IF IT AIN'T BROKE . . . AN EMPIRICAL PERSPECTIVE ON ETHICS 2000, SCREENING, AND THE CONFLICT-OF-INTEREST RULES

Susan P. Shapiro[*][1]

The Ethics 2000 Commission set out to retain the primary disciplinary and regulatory function of the Model Rules of Professional Conduct and to "fix" provisions only where they were "broken." The Commission drew on the insight and expertise of an extraordinarily wide assortment of interested parties. But, Susan Shapiro argues, their input on what in the Model Rules was working or broken suffers from what social scientists call "selection bias." This pool of self-selected advisors and commentators, however diverse, is unrepresentative of the legal profession as a whole and the varied settings in which lawyers practice and in which professional responsibility is enacted day to day. Participants had a stake in the debate—axes to grind, constituents to serve, interests or ideologies to promote. This unrepresentative patchwork of self-selected informants, however extensive the network or prescient its members, could not possibly substitute for solid empirical evidence on the actual practices of lawyers.

Shapiro argues that empirical research might have informed the Commission not only which Model Rules are working and which are not, where they work best and why, and how to engineer incentives for compliance or self-regulation, but also have provided some guidance about how to fix those rules that are "broken" and at what costs and consequences.

Moreover, Commissioners might have assessed the potential impact of changing an ethics rule by examining empirically the experience of a jurisdiction in which the prospective rule change had al-

* *Senior Research Fellow, American Bar Foundation. A.B. 1970, University of Michigan; M. Phil. 1974, Ph.D. 1980, Yale University.*

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> *ready been implemented. Drawing on her research on how Illinois law firms deal with conflicts of interest, Shapiro illustrates how rigorous empirical data might have been used to inform the contentious debate over screening. The issue is not whether clients can be protected adequately if firms are allowed to screen a lawyer hired laterally from another firm without seeking client consent. Instead, the data suggest, one effect of liberalizing the law may well be that, ironically, clients are better protected and confidentiality even more inviolate in jurisdictions that allow screening without consent than those that do not.*

> One of the primary reasons behind the decision to revisit the Model Rules was the growing disparity in state ethics codes. . . . There were also new issues and questions raised by the influence that technological developments were having on the delivery of legal services. The explosive dynamics of modern law practice and the anticipated developments in the future of the legal profession lent a sense of urgency as well as a substantive dimension to the project. . . . There was also a strong countervailing sense that there was much to be valued in the concepts and articulation of the Model Rules. The Commission concluded early on that these valuable aspects of the Rules should not be lost or put at risk in our revision effort. As a result, the Commission set about to be comprehensive, but at the same time conservative, and to recommend change only where necessary. . . . [W]e tried to keep our changes to a minimum: *when a particular provision was found not to be 'broken' we did not try to 'fix' it.*[2]

Thus began the report of the Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission) to the American Bar Association (ABA) House of Delegates. How did the Commission ascertain whether a particular rule was "broken?"

> In the end, of course, it was by majority vote of the 13 members of the Commission.[3] But those votes did not take place in a vacuum, and our determinations are not being pronounced *ex cathedra*. Rather, they are products of thorough research, scholarly analysis and thoughtful consideration. Of equal importance, they have been influenced by the views of practitioners, scholars, other members of the legal profession and the public. All these constituencies have had continual access to and considerable—and proper—influence upon the deliberations of the Commission during its extraordinarily

2. ABA Comm'n on Evaluation of the Rules of Prof'l Conduct, Report with Recommendation to the House of Delegates 1–2 (2001) (emphasis added) [hereinafter Ethics 2000 Report].

3. ABA Ctr. for Prof'l Responsibility, Report of the Commission on Evaluation of the Rules of Professional Conduct, app. A (2000). Members of the Commission came from the judiciary, legal academy, private practice, and the public (one member). *See* http://www.abanet.org/cpr/e2k-commisson_bios.html (last visited Jan. 15, 2003).

> open process from the beginning of its work over three years ago to the present. I must pause to underscore the openness of our process. We have had 45 days of meetings, all of which were open, and 10 public hearings[4] at regular intervals over this period of nearly 40 months. There have been a large number of interested observers at our meetings, many of whom were members of our Advisory Council of 250-plus persons,[5] to offer comments and suggestions. . . . Our public discussion drafts, minutes and the Commission's November 2000 Report have been available on our website . . . for the world to see and comment upon. As a consequence, we have received an enormous number of excellent comments and suggestions, many of which have been adopted in the formulation of this Report. Moreover, we have encouraged state and local bar associations, ABA sections and divisions, other professional organizations and the judiciary to appoint specially designated committees to work with and counsel the Commission. . . . Since publication of the Commission's Report in November 2000, the members of the Commission have met in person or via conference call with over 50 entities interested in the Commission's Report. Many of these groups have provided suggestions for improvement to the November Report.[6]

In short, the Commission drew on the insight and expertise of a vast assortment of interested parties. But, unfortunately, their input on what in the Model Rules was working or broken suffers from what social scientists call "selection bias." This pool of advisors and commentators, however diverse, is unrepresentative of the legal profession as a whole. Many were self-selected; indeed, a number spent substantial sums for the privilege of participating in the process.[7] Members of the pool had a stake in the debate—axes to grind, constituents to serve, interests or ideologies to promote. Even if some were truly disinterested, their vision was still limited to their own—often rarified—social worlds. And, if nothing else, they were certainly more familiar with the Model Rules than the run-of-the-mill practitioner.

4. Included among the forty-eight individuals who testified before the Commission (a quarter of them, on more than one occasion) were representatives of state or local bar associations (17%), entities within the ABA (21%), legal interest groups outside the ABA (15%), legal malpractice insurers (8%), and trade associations (2%); a tenth were private practitioners, and a little over a quarter came from university law schools. (These percentages were calculated from the witnesses listed on the Commission's webpage.) The interests represented by ABA entities and other nonprofit organizations included business law, international law, environmental law, employment law, elder law, dispute resolution, defense lawyers, criminal defense lawyers, legal aid, client protection, the delivery of legal services, pro bono, and public education. ABA Ctr. for Prof'l Responsibility, Testimony and Minutes from Previous Commission Meetings, *available at* http://www.abanet.org/cpr/e2ktest.html (last visited Oct. 29, 2002).

5. The roster and affiliations of the members of the Advisory Council can be found at http://www.abanet.org/cpr/adcounmembers.html (last visited Mar. 31, 2003).

6. Ethics 2000 Report, *supra* note 2, at 2–3.

7. Members of the Advisory Council were required to contribute $250 annually for administrative expenses. *See* ABA Ctr. for Prof'l Responsibility, Ethics 2000 Advisory Council, *available at* http://www.abanet.org/cpr/advisory.html (last visited Feb. 6, 2003).

However perceptive the observations or deep the analyses of those advising, debating, or offering testimony, they were refracted through the peculiar lens of the observers—witnesses unrepresentative of the varied, heterogeneous settings in which lawyers practice and in which professional responsibility is enacted day to day. Think of how different it might have been if the Commission had silenced those so eager to speak and had instead taken a random, representative sample of practitioners or clients and asked them to share their experience with the Model Rules. Imagine even a sample of practitioners who are not ABA members or those who, when I asked to interview them about conflicts of interest, said I would be wasting my time, or those who, during the interview, admitted that they had never read the Model Rules cover to cover. And what if the Commissioners had heard, not from the repeat-playing clients whose representatives sought to influence them, but instead from clients who have only a one-shot encounter with the legal system and, therefore, no investment in changing the rules (or, for that matter, much clout to affect the ethical behavior of their lawyers)?

Did the self-selected spokespersons get the story wrong? Not necessarily. But social scientists would alert us to be wary of the potential for bias, encourage us to ask which voices were not heard and how their stories are likely to be different, and suggest that we "triangulate" our methods, seeking independent data sources that might correct for the intrinsic bias of viewing the world through the lenses of these elite repeat-playing, self-interested spokespersons.

What about the "thorough research" and "scholarly analysis" to which the Commission Chair referred? Are these the triangulated data we seek? Unfortunately, no. A review of the minutes of the Commission meetings and written testimony offered at Commission hearings suggests that the research undertaken was mostly doctrinal. Commissioners asked for research on state statutes and their implementation, on court interpretations or rulings, and on reported cases, not for empirical data on how professional responsibility is practiced on the ground. Speakers occasionally referred to empirical evidence, though they typically either offered a generalization without citing any specific study[8] or

8. For example: "There is an absence of empirical evidence to justify revisiting such restrictions on the duty of confidentiality in modern practice." Demitrious Dimitriou et al., Bar Assoc. of San Francisco, Written Testimony Submitted at the Los Angeles Hearing of the Ethics 2000 Commission (Feb. 4, 1999), *at* http://www.abanet.org/cpr/e2k/tuft.html (last visited Oct. 29, 2002).

> The available empirical evidence, albeit very limited, suggests that most lawyers and clients expect that confidentiality will be breached when important interests of third persons or courts would be impaired. Nor is there any indication that clients are more candid with their lawyers in jurisdictions that have fewer exceptions to confidentiality than they are in jurisdictions with broader exceptions. It must be conceded that there is little solid empirical evidence to support firm conclusions in either direction.

