Processes and Ethical Decision-Making

Previous studies show that general upbringing and the law school experience affect the ethical decision-making of solo and small firm lawyers.²²⁶ But it also appears that even law students quickly perceive the “disconnect” between the formal rules they are taught in law school and lawyers’ practices.²²⁷ Indeed, there is some evidence that experiences in practice quickly alter students’ views about the importance of compliance with ethical rules.²²⁸

In this study I did not directly attempt to explore the impact of law school instruction on the ethical decision-making of solo and small firm practitioners. What I found striking, however, is that the lawyers I interviewed rarely spoke of lessons learned in law school when they described their ethical decision-making.²²⁹ Instead, they seemed to form their conclusions about how to resolve certain ethical questions during their early years in practice. Colleagues and mentors often affected their decision-making when first confronted with ethical issues. Their early conclusions appear to stay with these lawyers as they move through practice. Once these lawyers become more experienced,

226. A 1976 study revealed that solo and small firm lawyers—like most lawyers—believe that their general upbringing is the most important source contributing to their resolution of questions of professional responsibility. FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 171–72 (1981). The solo and small firm practitioners surveyed by Zemans and Rosenblum also reported that law school instruction contributed somewhat more to their resolution of questions of professional responsibility than did the lawyers in larger firms. *Id.* at 174–75; see also Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 482–83, 485 (1993) (reporting that small firm urban lawyers felt that the general law school curriculum was the most important source for their sensitivity to ethical concerns). For a discussion of the impact of legal profession courses and clinical legal education on the ethical development of law students, see James R.P. Ogloff et al., *More Than “Learning to Think like a Lawyer:” The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73, 184–85 (2000). For discussions of the impact of the law school culture on the values of law students, see ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* (1992); ROBERT V. STOVER, *MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL* 43–70 (Howard S. Erlanger ed., 1989).

227. Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students’ Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537, 605–07 (1991); Ogloff et al., *supra* note 226, at 185 (noting that students do not learn professional responsibility well in law school because they understand that the real-world professional legal standard is different from that taught in law school).

228. Hellman, *supra* note 227, at 605–07, 611 (noting that “a student’s practice environment quickly supersedes law school as a source of reference for demarcating professionally acceptable behavior”).

229. Although I did not ask directly about how their law school experiences affected their ethical decision-making, I did ask questions that could have elicited references to law school, including questions about their mentors, how they learned particular skills, and how they learned the rules concerning maintenance of client funds.

they do not seem to reconsider ethical questions they have previously addressed.²³⁰

Lessons from social psychology help explain these observations. The psychological pressure on individuals to conform to the behavior of a group can be powerful. Although solo and small firm practitioners view themselves as "independent,"²³¹ these lawyers often operate within—and are influenced by—a rich social environment comprised of suite mates and members of their advice networks.²³² Social psychologists have found that a group is more effective at inducing conformity if (1) it consists of experts; (2) the members are important to the individual; or (3) the members are comparable to the actor in some way.²³³ Certainly within collegial office-sharing arrangements or tightly-knit legal communities or practice specialties, many young lawyers would view the other lawyers with whom they come in contact as experts, as "important" colleagues, mentors, sources of referrals, or, at a minimum, as comparable to the young lawyer in some ways. Therefore, it would not be surprising that the psychological pressure to conform to certain types of behaviors would be powerful in this context.²³⁴ Whether the psychological pressure to conform to certain behaviors in large firm practice is equally strong is unclear.²³⁵

Once a lawyer conforms to group behavior, it is difficult to turn back. Psychologists who study decision-making have noted that individuals tend to see themselves in a positive light.²³⁶

230. Refer to notes 193–95 *supra* and accompanying text.

231. See CARLIN, LAWYERS ON THEIR OWN, *supra* note 11, at 184–88; SERON, *supra* note 28, at 12–13; ERWIN O. SMIGEL, THE WALL STREET LAWYER 173 (1969).

232. See Levin, *Preliminary Reflections*, *supra* note 29, at 864–66, 871–76.

233. ELLIOT ARONSON, THE SOCIAL ANIMAL 25 (8th ed. 1999).

234. Tanina Rostain has previously noted that conformist psychological processes cause people to take their cues from others in ethically ambiguous situations. Rostain, *supra* note 192, at 964. As she explains, these processes will cause a lawyer in such situations to rely heavily on how the people around her behave. *Id.*

235. On the one hand, young associates would probably view senior associates and partners as "experts" and as individuals who are important to them. On the other hand, if, as reports suggest, the ethical culture at large law firms is not clear, refer to note 192 *supra*, and if young associates feel little loyalty toward the firms, see Curtis, *supra* note 54, at 75–77, then it is possible that the tendency to conform to certain behaviors would be less pronounced than it is in small firm settings or would not last longer than the time spent at the large firm.