Roger C. Cramton, Professor, Cornell Law School, Written Testimony Submitted at the Montreal Hearing of the Ethics 2000 Commission (May 29, 1998), *at* http://www.abanet.org/cpr/cramton.html (last visited Feb. 6, 2003).

reflected on their own personal experience.[9] The only exception (at least within the materials disclosed on the Commission website) involved information solicited from a handful of lawyer disciplinary agencies regarding complaints about conflicts of interest.[10] I will expand on this later.

Rigorously designed empirical research might have informed the Commission:

- which of the Model Rules are misunderstood, ambiguous, or lack sufficient guidance;
- the extent of rule breaking or compliance, and how it varies by practice setting;
- the costs, incentives for, impact, and unintended consequences of rule compliance;[11]
- the opportunities for self- or external regulation;
- how and where social control is being exercised, at what cost, and to what effect;
- the impact of changes in the social organization of legal practice on opportunities for rule infraction, rates of compliance, and opportunities for social control;
- how well existing rules track the changing social organization and economics of legal practice;
- the impact, if any, of differences in ethics rules, enforcement mechanisms, or sanctions from jurisdiction to jurisdiction that might inform proposals to adopt versions of rules already in place in a given state; and so on.

In short, empirical data would have suggested not only which Model Rules were broken, but also provided some guidance about how to fix them and at what cost and consequences. Given that the Commission viewed the Model Rules as serving primarily a disciplinary and regulatory function,[12] it would seem essential to know which rules are working

9. For example:

> A number of Rule drafts and proposals appear to emanate from a desire to expand regulations based on theoretical needs, rather than on empirical data arising out of ethics complaints, disciplines or case law in the broader law of lawyering. In 18 years of enforcing, advising and defending lawyer ethics matters I have seldom or never encountered several of the situations which are proposed for new regulations. The proposed change to a "should have known" standard is also an example of a proposal unsupported by empirical evidence. There is no public outcry, or even awareness, regarding inadequacy of today's standard for conflicts imputation. Discipline authorities are not reporting that they are unable to discipline lawyers deserving of discipline because of an inadequate standard.

William J. Wernz, Ethics Partner & Trial Dep't Member, Dorsey & Whitney LLP, Written Testimony Submitted at the LaJolla Hearing of the Ethics 2000 Commission (June 4, 1999), *at* http://www.abanet.org/cpr/wwernz.html (last visited Oct. 29, 2002).

10. Brian J. Redding, Vice President & Assoc. Loss Prevention Counsel, Attorneys' Liab. Assurance Soc'y, Written Testimony Submitted at the Atlanta Hearing of the Ethics 2000 Commission Counsel (Aug. 5, 1999), *at* http://www.abanet.org/cpr/bredding.html (last visited Nov. 17, 2002).

11. For example, roiling litigation or motions for disqualification, aggravating adversarialism, increasing the cost of legal representation or even pricing some clients out of the system, restricting lawyer mobility, capping law firm growth, limiting lawyer choice, etc.

12. Ethics 2000 Report, *supra* note 2, at 2.

and which are not, where they work best and why, and how to engineer incentives for compliance or self-regulation. It is unlikely that the unrepresentative patchwork of self-selected informants, however extensive the network or prescient its members, could possibly substitute for solid empirical evidence.

I. THE STUDY

What might have the Commission learned if such data were available? In this paper, I share a brief overview of how one might see the terrain from an empirical lens. I draw on an extensive empirical study of conflict of interest in private legal practice, reported in *Tangled Loyalties*.[13] The study is restricted to a single state—Illinois—to control for variations from state to state in conflict-of-interest rules that might otherwise have confounded the results.[14] I constructed a random sample of 128 law firms, stratified by size and location,[15] to insure that firms of all sizes in downtown Chicago, Chicago neighborhoods and suburbs, and in large, medium, and small communities downstate as well as those that offer the only legal practice in town would be represented in the study. The firms represent a broad swathe of practice settings. Many are general practices. But the sample also includes boutiques specializing in litigation, insurance defense, personal injury plaintiffs' work, intellectual property, employment litigation, and criminal defense. A stunning ninety-two percent of the firms selected actually participated in the study. As a result, concerns about nonresponse bias—the possibility that firms included in the study are atypical (for example, have less to hide about their conflict-of-interest experience)—are minimal.

In each firm, I interviewed the person or persons with most responsibility for conflict-of-interest issues. In large firms, respondents were

13. *See* SHAPIRO, *supra* note 1.

14. To get some perspective on states other than Illinois, a pilot study included twelve large law firms from two other midwestern states. Moreover, because a number of the larger Illinois law firms have branch offices in other states or are themselves branch offices of national law firms headquartered elsewhere, I learned a bit about conflict of interest in other sites and under different legal regimes. For more detail on the research design, see SHAPIRO, *supra* note 1, at 465–70.

15. If I had selected my destinations purely randomly—say from a list of registered lawyers in the state—I would have spent almost three-quarters of my time in Chicago's Cook County and with either solo practitioners or lawyers practicing in larger firms, since that is how lawyers in Illinois cluster. *See* ATTORNEY REGISTRATION AND DISCIPLINARY COMM'N OF THE SUPREME COURT OF ILLINOIS, ANN. REP. 5 (1995); BARBARA A. CURRAN & CLARA N. CARSON, AMERICAN BAR FOUNDATION, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S 83 (1994). Stratified sampling insured that significant, but less common, structures and loci of legal practice would be included in the study. Because of this stratified sampling design, the sample is not statistically representative of the population of Illinois lawyers. However, the firms were selected randomly; those in a given cluster had an equal probability of being included. The sampled firms, then, do typify the population of firms in the various clusters from which they were drawn. While the 128 firms comprise fewer than one percent of the law firms in the state, they do encompass a much more sizable number of practitioners. About a fifth of the lawyers in Illinois work in firms included in the sample. My findings bear, then, on the experience of a sizable proportion of private legal practitioners in Illinois.

usually the Chair of the Conflicts, Ethics, Professional Responsibility, or New Business Committee. In smaller firms, I often interviewed the Managing Partner, a member of the Executive or Management Committee, or a name partner. Interviewees were questioned about whether, how, and to what extent conflicts of interest arise in their practice and how their firms identify and resolve potential conflicts when they do. Their responses reflected on their personal experience as well as on their role as conflicts czar or firm administrator. On average, interviews ran an hour and a quarter.

I begin with a few caveats. My empirical research was undertaken well before Ethics 2000 was even a glimmer in an ABA President's eye. It was conducted, not to gather data for policy reform, but simply to learn how one set of ethics rules—concerning conflict of interest—get translated into the day-to-day practices of lawyers, if at all, and how the translation varies across practice settings. If my intent had been to guide the Commission, I would have designed the research differently, drawn a multijurisdictional sample,[16] asked different questions, and utilized different measures. Moreover, the research was undertaken during a time of economic contraction and turbulence for the legal profession. As respondents reflected on how their firm resolved conflict-of-interest questions, many spoke of their fear of alienating important clients, a concern that may be far less salient in a seller's market. Responses about conflicts detonated by the lateral movement of lawyers were grounded in the reality of the demise and downsizing of major law firms, which resulted in scores of unemployed lawyers, many weighted down with cumbersome conflicts baggage, pounding the pavement for jobs. Law firms may encounter fewer conflicts of interest or resolve them quite differently when the economic climate is more rosy and robust. Though, of course, given the roller-coaster economic fortunes of law firms, ethics reformers ought to consider the ethical ramifications of both boom and bust.

Second, conflict of interest is different from other rules of professional responsibility. Conflicts are inevitable in legal practice, especially in successful legal practice, and lawyers talk freely about them. Conflicts do not carry the stigma associated with disclosures of other kinds of ethical infractions (sex with clients, for example). Moreover, unlike many ethical infractions, conflicts of interest can cause considerable damage when they detonate. Lawyers face substantial economic consequences for taking the wrong course in the face of clashing or potentially clashing interests. Relatively significant forms of economic self-interest, cross-cutting law firms and their individual members, provide incentives for regulating the process by which firms take on new interests and re-

16. For discussion of the ways in which Illinois may be atypical of other states, see SHAPIRO, *supra* note 1, at 466.

spond when interests collide.[17] Other rules of professional responsibility may not have such compelling incentives for compliance.

Third, my informants were conflicts "mavens," by and large.[18] One might get a rather different picture of the terrain from conversations with others located elsewhere in the law firm hierarchy (say, a newly hired associate, a rainmaker, or a powerful gorilla) with less exposure to or responsibility for conflicts of interest, or from clients, judges, disciplinary authorities, malpractice insurers, and the like.[19] Moreover, my data came from self-reports. Though my informants disclosed plenty that was incriminating or embarrassing (under the shield of confidentiality and anonymity), one would likely get a different picture from a different research methodology (observational methods, for example). These data, especially the very abbreviated account permitted here, leave much to be desired for policy analysts. Still, they suggest both the richness and challenges of an empirical approach.

II. AN EMPIRICAL PERSPECTIVE

The conflict-of-interest study yielded findings that bear on each of the bulleted items (that I suggested might have been informative to the Commission) enumerated above—and more. In the interest of space, I will refer you to the full manuscript for the details.[20] Here, I will provide a few brief illustrations and then move on to a more sustained example. Long substantive conversations with lawyers in the field responsible for negotiating around the shoals of conflict of interest generated a wealth of information about how the framers of the Model Rules might have been more clear or explicit. Respondents not only complained about concepts they found ambiguous, interpretations they struggled with parsing out, and requirements about which they needed more guidance; they also betrayed unwittingly their own misunderstandings of the rules in their answers to my questions and the stories they recounted.[21] The areas of confusion and misunderstanding became quickly familiar to me; they came up repeatedly in interview after interview. Here is one place the Ethics 2000 Commission got it right. The conflict-of-interest rules that were rewritten and reorganized with, as the Reporter explained "no change in substance intended," were pretty much the same ones that gave my respondents difficulty; the new comments that provided clarification or ad-

17. *See id.* at 272–74.