236. MAX H. BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 66 (5th ed. 2002) (stating that humans tend to perceive themselves as being superior to others across a variety of traits such as honesty, cooperativeness, or rationality). Legal scholars have previously noted the impact of this very human tendency on the decision-making of lawyers. See, e.g., Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569, 1573, 1587–88 (2000) [hereinafter Langevoort, *Taking Myths Seriously*]; Rostain, *supra* note 192, at 964–65.

Dissonance theory suggests that individuals will change their attitudes toward certain questionable behaviors once they have engaged in a behavior, so as to avoid the discomfort of seeing themselves in a less positive light.²³⁷ As the psychologist Elliott Aronson notes, “[i]f you want people to soften their moral attitudes toward some misdeed, tempt them so that they perform that deed.”²³⁸ Moreover, once judgments are made, confirmation bias causes people to see confirming evidence of their decision as more relevant than evidence that disconfirms the correctness of their choice.²³⁹

Other psychological phenomena help explain why there does not seem to be much rethinking of ethical decision-making once decisions are made. Donald Langevoort has drawn upon the theory of cognitive simplification to explain the behavior of lawyers. He notes that human beings must use “schemas” to simplify their thought processes in order to manage their daily affairs.²⁴⁰ Otherwise, people would be paralyzed by the information they take in and the decisions that they must make on a daily basis.²⁴¹ People therefore develop “stock explanations” for what is happening and once established, they are resistant to rethinking their assumptions because constant rethinking would result in cognitive paralysis.²⁴² The bias of overconfidence may also prevent lawyers from recognizing the need to rethink their ethical choices. This bias causes people to be overconfident in their judgments, especially when accurate judgments are difficult to make.²⁴³ The overconfidence bias may cause people to think they are making good choices and do not need to reconsider how to approach a decision they have previously made.²⁴⁴ Finally, people want to view themselves as consistent decision-makers.²⁴⁵

237. SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 30 (1993) (stating that “[a]ccording to the theory of cognitive dissonance, the pressure to feel consistent will often lead people to bring their beliefs in line with their behavior”).

238. ARONSON, *supra* note 233, at 203.

239. BAZERMAN, *supra* note 236, at 34–35; PLOUS, *supra* note 237, at 234.

240. Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 BROOK. L. REV. 629, 639–40 (1997) [hereinafter Langevoort, *Corporate-Securities Lawyering*]. Psychologists also refer to the use of “heuristics,” or general rules of thumb, to arrive at their judgments. PLOUS, *supra* note 237, at 109.

241. Langevoort, *Corporate-Securities Lawyering*, *supra* note 240, at 640.

242. *Id.*

243. PLOUS, *supra* note 237, at 219.

244. See Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1220 (2003) [hereinafter Rachlinski, *Uncertain Psychological Case*].

245. See Roderick M. Kramer & David M. Messick, *Ethical Cognition and the Framing of Organizational Dilemmas: Decision Makers as Intuitive Lawyers*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 59, 69–70 (David M. Messick &

Thus, as time goes on, the more entrenched is the lawyer's view that the conduct being engaged in is ethically appropriate.²⁴⁶

These psychological processes may help explain the powerful and long-lasting influence of the legal community on the ethical decision-making of lawyers. It is not surprising that young lawyers would look to the actions of the people around them to help them decide how to address ethical issues they have not previously encountered. Indeed, experiments by social psychologists have demonstrated how conformist pressures will cause people to select what they know to be the *wrong* answer simply to conform with the behavior of the group.²⁴⁷ The desire to remain employed would also help account for conformist impulses, especially in law firms. But even small firm lawyers who are self-sustaining and solo practitioners may feel such psychological impulses within collegial office-sharing arrangements or within tightly knit legal communities or practice specialties. Economic pressures may also encourage these lawyers to conform.²⁴⁸

Once lawyers choose a particular response to an ethical issue, cognitive simplification and overconfidence reinforce the tendency not to re-examine the decision in the future. This may help to explain why the more experienced lawyers I interviewed seemingly do not seek much advice about ethical issues, except perhaps when confronted with a novel question. Once they decide how to handle an ethical issue, they do not rethink it. Particularly if they believe that they are good lawyers and decent people, then they do not want to reconsider whether their choices might have been bad ones. It is possible that the desire to avoid feelings of regret may stop them from seeking the advice of others, even if they do begin to question their earlier ethical judgments.²⁴⁹

Based on my interviews, it appears that these psychological processes are at work in much of the ethical decision-making in which these lawyers engage. In cases where the formal bar rules

Ann E. Tenbrunsel eds., 1996) (stating that people strive to maintain their image as "rational, blameless, and consistent decision makers" by processing personal and social information selectively and strategically).

246. See Rostain, *supra* note 192, at 965.

247. See ARONSON, *supra* note 233, at 19-24.

248. Lawyers who do not conform may fear loss of referrals. See Daniels & Martin, *It's Darwinism*, *supra* note 59, at 384-87 (noting that a lawyer's reputation among his peers determines the type and the quantity of the referrals the lawyer receives); Parikh, *supra* note 31, at 154-55, 225. Moreover, economic pressures may also encourage ethical decision-making that conforms to norms favoring the client, because lawyers may fear that if they do not conform to certain norms, clients can take their business elsewhere.

249. See BAZERMAN, *supra* note 236, at 73.

generally coincide with the informal bar norms (e.g., rules of client confidentiality), it may be that new lawyers enter practice with their understanding of the formal rules and then comply with the rules because they see other lawyers doing so.²⁵⁰ In other cases, the formal bar rule may conflict with widely accepted bar norms (e.g., rules concerning the handling of referral fees in personal injury cases), and when this occurs, many lawyers look to their colleagues to determine how to behave. In still other cases, the informal bar norms literally vary from office to office (e.g., notarization practices), and young lawyers may be guided either by the lawyers with whom they work or by the tendency to interpret ambiguous situations in a self-interested fashion.²⁵¹ Finally, in some cases, solo and small firm lawyers find themselves engaged in conduct that neither formal rules nor informal norms endorse—such as neglecting client matters, failing to communicate, or taking client funds to pay office expenses—often because they are overwhelmed by their circumstances.²⁵² It is in this latter category of cases that lawyer discipline is most likely to be imposed.²⁵³

Assuming that further research supports these findings that solo and small firm lawyers are affected by their colleagues in much of their ethical decision-making, and do not tend to re-

250. I refer here to rules requiring lawyers to maintain client confidentiality. In states where there are mandatory disclosure rules, the formal rules and the informal norms may not coincide. See Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 135–36 (1994) [hereinafter Levin, *Testing the Radical Experiment*] (describing how New Jersey lawyers who were subject to a mandatory disclosure rule with which they did not agree generally did not comply with the rule, which conflicts with the bar norm of confidentiality). Moreover, even where formal bar rules and informal norms generally coincide, they are often not completely congruent. For example, it is common for lawyers to take the position that they maintain client confidentiality, but still share some client confidences with other lawyers for the purposes of advice-seeking, even though such disclosures are not permitted by formal rules. N.Y. PROF'L RESPONSIBILITY CODE DR 4-101(B) (codified at N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.19(B) (2003)).

251. Refer to note 234 *supra* and accompanying text. See also Levin, *Preliminary Reflections*, *supra* note 29, at 889–90; Rachlinski, *Uncertain Psychological Case*, *supra* note 244, at 1222.

252. Refer to note 119 *supra* and accompanying text. Although the lawyers I interviewed did not describe instances of mishandling client funds, the discipline cases frequently report on situations in which lawyers were drawing on client funds to pay office expenses. See, e.g., *In re Land*, 749 N.Y.S.2d 23, 24, 26 (App. Div. 2002); *In re Schatz*, 723 N.Y.S.2d 298, 298 (App. Div. 2001) (holding that the attorney mishandled the client's funds by drawing on client's trust account for personal and business expenses); STATE BAR OF CAL. REPORT, *supra* note 15, at 18 (noting that small firm attorneys face more disciplinary action because they "borrow" from trust accounts when they are cash strapped).

253. Refer to notes 18–19 *supra* and accompanying text; refer also to notes 278–79 *infra* and accompanying text.

examine their decisions once they have been made, then the question arises what, if anything, can be done to positively affect those early experiences so that lawyers are more likely to comply with certain formal bar rules?²⁵⁴ Lawyers in solo and small firm practices start out in virtually every imaginable law office setting, and it would therefore seem that the only way to reach all of them is through mandatory bridge-the-gap programs or regular CLE. Even though most of the lawyers I interviewed viewed CLE somewhat favorably, it would be naive to suggest that such courses—standing alone—can overcome the lessons learned from mentors and colleagues in practice about informal bar norms. This is especially true because some formal bar rules and the discipline system that enforces them are viewed as unfair by these lawyers.

B. The Perception of Formal Rules and Discipline

The comments of the lawyers I interviewed suggest that some of them view certain formal bar rules and the lawyer discipline system with open skepticism. Historically, solo and small firm lawyers have felt that some of the formal rules were written to limit their business-getting opportunities and they may be, to some degree, correct.²⁵⁵ These lawyers also harbor a concern that solo and small firm attorneys are unfairly targeted for discipline more often than lawyers who practice in other settings.²⁵⁶ Because solo and small firm lawyers are more likely to be the subjects of a disciplinary investigation—or to know colleagues who have been through the discipline process—they are in a position to closely observe what they view as the biased and arbitrary workings of the lawyer discipline system.

These views unquestionably shape their ethical decision-making. Borrowing again from the psychological literature,

254. As noted, it seems likely that most lawyers comply with the formal bar rules that coincide with the informal norms of the communities within which they practice. Refer to notes 180-87 *supra* and accompanying text. Moreover, some of the formal rules are so vague or so routinely under-enforced (e.g., the rule requiring lawyers to report the misconduct of other lawyers), that it may not be worth the investment of resources to change behavior with respect to those rules. The challenge is to identify and encourage compliance with rules that are inconsistent with the norms of the community within which the lawyer practices but are important to protect clients or the public or to promote compliance with substantive law.