18. *See id.* at 50–53, 310–14. Of course, their greater expertise provides another source of selection bias.

19. Indeed, interviews with these sorts of actors would provide triangulated data.

20. *See* SHAPIRO, *supra* note 1.

21. One of the many methodological advantages of my being openly a nonlawyer was that respondents did not seem to be intimidated by or feel judged by me and, therefore, spoke more freely and comfortably to me about their legal assessments, interpretations, and negotiations. I doubt that a law professor interviewer would hear the stories rendered in quite the same way that they were recounted to me.

ditional examples were responsive as well. It will take another empirical study, however, to determine whether the elucidation made matters better or worse.

The account that the Commissioners received about the ways in which the rapidly changing social organization and economics of legal practice is butting up against the conflict-of-interest rules also squares fairly closely with the account that I received—at least about big firms, big clients, and big cases. The Commissioners seemed to hear quite a bit less than I did about the effect of social change on lawyers at the bottom of the stratification hierarchy and about the difficult conflicts faced by those on the economic margins—serving indigent or unsophisticated clients, in smaller legal markets, or by those practicing in smaller towns who were being buffeted by big city practitioners who were setting up branch offices in their communities and attempting to skim the cream off their client base. Indeed, one of the most striking findings of my study is how much variability there is across law firms in how frequently lawyers encounter conflicts of interest, which kinds of conflicts are most problematic, and what firms do about them. The findings dramatically illustrate the costs and challenges of a one-rule-fits-all ethics paradigm.

I also learned more about the incentives that different types of legal practices have to self-regulate around conflicts of interest and the role of outsiders—especially clients and malpractice insurers—in the structure and outcome of self-regulation. For example, it became clear from many interviews that the demands from or fear of antagonizing, alienating, or losing important clients often trumped ethics rules—commanding usually higher standards—in how law firms responded to potential conflicts of interest.[22] The impact of malpractice insurers on a firm's self-regulatory system was so high[23] that I was often able to guess a firm's professional liability insurer, at the end of the interview, from what respondents had told me about how their firm deals with conflicts of interest. On the one hand, rule makers would profit from exploring the way in which these forms of social control can be harnessed to increase the incentives for compliance with ethics rules. On the other hand, they ought to be mindful of the nooks and crannies in the legal profession where such resources are absent—for example, lawyers who represent unsophisticated or one-shot clients, whose risk profiles lead them to malpractice insurers with no loss prevention program, or who go bare, foregoing insurance altogether.

My case study of conflict of interest in Illinois also provides an opportunity to undertake the last option suggested in the bulleted list: for regulators to conduct a kind of pilot experiment to explore what the po-

22. Though, as noted earlier in Part I, this may reflect, in part, the recessionary legal marketplace in which law firms were struggling at the time that I conducted my interviews.

23. The involvement of professional liability insurers in overseeing and micromanaging firms has become so great that some observers now refer to them as "regulators." *See* Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1996).

tential consequences might be of changing an ethics rule, by examining empirically the experience of a jurisdiction in which the potential rule change has already been implemented. I do so here with the debate over screening.

III. SCREENING

A. The Debate

Perhaps the most controversial of the conflict-of-interest amendments to the Model Rules of Professional Conduct—and the one that sparked the most empirical discourse among Commissioners and members of the legal community—was the proposed amendment to Rule 1.10 (Imputation of Conflicts of Interest: General Rule) concerning screening:

> (c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
>
> (1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.[24]

In his dissent to this recommendation of the Ethics 2000 Commission, Commissioner Lawrence J. Fox explains the issue:

> A lawyer has worked on a client matter long and hard. The lawyer gets a job offer from the law firm adverse to that client. The lawyer accepts the offer, resigns the client's representation and takes the new job. When that occurs under our present rules, the lawyer's new firm would be disqualified from continuing the representation of the adverse party, absent client consent to the continued representation. In practice, consent often is conditioned on a screen which cordons off the transferring lawyer from any participation in the matter. This means that, while the client might regret the loss of the wandering lawyer, that same client makes the judgment whether to worry about the fact that the lawyer who was the recipient of the client's confidential communications now works elsewhere.[25]

The debate, then, was not about screening per se,[26] but about so-called nonconsensual screening—whether imputed disqualification can be de-

24. Ethics 2000 Report, *supra* note 2, at 96.

25. ABA Comm'n on Evaluation of the Rules of Prof'l Conduct, Report with Recommendation to the House of Delegates, Minority Report 2–3 (2001) [hereinafter Ethics 2000 Minority Report].

26. We have no trouble with the use of voluntary screens in pending cases where a lawyer leaves one firm and joins the other. We believe they can be used to good effect when the client is told about the screen, understands the role the departing lawyer played in the client's matter,

feated merely by screening migratory private practitioners, without securing client consent for conflicts that they import into the firm.

Proponents of the screening amendment pointed to increasing law firm size and number of offices, the greater mobility of lawyers, and changing practices of repeat-playing clients to spread matters around to dozens or hundreds of different law firms, all of which increase the number of conflicts of interest imputed to firms, especially large firms.[27] These trends, proponents argued, also render increasingly less realistic for large multi-office firms the two presumptions that underlie the principle of imputed disqualification: "that every lawyer in every law firm always knows everything about every matter in which every other lawyer in the firm may be involved;" and "that lawyers who have confidential information of a firm's client that may be material to a current adverse matter will inevitably disclose that information within the firm."[28]

This principle of imputed disqualification, however archaic, has wreaked havoc on lawyers and clients alike, the argument goes. It constrains the mobility of lawyers to move from firm to firm (even those involuntarily out of work); it limits client choice of legal representation; and it incites disqualification motions and exacerbates their cost.[29] Because of these difficulties, the screening proponents pointed out, nonconsensual screening of lawyers moving laterally between firms has been gaining wider acceptance in a number of states (by rule or statute) as well as in the federal courts.[30]

The evidence from these jurisdictions that allow screening, say the advocates, is that "formalized screening works."[31] "Screening plays in

knows the identity and character of the firm to which the peripatetic lawyer has migrated, and is asked whether he or she will consent to the screen, with the understanding that everyone will respect the client's right to decide this important question. But screens should not be imposed on clients, especially when a lawyer switches sides in a pending matter.

Id. at 8.

27. M. Peter Moser, *Screening of Personally Disqualified Lawyers to Avoid Law Firm Disqualification Should Be More Widely Employed*, 1999 SYMP. ISSUE OF PROF. LAW. 161 (1999); Larry P. Scriggins, Chair, Ad Hoc Comm. on Ethics 2000, Written Testimony Submitted at the New York Hearing of the Ethics 2000 Commission (July 6, 2000), *at* http://www.abanet.org/cpr/e2k_testimony_newyork.html (last visited Feb. 6, 2003).

28. Written Testimony of Larry P. Scriggins, *supra* note 27; *see also* Robert A. Creamer, Vice President & Loss Prevention Counsel, Attorneys' Liab. Assurance Soc'y, Inc., Written Testimony Submitted at the Atlanta Hearing of the Ethics 2000 Commission (Aug. 5, 1999), *at* http://www.abanet.org/cpr/rcreamer.html (last visited Nov. 16, 2002); Moser, *supra* note 27. Both of these so-called presumptions are actually empirical questions. However, no one offered empirical data to support or rebut the presumptions that with increasing firm size and scope, lawyers are better able to keep secrets from their colleagues and, in any event, know far less to have to keep quiet.

29. "Slavish adherence to standards of imputed disqualification has, however, encouraged the use of the motion to disqualify as a tactical lever to drive up litigation costs, cause delay and embarrassment to lawyers and their clients, create conflicts between clients and their lawyers, force unfair settlements, and deprive clients of counsel who are best suited to handle their matters . . . ." Moser, *supra* note 27, at 162–63; *see also* Creamer, *supra* note 28; Redding, *supra* note 10.

30. Moser, *supra* note 27; Creamer, *supra* note 28.

31. Redding, *supra* note 10.

Peoria. It's time for the Commission to take it on the road."[32] Sharing both anecdotal and experiential data and letters from disciplinary authorities in a few states that permit screening in lateral transfer situations, proponents argued that there have been "virtually no complaints" that "lawyers have violated the provisions of a formal screen" or any other "screening problems."[33] Nor have any problems arisen from the screening of former government employees under ABA Model Rule 1.11.[34] Indeed, advocates charged, "the efficacy of screening to protect

32. Creamer, *supra* note 28.

33. Redding, *supra* note 10. Redding's testimony includes three exhibits regarding the disciplinary experience related to screening in Illinois, Washington, and Oregon. Information from Tennessee is alluded to in the testimony, but not documented. There is no description of the experience in the remaining states that allow nonconsensual screening or why that information was not provided. Exhibit A includes a Letter from Mary Robinson, Administrator, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, (July 19, 1999), who states, in part:

> In terms of formal cases, while there have been matters involving alleged violations of Rule 1.10(a) due to imputed conflicts, those cases did not include any effort by the firms involved to screen the tainted attorney. It appears that there have been *no* formal cases involving charges that an effort to screen under Rule 1.10 was inadequate to protect confidential information. While I cannot be as unequivocal in terms of whether clients or other lawyers have ever complained to the disciplinary commission of such a violation, I can surely state that we have seen no significant problems. Of course, as you understand, any problems that would occur would likely arise in the context of a large law firm, and the clients of large law firms are significantly less likely to complain to the discipline commission than are clients of small firms or sole practitioners. Nevertheless, we receive a small but not insignificant number of complaints involving conflicts of interest, often from an opposing attorney or a judge. We do not recall any case where a screen had been implemented and where there was a complaint that the screen failed to prevent the transmission of confidential information.

Exhibit B includes a Letter from Barrie Althoff, Director of Lawyer Discipline, Chief Disciplinary Counsel, Washington State Bar Association (July 22, 1999), who states in part:

> I have talked with our General Counsel and with a number of my colleagues in the Office of Disciplinary Counsel, who have been with the WSBA [Washington State Bar Association] since before screening was adopted. Since 1992, more than 20,000 grievance files have been opened against lawyers; far less than ten percent of those involved any type of conflicts-of-interest situation and, while we have not made any review of those files in writing this letter, none of us could recall any that involved issues relating to the adequacy or inadequacy of screening. . . . Thus, based on our experience, screening seems to work well and without any apparent disadvantage to affected clients. Indeed, because of the various steps that need to be taken to assure adequate screening, it may be that lawyers more carefully analyze possible conflict-of-interest cases than they might otherwise do.

Exhibit C includes a copy of a journal article reporting on the experience of screening in Oregon:

> In the 16 years since their adoption, there has not been a single complaint filed with the Oregon State Bar to the effect that a screened lawyer has done something that he or she should not have done. Similarly, there has not been a single malpractice or breach of fiduciary duty complaint filed in which a breach of a screen has been alleged. In other words, there has not even been an allegation or complaint, let alone a proven case. . . . Oregon's 16 years of experience with screening as a matter of right has been highly favorable and provides a firm basis for extending the screening rule to all American jurisdictions.

Peter R. Jarvis, *Sixteen Years on Screen: Oregon's Lateral Hire Screening Rules*, 10:4 PROF. LAW. 2, 7 (Summer, 1999). Jarvis does not disclose the source of these data.

34. *See* Creamer, *supra* note 28; Jarvis, *supra* note 33, at 7. The precedent for allowing screening without client consent when lawyers move between private firms came from similar provisions for lawyers moving from government service into private practice. Several decades ago, the ABA recognized that the imputed disqualification rules deterred able lawyers from government service who feared that they would be unable to exit government positions via the revolving door into lucrative partnerships in private law firms. Law reformers borrowed the concept of "Chinese wall," an institutional mechanism long used in banks, securities, and investment banking firms to segregate functions among separate departments and to insure that confidential information in one did not find its way

the interests of former clients and the public has been acknowledged by the Commission," having already approved nonconsented screening for "former government lawyers; former judges or arbitrators (and their clerks); lawyers who interviewed prospective clients; lawyers who rendered 'short-term' limited services; lateral paralegals and secretaries; and former student law clerks."[35]

The majority of Commission members were won over.

> The Commission was ultimately persuaded that nonconsensual screening in these cases adequately balances the interests of the former client in confidentiality of information, the interests of current clients in hiring the counsel of their choice (including a law firm that may have represented the client in similar matters for years), and the interests of lawyers in mobility, particularly when circumstances dictate the need to move. The Commission understands that there have been few significant complaints regarding screening in the seven jurisdictions whose rules currently permit it.[36]

They voted to propose an amendment to allow nonconsensual screening of lateral hires as long as the screen is timely, the screened lawyer receives no share of the fee, and the affected client is notified in writing about the screening arrangement.

Those opposed to the screening provision questioned the empirical assertion that there have been few complaints about breaches of screens, suggesting that it "comes from lack of knowledge concerning the violations"[37] and not the dearth of violations themselves. They asserted that nonconsensual screening represents a "relaxation of client protections"[38] that elevates the mobility interests of lawyers over loyalty to clients—one of the core values of the legal profession.[39] Others questioned whether screening could work in small law firms and implied that the amendment was "an unnecessary sop to large law firms."[40] Moreover, they argued that "firms cannot be counted on to administer screens effectively, that former clients will have no ability to police screening arrangements, and that confidences will inevitably be disclosed inadvertently in certain prac-

into another. The Model Rules of Professional Conduct officially greased the revolving door by stipulating that, where former government lawyers, judges, or public officials are screened and receive no share of the fees generated by an otherwise tainted matter, conflicts of interest which they carry with them into the private sector would not be imputed to their entire firm. Client consent was not required.

35. Robert A. Creamer, Vice President & Loss Prevention Counsel, Attorneys' Liab. Assurance Soc'y, Inc., Written Testimony Submitted at the New York Hearing of the Ethics 2000 Commission (July 6, 2000), *at* http://www.abanet.org/cpr/creamer10.html (last visited Oct. 21, 2002); *see also* Moser, *supra* note 27.

36. Ethics 2000 Report, *supra* note 2, at 6.

37. Redding, s*upra* note 10.

38. Ethics 2000 Minority Report, *supra* note 25, at 11.

39. These arguments were made during the open debate at the ABA House of Delegates, Chicago, IL, August 7, 2001.

40. Jarvis, *supra* note 33, at 7. As an observer to the debate over screening in the ABA House of Delegates, the tensions between big-firm and small-firm lawyers was surprisingly palpable.

tice settings."[41] The Commission, in turn, dismissed these concerns on empirical grounds, asserting that it "heard no evidence to suggest that these objections have a factual basis in the experience of jurisdictions that permit screening."[42] Those opposed to nonconsensual screening countered:

> But the argument that objections about the effectiveness of screening may be dismissed because the "commission heard no evidence to suggest that the objections have a factual basis" needs closer examination. . . . Whom did the commission expect to complain—firms that have used screens, either in jurisdictions that permit them or in situations of client consent? Did the commission really expect firms to confess to negligence or worse, with loss of business and lawsuits to follow? Really? The commission apparently ignored some cases that analyzed screening attempts in Pennsylvania firms in which courts found that screens had in fact leaked—sometimes quite badly. I am of course referring to Maritrans and Steel v. GM and there is also Lord Jefri v. KPMG from the House of Lords.[43]

The charges flew. Those opposed to screening faulted their adversaries with failing the test of loyalty to their clients; the latter accused the former of being anticlient. Those favoring screening suggested that their opponents would be seen as taking a position that lawyers cannot be trusted; those opposing screening railed that rules that favor the interests of lawyers over clients may result in the autonomy of lawyers to regulate themselves being snatched away.[44] The debate over screening in the ABA House of Delegates continued into the eleventh hour. Late in the afternoon of the last day of the ABA annual meeting, the House of Delegates, its ranks substantially thinned when the debate continued longer than originally projected, voted (58% to 42%) to kill the proposed screening amendment.[45] The Commission ultimately decided not to reopen the debate over screening at the following ABA midyear meeting, when the House of Delegates was scheduled to consider and vote on the remaining recommendations of the Ethics 2000 report.[46]

B. The Empirical Claims

Although the thrust of the debate over screening was political and ideological, it rested awkwardly on an empirical foundation. The advocates trumpeted empirical evidence that "formalized screening works";

41. Ethics 2000 Minority Report, *supra* note 25, at 5.
42. *Id.*
43. *Id.* at 6.
44. *Id.* at 1, 2, 11.
45. These arguments were made during the open debate at the ABA House of Delegates, *supra* note 39. I observed the vote.
46. Charlotte Stretch, ABA Center for Professional Responsibility, Minutes of the Philadelphia Meeting of the Commission on Evaluation of the Rules of Professional Conduct (Nov. 10, 2001), *at* http://www.abanet.org/cpr/e2k-11-10mtg.html (last visited Feb. 7, 2003).

the skeptics questioned the empirical evidence, but were unable to marshal any of their own that revealed systemic fissures in existing screens or that gave credence to their fears that screening would not protect client confidences. When the necessary data were elusive, both camps fell back on anecdotal or experiential data or logical argument to somehow resolve intrinsically empirical questions.

The screening skeptics were right to question the data, not because the inferences drawn from them were necessarily wrong, but because the methodologies that gave rise to them were problematic. Social scientists would not have been comfortable relying solely on the recollections expressed in the letters from the disciplinary authorities.[47] They would have wanted to review the files of complaints and investigations—something the bar regulators did not do before making their somewhat equivocal claims—and then would have asked some serious questions about the social construction of these data.[48]

The most serious methodological question about the disciplinary evidence was raised by the skeptics themselves. Even if experts had exhaustively reviewed the files, reclassified the information, and unambiguously concluded that not even a stray aspersion had ever been cast (let alone demonstrated) to regulators about the impermeability of screens, what about the selection bias problem? Disciplinary cases are subject to selection bias, in that most violations of ethics rules do not result in complaints to disciplinary authorities, those that generate complaints are often different from those that do not, and disciplinary authorities usually investigate only an (often biased) subset of the complaints they receive.