255. Refer to notes 6-7 *supra* and accompanying text. *But see* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 684-85 (1989) (questioning the view that rules were primarily written to disadvantage solo and small firm lawyers).

256. Refer to note 213 *supra* and accompanying text. *See also* McIntyre, *supra* note 16, at 27.

Donald Langevoort has noted that most people are motivated by egotism to see themselves as good, reasonable, and responsible people.²⁵⁷ He suggests that where there is ambiguity about what is “right,” people will often subconsciously construe the situation in a self-interested fashion. He further notes that when the need arises to reconcile the desire to be good with the desire to be successful, lawyers may engage in forms of rationalization that blunt the power of formal written rules.²⁵⁸ In addition, because personal choices regarding compliance with rules are often affected by the actor’s perception of their legitimacy, lawyers may consciously or unconsciously denigrate written codes, especially when they are ambiguous.²⁵⁹ Langevoort has noted, “[t]arget groups can easily develop mythic beliefs that effectively blunt the impact of the rule without much in the way of guilt.”²⁶⁰ Thus, the myth that “everyone does it” or even that “these rules were written to hurt small firm lawyers” can help rationalize actions that contravene formal written rules.²⁶¹

When skepticism about formal rules is coupled with concerns about the fairness of the discipline system, the likelihood of lawyer compliance with formal rules is further reduced. As noted, some of the lawyers I interviewed believe that bias arises not only in the disproportionate prosecution of solo and small firm practitioners, but also in the types of matters prosecuted and in the discipline actually imposed.²⁶² Under-enforcement of formal bar rules that are clear and specific may also contribute to this perception.²⁶³ A few of the lawyers I interviewed questioned why prosecutors rarely face lawyer discipline²⁶⁴ or why large firm lawyers are rarely disciplined for clearly impermissible conduct.

257. Langevoort, *Taking Myths Seriously*, *supra* note 236, at 1588.

258. *Id.* at 1590.

259. *Id.* at 1591.

260. *Id.* at 1592.

261. See *id.* at 1593.

262. Refer to notes 213, 216-17 *supra* and accompanying text.

263. Even under-enforcement that *benefits* solo and small firm practitioners can undermine the perceived legitimacy of rules and the discipline system. Fred Zacharias has identified some of the problems with under-enforcement of formal bar rules that are clear and specific, and his observations have special relevance to solo and small firm lawyers. Zacharias, *What Lawyers Do*, *supra* note 7, at 996, 1005-07. For example, he notes that when lawyer advertising in the yellow pages routinely appears in forms that violate bar rules and those rules are under-enforced, or only selectively enforced, it sends the message that the formal bar rules need not be obeyed. *Id.* at 1003, 1005-07. Indeed, failure to enforce the formal rules can promote distrust of the entire regulatory structure. *Id.* at 1014.

264. The reasons why prosecutors do not face more discipline are complex. Nevertheless, there is evidence that prosecutors are rarely disciplined relative to private lawyers. See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 755 (2001).

Of course, discipline sanctions may be imposed on these lawyers more often than other lawyers realize because the discipline may be private.²⁶⁵ But when the perception persists that the rules are not enforced—or that they are selectively enforced—this can lead to disrespect of formal bar rules and cynicism about the efficacy and purpose of the discipline system.

Thus, there are at least two problems of perception which decrease the likelihood that solo and small firm lawyers will adhere to certain formal bar rules, even when they contain clear and specific prohibitions. The first problem stems from the perception that certain formal rules are written to disadvantage these lawyers and therefore lack legitimacy. There is evidence that lawyers will not obey formal bar rules with which they disagree, even when the bar rules contain a strong moral component.²⁶⁶ When the formal rule is viewed as designed to interfere with business-getting activities of solo and small firm lawyers, it is even less likely to be viewed with respect or obeyed, and it is more likely that the lawyers will look to the informal norms of the community to rationalize their noncompliance with such rules.

The second problem can be found in the workings of the lawyer discipline system, which is viewed by some solo and small firm practitioners as arbitrary and biased against them. Indeed, it has become a common concern among solo and small firm lawyers that they are unfairly and disproportionately disciplined.²⁶⁷ There is, in addition, a concern among some lawyers that the disproportionate impact of lawyer discipline on solo and small firm lawyers may be racially motivated.²⁶⁸ In such a context, it is easy to see why some solo and small firm lawyers

265. Many bar discipline systems do not publish the reasons why private discipline is imposed. See Levin, *Emperor's Clothes*, *supra* note 23, at 22–23. They also often do not provide enough information to enable the reader to discern the type of setting in which the disciplined lawyer practiced.

266. For example, many lawyers indicated that they did not comply with mandatory disclosure rules with which they disagreed that required attorneys to disclose client confidences in order to prevent serious harm to third parties. Levin, *Testing the Radical Experiment*, *supra* note 250, at 134–35.

267. See, e.g., Hansen, *supra* note 14, at 30–33; Joyce E. Cutler, *California Orders Study of Possible Bias Against Small Firm Practices in Discipline Matters*, 15 ABA/BNA LAW. MAN. ON PROF. CONDUCT 394, 394–95 (1999); OR. ST. B. DISCIPLINARY TASK FORCE, REPORT, available at <http://www.osbar.org/barnews/monthly/disciplinary.html> (last visited Apr. 23, 2004).

268. A disproportionate number of minorities in private practice work in solo and small firm practices. See, e.g., Lempert et al., *supra* note 29, at 431. As a result, a disproportionate number of minorities appear to be subject to bar discipline. See N.M. TASK FORCE ON MINORITIES, *supra* note 17, at 46; see generally ILL. ARDC REPORT, *supra* note 18, at 16–18.

may not respect or comply with certain formal bar rules, particularly if the rules are viewed as illegitimate and are infrequently or selectively enforced.

Research on compliance with the law and the psychology of legitimacy bears out these concerns. Behavior is strongly influenced by the perceived legitimacy of laws and institutions.²⁶⁹ As psychologist Tom Tyler has noted, "people settle issues of loyalty and obedience to organizational rules and authorities by focusing on the procedure by which the authorities make decisions."²⁷⁰ Tyler found that ordinary citizens care about the decision-making process of institutions, and that their perception of legitimacy is affected by evidence about neutrality, bias, honesty, quality of decision, and consistency. The motives of the decision-makers matter to ordinary citizens, as does whether the person subjected to the process is treated with respect.²⁷¹ When citizens do not experience procedural fairness, it undermines the legitimacy of the institution.²⁷² It seems likely that lawyers—who are by training very attuned to issues of procedural fairness—would be doubly sensitive to these issues when it comes to formal bar rules and a discipline system that may drastically affect their own livelihood.

It is not clear from the small sample of lawyers I interviewed that most solo and small firm lawyers view certain formal rules and the discipline system as lacking legitimacy, but it appears that some lawyers hold that view. Thus, it is important to consider whether it is possible to change some of the formal bar rules—or the *perception* of the rules—so that they do not invite suspicion from these lawyers.²⁷³ It is also important to consider whether attitudes can be changed through better publicizing the discipline of lawyers for violations of the formal bar rules and by making the discipline process more transparent. One problem in New York, and in most other states, is that much lawyer

269. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 33 (1990).

270. *Id.* at 172.

271. *Id.* at 175; Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 739 (2000).

272. TYLER, *supra* note 269, at 172.

273. One way to change the perception of the rules may be to better educate the lawyers about the rationale behind the rules so that they do not view the rules simply as a means to limit their business getting ability. See generally Tyler & Darley, *supra* note 271, at 729 (discussing strategy of educating the public about misconceptions of the law to increase their beliefs that the laws are legitimate). It also might be possible to rewrite some of the rules so that they reflect recognition of the ways in which solo and small firm lawyers practice law. For example, it might be possible to revise confidentiality rules to permit lawyers to engage in advice-seeking with unaffiliated lawyers so long as certain protections of the client are in place.

discipline is private, and that even the public discipline decisions may not be known to most lawyers. If the courts, the organized bar, disciplinary systems, or insurers were willing to better publicize discipline decisions, it might reassure practitioners that the disciplinary decisions are fair and may help to alter lawyer conduct.²⁷⁴ A formal review of the state disciplinary process and recent discipline decisions by an independent commission that includes representatives of solo and small firm practitioners might also help allay fairness concerns or identify problems that genuinely require attention.²⁷⁵

Until then, the implications of these negative views of bar rules and the lawyer discipline system are that certain formal bar rules will be trivialized or ignored and that the norms of the community in which the lawyer practices will dominate lawyer decision-making. This allegiance to the norms of that legal community rather than to the aspirations of the profession—as reflected in formal bar rules—will undoubtedly have profound implications for the lawyers' views of their obligations to courts, their clients, and third parties, as well as for their views of themselves as part of a larger professional community.

C. *The Disintegration of Decision-Making*

As previously noted, much of the lawyer discipline is imposed for conduct that is neither consistent with formal bar rules nor accepted informal norms.²⁷⁶ Although in some cases neglect of client matters, failure to communicate or misuse of client funds occur because the lawyer is incompetent, arrogant or venal, rule violations often occur when lawyers simply are overwhelmed by their circumstances. A few of the lawyers I interviewed described times in their own lives when they were incapacitated or overwhelmed by their work loads and could not adequately service all of their clients.²⁷⁷ The published discipline

274. It was my sense from talking with the lawyers I interviewed that most solo and small firm lawyers do not disagree with discipline imposed on colleagues who take client money or who neglect client matters and then lie to their clients. Their unease comes, at least in part, from their belief that discipline authorities do not go after big firm lawyers or prosecutors who engage in similar wrongful conduct.