What are the conditions under which a malfunctioning screen would come to the attention of bar regulators? Are their recollections or file drawers the best place to unearth data on such problems? Do law firms turn themselves in? Unlikely. When firms discover a breach in their confidentiality shield, it is more likely that they will inform the affected client (at best), or quietly repair or reinforce the screen or cover up their misconduct (at worst). In the former case, the client would be unlikely to complain, because the firm was presumably trying to "make things right" and was doing whatever it took to appease the client; in the latter, no one would know about the damaged screen if the repair or cover up was adequate. Besides, as even the bar regulator from Illinois conceded, these are not the sorts of problems that wend their way into a disciplinary

47. The Oregon case study of screening cited in testimony to the Commission does not even disclose how the author knew that there has never been even an allegation of breach of a screen—whether it came from the recollections of a bar regulator, from systematic data, from the author's own recollections, or some other source. *See* Jarvis, *supra* note 33, at 7.

48. For example, what are the characteristics of those who typically make complaints to the agency? What are the incentives to complain? Under what conditions is a complaint, received by the disciplinary authorities, logged as a case to be counted? How are complaints classified and substantive violations coded? Are all complaints investigated? Is every allegation of a violation of confidentiality explored to see whether an ethical screen was involved; and is that information systematically coded into the database? And so on . . . .

agency: "Of course, as you understand, any problems that would occur would likely arise in the context of a large law firm, and the clients of large law firms are significantly less likely to complain to the discipline commission than are clients of small firms or sole practitioners."[49]

Who else might know that a wall had been breached? If the adversarial law firm (representing the former client whose confidences were potentially compromised) found out, it would be more likely to ask the firm to withdraw from the now tainted case or to file a motion for disqualification than to fire off a complaint to bar regulators. Sometimes, a disqualification motion or malpractice case will eventually find its way into the in-boxes of the bar regulators, but this trajectory is neither certain nor timely. Indeed, data from my study indicate that, at least in Illinois, it is extremely unlikely that a conflict of interest would make its way to the lawyer disciplinary agency, the Attorney Registration and Disciplinary Commission (ARDC).[50] Disciplinary action is by far the least common form of social control for conflicts of interest. So this is perhaps the worst place to look for evidence about the functioning of screens.

The disciplinary "data" presented to the Commission have still another limitation. Even if they were not confounded by selection bias and instead provided a perfect indicator of the vulnerability or permeability of ethical screens, they only tell half the story. The data cast a spotlight only on a few jurisdictions that allow nonconsensual screening, not on the majority that do not. The debate over Rule 1.10(c) seems to suggest that the alternative to screening is perfect confidentiality and client protection. But, of course, it is not. Screening is one of a handful of alternative normative and regulatory arrangements to deal with the tainted baggage that would-be mobile lawyers carry through the job market. The efficacy of nonconsensual screens to protect client confidentiality should be compared to these alternatives. How do nonconsensual screens stand up to those erected in "consent jurisdictions" to reassure clients and thereby secure their consent to waive a conflict of interest that would otherwise be imputed to the entire firm? Or how do they compare to arrangements in consent jurisdictions in which no screen is erected at all because asking clients for consent is problematic—the client is not sophisticated enough to give consent, the client will refuse to give consent, the client will give consent but get angry at the lawyers, and so on.[51] What do the disciplinary authorities in these jurisdictions have to report

49. Letter from Mary Robinson, *supra* note 33.

50. Not even one-tenth of the respondents in the study indicated that their firm had been subject to an ARDC complaint concerning a possible conflict of interest. Almost two-thirds of the firms subject to an ARDC complaint were small—comprised of fewer than ten attorneys—and many of the complaints were filed by convicted criminals who were unhappy with their lot. SHAPIRO, *supra* note 1, at 429. The letters from both the Illinois and Washington bar regulators, cited in the testimony to the Ethics 2000 Commission, provide figures consistent with my findings. Letter from Barrie Althoff, *supra* note 33; Letter from Mary Robinson, *supra* note 33. *Id.*

51. For materials on how lawyers and clients interact over disclosure and conflicts waivers, see SHAPIRO, *supra* note 1, at 384–92, 432–41.

about complaints over breaches of confidentiality or problems with lateral hiring?

C. Real Data

Curiously, there actually were empirical data available to the Commission on the efficacy of nonconsensual screens,[52] although I could find no reference to them in the public record of the Ethics 2000 Commission minutes, hearings, testimony, or debate in the House of Delegates. In a mail survey of firms with more than fifty lawyers practicing in states that allow screens in lateral hiring between private firms, Lee Pizzimenti asked detailed questions about the use of screens. Though tainted by a very low response rate (twenty percent) and a likely selection bias that overrepresents compliant firms mindful of their professional responsibilities (which chose to participate in the survey), the findings are nonetheless instructive. They revealed a glass both half empty and half full, offering a bit of something for all sides of the debate. Though concluding that most firms try "to do the right thing,"[53] the survey found significant minorities that did not know when screens should be erected, what was required, or that did not do an adequate job maintaining screens. Indeed, the author concluded that she had "real questions regarding the efficacy of screens."[54]

Whether this study never surfaced in the Ethics 2000 process because the methodology was tainted, the findings unconvincing or inconclusive, or the advocates uninterested in a complicated and somewhat equivocal result, the Commission missed a real opportunity. Even if Pizzimenti's sample was far too small and unrepresentative to draw inferences about the efficacy of screens, the findings provided important insights about where they are most vulnerable or about ways to shore them up. Rather than indulging in the superficial choice of either embracing or killing screens, rule makers might have used these insights to fashion rules that would increase the chances for screens to succeed in protecting client confidences.

Unfortunately, however, the Pizzimenti study missed the same opportunity as did those who sought to influence the Ethics 2000 Commission with reports from bar regulators. It looked only at jurisdictions that allowed nonconsensual screens. Once again, screening in practice was compared to some ideal type. It would have been tremendously useful to have data that compared firm structures and procedures for screening in jurisdictions that allow firms to erect walls without client consent and

52. Lee A. Pizzimenti, *Screen Verité: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?*, 52 U. MIAMI L. REV. 305 (1997).

53. *Id.* at 306.

54. *Id.* at 330.

those that do not. As I will argue below, there is no reason to expect that the empirical findings should be the same.

My study of conflict of interest improves on two of the limitations of the Pizzimenti study: nonresponse bias (my response rate was ninety-two percent, hers twenty percent) and concentration only on jurisdictions with nonconsensual screening. Although my sample was drawn from Illinois, one of the handful of nonconsent jurisdictions,[55] I also conducted some interviews in other jurisdictions with less lenient screening provisions. Moreover, my sample includes firms of all sizes, locations, specializations, types of clientele, and markets, not just the large ones on which Pizzimenti concentrated or the small ones which predominate in complaints to disciplinary authorities. Because my study was not designed to test the competing claims and hypotheses bandied about in the debate over screening, its findings are at best suggestive. They do not resolve the debate, but they recast some of the questions, undermine some of the assumptions, and invite the combatants to go back to the table and look again at what they hope to accomplish with regulations surrounding imputed disqualification.

D. The Experience of Screening in Illinois

In each interview, I asked respondents about their firm's experience with screening. Firms in the sample varied considerably in the extent to which they made use of screens. Were screening devices as visible as the Great Wall of China, after which some are modeled, I would have seen dozens in place in a few of the firms that I visited and none at all in most of the others. Not surprisingly, none of the firms in the sample with fewer than ten attorneys had ever used a screening device; this was true of a quarter of those with ten to nineteen attorneys, more than four-fifths of those with twenty to forty-nine, and virtually all those employing fifty or more lawyers. While about a fifth of the firms with ten to nineteen attorneys have constructed screens on a number of occasions, this was true of almost half the firms with twenty to forty-nine lawyers, and roughly three-quarters of those with fifty or more. Indeed, almost half the respondents in firms of one hundred or more indicated that screens were

55. Rule 1.10 of the Illinois Rules of Professional Conduct restates the imputed disqualification rule:

> (b) When a lawyer becomes associated with a firm, the firm may not represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person . . . .

But then goes on:

> unless:
>
> (1) the newly associated lawyer has no information . . . that is material to the matter; or
>
> (2) the newly associated lawyer is screened from any participation in the matter.

ILL. RULES OF PROF'L CONDUCT R. 1.10 (2002).

common in their firm, with many in place at any one time, sometimes dozens of them.

To put these figures in perspective, I conducted pilot interviews in the largest law firms (all with more than one hundred attorneys), where screens would be most common, in another midwestern state that—like most of the rest of the country—does not permit screens without client consent to resolve the conflicts of interest that arise from lateral hiring.[56] This sample is far too small from which to generalize, but the contrast is telling. The Chair of the Professional Standards Committee of the largest firm (which had a branch office in a state that allows screening) told me that most of the firm's lateral hiring occurs in the branch office that allows screening, but that the firm as a whole probably uses screens in a third of the matters in which it seeks client consent to a conflict. The Managing Partner of a second firm indicated that screening devices are not common, but "there are probably Chinese wall situations around here at all times." At the opposite extreme, the Chair of the New Client Committee at a nearby firm was barely familiar with the notion of a screening device. What little he knew, he conceded that he learned only hours before our interview when he questioned a colleague who had formerly worked in a Chicago law firm. Moreover, he said, the physical layout of the firm and the ease of access to files would render a wall "farcical." The remaining respondents explained that they erected screens on "a few occasions" or "no more than five times in the history of the firm" and some expressed distaste for the practice.[57] So screening devices appear to be less institutionalized in states that do not allow this prophylactic device to cure conflicts detonated by mergers and lateral hiring.

What does an ethical screen look like?[58] The Illinois respondents provided disparate descriptions, usually corresponding to the size of the firm.

S: What does a screen look like in the firm?

L: It's about this big [L gestures]. [laughter] We have a set of forms in which . . . the screened lawyer is notified by the Conflicts Department and our Administrative Manager that they have been screened

56. I also conducted interviews in a handful of large Chicago firms with headquarters or major branch offices in states that do not allow screening without consent.

57. Of course, these "large" firms are half the size, on average, of their counterparts in Chicago. So some of the disinclination to erect screens probably reflects firm size.

58. Rule 1.10 of the Illinois Rules of Professional Conduct stipulates that:

(e) [A] lawyer will be deemed to have been screened from any participation in a matter if:
(1) the lawyer has been isolated from confidences, secrets, and material knowledge concerning the matter;
(2) the lawyer has been isolated from all contact with the client or any agent, officer, or employee of the client and any witness for or against the client;
(3) the lawyer and the firm have been precluded from discussing the matter with each other; and
(4) the firm has taken affirmative steps to accomplish the forgoing.

ILL. RULES R. 1.10; *see also* Pizzimenti, *supra* note 52, at 329–31.

> *from the particular matter or client. . . . And the notice goes to the screened lawyer or lawyers. And the screened lawyer must sign an acknowledgment and a pledge to abide by the screen. Then the Conflicts Department sends out a screening memo to all parties and it's put into a database and then there are periodic reminders that go out. At this point, because of various technical problems, we do not lock files. We do not mark screened files. We're looking at that. {36Ch100+}*[59]
>
> *We send out a memo to everyone in the office saying, "Do not discuss whatever case it is with whoever it is." We memo everyone. We indicate that the files for the particular case will be stored in a specific cabinet which is to be locked and that no file is to stay in anyone's office overnight. It must be locked in the cabinet, which is located in a specific spot. But usually the secretary for the lawyers who are working on the matter and the lawyers have the keys to the cabinet. Any inter-office mail regarding those items is to be in a sealed envelope marked "confidential," as opposed to our standard envelope which has a pull-tab on it. {10Ch100+}*[60]

Many firms also communicate to attorneys and staff the seriousness with which they regard a breach of these barriers.

> *We circulate a memo: "So-and-So has come to us. At their prior firm, they did some work for B. We want to avoid even the appearance of conflicts. This partner is responsible for supervising the files. Don't leave files or records around. Don't ever talk to this individual about the case." We want lawyers to know that this is as serious as talking about a bomb in an airport. {43Ch20-49}*[61]
>
> *Let me put it to you this way. . . . [I]f we discovered that this person was violating our Chinese wall principles, we'd probably take him out in the street and beat him up and leave him for dead. {51Ch20-49}*[62]

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59. All quoted materials from the interviews are identified in the following way:
- a sequential number (from 1–128) that identifies the interview
- the location of the firm (Ch = Chicago, CC = collar county, DSL = downstate large city, DSM = downstate medium-sized city, DSS = downstate small town)
- firm size

So this quote comes from the thirty-sixth interview, conducted in a Chicago firm with more than 100 lawyers. Quotes from pilot interviews are flagged as such and numbered. "L" refers to the lawyer respondent. When I interview more than one lawyer in the firm, they are denoted "L1" and "L2." Nonlawyer respondents are "R." I am "S." SHAPIRO, *supra* note 1, at 404–05.

60. *Id.* at 405.

61. *Id*. Some lawyers do take the admonition seriously:

> I had an associate come in. I thought the poor guy was going to be in tears. I really thought he was going to cry. "I messed up, I messed up." And what happened, it turned out this guy was an M.D. and he wants to do medical-type work and he got involved in taking a deposition for a partner in a breast implant case and he has been working regularly for another partner in some other kind of medical device case for different client. But this client is also a codefendant in this one and so we had set up a screen and he was flipping through the file and, all of a sudden, he saw the screening memo and he thought that . . . it was the end of the world. {pilot02}

Id. at 405 n.

62. *Id.* at 405.

The most opaque and seemingly more impenetrable screens,[63] generally found in larger firms, have a mechanism for:

- alerting the screened lawyers to their new status, informing them of their obligations, and requiring them to sign a pledge to abide by the screen;
- notifying all of their colleagues, file room personnel, and coworkers (even secretaries, messengers, and food service workers) of the screen and cautioning them not to talk to their quarantined colleague about the case;
- explaining that all conversations must take place in private locations (and never in hallways, elevators, lunchrooms, etc.);
- restricting access to files;
- segregating, labeling, and locking files;
- reminding colleagues that records and documents must not be left out on their desks, but stored in secure locations;
- placing passwords on affected computer files;
- specifying confidential procedures for inter-office mail;
- naming a party responsible for supervising the screen; and
- periodically reminding all personnel of the existence of the screen.

Few of the respondents, even those with heavily fortified ethical walls, spoke about provisions to exclude screened lawyers from their share of the fees accrued from the conflicted matter.

Where screens in some firms are marked by barriers, locks, signs, and passwords and enforced by assorted border guards, in many others—especially smaller firms—they are more "ephemeral," to quote one respondent, constructed from much simpler blueprints. A few firms simply admonish lawyers not to talk to one another.

> *A Chinese wall is "a state of mind." We don't give the screened lawyer access to information and, similarly, he doesn't give you material information. {14Ch100+}*[64]

> *We just say "Hey, stay away. Stay the hell away from this client. [Case] was at your old office. You worked on it. So forget it." . . . We put something on the file saying, "So-and-So is not going to be involved in this." But people know it. If guys are working on a case, he knows who's working on the case and he shouldn't be talking to*

63. Some of the larger and more sophisticated firms also construct screens for support personnel—especially paralegals and secretaries—hired laterally from other law firms. In contrast, some of the independent solo practitioners who share office space, secretaries, computers, phone lines, and file cabinets with other attorneys—who often represent coparties—have no screens in place to protect the confidentiality of their cases.

64. *Id*. at 406.

anybody about it and he shouldn't read the file. So he doesn't. {20Ch50-99}[65]

Others tell the infected lawyer not to work on the case or assign separate teams of lawyers to work on the conflicting matters.

What we've done in the past—and what I still do—is that, if an attorney came from a certain firm, they just never work on the files from that firm. . . . But, generally, what we would do if there is a conflict, is just that attorney would not handle—ever handle—any of those files. That would be it. {102Ch10-19}[66]

We have simply screened off lawyers from cases. And the way we do that is—we work in litigation teams, generally. And, if we had such an issue, we would take the case outside of the entire "team sphere" and put it into another team sphere. Because there's very little crossover on the teams. That pretty much would guarantee that that lawyer would be screened off that case. {27Ch50-99}[67]

Virtually all the respondents offered immediate disclaimers that their security could be easily breached by an unscrupulous lawyer.

[W]e built this enormous edifice and there are times when you wonder what really is going on here. Because you built screens and go through all this. You're really, at the bottom, if the person you hired doesn't have integrity and wants to tell you the secrets that he learned at the other firm, he'll do it anyway. {5Ch100+}[68]

But do you lock up your files at night? No. Is there a possibility the information could be exchanged through the networks on computers? I think most of the things I do, you got to be a real dull person to raid my computer to find out what the hell I'm doing. I mean, you've got to have a dull life to track what [L names self] is doing. But, if in a conflict, that's possible, that's possible to key into our network. And . . . if someone in our [east coast] office wanted to know what I'm doing—if we have a conflicts situation—Chinese wall won't help. So I think that the computer world is another reason why I'm dubious about them. {16Ch100+}[69]

Still, the risk of inadvertent leaks appears considerably greater in the firms with few border controls or bureaucratic hurdles to enforce secrecy and silence.

But how easy is it to practice law in a firm crisscrossed with barricades—constantly under construction, being moved or torn down—that segregate departments, practice groups, even neighbors? Though most respondents whose firms utilize screens find them relatively easy to erect and to live with, others note some difficulties. Those in smaller firms comment that screens are difficult to enforce:

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 407.
69. *Id.*

We have a really small firm. This is [less than 15] lawyers. We have 3,000 square feet here. So I've got—whatever my square footage is—this is a small office. Is a Chinese wall a fiction? I mean, look, if it's a big enough case, then—and you've got a Chinese wall issue—then I've got a problem in a small firm this small. And the problem is—assuming that all the clients think the Chinese wall is wonderful and so on and so forth—how the hell am I going to enforce it? There's no secrets here. Everybody knows what's going on in all the cases. So that would be a problem. {104Ch10-19}[70]

Of course we could do that [build a screen]. I think I would feel awkward about it, especially if it's going to be a long drawn-out kind of thing. Because there's just too many chances—in a firm like ours—that something is going to be said. You know, the lawyers get together to have a beer—whatever. And you just don't want something said. {76Ch10-19}[71]

I think that would be pretty unworkable for us. I mean, all of our support staff is centrally located. I simply would walk through the secretarial area and my eyes could see documents that they may be working on. And if that's a problem—and I assume it is—that would make it not feasible for us. {87DSS10-19}[72]

I can't do that [set up a screen]. I can't, I can't enforce it. I can't enforce it. I can't be out there worrying about whether she's looking at documents she shouldn't be looking at. I won't place myself in that position. {118Ch<10}[73]

Those in larger firms find that screening devices impede and complicate communication and make use of records and documents sometimes cumbersome and inefficient.