275. Such a review was conducted by the California State Bar, which concluded that there was no institutional bias against solo and small firm practitioners, *see STATE BAR OF CAL. REPORT, supra* note 15, at 14, although it is unclear whether solo and small firm practitioners were persuaded by this report. The type of review that I am proposing, if it were conducted in New York, would include, for example, representatives of the New York County Lawyers' Association and the New York State Trial Lawyers Association, whose membership is primarily composed of solo and small firm practitioners.

276. Refer to notes 252-53 *supra* and accompanying text.

277. Refer to note 125 *supra* and accompanying text.

cases also tell the story of lawyers whose practices have careened out of control and who have taken client money to pay office expenses, neglected client matters, or failed to communicate with clients.²⁷⁸ In addition, many disciplinary rule violations arise in situations where there are drug or alcohol abuse or where lawyers suffer from emotional problems.²⁷⁹

The reported cases suggest that neglect of client matters and misuse of client funds often occur without the knowledge of firm partners or office colleagues.²⁸⁰ Similarly, one of the lawyers I interviewed described his ordeal when one of his partners in a three-partner firm had been investigated and ultimately disbarred for taking money from client escrow accounts in a scheme about which the other lawyers had been unaware. In such cases, theories of conformity to group behavior have little application because the misbehaving lawyers are not complying with the group's norms.

Instead, the bias of overoptimism may account for the behavior of some lawyers who neglect cases when they become too busy or who "borrow" from client trust accounts to pay other bills. This judgmental bias leads people to believe that their futures will be better and brighter than is realistic and that they have control over uncontrollable events.²⁸¹ This bias might account for why lawyers would take risks and neglect client matters—believing that things will work out in the end—or borrow from client trust accounts in the belief that they will soon be able to repay those amounts.

Behavioral law and economic concepts such as prospect theory may also help explain why some lawyers take risks and

278. See, e.g., *In re Rosenkrantz*, 760 N.Y.S.2d 415, 417–18 (App. Div. 2003) (attorney claimed "overwhelming" financial pressure and medical, personal, and financial problems in neglect case); *In re Land*, 749 N.Y.S.2d 23, 25 (App. Div. 2002) (attorney charged with paying business expenses from IOLA account claimed he was "overwhelmed" by events in personal life); *In re Lenoir*, 733 N.Y.S.2d 178, 180 (App. Div. 2001) (neglect occurred during wife's lengthy illness).

279. See Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 549–50 (1998); Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 257–58, 321–24 (1999) (discussing the link between mental illness and professional misconduct); Nathaniel S. Currall, Note, *The Cirrhosis of the Legal Profession—Alcoholism as an Ethical Violation or Disease Within the Profession*, 12 GEO. J. LEGAL ETHICS 739, 741 (1999); Alex Gronke, *The State Assembly OK's Bar-Funded Rehab for Lawyers Health*, L.A. TIMES, June 22, 2001, at B8 (noting that 30–40% of the California bar's discipline cases involve substance abuse).

280. See, e.g., *In re Rosenkrantz*, 760 N.Y.S.2d at 416–17 (solo practitioner neglected nine clients); *In re Cannon*, 727 N.Y.S.2d 704, 705 (App. Div. 2001) (solo attorney neglected fifteen estates).

281. BAZERMAN, *supra* note 236, at 66–67; Rachlinski, *Uncertain Psychological Case*, *supra* note 244, at 1172.

violate ethical rules when they find themselves in difficult moral or economic circumstances. Prospect theory posits that people are risk-seeking when selecting between options that are framed as losses.²⁸² Richard Painter has suggested that prospect theory may help account for why lawyers who are already in a bad situation will take bigger risks in such situations to avoid potential losses.²⁸³ When things appear to be going poorly (losses), ethical violations may have more appeal than when things are going well.²⁸⁴ Painter has pointed to corporate cases of misconduct to support the observation that “the worse things get, the more likely a lawyer is to compound his own and his client’s troubles with violations of ethics rules, violations of law or both.”²⁸⁵

These theories suggest that both increased knowledge and enhanced enforcement of formal rules are unlikely to reduce risk-seeking behavior.²⁸⁶ Rather, a better way to avoid these types of choices—or what I am calling the disintegration of decision-making—may be to try to limit the situations in which lawyers are overwhelmed by their financial circumstances or case loads and to provide for more outside support for handling these situations when they arise. Bar associations may be able to help by creating programs that provide for short-term, low interest loans to lawyers when they encounter cash flow problems. Although solo and small firm lawyers are already suspicious that formal rules are designed to limit their ability to function in the work place, it is still important to consider whether there is room for additional rules or guidelines that would be viewed by these lawyers as a legitimate effort to help them and to protect the public. For example, solo lawyers might be strongly encouraged to maintain a loose affiliation with another lawyer precisely so

282. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 268–88 (1979) (stating that many will take a probable loss over a guaranteed smaller loss); see also Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1118–19 (2003) (declaring people are risk-averse when selecting between options framed as gains).

283. Richard W. Painter, *Lawyers’ Rules, Auditors’ Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399, 1413–16 (2000).

284. *Id.* at 1421–23.

285. *Id.* at 1422. Jeffrey Rachlinski’s experiment with law students similarly revealed that when placed in the role of “lawyers,” the students appeared to be willing to sacrifice ethical principles to avoid losses. See Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 140–44 (1996) (demonstrating that people who are confronted with potential losses make riskier choices than those who face potential gains).

286. Research reflects that compliance with the law is only weakly linked to the risks associated with law-breaking behavior. Tyler & Darley, *supra* note 271, at 715. In other words, increased disciplinary enforcement is unlikely to have a powerful deterrent effect on risk-seeking behavior when lawyers are confronted with options that are framed as losses, unless the risk of detection is high and the possible punishment is severe.

they can have matters covered in the event of unforeseen illnesses or emergencies.²⁸⁷ Lawyers who work more than fifty-five hours per week might be encouraged to have certain part-time office support to help organize their offices, maintain client trust accounts, and manage their case loads. Although suggestions of this sort will not inhibit the truly incompetent, arrogant, or venal lawyer, if certain systems are in place—and they are viewed as legitimate by solo and small firm practitioners—they might help to avoid some of the situations that can lead to the breakdown of ethical decision-making.

VII. CONCLUSION

This study represents a small step toward trying to describe and understand the ethical world of today's solo and small law firm practitioners. Future research into their ethical decision-making should focus on lawyers who practice in particular office settings, locations, and practice specialties, recognizing that distinctions in their approach to ethical decision-making may also arise due to gender, age, and other factors. Research should also focus specifically on the different types of ethical issues these lawyers confront because formal bar rules have differing levels of perceived legitimacy, which seemingly affect how the ethical issues they implicate are resolved.

Psychological theories seemingly help to explain why lawyers often conform to certain informal bar norms. But not all lawyers conform. Differences in personality, upbringing, gender, practice specialty, economic security, and clientele may affect a lawyer's willingness to adhere to particular informal bar norms. For example, one study found that female divorce lawyers in New Hampshire and Maine often did not conform to the norm of the "reasonable lawyer."²⁸⁸ Some personal injury lawyers conform to informal norms concerning advertising and others do not. The question of why some lawyers who practice within the same legal communities respond to ethical problems in practice in ways that conform to informal bar norms and others do not would be an important area of research.

287. The affiliation that I am suggesting would not be a formal "of counsel" affiliation that would require constant conflict checking between lawyers or that would make lawyers liable for the torts of one another. This affiliation would simply be available in the event that one lawyer needs temporary assistance due to physical or emotional circumstances or a work load that has careened out of control. Obviously, in the event that such a lawyer would step in to help, rules would need to be observed concerning conflicts, confidentiality, and disclosure to clients of the arrangement.

288. Refer to note 181 *supra* and accompanying text. See also MATHER ET AL., *supra* note 33, at 51–58.

Other research questions include: Are solo and small firm lawyers, in fact, more “independent” in their decision-making than lawyers who work in other practice settings? Which specific formal rules are they more likely to accept and comply with than others? How much, if at all, do clients affect the ethical decision-making of solo and small firm lawyers? Are these lawyers more suspicious of their clients and less likely to share their clients’ objectives and values than large firm lawyers? What special challenges do lawyers who work in ethnic communities face? What is the actual impact of mentors and advice networks on the ethical decision-making of solo and small firm lawyers? How great is the impact of suite mates on the early ethical development of young solo and small firm lawyers? Why do some offices develop their own identifiable ethical cultures even when lawyers are not formally affiliated? What types of advice do these lawyers receive from their advice networks and other colleagues and do they heed it? Does the organizational form of the practice affect the ethical advice-giving in the office? What is the impact of published discipline and CLE on lawyers’ knowledge of and compliance with formal bar rules? When, and under what circumstances, do early decisions about how to resolve an ethical issue change over time?

It is also important to consider whether more can be done to improve the ethical decision-making of solo and small firm lawyers. Although lawyers are presumably as subject to cognitive biases as anyone, they also are trained to evaluate new facts as they become available. What might CLE training look like if the goals included increasing the perceived legitimacy of certain formal rules and improving the perception of the discipline system? Might lawyers who are regularly exposed to the content of formal bar rules—and introduced to stories about the discipline of a wide array of lawyers who violated the rules—come to view those rules as more legitimate and important?²⁸⁹ When lawyers are already suspicious that formal rules are

289. For example, there is evidence that lawyers who attend CLE courses in client relations skills view those skills as more important than lawyers who are not trained in that skill. Marcus T. Boccaccini et al., *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 LAW & PSYCHOL. REV. 97, 112 (2002). As the authors noted, however, these findings must be interpreted cautiously. It may be that lawyers who took the CLE courses were more likely to view client relations skills as more important than lawyers who did not take the courses, even before taking the course. *Id.* Moreover, even if lawyers come to view certain formal bar rules as more legitimate, such recognition does not mean that they will comply with them. See generally Ian Weinstein, *Don’t Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783, 792 (2003) (noting that cognitive biases are hard to avoid, even with conscious training).

designed to limit their business-getting efforts, is there any room for additional rules that would further limit those efforts but increase the protection of the public?