It would be easier if we were a smaller firm. But, we're a bigger firm and it's harder to wall somebody off from everything. I mean, for instance, we send these [New Business] Sheets out to everybody. . . . How do you say, "Well, don't give that to somebody." . . . How do you limit somebody's access on the computer to documents about that? So it's much more difficult in the age of information, because of the accessibility of things, than it would, you know, the old days, where you'd just sort of block somebody off from everything. And you take as many steps as you can, but who's to say that you've taken all of the steps so that that person doesn't find out anything. . . . I think there are a lot of problems. {1Ch100+}[74]

Sometimes that's not practical. It's hard to lock a room. It's hard when you've got 200 files for a client and someone's supposed to not have access to them. {2Ch100+}[75]

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 408.
74. *Id.*
75. *Id.*

Other respondents, even those in big firms, found it difficult to adequately staff cases with the necessary expertise, when departments are fractured by Chinese walls.[76]

> *Sometimes you say, "well, I'd like to use. . . . So-and-So's my environmental expert on this matter, but I can't because she's on the other side of the screen." {5Ch100+}*[77]
>
> *L: Our biggest problem on that was probably right at the beginning, being sure we had enough people. . . . You don't want to get all your tax lawyers on one side of the wall. Or your banking lawyers on one side of the wall. You want to leave enough people so you could adequately represent the RTC [Resolution Trust Corporation] and yet you could adequately represent a client.*
>
> *R: Your existing clients, yeah. Yeah, that was probably the hardest part on that one was getting the personnel shifted one way or the other.*
>
> *L: It can get tricky. Yeah, I mean, we don't have that much turnover. But if you're setting up a wall there that you expect to continue for three or four years, I mean, realistically, you ought to look at scheduled retirements to be sure you don't run down a small area and have nobody left there. {3Ch100+}*[78]

Because of these difficulties, a minority of respondents indicated that they try to avoid creating screens or use them mostly to solve conflicts between branch offices of the firm where the impediments and disruptions are less problematic.

> *We try to discourage Chinese walls unless we would otherwise lose business. Do a Chinese wall if you have to, but do something else if you are able. They are hard to administer. {pilot07}*[79]
>
> *They're very difficult to deal with when they're in the same office. And I'd be very hesitant to really do it in the same office. I mean, it's one thing if my [east coast] has got a problem. I mean, we're not, it's probably never going to happen that you're going to exchange information. Inside the office—very difficult, very difficult. . . . People*

76. Though others disagree. Clearly it depends on the social organization of expertise in the firm.

> It's not hard. I mean, again, because we're big enough. . . . A perfect example is a recent bankruptcy situation, where . . . one of the attorneys that joined our office from another firm did not work on a particular matter there, but his old office represented the other side of this matter. He's a bankruptcy lawyer. Also, we have another lateral who joined our firm from that same firm who's a business practitioner, okay? We now had a transaction involving that firm and that client, okay? The transaction had started while those two individuals are still at their other firm. So, it's the perfect Chinese wall situation. It wasn't a problem for us, because we have a number of switch players. So we were able to have a different business lawyer and a different bankruptcy lawyer working on the matter. So it wasn't that hard. If we were a smaller operation and the only bankruptcy person we had was that person, then there would have been a significant problem. . . . [I]f you have a conflict and you do a Chinese wall, you have an alternative source for the legal work within the firm. {10Ch100+}

Id. at 408 n.

77. *Id.* at 408.

78. *Id.* at 408–09.

79. *Id.* at 409.

are going to lunch and they're talking and you know. I've been at lunch where people will start talking and somebody'll say, "hey wait a minute. You know, I'm, I can't hear this." And I'm glad people think about that stuff, but . . . I'm not so sure it's something that you really should do very often. {18Ch100+}[80]

Small-firm lawyers were particularly likely to disparage screening devices—certainly in firms their size and often in much larger firms as well.

By the way, I do not believe that Chinese walls exist—not in fact, not in fiction. Not even the tooth fairy believes in them. Do you believe? There isn't such a thing. It's all baloney. Once another firm tried to lay this (that they had a Chinese wall) on our office; we wouldn't buy it. Perhaps the notion of a Chinese wall might work under extraordinary circumstances. We're a small operation; you couldn't create an effective Chinese wall here. {90Ch20-49}[81]

At best, they considered screening devices a kind of sophistry that allowed firms to represent adverse interests.

L: We're not like Winston & Strawn [large Chicago law firm] or anything. They probably have a computer program to come up with their conflicts.

S: A lot of the big firms tend to do that kind of thing.

L: Yeah. But they have those Chinese walls, so they can represent both sides. [laughter] {73CC10-19}[82]

At worst, they rejected them out of hand.

I don't believe, myself, in a China-wall concept. I think it's just a. . . big lie. {81Ch10-19}[83]

S: You smiled at one point when I mentioned Chinese walls. Could you envision a Chinese wall in this firm?

L: No, absolutely not. I [snickers] think Chinese walls are bullshit. . . . I think the whole idea of Chinese wall, especially when you have lawyers talking, it just doesn't work. And the appearance of impropriety should be avoided. You know, I think Chinese walls give me a very strong sense of the appearance of impropriety. Clearly, not in a small firm like this. But, even in a big firm, I think there are pressures that are brought to bear, there are informal talks. It just shouldn't happen. If you're on one side, you should be on that side and not the other. . . . In a small firm, a Chinese wall, everybody would laugh about it. Three lawyers can't have a Chinese wall. You almost live together. Six lawyers: a Chinese wall is not going to happen. . . . I mean, out here, a Chinese wall would have been, "yeah, I represented the husband. My partner's representing the wife. But

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 410.

don't worry, we won't talk about it." Who are you kidding? {84CC<10}[84]

As this last respondent suggests, others questioned the impenetrability of screening devices as well as the temptations to breach the barrier:

I'm not a big advocate of that Chinese wall either. I think they have big ears. {105Ch<10}[85]

You can certainly put your ear to 'em and listen [laughter]—sometimes peek over right [snicker]? I'm sure that happens all the time. {63DSS<10}[86]

I don't think it's easy in a large firm to function with a Chinese wall. You're basically asking a firm to be on its honor. There's a temptation there. . . . I kind of like the quote from the one guy that said, "I can resist anything but temptation." I don't want the temptation around. {107DSL<10}[87]

[T]he judge said, "set up the China wall and he's not supposed to talk to anybody about it." . . . And they said, "he's not going to work on the file." Come on! That's what you work with associates and partners with, is to discuss things, and bounce things off of them. But, I'm not saying that they didn't, but, I mean, I think there was strong evidence a[n] impropriety could have existed there. . . . We didn't have any axe to grind with this particular law firm, other than the fact that we felt that, human nature being what it is, there's going to be some communication back and forth. {95CC10-19}[88]

Perhaps most telling, one respondent described his reaction when he learned that the confidences and secrets of his law firm were being protected by barriers equivalent to those of a screening device. It raised his consciousness about the kind of trust in an artificial construct that lawyers routinely ask of their own clients.

You know, a while ago, I found out that our CPAs—two guys—had joined a large insurance defense firm—a competitor of ours. They moved their practice and all of our files and records right into that law firm. Our files were actually physically located there. These files conveyed virtually everything about our business, our financial condition. When I found out, I said, "no way!" I insisted that they had to move the records out of the firm. They argued that they were all locked up and no one could get to them. But this is a dog-eat-dog world. What if the major law firm client started asking questions about us? I couldn't sleep at night. This experience made me realize how clients must feel when their law firm is representing competitors or parties with adverse interests. {89Ch20-49}[89]

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 411.

E. Implications

What, if anything, does this glimpse of Illinois law firms and a few large counterparts in a neighboring state contribute to the debate over the ethics and efficacy of nonconsensual screening of lawyers moving laterally between private law firms? First, Illinois law firms are not teeming with screens. They are constructed most frequently where they are most appropriate—in large law firms where conflicts are more common and confidentiality easier to cloister, especially where conflicts span physical, social, or geographic distance within the firm. Moreover, the undercurrent of tongue clicking within the House of Delegates over the charade of small firms cloistering confidences behind such artifices appears unjustified. Small law firms simply do not partake much of screening devices.

Screens have not overtaken Illinois law firms because they are administratively costly to maintain and, although they may satisfy ethical requirements, they do not necessarily satisfy clients' expectations of undivided loyalty. Though Illinois lawyers may not be required to secure their clients' consent before erecting a wall, they are unlikely to begin construction if they know that what lies behind the screen may drive away a valued and significant client. As the Managing Partner of a large law firm observed in a slightly different context:

> *If that were a rule that I could sue a subsidiary of General Instruments and not have to worry about getting an ethics slap, my client's still going to be mad at me. . . . I am not sure that whether or not the conflict rule is there or not really would have much impact on how I conducted myself. Because, especially today, where it's so hard to get the business and keep the business, I want my clients to think I'm loyal to them. {18Ch100+}*[90]

These rules do not ameliorate client-relations problems nor do they address lawyers' ever-present business concerns. Ethical screens may reassure some clients. But reassurance comes with consultation and consent, a client-relations strategy that is available to lawyers practicing in all states. Illinois lawyers who, by undertaking a merger or lateral hire, risk losing significant clients, will usually abandon it—just like their counterparts in other jurisdictions.

Moreover, although screens may allow otherwise conflicted lawyers to travel through the job market, they do not allow them to travel laden down with heavy baggage. They do not permit migratory lawyers to undertake adverse representations shielded by the screen. And that is why, even in Illinois, many prospective lateral hires or mergers wither when lawyers realize that they will have to leave behind significant clients whose interests are adverse to those in the host firm. Ethical walls do

90. *Id.* at 218.

not change that fact. They may help to unstick the revolving door; but they do not motorize it.

Do the screens meet the specifications found in the ethics codes and case law? Not always, especially in the smaller firms. Admonitions simply to "stay the hell away" do not live up to the spirit of the rules. Even walls constructed from more sophisticated blueprints have points of vulnerability, especially with respect to computer networks and firmwide communications. Even more problematic, firms often do not construct screening devices as quickly as necessary because of the lag between the time that the migratory lawyer joins the firm and the time that their tainted baggage is discovered. Some of the most notorious and costly disqualification cases involve firms with the most impenetrable screens, but constructed too late.

Whatever their shortcomings, the glass is probably still half full. Because ethical screens in Illinois are routinized and subject to regulation, they are probably more opaque, more secure, better protected, less vulnerable, and better supervised than those erected in states where screens do not alone solve the imputation problem. In most other states, screens are offered to clients as a way of inducing them to consent to the conflict. They are designed by the affected lawyers and built ad hoc to reassure the clients. Because there are no regulatory standards, each wall can meet different specifications and be constructed from different materials. Because they are devices negotiated by affected attorneys rather than offered by the firm, there is less need to tinker with firmwide information systems—computer networks, voice mail, e-mail, and interoffice mail, communications, and the like—to ensure that screens are not inadvertently breached. In these states, it would be unlikely to find self-regulatory systems as institutionalized and comprehensive as those described earlier, which are standard in many large Illinois law firms to ensure the integrity of their screening devices. Whether Illinois screens are really more impenetrable is, of course, an empirical question that requires more data than what were gathered for my study. But the economies of scale, the regulatory requirements, the scrutiny of screening devices by Illinois courts all increase the likelihood that they are. One effect of liberalizing the law may well be that, ironically, clients are better protected and confidentiality even more inviolate in jurisdictions that allow screening without consent than those that do not.[91]

Still, it is likely that the liberalization of the law will reinforce a double standard that operates in other aspects of the lawyer-client rela-

91. Indeed, the bar regulator from Washington made a related conjecture in his letter to the Ethics 2000 Commission:

> Thus, based on our experience, screening seems to work well and without any apparent disadvantage to affected clients. Indeed, because of the various steps that need to be taken to assure adequate screening, it may be that lawyers more carefully analyze possible conflict-of-interest cases than they might otherwise do.

Letter from Barrie Althoff, *supra* note 33.

tionship. Where clients have considerable clout, it may be unnecessary to require that lawyers secure their consent, because their lawyers will anticipate their reaction before constructing a screening device anyway. As the respondent quoted last observed, if taking advantage of more liberal rules will alienate important clients, his firm will defer.

It is not the powerful, sophisticated repeat-playing clients that rule makers need to worry about, but the one-shotters. Are their rights and interests being trampled in jurisdictions like Illinois, where firms can screen with impunity? Do powerless clients fare better in states where lawyers must seek their consent? Or are these "offers" that such clients cannot realistically refuse? Do the off-the-rack institutionalized firmwide Illinois screening devices, devised to satisfy even powerful clients, better protect one-shotters than the screens constructed in other states to placate them so that they will consent to the conflict? And how are these screens patrolled in these states? Once the client has consented to the conflict and the matter goes forward, what incentives are there in these jurisdictions to police and fortify the wall from any possible cracks or leaks, especially those built for clients unlikely or unable to supervise the gatekeepers? Given that less powerful clients often lack the sophistication, influence, or resources to negotiate, monitor, or enforce the walls that cloister their secrets, are they better off in nonconsent jurisdictions where they can hope that others looking over their lawyers' shoulders will ensure that the gatekeepers remain vigilant?

Those opposed to screening were right to worry about the ability of clients to police the screens. But their fears were probably misplaced. Firms in all jurisdictions screen; the difference is consent. Policing is, therefore, a problem for screens everywhere. Because firms in nonconsent jurisdictions are subject to local ethics rules and court decisions about how to maintain their screens, to court supervision and sanctions, and, as a result, to firmwide self-regulatory procedures and structures, I would bet the biggest fears should not be directed there.

But, of course, this is all speculation. The answers to these and many other questions central to the reform of the rules of professional responsibility can be found in the world of everyday legal practice. But they can only be unearthed by rigorous, carefully designed, triangulated empirical research. I am not suggesting that such empirical research will be quick or easy. My own study—which clearly fell short in answering the important questions about screening—was neither. But the response is not to throw up one's hands, but to make plans for the long haul. Rules of professional responsibility are not carved in stone. The turbulent world that lawyers help to shape and sometimes roil, and to which they must respond demands that the profession continually reassess and retool its ethics rules. Indeed, before the ink was even dry on the Ethics 2000 amendments to the Model Rules, the profession was already reconsidering the ethics implications of multidisciplinary practice. And surely

the stunning revelations raised by the Enron debacle and the cascading series of financial scandals that exposed systemic conflicts of interest compromising accountants, investment advisors, bankers, corporate executives, regulators, and many other fiduciaries will cause lawyers to rethink (and probably celebrate) their own conflicts rules.[92] So too, will the regulatory fallout of the Sarbanes-Oxley Act.[93]

Perhaps it is time for the legal profession to recognize that, if it is to stay abreast of the changes roiling the profession and to fashion ethics rules that respond to these changes, it will need ongoing data. Just as we do a population census every ten years, we collect information daily or monthly or even hourly on indicators of our economy and financial markets, we conduct random annual audits of tax returns, we subject our children to periodic standardized testing, we allow Nielsen gadgets to monitor our television viewing habits, we ought to be collecting longitudinal data on aspects of legal practice. That is the only way future Commissions will know what is broken and whether and how to fix it. Social scientists will happily advise on how to design the research; in fact, in exchange for access to the data, some may even agree to conduct it.

IV. CONCLUSION

At least since the Kutak Commission's work on what were to become the Model Rules more than two decades ago, critical scholars have quizzically asked why the ABA bothers to promulgate ethics rules at all. Richard Abel answered that:

> We can approach a satisfactory explanation of professional rulemaking only by abandoning the insistence on seeing all laws as instrumental. Instead, we must turn to their symbolic functions. And the principal symbolic function of the rules of professional conduct, clearly, is legitimation. . . . [R]ules of legal ethics, including the Model Rules are vague, unrealistic, riddled with gaps, duplicative of ordinary law and morality, unknown to most practitioners, and systematically unenforced. The purpose of such rules is not to describe reality or even to prescribe right behavior, but rather to create a myth about what lawyers might be in order to disguise what they are . . . .[94]

Moreover, he argued:

> The Rules of Professional Conduct purport to resolve the ethical dilemmas of lawyers. They do so in order that those who draft, discuss, and consult them may be reassured that their conduct is morally correct. But the Rules do not resolve those dilemmas; they

92. *See* Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY (forthcoming 2003).

93. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 804(a), 116 Stat. 745, 801 (2002).

94. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 667–68, 686 (1981).

> merely restate them in mystifying language that obscures the issues through ambiguity, vagueness, qualification, and hypocrisy. The capacity of these precepts to legitimate is constantly being eroded as internal inconsistencies, the meaninglessness of the language, and the empirical falsity and impossibility of their claims and prescriptions become apparent or are exposed by criticism. Hence, the Rules must constantly be rewritten in a vain effort to renew their legitimating force.[95]

These are fighting words. If, as Abel (and others[96]) have asserted, ethics rules are not instrumental, but merely symbolic, then perhaps the Ethics 2000 process yielded just the right result. If, on the other hand, rule makers hope to fashion codes that shape and constrain behavior and that serve a disciplinary and regulatory function, as they profess,[97] then they have much to gain from an empirical perspective.

95. *Id*. at 686.

96. *See generally* ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1988); RICHARD L. ABEL, AMERICAN LAWYERS (1989); JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); JEFFREY LIONEL BERLANT, PROFESSION AND MONOPOLY: A STUDY OF MEDICINE IN THE UNITED STATES AND GREAT BRITAIN (1975); ELIOT FREIDSON, DOCTORING TOGETHER: A STUDY OF PROFESSIONAL SOCIAL CONTROL (1975); ELIOT FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE (1986); TERENCE J. JOHNSON, PROFESSIONS AND POWER (1972); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977); Andrew Abbott, *Professional Ethics*, 88 AM. J. SOCIOLOGY 855 (1983); William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485 (1995); Robert W. Gordon & William H. Simon, *The Redemption of Professionalism*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATION IN THE AMERICAN LEGAL PROFESSION 230 (Robert L. Nelson et al. eds., 1992); Herbert M. Kritzer, *Abel and the Professional Project: The Institutional Analysis of the Legal Profession*, 16 LAW & SOC. INQUIRY 529 (1991); Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 LAW & SOC'Y REV. 713 (1999); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981). These scholars argue that professions, in general, and ethics rules, in particular, represent "projects" of market control or cartelization that seek to attain and legitimate monopoly, erect barriers to entry, limit competition both inside and outside the profession, define, defend, and secure jurisdictional boundaries, protect professional turf from encroachment, and reinforce status hierarchies within the profession.

97. Ethics 2000 Report, *supra* note 2, at 2.