The stakes for the legal profession and the public are high. More lawyers practice in solo and small firms than in any other practice setting. Many of these lawyers provide representation to individuals who may have little sophistication about what lawyers do and little recourse when their representation goes awry. In an ethical world where so much decision-making is affected by informal norms, only a change in perception of the formal rules and the lawyer discipline system is likely significantly to affect behavior. As the list of future research topics demonstrates, generating the questions about lawyer behavior is easy. The harder part lies ahead.

METHODOLOGICAL APPENDIX

In order to locate attorneys to interview for this study, the names of lawyers were selected from the list of attorneys maintained by the New York Office of Court Administration as of August 15, 2000. A sublist was first created that included all attorneys whose office addresses were located in the New York City metropolitan area (Manhattan, the Bronx, Brooklyn, Queens, Staten Island, Nassau County, Rockland County, Suffolk County, and Westchester County). Lawyers who were disbarred or suspended from practice were excluded from the sublist, which left a list totaling 106,697 attorneys.

Approximately 425 lawyers' names were randomly selected from this sublist. Lawyers' names were then eliminated from the sample if they were obviously practicing in corporations, government agencies, or if it could be determined through Martindale-Hubbell that they were practicing in larger firm settings. Letters were sent to 181 attorneys who were believed to practice in solo or small firm settings, asking them to agree to participate in a study of the work lives and professional development of solo and small firm practitioners.²⁹⁰ Of the 181 letters that were mailed, eighty-one names were subsequently eliminated because the lawyers (1) had no working telephone number or were deceased; (2) were not working in solo or small firm practices at least fifteen hours per week; or (3) were in an age group (over seventy) that was already overrepresented among the group of lawyers I planned to interview. Of the

290. The 181 lawyers either appeared in *Martindale-Hubbell* as practicing in solo or small firm settings or their practice setting could not otherwise be identified.

remaining 100 lawyers, forty-one agreed to be interviewed and seventeen solo and small firm lawyers declined to be interviewed. Six other lawyers contacted by telephone indicated that they might make themselves available at a later date and thirty-six lawyers did not return telephone messages that were left with answering services, secretaries, family members, or on answering machines. Their failure to respond makes it impossible to determine whether they received the initial letter, whether they received the telephone messages, whether they were in fact solo or small firm practitioners, or whether they were refusing by their silence to participate in the study.

The random sample of 181 lawyers broke down as follows geographically: Manhattan (65 lawyers); the Bronx (11 lawyers); Brooklyn (15 lawyers); Queens (11 lawyers); Staten Island (5 lawyers); Nassau County (30 lawyers); Rockland County (12 lawyers); Suffolk County (12 lawyers); and Westchester County (20 lawyers). Data provided by the Office of Court Administration reflected that substantially more lawyers practice in Manhattan (66,837) than in the other boroughs (14,018) or in the suburbs (25,842). If the sample were based strictly on the percentage of lawyers in each locale, almost 63% of the lawyers should have been from Manhattan. It seems likely, however, that a disproportionate number of the lawyers who practice in Manhattan work in larger firm, government, or corporate in-house settings.

The forty-one lawyers I interviewed practiced in the boroughs of Manhattan (16), Brooklyn (5), Queens (2), and Staten Island (1), and in Nassau County (8), Rockland County (2), Suffolk County (4), and Westchester County (2). No lawyers from the Bronx agreed to be interviewed, except for one who worked on a very part-time basis.²⁹¹ According to the Office of Court Administration, 2,138 lawyers were practicing in the Bronx during this time period.

I interviewed each of the forty-one lawyers during early 2001. The attorneys were solo practitioners or lawyers who practiced in small firms that were mostly composed of five or fewer lawyers.²⁹²

291. In an effort to interview some lawyers from the Bronx, a disproportionate number of lawyers with offices in the Bronx (11) was included among the 181 lawyers, but these lawyers declined to be interviewed, worked in firms of more than five lawyers, or could not be contacted.

292. Any definition of "small firm" is necessarily somewhat arbitrary. Initially I sought to limit the study to firms of five or fewer lawyers because I believed that firms of that size would have more organizational and relational similarities than they would with larger firms. As it turned out, the attorneys who were interviewed practiced in the following settings: solo practitioners (17); two-lawyer firms (6); three-lawyer firms (4); four-lawyer firms (6); five-lawyer firms (2); and six-lawyer firms (2). The remaining three

Most of the semi-structured interviews were conducted in the attorneys' offices.

attorneys were affiliated with firms that were nominally as large as seven attorneys, but were somewhat hard to categorize. When calculating the size of a firm, lawyers who were "of counsel" to the firm but who did not have offices on the premises were not counted as being part of the firm.